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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

DEBBIE FELIX, an individual; RICK MELEAD, an individual, on behalf of themselves, and on behalf of all persons similarly situated, and in their representative capacity on behalf of the State of California and fellow Aggrieved Employees,

Plaintiffs,

vs.

TVI, INC., d.b.a. SAVERS, a Washington corporation; and DOES 1 through 50, Inclusive;

Defendants.

Case No. 21CV376407

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

Date: October 21, 2021

Time: 1:30 p.m.

Judge: Hon. Sunil R. Kulkarni

Dept.: 1

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I. INTRODUCTION

Plaintiffs DEBBIE FELIX and RICK MELEAD (collectively “Plaintiffs”) seek preliminary approval of the Stipulation of Settlement of Class Action Claims and Release of Claims (“Agreement”)¹, which if approved, would provide valuable monetary relief for approximately 3,098 members of the Settlement Class. The basic terms of the Agreement provide for the following:

1. The “**Settlement Class**” and “**Class Period**” shall mean with respect to the class, all of defendant TVI, INC.’s (“Defendant”) current and former non-exempt employees employed in California during the Class Period. The Class Period means the period from April 18, 2017 to July 27, 2021. The Settlement Class excludes any person who submits a timely and valid request for exclusion. Agreement at §§ I (G)-(H).

2. The “**Aggrieved Employees**” and “**PAGA Period**” means all of Defendant’s current and former non-exempt employees employed in California between June 26, 2019 and March 16, 2021 (“PAGA Period”). Agreement at §I(B).

3. The “**Total Settlement Amount**” is One Million Five Hundred Thousand Dollars (\$1,500,000). Agreement at §§I (GG). The releases granted to Defendant only become effective upon the funding of the Total Settlement Amount. §III(C)-(E). The Total Settlement Amount is non-reversionary and includes the following:

a. A “**Class Representative Service Awards**” in the amount of \$7,500 to each Plaintiff for their services on behalf of the Settlement Class, and for agreeing to a broad general release of California Civil Code section 1542. Agreement at § III(O)(9).

b. A “**Class Counsel Award**” in the amount not to exceed one-third of the Total Settlement Amount for attorney’s fees, currently estimated to be \$500,000 **and** litigation costs and expenses not to exceed \$25,000, to be paid to Class Counsel. Agreement at § III(O)(10).

c. A “**PAGA Settlement**” of \$50,000 shall be allocated from the Total Settlement Amount for settlement of claims for civil penalties under the Private Attorneys General Act of 2004 (“PAGA Amount”). The Settlement Administrator shall pay 75% of the PAGA Settlement (“LWDA

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

1 Payment”) the California Labor and Workforce Development Agency. The Settlement Administrator
2 shall distribute 25% of the PAGA Amount (“Aggrieved Employee Payment”) to members of the
3 Aggrieved Employees. Agreement at §III(0)(11).

4 d. And “**Settlement Administration Costs**” not to exceed \$22,500 payable to the
5 proposed Settlement Administrator, ILYM Group, Inc., for, *inter alia*, the administration of the Notice
6 Packet and Individual Settlement Payments. Agreement at §III(O)(12).

7 4. The “**Net Settlement Fund**” of approximately \$887,500 (Total Settlement Amount
8 minus the requested Class Representative Service Award, Class Counsel Award, PAGA Settlement and
9 Settlement Administration Costs) which will be allocated to all participating members of the Settlement
10 Class on a pro-rata basis according to the number of Workweeks each Settlement Class member
11 performed during the Class Period. The entire Net Settlement Amount will be paid to all Settlement
12 Class Members who do not opt out of the Settlement Class resulting in an average Individual Settlement
13 Share of **\$286.47**. Agreement at §I(P); JCL Dec., ¶ 5.

14 An objective evaluation of the Settlement confirms that the relief negotiated on behalf of the
15 Settlement Class is fair, reasonable, and valuable. The Settlement was negotiated by the Parties at arm’s
16 length. The Settlement confers substantial benefits to the Settlement Class. The relief offered by the
17 Settlement is particularly impressive when viewed against the difficulties encountered by plaintiffs
18 pursuing wage and hour cases (*see infra*). Indeed, by settling now rather than proceeding to trial, Class
19 Members will not have to wait (possibly years) for relief, nor will they have to bear the risk of class
20 certification being denied or of Defendant prevailing at trial. JCL Dec., ¶ 5.

21 As discussed below, the proposed Settlement satisfies all criteria for preliminary settlement
22 approval under California law and falls within the range of reasonableness. The average Individual
23 Settlement Share to the Settlement Class meet or exceeds awards in similar wage and hour class actions.
24 Moreover, the proposed Settlement Class is appropriate for provisional certification. Accordingly,
25 Plaintiffs respectfully request that this Court grant preliminary approval of the Settlement. JCL Dec.,
26 ¶ 6.

II. FACTS AND PROCEDURE

A. Overview of the Litigation

Defendant is a for-profit Washington corporation that was founded in 1954. Defendant operates a network of more than 100 second-hand retail stores throughout the United States, Canada and Australia, including 12 in California. JCL Dec., ¶ 7.

Plaintiff Melead worked for Defendant as an hourly, non-exempt employee between October 2015 and October 2019. Plaintiff Felix worked for Defendant as an hourly, non-exempt employee between February 2014 and December 2019. As non-exempt employees, Plaintiffs were subject to Defendant's written policies and procedures and general employment practices. JCL Dec., ¶ 8.

Generally, Plaintiffs claim that Defendant failed to pay them for all hours worked, failed to pay them overtime at the correct rate, failed to provide complaint meal and rest periods, failed to provide accurate itemized wage statements, failed to provide suitable seating, and failed to pay all wages due at the time of his separation. Defendant denies liability for each of Plaintiffs' claims. Defendant asserts that it fully complied with all applicable employment laws. Defendant asserts that it had clear, compliant policies and procedures for taking rest and meal periods. Defendant raised several other significant defenses to Plaintiffs' claims, including but not limited to, lack of any evidence of overtime and minimum wage violations. JCL Dec., ¶ 9.

On May 8, 2020, Plaintiff Melead served Defendant and the Labor and Workforce Development Agency ("LWDA") with a Notice of Violations ("PAGA Notice"). Plaintiffs' PAGA Notice set forth the facts and theories supporting Defendant's alleged violations of various provisions of the California Labor Code and applicable Industrial Welfare Commissions ("IWC") Wage Order and of his intent to pursue claims under California Labor Code Private Attorneys General Act, Cal. Lab. Code Sections 2698 et seq ("PAGA"). JCL Dec., ¶ 10.

