

1 David Mara, Esq. (230498)
2 Jill Vecchi, Esq. (299333)
3 **MARA LAW FIRM, PC**
4 2650 Camino Del Rio North, Suite 205
5 San Diego, California 92108
6 Telephone: (619) 234-2833
7 Facsimile: (619) 234-4048
8 Email: dmara@maralawfirm.com
9 jvecchi@maralawfirm.com

10 Attorneys for Plaintiff LARRY PEREZ,
11 on behalf of himself, all others similarly situated,
12 and on behalf of the general public
13

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

15 **IN AND FOR THE COUNTY OF ORANGE**

16 LARRY PEREZ on behalf of himself, all
17 others similarly situated, and on behalf of
18 the general public,

19 Plaintiffs,

20 v.

21 THE NIELSEN COMPANY (US), LLC;
22 and DOES 1-100,

23 Defendants.
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Case No. 30-2021-01194324-CU-OE-CXC

*[Assigned for All Purposes to the
Honorable Peter Wilson, CX-102]*

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF LARRY PEREZ'S MOTION
FOR PRELIMINARY APPROVAL OF
CLASS AND PAGA ACTION
SETTLEMENT, CONDITIONAL
CERTIFICATION, APPROVAL OF CLASS
NOTICE, SETTING OF FINAL APPROVAL
HEARING DATE**

Date: July 7, 2022

Time: 2:00 p.m.

Date File: April 8, 2021

Trial Date: None Set

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I. INTRODUCTION

Plaintiff Larry Perez (hereinafter “Plaintiff” or “Mr. Perez”), on behalf of himself and the approximately 318-member putative class, respectfully requests that this Court preliminarily approve the Joint Stipulation and Settlement Agreement (hereinafter “Agreement”¹) entered into between Plaintiff and Defendant The Nielsen Company (US), LLC (hereinafter “Defendant” or “Nielsen”) (hereinafter Plaintiff and Defendant are collectively referred to as the “Parties”). The Parties’ Agreement seeks to resolve claims raised against Defendant in this matter in exchange for a non-reversionary \$3,300,000 Gross Settlement Amount. The proposed Class is comprised of all non-exempt, salaried Membership Representatives and Field Representatives of Defendant in California at any time between April 8, 2017, to March 6, 2022.² It is requested that the Court grant preliminary approval, as, when analyzing the strengths and vulnerabilities of the claims and Defendant’s potential liability exposure, this proposed settlement of \$3,300,000 is well within the range of reasonableness.

This settlement is estimated to pay Class Members an average payment of approximately \$6,431.16.³ In addition, there are approximately 36,413 workweeks in the Class Period. (Declaration of Steven Guenther (“Guenther Dec.”) ¶ 4). This equates to a workweek value of \$56.16.⁴ As such, the low payment is \$56.16 for Class Members who worked one workweek in the Class Period. Class Members will receive approximately \$2,920.32 per year (if they worked 52 workweeks in a year). The high payout is approximately \$14,433.12.⁵ Under the settlement, Plaintiff’s Individual Settlement Share as a Class Member is estimated to be \$8,199.36 (representing 146 workweeks).⁶ (See Guenther Dec. ¶ 4). The proposed Agreement satisfies all of the criteria for preliminary approval under Rule 3.769 of the California Rules of Court.

¹ The Parties’ Joint Stipulation and Settlement Agreement (“Agreement”) is attached to the Declaration of David Mara, Esq. as Exhibit 1. “Exhibit 1” herein refers to the Parties’ Agreement.

² See Exhibit 1 at Section I, Paragraph 4, Page 1 and Section I, Paragraph 9, Page 2.

³ The Net Settlement Amount is approximately \$2,045,110. \$2,045,110 divided by approximately 318 Class Members = \$6,431.16.

⁴ \$2,045,110 divided by approximately 36,413 workweeks = \$56.16.

⁵ \$56.16 per workweek multiplied by 257 weeks between April 8, 2017 and March 6, 2022 = \$6,421.16.

⁶ These are just estimates. These amounts will change based upon factors such as whether Class Members request to be excluded from the settlement and the amounts awarded by the Court for attorneys’ fees and costs. As such, the Parties will provide the actual high and low settlement

1 As the following sections show, Class Counsel are convinced that the proposed settlement
2 is in the best interests of the Class based on the negotiations and a detailed knowledge of the issues
3 presented in this action. The length and risks of trial and perils of litigation that affect the value of
4 the claims were all carefully weighed. In addition, the defenses asserted by Defendant, the
5 uncertainty of class certification, the difficulties of complex litigation, the lengthy process of
6 establishing specific damages and various possible delays and appeals, were also carefully
7 considered by Class Counsel in arriving at the proposed settlement. The Agreement was the
8 product of an all-day mediation with respected wage and hour mediator David Rotman and was
9 the product of non-collusive, arm's-length negotiations by informed counsel and parties. The
10 settlement is fair, reasonable, and adequate. Accordingly, Plaintiff seeks: (1) preliminary approval
11 of the terms contained in the Agreement; (2) provisional certification of the Class; (3) appointment
12 of Plaintiff as Class Representative; (4) appointment of Mara Law Firm, PC, as Class Counsel; (5)
13 approval of the Parties' proposed notice of class action settlement⁷ (referred to herein as the "Class
14 Notice" or "Notice") and method of notifying the Class about the settlement; and (6) a hearing
15 date for final approval on November 17, 2022.

16 II. BACKGROUND

17 Nielsen is an information, data and market measurement company. Nielsen is an audience
18 measurement solution for video content across all platforms and devices. Nielsen employs salaried
19 employees such as Membership Representatives and Field Representatives to run its business.

20 On December 21, 2020, Plaintiff provided notice to the Labor and Workforce Development
21 Agency ("LWDA") in accordance with the Private Attorneys General Act of 2004 ("PAGA"). (*See*
22 Exhibit 2 attached to the Mara Dec.). On April 8, 2021, Plaintiff filed an action against Defendant
23 alleging violations of the PAGA for Defendant's: (1) Failure to Pay All Straight Time Wages; (2)
24 Failure to Pay Overtime Wages; (3) Failure to Provide Meal Periods; (4) Failure to Authorize and
25 Permit Rest Periods; (5) Failure to Adopt a Compliant Sick Pay Policy; (6) Knowing and
26 Intentional Failure to Comply with Itemized Employee Wage Statement Provisions; (7) Failure to

27
28 payments, and Plaintiff's estimated payment, at the time of final approval.

⁷ The Class Notice is attached to the Agreement as Exhibit A.

1 Reimburse/Illegal Deductions; and (8) Violation of Unfair Competition Law (Bus. & Prof. Code
2 § 17200, et seq.). (Mara Dec. ¶ 9).

3 On April 8, 2021, Plaintiff also filed a class action case against Defendant in the Orange
4 County Superior Court (Case No. 30-2021-01194580-CU-OE-CXC). The allegations in the class
5 action are for the same underlying conduct alleged in the PAGA action. (Mara Dec. ¶ 10).

6 On December 6, 2021, the Parties participated in a full-day global mediation of both of
7 Plaintiff's cases with respected wage and hour mediator, David Rotman, Esq., wherein the Parties
8 were able to reach the agreement which forms the basis of this settlement. The settlement seeks to
9 resolve the claims alleged in both Plaintiff's PAGA and class actions. (Mara Dec. ¶ 11).

10 On April 28, 2022, Plaintiff filed a First Amended Complaint adding his class action claims
11 into his PAGA action. (Mara Dec. ¶ 12).

12 **III. INVESTIGATION/ LITIGATION HISTORY**

13 **a. Discovery and Investigation**

14 After filing, the Parties engaged in extensive informal discovery and Plaintiff conducted
15 further investigation into the claims. On May 24, 2021, Plaintiff served one set of interrogatories
16 and one set of requests for production of documents on Defendant. In addition, the Parties
17 conducted informal discovery prior to mediation. These discovery efforts led to Defendant
18 producing policy documents, such as its employee guide which includes Defendant's meal and
19 rest period policies and paid time off policies. Defendant also produced time and wage records for
20 Plaintiff and time and wage records for a sampling of Class Members. In addition, Plaintiff
21 provided his Counsel with numerous documents, including emails, which set forth Defendant's
22 policies. (Mara Dec. ¶ 13).

23 **b. The Parties Agreed to Attend Mediation**

24 The Parties attended an all-day mediation with respected wage and hour mediator David
25 Rotman on December 6, 2021. This mediation was successful. The Parties then met and conferred
26 over all the terms of the settlement and finalized their settlement in the Parties' Agreement. The
27 Parties seek preliminary approval of the Agreement in the instant motion. (*See* Mara Dec. ¶ 11;
28 *see also* Exhibit 1 attached thereto).

1 **c. The Parties' Staunchly Conflicting Positions**

2 **i. Wage Statement Claim**

3 Plaintiff alleges that employees are not provided with lawful wage statements. Section
4 226(a) provides that employers must furnish an accurate itemized statement in writing showing:
5 (1) gross wages earned; (2) total hours worked by the employee; (3) the number of piece rate units
6 earned and applicable piece rate if the employee is paid on a piece rate basis; (4) all deductions;
7 (5) net wages earned; (6) the inclusive dates of the period for which the employee is paid; (7) the
8 name of the employee and only the last four digits of his or her social security number or employee
9 identification number other than a social security number; (8) the name and address of the legal
10 entity that is the employer; and (9) all applicable hourly rates in effect during the pay period and
11 corresponding number of hours worked at each hourly rate by the employee.

12 Plaintiff alleges that Defendant fails to provide employees with accurate itemized wage
13 statements because Defendant's wage statements do not meet California Labor Code § 226(a)'s
14 requirements because they do not itemize: (1) the non-overtime hours worked; (2) the correct
15 number of overtime hours; or (3) the total hours worked. Plaintiff contends that Defendant does
16 not list any hours under the "salary" category. Plaintiff asserts that Defendant also lists the
17 overtime hours worked twice. As such, Plaintiff contends that if employees were to add up all of
18 the overtime hours worked, they would arrive at a number that is double the actual overtime hours
19 worked. Plaintiff alleges that Defendant also does not list the total hours worked in the pay period.
20 (Mara Dec. ¶ 14).

