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individually and on behalf of similarly situated employees
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8 **SUPERIOR COURT OF CALIFORNIA**
9 **FOR THE COUNTY OF CALAVERAS**
10

11 RAYMUNDO VALLES, individually and on
behalf of all other similarly situated
12 employees,

13 Plaintiff,

14 vs.
15

16 TRICORP GROUP, INC., a California
Corporation; and DOES 1 to 100, inclusive,

17 Defendant.
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Case No. 21CV45611

CLASS ACTION

**MEMORANDUM OF POINTS &
AUTHORITIES IN SUPPORT OF PLAINTIFF'S
MOTION FOR FINAL APPROVAL OF CLASS
ACTION AND PAGA SETTLEMENT**

Date: September 9, 2022

Time: 9:00 a.m.

Dept.: 2

Judge: Hon. David Sanders

Filed: September 16, 2021

Trial Date: None Set

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1 **I. INTRODUCTION AND OPENING SUMMARY OF ARGUMENT¹**

2 This Motion is brought seeking final approval of a wage and hour class action settlement in the
3 gross amount of \$170,000.00. *See generally* Exhibit A (Joint Stipulation of Class Action and PAGA
4 Settlement and Release Between Plaintiff and Defendant [“Agreement”]). Plaintiff Raymundo Valles
5 (“Plaintiff”) brought this class action individually and on behalf of 129 Class Members employed by
6 Defendant Tricorp Group, Inc., (“Defendant”) during the Class Period of May 7, 2017, to March 17,
7 2022. Plaintiff worked for Defendant in California from June 9, 2020, to March 10, 2021, and was
8 subject to all the same policies and practices that are alleged to be unlawful in this litigation. *See*
9 Exhibit B (Plaintiff’s Operative Complaint); Declaration of Raymundo Valles (“Decl. Valles”) ¶ 2.

10 Plaintiff has alleged that Defendant failed to pay overtime wages, failed to pay minimum wages,
11 failed to provide meal periods, failed to provide rest breaks, failed to provide accurate wage statements,
12 failed to timely pay wages, failed to reimburse expenses, failed to maintain accurate records, failed to
13 provide paid sick leave, and unfair competition. *See generally* Exhibit B. Plaintiff has also alleged
14 Defendant is liable for civil penalties under the Private Attorneys General Act (“PAGA”) based on
15 these violations. *See id.*; Exhibit C (Plaintiff’s Ltr. to the LWDA Regarding PAGA Claims). These
16 violations primarily stem from Plaintiff’s allegations that Defendant violated California law by 1)
17 failing to pay minimum wages to Plaintiff and similarly situated employees for all hours worked due its
18 business practice of rounding employee hours; 2) failing to pay all overtime wages due to Defendant’s
19 policy of shifting daily overtime hours on to days where employees did not work an eight (8) hour day;
20 3) failing to provide compliant meal and rest periods, or pay premiums in lieu thereof; and 4) failing to
21 pay Plaintiff and similarly situated employees all reimbursements owed for use of their personal
22 vehicles, cell phones, and tools for work-related purposes. The PAGA, waiting time penalty, wage
23 statement violation, and unfair competition claims also derive from these violations. *See* Exhibit B.
24 Plaintiff has contended that this is a meritorious class action lawsuit and that this case is appropriate for
25 class certification for settlement purposes as the requisites for class certification in this case can be
26 satisfied. *See* Exhibit B.

27
28 ¹ Because this Motion seeks the certification of a settlement class, the 20-page limitation for a memorandum of points and
authorities is applicable pursuant to California Rules of Court 3.764(c)(2).

1 Defendant has denied all of Plaintiff's allegations in their entirety and any liability or
2 wrongdoing of any kind. *See* Declaration of Galen T. Shimoda ("Decl. Shimoda"), ¶ 5. Defendant has
3 denied that this case is appropriate for class certification other than for purposes of settlement and
4 maintains that Plaintiff would have difficulty proving class certification. *See id.* However, subject to
5 approval by the Court, the parties have been able to compromise and settle all asserted claims for
6 monetary compensation as a result of extensive investigations, informal document and data exchanges,
7 and extended negotiations relating to all aspects of the asserted claims. *See* Exhibit A. Plaintiff's
8 counsel is convinced that the proposed settlement is in the best interest of the putative class based on
9 the discovery, investigations, negotiations, and a detailed knowledge of the issues in this case. *See*
10 Decl. Shimoda, ¶¶ 3, 6-10. The prospect of potential class certification issues and the uncertainty of
11 class certification, difficulties of complex litigation, the lengthy process of establishing specific
12 damages and various possible delays and appeals were carefully considered by Plaintiff and Plaintiff's
13 counsel in agreeing to the proposed settlement. *See id.*

14 It is well within the discretion of this Court to grant final approval of the Agreement, which
15 satisfies all of the criteria for final settlement approval under California law. Accordingly, Plaintiff
16 requests that the Court: (1) certify the proposed settlement class; (2) grant final approval of the
17 proposed Agreement (Exhibit A); and (3) adopt the implementation schedule contained in the proposed
18 order.

19 **II. PROCEDURAL AND LITIGATION HISTORY**

20 Plaintiff filed a class action complaint on approximately September 16, 2021, in the Calaveras
21 County Superior Court against Defendant. Plaintiff exhausted administrative remedies under the
22 PAGA by providing notice of the claims and violations to the LWDA on April 27, 2021. *See* Exhibit
23 C; Cal. Lab. Code § 2699.3(a), (c); Decl. Shimoda, ¶ 3. *See id.*; Exhibit B. There is no date set for a
24 motion for certification or trial in this matter. *See* Decl. Shimoda, ¶ 4.

25 **III. INVESTIGATION AND DISCOVERY CONDUCTED**

26 Plaintiff thoroughly investigated issues affecting certification, the merits of the class claims, and
27 potential damages for such claims. *See id.* at ¶¶ 6-10. Plaintiff worked during the time all of
28 Defendant's policies and practices at issue in the Complaint were in effect and provided information

1 regarding these policies and practices, enabling pre-filing investigations to take place. *See* Declaration
2 of Raymundo Valles (“Decl. Valles”), ¶¶ 2, 4, 6.