On May 26, 2020, Plaintiff Melead filed a class action complaint in the Orange County Superior Court for: (1) Unfair Competition in Violation of Bus. and Prof. Code §§ 17200; (2) failure to pay minimum wages in violation of California Labor Code sections 1194, 1197 and 1197.1; (3) failure to pay overtime wages in violation of California Labor Code sections 510 *et seq.*; (4) failure to provide required meal periods in violation of California Labor Code sections 226.7 and 512; (5) failure to

1 provide required rest periods in violation of California Labor Code sections 226.7 and 512; (6) failure
2 to provide accurate itemized wage statements in violation of California Labor Code section 226; and
3 (7) failure to provide wages when due in violation of California Labor Code sections 201, 202 and 203
4 (“*Melead* Action”). JCL Dec., ¶ 11

5 On July 14, 2020, Defendant removed the *Melead* Action to United States District Court for the
6 Central District of California. On July 22, 2020, Plaintiff Melead filed the *Melead* PAGA Action
7 against Defendant alleging a single cause of action for violations of California Labor Code Private
8 Attorney General Act (“PAGA”). On September 25, 2020, the United States District Court for the
9 Central District of California remanded the *Melead* Action to the Orange County Superior Court. JCL
10 Dec., ¶ 11

11 On October 22, 2020, Plaintiff Felix filed a Notice of Violations with the LWDA and served the
12 same on Defendant. On February 24, 2021, Plaintiff Felix filed a PAGA Action against Defendant in
13 the Santa Clara County Superior Court alleging a single cause of action for violations of PAGA (“*Felix*
14 Action”). JCL Dec., ¶ 11

15 Plaintiffs prepared written discovery to Defendant, but prior to serving the discovery, the Parties
16 agreed to mediate this action as deemed in the best interest of the parties in particular in light of the
17 many anticipated factual disputes. In anticipation of mediation, the Parties stipulated to stay formal
18 discovery in favor of informal discovery. To prepare for mediation, the Parties agreed to informally
19 produce certain documents and data points subject to the mediation privilege, including but not limited
20 to, a sample of the Class Members’ time and payroll data. As discussed *infra*, Plaintiffs’ counsel
21 retained the Berger Consulting Group, to analyze Defendant’s time and payroll data. JCL Dec., ¶ 12.

22 On March 25, 2021, the Parties participated in a full day mediation with Mark Rudy, Esq. a well-
23 respected wage and hour class action mediator. After arms-length negotiations and bargaining, the
24 mediation concluded without a settlement. However, following the mediation, each side, represented
25 by its respective counsel, agreed to settle the Action based on a mediator’s proposal, which was
26 memorialized in the form of a Memorandum of Understanding. Thereafter, the parties drafted and
27 negotiated a long-form settlement agreement, which is the subject of the instant motion. JCL Dec., ¶
28 13.

B. Class Counsel Thoroughly Investigated the Factual and Legal Issues

Months before filing the Action, Class Counsel began its pre-filing investigation into Plaintiffs' complaints. Class Counsel's investigation started with several lengthy interviews with Plaintiffs. As part of the interview process, Plaintiffs produced documents related to their employment for Defendant, including portions of Defendant's handbooks, compensation policies and time and payroll records. At the conclusion of the interviews, Class Counsel determined that Plaintiffs' complaints justified further inquiry. JCL Dec., ¶ 14.

Class Counsel subsequently requested Plaintiffs' employee file from Defendant. In response, Defendant produced hundreds of pages of documents, including but not limited, a copies of Plaintiffs' hiring documents, payroll and time records, performance reviews and separation documents. Class Counsel reviewed and analyzed the documents and determined the documents appeared to substantiate Plaintiffs' claim that Defendant's failed to, among other things, pay for all time worked and to provide compliant meal and rest periods. Shortly thereafter, Class Counsel initiated the actions which are before the Court now. JCL Dec., ¶ 15.

In light of the many anticipated factual disputes, the parties agreed early in the litigation that it would be in the best interest of both parties to mediate the matter. To prepare for mediation, Class Counsel requested documents and data points to further evaluate Plaintiffs' claims and Defendant's liability exposure to the Settlement Class members. In response to Class Counsel's request, Defendant produced the time and payroll records for the Settlement Class members, aggregate workweek and pay period data for the Settlement Class, and copies of applicable handbooks, policies, and agreements containing, *inter alia*, compensation, timekeeping and, meal and rest period policies. In total, Defendant produced approximately 3,000 pages containing hundreds of thousands of unique cells of time and payroll data for Class Counsel to analyze. JCL Dec., ¶ 16.

Class Counsel then retained the statisticians and economists at Berger Consulting Group ("BCG"), to evaluate the Settlement Class Members' payroll and time data. BCG provides data analysis and damage modeling consulting services specializing in wage and hour class actions. BCG's team of financial and data analysts are credentialed and experienced experts in their fields and have provided their expertise on thousands of cases. Stated differently, the BCG is uniquely qualified to

1 analyze Defendant's time and payroll data. JCL Dec., ¶ 17.

2 BCG analyzed Defendant's time and payroll data to assist in the development of various damage
3 models. Among other things, BCG determined the approximate number of work shift, work weeks,
4 pay periods, average rate of pay, average length of shift and average number of hours worked per week
5 and pay period during the Class Period. BCG also estimated the number of missed or late meal and
6 rest periods, the amount of paid missed meal period premiums paid during the Class Period. JCL Dec.,
7 ¶ 18.

8 In advance of mediation, Class Counsel created a damage model predicated on BCG analysis.
9 Class Counsel's model calculated Defendant's potential liability exposure while accounting for the
10 uncertainties of continued litigation. This damage model informed and guided Class Counsel during
11 the mediated settlement discussions. JCL Dec., ¶ 19.

12 Overall, Class Counsel thoroughly investigated the claims at issue, including: (1) determining
13 Plaintiffs' suitability as a putative class representative through interviews, background investigations,
14 and analysis of their employment files; (2) evaluating all of Plaintiffs' potential claims; (3) researching
15 similar wage and hour class actions as to the claims brought, the nature of the positions, and the type
16 of employer; (4) analyzing the Settlement Class' time and payroll records; (5) analyzing Defendant's
17 labor policies and practices; (6) researching settlements in similar cases, including a recent case against
18 the same Defendant, as well as outstanding issues which could affect settlement approval; (7)
19 evaluating Plaintiffs' claims and estimating Defendant's liability for purposes of settlement; (8)
20 drafting the mediation brief and (9) participating in the mediation. This investigation allowed Class
21 Counsel to fully assess the nature and magnitude of the claims being settled, as well as the impediments
22 to recovery, such as to make an independent assessment of the reasonableness of the terms to which
23 the parties have agreed. JCL Dec., ¶ 20.

