

AEGIS LAW FIRM, PC

SAMUEL A. WONG, State Bar No. 217104

KASHIF HAQUE, State Bar No. 218672

JESSICA L. CAMPBELL, State Bar No. 280626

STEVEN A. MCNICHOLL, State Bar No. 323191

9811 Irvine Center Drive, Suite 100

Irvine, California 92618

Telephone: (949) 379-6250

Facsimile: (949) 379-6251

Email: jcampbell@aegislawfirm.com

smcnicholl@aegislawfirm.com

Attorneys for Plaintiff Asha Singh, individually,
and on behalf of all others similarly situated.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO - CENTRAL

ASHA SINGH, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

POINT LOMA REHABILITATION
CENTER, LLC; and Does 1 through 20,
inclusive,

Defendant.

Case No. 37-2021-00028133-CU-OE-CTL

*Assigned for All Purposes to:
Judge Joel R. Wohlfeil
Dept. C-73*

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

Date: September 15, 2023

Time: 9:00 am

Dept: C-73

Reservation: 2990892

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	SUMMARY OF THE LITIGATION	2
III.	SUMMARY OF THE SETTLEMENT	3
	A. Terms of Settlement	3
	B. Proposed Opt-Out and Exclusion Process	4
	C. Proposed Release	5
IV.	LEGAL ARGUMENTS SUPPORTING PRELIMINARY APPROVAL	6
	A. Provisional Certification of the Class is Appropriate	6
	1. The Proposed Class is Numerous and Ascertainable	6
	2. A Well-Defined Community of Interest Exists Among Class Members	6
	a. Common Questions Predominate	6
	b. Plaintiff; Claims are Typical of the Class Claims	7
	c. Plaintiff's and Plaintiff's Counsel Will Adequately Represent the Interests of the Proposed Class	7
	3. A Class Action is Superior to a Multitude of Individual Lawsuits	8
	B. The Settlement Meets the Standards for Preliminary Approval	8
	1. The Settlement is Entitled to a Presumption of Fairness	9
	a. The Settlement is the Result of Arm's Length Negotiations	9
	b. Plaintiff's Counsel Conducted Sufficient Investigation and Discovery	9
	c. Plaintiff's Counsel is Experienced in Similar Litigation	9
	2. The Settlement is Reasonable Given the Strengths of Plaintiff's Claims and the Risks and Expense of Litigation	10
	a. Exposure Analysis	10
	C. The Requested Incentive Award for Plaintiff	12
	D. The Requested Attorneys' Fees and Costs	13
V.	CONCLUSION	14

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Augustus, et al. v. ABM Security Services, Inc.,</i> 2 Cal 5th 257, 273 (2016).....	11
<i>Bell v. Farmers Ins. Exch.,</i> 115 Cal. App. 4th 715 (2004).....	12
<i>Brinker Restaurant Corp. v. Superior Court,</i> 53 Cal. 4th 1004 (2012)	6, 7
<i>Capitol People First v. State Dep't of Developmental Servs.,</i> 155 Cal. App. 4th 676 (2007).....	8
<i>Chavez v. Netflix, Inc.,</i> 162 Cal. App. 4th 43 (2008).....	13
<i>Classen v. Weller,</i> 145 Cal. App. 3d 27 (1983).....	7
<i>Dunk v. Ford Motor Co.,</i> 48 Cal. App. 4th 1794 (1996).....	9
<i>Fireside Bank v. Superior Court,</i> 40 Cal. 4th 1069 (2007)	6
<i>Ghazaryan v. Diva Limousine, Ltd.,</i> 169 Cal. App. 4th 1524 (2008).....	8
<i>Kullar v. Foot Locker Retail, Inc.,</i> 168 Cal. App. 4th 116 (2008).....	10
<i>Linder v. Thrifty Oil Co.,</i> 23 Cal. 4th 429 (2000)	8
<i>Munoz v. BCI Coca-Cola Bottling Co. of L.A.,</i> 186 Cal. App. 4th 399 (2010).....	10
<i>North County Contractor's Ass'n, Inc. v. Touchstone Ins. Servs.,</i> 27 Cal. App. 4th 1085 (1994).....	8
<i>Rebney v. Wells Fargo Bank,</i> 220 Cal. App. 3d 1117 (1991).....	10
<i>Reyes v. Bd. of Supervisors,</i> 196 Cal. App. 3d 1263 (1987).....	6

<i>Sav-On Drug Stores, Inc. v. Superior Court</i> , 34 Cal. 4th 319 (2004)	6, 13
---	-------

<i>Wershba v. Apple Computer, Inc.</i> , 91 Cal. App. 4th 224 (2001).....	10
--	----

Statutes

Business and Professions Code § 17200, <i>et seq</i>	2
--	---

Civ. Code § 1542	6
------------------------	---

Lab. Code § 203	11
-----------------------	----

Lab. Code § 226	11
-----------------------	----

Lab. Code § 2698, <i>et seq</i> (.California Private Attorneys General Act of 2004-PAGA).....	<i>passim</i>
--	---------------