3 The parties engaged in informal discovery and exchange of documents, including reviewing
4 employee data, such as timecards, paystubs, payroll data and relevant policies for the entirety of the
5 statute of limitations applicable to the alleged claims. *See* Decl. Shimoda, ¶¶ 6-7. The discovery
6 covered all aspects of the asserted claims, including certification issues, merits issues, damages, the
7 scope and configuration of Class Members, the content and implementation of the wage and hour
8 policies at issue, issues relating to manageability concerns at trial, among other relevant areas. *See id.*
9 The information allowed Plaintiff to determine the extent and frequency of any violations in accordance
10 with Plaintiff’s contentions and create an accurate damages model to assess the reasonableness of any
11 settlement. *See id.* at ¶¶ 6-10.

12 IV. NEGOTIATION AND PROPOSED SETTLEMENT

13 a. Plaintiff and Defendant Engaged in Extensive Arm’s Length Negotiations

14 The final settlement occurred only after extended, and sometimes contentious, arm’s length
15 negotiations. Over the course of approximately eight (8) months, Plaintiff has been investigating the
16 claims and discussing with Defendant’s counsel the merits of the claims and certification issues present
17 in this case. *See id.* at ¶¶ 6-10; Decl. Valles, ¶¶ 2, 4, 6. The parties exchanged substantial amounts of
18 information and legal analysis regarding the asserted claims. *See id.* Then, only after approximately
19 eight (8) months of litigation and negotiation, the parties were able to reach a mutually agreeable
20 settlement. *See id.* at ¶ 8. In light of the claims and defenses at issue, the parties agreed to a Maximum
21 Settlement Amount of \$170,000.00. *See* Exhibit A.

22 b. The Terms of the Settlement

23 Under the settlement agreement, Defendant has agreed to the following:

- 24 1. The following group of individuals are covered by the Settlement (*See* Exhibit A, ¶ 5):

25 All non-exempt employees who have or continue to work for Defendant
26 from May 7, 2017, to preliminary Court approval of the Settlement.

- 27 2. Defendant agrees to pay a Maximum Settlement Amount of \$170,000.00, inclusive of
28 the employer’s share of payroll taxes, on a claims made basis to resolve and release the claims alleged

1 in the Complaint. *See id.* at ¶ 14(c). Regardless of the claims rate, Defendant will be obligated to pay
2 out a minimum of 50% of the Net Settlement Amount. *See id.* at ¶ 14(c)(i). In the event that less than
3 50% of the Net Settlement Amount is claimed by Class Members who submit valid Claim Forms, the
4 Class Members who have submitted valid Claim Forms, will have their individual claim amounts
5 increased pro rata until 50% of the Net Settlement Amount is distributed. *See id.*

6 3. The parties agree that up to \$7,500.00 for Plaintiff Raymundo Valles will be paid as a
7 Class Representative Enhancement Award. This amount will be in addition to any amount Plaintiff
8 may be entitled to under the terms of the Agreement. *See id.* at ¶ 14(c)(vi).

9 4. The parties agree that the cost of administering this class action settlement shall be paid
10 from the settlement proceeds. *See id.* at ¶ 14(c)(vii). Subject to Court approval, the parties have
11 selected Simpluris, Inc. to act as the Claims Administrator, who has provided a final cost estimate of
12 \$6,500.00 for the administration work that has been performed and will be performed in the future. *See*
13 Declaration of Lindsay Kline (“Decl. Kline”), ¶ 17.

14 5. The parties agree that \$20,000.00 of the Maximum Settlement Amount shall be allocated
15 to resolving claims under the PAGA. Seventy-Five percent (75%) of this amount will be paid to the
16 LWDA and Twenty-Five percent (25%) will be paid to the Net Settlement Amount and paid to Class
17 Members who submitted Claim Forms. *See* Exhibit A, at ¶ 14 (c)(ii). All individuals falling within the
18 scope of the PAGA claims are also Class Members.

19 6. The parties agree that up to thirty-five percent (35%) of the Maximum Settlement
20 Amount (\$59,500.00) will be paid for Plaintiff’s attorneys’ fees incurred in the litigation of this case.
21 Defendant will not oppose any application for attorneys’ fees so long as it is within this threshold. *See*
22 *id.* at ¶ 16. Additionally, the parties agree that Plaintiff will also be entitled to the actual litigation
23 costs, which are \$2,756.04. *See id.*; Exhibit D (Plaintiff’s Itemized Costs and Invoices); Decl.
24 Shimoda, ¶ 28. The difference between any actual costs and the \$15,000.00 is being redistributed to
25 Class Members on a pro rata basis. *See id.* The notice sent to class members stated the maximum cost
26 potential of \$15,000.00. *See* Decl. Kline, Exh. A, pg 2.

27 7. Any Claims Administrator costs, any amounts paid for attorneys’ fees and costs, the
28 Class Representative Enhancement Award, and payment to the LWDA will be paid out from the

Maximum Settlement Amount, not in addition to the Maximum Settlement Amount. *See* Exhibit A, ¶ 13.