21 Defendant disputes this claim. Defendant argues that employees can ascertain the required
22 information, such as hours worked, using simple math. Defendant relies on cases which hold that
23 "[w]age statements comply with § 226(a) when a plaintiff employee can ascertain the required
24 information by performing simple math, using figures on the face of the wage statement."
25 *Hernandez v. BCI Coca-Cola Bottling Co.* (9th Cir. 2014) 554 Fed. Appx. 661, 662 (citing *Morgan*
26 *v. United Retail Inc.* (2010) 186 Cal.App.4th 1136). Defendant further argues that Plaintiff cannot
27 show that any potential failure to comply with California Labor Code § 226 was "knowing and
28 intentional." *See Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1195.

1 **ii. Meal Period Claim**

2 Plaintiff contends that Defendant does not provide employees with meal periods that
3 conform with California law. Employers have an obligation under California law to provide
4 employees with thirty (30) minute meal periods. Under California Labor Code § 512(a), “[a]n
5 employer may not employ an employee for a work period of more than five hours per day without
6 providing the employee with a meal period of not less than 30 minutes” Cal. Lab. Code §
7 512(a). An employer “satisfies this obligation [to provide meal periods] if it relieves its employees
8 of all duty, relinquishes control over their activities and permits them a reasonable opportunity to
9 take an uninterrupted 30-minute break, and does not impede or discourage them from doing so.”
10 *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1040.

11 Recently, the California Supreme Court issued a decision, wherein it ruled that time records
12 showing late, short, or missed meal periods raises a rebuttable presumption that the meal periods
13 were not provided: “If time records show missed, short, or delayed meal periods with no indication
14 of proper compensation, then a rebuttable presumption arises” that the meal periods were not
15 provided in accordance with California law. *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58,
16 74. Plaintiff contends that here the time records show that 42.5% of shifts have at least one meal
17 period violation. Plaintiff asserts that this means that in 42.5% of shifts meal periods were not
18 provided in compliance with California law. (Mara Dec. ¶ 17).

19 Defendant asserts that its meal period policy is lawful and that it provides employees with
20 meal periods in compliance with California law. Defendant alleges that if litigation continues it
21 would be able to show that it advised employees of the right to take a meal period through its
22 employee guide, and that employees either took a lawful meal period or knowingly and voluntarily
23 decided to skip the meal period or take a late or short meal period. Defendant contends that this
24 evidence would rebut the presumption under *Donohue v. AMN Services, LLC*. As such, a legal
25 dispute exists as to whether Defendant can rebut the presumption that arises when employees’ time
26 records show late, short, and missed meal periods.

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In California, the ten (10) minute rest break must be a *net* ten (10) minutes in a suitable rest area. None of the time allotted for rest breaks can be consumed by the time it takes to get to a suitable rest area. *See Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 267-268 (relying on January 3, 1986 and February 22, 2002 Department of Labor Standards Enforcement Letters wherein the DLSE ruled that the net ten-minute language for rest breaks means ten minutes of time in a rest area and cannot include time it takes to get to and from the rest area). The employer must show that it clearly articulates the right to a net ten (10) minutes, which means it must clearly communicate what “net” ten minutes means and that, regardless of what happens along the way to or from the rest area, employees are entitled to a full ten-minutes in the rest area. *See Bufil v. Dollar Fin. Grp., Inc.* (2008) 162 Cal.App.4th 1193, 1199 (the “onus is on the employer to clearly communicate the authorization and permission [to take rest breaks] to its employees.”).

Plaintiff contends that Defendant's policy set forth in its employee guide does not inform employees that rest periods are a consecutive net ten minutes at a suitable rest area. Therefore, Plaintiff asserts that Defendant does not provide employees with net ten-minute rest periods. (Mara Dec. ¶ 20).

Defendant asserts that employees are instructed that they get ten minutes of rest at a suitable resting area. Further, Defendant argues that employees are told that they are to start their rest periods once they reach a suitable resting area.

1 **iv. Unpaid Wages Claim**

2 Plaintiff alleges that Defendant forces employees to use paid time off (PTO) to cover salary
3 hours. The California Supreme Court in *Oman v. Delta Air Lines, Inc.* found that “State law
4 prohibits borrowing compensation contractually owed for one set of hours or tasks to rectify
5 compensation below the minimum wage for a second set of hours or tasks, regardless of whether
6 the average of paid and unpaid (or underpaid) time exceeds the minimum wage. Even if that
7 practice nominally might be thought to satisfy the requirement to pay at least minimum wage for
8 each hour worked, it does so only at the expense of renegeing on the employer’s contractual
9 commitments, in violation of the contractual protection provisions of the Labor Code.” *Oman v.*
10 *Delta Air Lines, Inc.* (2020) 9 Cal. 5th 762, 781. The *Oman* Court went on to state that “[t]he
11 compensation owed to employees is a matter determined by contract. Compensation may be
12 calculated on a variety of bases: Although nonexempt employee pay is often by the hour, state law
13 expressly authorizes employers to calculate compensation by the task or the piece, by the sale, or
14 by any other convenient standard.” *Id.* “Consistent with general contract interpretation principles,
15 the unit for which pay is promised should be determined based upon the ‘mutual intention of the
16 parties as it existed at the time of the contracting.’” *Id.* at 782 (*quoting* Civ. Code § 1636). “For all
17 hours worked, employees are entitled to the greater of the (1) amount guaranteed by contract for
18 the specified task or period, or (2) the amount guaranteed by the minimum wage.” *Id.*

19 Plaintiff contends that Defendant pays employees a set salary. Yet, Plaintiff asserts when
20 employees are unable to work 40 hours in a week, Defendant requires them to pay themselves for
21 hours worked under 40 in a workweek using their PTO. In doing so, Plaintiff alleges that Defendant
22 fails to compensate employees for the “amount guaranteed by contract for the specified task or
23 period.” When employees work less than 40 hours in a week, Plaintiff contends that Defendant
24 forces them to pay themselves a portion of the salary guaranteed to them by Defendant for the
25 workweek. (Mara Dec. ¶ 23).

26 Defendant disputes this claim and contends that it does not require employees to use PTO
27 to cover hours worked that are less than 40 in a week. In fact, Defendant asserts that since COVID,
28 employees have been placed on “audio shifts” so they can work from home making calls to

1 potential customers. Defendant states that audio shifts are only 32 hours a week, yet employees
2 were paid for 40 hours. As such, employees have been scheduled to work less than 40 hours a
3 week during COVID and have not had to make up any hours using PTO. Defendant contends that
4 if litigation were to continue it would provide records which disprove this claim.

5 **v. Unpaid Overtime Wages Claim**

6 Plaintiff argues that Defendant does not pay the correct amount of overtime wages because
7 it improperly calculates the regular rate of pay. Labor Code section 510 and Wage Order 7 require
8 employers to pay non-exempt employees overtime wages of no less than one and one-half times
9 their respective regular rates of pay for all hours worked in excess of eight hours in one workday,
10 all hours worked in excess of forty hours in one workweek, and/or the first eight hours worked on
11 the seventh consecutive day of the workweek. The regular rate of pay under California law includes
12 all remuneration for employment paid to, on behalf of, the employee. In *Alvarado v. Dart*
13 *Container Corporation of California*, the California Supreme Court observed, “[r]egular rate of
14 pay, which can change from pay period to pay period, includes adjustments to the straight time
15 rate, reflecting, among other things, shift differentials and the per hour value of any nonhourly
16 compensation the employee has earned.” *Alvarado v. Dart Container Corporation of California*
17 (2018) 4 Cal. 5th 542, 554.

18 Plaintiff contends that Defendant pays employees incentives and bonuses. Plaintiff asserts
19 that when these incentive and bonuses are paid Defendant either fails to adjust the regular rate of
20 pay at all or fails to adjust it correctly. Plaintiff argues that Defendant does not properly adjust the
21 regular rate of pay in accordance with *Alvarado* when determining the overtime rate owed. Under
22 *Alvarado*, the regular rate of pay is calculated by dividing the non-hourly compensation paid by
23 the number of non-overtime hours worked during the earning period. This amount is multiplied by
24 1.5 and is paid for each overtime hour worked. (Mara Dec. ¶ 26).

25 Defendant argues that it does properly adjust the regular rate of pay. Defendant argues that
26 *Alvarado* only applies to “flat sum bonuses” and therefore does not apply to this case as Defendant
27 pays discretionary bonuses and commissions and not flat sum bonuses. Defendant points to its pay
28 records which show that the regular rate of pay has been adjusted in accordance with the federal

1 method of calculating the regular rate of pay. Under this method the regular rate is calculated by
2 dividing the total earnings for the week (including earnings during overtime hours), by the total
3 hours worked during the week (including overtime hours). This amount is then multiplied by 0.5
4 to determine the additional half-time premium that must be paid for all overtime hours (the full
5 amount of the premium is paid for overtime hours compensated as double time).

6 Defendant further argues that if a bonus was not included in an employee's regular rate of
7 pay, this is because the bonus was discretionary which does not need to be included in regular rate
8 of pay adjustments under California law. To the extent any bonus is non-discretionary, Defendant
9 properly incorporates such commission into the regular rate and pays the additional overtime
10 wages owed.

11 **vi. Waiting Time Penalties Claim**

12 Plaintiff also pursued waiting time penalties. This claim is derivative of Plaintiff's unpaid
13 wages claim. Should Plaintiff's unpaid wages claim fail, this claim would also fail. In addition,
14 Defendant contends that even if Plaintiff were successful in his unpaid wage claim, he would have
15 to prove Defendant "willfully" failed to pay employees the appropriate wages due upon separation
16 of employment. "A willful failure to pay wages within the meaning of Labor Code Section 203
17 occurs when an employer intentionally fails to pay wages to an employee when those wages are
18 due. However, a good faith dispute that any wages are due will preclude imposition of waiting
19 time penalties under Section 203." Cal. Code Regs. Tit. 8 § 13520. "A 'good faith dispute' that
20 any wages are due occurs when an employer presents a defense, based in law or fact, which would
21 preclude any recovery on the part of the employee. The fact that a defense is ultimately
22 unsuccessful will not preclude a finding that a good faith dispute did exist." *Id.* Defendant contends
23 that any failure to pay wages due at the separation of employment was not willful. Defendant
24 argues that it would not be liable for waiting time penalties because a "good faith dispute" exists
25 over the payment of those wages. *See* Cal. Code Regs. Tit. 8 § 13520; *Amaral v. Cintas Corp. No.*
26 *2* (2008) 163 Cal.App.4th 1157, 1201.

