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individually, and on behalf of all others similarly
situated

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

JOAQUIN ROJAS, individually, and on
behalf of all others similarly situated,

Plaintiff,

vs.

JAR TRANSPORTATION INC., a
California Corporation, RAYMOND
PAUL JUNE, an individual, FEDEX
GROUND PACKAGE SYSTEM, INC., a
Delaware corporation; and DOES 1
through 20, inclusive;

Defendants.

CASE NO. 21STCV15613

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

*[Filed Concurrently With Supporting
Declaration and [Proposed] Order]*

Date: April 7, 2023

Time: 10:00 a.m.

Department: 11

Complaint Filed: April 26, 2021
Consolidated with 21STCV41706

1 **PLEASE TAKE NOTICE** that on April 7, 2023 at 10:00 a.m. or as soon thereafter as the
2 matter may be heard in Department 11 of the above-entitled court, Plaintiff JOAQUIN ROJAS
3 (“Plaintiff”) will and hereby does move this Court for an order in Plaintiff’s lawsuit alleging wage
4 and hour violations against Defendants captioned *ROJAS V. JAR TRANSPORTATION INC. ET AL.*,
5 Case No. 21STCV15613 initiated on April 26, 2021 and pending in Superior Court of the State of
6 California, County of Los Angeles to be consolidated with a Complaint for Violation of Private
7 Attorneys General Act, Labor Code Sections 2698 et seq. action against JAR captioned *ROJAS V.*
8 *JAR TRANSPORTATION INC., ET AL*, Case No. STCV41706 initiated on November 12, 2021 and
9 also pending in Superior Court of the State of California, County of Los Angeles:

10 1. Granting Preliminary approval of the proposed class settlement of this lawsuit as
11 reflected in the Class Action and PAGA Settlement Agreement (“Settlement Agreement”), a true
12 and correct copy of which is attached to the Declaration of Daniel J. Bass as Exhibit “1”. A true
13 and correct copy of the redline of the Settlement Agreement to form LASC CIV 296 is attached to
14 the Declaration of Daniel J. Bass as Exhibit “2”.

15 2. Pursuant to Section 382 of California Code of Civil Procedure, provisional
16 certification of the Settlement Class defined as follows:

17 The “Class” means all individuals employed by Defendant JAR
18 Transportation Inc., as a non-exempt employee in the state of
19 California at any time between July 1, 2020 and September 7, 2022.

20 3. Preliminary appointment of Plaintiff as Class Representative;

21 4. Preliminary appointment of Ronald W. Makarem, Samuel Almon, and Daniel J.
22 Bass of Makarem & Associates, APLC. (“Plaintiff’s Counsel or Class Counsel”) as Class Counsel;

23 5. Appointment of CPT Group, Inc. as the third-party settlement administrator for
24 mailing notices;

25 6. Approving as to form the COURT APPROVED NOTICE OF CLASS ACTION
26 SETTLEMENT AND HEARING DATE FOR FINAL COURT APPROVAL (“Class Notice” or
27 “Notice” or “Notice of Settlement”) and ordering that such Notice be given to the Settlement Class,
28

1 a true and correct copy of which is attached as Exhibit “A” to Exhibit “1” of the Declaration of
2 Daniel J. Bass;

3 7. Setting this matter for hearing on the issues of final approval, approval of the Class
4 Representative’s Incentive Award, and approval of Class Counsel’s application for attorney’s fees
5 and expenses; and,

6 8. Granting such other and further relief as the Court deems just and proper.

7 This Motion is brought pursuant to California *Rules of Court*, Rule 3.769, on the grounds
8 that the settlement reached with the Defendants is fair, reasonable, and adequate, achieved as the
9 result of informed, arms-length negotiations, and deserving of approval for the benefit of the
10 Settlement Class members to whom it pertains.

11 This Motion is based on this Notice of Motion, the attached Memorandum of Points and
12 Authorities, the declaration of Daniel J. Bass along with the exhibits attached thereto, the pleadings
13 and other papers filed in this action, and on any further oral or documentary evidence or argument
14 presented at the time of hearing.

15
16 Dated: January 31, 2023

MAKAREM & ASSOCIATES, APLC

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18 By: Daniel Bass
19 Daniel J. Bass
20 Attorneys for Plaintiff
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1 **I. INTRODUCTION**

2 By this Motion, Class Representative, Joaquin Rojas (referred to as “Class
3 Representative” or “Plaintiff”) and Defendants JAR Transportation Inc. and Raymond Paul June
4 (“Defendants”) (collectively, the “Parties”) seek an Order from this Court granting preliminary
5 approval of the settlement reached in this matter by and between the Class Representative, on his
6 own behalf, and on behalf of the Class Members on one hand, and Defendants on the other hand,
7 which settles the claims of the Class, Aggrieved Employees and Plaintiff for \$165,000 in a non-
8 reversionary settlement.

9 The settlement before the Court is a fair outcome for the approximately 91 Class
10 Members who collectively worked a total of 3,196 Workweeks, and 91 of Aggrieved Employees
11 who worked a total 3,070 of PAGA Pay Periods. Indeed, the proposed settlement affords Class
12 Members tangible monetary relief without the expense, delay, and uncertainty of continued
13 litigation. This is particularly true where, as here, Defendants sharply disputes the factual and
14 legal contentions of all the claims asserted. Absent settlement, the Parties would be required to
15 litigate these claims as to both certification and then liability issues, which would be costly, time
16 consuming to resolve, and would present substantial risk as to both sides of the case.

17 As shown in this Motion, the proposed settlement is fair, reasonable and adequate, and
18 more than satisfies the criteria for preliminary approval. Accordingly, Plaintiff requests that the
19 Court grant preliminary approval of the proposed settlement, preliminarily approve the attorneys’
20 fees, costs, and incentive award sought herein, direct distribution of the Class Notice in the
21 manner provided in the Parties’ settlement agreement, and set a hearing for final approval of the
22 settlement.