24 **C. The Parties Settled at Mediation**

25 On March 16, 2021, the Parties conducted a full day of mediation with Mark Rudy, Esq., a highly
26 regarded mediator of wage and hour class actions. Mr. Rudy helped to manage the Parties' expectations
27 and provided a useful, neutral analysis of the issues and risks to both sides. The Parties made substantial
28 progress with Mr. Rudy's assistance. Namely, the parties exchanged information regarding their

1 respective claims and defense, including their respective evaluation of the damages. After nearly eight
2 hours of arm's length and adversarial negotiations, the mediation concluded without a settlement.
3 However, following the mediation, each side, represented by its respective counsel, agreed to settle the
4 Action based on a mediator's proposal, which was memorialized in the form of a Memorandum of
5 Understanding. Thereafter, the parties drafted and negotiated a long-form settlement agreement, which
6 is the subject of the instant motion. Class Counsel submits that the Settlement constitutes a fair,
7 adequate, and reasonable compromise of the claims at issue. JCL Dec., ¶ 21.

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

9 1. The Composition of the Settlement Class Members

10 The proposed Settlement Class consists of all Defendant's current and former non-exempt
11 employees employed in California between April 18, 2017 to July 27, 2021. The Settlement Class
12 excludes any person who submits a timely and valid request for exclusion. Agreement at §§ III(N)(7).
13 There are approximately 3,098 members of the Settlement Class that worked an estimated 178,668
14 workweeks during the Class Period. Agreement at §III(A)(2).

15 2. The Settlement Consideration

16 The Parties agreed to settle the underlying class claims in exchange for the Total Settlement
17 Amount of \$1,500,000. The Total Settlement Amount Fund: (1) Individual Settlement Payments to the
18 Settlement Class; (2) Class Representative Service Awards of \$7,500 to each Plaintiff for their services
19 on behalf of the Class and, equally important, for a general release of claims; (3) a PAGA Settlement
20 in the amount of \$50,000; (4) Settlement Administration costs estimated at \$22,500, (5) Class Counsel
21 Award in the amount of \$525,000, comprised of attorneys' fees equal to one-third of the Total
22 Settlement Amount estimated to be at least \$500,000 and an estimated \$25,000 for actually incurred
23 litigation expenses. Agreement at §III(O).

24 Subject to the Court approving the Class Representative Service Awards, Class Counsel Award,
25 PAGA Settlement, and Settlement Administration Costs, the Net Settlement Amount will be distributed
26 to each participating member of the Settlement Class Member. Agreement at §III(O)(1). There is no
27 reversion to Defendant and Defendant must separately pay for its share of the employer payroll taxes.
28 Agreement at §III(A)(4).

3. Formula for Calculating Individual Settlement Payments

Each participating member of the Settlement Class will receive an Individual Settlement Payment. The Individual Settlement Payment will be proportional to the number of Workweeks each member of the Settlement Class worked for Defendant during the Class Period. Using the Class Data, the Settlement Administrator shall add up the total number of Workweeks for the entire Settlement Class. Each Settlement Class Member's final Individual Settlement Payment for purposes of payment will be calculated by multiplying the NSF by a fraction, the numerator of which is the Settlement Class Member's total number of Workweeks, and the denominator of which is the total number of Workweeks of all Settlement Class Members. Agreement at §III(O)(1).

Each Individual Settlement Payment will be reduced by any legally mandated employee tax withholdings (e.g., employee payroll taxes, etc.). Agreement at §III(O)(1). Individual Settlement Payments for members of the Settlement Class who submit valid and timely requests for exclusion will be redistributed to Settlement Class member who do not submit valid and timely requests for exclusion on a pro rata basis. Agreement at §III(O)(1).

Given that there are approximately 3,098 Settlement Class Members, the average gross recovery is approximately \$286.47 (Net Settlement Amount divided by Settlement Class Members). This average net recovery exceeds many wage and hour class action settlements approved by California state and federal courts. (See, e.g., *Shachno et al. v. KT Hotels, LLC, et al.*, San Diego Superior Court Case No. 37-2018-00043601 (average net recovery of \$283.35).

4. Release by Participating Settlement Class Members

Generally, as of the Funding Date, Plaintiffs and the Settlement Class Members will agree to release the Released Parties from the Released Claims (all class action claims under state, federal, or local law, whether statutory, common law, or administrative law, arising out of the claims expressly plead in the *Felix* Action, *Melead* Class Action and *Melead* Federal Class Action and all other claims that could have been plead based on the facts plead in the *Felix* Action, *Melead* Class Action and *Melead* Federal Class Action including: failure to pay minimum and overtime wages; failure to pay for or provide meal and rest periods, failure to pay all wages due to discharged or quitting employees; failure to provide accurate wage statements; alleged violation of Business and Professions Code Section

17200, based on the alleged labor code violations including, but not limited to, injunctive relief; liquidated damages and penalties of any nature, and expressly excluding all other claims, including claims for vested benefits, wrongful termination, unemployment insurance, disability, social security, workers' compensation, and class claims outside the Class Period. Agreement at §§I(Z).

5. Release by the LWDA and the Aggrieved Employees

Generally, upon the Funding Date the LWDA and the Aggrieved Employees will release l claims for civil penalties, fees and costs arising under PAGA expressly alleged, or that could have been alleged based on the facts alleged in the *Felix* Action and *Melead* PAGA Action and Plaintiffs notice letters to the LWDA including, but not limited to, Labor Code sections 201, 202, 203, 204, 226, 226.3, 226.7, 510, 512, 558, 1194, 1197, 1197.1, and 1198, and the applicable IWC Wage Orders, including but not limited to Defendant's alleged failure to provide suitable seating, which occurred during the PAGA Period and expressly excluding all other claims, including claims for vested benefits, wrongful termination, unemployment insurance, disability, social security, workers' compensation, and PAGA claims outside the PAGA Period. Agreement at §§I(AA).

III. DISCUSSION

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

The proposed Settlement, including a Total Settlement Amount of \$1,500,000 meets the standards for preliminary approval. Pre-trial settlement of complex class actions is a judicially favored remedy. (*Officers for Justice v. Civil Serv. Comm'n* (9th Cir. 1982) 688 F.2d 615, 625 ("Voluntary conciliation and settlement are the preferred means of dispute resolution.").) In California, class action settlement approval requires an early "preliminary" review by the trial court and a subsequent "final" review after notice of the settlement has been distributed to class members for their comments and objections. (C.R.C. 3.769(c)-(g); *Cellphone Termination Fee Cases*, 180 Cal. App. 4th 1110, 1118 (2010) (the court first "preliminarily approves the settlement" and later "conducts a final approval hearing to inquire into the fairness of the proposed settlement").)