8. For any portion of the Net Settlement Amount paid to Class Members that is not claimed by them by cashing their respective settlement checks within 90 days, the remaining amount shall be paid 50/50 to Koinonia Family Services, a non-profit 501(c)(3) organization with child advocacy programs in the state of California, and Capital Pro Bono, Inc. as *cy pres* recipients, subject to Court approval. under the doctrine of *cy pres*. *See id.* at ¶ 20. The use of a *cy pres* is specifically authorized under California Civil Procedure Code section 384(b). *See* Cal. Civ. Proc. Code § 384(b) (identifying appropriate recipients as “nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent”).

c. Allocation of Settlement Funds

Payment to Class Members of their share of the Net Settlement Amount will require the submission of a Claim Form. First, a Net Settlement Amount will be determined by subtracting from the Maximum Settlement Amount any amounts for approved attorneys’ fees and costs, any Enhancement Award to the Class Representative, the Claims Administrator costs, employer payroll taxes on any amounts characterized as wages, and payment to the LWDA. *See* Exhibit A, ¶¶ 14(c), 14 (c)(i)(ii). Then, each Class Member’s share of the Net Settlement Amount is determined by taking the workweeks for that individual Class Member and dividing that number by the weeks worked by all Class Members combined and multiplying that fraction by the Net Settlement Amount. *See id.* at ¶ 14(c)(i). However, regardless of the claims rate, Defendant shall be obligated to pay out a minimum of 50% of the Net Settlement Amount. If less than 50% of the Net Settlement Amount is claimed by Class Members, the Class Members who have submitted Claim Forms will have their individual shares of the Net Settlement Amount increased, pro rata, until at least 50% of the Net Settlement Amount is distributed. Any portion of the Net Settlement Amount in excess of the minimum 50% threshold that is not claimed by Class Members shall remain the property of Defendant. *See id.* at ¶ 14 (c)(i).

//

1 **V. PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND THE**
2 **SUBSEQUENT CLASS ACTION ADMINISTRATION**

3 Plaintiff's motion for preliminary approval of the class action and PAGA settlement was
4 approved by the Court on March 17, 2022. To comply with the class members' due process rights, the
5 parties enlisted an exhaustive method to ensure the best practical means possible was used to provide
6 notice to the class. Defendant provided the Claims Administrator with Class Members' names, last
7 known address, social security numbers, and other information necessary to effectuate notice and
8 payment calculations for the class. The Claims Administrator then updated this information utilizing
9 the National Change of Address Database maintained by the U.S. Postal Service to mail the Notice of
10 Proposed Class Action Settlement and Claim Form (collectively referred to as "Notice Packet"). *See*
11 Decl. Kline, ¶¶ 5-8. If the Notice Packets were returned as undeliverable, further investigation was
12 performed and they were re-mailed using updated information. *See id.* at ¶ 9. Of the 129 Notice
13 Packets mailed, only 8 were undeliverable after use of these methods. *See id.* at ¶¶ 8-9. The Notice
14 Packets included information regarding the requested attorneys' fees, costs, payment to the LWDA,
15 administration costs, requested Enhancement Award to the Class Representative, and tax allocations.
16 *See* Decl. Kline, Ex. A.

17 The notice provided to Class Members under the Agreement satisfies any and all due process
18 concerns, including for the one (1) individual whose notice was deemed undeliverable. It is not
19 required that Class Members be given actual notice of the settlement; instead, "the best practicable
20 notice under the circumstances, including individual notice to all members who can be identified
21 through reasonable effort" is all that is required. *See* Fed. R. Civ. Proc. 23(c)(2)(b)²; *Silber v. Mabon*,
22 18 F.3d 1449, 1453 (9th Cir. 1994); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1129 (9th Cir.
23 2017); *Walsh v. CorePower Yoga LLC*, 2017 U.S. Dist. LEXIS 163991, at *12-14 (N.D. Cal. 2017);
24 *Wright v. Linkus Enters.*, 259 F.R.D. 468, 474-75 (E.D. Cal. 2009). In *Silber v. Mabon*, 18 F.3d 1449
25 (9th Cir. 1994), the Court rejected a class member's argument that he had not received due process
26 because he did not receive notice until after the opt out period, finding that, so long as the notice
27

28 ² The California Supreme Court has authorized California's trial courts to rely on these federal resources to decide class certification issues. *See Green v. Obledo*, 29 Cal.3d 126, 145-46 (1981).

1 process utilized is the best practicable under the circumstances, due process is satisfied even if there is
2 no actual receipt of the notice. *See Silber*, 18 F.3d at 1453-1454. A similar finding was made in
3 *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017), which further noted that those class
4 members who did not receive actual notice may still receive benefits from the settlement through a cy
5 pres distribution. *See Briseno*, 844 F.3d at 1129. Directly to the point of any potential undeliverable
6 notice packet in this case, the Court in *Rannis v. Recchia*, 380 F. App'x 646 (9th Cir. 2010) found that
7 class members who did not receive actual notice due to their mailings being deemed undeliverable were
8 still properly held to be part of the class settlement because they received the best notice practicable
9 under the circumstances. *See Rannis v. Recchia*, 380 F. App'x at 650-651. The notice method in
10 *Rannis* is similar to that used in the present case. Importantly, California follows the federal approach
11 to notice and due process in the class action context. *See Noel v. Thrifty Payless, Inc.*, 7 Cal.5th 955,
12 980-984 (2019).

13 The average distribution to participating Class Members is approximately \$1,120.56, the
14 maximum distribution is approximately \$3,385.60. *See Decl. Kline*, ¶ 16. Out of 129 Class Members,
15 zero objected, zero opted out, and zero filed any disputes to their workweek calculations. *See id.* at
16 ¶¶ 10-12.

17 VI. ARGUMENT

18 a. Class Action Settlements are Subject to Court Review and Approval Under the 19 California Rules of Court

20 A class action may not be dismissed, compromised, or settled without Court approval and the
21 decision to approve or reject a settlement is committed to the Court's sound discretion. *See Cal. Rules*
22 *of Court*, Rule 3.769; *Fed. R. Civ. Proc.*, Rule 23(e); *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th
23 224, 234-35 (2001); *see also Cal. Lab. Code* §§ 2699(1)(2) (requiring Court review of PAGA
24 settlements). However, courts should give "proper deference to the private consensual decision of the
25 parties," since "the court's intrusion upon what is otherwise a private consensual agreement negotiated
26 between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment
27 that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating
28 parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned."

