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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **COUNTY OF SAN MATEO**

11 WILLIAM M. RIEDL an individual, on behalf
12 of himself and on behalf of all persons
13 similarly situated,

14 Plaintiff,

15 v.

16 OWL, INC. dba OWL TRANSPORTATION,
17 a Florida corporation doing business in
18 California and DOES 1-50, inclusive

19 Defendants.

Case No. 21-CIV-02704

[Action Filed: May 11, 2021]

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

Date: October 30, 2023

Time: 3:00 p.m.

Judge: Honorable Raymond Swope

Dept.: 23

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I. INTRODUCTION

Plaintiff WILLIAM M. RIEDL (“Plaintiff”) seeks preliminary approval of the Class Action and PAGA Settlement Agreement (“Agreement”)¹ in this pending action against OWL INC. dba OWL TRANSPORTATION (“Defendant”), which if approved, would provide valuable monetary relief for approximately 143 Class Members and 79 Aggrieved Employees. The basic terms of the Agreement provide for the following:

1. The “**Class**” and “**Class Period**” shall mean all individuals employed by the Defendant in California in a non-exempt position (“Class”) during the period from March 21, 2016 through April 30, 2023 (“Class Period”). Agreement at I(I).

a. The “**Participating Class Members**” means a Class Member who does not submit a valid and timely Request for Exclusion from the Settlement.

b. The “**Class Size**” is comprised of 143 individuals who collectively worked approximately 9603 Workweeks during the Class Period as estimated by Defendant at the time of mediation. Agreement at § III(A)(2).

2. The “**Aggrieved Employees**” and “**PAGA Period**” means all individuals employed by Defendant in California in a non-exempt position (“Aggrieved Employees”) during the period of May 14, 2020 through April 30, 2023 (“PAGA Period”). Agreement at § I(Y). Aggrieved Employees do not have the ability to opt-out of the PAGA portion of the settlement. At the time of mediation, there were approximately 79 Aggrieved Employees during the PAGA Period.

3. The “**Gross Settlement Amount**” is Two Hundred Eighty-Five Thousand Dollars and Zero Cents (\$285,000.00). Agreement at § III(A)(1). The Gross Settlement Amount includes the following:

a. A “**Class Representative Payment**” of not more than \$10,000 to Plaintiff in recognition of his efforts and risks in assisting with the furtherance of the Action and in exchange for executing a General Release. Agreement at § III(L)(9).

¹ The Agreement is attached as Ex “A” to the Declaration of Attorney Matt Blum (“Blum Dec.”) Further, unless indicated otherwise, capitalized terms used herein have the same meaning as those defined by the Agreement.

b. **“Attorneys’ Fees and Litigation Costs”** in the amount not to exceed one-third of the Gross Settlement Amount for attorney’s fees, currently estimated to be \$95,000.00 **and** litigation expenses not to exceed \$25,000, to be paid to Class Counsel. Agreement at §§ III(L)(10);

c. A **“PAGA Payment”** of Fourteen Thousand Two Hundred and Fifty Dollars (\$14,250.00) shall be allocated from the Gross Settlement Amount for settlement of claims for civil penalties under the Private Attorneys General Act of 2004 (“PAGA Payment”). The Settlement Administrator shall pay seventy-five (75%) of the PAGA Payment (\$10,687.50) to the Labor and Workforce Development Agency (“LWDA PAGA Payment”). Twenty-five percent (25%) of the PAGA Payment (\$3,562.50) will be distributed to the Aggrieved Employees (“Individual PAGA Payment”). Agreement at § III(L)(11)

d. **“Administration Expenses Payment”** not to exceed \$10,000.00 payable to the Settlement Administrator, ILYM GROUP, for, *inter alia*, the administration of the Class Notice and Administration Expenses Payment. Agreement at § III(L)(12)

4. The **“Net Settlement Amount”** (Gross Settlement Amount less the requested Attorneys’ Fees and Litigation Costs, Class Representative Payment, PAGA Payment, and Administration Expenses Payment) which will be allocated to all Participating Class Members on a pro-rata basis according to the number of Workweeks each Settlement Class Member worked during the Class Period. The entire Net Settlement Amount will be paid to all Participating Class Members who do not opt out of the Settlement Class. Agreement at I(T).

As discussed below, the proposed Settlement satisfies all criteria for preliminary settlement approval and falls within the range of reasonableness. Moreover, the proposed Settlement Class is appropriate for provisional certification. Accordingly, Plaintiff respectfully requests the Court grant preliminary approval of the Settlement.

II. FACTS AND PROCEDURE

A. Overview of the Litigation

Defendant provides non-emergency medical transportation services throughout California, including in northern California where Plaintiff worked. Plaintiff worked for Defendant as a

1 driver in California during 2020 as a non-exempt employee and was paid on an hourly basis.
2 Throughout the course of his employment, Plaintiff alleges that was denied legally compliant meal
3 and rest periods, and minimum wages and overtime compensation. Plaintiff further contends that
4 Defendant failed to pay him overtime at the proper rate of pay due to their decision not to factor
5 his hourly fringe benefit payment into the calculation. Blum Dec., ¶ 4.

6 Generally, Plaintiff claims that Defendant failed to pay for all time worked, failed to provide
7 compliant meal and rest periods, failed to furnish accurate itemized wage statements, failed to
8 properly calculate overtime, and failed to pay all wages upon separation. Evidence obtained in
9 discovery including employee timecards supported Plaintiff's allegation(s) that Defendant
10 improperly engaged in the practice of rounding their employees' clock-ins and clock-outs to the
11 nearest fifteen-minute intervals. Further, wage statements and timecards demonstrated that the
12 Defendant engaged in unlawfully deducting employee wages in one-hour intervals, likely in an
13 effort to create phantom meal period, and that they did so without obtaining the signed consent of
14 their employees. Next, timecards, wage statements and the company handbook showed that the
15 Defendant simply failed to include a \$4.18 fringe benefit payment issued to many of their
16 employees as part of the regular rate of pay with respect to their calculation for employee overtime.
17 Next, an analysis of class timecard data demonstrated patterns of short meal periods, late meal
18 period, no meal periods, and class members being forced to work through meal periods.
19 Collectively, the above violations resulted in inaccurate wages statements under Cal. Labor Code
20 § 226(1) (2)(4) and (5). Blum Dec., ¶ 5.