23 **II. SUMMARY OF LITIGATION**

24 **A. Defendants and Plaintiff**

25 Defendants employed Plaintiff as a non-exempt employee, serving as a delivery driver from
26 approximately April 2020 to January 2021. (*Declaration of Daniel J. Bass “Bass Decl.”*, ¶ 2).
27 During their employment, Plaintiff and fellow non-exempt employees made pick ups and deliveries
28 in Los Angeles County and other locations within California. (*Id.*)

During the time that Plaintiff was employed, he was subject to the same policies and procedures as all other non-exempt hourly paid employees, which among other things, Plaintiff contends caused employees to work long hours, sometimes off the clock, and without breaks. As such, Plaintiff and his fellow class members were denied full payment of their wages, including overtime and double time, and legally compliant breaks. (*Id. at* ¶ 3).

B. Commencement of the Action and Pleadings

This matter involves two lawsuits brought by Plaintiff on behalf of non-exempt employees of Defendants. The first action is the putative class action pending in Los Angeles County, Case No. 21STCV15613, filed on April 26, 2021. (*Id. at* ¶ 4). Thereafter on November 12, 2021 Plaintiff filed a PAGA representative action as Los Angeles County Case No. 21STCV41706 (collectively “Actions”). (*Id. at* ¶ 5) The Actions were related and the Class Action ordered as the lead case. (*Id.*).

Defendants contend that they at all times complied with California law. Defendants assert that it properly paid employees for all time worked. Defendants further contend that they provided Plaintiff and other putative class members with compliant meal and rest periods, and that to the extent any employee did not take a compliant meal or rest period, the reason for the non-compliant meal or rest period would be an individualized issue that would preclude class certification. (*Id. at* ¶ 6).

C. Investigation

Before filing the lawsuit, Class Counsel investigated and researched the facts and circumstances underlying the pertinent issues and the laws applicable thereto. This required thorough discussions between Class Counsel and the Plaintiff, as well as preliminary research into the various legal issues and employment practices involved in the case. After conducting their initial investigation, Class Counsel determined that Plaintiff’s claims were well-suited for class action adjudication owing to what appeared to be a common set of policies and procedures that impacted Plaintiff and other putative class members in a similar fashion. (*Id. at* ¶ 7).

After filing the lawsuit, Class Counsel conducted an extensive investigation of the facts and claims giving rise to the action, including:

- (1) reviewing and analyzing time and payroll records and Defendant’s written policies and procedures;
- (2) researching the applicable law and evaluating potential defenses;

- (3) evaluating the damages based on countervailing interpretations of law;
(4) reviewing other documentation provided by Defendant. (*Id. at* ¶ 8).

Defendants, for their part, vigorously contested liability, the amount of claimed damages, and the propriety of class certification. After Class Counsel analyzed the relevant documentary and testamentary evidence, Class Counsel determined that this case was appropriate for resolution via settlement. (*Id. at* ¶ 9).

D. Mediation and Settlement

On July 7, 2022, the Parties participated in an all-day mediation presided over by Gig Kyriacou which led to this Agreement to settle the Action. Over the next months the parties negotiated the details of the long form settlement agreement which was fully executed on January 31, 2023 and for which the Parties now seek preliminary approval. (*Id. at* ¶ 10)

III. SETTLEMENT AGREEMENT AND ACCOMPANYING DOCUMENTS

A. Settlement Class

The “Class” or “Settlement Class” means all individuals employed by Defendant JAR Transportation Inc., as a non-exempt employee in the state of California at any time between July 1, 2020 and September 7, 2022. Based on its records, JAR estimates that there are 91 Class Members who collectively worked a total of 3,196 Workweeks, and 91 Aggrieved Employees who worked a total 3,070 of PAGA Pay Periods. (*Id. at* ¶ 12).

B. Settlement Consideration

Under the terms of the proposed agreement, the parties have agreed that all claims brought on behalf of the Class shall be fully and finally resolved for a “Gross Settlement Amount” of \$165,000.00. (*Id.*, ¶13). The Gross Settlement Amount is non-reversionary and no portion of the Settlement Amount will be returned to Defendant. (*Id.*, ¶ 13). The following amounts will be deducted from the Gross Settlement Amount, with the amount remaining after these deductions constituting the Net Settlement Amount:

- **Attorneys’ Fees and Costs:** Up to 33 1/3% of the Gross Settlement Amount or \$ 55,000.00 plus up to \$20,000 in actual costs and expenses;
- **Class Representative Service Payment:** Up to \$ 7,500 to the named Plaintiff as a class representative;
- **Settlement Administration Costs:** Up to \$11,800 from the Gross Settlement Amount for the costs associated with administration of the Settlement.
- **LWDA PAGA Penalty Amount:** 75% share of the \$10,000.00 (or \$7,500.00) allocated from the Gross Settlement Amount for PAGA penalties that will be paid to the LWDA.

- **Individual PAGA Payments:** 25% share of the \$10,000.00 (or \$2,500.00) allocated from the Gross Settlement Amount for PAGA penalties that will be paid to Aggrieved Employees based on their PAGA Period Pay Periods.

Thus, the Net Settlement Amount will be approximately \$68,200.00, plus the \$2,500.00 separately distributed to Aggrieved Employees based on their PAGA Period Pay Periods. Each Participating Class Member shall be eligible to receive an Individual Class Payment, which is calculated by (a) dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating Class Members during the Class Period and (b) multiplying the result by each Participating Class Member's Workweeks. Assuming this Court makes no modification, the estimated 91 Class Members shall recover an estimated average recovery of approximately \$749.45 and the estimated 91 Aggrieved Employees will receive, on average, an additional \$27.47. (*Id.*, ¶¶ 21-22).