Although California Rule of Court Rule 3.769 does not provide detail as to the scope of review of the proposed settlement, preliminary approval is warranted if the settlement falls within a "reasonable range." (See *North County Contractor's Assn., Inc. v. Touchstone Ins. Services* (1994) 27

Cal.App.4th 1085, 1089-90; Conte & Newberg, *Newberg on Class Actions*, §§ 11.26 (4th ed. 2002) (“Newberg”). Reasonableness and fairness are presumed where: (1) the settlement is reached through “arms-length bargaining;” (2) investigation and discovery are “sufficient to allow counsel and the court to act intelligently;” (3) counsel is “experienced in similar litigation. . . .” (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802.) The presumption of fairness is consistent with California’s public policy goal of favoring settlements. (*Stambaugh v. Super. Ct* (1976) 62 Cal.App.3d 231, 236 (“the law wisely favors settlements”); *Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1118 (“public policy generally favors the compromise of complex class action litigation”); *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1151 (“voluntary conciliation and settlement are the preferred means of dispute resolution ... [t]his is especially true in complex class action litigation”).)

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

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

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

The Parties participated in mediation with highly respected mediator of wage and hour class actions, Mark Rudy, Esq.. Mr. Rudy managed the Parties’ expectations and provided a useful, neutral analysis of the issues and risks to both sides. (*In re Apple Computer, Inc. Derivative Litig*, No. C 06-4128 JF (HRL), 2008 U.S. Dist. LEXIS 108195 (N.D. Cal. Nov. 5, 2008) (mediator’s participation

weighs considerably against any inference of a collusive settlement); *D'Amato v. Deutsche Bank* (2d. Cir. 2001) 236 F.3d 78, 85 (a “mediator’s involvement in pre-certification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure.”).) At all times, the Parties’ negotiations were at an arm’s length, adversarial and non-collusive. In fact, despite a full day of mediated negotiations, the Parties reached an impasse and the mediation session concluded without a settlement. The matter resolved after subsequent settlement negotiations with Mr. Rudy’s help, and only when Mr. Rudy issued a mediator’s proposal that the Parties accepted. Mr. Rudy only arrived at his proposal after hearing arguments, reviewing evidence and evaluating the Parties’ respective claims and defenses.

Once the Parties agreed to the Mediator’s proposal, the Parties engaged in protracted negotiations regarding the written terms of the class action settlement. The Parties maintained the arm’s length, non-collusive and adversarial negotiations while arriving at the final terms of the Settlement. The Agreement is the final product of these mediated negotiations. Objectively, the Settlement terms are fair, adequate and represent a reasonable compromise of the claims at issue. JCL Dec., ¶ 23.

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

As set forth in greater detail above, Class Counsel conducted a very thorough investigation into the factual and legal issues in dispute. In addition to formal and informal discovery, document review, data analysis and legal research, Class Counsel also researched similar wage and hour actions. Although no two cases are identical, this research provided Class Counsel with a marker to inform settlement discussions and, ultimately, to measure this settlement against. The investigation allowed to Class Counsel to realistically assess the value of Plaintiffs’ claims and intelligently engage defense counsel in settlement discussions that culminated in the proposed settlement now before the Court.

Class Counsel only agreed to enter the Settlement following their thorough investigation and evaluation of Plaintiffs’ claims. Based on their investigation of the facts, applicable law, and marketplace for similar settlements, and in light of the risk of significant delay, uncertainty associated with litigation, and the various defenses asserted by Defendant, Class Counsel firmly believe this Agreement to be in the best interests of Settlement Class. Because the Settlement’s terms are fair,

reasonable, and adequate, the Court should preliminarily approve the Settlement. JCL Dec., ¶ 24.

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

The Total Settlement Amount of \$1,500,000 is well within the range of reasonable for preliminary approval. To determine whether a settlement is fair and reasonable, the court should “consider enough information about the nature and magnitude of the claims being settled, as well as the impediments to recovery, to make an independent assessment of the reasonableness of the terms to which the parties have agreed.” (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133.) In making this determination, the court is “not to try the case” but rather “satisfy itself that the class action settlement is within the ‘ballpark of reasonableness.’ ” (*Id.* (emphasis added).) For this analysis, courts do “not require any such explicit statement of value; [they] require[] a record which allows an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.” (*Munoz v. BCI Coca-Cola Bottling Co.* (2010) 186 Cal.App.4th 399, 409 (internal citation omitted).) The reasonableness of a settlement is not dependent upon its actual value approaching the potential recovery plaintiffs might have received if they had succeeded at trial.² Indeed, “[t]he determination whether a settlement is reasonable does not involve the use of a ‘mathematical equation yielding a particularized sum.’ ” (*Frank v. Eastman Kodak Co.* (W.D.N.Y. 2005) 228 FRD. 174, 186 (quoting *In re Michael Milken and Assoc. Sec. Litig.* (S.D.N.Y. 1993) 150 F.R.D. 57, 66).)

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

The Total Settlement Amount of \$1,500,000 is fair and reasonable considering the nature and magnitude of the claims being settled and the various factual and legal issues in disputes and potential impediments to recovery. Prior to mediation, Class Counsel retained BCG to develop varied economic

² Federal district courts recognize that there is an inherent “range of reasonableness” in determining whether to approve a settlement “which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.” *Newman v. Stein* (2d. Cir. 2002) 464 F.2d 689, 693; see *In re Omnivision Tech, Inc.* (N.D. Cal. 2008) 559 F.Supp.2d 1036; see also *Nat’l Rural Telecomm. Coop. v. Directv. Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 527 (“well settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery”); *In re Global Crossing Sec. and ERISA Litig.* (S.D.N.Y. 2004) 225 F.R.D. 436, 460 (“settlement amount’s ratio to the maximum potential recovery need not be the sole, or even dominant, consideration when assessing settlements fairness”); *In re IKON Office Solutions, Inc Sec Litig.* (E.D. Pa. 2000) 194 F.R.D. 166, 184 (“the fact that a proposed settlement constitutes a relatively small percentage of the most optimistic estimate does not, in itself, weigh against the settlement; rather the percentage should be considered in light of strength of the claims”); *Officers for Justice v. Civil Serv. Comm.* (9th Cir. 1982) 688 F.2d 615, 628 (it is “the complete package, taken as a whole rather than the individual component parts, that must be examined for overall fairness”).

damages models measuring Defendant's liability exposure while accounting for the uncertainties of continued litigation. The various models were informed by Class Counsel's investigation, including the analysis of time and payroll data. Class Counsel projected Defendant's liability exposure for the Settlement Class ranged between approximately \$3,116,921 and \$22,789,492 for damages, and between \$14,019,898 and \$33,692,469 for damages and statutory penalties, if successful at trial. This range reflects the uncertainty regarding several of Plaintiffs' claims, together with the uncertainty surrounding derivative liability for inaccurate wage statements and waiting time penalties resulting from meal and rest period violations. Thus, the Total Settlement Amount of \$1,500,000 represents approximately between 6.6% and 48.1% of Defendant's liability exposure for damages, as estimated by Class Counsel at the time of mediation. The following summarizes Defendant's estimated exposure if Plaintiffs were to prevail. JCL Dec., ¶ 24.