21 On the other hand, Defendant denies liability for each of Plaintiff's claims. Further,
22 Defendant asserts that it fully complied with all applicable employment laws and raised several
23 other significant defenses to Plaintiff's claims. Defendant presented evidence of facially compliant
24 meal and rest break policies, along with evidence of employees' freedom from employer control
25 over timing of meal and rest breaks. See *Brinker Restaurant Corp. v. Superior Court* (2012) 53
26 Cal.4th 1004, 1040 [employer satisfies its obligations to provide a compliant meal and rest period
27 by relinquishing control over activities and permitting a reasonable opportunity to take breaks,
28

1 whether or not employee takes them, timely or otherwise.] Defendants also presented evidence of
2 compliant wage statements, which accurately calculated overtime pay, as well as evidence of
3 timely paid wages due upon separation of employment. Defendants also presented additional
4 evidence that its minimum hourly rates, (\$18), were higher than minimum wage. Blum Dec., ¶ 6.

5 With respect to the claim that fringe benefits were required to be included in the employees'
6 regular rate of pay, Defendants also presented evidence that they were a government contractor,
7 arguing that claims related to inclusion of fringe benefit pay in the regular rate of pay were
8 preempted by the Service Contract Act of 1965 at 41 U.S.C. section 351, et seq. and its
9 accompanying regulations, which expressly state that fringe benefit payments meant to compensate
10 employee for otherwise non-compensable employer-provided health insurance rather than work
11 performed "are excludable from the regular rate in applying overtime provisions." 29 C.F.R.
12 section 4.177(e); see also *Phelps v. Parsons Tech Support* (S.D. IN October 29, 2010) 2010 U.S.
13 District LEXIS 116197, *7-8 [holding fringe benefit payment properly excluded from contractor's
14 employees' regular rate of pay for purposes of calculating overtime.] Additionally, a separate
15 Nationwide class action against Defendants for overtime pay from 2014-2022 was approved in the
16 Middle District of Florida in August 2022, Case No. 6:17-cv-01092-CEM-DAB, *Perez v. Owl, Inc.*
17 on 8/16/2022.² 26 class members are participating in that settlement.³ Blum Dec., ¶ 7.

18 Defendants also noted that Plaintiff was barred from bringing individual or class claims for
19 penalties for alleged violations of Labor Code sections 204 and 210 (alleged failure to timely pay
20 wages), both because Plaintiff's election to pursue PAGA remedies for a violation of Labor Code
21 section 210 bars an individual claim, and because there is no private right of action for a violation
22 of Labor Code section 204. See Labor Code section 210(c) [Plaintiff's election to pursue a violation
23 of this statute through PAGA bars an individual claim; *Johnson v. Hewlett Packard Co.* (N.D. Cal.
24 August 12, 2011) 809 F. Supp. 2d 1114, 1136. Blum Dec., ¶ 8.

26 ² The Federal District Court approved the settlement of a nationwide class of 645 employee opt-ins
27 for a total payment of \$350,000 inclusive of attorney fees and costs.

28 ³ Those class members are participating in this settlement as well as some claims arising from the
California Labor Code sections were not at issue in the federal case.

1 Finally, Defendant presented evidence that its California Operation is small, employing
2 between 20-30 employees at any one time, and that the claims presented by the action were not
3 covered by insurance. The terms of the settlement allow Owl to make 12 monthly payments to fund
4 the settlement fund, which will be fully funded by February 27, 2024, consistent with the anticipated
5 timing of the final settlement in this action. Blum Dec., ¶ 9.

6 On May 14, 2021, Plaintiff served the Labor and Workforce Development Agency
7 (“LWDA”) with a PAGA Notice, setting forth the facts and theories supporting Defendant’s
8 alleged violations of various provisions of the California Labor Code and applicable Industrial
9 Welfare Commissions (“IWC”) Wage Orders. Plaintiff proceeded to file a class action complaint
10 on May 11, 2021 (“The Action”). Shortly thereafter, Plaintiff submitted an amended notice of
11 PAGA claims to the LWDA. Plaintiff then filed a First Amended Complaint which included all
12 operative class and PAGA claims on July 28, 2021. Blum Dec., ¶ 10.

13 The Action alleged nine causes of action against Defendant for: (1) Violation of California
14 Labor Code §§ 510 and 1198 (Unpaid Overtime); (2) Violation of California Labor Code §§ 226.7
15 and 512(a) (Unpaid Meal Period Premiums); (3) Violation of California Labor Code § 226.7
16 (Unpaid Rest Period Premiums); (4) Violation of California Labor Code §§ 1194, 1197, and 1197.1
17 (Unpaid Minimum Wages); (5) Violation of California Labor Code §§ 201 and 202 (Final Wages
18 Not Timely Paid); (6) Violation of California Labor Code § 204 (Wages Not Timely Paid During
19 Employment); (7) Violation of California Labor Code § 226(a) (Non-Compliant Wages
20 Statements); (8) Violation of California Business & Professions Code §§ 17200; and (9) Labor
21 Code Private Attorney General Act under Cal. Labor Code § 2698, *et seq.* Blum Dec., ¶ 11.

22 Plaintiff propounded written discovery in this action on November 22, 2022. After receiving
23 discovery responses, the Parties agreed to mediate this action. To prepare for mediation, the Parties
24 agreed to informally produce additional documents and data points subject to the mediation
25 privilege, including but not limited to, the Class Members’ time data and certain payroll data points.
26 As discussed *infra*, Plaintiff’s counsel retained the forensic consultants at Berger Consulting Group
27 (“BCG”) to analyze Defendant’s time and payroll data. Blum Dec., ¶ 12.

On November 7, 2022, the Parties participated in mediation presided over by Jill Sperber, Esq., an experienced mediator of wage and hour class actions. The mediation concluded without a settlement. However, in the weeks that followed, Sperber made a mediator's proposal. Both Parties agreed to the mediator's proposal which was subsequently memorialized in the form of a preliminary settlement agreement. Thereafter, the Parties drafted and negotiated a long-form settlement agreement, which is the subject of the instant motion and herein attached as Exhibit A to the Declaration of Attorney Matt Blum. Blum Dec., ¶ 13.

B. Class Counsel Thoroughly Investigated the Factual and Legal Issues

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

Class Counsel subsequently requested Plaintiff's employee files from Defendant. In response, Defendant produced responsive documents, including but not limited, copies of Plaintiff's hiring documents and payroll and time records. Class Counsel reviewed and analyzed the documents and determined the documents appeared to substantiate Plaintiff's claim that Defendant's failed to, among other things, provide accurate wage statements, failure to properly incorporate fringe benefits payments into the overtime rate calculation, and a failure to provide compliant meal and rest periods. Blum Dec., ¶ 15.