1 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). Where a settlement is reached on terms
2 agreeable to all parties, a court should disapprove of the settlement “only with considerable
3 circumspection.” *Jamison v. Butcher & Sherrerd*, 68 F.R.D. 479, 481 (E.D. Pa. 1975). The law favors
4 settlement of lawsuits, particularly class actions and other complex cases where substantial resources
5 can be conserved by avoiding the time, expense, and rigors of formal litigation. *See Neary v. Regents of*
6 *Univ. of Cal.*, 3 Cal. 4th 273, 277-81 (1992).

7 **b. The Terms of The Settlement Are Fair and Within the Range of Reasonableness**

8 The purpose of the Court’s final evaluation of a proposed class action settlement is to determine
9 only whether the proposed settlement is within the range of reasonableness. *See Wershba*, 91 Cal. App.
10 4th at 234-35. If the Court finds a proposed settlement falls within “the range of reasonableness,” it
11 should grant final approval of the class action settlement. *See, e.g., North County Contr. ’s Assn., Inc. v.*
12 *Touchstone Ins. Svcs.*, 27 Cal. App. 4th 1085, 1089-90 (1994). To make the fairness determination, the
13 Court must consider several factors, including:

14 the strength of the Plaintiff’s case, the risk, expense, complexity and likely
15 duration of further litigation, the risk of maintaining class action status
16 through trial, the amount offered in settlement, the extent of discovery
17 completed and the stage of the proceedings, the experience and views of
counsel, the presence of a governmental participant, and the reaction of the
class members to the proposed settlement.

18 *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996). However, this Court should begin its
19 analysis with a presumption that the settlement is fair. “A presumption of fairness exists where: (1) the
20 settlement is reached through arm’s length bargaining; (2) investigation and discovery are sufficient to
21 allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4)
22 the percentage of objectors is small.” *Id.* at 1802.

23 **i. The Settlement is a Result of Extensive, Non-Collusive Arm’s Length**
24 **Negotiations Between the Parties**

25 Settlement in this case was reached only after substantial investigations, litigation and extensive
26 arm’s length negotiations lasting approximately eight (8) months. *See Decl. Shimoda*, ¶¶ 6-10. At all
27 times, the negotiations were adversarial and contentious, although still professional in nature. *See id.*
28 Further, while Plaintiff contends he would ultimately prevail on the claims and the issue of certification,

1 this is not a certainty and there is substantial risk in proceeding to further litigation. *See id.* The ability
2 to secure a guaranteed settlement now and ensure class members receive some compensation, rather
3 than proceed to further litigation and potentially recover nothing, was a motivating factor in reaching
4 this settlement. *See id.*

5 **ii. The Extent of Investigation and Discovery Completed Provided Ample**
6 **Information to Enter Into an Informed and Reasonable Settlement**

7 The parties were in possession of all necessary information during the negotiations. The parties
8 engaged in substantial informal discovery and exchange of documents, including reviewing employee
9 data, such as timecards, paystubs, payroll data and relevant policies for the entirety of the statute of
10 limitations applicable to the alleged claims, which covered all aspects of the class claims and helped
11 thoroughly vet the extent of Plaintiff's claims against Defendant and create an accurate damages model.
12 *See id.* at ¶¶ 6-10. Plaintiff was in possession of this information prior to calculating the potential
13 damages in this case. *See id.* As a result, Plaintiff was able to make a reasonable estimation of
14 Defendant's potential liability. *See id.* For these reasons, the settlement now before the Court was
15 reached at a stage where "the parties certainly have a clear view of the strengths and weaknesses of
16 their cases" sufficient to support the settlement. *Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 617 (N.D.
17 Cal. 1979).

18 **iii. Plaintiff's Counsel Is Experienced In Similar Litigation and No Class Members**
19 **Objected, Opted Out, Or Submitted Disputes Of Any Kind Regarding The**
20 **Settlement**

21 Plaintiff's counsel has considerable experience in class actions and wage and hour litigation.
22 Plaintiff's counsel has brought and is currently bringing several wage and hour class and/or PAGA
23 actions. Thus, Plaintiff's counsel is qualified to evaluate the class claims, value of settlement versus
24 moving for certification and going to trial, and the viability of possible affirmative defenses. *See Decl.*
25 *Shimoda*, ¶¶ 11-22. Plaintiff's counsel believes that the settlement is fair and reasonable in light of the
26 complexities of the case, the uncertainties of class certification and litigation, and the secured benefit to
27 the class. *See id.* at ¶¶ 6, 23. This belief is bolstered by the fact that there were no objections, opt outs,
28 or disputes regarding the settlement of any kind. *See Decl. Kline*, ¶¶ 10-12.

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1 **iv. The Settlement is Fair and Reasonable Based on the Strength of Plaintiff's Case**
2 **and the Risks and Costs of Further Litigation**

3 A review of the Agreement's terms does not give rise to any doubts about its fairness. Based on
4 the records and facts of this case, Plaintiff has secured a gross recovery of approximately 16% and a net
5 recovery of approximately 7.3% of the claims' maximum likely value. *See id.* at ¶¶ 9-10. Additionally,
6 the average net award per Class Member is approximately \$1,120.56 and the maximum net award is
7 \$3,385.60. *See Decl. Kline*, ¶ 16. This settlement is a reasonable compromise of the class and PAGA
8 claims, and is within the percentile ranges of the total available damages that have been approved in
9 other class settlements. *See Wershba*, 91 Cal. App. 4th at 246, 250; *Rebney v. Wells Fargo Bank*, 220
10 Cal.App.3d 1117, 1139 (1990); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 628 (9th Cir.
11 1982); *see also In re Omnivision Technologies, Inc.*, 559 F.Supp.2d 1036, 1042 (2007) (noting that
12 certainty of recovery in settlement of 6% of maximum potential recovery after reduction for attorney's
13 fees was higher than median percentage for recoveries in shareholder class action settlements,
14 averaging 2.2%-3% from 2000 through 2002); *Bravo v. Gale Triangle, Inc.*, 2017 U.S. Dist. LEXIS
15 77714 (C.D. Cal. 2017) (approving a settlement where the net recovery to class members was
16 approximately 7.5% of the projected maximum recovery amount); *Avila v. Cold Spring Granite Co.*,
17 2017 U.S. Dist. LEXIS 130878 (E.D. Cal. 2017) (approving a settlement with a gross recovery of 11%
18 of the projected maximum damages available and a net recovery of approximately 6.7% of the
19 projected maximum recovery); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245 (N.D. Cal 2015)
20 (approving a settlement where the gross recovery was approximately 8.5% of the projected maximum
21 recovery).