C. Release By Class Members

All Participating Class Members, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, release Released Parties from (i) all claims that were alleged, or reasonably could have been alleged, based on the Class Period facts stated in the Operative Complaints and ascertained in the course of the Action, including (1) failure to pay all earned wages, (2) unpaid minimum wages, (3) unpaid overtime wages, (4) failure to provide meal periods, (5) failure to provide rest periods, (6) failure to provide accurate wage statements, (7) waiting time penalties, (8) failure to maintain accurate payroll, (9) failure to pay all wages earned for labor performed each pay period, (10) failure to indemnify for all necessary business expenditures, (11) unfair competition pursuant to California Business and Professions Code section 17200, et seq., and (12) violation of California Labor Code section 2698, et seq. Except as set forth in Section 6.3 of this Agreement, Participating Class Members do not release any other claims, including claims for vested benefits, wrongful termination, violation of the Fair Employment and Housing Act, unemployment insurance, disability, social security, workers' compensation, or claims based on facts occurring outside the Class Period. (*Id.*, ¶ 23).

All Non-Participating Class Members who are Aggrieved Employees are deemed to release, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, the Released Parties from all claims for PAGA

penalties that were alleged, or reasonably could have been alleged, based on the PAGA Period facts stated in the Operative Complaints PAGA Notice, including violation of California Labor Code section 2698, et seq., and ascertained in the course of the Action. (*Id.*, ¶ 24).

D. Notice Procedure

The Parties selected CPT Group, Inc. to serve as the Administrator. The Parties have agreed on the form of notice to be mailed to the Class and the method of notice to the class. ("Class Notice," attached as Exhibit "A" to Exhibit "1" of the Declaration of Daniel J. Bass). (*Id.*, ¶ 26).

1. Settlement Notice Timeline

Timeframe	Event
Not later than 15 days after the Court grants Preliminary Approval of the Settlement	JAR will simultaneously deliver the Class Data to the Administrator, in the form of a Microsoft Excel spreadsheet. "Class Data" means Class Member identifying information in JAR's possession including the Class Member's name, last-known mailing address, Social Security number, and number of Class Period Workweeks and PAGA Pay Periods
No later than three (3) business days after receipt of the Class Data	Administrator shall notify Class Counsel that the list has been received and state the number of Class Members, Aggrieved Employees, Workweeks, and Pay Periods reflected in the Class Data.
In no event later than 14 days after receiving the Class Data	Administrator will send to all Class Members identified in the Class Data, via first-class United States Postal Service ("USPS") mail, the Class Notice with Spanish translation.
45 days after mailing Class Notice	Response Deadline: Last date on which Class Members may: (a) fax, email, or mail Requests for Exclusion from the Settlement, or (b) fax, email, or mail his or her Objection to the Settlement. Class Members to whom Notice Packets are resent after having been returned undeliverable to the Administrator shall have an additional 14 calendar days beyond the Response Deadline has expired.

2. Details Regarding Dissemination of Notice

The Notice of Settlement, in materially the form attached to the Bass Declaration as Exhibit “A” to Exhibit “1” and as approved by the Court, shall be sent by the Claims Administrator to the Settlement Class Members, by first class mail to those addresses provided by Defendant, within approximately twenty-nine (29) days following Preliminary Approval of the Settlement. (*Id.*, ¶ 26). If any Class Notice mailed to a Settlement Class Member is returned as having been undelivered by the U.S. Postal Service, the Settlement Administrator shall perform a skip trace search and seek an address correction for such. (*Id.*).

E. The Claims, Opt-Out and Objection Process

Class Members who wish to exclude themselves (opt-out of) the Class Settlement must send the Administrator, by fax, email, or mail, a signed written Request for Exclusion not later than 45 days after the Administrator mails the Class Notice (plus an additional 14 days for Class Members whose Class Notice is re-mailed). A Request for Exclusion is a letter from a Class Member or his/her representative that reasonably communicates the Class Member’s election to be excluded from the Settlement and includes the Class Member’s name, address and email address or telephone number and Social Security number. To be valid, a Request for Exclusion must be timely faxed, emailed, or postmarked by the Response Deadline. (*Id.*, ¶ 27).

Participating Class Members may send written objections to the Administrator, by fax, email, or mail. In the alternative, Participating Class Members may appear in Court (or hire an attorney to appear in Court) to present verbal objections at the Final Approval Hearing. A Participating Class Member who elects to send a written objection to the Administrator must do so not later than 45 days after the Administrator’s mailing of the Class Notice (plus an additional 14 days for Class Members whose Class Notice was re-mailed. (*Id.*, ¶ 28).

The Administrator will establish and maintain and use an internet website to post information of interest to Class Members including the date, time and location for the Final Approval Hearing and copies of the Settlement Agreement, Motion for Preliminary Approval, the Preliminary Approval, the Class Notice, the Motion for Final Approval, the Motion for Class Counsel Fees Payment, Class Counsel Litigation Expenses Payment and Class Representative Service Payment, the Final Approval and the Judgment. The Administrator will also maintain and

monitor an email address and a toll-free telephone number to receive Class Member calls, faxes and emails. (*Id.*, ¶ 29).

IV. PRELIMINARY SETTLEMENT APPROVAL

California courts favor settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost, and rigors of protracted formal litigation. See *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1151. In determining whether to approve or reject a proposed settlement, courts have broad discretion. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235; *Mallick v. Super. Ct.* (1979) 89 Cal.App.3d 434, 438. Court approval of class action settlements is generally a two-step process: preliminary approval and final approval. See *Manual for Complex Litigation*, 4th Ed., Federal Judicial Center, 2004, § 21.632. At the preliminary approval stage, the Court's review is "limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and adequate to all concerned." *Officers for Justice v. Civil Serv. Comm'n* (9th Cir. 1982) 688 F.2d 615, 625.