27 ///

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

2 Under the terms of the settlement, Defendant will create a settlement fund of \$3,300,000.

3 **a. Deductions from the Settlement**

4 The Parties have agreed (subject to and contingent upon the Court's approval) that this
5 action be settled and compromised for the non-reversionary total sum of \$3,300,000 ("Gross
6 Settlement Amount" or "GSA"), which includes, subject to Court approval: (a) attorneys' fees of
7 up to \$1,099,890 (33.33% of the GSA) to compensate Class Counsel for work already performed
8 and all work remaining to be performed in documenting the settlement, administering the
9 settlement, and securing Court approval; (b) litigation costs estimated at approximately, and not to
10 exceed, \$25,000;⁸ (c) a Class Representative Enhancement Payment to the named class
11 representative, Larry Perez, in a sum not to exceed \$10,000 in consideration for prosecuting this
12 class action, serving as Class Representative, work performed, and risks undertaken for the
13 payment of attorneys' fees and costs in the event he had been unsuccessful in the matter; (d) claims
14 administration fees and expenses to Phoenix Settlement Administrators (hereinafter "Phoenix"),
15 estimated not to exceed approximately \$20,000;⁹ and (e) \$100,000 allocated to Plaintiff's claims
16 under the PAGA. Of this payment, 75%, or \$75,000 will be provided to the LWDA, and 25%, or
17 \$25,000, will be available for distribution to PAGA Aggrieved Employees.¹⁰

18 **b. Calculation of the Settlement Payments to Class Members**

19 After all Court-approved deductions from the GSA, it is estimated that \$2,045,110 ("Net
20 Settlement Amount" or "NSA"), less employee taxes on the "wage portion" of the settlement
21 payment, will be distributed to Participating Class Members.¹¹ Subject to the terms and conditions

22 ⁸ These will be tabulated and presented to the Court at final approval. Plaintiff will only seek the
23 amount of actual costs incurred during the litigation of this case. Should the actual costs exceed
24 \$25,000, Plaintiff will only seek reimbursement of costs up to \$25,000. Should the actual costs be
lower than \$25,000, the difference will be added to the Net Settlement Amount for disbursement
to Participating Class Members.

25 ⁹ Phoenix will present to the Court a declaration in conjunction with the final approval motion
26 outlining the costs of the settlement administration process. If the settlement administration costs
are lower than the amount allocated in the Agreement, the difference will be added to the Net
Settlement Amount for distribution to Participating Class Members.

27 ¹⁰ PAGA Aggrieved Employees are Class Members who worked from December 21, 2019 through
March 6, 2022. (Exhibit 1 at Section I, Paragraphs 26 and 29, Page 4).

28 ¹¹ Participating Class Members are Class Members who do not submit a valid and timely request
to exclude themselves from this Settlement. (Exhibit 1 at Section I, Paragraph 32, Page 5).

1 of the settlement, each Participating Class Member will receive a proportionate share of the Net
2 Settlement Amount that is equal to (i) the number of weeks he or she worked for Defendant in
3 California, in an hourly, non-exempt position, based on the Class Data provided by Defendant,
4 divided by (ii) the total number of weeks worked by all Participating Class Members based on the
5 same Class Data, which is then multiplied by the Net Settlement Amount. One day worked in a
6 given week will be credited as a work week for purposes of this calculation. Therefore, the value
7 of each Class Member's Individual Settlement Share ties directly to the amount of weeks that he
8 or she worked. (Exhibit 1 at Section III, Paragraph 56(A)(i), Page 9).

9 In addition, each PAGA Aggrieved Employee will receive a will receive a proportionate
10 share of the PAGA Fund that is allocated for distribution to PAGA Aggrieved Employees (i.e.,
11 25% of the PAGA Payment), equal to (i) the estimated number of weeks he or she worked at least
12 one (1) day of the week for Defendant in California during the PAGA Period based on the Class
13 data provided by Defendant, divided by (ii) the total estimated number of weeks worked by all
14 PAGA Aggrieved Employees during the PAGA Period based on the same Class data, which is
15 then multiplied by the PAGA Payment allocated for distribution to PAGA Aggrieved Employees.
16 (Exhibit 1 at Section III, Paragraph 56(A)(ii), Page 9). Therefore, the value of each PAGA
17 Aggrieved Employees' PAGA Settlement Share ties directly to the amount of pay periods that the
18 PAGA Aggrieved Employees worked during the PAGA Period.

19 Under no circumstances will any portion of the \$3,300,000 settlement revert to Defendant
20 and 100% of the NSA will be paid out to Participating Class Members. In addition, the employer's
21 share of taxes will be paid in addition to and outside of the GSA. (See Exhibit 1 at Section I,
22 Paragraph 21, Page 3).

23 The individual settlement payments will be divided into a "wage portion" to compensate
24 Participating Class Members for alleged unpaid wages and a "non-wage portion" to compensate
25 Participating Class Members for alleged interest and penalties. The wage portion will make up
26 60% of each Participating Class Members' Individual Settlement Share, and the non-wage portion
27 will make up 40% of each Participating Class Members' Individual Settlement Share. In addition,
28 each PAGA Aggrieved Employees' PAGA Settlement Share will be apportioned as 100%

1 penalties. (See Exhibit 1 at Section III, Paragraph 56(B), Pages 9-10).

2 **c. Notice to the Class**

3 Within fourteen (14) calendar days after entry of the Preliminary Approval Order,
4 Defendant shall deliver to the Settlement Administrator an electronic database, which will list the
5 following information for each Class Member: (1) first and last name; (2) last known mailing
6 address; (3) last known telephone number; (4) social security number; (5) hire and termination
7 dates; and (6) the total number of Work Weeks during which the Class Member worked during
8 the Class Period. The Settlement Administrator will conduct a skip trace for the address of all
9 former Defendant employee Class Members. (Exhibit 1 at Section III, Paragraph 59(B)(i), Page
10 13).

11 Within fourteen (14) calendar days after receipt of the Class Data, the Settlement
12 Administrator will mail via first-class regular U.S. Mail the Class Notice to all identified Class
13 Members using the mailing address information provided by Defendant and the results of the skip
14 trace performed on all former Defendant employee Class Members. (Exhibit 1 at Section III,
15 Paragraph 59(B)(iii), Page 14). The Class Notices will be mailed in English language only. No
16 translations of the Class Notice are necessary as all Class Members are fluent in English and
17 communicate with Nielsen in English. (See Declaration of Tracy Staines ¶ 4).

18 After notices are mailed, Class Members will have sixty (60) days to respond to the
19 settlement. (Exhibit 1 at Section I, Paragraph 38, Page 6). This deadline is referred to as the
20 “Response Deadline.” Class Members may respond to the settlement by requesting to be excluded
21 from it or objecting to it. Class Members can also file a dispute as to the number of workweeks
22 attributed to them.

23 **i. Requests for Exclusion**

24 Class Members can request to be excluded from the settlement by mailing a written request
25 for exclusion to the Settlement Administrator. This can be done on the Request for Exclusion Form
26 enclosed with the Class Notice. Whether on the Request for Exclusion Form or otherwise, the
27 written request for exclusion must: (a) state the Class Member’s name, address, telephone number,
28 and the last four digits of the Class Member’s social security number or employee identification

number; (b) state the Class Member's intention to exclude themselves from or opt-out of the Settlement; (c) be addressed to the Settlement Administrator; (d) be signed by the Class Member or his or her lawful representative; and (e) be postmarked no later than the Response Deadline. A request to Opt-Out of the Settlement shall not serve to exclude the Class Member from participation in the settlement of PAGA claims. PAGA Aggrieved Employees who opt-out from the class portion of the settlement will still receive their share of the PAGA Fund. Subject to Court approval of the PAGA Payment, PAGA Aggrieved Employees shall have no right or ability to opt out of the PAGA portion of this Settlement and PAGA Released Claims. (Exhibit 1 at Section III, Paragraph 59(D), Page 16). At final approval, the Plaintiff will present the Court with a report on all requests for exclusion received.

ii. Objections to the Settlement

Class Members who wish to object to the settlement can do so by mailing a written objection to the Settlement Administrator. This can be done on the Formal Objection Form mailed with the Class Notices. Whether on the Formal Objection Form or otherwise, objections shall: (a) state the Class Member's name, address, telephone number, and the last four digits of the Class Member's social security number or employee identification number; (b) the words "Notice of Objection" or "Formal Objection;" and (c) a short statement of the facts supporting the objection, such as, the legal and factual arguments supporting the objection. Class Members may (though are not required to) appear at the Final Approval Hearing to state an objection, either in person or through the objector's own counsel. Absent good cause found by the Court, objections will not be considered by the Court if not timely or otherwise compliant with the procedures set forth in the Parties' Agreement. (Exhibit 1 at Section III, Paragraph 59(C), Page 15-16). At final approval, Plaintiff will provide the Court with a single packet of objections submitted by Class Members, if any.