(1) Estimated Damages for Meal Period

Plaintiffs allege that Defendant failed to provide compliant meal periods. Specifically, Plaintiffs allege that Defendant's absence of time records for employees prior to September 2020 creates a presumption of meal period violations, because Defendant cannot prove that meal periods were timely taken during that time. Consequently, Plaintiffs allege that they are owed meal period premiums for non-compliant meal periods for every day during that time period. JCL Dec., ¶ 25.

Labor Code 512 requires employers to provide employees with thirty (30) minute uninterrupted and duty-free meal period within the first five hours of work. Moreover, an employee who works more than ten (10) hours per day is entitled to receive a second thirty (30) minute uninterrupted and duty-free meal period. Pursuant to Labor Code § 512, an employer may not employ an employee for a work period of more than ten (10) hours, without providing the employee with a second meal period of not less than thirty (30) minutes. Moreover, the second meal period may not be waived if the total hours worked is more than twelve (12) hours. California Lab. Code § 226.7(c) provides that "if an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including ... an ... order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided."

1 Defendant has denied these claims. Defendant maintains that it fully complied with California
2 meal period laws and maintained legally compliant policies and practices. Courts have found that where
3 an employer's meal period policies are compliant, individualized issues exist as to the reasons for
4 missed, late or truncated meal periods. *See e.g. Lampe v. Queen of the Valley Medical Center*, 19
5 Cal.App.5th 832, 851 (2018) (holding that although only 11.1% of the employees' time punches for
6 meal periods were within the first 5 hours, the claim was not certifiable because individualized issues
7 existed as to the reasons for the late meal periods). If successful, Defendant availed itself to a complete
8 defense of Plaintiffs' meal period claim. Defendant further argued that the absence of the time records
9 was a result of a cyber-attack that left Defendant without those records, and that had these records been
10 available, they would have shown consistent compliance with California's meal break laws. Finally,
11 Defendant argued that to the extent time records exist (since September 2020) the violation rate was
12 very low (below 3%) and meal premiums were always paid—an assertion confirmed by Plaintiffs'
13 expert. Plaintiffs estimated the exposure for this claim was approximately between **\$0** and **\$9,897,710**,
14 if substantiated. JCL Dec., ¶ 26.

15 (2) Estimated Damages for Rest Period Violations

16 Plaintiffs also alleged that Defendant failed to provide compliant rest periods. Specifically, this
17 claim assumed an unlikely 100% violation rate based on Defendant's alleged policy requiring
18 employees to remain on the premises during their rest breaks. Before and during the mediation,
19 Defendant argued that the Court of Appeals decision in *Cacho v. Eurostar, Inc.* (2019) 43 Cal.App.5th
20 885, all but eliminated Plaintiffs' claims, on liability, value, and manageability as to the rest period
21 claims. Additionally, Defendant cited to a prior ruling that upheld the same "on premise" rest period
22 policy challenged in this action. *See Bell v. Home Depot, U.S.A.*, (E.D. 2017) 2017 WL 1353779.
23 Further, Defendant likely would have argued that only a small number of Class Members actually
24 missed their rest breaks, and that those missed rest breaks were voluntary. Therefore, certification
25 likely would have required depositions of Class Members, and Defendant surely would have obtained
26 opposing testimony stating either rest breaks were taken or rest breaks were voluntarily waived. *See*,
27 *e.g., Ordonez v. Radio Shack, Inc.* (C.D. Cal. Jan. 17, 2013) 2013 WL 210223, at *11 ("Because of
28 the competing testimony before the Court, plaintiff's evidence that defendant may have an illegal,

1 written rest break policy is insufficient for this Court to find that common issues predominate.”);
2 *Villa v. United Site Servs. of California, Inc.* (N.D. Cal. Nov. 13, 2012) 2012 WL 5503550, at *8
3 (“Indeed, Plaintiff’s own evidence confirms that the written policy does not generate uniform
4 practices.”). Accordingly, the rest break claim was subject to significant defenses. If successful,
5 Defendant availed itself to a complete defense of Plaintiffs’ rest period claim. Plaintiffs estimated the
6 exposure for this claim ranged between **\$0** and **\$9,774,861**, if substantiated. JCL Dec., ¶ 27.

7 (3) Defendant’s Estimated Exposure for Unpaid Minimum Wages

8 Plaintiffs alleged that Defendant subjected them and other employees to mandatory post-shift
9 security theft-prevention checks at the end of their shifts, which were done off-the-clock and lasted
10 15 minutes every time. Plaintiffs alleged that these screenings included a requirement that employees
11 wait for a supervisor to come and check their personal belongings (usually a purse or a bag) to insure
12 no items were stolen from Defendant’s store. Defendant argued, however, that employees were not
13 always required to go through the security checks, and that those checks were not always off-the-clock.
14 Finally, Defendant argued this claim, even if successful, was limited to only a small portion of the Class
15 Members who brought their purses or handbags into the store for their shift, and was limited to 1-5
16 minutes every time, and not 15 minutes as assumed by Plaintiffs. Accordingly, the minimum wage
17 claim was subject to significant defenses. Plaintiffs estimated the exposure for this claim is
18 approximately **\$3,114,753**, if substantiated. JCL Dec., ¶ 28.

19 (4) Defendant’s Estimated Exposure for Unpaid Overtime Wages

20 Plaintiffs alleged that Defendant failed to include nondiscretionary bonuses and commissions
21 in the regular rate. Plaintiffs understood that this claim, however, presented significant obstacles.
22 Namely, Defendants argued that most incentives were *discretionary* bonuses that do not need to be
23 included in employees’ regular rate of pay. Accordingly, the overtime claim was subject to significant
24 defenses. Furthermore, Defendant argued that, even if successful, this claim resulted in minimal actual
25 damage to the Class Members—and Plaintiffs’ expert confirmed this to be true. Plaintiffs estimated
26 the exposure for this claim to be approximately **\$2,168**, if substantiated. JCL Dec., ¶ 29.