22 **v. The Proposed Settlement is a Reasonable Compromise of Claims**

23 The case of *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116 (2008) requires additional
24 information be presented to the Court, acting as a fiduciary for the absent class members "to ensure that
25 the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims
26 being released, discounted by the risks and expenses of attempting to establish and collect on those
27 claims by pursuing the litigation" *Id.* at 129. *Munoz v. BCI Coca-Cola Bottling Co. of Los*
28 *Angeles*, 186 Cal. App. 4th 399 (2010), clarified that a *Kullar* showing does not require the parties to
submit an illusory prediction of the outer reaches of exposure without taking into account the actual

1 risks of certification, decertification, dispositive motions, and trial. *Kullar* also does not require an
2 explicit statement of the maximum amount the plaintiff class could recover if it prevailed on all its
3 claims provided there is a record that allows “an understanding of the amount that is in controversy and
4 the realistic range of outcomes of the litigation.” *Id.* at 409. The *Munoz* Court found that the record
5 before the trial court was sufficient, having included the number of class members, payroll data,
6 declarations describing hours and overtime worked, as well as variances in duties and rest and meal
7 period experience, and a companion action alleging less than \$5,000,000 in damages. This information
8 constituted “an adequate basis from which to garner a reasonably adequate understanding of the amount
9 that is in controversy within the meaning of *Kullar*.” *Id.*

10 Plaintiff similarly relied upon payroll data and Class Members data to determine the realistic
11 potential damages suffered by the class as a whole. *See Decl. Shimoda*, ¶¶ 6-10. This analysis allowed
12 Plaintiff to determine the extent and frequency of potential violations on all claims as to all Class
13 Members. *See id.* Ultimately, Plaintiff secured a percentage of the total demand for the putative class
14 that is within the range of what has been found to be sufficient in several other cases. *See, supra*,
15 Section VI.b.iv; *see also, e.g., In re Omnivision Technologies, Inc.*, 559 F.Supp.2d at 1042; *Reed v. 1-*
16 *800 Contacts, Inc.*, 2014 U.S. Dist. LEXIS 255 (S.D. Cal. 2014) (approving a settlement of \$11.7
17 million where the maximum range of damages was \$5,000 for each of the alleged 300,000 instances of
18 unlawful recording violations (\$1.5 billion), equaling approximately .78% of the total demand and
19 approximately \$800 per class member). This settlement represents a reasonable compromise given the
20 percentage of the total demand that was secured, the average recovery per class member, the Court’s
21 ability and discretion to cut PAGA penalties, and the uncertainty of class certification. *See Decl.*
22 *Shimoda*, ¶ 10.

23 **vi. The Enhancement Award to the Named Plaintiff for Plaintiff’s Services to the**
24 **Putative Class Is Reasonable and Routinely Awarded by Courts**

25 The Enhancement Award to the named Plaintiff is intended to recognize the time and effort
26 expended on behalf of the class. Indeed, Courts routinely approve such payments to compensate
27 named plaintiffs for the services they provide and the risks they incurred during the course of the class
28 action litigation. *See Ingram v. The Coca Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001). In *Ingram*,

1 the Court approved enhancement awards of \$300,000.00 to each named plaintiff in recognition of the
2 services they provided to the class by responding to discovery, participating in the mediation process,
3 and taking the risk of stepping forward on behalf of the class. *See Id.* at 694; *see also Van Vranken v.*
4 *Atlantic Richfield Co.*, 901 F.Supp. 294 (N.D. Cal. 1995) (approving a \$50,000.00 enhancement
5 award).

6 In this case, Plaintiff provided and explained a substantial number of documents, sought out
7 witnesses for potential declarations, and regularly communicated with counsel to ensure that the case
8 was progressing for the benefit of all Class Members. *See Decl. Shimoda*, ¶ 7; *Decl. Valles*, ¶¶ 2-4, 6-
9 7. Plaintiff spent a significant amount of time, approximately 85-100 hours, pursuing this litigation for
10 the benefit of the class. *See id.* Furthermore, Plaintiff is subject to a broader general release and civil
11 code section 1542 waiver, something that no other Class Member is subject to. *See Exhibit A*, ¶ 24.
12 Plaintiff brought this action knowing there would be a delay in any payment as the litigation
13 progressed, rather than proceeding on individual claims in front of the California Labor Commissioner.
14 *See Decl. Valles*, ¶ 5. Payment of \$7,500.00 to Plaintiff is appropriate given the risk, assistance, time
15 required in bringing this case and resolution of this case is well within the ranges approved by Courts in
16 cases such as this one. *See Decl. Shimoda*, ¶ 27; *West v. Circle K Stores, Inc.*, 2006 U.S. Dist. LEXIS
17 76558, at *7-*8, *12, *27 (E.D. Cal. 2006) (awarding a \$15,000 representative enhancement where
18 10,000 class members were to receive a gross award of approximately \$500 each from the \$5,000,000
19 settlement); *see Dent v. ITC Serv. Croup*, 2013 U.S. Dist. LEXIS 139359, at *9-*10, *15-*16 (D. Nev.
20 Aug. 6, 2013) (awarding a \$15,000 representative enhancement out of a \$150,000 settlement for
21 approximately 530 class members).