To prepare for mediation, Defendant produced additional time and payroll records for the Class Members, aggregate workweek and pay period data for the Class Members, aggregate meal premiums paid to the Class Members, average hourly rate for the Class Members, and copies of applicable handbooks, policies, and agreements. In total, Class Counsel reviewed hundreds of documents. Blum Dec., ¶ 16.

Class Counsel then retained the statisticians and economists at Berger Consulting Group

1 “BCG” to evaluate the Class Members’ payroll and time data. BCG provides data analysis and
2 damage modeling consulting services, specializing in wage and hour class actions. BCG’s team
3 of financial and data analysts are credentialed and experienced experts in their fields and have
4 provided their expertise on thousands of cases. Blum Dec., ¶ 17.

5 BCG analyzed Defendant’s time and payroll data to assist in the development of various
6 damage models. Among other things, BCG determined the approximate number of unpaid wages,
7 amount of unpaid overtime wages, number of workweeks, pay periods, average length of shifts and
8 average number of hours worked per week. BCG also estimated the number of missed, late, or
9 truncated meal and rest periods, the amount of unpaid wages, the amount of unpaid overtime, and
10 the amount of missed meal and rest periods during the Class Period. Blum Dec., ¶ 18.

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

23 Class Counsel only agreed to enter the Settlement following this thorough investigation and
24 evaluation of Plaintiff’s claims. Based on its investigation of the facts, applicable law, and
25 marketplace for similar settlements, and considering the risk of significant delay and uncertainty
26 associated with litigation, and the various defenses asserted by Defendant, Class Counsel firmly
27 believe this Agreement to be in the best interests of the Class Members. Because the Settlement’s
28

terms are fair, reasonable, and adequate, the Court should preliminarily approve the Settlement.
Blum Dec., ¶ 20.

C. The Proposed Settlement Fully Resolves Plaintiff's Claims

1. The Composition of the Participating Class Members

The proposed Settlement Class consists of all individuals who were paid on an hourly basis by Defendant and performed work in California between March 21, 2016 through April 30, 2023. The Settlement Class excludes any person who submits a timely and valid request for exclusion. Defendant estimates that the Settlement Class is comprised of 143 individuals that worked approximately 9603 workweeks during the Class Period.⁴ Agreement at § III(A)(2).

2. The Settlement Consideration

The Parties agreed to settle the underlying class claims in exchange for the Gross Settlement Amount of Two Hundred and Eighty-Five Thousand Dollars (\$285,000.00). The Gross Settlement Amount includes: (1) Individual Class Payments to the Settlement Class; (2) a Class Representative Payment of not more than \$10,000 to Plaintiff for his services on behalf of the Settlement Class and, equally important, for a general release of claims; (3) a PAGA Payment in the amount of \$14,250.00; (4) Administration Expenses Payments not to exceed \$5,000.00; (5) Attorneys' Fees and in the amount of \$95,000.00, which is equal to one-third of the Gross Settlement Amount, and actual litigation costs incurred not to exceed \$25,000.00. See generally Agreement at III(A)(1).

Subject to the Court approving the Class Representative Payment, Attorneys' Fees and Litigation Costs, PAGA Payment, and the Administration Expenses Payment, the Net Settlement Amount will be distributed to each participating member of the Settlement Class Member. There is no reversion to Defendant and Defendant must separately pay for its share of the employer payroll taxes. Agreement at § III(A)(1)

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⁴ Many of the class members worked part-time, or were not scheduled to work during all weeks of employment. Because workweeks were calculated based on dates of employments rather than weeks actually worked, the total includes weeks where employees were employed but did not perform work.

1 3. The Funding Date

2 Assuming there are no objectors, and no appeal is filed, Defendant will fund the Gross
3 Settlement Amount by February 24, 2024 (“Funding Date”), or within fourteen (14) days of the
4 Court’s entry of the order granting final approval of this Settlement, whichever is later. Agreement
5 at § III(A)(1).

6 4. Formula for Calculating Individual Class Payments

7 Participating Class Members will receive an Individual Class Payment. The Individual Class
8 Payment will be proportional to the number of Workweeks each Class Member worked for
9 Defendant in California during the Class Period. The Class Data provided by Defendant to the
10 Settlement Administrator will include, among other things, the number of Workweeks for each
11 Class Member and the number of PAGA Pay Periods worked during the relevant periods. Each
12 Class Member’s final Individual Class Payment for purposes of payment will be calculated by
13 using a fraction, the numerator of which is the Class Member’s total number of Workweeks, and
14 the denominator of which is the total number of Workweeks of all Class Members. Agreement at
15 § (III)(L) et seq. For purposes of these calculations, a Workweek shall mean any week during
16 which a Class Member worked for Defendant for at least one day during the Class Period. Id.
17 Each Individual Class Payment will be reduced by any legally mandated employee tax
18 withholdings (e.g., employee payroll taxes, etc.). Individual Class Payments for members of the
19 Settlement Class who submit valid and timely requests for exclusion will be redistributed to
20 Participating Class Members on a pro rata basis. Id.

21 5. Release by Participating Class Members

22 Generally, as of the Funding Date, Plaintiff and the Participating Class Members will agree
23 to release the Released Parties from the Released Class Claims that accrued during the Class
24 Period. Agreement at §III(B).

25 6. PAGA Release by the State of California on behalf of the Aggrieved Employees

26 Generally, as of the Funding Date, Plaintiff, acting as the representative of the State of
27 California, on behalf of the Aggrieved Employees, will release the Released Parties from the
28

Released PAGA Claims that accrued during the PAGA Period. Agreement at §III(C).

III. ARGUMENT

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

The proposed Settlement, including a Gross Settlement Amount of \$285,000.00 meets the standards for preliminary approval. Pre-trial settlement of complex class actions is a judicially favored remedy. (*Officers for Justice v. Civil Serv. Comm’n* (9th Cir. 1982) 688 F.2d 615, 625 (“Voluntary conciliation and settlement are the preferred means of dispute resolution.”).) Class action settlement approval requires an early “preliminary” review by the trial court and a subsequent “final” review after notice of the settlement has been distributed to class members for their comments and objections. (C.R.C. 3.769(c)-(g); *Cellphone Termination Fee Cases*, 180 Cal. App. 4th 1110, 1118 (2010) (the court first “preliminarily approves the settlement” and later “conducts a final approval hearing to inquire into the fairness of the proposed settlement”).)