If a Class Member first requests exclusion from the settlement and then objects, the objection will not be considered valid. In addition, if a Class Member objects then requests to be excluded from the settlement, the Class Member will be deemed to have waived their objection and will be excluded from the settlement. (See Exhibit 1 at Section III, Paragraph 59(B)(ii), Page

13-14).

iii. Disputes Regarding Workweeks

If a Class Member who receives a Class Notice wishes to dispute the number of work weeks listed on the Class Notice, the Class Member may notify the Settlement Administrator by mail or telephone no later than the Response Deadline and should produce any available supporting evidence, such as wage statements, offers of employment, termination letters, and/or other employment records, to the Settlement Administrator. The documentation should provide evidence of the dates the Class Member contends he or she worked for Defendant during the Class Period. The Settlement Administrator shall then provide the documentation provided by the Class Member to Defendant. Defendant shall review its records, the documentation provided by the Class Member, and shall provide information to the Settlement Administrator in response to any such disputed claim. The Settlement Administrator shall evaluate the evidence submitted by the Class Member and make the decision as to which dates should be applied. All disputes submitted to the Settlement Administrator, including any evidence submitted in conjunction with a dispute, shall be presented to the Court in conjunction with final approval along with the determination made by the Settlement Administrator. The Court shall have the right to review any decision made by the Settlement Administrator regarding a workweek dispute. (Exhibit 1 at Section III, Paragraph 59(E), Page 17).

iv. Returned Notices

If a Class Notice is returned because of an incorrect address, within five (5) business days from receipt of the returned notice, the Settlement Administrator will conduct a search for a more current address for the Class Member and re-mail the Class Notice to the Class Member. The Settlement Administrator will use the National Change of Address Database and skip traces to attempt to find the current address. The Settlement Administrator will be responsible for taking reasonable steps to trace the mailing address of any Class Member for whom a Class Notice is returned by U.S. Postal Service as undeliverable. These reasonable steps shall include, at a minimum, the tracking of all undelivered mail, performing address searches for all mail returned without a forwarding address, and promptly re-mailing to Class Members for whom new addresses

are found. (Exhibit 1 at Section III, Paragraph 59(B)(v), Page 14).

If the Settlement Administrator is unable to locate a better address through a database search or skip trace, the Settlement Administrator shall call the last known phone number provided by Defendant to attempt to obtain an accurate address. If an address is obtained, the Settlement Administrator shall promptly re-mail the Class Notice to the updated address. If the Class Notice is re-mailed, the Settlement Administrator will note for its own records the date and address of each remailing. If the Settlement Administrator is unable to locate an accurate address for the Class Member by telephone, the Settlement Administrator will promptly provide the contact information of the Class Member with the undeliverable Notice to Class Counsel. Class Counsel will provide this contact information to a third-party investigator to perform a TLOxp search using the available contact information. The TLOxp search performs a “deep skiptrace” of the Class Member and will have a greater chance of locating a better address to provide the Class Member with Notice. (Exhibit 1 at Section III, Paragraph 59(B)(vi), Pages 14-15).

If a Class Notice is returned because of an incorrect address and re-mailed to a Class Member for whom a new address is found, the Class Member’s deadline to respond to the settlement shall be increased by ten (10) calendar days. (Exhibit 1 at Section III, Paragraph 59(B)(v), Page 14). As such, if a Class Member’s Class Notice is re-mailed, the Class Member shall have ten (10) extra days to request to be excluded from the settlement, object to the settlement, or submit a dispute as to the number of workweeks attributed to them.

d. Distribution of Funds

Defendant has already wired the Gross Settlement Amount to the Settlement Administrator.¹² The Settlement Administrator shall inform Defendant of the amount of the employer’s share of taxes no later than ten (10) calendar days after the Effective Final Settlement Date.¹³ Defendant shall wire to the Settlement Administrator the employer’s share of taxes no later than twenty (20) calendar days of the Effective Final Settlement Date. (Exhibit 1 at Section III,

¹² Should the settlement ultimately not be approved of by the Court or otherwise not become final, the Settlement Administrator shall return all settlement funds to Defendant. (Exhibit 1 at Section I, Paragraph 20, Page 3).

¹³ The Effective Final Settlement Date is the date when the settlement can no longer be appealed. (Exhibit 1 at Section I, Paragraph 17, Page 3).

Paragraph 59(K)(i), Page 19). Within seven (7) calendar days after Defendant wires the employer's share of taxes to the Settlement Administrator, the Settlement Administrator shall disburse: (1) the Net Settlement Amount to be paid to Participating Class Members; (2) the Attorney Fee Award and Cost Award to Class Counsel for attorneys' fees and costs, as approved by the Court; (3) the Class Representative Enhancement Payment paid to the Class Representative, as approved by the Court; (4) the Administration Costs, as approved by the Court; (5) the PAGA Payment to the LWDA and the PAGA Aggrieved Employees; and (6) Defendant's portion of payroll taxes as the Class Members' current or former employer. (Exhibit 1 at Section III, Paragraph 59(K)(ii), Pages 19-20).

Participating Class Members and PAGA Aggrieved Employees must cash or deposit their Individual Settlement Share checks within one hundred and eighty (180) calendar days after the checks are mailed to them. If any checks are not redeemed or deposited within ninety (90) calendar days after mailing, the Settlement Administrator will send a reminder postcard indicating that unless the check is redeemed or deposited in the next ninety (90) days, it will expire and become non-negotiable, and offer to replace the check if it was lost or misplaced. If a check is returned because of an incorrect address, within five (5) business days from receipt of the returned check, the Settlement Administrator will conduct a search for a more current address for the Class Member and re-mail the Class Notice to the Class Member. The Settlement Administrator will use the National Change of Address Database and skip traces to attempt to find the current address. The Settlement Administrator will be responsible for taking reasonable steps to trace the mailing address of any Class Member for whom a check is returned by U.S. Postal Service as undeliverable. If the Settlement Administrator is unable to locate a better address through a database search or skip trace, the Settlement Administrator shall call the last known phone number provided by Defendant to attempt to obtain an accurate address. If an address is obtained, the Settlement Administrator shall promptly re-mail the check to the updated address. If any checks remain uncashed or not deposited by the expiration of the 90-day period after mailing the reminder notice, the Settlement Administrator will, within two hundred (200) calendar days after the checks are mailed, cancel the checks. All funds associated with the Individual Settlement Share checks

1 returned as undeliverable and funds associated with those checks remaining un-cashed, shall be
2 transmitted by the Settlement Administrator to a cy pres beneficiary. The cy pres beneficiary
3 selected by the Parties is Legal Aid at Work. (Section III, Paragraph 59(M), Pages 20-21)

4 Legal Aid at Work offers free clinics and helplines that provide free direct, individualized
5 help in person or by phone for people across California. Legal Aid at Work also offers know-your-
6 rights trainings, fact sheets, and numerous do-it-yourself guides and toolkits, and other information
7 and resources online and in person. Legal Aid at Work's litigation efforts enforce and strengthen
8 the civil and employment rights of low-wage workers in California and across the country. Legal
9 Aid at Work also drafts and promotes laws, regulations, and policies to strengthen civil and
10 workplace rights at the local, state, and federal level.

11 **e. Release of Claims**

12 The claims that Plaintiff and other Participating Class Members are releasing in exchange
13 for an Individual Settlement Share payment are based on the facts and claims asserted in the class
14 case. In exchange for an Individual Settlement Share, Plaintiff and Participating Class Members
15 will release and discharge the Released Parties¹⁴ from any and all claims, debts, liabilities,
16 demands, obligations, penalties, guarantees, costs, expenses, attorney's fees, damages, action or
17 causes of action of whatever kind or nature, whether known or unknown, contingent or accrued,
18 that are alleged or could have been alleged based upon a reasonable interpretation of the facts
19 alleged in the Class Action, against Defendant (including any and all unnamed Does). The
20 Released Class Claims include, but are not limited to, 1) Failure to Pay All Straight Time Wages;
21 2) Failure to Pay All Overtime Wages; 3) Failure to Provide Meal Periods (Lab. Code §§ 226.7,
22 512, IWC Wage Order No. 4- 2001(11); Cal. Code Regs., tit. 8 § 11090); 4) Failure to Authorize
23 and Permit Rest Periods (Lab. Code § 226.7; IWC Wage Order No. 4-2001(12); Cal. Code Regs.
24 tit. 8 § 11040); 5) Failure to Adopt a Compliant Sick Pay Policy (Lab. Code §§ 233, 234, 246); 6)
25 Knowing and Intentional Failure to Comply with Itemized Employee Wage Statement Provisions

26 ¹⁴ The Released Parties are Defendant and its past and present officers, directors, owners, parents,
27 subsidiaries, divisions, related companies, employees, representatives, affiliates, administrators,
28 attorneys, agents, consultants, shareholders, joint ventures, predecessors, successors, fiduciaries,
beneficiaries, subrogees, executors, insurers, employee benefit plans, and/or assigns of said entities
and individuals. (Exhibit 1 at Section I, Paragraph 37, Page 6).

(Lab. Code §§ 226, 1174, 1175); 7) Failure to Reimburse/Illegal Deductions (Lab. Code §§ 221, 2802, Cal. Regs., tit. 8, § 11040(8)); 8) Violation of Unfair Competition Law (Bus. & Prof. Code § 17200, et seq.); and 9) Waiting Time Penalties (Lab. Code § 203). This release will be for the Class Period. (Exhibit 1 at Section I, Paragraph 35, Page 5).

The claims that Plaintiff and other PAGA Aggrieved Employees are releasing in exchange for a PAGA Settlement Share payment are based upon Plaintiff's PAGA complaint and include any and all claims, debts, liabilities, demands, obligations, penalties, guarantees, costs, expenses, attorney's fees, damages, action or causes of action of whatever kind or nature, whether known or unknown, contingent or accrued, that are alleged or could have been alleged based upon a reasonable interpretation of the facts alleged in the PAGA Action, against Defendant (including any and all unnamed Does). The Released PAGA Claims include, but are not limited to, violations of the private Attorneys General Act, Labor Code §2699, et seq. This release will be for the PAGA Period. (Exhibit 1 at Section I, Paragraph 36, Page 5).

In addition, Plaintiff has agreed to a broader release than Class Members. (See Exhibit 1 at Section III, Paragraph 61, Page 21).

V. ARGUMENT

a. Class Action Settlements Are Subject to Court Review and Approval Under the California Rules of Court

Rule 3.769 requires court approval for class action settlements.¹⁵ "Before final approval, the court must conduct an inquiry into the fairness of the proposed settlement." (California Rules of Court, Rule 3.769(g)). Rule 3.769 further requires a noticed motion for preliminary approval of class settlements:

(a) A settlement or compromise of an entire class action, or a cause of action in a class action, or as to a party, requires the approval of the court after hearing.

...