22 **vii. Awarding Attorneys' Fees as a Percentage of the Common Fund Is Reasonable**
23 **and Customarily Approved by Courts and Plaintiff's Counsels' Expenses and**
24 **Costs Were Necessarily Incurred to Achieve the Benefit Obtained**

25 California state and federal courts have recognized that when a litigant's efforts create or
26 preserve a fund from which others derive benefits, the Court may spread litigation costs proportionally
27 among all the beneficiaries to compensate those who created the fund. *See Boeing Co. v. Van Gemert*,
28 444 U.S. 472, 477-478 (1980) ("A lawyer who recovers a common fund for the benefit of persons other
than . . . her client is entitled to a reasonable attorney's fee from the fund as a whole."); *Vincent v.*

1 *Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375
2 (1970); *Waters v. Intern. Precious Metals Corp.*, 190 F.3d 1291 (11th Cir. 1999); *see also Serrano v.*
3 *Priest*, 20 Cal.3d 25, 34-35 (1977); *Laffitte v. Robert Half Internat., Inc.*, 1 Cal.5th 480, 506 (2016).
4 The purpose of this equitable doctrine is to avoid unjust enrichment of counsel and to “spread litigation
5 costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
6 burden alone.” *Vincent*, 557 F.2d at 769; *Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026,
7 1027 (9th Cir. 1977). California state courts have approved use of a percentage of the fund to calculate
8 reasonable attorney fee awards where the amount of the settlement is certain or is an easily calculable
9 sum of money. *See Dunk*, 48 Cal. App. 4th at 1808.

10 The Ninth Circuit has also held that the common fund doctrine applies when: (1) the class of
11 beneficiaries is sufficiently identifiable; (2) the benefits can be accurately traced; and (3) the fee can be
12 shifted with some exactitude to those benefitting. *See Paul, Johnson, Alston & Hunt v. Grauly*, 886
13 F.2d 268, 271 (9th Cir. 1989). These criteria are “easily met” when “each member of a certified class
14 has an undisputed and mathematically ascertainable claim to part of a lump-sum settlement recovered
15 on her behalf.” *Id.* at 271 (citations omitted). Under the three (3) factors set forth in *Paul, Johnson,*
16 *Alston & Hunt*, the common fund doctrine applies in this case because there is a sufficiently identifiable
17 class of beneficiaries (*e.g.* the settlement class), the benefits can be accurately traced to the settlement
18 Plaintiff and Plaintiff’s counsel were able to negotiate on behalf of the class, and the fee can be shifted
19 with exactitude to those benefiting as the fee request is a specific, lump-sum percentage of the common
20 fund. As set forth in the fee award examples provided below for the Court’s reference, it is an accepted
21 practice in wage and hour class action settlements to award attorneys’ fees based on a percentage of the
22 common fund. *See, e.g., Staton v. Boeing Co.*, 327 F.3d 938, 967-972 (9th Cir. 2003); *Sanders v. City*
23 *of Los Angeles*, 3 Cal.3d 252, 261, 263 (1970); *Wershba*, 91 Cal. App. 4th at 254; *Bell v. Farmers Ins.*
24 *Exchange*, 115 Cal. App. 4th 715, 726, 765 (2004).

25 Historically, attorneys’ fee awards in common fund cases in general range from 20% to 50% of
26 the fund, depending on the circumstances of the case. *See Newberg on Class Actions*, (3rd Ed.), 1992,
27 §14.03 (finding 50% to be the upper limit). Awards ranging between 30% and 40% of the fund are
28 generally approved as reasonable in wage and hour settlements below \$10 million:

1 More particularly, courts may award attorneys fees in the 30-40% range in wage and hour
2 class actions that result in recovery of a common fund under \$10 million. *See Vasquez v.*
3 *Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491-492 (E.D. Ca. 2010) (citing to five
4 recent wage and hour class actions where federal district courts approved attorney fee
5 awards ranging from 30 to 33%); *Singer v. Becton Dickenson and Co.*, 2010 U.S. Dist.
6 LEXIS 53416, 2010 WL 2196104, *8 (S.D. Ca. June 1, 2010) (approving attorney fee
award of 33.33% of the common fund and holding that award was similar to awards in
three other wage and hour class action cases where fees ranged from 33% to 40%);
Romero v. Producers Dairy Foods, Inc., 2007 U.S. Dist. LEXIS 86270, 2007 WL
3492841 (E.D. Ca. Nov. 14, 2007).

7 *See Martin v. Ameripride Servs.*, 2011 U.S. Dist. LEXIS 61796 at *22-23 (S.D. Cal. 2011). Plaintiffs
8 request of thirty-five percent (35%) of the settlement sum for attorneys' fees is within established rates
9 for fee awards in class settlements pursuant to the common fund doctrine, especially in light of the
10 excellent results achieved in this case. *See In re Activision Sec. Litigation*, 723 F.Supp. 1373, 1379
11 (N.D. Cal. 1989); *Watson v. Raytheon Company*, USDC Southern District, Case No. 3:10-cv-00634;
12 *Dirienzo v. Dunbar Armored, Inc.*, USDC Southern District, Case No. 3:09-cv-02745; *Green, et al. v.*
13 *Penske Logistics, L.L.C., et al.*, USDC Southern District, Case No. 3:09-cv-00069; *Benitez et al. v.*
14 *Wilbur*, USDC Eastern District, Case No. 1:08-cv-01122; *Chavez et al. v. Petrissans et al.*, USDC
15 Eastern District, Case No. 1:08-cv-00122; *Willis et al. v. Cal-Western Transport*, USDC Eastern
16 District, Case No. 1:00-cv-05695. To determine whether a percentage is reasonable, a court should
17 consider: (1) the percentage that would likely be negotiated between parties in a similar case; (2) the
18 percentage applied in other class actions; (3) the quality of class counsel; (4) the size of the award; and
19 (5) whether there are any objections by class members. *See In re Ikon Office Solutions, Inc. Secur.*
20 *Litig.*, 194 F.R.D. 166, 193 (E.D. Pa. 2000).