Lab. Code § 2699(e)(2)	12
------------------------------	----

Lab. Code § 2699(f)	12
---------------------------	----

Lab. Code § 2699(l)(2).....	3
-----------------------------	---

Lab. Code § 2699.3(a).....	2
----------------------------	---

Other Authorities

Cal. R. Ct. 3.766(d)	4
----------------------------	---

Cal. R. Ct. 3.766 (d)-(f).....	5
--------------------------------	---

Treatises

Conte & Newberg, <i>Newberg on Class Actions</i> , § 11.26 (4th ed. 2002)	8
---	---

1 **I. INTRODUCTION**

2 Pursuant to California Rules of Court 3.769 (d) and (e), Plaintiff Asha Singh (“Plaintiff”) requests
3 that the Court grant preliminary approval of a class action settlement of wage and hour claims, including
4 claims under the California Private Attorneys General Act of 2004, codified at Lab. Code § 2698, *et*
5 *seq.* (“PAGA”), against Defendant Point Loma Rehabilitation Center, LLC (“Defendant”); DOES 1
6 through 20, inclusive (collectively, Plaintiff and Defendant are hereafter referred to as, the “Parties”).
7 The putative class consists of approximately 766 non-exempt employees who worked for Defendant in
8 California (individually, “Class Member”; collectively, the “Class”) from from June 30, 2017 through
9 December 2, 2022, (“Class Period”), The basic terms of the Settlement Agreement¹ provide for the
10 following:

- 11 (1) A non-reversionary Gross Settlement Amount of \$200,000.00 allocated to
12 approximately 766 Class Members on a pro rata basis according to the number of
13 weeks each Class Member worked during the Class Period;
- 14 (2) An award of up to one-third of the Gross Settlement Amount (currently
15 \$66,666.66) and up to \$25,000 in reimbursement of costs to Plaintiff’s Counsel for
16 services rendered as counsel on this matter;
- 17 (3) Incentive Award of up to \$8,500.00 to Plaintiff Asha Singh;
- 18 (4) Settlement Administration fees and costs of up to \$15,000.00; and
- 19 (5) Payment to the California Labor and Workforce Development Agency (“LWDA”)
20 of \$16,000 for civil penalties pursuant to PAGA. Seventy-five percent (75%) of this
21 payment will be paid to the California Labor and Workforce Development Agency
22 (“LWDA Payment”), and twenty-five percent (25%) will be paid to the Net
23 Settlement Amount for distribution to Class Members.

24 With each Class Member allocated an average recovery of approximately \$95.00 from the Net

25
26 ¹ A true and correct copy of the fully-executed “Stipulation and Settlement of Class Action Claims” is
27 attached as **Exhibit 3** to the Declaration of Steven A. McNicholl in Support of Plaintiff’s Motion for
28 Preliminary Approval of Class Action Settlement (“McNicholl Decl.”), filed concurrently herewith.
Unless otherwise defined herein, all capitalized terms in this Motion will be used as such terms are
defined and used in the Settlement.

Settlement Amount, the Settlement satisfies the criteria for preliminary approval and falls well within the range of reasonableness given the risks and costs of continued litigation. The Settlement was reached through informed, arms-length bargaining at and after mediation between experienced attorneys. As such, Plaintiff requests that the Court grant preliminary approval of the Settlement, conditionally certify the Class for settlement purposes only, appoint Plaintiff as the Class Representative, appoint Plaintiff's Counsel as Class Counsel, appoint selected ILYM Group, Inc. Settlement Administrators as the Settlement Administrator, authorize the Settlement Administrator to send notice of the Settlement, and set a final approval hearing date.

II. SUMMARY OF THE LITIGATION

On June 30, 2021, Plaintiff filed this action on behalf of Defendant's non-exempt employees. McNicholl Decl., ¶ 3. Plaintiff alleged the following causes of action in the original Complaint: (1) failure to pay minimum wages; (2) failure to pay overtime wages; (3) failure to provide meal periods; (4) failure to permit rest breaks; (5) failure to provide accurate itemized wage statement; (6) failure to pay all wages due upon separation of employment; (7) failure to reimburse business expenses; and (8) violation of Business and Professions Code §§ 17200, *et seq.*, based on the preceding claims. *Id.* On the same day, Plaintiff's counsel provided written notice to the LWDA and Defendant regarding Defendant's alleged Labor Code violations, as required by Lab. Code § 2699.3(a). *Id.* The LWDA did not respond to this notice, indicating it did not intend to investigate, thus allowing Plaintiff to bring a PAGA claim against Defendant. *Id.* at ¶ 4. On September 28, 2021, Plaintiff filed a First Amended Complaint adding a cause of action for enforcement of Lab. Code § 2698, *et seq.* ("PAGA"), for the preceding claims. *Id.*

Through informal discovery, Plaintiff requested certain information and documents related to, *inter alia*, class contact information, the number of Class Members, Class Members hire and termination dates, Class Member final hourly rates, total number of weeks and shifts worked by Class Members, policy documents, Class Members time records, and Class Members pay records. *Id.* at ¶ 5. Defendant produced a significant amount of documents and information, including Plaintiff's personnel file, policy documents, employment dates, and an approximate sampling of 12% of the time and pay records for all non-exempt employees that worked at the Defendant's locations during the class period. *Id.* Defendant also produced its financial documents. *Id.* After the Parties engaged in numerous discussions, the Parties agreed to attend