A classwide settlement is presumed to be fair where "(1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." *Dunk v. Ford Motor. Co.* (1996) 48 Cal.App.4th 1794, 1801- 02 (citing Newberg on Class Actions (3d ed. 1992) §11.41).

As courts have explained, "The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved had plaintiffs prevailed at trial." *Wershba*, 91 Cal. App. 4th at 246.

Compromise is inherent and necessary in the settlement process. Thus, 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.

Id. at 250 (quoting *Air Line Stewards, Loc. 550 v. American Airlines, Inc.*, (7th Cir.1972) 455 F.2d 101, 109.

For the reasons set forth below, the Court should grant Plaintiff's Motion for Preliminary Approval of this Class Action Settlement.

A. The Settlement Agreement Resulted from Arm's-Length Negotiations

The presumption is that a proposed settlement is fair and reasonable when it is the result of arm's-length negotiations. *See Williams v. Vukovich* (6th Cir.1983) 720 F.2d 909, 922-923 ("The court should defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs"); *In re Excess Value Ins. Coverage Litig.* (S.D.N.Y. July 30, 2004, No. M-21-84RMB) No. M-21-84 (RMB) 2004 U.S. Dist. LEXIS 14822, at *34 ("Where 'the Court finds that the settlement is the product of arm's length negotiations conducted by experienced counsel knowledgeable in complex class litigation, the Settlement will enjoy a presumption of fairness'"); *In re Inter-Op Hip Prosthesis Liab. Litig.* (N.D. Ohio 2001) 204 F.R.D. 359, 380 (granting preliminary settlement approval) ("when a settlement is the result of extensive negotiations by experienced counsel, the Court should presume it is fair"); 4 Rubenstein, et al., *Newberg on Class Actions* (5th Ed. 2016) §11.41 at p. 90; *Manual For Complex Litig.* (4th Ed. 2004), §21.612.

The proposed settlement here is the product of arm's-length negotiations, assisted by a well-respected Judge at a settlement conference for which the Parties prepared by engaging in exchanging substantial relevant information and documents.

Counsel for the Parties have investigated the applicable law, as applied to the facts discovered, regarding the alleged claims of Plaintiff and potential defenses thereto, and the damages claimed by Plaintiff. Armed with this extensive body of knowledge, the Parties engaged in a full, complete, and ultimately successful mediation. At all times, the negotiations leading to the Settlement have been adversarial, non-collusive, and at arm's length.

B. The Strength of Plaintiff's Case and Complexities of Further Litigation

Plaintiff believes that the Settlement Class claims in this action are legally meritorious and present a reasonable probability of a favorable determination on behalf of the Class. At the same time, there is undeniably significant litigation risk avoided by the proposed Settlement, both at class certification proceedings, at trial, and in the appellate courts. (Bass Decl. ¶ 30)

Liability remains highly contested by Defendant, who denies that it engaged in any violations of the law, and it further denies any liability or engagement in wrongdoing of any kind

associated with the claims alleged in the Action by the Named Plaintiff or any Class Member.
1 Defendants contend that at all times they complied with all wage-and-hour laws in connection with
2 the employment and/or retention of services of Plaintiff and the Class Members. (*Id.* ¶ 31)

3 Plaintiff's counsel understood and appreciated the defenses and position of Defendants but
4 believed that Plaintiff would ultimately succeed in the action. In light of the strongly divergent
5 views, the parties, with the assistance of the mediator, were able to negotiate a fair settlement,
6 considering the costs and risks of continued litigation. The negotiations were at all times conducted
7 professionally and at arm's length and have produced a result that the Parties believe to be in their
8 respective best interests. (*Id.* ¶ 32)

9 The Parties have also considered the uncertainty and risk of the outcome of further
10 litigation, and the difficulties and delays inherent in such litigation. Plaintiff is also aware of the
11 burdens of proof necessary to establish liability for the claims asserted in the action, the defenses
12 thereto, and the difficulties in establishing damages. In evaluating the settlement, the Court will
13 seek a reasonable estimate of the nature and amount of recovery that each class member could have
14 obtained if the Plaintiff had prevailed in the litigation. Numerous decisions summarize a trial court's
15 task when considering whether to approve the settlement of a putative class action (*Id.* ¶ 33). As
16 Division Five of this Court stated:

17 The trial court has broad discretion to determine whether the settlement is fair.
18 [Citation.] It should consider relevant factors, such as the strength of plaintiffs' case,
19 the risk, expense, complexity and likely duration of further litigation, the risk of
20 maintaining class action status through trial, the amount offered in settlement, the
21 extent of discovery completed and the stage of the proceedings, the experience and
22 views of counsel, the presence of a governmental participant, and the reaction of the
23 class members to the proposed settlement.

24 *Cellphone Fee Termination Cases* (2009) 180 Cal.App.4th 1110, 1117-18, quoting *Dunk*, 48
25 Cal.App.4th at 1801.

26 The court's consideration of relevant factors, however, does not transform the settlement
27 approval "into a trial or rehearsal for trial on the merits." *7-Eleven Owners for Fair Franchising*,
28 85 Cal.App.4th at 1145 (internal citation omitted). The record need only provide the trial court
with an understanding of the amount that is in controversy and the realistic range of outcomes of
the litigation. Because settlements are inherently a compromise, once the parties have provided it
with the requisite "basic information," the trial court must only "satisfy itself that the class
settlement is within the 'ballpark' of reasonableness." *Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.*

(1985) 38 Cal.3d 488, 499-500.

Here, in preparation for mediation, Plaintiff calculated Defendant's liability to Class Members to be in excess of the settlement amount. Plaintiff's valuation assumed that Plaintiff: (1) prevailed in certifying the case; (2) prevailed in establishing liability on the merits; and (3) was awarded the full amount of all discretionary penalties. (Bass Decl. ¶ 34).