(c) Any party to a settlement agreement may serve and file a written notice of motion for preliminary approval of the settlement. The settlement agreement and proposed notice to class members must be filed with the motion, and

¹⁵ The California Supreme Court also has authorized California's trial courts to use Federal Rule 23 and cases applying it for guidance in considering class issues. See *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821; *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146. Where appropriate, therefore, the Parties cite Federal Rule 23 and federal case law in addition to California law.

1 the proposed order must be lodged with the motion.

2 Courts act within their discretion in approving settlements that are fair, not collusive, and
3 take into account “all the normal perils of litigation as well as the additional uncertainties inherent
4 in complex class actions.” *In re Beef Industry Antitrust Litigation* (5th Cir. 1979) 607 F. 2d 167,
5 179, cert. den. sub nom. *Iowa Beef Processors, Inc. v. Meat Price Investigators Ass’n* (1981) 452
6 U.S. 905.

7 **b. The Settlement Is Fair, Reasonable, and Adequate**

8 In deciding whether to approve a proposed class action settlement under Code of Civil
9 Procedure § 382, the Court must find that a proposed settlement is “fair, adequate and reasonable.”
10 *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. A proposed class action settlement is
11 **presumed** fair under the following circumstances: (1) the parties reached settlement after arms-
12 length negotiations; (2) investigation and discovery were sufficient to allow counsel and the court
13 to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of
14 objectors is small. *Dunk v. Ford Motor Co., supra*, at 1802. As the following shows, all of these
15 elements – with the exception of the percentage of objectors, which cannot be anticipated at this
16 stage of the litigation – bearing on the fairness of the proposed settlement are present here and the
17 Court’s grant of preliminary approval is therefore requested.

18 **i. The Settlement Was Reached as a Result of Arm’s-Length Negotiations**

19 The settlement was reached as a result of arm’s-length negotiations. Though cordial and
20 professional, the settlement negotiations have been, at all times, adversarial and non-collusive in
21 nature. Prior to, at, and after the mediation, Counsel for the Parties conducted extensive arm’s
22 length settlement negotiations until the settlement was reached. The terms of the settlement are
23 memorialized in the Agreement which is attached to the Declaration of David Mara, Esq. as
24 Exhibit 1. While Plaintiff believes in the merits of his case, he also recognizes the inherent risks
25 of litigation and understands the benefit of the class receiving significant settlement funds
26 immediately as opposed to risking continued litigation in achieving class certification, preparing
27 for and conducting a trial, and/or an appeal that may take several more years to litigate.

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1 **ii. The Settlement is the Result of Thorough Investigation and Discovery**

2 The Parties thoroughly investigated and evaluated the factual strengths and weaknesses
3 before reaching the proposed settlement, and engaged in sufficient investigation, research and
4 discovery to support the settlement. The settlement was only possible following investigation,
5 discovery, and evaluation of Defendant’s policies and procedures, as well as the data produced for
6 the putative class, which permitted Class Counsel to engage in a comprehensive analysis of
7 liability and potential damages. This litigation has reached the stage where “the Parties certainly
8 have a clear view of the strengths and weaknesses of their cases” sufficient to support the
9 settlement. *Boyd v. Bechtel Corp.* (N.D. Cal. 1979) 485 F. Supp. 610, 617.

10 **iii. Counsel for Both Parties Are Experienced in Similar Litigation**

11 Both Plaintiff’s Counsel and Defendant’s Counsel are particularly experienced in wage and
12 hour employment law and class actions. Plaintiff’s Counsel has significant experience in litigating
13 unpaid wages, unprovided meal and rest periods, and overtime claims. Indeed, Plaintiff’s Counsel
14 was class counsel in *Hohnbaum et al. v. Brinker Restaurant Corp et al.*, which is the subject case
15 in the landmark decision of *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004.
16 (Mara Dec. ¶¶ 2-8). Plaintiff’s Counsel has prosecuted numerous wage and hour class action cases
17 on behalf of employees for California Labor Code violations and thus are experienced and
18 qualified to evaluate the class claims and to evaluate settlement versus trial on a fully informed
19 basis, and to evaluate the viability of the defenses. (Mara Dec. ¶ 8). This experience instructed
20 Plaintiff’s Counsel on the risks and uncertainties of further litigation and guided their
21 determination to endorse the proposed settlement.¹⁶ Defendant’s Counsel practices labor and
22 employment law and have represented numerous employers in similar types of claims.
23 Accordingly, both Parties’ Counsel are experienced in wage and hour employment law and class
24 actions.

25 ///

26 ///

27 ¹⁶ The final factor mentioned in *Dunk* – the number of objectors – is not determinable until the
28 Class Notice has been provided to the class and they have had an opportunity to respond. This
information will be provided to the Court in conjunction with the final approval motion.

1 **iv. The Proposed Settlement is a Reasonable Compromise of Claims**

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

8 In weighing the strength of the plaintiff’s case, *Kullar* instructs that the court is not to
9 “decide the merits of the case or to substitute its evaluation of the most appropriate settlement for
10 that of the attorneys.” *Kullar, supra*, 168 Cal.App.4th at 133. *Kullar* does not require an explicit
11 statement of the maximum amount the plaintiff class could recover if it prevailed on all its claims,
12 provided there is a record which allows “an understanding of the amount that is in controversy and
13 the realistic range of outcomes of the litigation.” *Munoz*, 186 Cal.App.4th at 409. Put differently,
14 “as the court does when it approves a settlement as in good faith under Code of Civil Procedure §
15 877.6, the court must at least satisfy itself that the class settlement is within the ‘ballpark’ of
16 reasonableness.” *Kullar, supra*, 168 Cal.App.4th at 133, citing *Tech-Bilt v. Woodward-Clyde &*
17 *Associates* (1985) 38 Cal.3d 488, 499-500. As the following subsections show, the Parties’
18 investigation and discovery revealed many reasons to discount claims and agree to this settlement.

19 **1. The Proposed Settlement is a Reasonable Compromise of**
20 **Claims**

21 The proposed settlement was only possible following significant discovery and an
22 evaluation of Defendant’s relevant policies and procedures, as well as the data that Defendant
23 produced for the putative class as referenced above. This permitted Class Counsel to engage in a
24 comprehensive analysis of liability and potential damages. The discovery conducted allowed
25 Plaintiff to evaluate the strengths and weaknesses of his central theories of liability, which are
26 predicated on Plaintiff’s claims that Defendant failed to provide compliant meal and rest
27 periods, failed to provide accurate itemized wage statements, and failed to pay all wages owed. As
28

1 explained herein, Defendant maintains that the discovery produced demonstrates that it would
2 succeed at both in denying class certification and on the merits.

3 Although, Plaintiff believes this case is suitable for certification on the claimed bases that
4 there are company-wide policies that Plaintiff contends violate California law and uniformly affect
5 the Class Members, Defendant's counter-arguments raise uncertainties with respect to both class
6 certification and success on the merits. As the California Supreme Court ruled in *Sav-On v.*
7 *Superior Court* (2004) 34 Cal.4th 319, class certification is always a matter of the trial court's
8 sound discretion. Decisions following *Sav-On* have reached different conclusions, with respect to
9 certification of wage and hour claims.¹⁷ While remaining confident in the strengths of his claims,
10 all of these factors led Plaintiff to discount the following maximum potential damage exposure.

11 **2. Maximum Potential Exposure as Estimated by Plaintiff**

12 Class Members worked approximately 36,413 workweeks, which equates to approximately
13 182,065 shifts, during the Class Period.¹⁸ (Guenther Dec. ¶ 4). Based upon the data and documents
14 requested of and produced by Defendant, Plaintiff calculated that Class Members were paid an
15 average hourly rate of approximately \$22.04.

16 Plaintiff alleges that Defendant failed to provide accurate itemized wage statements. The
17 statute of limitations for Plaintiff's wage statement claim is one year. Under California Labor Code
18 § 226(e)(1), the damages for breach of this section are fifty dollars (\$50) for the initial pay period
19 in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a
20 subsequent pay period, not to exceed an aggregate penalty of four thousand dollars (\$4,000). If
21 Plaintiff were to prevail on this claim and assume that each employee who worked within the
22 statute of limitations was entitled to the maximum penalty, Plaintiff and the Class Members would

24 ¹⁷ See, e.g., *Harris v. Superior Court* (2007) 154 Cal. App. 4th 164 (reversing decertification of
25 class claiming misclassification and ordering summary adjudication in favor of employees), *review*
26 *granted*, 171 P.3d 545 (2007) (not cited as precedent, but rather for illustrative purposes only);
27 *Walsh v. IKON Solutions, Inc.* (2007) 148 Cal. App. 4th 1440 (affirming decertification of class
28 claiming misclassification); *Aguilar v. Cintas Corp. No. 2* (2006) 144 Cal. App. 4th 121 (reversing
denial of certification); *Dunbar v. Albertson's Inc.* (2006) 141 Cal. App. 4th 1422 (affirming
denial of certification).

¹⁸ These numbers have been updated since mediation. At mediation, there were approximately
34,429 workweeks.

1 be entitled to the following maximum potential damages: \$764,000 ($\$4,000 \times 191$ employees in
2 the statute of limitations = \$764,000). (Mara Dec. ¶ 15).

3 Plaintiff alleges that Defendant failed to provide lawful meal periods because Plaintiff
4 contends employees' records show late, short, and missed meal periods in 42% of shifts. If Plaintiff
5 were to prevail on this claim for the entire class period, Plaintiff and the Class Members would be
6 entitled to the following maximum potential damages: \$1,685,332 (76,467 shifts with meal period
7 violations $\times \$22.04 = \$1,685,332.68$). (Mara Dec. ¶ 18).

8 Plaintiff alleges that Defendant failed to provide lawful rest periods because Plaintiff
9 contends employees did not receive a full ten minutes of rest at a suitable rest area. If Plaintiff
10 were to prevail on this claim for the entire class period, Plaintiff and the Class Members would be
11 entitled to the following maximum potential damages: \$4,012,712 ($182,065 \text{ shifts} \times \$22.04 =$
12 $\$4,012,712.60$). (Mara Dec. ¶ 21).