Although Rule of Court Rule 3.769 does not provide detail as to the scope of review of the proposed settlement, preliminary approval is warranted if the settlement falls within a “reasonable range.” (*See North County Contractor’s Assn., Inc. v. Touchstone Ins. Services* (1994) 27 Cal.App.4th 1085, 1089-90; Conte & Newberg, *Newberg on Class Actions*, §§ 11.26 (4th ed. 2002).) Reasonableness and fairness are presumed where: (1) the settlement is reached through “arms-length bargaining;” (2) investigation and discovery are “sufficient to allow counsel and the court to act intelligently;” (3) counsel is “experienced in similar litigation. . . .” (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802.) The presumption of fairness is consistent with California’s public policy goal of favoring settlements. (*Stambaugh v. Super. Ct* (1976) 62 Cal.App.3d 231, 236 (“the law wisely favors settlements”); *Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1118 (“public policy generally favors the compromise of complex class action litigation”); *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1151 (“voluntary conciliation and settlement are the preferred means of dispute resolution ... [t]his is especially true in complex class action litigation”).)

Additionally, in reviewing the fairness of a class action settlement, due regard should be

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

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

8 “[W]hat transpires in settlement negotiations is highly relevant to the assessment of a
9 proposed settlement’s fairness.” (*State v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 482.)

10 The Parties participated in mediation the highly respected mediator Jill Sperber. Mediator
11 Sperber managed the Parties’ expectations and provided a useful, neutral analysis of the issues and
12 risks to both sides. (*In re Apple Computer, Inc. Derivative Litig*, No. C 06-4128 JF (HRL), 2008
13 U.S. Dist. LEXIS 108195 (N.D. Cal. Nov. 5, 2008) (mediator’s participation weighs considerably
14 against any inference of a collusive settlement); *D’Amato v. Deutsche Bank* (2d. Cir. 2001) 236
15 F.3d 78, 85 (a “mediator’s involvement in pre-certification settlement negotiations helps to ensure
16 that the proceedings were free of collusion and undue pressure.”).)

17 Once the Parties agreed to the Mediator’s proposal, the Parties engaged in negotiations
18 regarding the written terms of the class action settlement. The Agreement is the final product of
19 the mediated negotiations. Objectively, the Settlement terms are fair, adequate and represent a
20 reasonable compromise of the claims at issue. Blum Dec., ¶ 21.

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

23 As set forth in greater detail above, Class Counsel conducted a very thorough investigation
24 into the factual and legal issues in dispute. In addition to informal discovery, document review,
25 data analysis and legal research, Class Counsel also researched similar wage and hour actions.
26 Although no two cases are identical, this research provided Class Counsel with a marker to inform
27 settlement discussions and, ultimately, to measure this settlement against. The investigation
28

1 allowed Class Counsel to realistically assess the value of Plaintiff's claims and intelligently engage
2 defense counsel in settlement discussions that culminated in the proposed settlement now before
3 the Court. Blum Dec., ¶ 22.

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

5 The Gross Settlement Amount of \$285,000.00 is within the range of reasonableness. To
6 determine whether a settlement is fair and reasonable, the court should "consider enough
7 information about the nature and magnitude of the claims being settled, as well as the impediments
8 to recovery, to make an independent assessment of the reasonableness of the terms to which the
9 parties have agreed." (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133.) In
10 making this determination, the court is "not to try the case" but rather "satisfy itself that the class
11 action settlement is within the 'ballpark of reasonableness.'" (*Id.*). For this analysis, courts do "not
12 require any such explicit statement of value; [they] require a record which allows an understanding
13 of the amount that is in controversy and the realistic range of outcomes of the litigation." (*Munoz*
14 *v. BCI Coca-Cola Bottling Co.* (2010) 186 Cal.App.4th 399, 409 (internal citation omitted).) The
15 reasonableness of a settlement is not dependent upon its actual value approaching the potential
16 recovery plaintiffs might have received if they had succeeded at trial.⁵ Indeed, "[t]he determination
17 whether a settlement is reasonable does not involve the use of a 'mathematical equation yielding a
18 particularized sum.'" (*Frank v. Eastman Kodak Co.* (W.D.N.Y. 2005) 228 FRD. 174, 186 (quoting
19 *In re Michael Milken and Assoc. Sec. Litig.* (S.D.N.Y. 1993) 150 F.R.D. 57, 66).)

20
21 ⁵ Federal district courts recognize that there is an inherent "range of reasonableness" in determining
22 whether to approve a settlement "which recognizes the uncertainties of law and fact in any particular
23 case and the concomitant risks and costs necessarily inherent in taking any litigation to completion."
24 *Newman v. Stein* (2d. Cir. 2002) 464 F.2d 689, 693; see *In re Omnivision Tech, Inc.* (N.D. Cal.
25 2008) 559 F.Supp.2d 1036; see also *Nat'l Rural Telecomm. Coop. v. Directv. Inc.* (C.D. Cal. 2004)
26 221 F.R.D. 523, 527 ("well settled law that a proposed settlement may be acceptable even though
27 it amounts to only a fraction of the potential recovery"); *In re Global Crossing Sec. and ERISA*
28 *Litig.* (S.D.N.Y. 2004) 225 F.R.D. 436, 460 ("settlement amount's ratio to the maximum potential
recovery need not be the sole, or even dominant, consideration when assessing settlements
fairness"); *In re IKON Office Solutions, Inc Sec Litig.* (E.D. Pa. 2000) 194 F.R.D. 166, 184 ("the
fact that a proposed settlement constitutes a relatively small percentage of the most optimistic
estimate does not, in itself, weigh against the settlement; rather the percentage should be considered
in light of strength of the claims"); *Officers for Justice v. Civil Serv. Comm.* (9th Cir. 1982) 688 F.2d
615, 628 (it is "the complete package, taken as a whole rather than the individual component parts,
that must be examined for overall fairness").

1 a. The Gross Settlement Amount Meets the Recognized Range of
2 Reasonableness.

3 The Gross Settlement Amount of \$285,000.00 is fair and reasonable considering the nature
4 and magnitude of the claims being settled and the various potential impediments to recovery. Prior
5 to mediation, Class Counsel retained BCG to develop economic damage models measuring
6 Defendant's liability exposure while accounting for the uncertainties of continued litigation.

7 The various models were informed by Class Counsel's investigation, including the analysis
8 of a significant sample of time and payroll data. Class Counsel projected Defendant's liability
9 soaking wet exposure for *class claims* (excluding PAGA Penalties) was approximately \$2,508,083
10 inclusive of *all* damages, interest and waiting time penalties ("Maximum Class Damages") if
11 successful at trial. Without the inclusion of penalties and interest, the total Class Damages was
12 estimated at \$1,564,822.00. Plaintiff's experts further calculated a total of \$1,557,700 in *potential*
13 PAGA penalties. Blum Dec., ¶ 23

14 That being said, a careful review of Defendant's arguments and the governing caselaw
15 resulted in class-counsel reducing Defendant's total expected exposure, inclusive of interest,
16 waiting time penalties and PAGA penalties, to \$976,918.05, of which the \$285,000.00 settlement
17 represents a 29.1% recovery. The following summarizes Defendant's liability exposure. Blum
18 Dec., ¶ 23.