The realistic range of outcomes for this litigation took into account the present state of the law regarding meal and rest break claims and the other claims brought in the Action, Defendant's defenses for each claim, and the likelihood of prevailing on a class certification motion as well as trial and any appeals. Moreover, Plaintiff had to consider the difficulties of maintaining class claims as drivers in the transportation industry against the Defendants and thus factor in how much they could realistically consider for settlement. Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011,1026.

Kullar v. Footlocker Analysis.

To allow this Court to make an informed assessment pursuant to *Kullar v. Foot Locker Retail, Inc.* (2008) 18 Cal.App.4th 116, Plaintiff's Counsel provides the following assessment of the case and settlement. Plaintiff's Counsel believes that the settlement is a good one for the Class Members in light of the number of employees and claims at issue. In Plaintiff's First Amended Complaint Plaintiff seeks, PAGA penalties, unpaid wages, and statutory penalties as well as the equitable remedies. Plaintiff estimated Defendant's total non-penalty exposure at \$415,417.00. (Bass Decl., ¶ 37) As such, the settlement represents over approximately 39.7% of Defendant's non-penalty exposure based on Plaintiff's analysis. This is a reasonable recovery, particularly given the number of class members at issue and the size of Defendant's operations. (*Id.*).

Courts have determined that settlements are, of course, reasonable even where plaintiffs recover only a portion of their actual losses. *See Behrens v. Wometco Enters., Inc.* (S.D. Fla. 1988) 118 F.R.D. 534, 542, *aff'd*, (11th Cir. 1990) 899 F.2d 21 ("[T]he fact that a proposed settlement amounts to only a fraction of the potential recovery does not mean the settlement is unfair or inadequate."). Indeed, "[a] settlement can be satisfying even if it amounts to a hundredth or even - a thousandth of a single percent of the potential recovery." *Id.*; *see also City of Detroit v. Grinnell Corp.* (S.D.N.Y. 1972) 356 F.Supp. 1380, 1386 [a recovery of 3.2% to 3.7% of the amount sought

is “well within the ball park”], aff’d in part, rev’d on other grounds, (2d Cir. 1974) 495 F.2d 448; *Martel v. Valderamma* (C.D. Cal. 2015) 2015 U.S. Dist. LEXIS 49830 * 17 (approving a settlement of \$75,000 when potential damages were \$1.2 million); *In re Toys R US FACTA Litig.* (C.D. Cal. 2014) 295 F.R.D. 438, 453 (approving settlement with vouchers (not cash) potentially worth a maximum of three percent (3%) if all possible claims were actually made, or \$391.5 million aggregate voucher potential where the class could have recovered \$13.05 billion); 4 William B. Rubenstein et al., *Newberg on Class Actions* (5th ed. 2016) § 13:15 (the range of reasonableness percentage could be as low as 1/100th or 1/1000th of 1%); *Ma v. Covidien Holding, Inc.*, (C.D. Cal. Jan. 31, 2014, No. SACV 12-02161-DOC) 2014 WL 360196, at *5 (finding a settlement worth 9.1% of the total value of the action “within the range of reasonableness”); *Balderas v. Massage Envy Franchising, LLC*, (N.D. Cal. July 21, 2014, No. 12-CV-06327 NC) 2014 WL 3610945, at *5 (granting preliminary approval of a net settlement amount representing 5% of the projected maximum recovery at trial); *Glass v. UBS Fin. Servs., Inc.* (N.D. Cal. Jan. 26, 2007, No. C-06-4068 MMC) 2007 WL 221862, at *9, *aff’d*, 331 Fed. Appx. 452 (9th Cir. 2009) (approving a settlement of an action claiming unpaid overtime wages where the settlement amount constituted approximately 25% to 35% of the estimated actual loss to the class).

Below, Plaintiff details the issues that necessitated deductions from the maximum potential value of this case to arrive at the reasonable Maximum Settlement Amount derived in this action: At mediation Plaintiff’s review of the data estimated approximately 91 Class Members who collectively worked approximately 2,953 Workweeks, and 91 of Aggrieved Employees who worked an estimated 2,921 PAGA Pay Periods. (Bass Decl. ¶ 38).

Rest Periods

Plaintiff calculated Defendants’ maximum liability to be about 4.5 shifts per employee per week at the average hourly rate of \$15.86 per violation. As such, with a 100% violation rate, Plaintiff estimated that Defendants’ exposure could be as high as \$ 210,320. Plaintiff did not discount this number or the calculations that follow in order to arrive at the settlement; rather, Plaintiff discounted the number in order to reach a settlement that understood the risks of continued litigation and difficulties in showing a 100% violation rate for rest breaks during employee shifts.

Meal Periods

Plaintiff again calculated Defendant's maximum liability at about a 46.4% unique violation rate for meal breaks or 1,030 unique meal period violations. However, the data provided also showed approximately 491 meal premium payments were paid, reducing potential violations to approximately 539 instances or 24.3% of eligible breaks. As such, Plaintiff estimated that Defendant's exposure could be as high as \$ 3,420. Plaintiff did not discount this number or the calculations that follow in order to arrive at the settlement; rather, Plaintiff discounted the number in order to reach a settlement that understood the risks of continued litigation and difficulties in showing the calculated violation rate for meal breaks during employee shifts.

Unpaid Off-the-Clock

Based on Plaintiff's experiences and personal observations at work, Plaintiff estimated that approximately 0.5 hours (30 minutes) of work was performed off-the-clock by employees on a daily basis, resulting in an approximately \$143,806 in underpayments at employees regular rate and \$5,667 in unpaid overtime.