27 (5) Exposure for Wage Statement Violations and Waiting Time Penalties
28

Generally, Plaintiffs allege that Defendant's aforementioned violations resulted in derivative violations of Labor Code sections 203 and 226(a). Class Counsel considered the arguable presence of various penalties and weighed the potential recoveries against probable defenses. Specifically, Defendant could argue that Plaintiffs could not prove the "willful" prong needed to obtain waiting time penalties under Cal. Lab. Code § 203. Additionally, Defendant could argue that Plaintiffs could not show that Class Members suffered an "injury" because of wage statement violations, as required by Cal. Lab. Code § 226. Defendant could also argue that that meal and rest period violations do not entitle employees like Plaintiffs and the Settlement Class Members to pursue the derivative waiting time and itemized wage statement penalties. (*See Naranjo v. Spectrum Security Services, Inc.*, (2019) 40 Cal. App. 5th 444; *Maldonado v. Epsilon Plastics, Inc.* (2018) 22 Cal. App. 5th 1308.) Although the Settlement Class arguably could have seen a significant payout for these penalties if Plaintiffs prevailed on every penalty claim, Plaintiffs would not recover any derivative penalties if they failed to prove the underlying claims. Moreover, Plaintiffs would have to overcome damaging precedent to prove the Class deserved the penalties. *See, e.g., Howard v. CVS Caremark Corp.*, 2014 U.S. Dist. LEXIS 172406 (C.D. Cal. Dec. 9, 2014) (denying class certification for the same penalty claims); *Alonzo v. Maximus, Inc.*, 832 F. Supp. 2d 1122, 1134-1137 (C.D. Cal. 2011) (finding insufficient evidence of bad faith or actual injury). Plaintiffs could not give the penalty claims great weight given that they depended on proving the underlying claims, which according to Defendant were not supported by the facts. Nevertheless, Plaintiffs estimated the potential exposure for these claims, if substantiated, was approximately **\$10,902,977** (\$7,031,977 for waiting time penalties and \$3,871,000 for wage statement penalties). JCL Dec., ¶ 30.

(6) Total Damages and Penalties

In conclusion, the settlement of \$1,500,000.00 represents between 6.6% and 48.1% of the value of the maximum potential *damages* at issue. Even when including the penalties for Plaintiffs' claim for wage statement violations and waiting time penalties under Labor Code Sections 203 and 226, the settlement represents up to 10.7% of the maximum potential liability, assuming all of these amounts could be proved at trial. This is well within the bounds of reasonableness. (*See Vicerel v. Mistras Grp., Inc.* (N.D. Cal. 2016) 2016 WL 5907869, at *3, 7 (approving a California wage and hour

1 settlement where the class received 11.6% of the estimated total liability); *Leverage v. Traeger Pellet*
2 *Grills, LLC* (N.D. Cal. 2017) 2017 WL 2797811, at *7 (Approving a California wage and hour
3 settlement where the class received 18% of the estimated total liability); *Stovall-Gusman v. W.W.*
4 *Granger, Inc.*, (N.D. Cal. 2015) 2015 WL 3776765 at * 4 (Approving California wage and hour
5 misclassification settlement where the class received approximately 7.3% of the estimated trial award
6 was within the “range of reasonableness.”.) JCL Dec., ¶ 31.

7 (7) Defendant’s PAGA Exposure

8 Class Counsel’s damage models also estimated Defendant’s exposure for PAGA penalties arising
9 from the aforementioned violations. At the time of mediation, Plaintiffs estimated Defendant’s PAGA
10 exposure at approximately \$13,880,300. JCL Dec., ¶ 31.

11 Under PAGA, Courts have considerable discretion to reduce the penalty award. In *Fleming v.*
12 *Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011), a federal court reduced PAGA penalties
13 from \$2,800,000 to \$500,000, a reduction of 82.2%, because the court found maximum penalties
14 "unjust" because the employees had suffered no injuries. Some trial courts have actually awarded no
15 civil penalties, even when Labor Code violations are established. *See also In re Nordstrom Com. Cases*,
16 186 Cal.App.4th 576, 589 (2010) (affirming an award of \$0 in PAGA penalties in a wage and hour class
17 action); *In re Taco Bell Wage & Hour Actions*, 2016 U.S. Dist. LEXIS 48557, *40-43 (E.D. Cal. Apr.
18 6, 2016) (PAGA penalties denied after trial).

19 In order to recover any PAGA penalties, Plaintiffs would be required at trial to prove each of the
20 underlying Labor Code violations. See *Cardenas v. McLane Foodservice, Inc.*, 2011 U.S. Dist. LEXIS
21 13126, *10 (C.D. Cal. 2011) ("Given the statutory language [of PAGA], a plaintiff cannot recover on
22 behalf of individuals whom the plaintiff has not proven suffered a violation of the Labor Code by the
23 defendant."). Here, Plaintiffs would need to prove that each Aggrieved Employee suffered a violation
24 for each pay period the employee worked. Again, Defendant raised several defenses that presented
25 serious threats to the claims of the Plaintiffs and the Aggrieved Employees. Defendant asserted that the
26 employment practices complied with all applicable Labor Laws. In addition to those arguments
27 discussed *supra*, Defendant also argued that the Court of Appeals decision in *Cacho v. Eurostar, Inc.*
28

(2019) 43 Cal.App.5th 885, weakened Plaintiffs’ claims, on liability, value, and manageability as to the rest period claims. In all, Plaintiffs’ PAGA liability exposure is hotly contested. JCL Dec., ¶ 32.

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

b. Inherent Risks of Continued Litigation Support Preliminary Approval.

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

With respect to the most immediate challenge, i.e., class certification, the risks attendant to the certification of similar wage and hour claims are demonstrated by *Donohue v. AMN Services, LLC* (2018) 29 Cal.App.5th 1068 (cert granted.) In *Donohue*, Fourth District Court of Appeal affirmed Hon. Joel Pressman’s denial of class certification for missed meal and rest periods by call center employees. (*See also O’Conner v. Uber Technologies, Inc.* (9th Cir. 2018) 904 F.3d 1087 (decertification of wage and hour misclassification action); *see also Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, 31 (reversing a trial verdict in favor plaintiffs in a wage and hour class action)); *Tien v. Tenet Healthcare Corp.* (2012) 209 Cal.App.4th 1077, 1088 (“[T]he reason, if any, that employees might not take their breaks were predominantly individualized questions of fact not susceptible to class treatment.”); *Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333, 1341 (affirming denial of certification because employees’ declarations attesting to having taken meal and rest breaks demonstrated that individualized inquiries were required to show harm); *Campbell v. Best Buy Stores, L.P.*, (C.D. Cal. 2013) 2013 WL 5302217 at *11-13 (following *Brinker* and denying certification of proposed off-the-clock and rest and meal break classes due to lack of uniform policy); *Brown v. Fed*

1 *Express Corp.* (C.D. Cal. 2008) 249 F.R.D. 580, 587-88 (denying certification of driver meal and rest
2 period claims based on the predominance of individual issues).) Plaintiffs are confident about the
3 strength of his claims. Nonetheless, Plaintiffs recognize that Defendant has factual and legal defenses
4 that, if successful, would potentially defeat or substantially impair the value of Plaintiffs' lawsuit.
5 Collectively, the examples cited above illustrate the uncertain nature of class litigation. Consequently,
6 the uncertainty of obtaining certification through a contested motion is a significant risk factor favoring
7 settlement. JCL Dec., ¶ 33.