19 (1) Exposer for Failure to Pay Wages (Min. Wage and Overtime)

20 Plaintiff has asserted that Defendant failed to pay all wages based on 1) An improper
21 rounding policy; and 2) Unlawful deductions of wages. The total exposure for these claims is
22 \$375,189⁶. For purposes of negotiation, Plaintiffs reduced the exposure by 50% to \$187,594.50
23 based on recent case law suggesting a court might uphold the rounding policy⁷. Furthermore, Owl

24 ⁶ \$101,797 for deductions, \$194,079 for off-the-clock work as a result of rounding, and \$79,313 for
25 derivative overtime claims.

26 ⁷ See *Ferra v. Loews Hollywood Hotel, LLC* (2019) 40 Cal.App.5th 1239, 1255, reversed on other
27 grounds, 11 Cal.5th 858 (upholding nearest quarter-hour rounding with grace period policy; "a
28 system can be fair or neutral even where a small majority loses compensation"); *Donohue v. AMN
Servs., LLC* (2018) 29 Cal.App.5th 1068, 1085, reversed on other grounds, 11 Cal.5th 58 (granting
summary judgment for employer); *Utne v. Home Depot U.S.A., Inc.* (N.D. Cal., Dec. 4, 2017) 2017
WL 5991863 at *3 (granting summary judgment for employer; noting "rounding contemplates the

1 could defeat certification by successfully arguing it is Plaintiffs' burden to prove employees were
2 actually working during the rounded "windows", which would require individual inquiry. This is
3 especially problematic when factual disputes exist as to the nature of the rounded (deleted) time.
4 Blum Dec., ¶ 24.

5 (2) Exposure for Regular Rate Violations

6 Under California law, overtime work must be paid at a rate of "no less than one-and-onehalf
7 times the regular rate of pay" for that employee. Cal. Lab. Code § 510(a); California IWC Wage
8 Order No. 7 § 3(A)(1). Significantly, an employee's "regular rate of pay" for purposes of Labor
9 Code section 510 and the IWC wage orders is not the same as the employee's straight time rate
10 (i.e., his or her normal hourly wage rate). The regular rate of pay, which can change from pay
11 period to pay period, includes adjustments to the straight time rate, reflecting, among other things,
12 non-discretionary bonuses and awards, shift differentials and the per-hour value of any non-hourly
13 compensation the employee has earned. *Alvarado v. Dart Container Corp. of California* (2018) 4
14 Cal.5th 542, 552–54. For overtime work, "an employee must receive a 50 percent premium on top
15 of his or her regular rate of pay[.]" Id. at 553 (emphasis added). The Divisions of Labor Standards
16 Enforcement ("DLSE") Enforcement Policies and Interpretations Manual addresses how to
17 calculate the "regular rate" of pay. For purposes of applying the overtime pay requirements, an
18 employer must factor the per-hour value of all non-discretionary compensation, like bonuses and
19 awards, into an employee's regular rate of pay for the relevant pay period. See *Alvarado v. Dart*
20 *Container Corp. of California*, 4 Cal.5th 542, 559(2018). Once the RROP is determined, the
21 employer must pay overtime hours at 1.5 times the RROP. Whether California Labor Code section
22 510 requires overtime wages to be calculated as 1.5 times an employee's RROP—and not less—is
23 not a legal question on which there is substantial ground for difference of opinion. See *Alvarado*,
24 4 Cal.5th at 553 ("an employee must receive a 50 percent premium on top of his or her regular rate
25 of pay".) In the present case, Defendant simply failed to include the \$4.18 fringe benefit as part of
26 the regular rate of pay with respect to their calculation for employee overtime. When this figure is

27 possibility that in any given time period some employees will have net overcompensation and some
28 will have net under compensation").

1 extrapolated out over the entire class period, the damages come to \$91,523.00. The failure to issue
2 this payment further triggers PAGA penalties for failing to pay timely wages, waiting time
3 penalties associated with a failure to timely pay wages, and PAGA penalties for inaccurate wage
4 statements. Blum Dec., ¶ 25.

5 In response, Defendant primarily raised an argument of preemption, citing the Service
6 Contracts Act, which specifically sets forth how fringe benefits are to be provided and paid to a
7 federal contractor's employees, and states that fringe benefits payments are not to be considered as
8 part of the regular pay rate for purposes of calculating overtime: 29 CFR sections 4.180 and
9 4.182. Blum Dec., ¶ 26.

10 In response, Plaintiff argued that California courts have held that state laws providing a
11 higher-level of protection to workers supersedes federal law. (see, e.g., *Tidewater Marine Western,*
12 *Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 566-568; *Morillion v. Royal Packing Co.* (2000) 22
13 Cal.4th 575, 592; *Skyline Homes, Inc. v. Department of Industrial Relations* (1985) 165 Cal.App.3d
14 239, 250-251.) With the California law here offering greater pay to employees than the FLSA, the
15 argument was that it would supersede the Service Contracts Act. Blum Dec., ¶ 27.

16 Similar regular rate calculation conflicts between the FLSA and California law have recently
17 been addressed. In *Alvarado v. Dart Container Corp. of California* (2018) 4 Cal. 5th 542, the
18 California Supreme Court looked at a conflict between the California Labor Code and the FLSA
19 with respect to the calculation of regular rate of pay on overtime premiums. At issue in *Alvarado*
20 was how to calculate the per-hour value of a lump sum bonus of \$15 per day for purposes of regular
21 rate payment under California law. At issue was DOL regulation 29 C.F.R. 778.110(b), which calls
22 for an employer to divide the weekly bonus amount by the *total hours* actually worked by the
23 employee in the week. This is how the employer calculated *Alvarado's* regular rate. However, this
24 approach directly conflicted with California law, which requires that the per-hour value of a lump
25 sum bonus be calculated by dividing the lump sum by the number of *non-overtime* hours worked
26 in the week. In analyzing several of the cases cited above, the California Supreme Court held that
27 that the employer had erred in following the FLSA guideline as opposed to the more protective
28

1 California law. Blum Dec., ¶ 28.

2 While *Alvarado* seemed to be on-point, issues of preemption for a different statutory scheme
3 presented potential risk were this case to be decided by summary judgment. Given this risk,
4 Plaintiff's counsel felt that it was appropriate to discount this exposure by 50%, which would result
5 in approximately \$45,761.00 that was not properly included in employee overtime calculations.
6 Blum Dec., ¶ 29.