1 a private mediation session. *Id.*

2 On November 1, 2022, the Parties attended a mediation session with Tripper Ortman, a respected
3 mediator, but the parties did not reach a settlement. *Id.* at ¶ 6. From November 1, 2022 to January 24,
4 2023, the Parties continued to negotiate. *Id.* On January 24, 2022, the Parties executed a Memorandum
5 of Understanding with the material terms the Parties had agreed too. *Id.* The Parties spent the next two
6 months negotiating the terms of the Settlement, which was finalized in May of 2023. *Id.* Plaintiff
7 submitted the Settlement to the LWDA pursuant to Lab. Code § 2699(1)(2). *Id.* at ¶ 7, Ex. 2
8 (Confirmation of Submission of Settlement to LWDA).

9 **III. SUMMARY OF THE SETTLEMENT**

10 **A. Terms of Settlement**

11 Plaintiff and Defendant agreed to settle the class claims in exchange for a Gross Settlement
12 Amount of \$200,000.00. Settlement Agreement, § 3.06. However, should the number of work weeks
13 exceed 5,275 by more than 10% (i.e., 5,803 workweeks or more) or the number of PAGA pay periods
14 exceed 10,610 as of the end of the Class Period, there will be a pro rata adjustment to the Gross
15 Settlement Amount per additional work week equal to \$37.91 or \$20.74 per additional PAGA pay
16 period, whichever is greater. *Id.* at § 3.04(e). The Gross Settlement Amount will be used to make
17 payments for the following: (1) Individual Settlement Payments to Participating Class Members; (2)
18 attorneys' fees to Class Counsel of up to thirty five percent of the Gross Settlement Amount; (3)
19 reimbursement of Class Counsel's litigation costs of up to \$25,000; (4) an Incentive Award to Plaintiff
20 of up to \$8,500.00; (5) Settlement Administration fees and costs of \$15,000; and (6) a payment to the
21 LWDA of \$16,000 pursuant to PAGA. *Id.* at § 3.06(a-e). Class Members' Individual Settlement
22 Payments will be distributed after final approval of the Settlement and Defendant funds the Gross
23 Settlement Amount. *Id.* at § 3.06(f). Individual Settlement Payments will be calculated by comparing
24 the total Qualifying Workweeks for the Class to each individual Class Member's Qualifying
25 Workweeks. *Id.* With approximately 766 Class Members, the Net Settlement Amount allocates an
26 average of approximately \$100.00 per Class Member. The Settlement Administrator will calculate the
27 actual estimated recovery to include in the Class Notice and provide the estimated low and high range
28

1 of possible recovery at final approval. *Id.*; Settlement Agreement, Ex. A (Notice of Class Action
2 Settlement).

3 The Individual Settlement Payments to Class Members will be allocated for tax purposes as
4 follows: 1/3 to wages; 2/3 to penalties and interest. Settlement Agreement, § 3.06(f). The employer-side
5 payroll taxes on the portion allocated to wages will be paid by Defendant separately from, and in
6 addition to the Gross Settlement Amount. *Id.* No portion of the Gross Settlement Amount will revert to
7 Defendant. *Id.* at § I. Funds from uncashed or undeliverable checks will be tendered by the Settlement
8 Administrator to the State Controller Unclaimed Property Fund in the name of the Class Member for
9 whom the funds are designated. *Id.* at § 3.06(f).

10 **B. Proposed Opt-Out and Objection Process**

11 The Settlement Administrator will send Class Members the Notice of Class Action Settlement
12 (“Class Notice”) by first-class mail, after checking for updated addresses through the National Change of
13 Address database. *Id.* at § 3.03. The Class Notice provides information regarding the nature of the
14 lawsuit, a summary of the substance of the settlement terms, the formula for calculating Individual
15 Settlement Payments, the individual’s estimated payout, a statement that Class Members who take no
16 action will release their claims and receive settlement checks, instructions regarding how to dispute the
17 calculations, instructions regarding how to request exclusion or object to the Settlement, the date for the
18 final approval hearing, the amounts sought for attorneys’ fees and costs, the Settlement Administration
19 Costs, the Class Representative’s Incentive Award, and the PAGA allocation. *See* Settlement
20 Agreement, Ex. A (Class Notice).

21 The Class Notice provides instructions for Class Members who choose to exclude themselves
22 from the Settlement. *Id.* To opt out, Class Members are instructed to submit a written and signed letter
23 requesting exclusion by a specified date (45 days after the date of mailing of the Class Notice). *Id.* *See*
24 *also* Settlement Agreement § 3.03. Class Members do not need to submit a claim form to participate in
25 the Settlement. *See* Settlement Agreement, Ex. A (Class Notice). Class Members are informed of how
26 they can object to the Settlement, and the Class Notice informs Class Members of the date, time, and
27 location of the final fairness and approval hearing so that they can appear in person. *Id.* Accordingly, the
28 content of the Class Notice complies with the requirements of Cal. R. Ct. 3.766(d).