Penalties

Although the Class arguably could have seen a payout of approximately \$279,061 for waiting time penalties (for 62 terminated employees during a three-year statutory period) and \$202,300 in wage statement penalties (for 91 employees for a one-year period), Plaintiff's Counsel had to weigh the likelihood of recovery against probable defenses and the wide discretion Courts have exercised in awarding Labor code penalties. Along these lines, Plaintiff considered that Defendants would argue that Plaintiff could not prove the "willful" prong needed to obtain waiting time penalties under Cal. Lab. Code § 203 and would further argue that Plaintiff could not show that Class Members suffered an "injury" as a result of wage statement violations, as required by Cal. Lab. Code § 226. Further, Plaintiff arguably could not recover any waiting time penalties for meal and rest claims. Moreover, Plaintiff would not recover any derivative penalties if he failed to prove the underlying claims. (*Id.* ¶ 42).

Plaintiff, in agreeing to the settlement had to take into account the difficulties in certifying a class and maintaining any such certification. What's more, Plaintiff had to take into account the uncertainties, including business uncertainties facing employers during the ongoing COVID 19

1 pandemic. Each of these concerns weighed into Plaintiff's analysis to eventually agree to a
2 settlement that is less than Defendants' total projected liability even if Plaintiff eventually won
3 every aspect of this case including potential appeal. A settlement now guarantees that class
4 members will 1) obtain a recovery and 2) that they will get the recovery in a time period that is
shorter than one if the case went through a full trial and appeal process. (*Id.* at ¶ 43).

5 **Certification in General**

6 The great discretion afforded trial courts in electing to grant or deny class certification,
7 and the resultant possibility that this Court would deny certification of any of the claims, resulting
8 in no recovery whatsoever for those unnamed class members further weighed in favor of
9 settlement. Indeed, going into mediation and during the course of constructing the settlement,
10 Class Counsel bore in mind similar meal and rest break cases wherein class certification was
11 denied. *See e.g. In re Lamps Plus Overtime Cases* (2012) 209 Cal.App.4th 35; *Washington v.*
12 *Joe's Crab Shack* (N.D. Cal. 2010) 271 F.R.D. 629 ("individualized inquiry will be required to
13 determine whether any single employee failed to take a meal break because he/she was too busy,
14 and also to determine whether a particular employee signed a waiver based on a decision not to
15 take meal breaks"); *Hernandez v. Chipotle Mexican Grill, Inc.* (2012) 146 Cal.Rptr.3d 424, 2012
16 WL 3579567, *10.

17 **Trial and Manageability Issues**

18 While Plaintiff was confident in the strength of his claims, as is always the case with a
19 trial, Plaintiff needed to accept that there was a possibility that he would not prevail at trial.
20 Compromise is inherent and necessary in the settlement process. Thus, even if "the relief afforded
21 by the proposed settlement is substantially narrower than it would be if the suits were to be
22 successfully litigated," this is no bar to a class settlement because "the public interest may indeed
23 be served by a voluntary settlement in which each side gives ground in the interest of avoiding
24 litigation." *Id.* at 250 (quoting *Air Line Stewards, Loc. 550 v. American Airlines, Inc.*, (7th
25 Cir.1972) 455 F.2d 101, 109. The Ninth Circuit observed "the very essence of a settlement is
26 compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Officers for Justice v.*
27 *Civil Serv. Commission* (9th Cir.1982) 688 F.2d 615, 624 (citation omitted). Thus, when
28 analyzing the amount offered in settlement, the Court should examine "the complete package

1 taken as a whole,” and the amount is “not to be judged against a hypothetical or speculative
2 measure of what might have been achieved by the negotiators.” *Id.* at 625, 628.

3 Given the difficulties Plaintiff and the Settlement Class faced, both in terms of
4 certification and in adjudicating their claims on the merits, the litigation discounts afforded by
5 Plaintiff is appropriate and the settlement is fair, reasonable, and adequate. In the present case, it
6 is clear that the settlement before this Court is the best course of action as it ensures a fair and
7 adequate recovery for the members of the class. Thus, it was clearly reasonable for Plaintiff to
8 negotiate a smaller certain award rather than seek the full recovery but risk recovering nothing.

9 **C. The Settlement Has No Obvious Deficiencies**

10 This proposed settlement has no obvious deficiencies. The settlement provides no
11 preferential treatment for the Plaintiff or other Class Members. The Plaintiff will receive a
12 distribution from the settlement proceeds calculated in the same manner as the distributions to all
13 other Settlement Class Members, plus any service award approved by the Court.

14 The proposed Settlement does not place the named Plaintiff’s interests ahead of the
15 Settlement Class as a whole. Apart from a reasonable incentive payment for his efforts on behalf
16 of the Settlement Class, typical in class action litigation, the named Plaintiff’s personal recovery in
17 this action and settlement will be the same as those with whom he shares a common set of facts
18 amongst the Settlement Class. Indeed, the named Plaintiff has not in any way tried to leverage a
19 class action for some personal agenda or gain.

20 Plaintiff contends that the proposed Settlement also does not place the Class Counsel’s
21 interests ahead of class members’ interests. Settlement provisions relating to attorneys’ fees and
22 litigation expenses in the action were not negotiated until after an agreement was reached in
23 principal with respect to the direct Settlement Class benefits and the Gross Settlement Amount.
24 Further, the Settlement provides only for a maximum permissible amount of the request for an
25 award of attorneys’ fees and litigation expenses. Any award of fees and expenses remains to be
26 determined by the Court at the time of the fairness hearing and must necessarily be found to be fair
27 and reasonable to the Settlement Class based on applicable law.

28 Again, each Settlement Class Member has the right to object and be heard regarding the
amount of fees and expenses requested. Any amounts not awarded by the Court as fees and

1 expenses will remain in the net settlement fund to be distributed to the class. Class Counsel will
2 file a separate motion for approval of the fee award sought herein, at the time of and in conjunction
3 with the filing of the motion for final approval, should preliminary approval be granted, and a final
4 approval hearing scheduled by the Court.