7 (3) Exposure for Meal Period Violations

8 Plaintiff also alleges that Defendant failed to provide compliant meal periods. Specifically,
9 Plaintiff alleges that as a result of their rigorous work schedules, Plaintiff, Class Members, and
10 Aggrieved Employees were not able to take timely and duty-free meal periods. Consequently,
11 Plaintiff alleges that he is owed meal period premiums for meal period violations that occurred
12 during the Class Period. Defendant argued, among other things, that it provided all their employees,
13 i.e., Class Members and Aggrieved Employees, with the opportunity to take compliant meal
14 periods. Defendant presented evidence of facially compliant meal and rest break policies, along
15 with evidence of employees' freedom from employer control over timing of meal and rest breaks.
16 Blum Dec., ¶ 30. Based on the facially compliant policies and the need for anecdotal testimony at
17 trial, Plaintiff's counsel felt that it was appropriate to reduce the total exposure (\$500,542) related
18 to all meal break violations by 50%, which would equal \$250,271.00. Blum Dec., ¶ 30.

19 (4) Exposure for Rest Period Violations

20 Plaintiff also alleged that Defendant failed to provide compliant rest periods. On many
21 occasions, Plaintiff was placed on a tight transportation schedule that simply did not afford him the
22 ability to take a rest break. As a result, Plaintiff's rest periods were often on-premises, on-duty,
23 and/or on call, and often interrupted. Again, Defendant denied liability and asserted that it
24 maintained legally compliant rest period policies and practices throughout the Class Period.
25 Defendant also argued that because Wage Order 15 applied, employees were exempt from rest
26 period requirements, which would completely eliminate liability for Plaintiff's rest period
27 violations. Moreover, Plaintiff recognizes the evidentiary burdens establishing this claim.
28 Establishing Plaintiff's rest period claim would rely, almost entirely, on Class Member testimony,

1 making it a riskier claim at class certification and liability stages. Certification likely would have
2 required depositions of Class Members who provided declarations, and Defendant surely would
3 have obtained opposing declarations stating either rest breaks were taken, or rest breaks were
4 voluntarily waived. *See, e.g., Ordonez v. Radio Shack, Inc.* (C.D. Cal. Jan. 17, 2013) 2013 WL
5 210223, at *11 (“Because of the competing testimony before the Court, plaintiff’s evidence that
6 defendant may have an illegal, written rest break policy is insufficient for this Court to find that
7 common issues predominate.”); *Villa v. United Site Servs. of California, Inc.* (N.D. Cal. Nov. 13,
8 2012) 2012 WL 5503550, at *8 (“Indeed, Plaintiff’s own evidence confirms that the written policy
9 does not generate uniform practices.”). As a result of these potential issues, Plaintiff’s counsel felt
10 that it was appropriate to discount the total rest break exposure (\$627,789.00) violations by 80%,
11 which would equal \$125,557.80. Blum Dec., ¶ 31.

12 (5) Exposure for Wage Statement Violations – Derivative

13 Plaintiff also alleged that Defendant failed to furnish its employees with accurate itemized
14 wage statements. Specifically, Plaintiff alleges that as a result of Defendant’s failure to provide
15 proper overtime pay, as well as meal periods as required by the California Labor Code, Plaintiff
16 and other Class Members are entitled to derivative wage statement penalties. (*See Naranjo v.*
17 *Spectrum Security Services* (2022) 13 Cal. 5th 93 (concluding that meal premiums are “wages”
18 entitling employees to derivative wage statement penalties). Further, Defendant argued that even
19 it failed to furnish accurate wage statements, Plaintiff could not establish the injury requirement on
20 a class-wide basis. Per the expert report, wage statement penalties carried a maximum of \$147,550,
21 but were completely dependent on prevailing on one of the prior causes of action. To recover,
22 Plaintiffs must prove the underlying violations and prove Owl intentionally and willfully withheld
23 such wages. *Pedroza v. PetSmart, Inc.* (C.D. Cal. June 14, 2012) 2012 U.S. Dist. LEXIS 189530
24 *20. Further, the good faith defense to willfulness is clearly established under California law. *In*
25 *Re Nordstrom Comm’n Cases* (2010) 186 Cal. App. 4th 576, 584 (“There is no willful failure to
26 pay wages if the employer and employee have a good faith dispute as to whether and when the
27 wages were due.”). Owl would also assert that to the extent this claim depends on unpaid rest and
28 meal period premiums, it has no value. In light of the proof required to establish this violation, the

1 good faith defense, and the obstacles to certification, and success at trial, the realistic exposure was
2 reduced by 75% to \$36,887.50. Blum Dec., ¶ 32.

3 (6) Exposure for Waiting Time Penalties – Derivative

4 An employer must pay all wages due to an involuntarily terminated employee at the time of
5 termination, or within 72 hours to one voluntarily terminating. Labor Code § 203. If an employer
6 willfully fails to timely pay all wages to separated employees, the wages continue at the same rate
7 for up to 30 days. The statute of limitations is three years. Labor Code § 203(b).

8 Owl’s maximum exposure on this claim was estimated at \$700,301.00. To prevail, Plaintiffs
9 must prove the underlying claims, and to prove the failure to pay final wages was “willful.” To
10 extent this claim depends on the failure to pay rest and meal period premium wages, it also fails.
11 Naranjo, supra. This claim is also subject to Owl’s good faith defense, precluding imposition of
12 waiting time penalties under Labor Code § 203. In Re Nordstrom Comm’n Cases, supra. In light
13 of the foregoing, proving the underlying claims, Owl’s good faith defense, and the difficulties of
14 obtaining certification, the realistic exposure on this claim was reduced by 75% to \$175,075.25.
15 Blum Dec., ¶33

16 (7) Defendant’s PAGA Exposure

17 Class Counsel’s damage models also estimated Defendant’s exposure for PAGA penalties.
18 At the time of mediation, Plaintiff estimated Defendant’s PAGA exposure at \$1,557,700.00. Blum
19 Dec., ¶ 23. The proposed PAGA allocation of the Gross Settlement Amount is fair, just, and
20 reasonable. *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 77. Where settlements “negotiate
21 a good faith amount” for PAGA penalties and “there is no indication that this amount was the result
22 of self-interest at the expense of class members,” such amounts are generally considered reasonable.
23 *Hopson v. Hanesbrands Inc.*, No. CV-08-0844 EDL, 2009 WL 928133, at *9 (N.D. Cal. Apr. 3,
24 2009). Courts routinely approve of amounts for PAGA penalties in the range of zero to two percent
25 of the settlement. *See id.* at *1, 9 (approving a PAGA payment of 0.3%); *Jack v. Hartford Fire Ins.*
26 *Co.*, No. 09cv1683 MMA (JMA), 2011 WL 4899942, at *6 (S.D. Cal. Oct. 13, 2011) (approving a
27 PAGA payment of 0.25%); *McKenzie v. Fed. Express Corp.*, No. CV 10-02420 2012 WL
28

1 12882124, at *5 (C.D. Cal. Jan. 23, 2012) (acknowledging that courts approve PAGA claim
2 settlements in the range of zero to two percent of the total settlement).