13 Plaintiff alleges that Defendant fails to pay employees all wages owed because Plaintiff
14 contends that Defendant requires employees to use PTO to cover salary hours. Plaintiff believes
15 that approximately 70% of the PTO used was used to cover salary hours. If Plaintiff were to prevail
16 on this claim for the entire class period, Plaintiff and the Class Members would be entitled to the
17 following estimated maximum potential damages: \$953,820 ($56 \text{ hours per year} \times 138 \text{ employees}$
18 $\text{at any time during the class period} \times 5.6 \text{ years} \times \$22.04 \text{ per hour} = \$953,820.67$). (Mara Dec. ¶
19 24).

20 Plaintiff alleges that Defendant fails to pay employees the correct overtime rate when
21 bonuses and incentives are paid. Plaintiff contends that Defendant does not properly calculate the
22 correct regular rate of pay when bonuses and incentives are paid for purposes of paying overtime.
23 In pay periods in which bonuses and incentives were paid, Plaintiff calculates that employees are
24 owed approximately \$81.19 in overtime wages. Plaintiff contends that incentives and bonuses
25 were paid in approximately 37% of pay periods. If Plaintiff were to prevail on this claim for the
26 entire class period, Plaintiff and the Class Members would be entitled to the following estimated
27 maximum potential damages: \$546,895 ($\$81.19 \text{ owed} \times 6,736 \text{ pay periods} = \$546,895.84$). (Mara
28 Dec. ¶ 27).

1 If Plaintiff were to prevail on his unpaid wages claim, he and the Class Members may also
2 be entitled to waiting time penalties. Plaintiff calculates the potential maximum exposure under
3 his waiting time penalties cause of action as \$730,626 (130 former employees within waiting time
4 penalties statute of limitations x 30 days x 8.5-hour average shift length x \$22.04 average hourly
5 rate = \$730,626). As these damages are derivative of Plaintiff's unpaid wages claim, if Plaintiff's
6 unpaid wages claim fails, this claim also would fail. (Mara Dec. ¶ 29).

7 Plaintiff also seeks PAGA penalties. PAGA allows the private enforcement of certain
8 California Labor Code sections relating to wage and hour violations. PAGA Section 2699(f)(2)
9 reads, in part, as follows:

10 [T]he civil penalty is one hundred dollars (\$100) for each aggrieved employee per
11 pay period for the initial violation and two hundred dollars (\$200) for each
aggrieved employee per pay period for each subsequent violation.

12 Plaintiff alleges that Defendant has six (6) violations – unlawful rest and meal periods, failure to
13 pay all regular and overtime wages owed, inaccurate wage statements, and waiting time penalties
14 – of the California Labor Code sections which give rise to PAGA penalties. The statute of
15 limitations for PAGA violations go back one year. Based upon the data and documents produced
16 by Defendant, Plaintiff calculated that there are approximately 7,070 pay periods within the PAGA
17 statute of limitations. Not all of the violations alleged by Plaintiff occurred in every pay period.
18 For example, Plaintiff's claims for overtime wages only occurred in approximately 6,369 pay
19 periods. In addition, Plaintiff's claim for waiting time penalties only occurred in one pay period
20 (when an employee's employment with Defendant was terminated). Further, Plaintiff's claims for
21 unpaid wages only occurred when employees used PTO. Plaintiff estimates that this occurred in
22 approximately 50% of the pay periods. Therefore, the maximum potential damages under
23 Plaintiff's PAGA claim are:

24 7,070 pay periods x 3 violations (meal, rest, and wage statements) x \$100 = \$2,121,000

25 3,535 pay periods x 1 violation (unpaid wages) x \$100 = \$353,500

26 6,369 pay periods x 1 violation (unpaid overtime wages) x \$100 = \$636,900

27 191 pay periods x 1 violation (waiting time penalties) x \$100 = \$19,100

28 Total maximum PAGA penalties: \$3,130,500

1 (Mara Dec. ¶ 31).

2 Thus, not taking into account any of its defenses or arguments, Plaintiff estimated that if
3 he were successful in his core claims, Defendant's total exposure would be approximately
4 \$7,943,153 [\$953,820 (unpaid wages exposure) + \$527,289 (unpaid overtime wages exposure) +
5 \$4,012,712 (rest period exposure) + \$1,685,332 (meal period exposure) + \$764,000 (wage
6 statement exposure) = \$7,943,153]. If Plaintiff is successful in his unpaid wage claims, he may
7 also be entitled to damages for waiting time penalties in the amount of \$730,626. If all of Plaintiff's
8 claims are successful, he may also be entitled to PAGA penalties in the maximum amount of
9 \$3,130,500. (Mara Dec. ¶ 32).

10 **3. Risks to Plaintiff's Claims**

11 **a. Plaintiff's Wage Statement Claim is Subject to Risks on 12 the Merits**

13 Plaintiff's wage statement claim is subject to risks on the merits. Plaintiff alleges that
14 Defendant failed to provide accurate itemized wage statements because Defendant's wage
15 statements fail to itemize: (1) the non-overtime hours worked; (2) the correct number of overtime
16 hours; or (3) the total hours worked. Plaintiff asserts that this case is akin to *McKenzie v. Federal*
17 *Express Corporation* (2011) 765 F. Supp. 2d 1222, in which summary judgment was granted in
18 favor of the plaintiff. Defendant disputes this claim and relies on cases which hold that "[w]age
19 statements comply with § 226(a) when a plaintiff employee can ascertain the required information
20 by performing simple math, using figures on the face of the wage statement." *Hernandez v. BCI*
21 *Coca-Cola Bottling Co.* (9th Cir. 2014) 554 Fed. Appx. 661, 662. (*citing Morgan v. United Retail*
22 *Inc.* (2010) 186 Cal.App.4th 1136). In *Hernandez*, the court granted summary judgment in the
23 defendant employer's favor. Should litigation continue, the Parties would file cross motions for
24 summary judgment on this issue. In addition, Defendant argues that Plaintiff cannot show that any
25 potential violation was knowing and intentional. *Amaral v. Cintas Corp. No. 2* (2008) 163
26 Cal.App.4th 1157, 1195 ("Some statutory penalties are imposed only if an employers' violation
27 was 'willful' or 'knowing.' . . . [S]ection 226, subdivision (e) penalizes an employer's 'knowing
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1 and intentional' failure to provide itemized wage statements under *section 226, subdivision*
2 *(a)[.]*"). As such, Defendant argues that it would be successful in its motion for summary judgment.

3 Based on these arguments, Plaintiff estimates that he has a 90% chance of prevailing on
4 this claim. Therefore, Plaintiff estimates the realistic value of this claim as \$687,600 (90% of
5 \$764,000). (Mara Dec. ¶ 16).

6 **b. Plaintiff's Rest Period Claim is Subject to Risks at**
7 **Certification and on the Merits**

8 Plaintiff's rest period claim is subject to risks at certification and on the merits. As noted
9 previously, Plaintiff alleges that employees are not provided with full ten-minute rest periods.
10 Plaintiff's rest period claim is subject to risks at class certification. Defendant contends that the
11 policies in its employee guide are lawful and that employees were instructed by supervisors that
12 they are entitled to ten minutes of rest once they arrived at a suitable rest area. Defendant also
13 points out that Plaintiff's position is contradicted by the practical realities of employees' work.
14 Employees work out in the field and can take rest breaks when and where they choose. During
15 COVID, employees were working from home making calls. Therefore, employees are not at a
16 worksite where they have to get to a breakroom. As such, Defendant argues that Plaintiff cannot
17 show that employees did not receive a full ten minutes of rest at a suitable rest area. Should
18 litigation continue, Defendant contends that it will provide declarations which show that
19 employees did receive full ten-minute rest periods. Defendant asserts that at certification the Court
20 would have to ask each employee whether or not they received a full ten minutes for rest periods
21 which would defeat certification because individualized issues would then predominate.

22 This claim is also subject to risks on the merits. Defendant contends that employees were
23 supposed to follow the rest period policy in Defendant's employee guide, which it contends is
24 lawful. If the case is certified, Defendant would file a motion for summary judgment on this issue.
25 There is a risk that the Court could agree with Defendant, which would eliminate all exposure
26 under this claim.

1 For all of these reasons, Plaintiff estimates that he has a 20% chance of prevailing on this
2 claim at certification and on the merits. Therefore, Plaintiff estimates the realistic value of this
3 claim as \$802,542.52 (20% of \$4,012,712.60). (Mara Dec. ¶ 22).

4 **c. Plaintiff's Meal Period Claim is Subject to Risks at**
5 **Certification and on the Merits**

6 Plaintiff's meal period claim is subject to risks at certification and on the merits. Defendant
7 argues that employees were provided with meal periods in conformity with California law and that
8 the policy in its employee guide complies with California law. Defendant contends that if litigation
9 continues, it will provide declarations from Class Members that show employees received meal
10 periods in conformity with California law. If meal periods are late, missing, or short in the time
11 records, Defendant contends that this is due to employees' choice. Defendant again emphasizes
12 the nature of employees' work. Employees work in the field during non-COVID times and work
13 from home making calls during COVID. As such, Defendant argues employees are not supervised
14 in real time. Defendant argues that employees are free to take meal periods when, where, and for
15 how long they want. Defendant asserts that at certification the Court would have to ask each
16 employee whether or not they were provided with a lawful meal period which would defeat
17 certification because individualized issues would then predominate. Defendant contends that the
18 Court would also have to ask the reason why each employee took a late, missing, or short meal
19 period if their time records show such a meal period.

20 Plaintiff's meal period claim is also subject to risks on the merits. Plaintiff relies on
21 *Donohue v. AMN Services, Inc.* (2021) 11 Cal.5th 58, 74, to show that Defendant does not provide
22 meal periods in conformity with California law. Plaintiff asserts that Defendant's time records
23 show that meal periods were late, short, or missed raising a rebuttable presumption that these meal
24 periods were not provided in compliance with California law. Defendant contends that it can rebut
25 the presumption that arises under *Donohue v. AMN Services, Inc.* Defendant asserts that it can show
26 that employees voluntarily chose to take a short or late meal period or to skip the meal period
27 entirely in these shifts. There is a risk that Defendant could meet its burden of proof in showing
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1 this by providing evidence that employees were provided with proper meal periods and it was the
2 employee's choice to take a late or short meal period or forgo taking a meal period altogether.