1 If Class Notice packets are returned as undeliverable, the Settlement Administrator will perform a
2 skip-trace or other search, and re-mail the Class Notice with an extended deadline, to opt out or object, of
3 an additional 15 calendar days from the re-mailing, or 45 calendar days from the date of the initial mailing,
4 whichever is later, in which to postmark objections or requests for exclusion. Settlement Agreement, §
5 3.03. The initial 45-day notice period and extension process ensures the notice program provides due
6 process by giving Class Members enough time to determine whether they want to participate in the
7 Settlement. This means of notice is reasonably calculated to apprise Class Members of the pendency of
8 the action. *See* Cal. R. Ct. 3.766 (d)-(f).

9 **C. Proposed Release**

10 The release to be given by Class Members is limited to the Defendant (“Released Parties”).
11 Settlement Agreement, § I. Under the proposed release, Class Members who do not exclude themselves
12 from the Settlement will be deemed to have released or waived the following “Released Claims” against
13 the Released Parties during the period of June 30, 2017 through December 2, 2022:

14 “... any and all claims alleged in Named Plaintiffs’ Operative Complaint, during the Class Period,
15 including but not limited to (1) failure to pay minimum wages (2) failure to pay overtime wages
16 (3) failure to provide meal periods (4) failure to authorize or permit rest periods (5) failure to
17 reimburse business expenses (6) failure to furnish accurate itemized wage statements wage
18 statement violations (7) failure to pay wages upon separation of employment and within the
19 required time and (8) violation of California Business and Professions Code §§17200, *et seq.*, based
20 on the preceding claims.”

21 *Id* at § 5.01.

22 The State of California and PAGA Group Members will release Defendant from all claims
23 exhausted in Plaintiff’s notice(s) sent to the LWDA and alleged in the operative complaint, which arose
24 during the PAGA Period, regardless of whether PAGA Group Members opt out of the Class Settlement.
25 Settlement Agreement, § 5.02.

26 Only Plaintiff will agree to a general release of any and all claims, whether known or unknown,
27 which exist or may exist on Plaintiff’s behalf as of the date of the Settlement, and a waiver of Civ. Code
28 § 1542. Settlement Agreement, § 5.03.

29 **IV. LEGAL ARGUMENTS SUPPORTING PRELIMINARY APPROVAL**

30 **A. Provisional Certification of the Class is Appropriate**

1 Class certification is appropriate when there exists (1) an ascertainable and sufficiently numerous
2 class, (2) a well-defined community of interest among Class Members, and (3) when certification would
3 be a fair and efficient means of adjudicating the action, rendering class litigation superior to alternative
4 means. *See Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1021 (2012).

5 **1. The Proposed Class is Numerous and Ascertainable**

6 Whether a class is “ascertainable” is “determined by examining (1) the class definition, (2) the
7 size of the class, and (3) the means available for identifying Class Members.” *Reyes v. Bd. of*
8 *Supervisors*, 196 Cal. App. 3d 1263, 1271 (1987). Here, the Class consists of all current and former non-
9 exempt employees who are and/or were employed by Defendant in California at any time from March 4,
10 2018 through January 27, 2023. Settlement Agreement, § I. Defendant’s records show the Class consists
11 of approximately 766 individuals, making joinder of all Class Members impracticable. McNicholl Decl.,
12 ¶ 8. Further, the Class is readily ascertainable from Defendant’s business records because all Class
13 Members are current or former employees of Defendant. *Id.*

14 **2. A Well-Defined Community of Interest Exists Among Class Members**

15 “[T]he ‘community of interest requirement embodies three factors: (1) predominant common
16 questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3)
17 class representatives who can adequately represent the class.’” *Fireside Bank v. Superior Court*, 40 Cal.
18 4th 1069, 1089 (2007) (quoting *Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462, 470 (1981)).

19 **a. Common Questions Predominate**

20 To assess whether common questions predominate, courts focus on whether the theories of
21 recovery advanced are likely to prove amenable to class treatment. *See Sav-On Drug Stores, Inc. v.*
22 *Superior Court*, 34 Cal. 4th 319, 327 (2004). In other words, courts determine whether the elements
23 necessary to establish liability are susceptible of common proof, even if the Class Members must
24 individually prove their damages. *Brinker, supra*, 53 Cal. 4th at 1021-1022, 1024.

25 Plaintiff alleged that Defendant maintained uniform employment policies and/or practices that
26 illegally deprived Class Members of lawful wages, meal periods, rest breaks, accurate wage statements,
27 and waiting time pay. McNicholl Decl., ¶ 9. Plaintiff’s allegations present common legal and factual
28 questions of, *inter alia*, whether Defendant applied the same scheduling, timekeeping, minimum and

1 overtime pay, meal period, and rest break policies to all Class Members; whether these policies and
2 practices resulted in Labor Code violations; whether Defendant's conduct was intentional; and whether
3 Class Members are entitled to penalties. *Id.* These common questions could be resolved using Class
4 Members' schedules, time punches, and payroll records, Defendant's corporate representative's
5 testimony, written communications between Defendant and Class Members, and Class Member
6 declarations. *Id.* Thus, the Court can and should exercise its discretion to grant conditional class
7 certification for settlement purposes.