5 For any Class Member whose Individual Class Payment check or Individual PAGA
6 Payment check is uncashed and cancelled after the void date, the Administrator shall transmit the
7 funds represented by such checks to the California Controller's Unclaimed Property Fund in the
8 name of the Class Member thereby leaving no "unpaid residue" subject to the requirements of
9 California Code of Civil Procedure Section 384, subd. (b). (Bass Decl, ¶ 45, *Exh "I" at ¶ 4.4.3.*)¹

10 **D. The Class Representative's Service Payment, Counsel's Fees, and Expenses**

11 **1. The Service Payment Requested by Plaintiff Is Reasonable**

12 As part of the Settlement, Plaintiff will seek a Class Representative's Service Payment of
13 \$7,500. Plaintiff has taken the extraordinary step of challenging his former employer's actions by
14 bringing this case. Plaintiff did so in the belief that he, and the members of the Settlement Class,
15 were, in fact, entitled to the relief sought in this case. Until this case was filed, no one was pursuing
16 the claims raised in this matter. Plaintiff's actions have resulted in a recovery for the members of
17 the Settlement Class, and the service enhancement he seeks is reasonable. (*Bass Decl. ¶ 46*)

18 Plaintiff fully participated in this action throughout the pendency of the litigation. He was
19 kept well informed of the nature and extent of settlement discussions and approved the same. As
20 such, the Service Payment sought for Plaintiff is reasonable and represents a small percentage of
21 the Gross Settlement Amount. Absent the actions taken by Plaintiff, none of the Settlement Class
22 Members would have reaped the rewards of this action. (*Bass Decl. ¶ 47*)

23 **2. The Fees and Costs Requested by Class Counsel Are Reasonable**

24 As noted, *supra*, the Settlement provides for Class Counsel to apply to the Court for an
25 award of fees of 33 1/3% of the Gross Settlement Amount, plus reimbursement of their litigation
26 expenses. The percentage award is commensurate with (1) the risk Class Counsel took in

27 ¹ Concurrently with this filing Plaintiff's counsel has submitted the proposed settlement to the
28 LWDA to provide it notice. Plaintiff's counsel will do so again and provide evidence of its
submissions at final approval before the Court rules on approval of the PAGA settlement. *Bass Decl., ¶ 58*

commencing this action, (2) the time, effort and expense dedicated to the case, (3) the skill and determination they have shown, (4) the results they have achieved throughout the litigation, (5) the value of the Settlement which they have achieved for Class Members, and (6) the other cases they have turned down in order to devote their time and efforts to this matter. (Bass Decl. ¶¶ 54-57)

California public policy encourages attorneys to take the risks of time and money necessary to vindicate the public interest. To fulfill this policy, California law provides that attorneys' fees awards should be equivalent to fees paid in the legal marketplace to compensate for the result achieved and risk incurred. See *Lealao v. Beneficial Cal., Inc.* (2000) 82 Cal.App.4th 19. Accordingly, Class Counsel's request is based on marketplace standards. In *Lealao*, the First Appellate District held that when an action leads to a recovery that can be "monetized" with a reasonable degree of certainty, the trial court should "ensure that the fee awarded is within the range of fees freely negotiated in the legal marketplace in comparable litigation." *Id.* at 50.

The governing principles, as well as a survey of attorneys' fees jurisprudence (both in California and throughout the country), are set out in *Lealao*. As the court in *Lealao* explained, in determining an attorney fee request, courts should strive to award fees equivalent to those "freely negotiated in the legal marketplace in comparable litigation." *Id.* "If courts were to ask what fee structure an informed, sophisticated client would use to compensate his attorney when close monitoring is not feasible, they would at least have focused on the correct question." *Id.* at 48. As *Lealao* recognizes, fee awards that are too small will "chill the private enforcement essential to the vindication of many legal rights and obstruct the representative actions that often relieve the courts of the need to separately adjudicate numerous claims." *Id.* at 53. Finally, an attorneys' fees motion should not turn into "a second major litigation." *Id.* at 31 (citing *Hensley v. Eckerhart* (1983) 461 U.S. 424, 437).

As in many cases of this type, Class Counsel seek a fee award for their successful prosecution and resolution of this action, calculated as a percentage of the total value of benefits afforded the Class Members by the Settlement. *Serrano v. Priest* (1977) 20 Cal.3d 25, 34 (*Serrano III*); *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478; see also *Vincent v. Hughes Air West, Inc.* (9th Cir. 1977) 557 F.2d 759, 769. The purpose of this equitable doctrine is not only to avoid unjust enrichment of counsel but also to spread litigation costs proportionally among all the beneficiaries so that the

active beneficiary does not bear the entire burden alone. *Id.* Where the amount of a settlement is a "certain easily calculable sum of money," California courts may calculate attorney fees as a reasonable percentage of the settlement created. Weil and Brown, *California Practice Guide: Civil Procedure Before Trial*, ch. 14, § 14:145; *Dunk*, at 1808. In addition, Class Counsel will present a lodestar plus multiplier analysis of their efforts which will further support the amount sought.

E. Claims Administration

Parties seeks the appointment of CPT Group, Inc ("CPT") as the Claims Administrator. CPT is an experienced class notice administration company, and has acted as claims administrator in thousands of class action cases. See Declaration of Julie Green on Behalf of CPT Group, Inc. ("Green Decl.") CPT has presented an estimate to counsel reflecting that its charges to administer the proposed settlement at a flat rate of \$10,000.00. (See Green Decl. ¶11, Exhibit B).

F. The Content and Manner of the Notice to Class Members Complies with California Rules of Court, Rule 3.766 and Should be Approved.