3 Under PAGA, Courts have considerable discretion to reduce the penalty award. In *Fleming*
4 *v. Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011), a federal court reduced PAGA
5 penalties from \$2,800,000 to \$500,000, a reduction of 82.2%, because the court found maximum
6 penalties "unjust" because the employees had suffered no injuries. Some trial courts have actually
7 awarded no civil penalties, even when Labor Code violations are established. See *In re Nordstrom*
8 *Com. Cases*, 186 Cal.App.4th 576, 589 (2010) (affirming an award of \$0 in PAGA penalties in a
9 wage and hour class action); *In re Taco Bell Wage & Hour Actions*, 2016 U.S. Dist. LEXIS 48557,
10 *40-43 (E.D. Cal. Apr. 6, 2016) (PAGA penalties denied after trial).

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

17 Plaintiffs further considered the court may deem a PAGA trial unmanageable given the need
18 to interview Class Members as to rest and meal period violations. Based on the risks of not proving
19 the underlying claims, and the discretionary nature of PAGA penalties, Plaintiffs' realistic exposure
20 was discounted for purposes of Settlement by 90% to \$155,770. Blum Dec., ¶ 34.

21 **b. Inherent Risks of Continued Litigation Support Preliminary Approval**

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

27 With respect to the most immediate challenge, i.e., class certification, the risks attendant to
28

1 the certification of similar wage and hour claims are demonstrated by *Magadia v. Wal-Mart*
2 *Associates, Inc.* (9th Cir. 2021) 999 F.3d 668. There, the Ninth Circuit, vacated, reversed, and
3 remanded a \$110 million judgement against an employer for, *inter alia*, inaccurately paying
4 overtime, and directed the trial court to enter judgement in favor of the employer. *See also*
5 *O’Conner v. Uber Technologies, Inc.* (9th Cir. 2018) 904 F.3d 1087 (decertification of wage and
6 hour misclassification action); *see also Duran v. U.S. Bank National Association* (2014) 59 Cal.4th
7 1, 31 (reversing a trial verdict in favor plaintiffs in a wage and hour class action)); *Tien v. Tenet*
8 *Healthcare Corp.* (2012) 209 Cal.App.4th 1077, 1088 (“[T]he reason, if any, that employees might
9 not take their breaks were predominantly individualized questions of fact not susceptible to class
10 treatment.”); *A.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333, 1341 (affirming denial of certification
11 because employees’ declarations attesting to having taken meal and rest breaks demonstrated that
12 individualized inquiries were required to show harm); *Campbell v. Best Buy Stores, L.P.*, (C.D.
13 Cal. 2013) 2013 WL 5302217 at *11-13 (following *Brinker* and denying certification of proposed
14 off-the-clock and rest and meal break classes due to lack of uniform policy); *Brown v. Fed Express*
15 *Corp.* (C.D. Cal. 2008) 249 F.R.D. 580, 587-88 (denying certification of driver meal and rest period
16 claims based on the predominance of individual issues). Collectively, the examples cited above
17 illustrate the uncertain nature of class litigation. Consequently, the uncertainty of obtaining
18 certification through a contested motion is a significant risk factor favoring settlement. Blum Dec.,
19 ¶ 37.

20 “The Settlement eliminates these and other risks of continued litigation, including the very
21 real risk of no recovery after several years of litigation.” (*In re Nvidia Derivs. Litig.* (N.D. Cal.
22 2008) 2008 WL 5382544, at *3.) Indeed, potential appeals aside, litigating a complex case through
23 trial is inherently perilous regardless of the strengths of merits of the claims: “[N]othing is assured
24 when litigating against commercial giants with vast litigative resources, particular in such complex
25 litigation as this, which would strain the cognitive capacities of any jury. Defense judgments were
26 hardly beyond the realm of possibility. Accordingly, this factor weighs in favor of preliminary
27 approval.” (*Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1140, *opinion modified*
28

(June 18, 1990).)

Finally, continuing to litigate this action would require continued and extensive resources coupled with significant Court time to proceed through trial and post-trial motions; which can often take years. Furthermore, wage and hour litigation is complex and expensive, as it often necessitates extensive expert testimony, particularly with regards to damages. But even if Plaintiff is successful at trial, Plaintiff is acutely aware that a judgment does not end the litigation. Plaintiff fully expects that Defendant would appeal any favorable judgment. As demonstrated by *Magadia, supra*, 999 F.3d 668, the risk of an appeal and subsequent reversal is real. “Avoiding such a trial and the subsequent appeals in this complex case strongly militates in favor of settlement rather than further protracted and uncertain litigation.” (*Nat’l Rural Telecomms. Coop v. DirecTV* (C.D. Cal. 2004) 221 F.R.D. 523, 527.) Thus, “unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.” (*Id.* at 526.) Blum Dec., ¶ 35.

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

The Settlement Class is entitled to the best practical notice under the circumstances. (*Kass v. Young* (1977) 67 Cal.App.3d 100, 106.) The purpose of the notice is to give class members sufficient information to decide whether they should accept the benefits offered, opt out and pursue their own remedies, or object to the settlement. (*Trotsky v. Los Angeles Fed Savings & Loan Assn.* (1975) 48 Cal. App. 3d 143, 151-52.) The notice must advise class members “that they may be excluded from the class if they so request and that they will be bound by the judgment, whether favorable or not, if they do not request exclusion.” (*Kass*, 67 Cal.App.3d at 106.) Authorities generally require service of the class notice by mail or similar reliable means. (*Chance v. Super. Ct.* (1962) 58 Cal.2d 275, 290; *Cart v. Super. Ct.* (1975) 50 Cal.App.3d 960, 972.)⁸

⁸ Due process does not require that each class member actually receive a notice, but rather a procedure reasonably certain to reach class members. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1789, at 253 (2d ed. 1986). If appropriate notice is given, class members will be bound by the judgment even if they never actually receive the notice. *Fontana v. Elrod* (7th Cir. 1987) 826 F.2d 729, 732.