8 *b. Plaintiff's Claims are Typical of the Class Claims*

9 The typicality requirement is satisfied when the legal theories and facts supporting Plaintiff's
10 claims are substantially similar to other Class Members. *See Classen v. Weller*, 145 Cal. App. 3d 27, 46
11 (1983). Here, Plaintiff alleges that she and other Class Members were employed by Defendant and
12 injured by Defendant's common wage and hour policies and practices, including Defendant's
13 scheduling, timekeeping, minimum wage pay, overtime pay, meal period, and rest break practices and
14 policies. McNicholl Decl., ¶ 10. Through documents and information exchanged in informal discovery,
15 including production of thousands of pages of documents by Defendant, Plaintiff confirmed that these
16 common policies and practices similarly affected Plaintiff and the Class. *Id.* Thus, Plaintiff's claims
17 arise from the same employment practices and are based on the same legal theories as those applicable
18 to other Class Members, as further explained in Plaintiff's exposure analysis below.

19 *c. Plaintiff and Plaintiff's Counsel Will Adequately Represent the Interests of*
20 *the Proposed Class*

21 Certification requires adequacy of both the proposed class representative(s) and proposed class
22 counsel. With respect to the class representative, a plaintiff must adequately represent and protect the
23 interests of other members of the class and demonstrate that his or her claim is not inconsistent with the
24 claims of other members of the class. *See Capitol People First v. State Dep't of Developmental Servs.*,
25 155 Cal. App. 4th 676, 696-697 (2007). Here, Plaintiff's interests are coextensive with the interests of
26 the Class. Plaintiff demonstrated an ability to advocate for the interests of the Class by initiating this
27 litigation, gathering documents and information, being available on the day of mediation to answer
28 questions, meeting with his attorneys on several occasions to understand the claims and theories of

1 liability at issue, assisting attorneys in preparing for mediation, reviewing the proposed settlement
2 agreement to understand its legal effect, and obtaining a fair settlement on behalf of Class Members
3 who stand to recover a substantial amount under the Settlement. McNicholl Decl., ¶ 24.

4 Likewise, Aegis Law Firm, PC has expended considerable time and effort on this case and will
5 continue to do so through final approval. *See generally*, McNicholl Decl. Accordingly, Plaintiff should
6 be appointed Class Representative, and Plaintiff’s Counsel should be appointed Class Counsel.

7 **3. A Class Action is Superior to a Multitude of Individual Lawsuits**

8 Class treatment is superior to other methods of adjudication when the probability is small that
9 each Class Member will come forward to prove his or her claim and when the class approach would
10 deter and redress the alleged wrongdoing. *See Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 435, 446 (2000);
11 *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524, 1537-1538 (2008). Here, none of the other
12 766 Class Members had shown any interest in bearing the expense and burden of litigating their own
13 claims. McNicholl Decl. ¶ 12. Thus, a class action is the superior method for seeking relief.

14 **B. The Settlement Meets the Standards for Preliminary Approval**

15 Preliminary approval is warranted if the settlement falls within a “reasonable range.” *See North*
16 *County Contractor’s Ass’n., Inc. v. Touchstone Ins. Servs.*, 27 Cal. App. 4th 1085, 1089-90 (1994);
17 *Conte & Newberg, Newberg on Class Actions*, § 11.26 (4th ed. 2002). In reviewing the fairness of a
18 class action settlement, due regard should be given to what is “‘otherwise a private consensual
19 agreement between the parties.’” *Cellphone Termination Fee Cases*, 186 Cal. App. 4th 1380, 1389
20 (2010). The inquiry “must be limited to the extent necessary to reach a reasoned judgment that the
21 agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties,
22 and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” *Id.*

23 Reasonableness and fairness are presumed where (1) the settlement is reached through “arms-
24 length bargaining”; (2) investigation and discovery are “sufficient to allow counsel and the court to act
25 intelligently”; (3) counsel is “experienced in similar litigation”; and (4) the percentage of objectors “is
26 small.” *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1802 (1996). The Settlement satisfies the first
27 three factors. Plaintiff will analyze the fourth factor at the final approval stage.

28 ///

1 **1. The Settlement is Entitled to a Presumption of Fairness**

2 a. *The Settlement is the Result of Arm’s-Length Negotiations*

3 Courts presume the absence of fraud or collusion in the negotiation of a settlement, unless
4 evidence to the contrary is offered. Thus, there is a presumption that settlement negotiations are
5 conducted in good faith. Here, the Settlement was the product of extensive investigation, a full day
6 mediation session with a respected mediator after exchanging informal discovery followed by several
7 months of continued negotiations. McNicholl Decl. ¶¶ 5-6. The negotiations were adversarial,
8 conducted at arm’s length and tempered by the efforts of both sides to serve the interests of their clients.
9 *Id.* at ¶ 6. The amount of Plaintiff’s requested Enhancement Payment was not negotiated until after the
10 Parties agreed to the Gross Settlement Amount and many other terms. *Id.* at ¶ 25.