21 These factors support Plaintiff's request for reasonable attorneys' fees. The typical percentage
22 negotiated between parties ranges from thirty-five to forty percent (35% to 40%) in individual litigation
23 depending on the complexity of the case. In class action litigation, the typical percentage negotiated
24 between parties ranges from thirty to forty percent (30% to 40%) based on the same factors. Plaintiff's
25 request of 35% falls within these typical fee arrangements. *See Decl. Shimoda*, ¶ 23. The quality of
26 counsel and the size of settlement payments to Class Members (average of \$1,120.56 and high of
27 \$3,385.60) also support the fee request when compared to other settlements Courts have considered as
28 good results. *See Decl. Kline*, ¶ 16; *Schiller v. David's Bridal, Inc.*, 2012 U.S. Dist. LEXIS 80776 at

1 *48 (E.D. Cal. 2012) (“Class Members will receive an average of approximately \$198.70, with the
2 highest payment to a Class Member being \$695.78 . . . Overall, the Court finds that the results achieved
3 are good, which is highlighted by the fact that there was no objection to the settlement amount or the
4 attorneys’ fees requested.”); *Gardner v. GC Servs., LP*, 2012 U.S. Dist. LEXIS 47043, 18 (S.D. Cal.
5 2012) (“the results achieved in this case were very favorable. Class members are provided with
6 immediate monetary relief, with an average award of around several hundred dollars and a minimum
7 award of \$50”). Furthermore, there were zero objections to the settlement, zero opt outs, and zero
8 disputes of any kind regarding the settlement or payment allocations, which is strong evidence of the
9 fee request being reasonable as Class Members are in the best position to determine the value of
10 counsel’s representation compared to the benefits they are receiving under the settlement. *See* Decl.
11 Kline ¶¶ 10-12; *In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555, 71 (C.D. Cal. 2005) (“the
12 absence of objections or disapproval by class members to class counsel’s fee request further supports
13 finding the fee request reasonable”).

14 To the extent the Court wishes to exercise its discretion to conduct a lodestar cross check, the
15 cross check only validates the fee request. *See Laffitte*, 1 Cal.5th at 503-506. In the present case,
16 Plaintiff’s counsel will have spent a combined 142 hours litigating this action by the time of the final
17 approval hearing and estimate they will spend up to a total of approximately 148 hours through the
18 complete distribution of all funds and compliance hearing(s). *See* Exhibit F (Plaintiff’s Attorneys’ Fees
19 Summary Chart); Decl. Shimoda, ¶ 26. Generally, hours are reasonable if they were “reasonably
20 expended in pursuit of the ultimate result achieved in the same manner that an attorney traditionally is
21 compensated by a fee-paying client.” *Hensley v. Eckerhart*, 461 U.S. 424, 431 (1983). Counsel
22 undertook significant work to prosecute this case. This included investigations, filing, drafting of
23 pleadings, legal research on numerous complex issues, numerous interviews of Plaintiff and Class
24 Members, pursuing declarations from Class Members, informal discovery and document exchanges,
25 public records requests and review, extensive document review and analysis, and settlement
26 negotiations. *See generally* Exhibit F; *Syers Props. III, Inc. v. Rankin*, 226 Cal.App.4th 691, 699
27 (2014) (“Because time records are not required under California law . . . , there is no required level of
28 detail that counsel must achieve.”) (internal quotations omitted). As set forth in the summary chart,

Plaintiff's counsel reasonably spent a substantial number of hours in this case. See Exhibit F. A breakdown of the hours worked and corresponding lodestars on a timekeeper-by-timekeeper basis is as follows:

<u>Timekeeper</u>	<u>Hours</u>	<u>Rate</u>	<u>Lodestar</u>
Galen T. Shimoda	18.8	\$675	\$12,690.00
Justin P. Rodriguez	63.6	\$525	\$33,390.00
Jessica L. Hart	52.6	\$325	\$17,095.00
Jennifer Livingston	13	\$150	\$1,950.00
Total:	148		\$65,125.00

At their hourly rates, Plaintiff's Counsel's lodestar is \$65,125.00. See Decl. Shimoda, ¶¶ 24-25. Generally, counsel should receive a positive multiplier of their lodestar to compensate for the risk and contingent nature of the representation. See *Chem. Bank v. City of Seattle (In re Wash. Pub. Power Supply Sys. Sec. Litig.)*, 19 F.3d 1291, 1299-1301 (9th Cir. 1994); *Ketchum v. Moses*, 24 Cal.4th 1122, 1138 (2001) ("The adjustment to the lodestar figure, e.g., to provide a fee enhancement reflecting the risk that the attorney will not receive payment if the suit does not succeed, constitutes earned compensation; unlike a windfall, it is neither unexpected nor fortuitous"). In this case, the fee request would actually represent a negative multiplier of 0.91x of the expected fees. For these reasons, Plaintiff's request for fees in the amount of 35% of the common fund should be granted.

Filed with this motion as Exhibit E is an itemization and the accompanying invoices for costs incurred, and expected to be incurred, in this case, which total \$2,756.04. See Exhibit E (Plaintiff's Itemized Costs and Invoices); Decl. Shimoda, ¶ 28. All costs incurred were reasonably necessary to the conduct of the litigation. See *id.*; see also *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) ("Harris may recover as part of the award of attorney's fees those out-of pocket expenses that 'would normally be charged to a fee paying client.'"); *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995) (expenses recoverable if customary to bill clients for them); *Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42*, 8 F.3d 722, 725-26 (10th Cir. 1993) (expenses reimbursable if normally billed to client).

//

1 **c. Certification of the Class is Appropriate**

2 Class certification is appropriate when (1) the class is ascertainable and (2) there is “a well-
3 defined community of interest in the questions of law and fact involved affecting the parties to be
4 represented.” *Dunk*, 48 Cal. App. 4th at 1806. The “community of interest” element “embodies three
5 factors: (1) common questions of law or fact predominate; (2) class representatives with claims or
6 defenses typical of the class; and (3) class representatives who can adequately represent the class.” *Id.*
7 Here, the parties agree that, for the purposes of settlement, these prerequisites are met. *See* Exhibit A.