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

As provided in California Rules of Court, Rule 3.769 (e):

If the court grants preliminary approval, its order must include the time, date, and place of the final approval hearing; the notice to be given to the class; and any other matters deemed necessary for the proper conduct of a settlement hearing.

Here, the Parties have negotiated the form of a notice ("Class Notice," attached as Exhibit "A" to Exhibit 1 of the Declaration of Daniel Bass.). The Notice will be disseminated to all people who fall within the definition of the Settlement Class and whose names and addresses have already been identified from Defendant's records. In addition, Notices returned as undeliverable will be subjected to a further follow up and re-mailing procedure as detailed in the Settlement Agreement.

With regard to the content of the Notice, the proposed version meets all requisite levels for appropriately providing full disclosure and information to the class members. "Notice is satisfactory if it generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." 4 Newberg on Class Actions § 8.32 at 8-103. As such, the Class Notice is proper and affords the best possible notice under the circumstances presented in this case.

IV. THE CLASS SHOULD BE PROVISIONALLY CERTIFIED FOR SETTLEMENT

Courts have generally found that class action suits are appropriate "when the question is one of a common or general interest . . . or when the parties are numerous, and it is impracticable to bring them all before the court." *Cal. Civ. Proc.* § 382; *see also Richmond v. Dart Indus., Inc.* (1981) 29 Cal.3d 462, 469-75. In order to sustain a class action, two requirements must be met: (1) there must be an ascertainable class; and (2) there must be a "well-defined community of interest in the questions of law and fact involved affecting the parties to be represented." *Daar v. Yellow Cab. Co.* (1967) 67 Cal.2d 695, 704. As a general rule, a community of interest is established where (1) there are predominant common questions of law or fact; (2) the named Plaintiff has "claims or defenses typical of the class"; and (3) the named Plaintiff is able to adequately represent the class. *See Dunk*, 48 Cal.App.4th at 1806. In order to ensure the efficient use of judicial resources, California law and policy favors the fullest and most flexible use of the class action device. *Richmond*, 29 Cal.3d at 469-75.

As stated above, the settlement class is clearly defined and comprises approximately 91 individuals, which is sufficiently numerous to warrant the use of the class action device. The Class is readily ascertainable and, in fact, Defendants have agreed to provide the names and contact information for the Class to the Settlement Administrator. *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932 (finding "[c]lass members are 'ascertainable' where they may be readily identified without unreasonable expense or time by reference to official records.")

Similarly, common questions of law and fact exist among Class Members in this case. *See Clothesrigger, Inc. v. GTE Corp.* (1987) 191 Cal.App.3d 605, 612; *Lazar v. Hertz Corp.* (1983) 143 Cal.App.3d 128, 138-39. At a minimum, some of the common questions of law and fact affecting the Class include: (1) whether Defendants adequately compensated Class Members for

all hours worked, including overtime wages; (2) whether Defendants failed to pay all wages due to Class Members within the required time upon their discharge or resignation; (3) whether the wage statements Defendants provided to Class Members complied with California law; (4) whether Defendants deprived Plaintiff and other Class Members of meal and/or rest periods or required Plaintiff to work during meal and/or rest periods without compensation or failed to properly compensate Class Member and Plaintiff for rest periods and meal periods; and (5) whether Defendant's policies and practices violate California's Unfair Competition Law. Further, Plaintiff was able to evaluate such claims by reviewing common evidence such as Defendant's uniform employment policy and procedure documents. *Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 36 ("class litigation may be appropriate if the circumstances of a particular case demonstrate that there is common evidence").

The complex common questions implicated by the facts and law in this case strongly suggest that Settlement Class members could not do substantially better than this Settlement by litigating individually. *See Dunk, supra*, 48 Cal.App.4th at 1807, fn. 19. Commonality and predominance requirements for certification, particularly in the less intensive context of a Settlement Class, are therefore satisfied.

Finally, Plaintiff's claims are typical of class members' claims and Plaintiff has and will adequately represent the settlement class. Specifically, Plaintiff falls within the class definition and was subjected to the same policies, procedures, and practices giving rise to the claims in this action. *See Amchem Products, Inc. v. Windsor* (1997) 521 U.S. 591, 625-26 ("[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members."). Plaintiff has pursued his case via highly experienced counsel (*Bass Decl.* ¶¶ 48-53). Plaintiff has fulfilled his duties as class representative throughout the litigation, spending time and effort to gather relevant documents and information, providing the facts and evidence necessary to prove the allegations, and discussing his employment with Class Counsel.

V. ACTION REQUESTED FOR THE MOTION FOR PRELIMINARY APPROVAL

Plaintiff respectfully requests for this Court, as part of the preliminary-approval process, to grant the following relief and make the following orders:

1. Consider and determine that the proposed class action settlement as set forth in the Settlement Agreement preliminarily appears fair, reasonable, and adequate;
2. Conditionally certify the action as a class action for settlement purposes only;
3. Appoint Ronald W. Makarem, Samuel Almon, and Daniel J. Bass of Makarem & Associates, APLC to serve as Class Counsel;
4. Appoint Plaintiff as Representative Plaintiff for settlement purposes;
5. Approve CPT Group, Inc as the settlement administrator to handle the notice and claims procedures as set forth in the Stipulation;
6. Order Defendants to provide CPT the Class Member data as set forth in the Settlement Agreement;
7. Approve the Class Notice, which is attached to the Settlement Agreement;
8. Order that CPT mail the Class Notice to class members; and
9. Set a date for the Final Approval Hearing.

VI. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court preliminarily approve the proposed settlement, provisionally certify the Settlement Class, and enter the Proposed Order submitted concurrently herewith.

Dated: January 31, 2023

MAKAREM & ASSOCIATES, APLC

By: *Daniel Bass*

Daniel J. Bass
Attorneys for Plaintiff