11 b. *Plaintiff’s Counsel Conducted Sufficient Investigation and Discovery*

12 Plaintiff’s Counsel thoroughly investigated the class claims, applicable law, and potential
13 defenses. *See generally*, McNicholl Decl. In particular, Plaintiff’s Counsel assessed the value of the
14 class claims using Defendant’s data and documents produced through informal discovery. *Id.* Plaintiff’s
15 Counsel personally reviewed policy documents, timekeeping records, and wage statements to identify
16 potential violations. *Id.* at ¶¶ 13-23. Accordingly, Plaintiff’s Counsel fully understood the strengths and
17 weaknesses of the claims before the Parties reached a settlement. *Id.* at ¶ 14.

18 c. *Plaintiff’s Counsel is Experienced in Similar Litigation*

19 Plaintiff is represented by Aegis Law Firm, PC (“Class Counsel”). Class Counsel prosecute wage
20 and hour class actions on behalf of employees and others who have had their rights violated. McNicholl
21 Decl. ¶¶ 27-39. The attorneys working on this case have been appointed class counsel in many cases,
22 through both contested motions and settlement approval motions. *Id.* Thus, Plaintiff’s Counsel has
23 extensive experience in similar litigation and should be appointed as Class Counsel.

24 **2. The Settlement is Reasonable Given the Strengths of Plaintiff’s Claims and**
25 **the Risks and Expense of Litigation**

26 Courts have discretion to approve class settlements by assessing several factors, including the
27 “strength of plaintiffs’ case, risk, expense, complexity and likely duration of further litigation and risk
28

of maintaining the class action through trial.” *Munoz v. BCI Coca-Cola Bottling Co. of L.A.*, 186 Cal. App. 4th 399, 407 (2010); see *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 129 (2008).

While Plaintiff and his counsel believed and continue to believe this is a strong case for certification, the significant risks and expenses associated with class certification and liability proceedings were taken into account. McNicholl Decl., ¶ 13. To determine if the amount offered at mediation was reasonable, Plaintiff’s Counsel weighed that figure against many risk factors. *Id.* at ¶ 14. If Plaintiff continued to prosecute the claims rather than accept a settlement, Plaintiff would have faced deadlines to file a motion for class certification, had to have engaged in more formal written discovery and taken depositions, expended time and resources to resolve disputes, prepared and filed potential dispositive motions and/or discovery motions, and engaged in extensive trial preparation. *Id.* at ¶ 15. An adverse ruling at any one of these stages could have prevented the Class from obtaining any recovery. *Id.*

a. Exposure Analysis

A settlement does not have to provide 100% of the damages sought to be considered a fair and reasonable settlement. See *Rebney v. Wells Fargo Bank*, 220 Cal. App. 3d 1117, 1139 (1991). Rather, compromise is expected:

Compromise is inherent and necessary in the settlement process . . . even if “the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated,” this is no bar to a class settlement because “the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation.”

Wershba v. Apple Computer, Inc., 91 Cal. App. 4th 224, 250 (2001) (citation omitted). Here, Plaintiff contends that his claims are based on Defendant’s common, class-wide policies and procedures, and that liability could be determined on a class-wide basis without dependence on individual assessments of liability. McNicholl Decl., ¶ 10-11. Although the amount of Defendant’s potential exposure – if proven – is substantial, the legitimate and serious risks of succeeding at class certification and trial compelled a serious consideration of the benefit of a settlement. *Id.* at ¶ 14.

Unpaid Wages Claims: Plaintiff argued that Defendant paid Class Members non-discretionary bonuses and shift differentials in addition to their hourly wages but failed to include the bonuses and shift differentials in the regular rate. Plaintiff’s expert estimated the total value of such damages for

1 failing to pay overtime at the regular rate to be approximately \$47,659 based on the sample of pay and
2 time records. McNicholl Decl., ¶ 16. Defendant claimed the bonuses were discretionary and not paid
3 regularly. *Id.* In addition, Plaintiff argued that Class Members were forced to work off-the-clock because
4 Defendant failed to schedule sufficient coverage for shift turnover and meal periods. *Id.* Plaintiff's
5 expert estimated the total value of the off-the-clock damages to be approximately \$1,821,563 assuming
6 15 minutes of off-the-clock work per shift for each Class Member. *Id.* Defendant argued that its policies
7 required all overtime to be approved and employees were required to record their time at the start and
8 end of each shift. *Id.* Plaintiff estimated an 50% chance of class certification on Plaintiff's unpaid wages
9 claims, and a 25% chance at trial, making this claim worth around \$230,000 for settlement purposes.
10 *Id.*

11 Unreimbursed Business Expenses Claims: Plaintiff argued that Class Members were not
12 reimbursed for expenses for the purchase of required vital sign equipment at the start of the job.
13 Plaintiff's expert calculated unreimbursed business expenses to be valued at \$144,181 assuming \$150
14 of unreimbursed business expenses per Class Member. McNicholl Decl., ¶ 17. However, Defendant
15 also argued that it provided employees with the equipment necessary to perform their jobs. Further, if
16 Defendant was required to reimburse these expenses, there is no source of common proof as to who
17 incurred expenses and whether they sought reimbursement, making the claim difficult to prove at trial.
18 *Id.* As such, Plaintiff estimated a 40% chance at class certification and 20% chance at trial, resulting in
19 a settlement value of \$11,534.48. *Id.*