3 For all of these reasons, Plaintiff estimates that he has a 35% chance of prevailing on this
4 claim at certification and on the merits. Therefore, Plaintiff estimates the realistic value of this
5 claim as \$589,866.44 (35% of \$1,685,332.68). (Mara Dec. ¶ 19).

6 **d. Plaintiff's Unpaid Wages Claim is Subject to Risks at
Certification and on the Merits**

7 Plaintiff's unpaid wages claim is subject to risks at certification and on the merits. Plaintiff
8 alleges that Defendant forces employees to use paid time off (PTO) to cover salary hours. Plaintiff
9 asserts when employees are unable to work 40 hours in a week, Defendant requires them to pay
10 themselves for hours worked under 40 in a workweek using their PTO. In doing so, Plaintiff alleges
11 that Defendant fails to compensate employees for the "amount guaranteed by contract for the
12 specified task or period." When employees work less than 40 hours in a week, Plaintiff contends
13 that Defendant forces them to pay themselves a portion of the salary guaranteed to them by
14 Defendant for the workweek. Defendant argues that it does not require employees to use PTO to
15 cover hours worked that are less than 40 in a week. In fact, Defendant asserts that since COVID,
16 employees have been placed on "audio shifts" so they can work from home making calls to
17 potential customers. Defendant states that audio shifts are only 32 hours a week, yet employees
18 were paid for 40 hours. As such, employees have been scheduled to work less than 40 hours a
19 week during COVID and have not had to make up any hours using PTO. Defendant contends that
20 at certification, it would provide declarations from Class Members supporting this as well as
21 documents that refute Plaintiff's position. In addition, at class certification the Court would have
22 to look into the reasons why an employee used PTO on each shift PTO was used. Defendant asserts
23 this would lead to individualized issues and would defeat class certification. Defendant also
24 contends that if litigation were to continue it would file a motion for summary judgment on this
25 claim and provide records which disprove this claim. Plaintiff had to take into consideration that
26 the Court could agree with Defendant, and the documents it provides.

1 As such, Plaintiff estimates that he has a 70% chance of prevailing on this claim at
2 certification and on the merits. Therefore, Plaintiff estimates the realistic value of this claim as
3 \$667,674 (70% of \$953,820). (Mara Dec. ¶ 25).

4 **e. Plaintiff's Unpaid Overtime Claim is Subject to Risks at
on the Merits**

5 Plaintiff's unpaid overtime claim is subject to risks at certification and on the merits.
6 Plaintiff contends that Defendant pays employees non-hourly compensation (bonuses and
7 incentives) in addition to hourly pay. Plaintiff contends that Defendant did not properly calculate
8 the regular rate of pay for overtime purposes. The "[r]egular rate of pay, which can change from
9 pay period to pay period, includes adjustments to the straight time rate, reflecting, among other
10 things, shift differentials and the per hour value of any non-hourly compensation the employee has
11 earned." *Alvarado*, 4 Cal. 5th at 554. Plaintiff argues that Defendant did not include all non-hourly
12 pay when calculating the regular rate of pay and that Defendant should have utilized the California
13 method of calculating the regular rate of pay as outlined in the *Alvarado* case. Defendant argues
14 that it properly employed the federal method of calculating the regular rate of pay. Defendant
15 contends that *Alvarado* is only applicable to "flat-sum bonuses." Therefore, Defendant contends
16 no additional overtime wages are owed. There is a risk that the Court will agree with Defendant
17 and find the employees are not owed any additional overtime wages.

18 As such, Plaintiff estimates that he has a 70% chance of prevailing on this claim at
19 certification and on the merits. Therefore, Plaintiff estimates the realistic value of this claim as
20 \$382,826.50 (70% of \$546,895). (Mara Dec. ¶ 28).

21 **f. Plaintiff's Waiting Time Claim is Subject to Risks on the
Merits**

22 Plaintiff also pursued a claim for waiting time penalty claims. This claim is derivative of
23 Plaintiff's unpaid wages claim. Should Plaintiff's unpaid wages claim fail or not be certified, this
24 claim would also fail. As noted above, Plaintiff's unpaid wages claim is subject to risks at
25 certification and on the merits. This claim is subject to those same risks.

26 Further, this claim is also subject to its own risks on the merits independent of the risks of
27 Plaintiff's unpaid wages claim. This is because this claim has a "willful" component. "Some
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1 statutory penalties are imposed only if an employers' violation was 'willful' or 'knowing.' . . .
2 [S]ection 203 penalizes an employer that 'willfully' fails to pay wages due under *section 201* or
3 *202[.]*" *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1195. Defendant contends
4 that even if Plaintiff were successful in his unpaid wages claim, he would have to prove Defendant
5 "willfully" failed to pay Class Members appropriate wages due upon separation of employment.
6 "A willful failure to pay wages within the meaning of Labor Code Section 203 occurs when an
7 employer intentionally fails to pay wages to an employee when those wages are due." Cal. Code
8 Regs. Tit. 8 § 13520; *see also Amaral, supra*, 163 Cal.App.4th at 1201 ("The settled meaning of
9 'willful,' as used in *section 203*, is that an employer has intentionally failed or refused to perform
10 an act which was required to be done."). "However, a good faith dispute that any wages are due
11 will preclude imposition of waiting time penalties under Section 203." Cal. Code Regs. Tit. 8 §
12 13520. "A 'good faith dispute' that any wages are due occurs when an employer presents a defense,
13 based in law or fact, which would preclude any recovery on the part of the employee. The fact that
14 a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist."
15 *Id.*

16 Defendant contends that any failure to pay wages due at the separation of employment was
17 not willful. Defendant argues that it would not be liable for waiting time penalties because a "good
18 faith dispute" exists over the payment of those wages. *See* Cal. Code Regs. Tit. 8 § 13520; *Amaral,*
19 *supra*, 163 Cal.App.4th at 1201. As outlined above, Defendant contends that the time employees
20 spend waiting in line and going through the turn styles is not compensable time.

21 Due to this, Plaintiff estimates that he has a 60% chance of prevailing on this claim.
22 Therefore, Plaintiff estimates the realistic value of this claim as \$438,375.60 (60% of \$730,626).
23 (Mara Dec. ¶ 30).

24 **g. Plaintiff's PAGA Exposure would Likely be Reduced by**
25 **the Court**

26 Plaintiff's PAGA claims are subject to the same risks on the merits as Plaintiff's non-
27 PAGA claims. Section 2699, subdivision (e)(2) provides that "[i]n any action by an aggrieved
28 employee seeking recovery of a civil penalty available under subdivision (a) or (f), a court may

1 award a lesser amount than the maximum penalty amount specified by this part if, based on the
2 facts and circumstances of the particular case, to do otherwise would result in an award that is
3 unjust, arbitrary, oppressive, or confiscatory.” In *Thurman v. Bayshore Transit Management, Inc.*
4 (“*Thurman*”) (2012) 203 Cal. App. 4th 1112, the court determined that an award of the maximum
5 penalty allowed may be unjust in circumstances outside of when a defendant cannot afford to pay
6 the maximum amount. *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal. App. 4th
7 1112, 1135-1136. The *Thurman* court found that penalties may be reduced when a defendant has
8 taken its obligations to comply with the law seriously. *Id.* Defendant argues that if the case were
9 to continue in litigation, it would be able to show that it took its obligations to comply with the
10 law seriously. As such, if Plaintiff were able to prevail on the merits of his PAGA claims, it is
11 likely that the Court would reduce the maximum penalty allowed.

12 As Plaintiff’s PAGA claims are based on the same alleged unlawful conduct as his class
13 claims, Plaintiff’s PAGA claims are subject to the same risks on the merits as Plaintiff’s class
14 claims. Therefore, PAGA penalties can only be awarded if the factfinder agrees with Plaintiff’s
15 meal and rest period, and unpaid wages allegations. The likelihood of the Court reducing the
16 PAGA penalties awarded to Plaintiff and the aggrieved employees – assuming liability is proven
17 as to each of Plaintiff’s claims – is higher in this case where these same individuals may also be
18 receiving money for the same unlawful conduct under the class claims. *See Avila v. Cold Spring*
19 *Granite Co.* (E.D. Cal. Jan. 12, 2018) Case No. 1:16-cv-001533-AWI-SKO, 2018 U.S. Dist.
20 LEXIS 6142 *17 (“Because the PAGA penalties sought are at least partially duplicative of
21 penalties granted by the underlying Labor Code violations, *see, e.g.,* Cal. Lab. Code §§
22 203, 226, 558(a), 1194.2, and because a Court has discretion in whether and in what amount to
23 award PAGA penalties, *see* Cal. Lab. Code § 2699(e)(2), Plaintiff recognizes that the potential
24 PAGA penalties are highly uncertain.”). Plaintiff must take into consideration the risks his
25 underlying claims faced, as well as the risk that the Court would likely reduce the amount of PAGA
26 penalties awarded.

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h. Defendant's Adjusted Exposure

For the reasons just outlined, Defendant's adjusted exposure of his non-PAGA claims is approximately \$3,568,883 (\$687,600 (wage statements) + \$802,542 (rest periods) + \$589,866 (meal periods) + \$667,674 (unpaid wages) + \$382,826 (unpaid overtime wages) + \$438,375 (waiting time penalties) = \$3,568,883). This exposure is comprised of \$2,442,908 for wages and \$1,125,975 for non-wages (penalties for wage statement violations and waiting time penalties). As such, wages comprise approximately 68% of the exposure and penalties comprise approximately 32% of the exposure. When interest is factored in, the split between wages and non-wages is estimated to be approximately 60% wages and 40% non-wages (penalties and interest). This split is in line with the tax split allocated to Participating Class Members' Individual Settlement Shares.

4. The Settlement Amount of \$3,300,000 is Reasonable

In light of the risks Plaintiff's claims faced, Plaintiff and his Counsel believe that the settlement amount of \$3,300,000 – **with an average settlement share amount estimated at \$6,431.16** – is a reasonable and fair settlement amount. (Mara Dec. ¶ 33).