1 The Parties jointly drafted the Class Notice which fairly and neutrally informs the Class
2 Members of their rights and remedies. A copy of the Notice is attached as Exhibit A to The
3 Agreement. The Settlement Administrator will first verify addresses, then mail the proposed Class
4 Notice to all Class Members. The Notice will include information regarding the nature of the
5 lawsuit, a summary of the substance of the Settlement’s terms, the class definition, the procedure,
6 and time period within which to requests for exclusions or objections to the Settlement, the date
7 for the final approval hearing, the formula used to calculate settlement payments, and the terms
8 and scope of the Released Claims. Agreement at §III(J). Blum Dec., ¶ 36.

9 Accordingly, both the method of disseminating the Class Notice and content of the Class
10 Notice satisfy due process. (See C.R.C. 3.776(e)-(f); *State of Cal. v. Levi Strauss* (1986) 41 Cal.3d
11 460,485 (the class notice must “fairly apprise the class members of the terms of the proposed
12 compromise and of the options open to dissenting class members.”).) Blum Dec., ¶ 37.

13 **C. The Court Should Preliminarily Approve the Class Representative Payment**

14 Enhancement payments “are fairly typical in class action cases.” (*Cellphone Termination*
15 *Fee Cases* (2010) 186 Cal.App.4th 1380, 1393 (affirming incentive awards of \$10,000); *Rodriguez*
16 *v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958, *citing* 4 Newberg on Class Actions
17 (4th ed. 2002) § 1 1:38, and Eisenberg & Miller, *Incentive Awards to Class Action Plaintiffs: An*
18 *Empirical Study*, 53 UCLA L. Rev. 1303 (2006).) Enhancement payments “are intended to
19 compensate class representatives for work done on behalf of the class, to make up for financial or
20 reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness
21 to act as a private attorney general.” (*Rodriguez*, 563 F.3d at 958-59.) “[T]he rationale for making
22 enhancement or incentive awards to named plaintiffs is that they should be compensated for the
23 expense or risk they have incurred in conferring a benefit on other members of the class.” (*Clark*
24 *v. American Residential Services LLC* (2009) 175 Cal.App.4th 785.)

25 The Settlement provides for a Class Representative Payment of \$10,000 for Plaintiff.
26 Agreement at III(L)(9). The service award is fair and reasonable compensation for the Plaintiff’s
27 efforts bringing the action, assisting Class Counsel with the litigation and settlement, regularly
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1 conferring with Class Counsel on the status of his case and the strategies for prosecuting the claims,
2 reviewing the proposed Settlement to ensure that its terms are fair and provide adequate relief for
3 the Settlement Class, and agreeing to provide Defendant a general release of all claims arising out
4 of his employment. Blum Dec., ¶ 38.

5 **D. The Court Should Preliminarily Approve the Attorneys' Fees and Litigation Costs**

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

16 Class Counsel took this matter on a contingency fee basis and invested significant time and
17 expense successfully prosecuting Plaintiff's claims. Considering the positive outcome for the Class
18 Members, and in light of the supporting authority, the proposed Attorneys' Fees and Litigation
19 Costs are fair and reasonable. Plaintiff will file a formal motion for the negotiated Attorneys' Fees
20 and Litigation Costs once preliminary approval of the Settlement is granted. Plaintiff respectfully
21 submits that the above showing is sufficient for preliminary approval of the negotiated attorneys'
22 fees. Blum Dec., ¶ 39.

23 **E. Provisional Certification for Settlement Purposes Is Appropriate**

24 For Settlement, Plaintiff contends, and Defendant does not dispute, that provisional
25 certification of the Class is appropriate.

26 1. The Standard for Class Certification

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

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

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

15 The community of interest requirement embodies three factors: (1) predominant common
16 questions of law or fact; (2) a class representative with claims or defenses typical of the class; and
17 (3) a class representative and counsel who can adequately represent the class. (*Cal. Civ. Proc. Code*
18 § 382.)

19 In April 2012, the Supreme Court expounded on the element of predominance: The “ultimate
20 question” the element of predominance presents is whether “the issues which may be jointly tried,
21 when compared with those requiring separate adjudication, are so numerous or substantial that the
22 maintenance of a class action would be advantageous to the judicial process and to the litigants.”
23 *Brinker*, 53 Cal. 4th at 1021-1022 (citations omitted).) Because all Class Members are Defendant’s
24 current and former employees, the class is readily ascertainable from Defendant’s regular business
25 records, i.e., payroll records. *Blum Dec.*, ¶ 40.

26 The statutes relating to each of Plaintiff’s claims apply with equal force and effect to the
27 entire Settlement Class. Factually, Defendant’s policies and practices apply class-wide and
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1 Defendant's liability can be determined by facts common to all members of the class. The wage
2 and hour issues are both numerous and substantial, and a class action is the most advantageous
3 method of dealing with the claims of the Settlement Class. Blum Dec., ¶ 41.

4 Plaintiff's wage and hour claims are typical of the proposed Settlement Class because they
5 arise from the same factual basis and are based on the same legal theories applicable to the other
6 Class Members. Likewise, Plaintiff's interests are entirely coextensive with the interests of the
7 Settlement Class. Plaintiff alleges that she was injured by the same company-wide practices to
8 which the proposed Class Members were subject to and seek the same relief. Plaintiff has already
9 demonstrated his ability to advocate for the interests of the Class Member by initiating this
10 litigation, undertaking extensive class discovery, and evaluating the proposed settlement to assure
11 that it is fair. Blum Dec., ¶ 42.

12 Additionally, Plaintiff is represented by competent Class Counsel who have extensive
13 experience in litigating wage and hour class action cases. Class Counsel successfully briefed,
14 argued, certified, and gained state court settlement approval of the same class-wide causes of action
15 that are at issue in this case. Class Counsel's wage and hour class action experience establishes that
16 they are well qualified to represent the interests of this Class. Blum Dec., ¶ 43-46.

17 A class action is superior to a multitude of individual lawsuits. Given the size and amount
18 of each individual claim, the Class Members likely have little incentive to litigate their claims on
19 an individual basis because the out-of-pocket expense and personal commitment necessary to
20 litigate each claim outweighs any potential recovery. In sum, class treatment is superior to
21 individual, case-by-case adjudication.

22 IV. CONCLUSION

23 The Parties have negotiated a fair and reasonable settlement of claims. Having appropriately
24 presented the materials and information necessary for preliminary approval, the Parties request
25 that the Court preliminarily approve the settlement.

26 Dated: October 3, 2023

THE LAW OFFICE OF MATT BLUM

27 By: 

28 Matt Blum, Esq.