20 Meal Period Claims: Plaintiff's meal period claim was potentially worth a maximum of about
21 \$110,049, in light of the violations shown in the records. McNicholl Decl., ¶ 18. Plaintiff argued Class
22 Members' daily time-punch data show repeated first meal period violations despite Defendant's
23 purportedly facially-compliant first meal period policy. *Id.* Although the time records appear to show a
24 high compliance rate, the timekeeping system locked employees out when their meal breaks were less
25 than 30 minutes artificially deflating the violation rate when employees were forced to return to work
26 early but unable to clock back in. *Id.* However, Defendant argued that it maintained compliant written
27 policies and Class Members voluntarily signed meal waivers. *Id.* Plaintiff discounted the value of the
28 meal claim based on Defendant's argument that they maintained facially compliant meal period policies

1 within its employee handbooks and other policies. *Id.* Defendant argued that, in light of its compliant
2 meal period policy, Plaintiff's meal period claims could not be jointly adjudicated due to the prevalence
3 of individualized inquiries, including whether employees choose to skip or take a late break. Thus,
4 Plaintiff discounted this claim for the risk that the damages could at least be reduced, and that the claim
5 would be hard to certify with a compliant policy. However, Plaintiff estimated a 50% chance of
6 certifying his meal period claims and a 30% chance of success at trial. Thus, Plaintiff valued his meal
7 period claim at around \$1,657.35 for settlement purposes. *Id.*

8 Rest Break Claim: Plaintiff alleged that Defendant failed to provide all uninterrupted rest breaks.
9 McNicholl Decl., ¶ 19. Plaintiff's expert valued his rest break claim at \$5,054,411 assuming a 100%
10 violation rate. *Id.* Defendant maintained that they had a compliant rest break policy. *Id.* Certification of
11 the rest break claim likely would have required depositions of Class Members who provided
12 declarations, and Defendant would likely have obtained opposing declarations stating rest breaks were
13 taken, significantly decreasing the likelihood of certification. In addition, Plaintiff is not likely to
14 establish a rest break violation of 100% through testimony. *Id.* Plaintiff estimated a 40% chance of class
15 certification and a 10% chance at trial, making this claim worth around \$202,176.44 for settlement
16 purposes. *Id.*

17 Wage Statement Penalties: Plaintiff's Counsel investigated and evaluated direct and derivative
18 claims for failure to accurate itemized wage statements. McNicholl Decl., ¶ 20. Plaintiff argued Class
19 Members' wage statements listed the incorrect total hours because the total hours included non-working
20 hours such as vacation. *Id.* Defendant argued that the facial deficiencies were not present in any wage
21 statements. *Id.* Defendant argued that Plaintiff could not show that Class Members suffered an "injury"
22 as a result of "knowing and intentional" wage statement violations as required by Cal. Lab. Code § 226.
23 Defendant also argued that Plaintiff's wage statement claim would fail if the wage statements contained
24 all required information; that the wage statements accurately reflected gross and net wages paid by the
25 employer and the rates at which those wage were paid. *Id.* Using the start and end dates of employment
26 and capping the penalties at \$4,000 per person, Plaintiff calculated a maximum of \$943,500. *Id.* In light
27 of the above, Plaintiff estimated an 80% chance at class certification and a 30% chance at trial, valuing
28 the wage statement claim at roughly \$226,440. *Id.*

1 Derivative Waiting Time: Plaintiff investigated and evaluated the claim for waiting time penalties.
2 McNicholl Decl., ¶ 21. Plaintiff did discover evidence of direct waiting time violations in the time and
3 pay records provided by Defendant. *Id.* In addition, waiting time penalties would be derivative of, and rise
4 or fall, with Plaintiff’s other claims. *Id.* While Plaintiff is confident that it can establish the existence of
5 unpaid wages, Defendant could argue that Plaintiff could not prove the “willful” prong needed to obtain
6 waiting time penalties, and that there is a good faith dispute that any unpaid wages are due. Based on the
7 documents and data produced by Defendant, Plaintiff’s expert calculated \$1,907,950 in waiting time
8 penalties. *Id.* Plaintiff estimated an 80% chance at class certification and a 30% chance at trial, making
9 this claim worth about \$457,908. *Id.*

10 PAGA Claim: The PAGA claim presented even higher hurdles. Although Plaintiff’s Counsel
11 found Defendant’s exposure could potentially reach \$4,810,550 under Lab. Code § 2699(f), assuming
12 the penalty rate of \$100 for each pay period, Plaintiff would have to prove a violation in every pay
13 period. McNicholl Decl., ¶ 22. Most importantly, the Court would have discretion to reduce the PAGA
14 award based on whether the amount of the award would be “unjust, arbitrary and oppressive, or
15 confiscatory.” Lab. Code § 2699(e)(2). *Id.* In theory, the Court could reduce the award by 99% if it so
16 wished. *Id.* Plaintiff was doubtful she could recover all PAGA penalties, especially if a large class
17 judgment was entered for the same violations. *Id.* Accordingly, Plaintiff could not place a high value on
18 the PAGA penalties, and therefore allocated \$16,000 of the Gross Settlement Amount to settle these
19 claims. *Id.*