8 **i. The Proposed Settlement Class is Ascertainable and Sufficiently Numerous**

9 The proposed settlement class is ascertainable because all putative class members can be readily
10 identified through employee personnel and payroll files. *See Noel*, 7 Cal.5th at 980; *Rose v. City of*
11 *Hayward*, 126 Cal.App.3d 926, 932 (1981); *Lee v. Dynamex, Inc.*, 166 Cal. App. 4th 1325, 1334
12 (2008). The numerosity requirement is met because the putative class consists of 129 class members at
13 the time of settlement who worked during the Class Period, which makes joinder of all members
14 impracticable. *See Gay v. Waiters’ & Dairy Lunchmen’s Union*, 489 F.Supp. 282 (N.D. Cal. 1980),
15 *aff’d* 694 F.2d 531 (9th Cir. 1982); *Hebbard v. Calgrove*, 28 Cal. App. 3d 1017, 1030 (1972) (noting no
16 set minimum to meet the numerosity prerequisite, but a class as few as twenty-eight (28) members is
17 acceptable). Thus, these requirements are satisfied.

18 **ii. The Commonality, Predominance, and Typicality Requirements are Met**

19 The commonality requirement is met when there are questions of law or fact regarding the class
20 as a whole. *See Hanlon*, 150 F.3d at 1019. Commonality requires only that some common legal or
21 factual questions exist; Plaintiff need not show that all issues in the litigation are identical. *See*
22 *Richmond v. Dart Ind., Inc.*, 29 Cal.3d 462, 473 (1981); *City of San Jose v. Superior Court*, 12 Cal.3d
23 447, 460 (1974). Common questions of law or fact must also predominate over individual questions
24 and class-wide treatment of a dispute must be superior to individual litigation.³ *See Richmond*, 29
25 Cal.3d at 469. Predominance requires a putative class be sufficiently cohesive to warrant adjudication
26 by representation. *See Hanlon*, 150 F.3d at 1022. The typicality requirement is met when claims of the
27

28 ³When assessing predominance and superiority, a court may consider that the class will be certified for settlement purposes only and that manageability of trial is therefore irrelevant. *See Amchem Products v. Windsor*, 521 U.S. 591 (1997).

1 named representative are typical of those of the class, though “they need not be substantially identical.”
2 *Id.* at 1020; *Classen v. Weller*, 145 Cal. App. 3d 27, 46-47 (1983).

3 The common questions of law and fact in this case stem from Plaintiff’s contention that
4 Defendant 1) failed to pay minimum wages to Plaintiff and similarly situated employees for all hours
5 worked due their business practice of rounding employee hours; 2) failed to pay all overtime wages due
6 to Defendant’s policy of shifting daily overtime hours on to days where employees did not work an
7 eight (8) hour day; 3) failed to provide compliant meal and rest periods, or pay premiums in lieu
8 thereof; and 4) failed to pay Plaintiff and similarly situated employees all reimbursements owed for use
9 of their personal vehicles, cell phones, and tools for work-related purposes. The PAGA, waiting time
10 penalty, wage statement violation, and unfair competition claims also derive from these violations. *See*
11 Exhibit B. The waiting time penalties, unfair competition, and PAGA claims are derivative of these
12 violations. *See id.* Plaintiff and the Class Members seek the same remedies under state law. Under
13 these specific circumstances, the commonality and predominance requirements are satisfied. Regarding
14 the typicality requirement, Plaintiff contends he suffered from the same unlawful policies, treatment,
15 and circumstances as Class Members did, will request the same remedies, and will rely on the same
16 methods of proof to establish liability and damages. *See id.* Thus, the typicality requirement is also
17 satisfied for settlement purposes.

18 **iii. The Adequacy Requirement is Met**

19 The adequacy of representation requirement is met if the named representative and counsel have
20 no interests adverse to those of the putative class members and are committed to vigorously prosecuting
21 the case on behalf of the class. *See Hanlon*, 150 F.3d at 1020; *McGhee v. Bank of America*, 60
22 Cal.App.3d 442, 450-51 (1976). Those standards are met here. Under the preliminarily approved
23 settlement, Plaintiff and the putative class members will receive a pro rata share of the settlement based
24 on the number of workweeks they worked for Defendant. *See Exhibit A.* Finally, any settlement class
25 member who wished to opt-out of the settlement was able to do so, and he or she was also able to
26 dispute the number of workweeks stated in the notice materials.

27 There is no conflict of interest between Plaintiff and Class Members. Plaintiff and Plaintiff’s
28 counsel have pursued the claims made in the operative Complaint vigorously on behalf of the class.

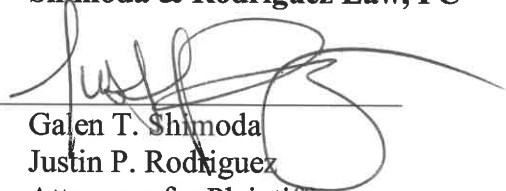
1 Plaintiff's counsel, with Plaintiff's assistance, thoroughly investigated the claims made in this case by
2 speaking with Plaintiff and reviewing substantial amounts of documents. Plaintiff's counsel thereafter
3 engaged Defendant's counsel in settlement discussions over the course of approximately eight (8)
4 months. Moreover, Plaintiff's counsel has experience defending and bringing wage and hour claims.
5 Because Plaintiff's counsel has vigorously pursued Plaintiff's and the class members' claims, the
6 adequacy requirement is met. *See generally* Decl. Shimoda.

7 **VII. CONCLUSION**

8 For all of the foregoing reasons, Plaintiff respectfully requests that this Court certify the class
9 for settlement purposes; grant final approval to the proposed settlement, including the Plaintiff's Class
10 Representative Enhancement Award, the payment to the LWDA under PAGA, and Class Counsel's
11 application for reasonable attorneys' fees and costs; find that the notice given to Class Members and
12 administration process satisfied Class Members' due process rights; and approve the proposed order
13 submitted concurrently herewith.

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15 Dated: August 3, 2022

Shimoda & Rodriguez Law, PC

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17 By: 

18 Galen T. Shimoda
19 Justin P. Rodriguez
20 Attorneys for Plaintiff
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