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

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

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

18 Finally, continuing to litigate this action would require continued and extensive resources
19 coupled with significant Court time to proceed through trial and post-trial motions; which can often
20 take years. Furthermore, wage and hour litigation are complex and expensive, as it often necessitates
21 extensive expert testimony, particularly with regards to damages. But even if Plaintiffs are successful
22 at trial, Plaintiffs are acutely aware that a judgment does not end the litigation. Plaintiffs fully expect
23 that Defendant would appeal any favorable judgment. JCL Dec., ¶ 34. "Avoiding such a trial and the
24 subsequent appeals in this complex case strongly militates in favor of settlement rather than further
25 protracted and uncertain litigation." (*Nat'l Rural Telecomms. Coop v. DirecTV* (C.D. Cal. 2004) 221
26 F.R.D. 523, 527.) Thus, "unless the settlement is clearly inadequate, its acceptance and approval are
27 preferable to lengthy and expensive litigation with uncertain results." (*Id.* at 526.)

28 In this matter, Class Counsel negotiated a Total Settlement Amount of \$1,500,000 that is roughly

between 6.6% and 48% of Defendant's maximum liability exposure for damages, and up to 10.7% when including wage statement and waiting time penalties. Given the amount of the settlement here, as compared to potential value of the claims, offset by the various inherent risks to continued litigation, the settlement is fair and reasonable. JCL Dec., ¶ 35.

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

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

The Parties jointly drafted the Class Notice which fairly and neutrally informs the Settlement Class of their rights and remedies in this action. The Settlement Administrator will first verify addresses, then mail the proposed Class Notice to entire Settlement Class. The Notice will include information regarding the nature of the lawsuit, a summary of the substance of the Settlement's terms, the class definition, the procedure and time period within which to requests for exclusions or objections to the Settlement, the date for the final approval hearing, the formula used to calculate settlement payments, and the terms and scope of the Released Claims. This method was negotiated by the Parties to ensure delivering the most reasonable method of notice to the Settlement Class while ensuring cost effective administration of the Settlement. JCL Dec., ¶36.

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

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

5 **C. The Court Should Preliminarily Approve the Class Representative Enhancement Award**

6 Enhancement payments “are fairly typical in class action cases.” (*Cellphone Termination Fee*
7 *Cases* (2010) 186 Cal.App.4th 1380, 1393 (affirming incentive awards of \$10,000); *Rodriguez v. West*
8 *Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958, citing 4 Newberg on Class Actions (4th ed. 2002)
9 § 1 1:38, and Eisenberg & Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53
10 UCLA L. Rev. 1303 (2006).) Enhancement payments “are intended to compensate class representatives
11 for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing
12 the action, and, sometimes, to recognize their willingness to act as a private attorney general.”
13 (*Rodriguez*, 563 F.3d at 958-59.) “[T]he rationale for making enhancement or incentive awards to
14 named plaintiffs is that they should be compensated for the expense or risk they have incurred in
15 conferring a benefit on other members of the class.” (*Clark v. American Residential Services LLC*
16 (2009) 175 Cal.App.4th 785.)

17 Approximately 3,098 members of the Settlement Class will share in the estimated \$887,500 Net
18 Settlement Amount due entirely to the effort and commitment of Plaintiffs. Subject to Court approval,
19 therefore, the Settlement provides for a Class Representative Service Award of \$7,500 each⁴ for

20
21 ⁴ The amount of the requested enhancement payment-\$7,500-is reasonable by reference to the amounts
22 that California courts (both federal and state) have repeatedly found to be reasonable for wage and hour
23 class action settlements: *See Baker v. LA. Fitness Int’l, LLC*, No. BC438654 (L.A. County Super. Ct.
24 Dec. 12, 2012) (awarding \$10,000 enhancement payments to three of the named plaintiffs); *Blue v.*
25 *Codwell Banker Residential Brokerage Co.*, No. BC417335 (L.A. County Super. Ct. Mar. 21, 2011)
26 (awarding \$10,000 enhancement payment); *Buckmire v. Jo-Ann Stores, Inc.*, No. BC394795 (L.A.
27 County Super. Ct. June 11, 2010) (awarding \$10,000 enhancement payments to the named plaintiff);
28 *Coleman v. Estes Express Lines, Inc.*, No. BC429042 (L.A. County Super. Ct. Oct. 3, 2013) (awarding
\$10,000 enhancement payment); *Ethridge v. Universal Health Services, Inc.*, No. BC391958 (L.A.
County Super. Ct. May 27, 2011) (awarding \$10,000 enhancement payment); *Hickson v. South Coast*
Auto Insurance Marketing, Inc., No. BC390395 (L.A. County Super. Ct. Mar. 27, 2012) (awarding
\$10,000 enhancement payment); *Hill v. Sunglass Hut Int’l, Inc.*, No. BC422934 (L.A. County Super. Ct.
July 2, 2012) (awarding \$10,000 enhancement payments to the named plaintiffs); *Kabamba v. Victoria’s*
Secret Stores. LLC, No. BC368528 (L.A. County Super. Ct. Aug. 19, 2011) (awarding enhancement
payments of \$ 10,000 to the named plaintiffs along with additional compensation for their general

1 Plaintiffs. The service award is fair and reasonable compensation for Plaintiffs' efforts bringing the
2 action, assisting Class Counsel with the litigation and settlement, regularly conferring with Class
3 Counsel on the status of his case and the strategies for prosecuting the claims, reviewing the proposed
4 Settlement to ensure that its terms are fair and provide adequate relief for the Settlement Class, and
5 agreeing to provide Defendant a general release of all claims arising out of their employment. JCL
6 Dec., ¶ 38.

7 Class Counsel on behalf of Plaintiffs will file a formal motion for the negotiated Class
8 Representative Service Award once preliminary approval of the Settlement is granted. Plaintiffs
9 respectfully submit that the above showing is sufficient for preliminary approval of the negotiated Class
10 Representative Service Award. JCL Dec., ¶ 39.