20 Financial Condition: The exposure analysis in this case was also overshadowed by Defendant’s
21 financial ability to pay a large judgment. Prior to mediation, Defendant produced extensive financial
22 information, including evidence of bank loans which would be superior to debt owed to employees if
23 Plaintiff obtained a judgment in this case. McNicholl Decl. ¶ 23. Plaintiff’s forensic accounting expert
24 conducting an examination of Defendant’s financial records showing Defendant reported a significant
25 negative operating margin every year from 2017 to 2021. *Id.* Ultimately, Plaintiff determined that the
26 settlement amount would compensate employees for violations but also allow Defendant to continue
27 operating so that current employees would not lose their jobs. *Id.* Plaintiff discounted the overall value
28

1 of the claims by about 70% to account for this financial risk. *Id.* Thus, Plaintiff believes the settlement
2 amount is fair in light of these circumstances. *Id.*

3 **C. The Requested Enhancement Payment for Plaintiff**

4 Plaintiff seeks an Enhancement Payment of up to \$8,500 for accepting the responsibilities of
5 representing the interests of the Class and assuming risks and potential costs that were not borne by any
6 other Class Members. Settlement Agreement, § 3.06(d). A named plaintiff is eligible for payment that
7 reasonably compensates him or her for undertaking and fulfilling a fiduciary duty to represent absent
8 Class Members. *See Cellphone Termination Fee Cases, supra*, 186 Cal. App. 4th at 1393; *Bell v.*
9 *Farmers Ins. Exch.*, 115 Cal. App. 4th 715, 726 (2004).

10 Here, Plaintiff had the option to pursue his claims individually, but instead chose to pursue this
11 class action, delaying individual recovery until approval of a class action settlement. McNicholl Decl.,
12 ¶ 24. Throughout the case, Plaintiff assisted counsel in gathering the evidence necessary to prosecute
13 the class claims, maintained regular contact with counsel, was available on the day of mediation to
14 answer critical questions, and reviewed the Settlement to make sure it was fair to the Class. *Id.* No action
15 would likely have been taken by Class Members individually, and no compensation would have been
16 recovered for them, but for Plaintiff's services on behalf of the Class. *Id.*

17 By actively pursuing this action, Plaintiff furthered the California public policy goal of enforcing
18 the State's wage and hour laws. *See Sav-On Drug Stores, Inc., supra*, 34 Cal. 4th at 340. The requested
19 Incentive Award for Plaintiff's service as the class representative and for a general release of all
20 employment claims is reasonable and should be preliminarily approved. At the final approval stage,
21 Plaintiff will further support the request for an Incentive Award by declaration addressing the factors
22 for the award. McNicholl Decl., ¶ 26.

23 **D. The Requested Attorneys' Fees and Costs**

24 The purpose of an attorneys' fee award in class action litigation is to reward counsel who invested
25 in a case despite the risk of non-payment and achieved a substantial positive result for the class.
26 Attorneys' fees are awarded as a matter of equity. California courts routinely award attorneys' fees
27 equaling one-third or more of the potential value of the common fund. *See Chavez v. Netflix, Inc.*, 162
28 Cal. App. 4th 43, 66, n.11 (2008) ("Empirical studies show that, regardless of whether the percentage

1 method or the lodestar method is used, fee awards in class actions average around one-third of the
2 recovery”).

3 Plaintiff seeks appointment of Aegis Law Firm, PC as Class Counsel. The attorneys performed
4 significant work and expended litigation costs in prosecuting the matter with no guarantee of any
5 payment. McNicholl Decl., ¶ 40. Plaintiff’s Counsel seeks preliminary approval for attorney’s fees in
6 the amount of thirty three percent of the Gross Settlement Amount, which is currently estimated to be
7 \$66,666.66, and up to \$25,000 in reimbursement of litigation costs. Given the work performed in this
8 matter, the extensive information exchange, and substantial recovery obtained on behalf of Plaintiff and
9 the Class, Plaintiff’s Counsel achieved a settlement through efficient and diligent work. *See generally*,
10 McNicholl Decl. At final approval, Plaintiff’s Counsel will fully brief the merits of its request for the
11 award of attorneys’ fees and litigation costs. *Id.* at ¶ 41.

12 **V. CONCLUSION**

13 The Parties have negotiated a fair and reasonable Settlement of the class claims in light of the
14 risks present in this case. Plaintiff has appropriately presented the materials and information necessary
15 for preliminarily approval, and therefore, respectfully requests that the Court preliminarily approve the
16 Settlement and schedule a date to conduct the final approval hearing.

17
18 Dated: June 28, 2023

AEGIS LAW FIRM, PC

19
20 By: Steven McNicholl
21 Steven A. McNicholl
22 Attorneys for Plaintiff
23
24
25
26
27
28