It should be noted that a settlement is not judged solely against what might have been recovered, had the plaintiff prevailed at trial, nor does the settlement have to provide 100% of the damages sought to be fair and reasonable. *Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 224, 246, 250; *Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1139; "Compromise is inherent and necessary in the settlement process...even if the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated, this is no bar to a class settlement because the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation." *Wershba, supra*, at 250; *Officers for Justice v. Civil Serv. Comm'n* (9th Cir. 1982) 688 F.2d 615, 628 ("It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not...render the settlement inadequate or unfair"); *see also In re Omnivision Technologies, Inc.* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 95616, *21, (noting that certainty of recovery in settlement of 6% of maximum potential recovery after reduction for

attorneys' fees was higher than median percentage for recoveries in shareholder class action settlements, averaging 2.2%-3% from 2002 through 2006).

c. Provisional Class Certification Should be Granted

Under California law, a class action is appropriate when the class is ascertainable and there is "a well defined community of interest in the questions of law and fact involved affecting the parties to be represented." Cal. Civ. P. Code § 382. State law requirements under California Code of Civil Procedure section 382 for class certification follow federal law according to Rule 23 of the Federal Rule of Civil Procedure: numerosity, typicality of the class representatives' claims, adequacy of representation, predominance of common issues, and superiority. Fed. R. Civ. P. 23(a); *see also Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1019. It should be noted that while a court must certify a class for settlement purposes if a class has not already been certified, "it is well established that trial courts should use different standards to determine the propriety of a settlement class, as opposed to a litigation class certification. Specifically, a lesser standard of scrutiny is used for settlement cases." *Glob. Minerals & Metals Corp. v. Superior Court* (2013) 113 Cal.App.4th 836, 859 *citing Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1807, fn. 19.

Plaintiff contends, and Defendant does not dispute for settlement purposes only, each of these elements must be present. *See Wershba v. Apple Computer* (2001) 91 Cal. App. 4th 224, 237-38. Plaintiff seeks approval of the following Class for settlement purposes only: All California non-exempt, salaried Membership Representatives and Field Representatives of The Nielsen Company (US), LLC in California during the Class Period. The Class Period is April 8, 2017, to March 6, 2022.

i. The Proposed Settlement Class is Ascertainable

Plaintiff contends that the proposed Class is ascertainable because of all of the Class Members have worked for Defendant as non-exempt employees and have been identified through Defendant's own records, such as employee and payroll files. *See Rose v City of Hayward* (1981) 126 Cal.App.3d 926,932 (finding that "Class Members are 'ascertainable' where they may be readily identified without unreasonable expense or time by reference to official records."); *Sevidal*

1 v. *Target Corp.* (2010) 189 Cal.App.4th 905, 919 (“[c]lass members are ‘ascertainable’ where they
2 may be readily identified without unreasonable expense or time by reference to official [or
3 business] records.”). Thus, the ascertainability requirement is met.

4 **ii. The Proposed Settlement Class is Sufficiently Numerous**

5 The numerosity requirement is met if the class is so large that joinder of all members would
6 be impracticable. *Gay v. Waiters’ & Dairy Lunchmen’s Union* (N.D. Cal. 1980) 489 F. Supp. 282,
7 *aff’d* (9th Cir. 1982) 694 F.2d 531. “There is no set number required to maintain a class action,
8 and the statutory test is whether a class is so numerous that ‘it is impracticable to bring them all
9 before the court.’” *Henderson v. Ready to Roll Transportation, Inc.* (2014) 228 Cal.App.4th 1213,
10 1223 (reversing superior court ruling that nine class members was too few); *Bowles v. Superior*
11 *Court* (1995) 44 Cal.2d 574 (upholding a class of ten members). “The numerosity requirement is
12 more readily met when a class contains employees suing their present employer . . . This is because
13 class members may be unwilling to sue their employer individually out of fear of retaliation.”
14 *Romero v. Producers Dairy Foods* (E.D. Cal. 2006) 235 F.R.D. 474, 485. As explained by the
15 California Supreme Court, “fear of retaliation for individual suits against an employer is a
16 justification for class certification in the arena of employment litigation, even when it is otherwise
17 questionable that the numerosity requirements were satisfied . . . It needs no argument to show that
18 fear of economic retaliation might often operate to induce aggrieved employees quietly to accept
19 substandard conditions.” *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 460 (citation omitted),
20 overruled on other grounds in *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348.

21 Here, Defendant’s records show that they proposed Class has approximately 318 members.
22 Plaintiff contends that joinder of all Class Members is impracticable and, therefore, a class wide
23 proceeding is preferable. *See Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1030 (noting that
24 there is no set minimum to meet the numerosity prerequisite, but that a class of as few as 28 is
25 acceptable.). In fact, a class of ten (10) has been certified as a class action. *Id.*, citing *Bowles v.*
26 *Superior Court* (1995) 44 Cal.2d 574. Several federal cases on this issue have held that classes of
27 over forty (40) individuals are numerous enough to meet the numerosity requirement. *See Ikonen*
28

1 *v. Hartz Mountain Corp.* (S.D. Cal. 1988) 122 F.R.D. 258, 262. Accordingly, the Class is
2 comprised of approximately 318 members and is sufficient to satisfy the numerosity requirement.

3 **iii. The Commonality Requirement is Met**

4 The commonality requirement is met if there are questions of law and fact common to the
5 class. *Hanlon, supra*, 150 F.3d at 1019 (“The existence of shared legal issues with divergent factual
6 predicates is sufficient, as it a common core of salient facts coupled with disparate legal remedies
7 within the class.”). “Predominance is a comparative concept, and ‘the necessity for class members
8 to individually establish eligibility and damages does not mean individual fact questions
9 predominate.’” *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 334.
10 Commonality exists if there is a predominant common legal question regarding how an employer’s
11 policies impact its employees. *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal.App.4th 1524, 1536
12 (2008) (“[T]he common legal question remains the overall impact of Diva’s policies on its
13 drivers.”). Whether Plaintiff is likely to prevail on his theory of recovery is irrelevant at the
14 certification stage since the question is “essentially a procedural one that does not ask whether an
15 action is legally or factually meritorious.” *Linder v. Thrifty Oil Co.* (2003) 23 Cal.4th 429, 439-
16 440.

17 Here, Plaintiff contends that the proposed Class Members’ claims all stem from the same
18 allegedly unlawful policies and practices, which were addressed previously in this motion. Plaintiff
19 seeks the same legal remedies under state law on behalf of himself and all Class Members. As
20 liability as to all Class Members is predicated on the same policies and practices, which Plaintiff
21 alleges violates California law, the commonality requirement has been satisfied.

22 **iv. The Typicality Requirement is Met**

23 The typicality requirement is met if the claims of the named representative are typical of
24 those of the class, though “they need not be substantially identical.” *Hanlon, supra*, 150 F.3d at
25 1020; *Classen v. Weller* (1983) 145 Cal.App.3d 27, 46-47. Plaintiff contends that his claims are
26 typical of the Class Members’ claims because they arise from the same factual basis and are based
27 on the same legal theory as those applicable to the Class Members. *See Wehner v. Syntex Corp.*
28 (N.D. Cal. 1987) 117 F.R.D. 641, 644. Each Class Member is challenging the same policies and

1 practices. Plaintiff alleges that Defendant's policies applied to all Class Members. Factual
2 differences may exist between Plaintiff's and the Class Members so long as the claims arise from
3 the same events or course of conduct and are based on the same legal theories. *Hanlon, supra*, 150
4 F. 3d at 1020; *see also Wehner, supra*, 117 F.R.D. at 644; *Newberg on Class Actions*, 4th ed. §
5 3:15, p.335 [When it is alleged that the same unlawful conduct was directed at or affected both the
6 named plaintiff and the class sought to be represented, the typicality requirement is usually met
7 irrespective of varying fact patterns which underlie individual claims.] As such, the typicality
8 requirement is satisfied.

9 **v. The Adequacy Requirement is Met**

10 The adequacy requirement is met if Plaintiff has no interests adverse to the interests of the
11 proposed Class Members and is committed to vigorously prosecuting the case on behalf of the
12 class. *Hanlon, supra*, 150 F.3d at 1020; *McGhee v. Bank of America* (1976) 70 Cal.App.3d 442,
13 450-51. Plaintiff contends those standards are met here. Plaintiff does not have any conflicts of
14 interest with the Class. He has been and continues to be committed to vigorously prosecuting this
15 case. If any Class Member wishes to opt-out of the Settlement, he or she may do so. Therefore,
16 there is no conflict of interest between Plaintiff and the Class Members.

17 **d. Notice to Class Members Complies with California Rule of Court 3.769(f)**

18 California Rule of Court 3.769(f), provides:

19 If the court has certified the action as a class action, notice of the final approval
20 hearing must be given to class members in the manner specified by the court. The
21 notice must contain an explanation of the proposed settlement and procedures for
22 class members to follow in filing written objections to it and in arranging to appear
23 at the settlement hearing and state any objections to the proposed settlement.

24 The proposed Class Notice meets all of these requirements. The proposed Class Notice advises the
25 class of their rights to participate in the settlement, how to and when to object to or request
26 exclusion from the settlement, and the date, time, and location of the final approval hearing. The
27 proposed Class Notice is attached as Exhibit A to the Agreement.

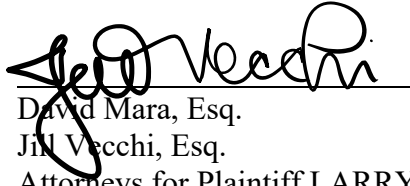
28 **VI. CONCLUSION**

Plaintiff respectfully submits that the proposed settlement is in the best interests of the class
and class members, as it is fair, adequate, and reasonable, and one that should ultimately be granted

1 final approval. Under the applicable class action criteria and guidelines, the proposed settlement
2 should be preliminarily approved by the Court, the class should be conditionally certified for
3 purposes of settlement only, and the Class Notice should be approved. Plaintiff also respectfully
4 requests the Court set a final approval hearing date of November 17, 2022.

5
6 Dated: May 12, 2022

MARA LAW FIRM, PC

7 
8 David Mara, Esq.
9 Jill Vecchi, Esq.

10 Attorneys for Plaintiff LARRY PEREZ on behalf of
11 himself, all others similarly situated, and on behalf of
12 the general public
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