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

12 The purpose of a Class Counsel Award in class action litigation is to reward counsel who took

13
14 release of claims); *Magee v. American Residential Services, LLC*, No. BC423798 (L.A. County Super.
15 Ct Apr. 21, 2011) (awarding \$15,000 enhancement payment); *Mares v. BFS Retail & Commercial*
16 *Operations, LLC*, No. BC375967 (L.A. County Super. Ct. June 24, 2010) (awarding \$15,000
17 enhancement payments to the named plaintiffs); *Nevarez v. Trader Joe's Co.*, No. BC373910 (L.A.
18 County Super. Ct. Jan. 29, 2010) (awarding \$10,000 enhancement payment); *Ordaz v. Rose Hills*
19 *Mortuary, LP.*, No. BC386500 (L.A. County Super. Ct. Mar. 19, 2010) (awarding 10,000 enhancement
20 payments to the named plaintiffs); *Sheldon v. AHMC Monterey Park Hospital LP*, No. BC440282 (L.A.
21 County Super. Ct. Feb. 22, 2013) (awarding \$10,000 enhancement payment); *Silva v. Catholic Moray*
22 *Services, Inc.*, No. BC408054 (L.A. County Super. Ct. Feb. 8, 2011) (awarding \$10,000 enhancement
23 payments to the named plaintiffs); *Weisbarth v. Banc West Investment Services, Inc.*, No. BC422202
24 (L.A. County Super. Ct. May 24, 2013) (awarding \$10,000 enhancement payment); *Zamora v. Balboa*
25 *Life & Casualty LLC*, No. BC360026 (L.A. County Super. Ct. Mar. 7, 2013) (awarding \$25,000
26 enhancement payments to the named plaintiffs); *Acheson v. Express, LLC*, No. 109CV135335 (Santa
27 Clara County Super. Ct. Sep. 13, 2011) (awarding \$10,000 enhancement payment); *Aguir v. Cingular*
28 *Wireless. LLC*, No. CV 06-8197 DDP (AJWx) (C.D. Cal. Mar. 17, 2011) (awarding \$14,767
enhancement payment); *Bejarano v. Amerisave Mortgage Corp.*, No. EDCV 08-00599 SGL (Opx) (C.D.
Cal. June 22, 2010) (awarding \$10,000 enhancement payment); *Carbajal v. Sally Beauty Supply LLC*,
No. CIVVS 1004307 (San Bernardino Super. Ct. Aug. 6, 2012) (awarding \$10,000 enhancement
payments to the named Plaintiffs); *Contreras v. Serco Inc.*, No. 10-cv-04526-CAS-JEMx (CD. Cal. Sep.
10, 2012) (awarding \$10,000 enhancement payment); *Guerrero v. R.R. Donnelley & Sons Co.*, No. RIC
10005196 (Riverside Super. Ct July 16, 2013) (awarding \$10,000 enhancement payment); *Kisliuk v.*
ADT Security Services, Inc., No. CV08-0324 DSF (RZx) (C.D. Cal. Jan. 10, 2011) (awarding \$10,000
enhancement payment); *Morales v. BCBG Maxaria Int'l Holdings, Inc.*, No. JCCP 4582 (Orange County
Super. Ct Jan. 24, 2013) (awarding \$10,000 enhancement payment); and *Barrett v. Doyon Security*
Services, LLC, Nos. BS900199, BS900517 (San Bernardino County Super. Ct. Apr. 23, 2010) (awarding
\$10,000 enhancement payment).

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

Class Counsel took this matter on a contingency fee basis and invested significant time and expense successfully prosecuting Plaintiffs' claims. As discussed *supra*, the estimated average Individual Settlement Share illustrates the demonstrably positive outcome for the Settlement Class Members. The Agreement provides for a Class Counsel Award in the amount of one-third of the Total Settlement Amount and litigation costs and expenses not to exceed \$25,000. Agreement at §III(O)(10). In light of the positive outcome for the Settlement Class, and in light of the supporting authority, the proposed Class Counsel award is fair and reasonable. JCL Dec., ¶ 40.

Plaintiffs will file a formal motion for the negotiated Class Counsel Award once preliminary approval of the Settlement is granted. Plaintiffs respectfully submit that the above showing is sufficient for preliminary approval of the negotiated attorneys' fees. JCL Dec., ¶ 41.

E. California Law Authorizes Provisional Certification for Settlement Purposes

For the purpose of Settlement only, Plaintiffs contend, and Defendant does not dispute, that provisional certification of the Settlement Class is appropriate. JCL Dec., ¶ 42.

1. The California Standard for Class Certification

Cal. Rules of Court, 3.769(d) provides that the Court may make an order approving certification of a provisional settlement class at the preliminary approval stage. It is well-established that trial courts should use a "lesser standard of scrutiny" for determining the propriety of certifying a settlement class, as opposed to a litigation class. *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1807 at n. 19. Class actions are statutorily authorized "when the question is one of common or general interest, of

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

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

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

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

18 In April of 2012, the California Supreme Court expounded on the element of predominance:
19 The “ultimate question” the element of predominance presents is whether “the issues which may be
20 jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial
21 that the maintenance of a class action would be advantageous to the judicial process and to the litigants.”
22 (*Brinker*, 53 Cal. 4th at 1021-1022 (citations omitted).)

23 Generally, the proposed Settlement Class consists of all of Defendant’s current and former
24 California employees during the Class Period. Defendant’s records show that the Settlement Class
25 Members consists of approximately 3,098 individuals, making joinder of all Settlement Class Members
26 impracticable. Further, because all Settlement Class Members are Defendant’s current and former
27 employees, the class is readily ascertainable from Defendant’s regular business records, i.e., payroll
28 records. JCL Dec., ¶ 43.

1 The California statutes relating to each of Plaintiffs' claims apply with equal force and effect to
2 the entire Settlement Class. Factually, Defendant's policies and practices apply class-wide and
3 Defendant's liability can be determined by facts common to all members of the class. While Defendant
4 disputes whether the class would be appropriate if the litigation were to continue, it agrees to class
5 certification for purposes of this settlement only. The wage and hour issues are both numerous and
6 substantial, and a class action is the most advantageous method of dealing with the claims of the
7 Settlement Class. JCL Dec., ¶ 44.

8 Plaintiffs' wage and hour claims are typical of the proposed Settlement Class because they arise
9 from the same factual basis and are based on the same legal theories applicable to the other Class
10 Members. Likewise, Plaintiffs' interests are entirely coextensive with the interests of the Settlement
11 Class. Plaintiffs allege that they were injured by the same company-wide practices to which the
12 proposed Settlement Class was subject and seeks the same relief. Plaintiffs have already demonstrated
13 their ability to advocate for the interests of the Settlement Class by initiating this litigation, undertaking
14 class discovery, and evaluating the proposed settlement to assure that it is fair. Again, the Defendant
15 disputes whether Plaintiffs' claims are typical of the Class for purposes of any continued litigation of
16 the Action, but agrees for the purposes of this settlement only that Plaintiffs assert claims that are typical
17 of the Settlement Class, including claims for meal and rest break practices and unpaid wages. JCL
18 Dec., ¶ 45.

19 Additionally, Plaintiffs are represented by competent Class Counsel who has extensive
20 experience in litigating wage and hour class action cases. Class Counsel successfully briefed, argued,
21 certified, and gained state court settlement approval of the same class-wide causes of action that are at
22 issue in this case. Class Counsel's wage and hour class action experience establishes that they are well
23 qualified to represent the interests of this Class. JCL Dec., ¶¶ 45.

24 A class action is superior to a multitude of individual lawsuits. Given the size and amount of
25 each individual Settlement Class Member's claim, Class Settlement Members likely have little
26 incentive to litigate their claims on an individual basis because the out-of-pocket expense and personal
27 commitment necessary to litigate each claim outweighs any potential recovery. In sum, class treatment
28 is superior to individual, case-by-case adjudication. JCL Dec., ¶ 46.

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Dated: September 23, 2021

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