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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

GEORGE CARRILLO,

Plaintiff,

v.

SK TRUCK RENTALS, INC.; SKS
MANAGEMENT LLC; and DOES 1
through 20, inclusive,

Defendants.

Case No. RG21111864

*Assigned for all purposes to
Judge Evelio Grillo
Dept. 21*

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

Date: April 28, 2023

Time: 9:00 am

Dept: 21

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1 **I. INTRODUCTION**

2 Pursuant to California Rules of Court 3.769 (d) and (e), Plaintiff George Carrillo (“Plaintiff”)
3 request that the Court grant preliminary approval of a class action settlement of wage and hour claims,
4 including claims under the California Private Attorneys General Act of 2004, codified at Lab. Code §
5 2698, *et seq.* (“PAGA”), against Defendants SK Truck Rentals, Inc. and SKS Management LLC
6 (“Defendants”) (collectively, Plaintiff and Defendants referred to as, the “Parties”). The putative class
7 consists of approximately 183 current and former non-exempt employees who are or were employed by
8 Defendants in California (individually, “Class Member”; collectively, the “Class”) from March 9, 2017,
9 through November 11, 2022 (the “Class Period”). The basic terms of the Joint Stipulation of Settlement
10 (“Settlement Agreement” or “Settlement”)¹ provide for the following:

- 11 (1) A non-reversionary Gross Settlement Amount of \$500,000 allocated to
12 approximately 183 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 \$166,666.66) and up to \$25,000 in reimbursement of costs to Plaintiff’s Counsel
16 for services rendered as counsel on this matter;
- 17 (3) Incentive Awards of up to \$8,500.00 to Plaintiff;
- 18 (4) Settlement Administration fees and costs of up to \$15,000; and
- 19 (5) Payment to the California Labor and Workforce Development Agency (“LWDA”)
20 of \$40,000 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 \$1,300 from the Net
25

26 ¹ A true and correct copy of the fully-executed “Joint Stipulation of Settlement” is attached as **Exhibit 3**
27 to the Declaration of Steven A. McNicholl in Support of Plaintiff’s Motion for Preliminary Approval of
28 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 Representatives, appoint Plaintiff's Counsel as Class Counsel, appoint ILYM Group, Inc 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 September 3, 2021, Plaintiff George Carrillo filed this action on behalf of Defendants' non-exempt employees and claim and on the same day, Plaintiff George Carrillo provided written notice to the LWDA and Defendants as required by Lab. Code § 2699. McNicholl Decl. at ¶ 3. Plaintiff alleges the following causes of action in the operative Complaint: (1) failure to pay overtime wages; (2) failure to provide meal periods; (3) failure to permit rest breaks; (4) failure to provide accurate wage statements; (5) failure to pay all wages timely and upon separation of employment; (6) failure to reimburse necessary business expenses; and (7) violation of Business and Professions Code § 17200, *et seq.*, based on the preceding claims. On November 9, 2022, Plaintiff filed a First Amended Complaint adding a PAGA claim. *Id.* at ¶ 3.

The Parties attended mediation session with mediator Eve Wagner Esq., a respected mediator, on September 6, 2022. *Id.* at ¶ 4. Prior to mediation, Defendants produced a 25% sampling of pay records, time sheets, hiring and termination dates, signed on duty meal waivers, employee handbooks and employee policies for Class Members for the Class Period. *Id.* at ¶ 4. The Parties failed to reach a settlement at mediation. *Id.* at ¶ 4.

On September 28, 2022, Defendants filed a Motion to Compel Arbitration. *Id.* at ¶ 5. On November 9, 2022, the Court denied Defendant's Motion to Compel Arbitration on the basis that Defendant waived its right to move to compel. *Id.* at ¶ 5.

Following the ruling by the Court, the Parties were able to settle the matter for \$500,000. *Id.* at ¶ 6. Thereafter, the Parties executed a Memorandum of Understanding. *Id.* The Parties spent the next several months negotiating the terms of the Settlement, which was finalized in February of 2023. *Id.* Plaintiff

submitted the Settlement to the LWDA pursuant to Lab. Code § 2699(1)(2). *Id.* at ¶ 7, Ex. 4 (Confirmation of Submission of Settlement to LWDA).

III. SUMMARY OF THE SETTLEMENT

A. Terms of Settlement

Plaintiff and Defendants agreed to settle the class claims in exchange for a Gross Settlement Amount of \$500,000. Settlement Agreement, § 3.06(a). The Gross Settlement Amount will be used to make payments for the following: (1) Individual Settlement Payments to Participating Class Members; (2) attorneys' fees to Class Counsel of up to one-third of the Gross Settlement Amount; (3) reimbursement of Class Counsel's litigation costs of up to \$25,000; (4) Incentive Awards to Plaintiff George Carrillo of up to \$8,500; (5) Settlement Administration fees and costs of \$15,000; and (6) a payment to the LWDA of \$40,000 pursuant to PAGA. *Id.* at 3.06(a-e). Class Members' Individual Settlement Payments will be distributed after final approval of the Settlement and Defendants fund the Gross Settlement Amount. *Id.* at 3.06(f). Individual Settlement Payments will be calculated by comparing the total Qualifying Workweeks for the Class to each individual Class Member's Qualifying Workweeks. *Id.* With approximately 183 Class Members, the Gross Settlement Amount allocates an average of \$1,300 per Class Member. The Settlement Administrator will calculate the actual estimated recovery to include in the Class Notice. *Id.*; Settlement Agreement, Ex. A (Notice of Class Action Settlement).

The Individual Settlement Payments to Class Members will be allocated for tax purposes as follows: 40% to wages; 60% to penalties and interest. The employer-side payroll taxes on the portion allocated to wages will be paid by Defendants separately from, and in addition to the Gross Settlement Amount. *Id.* at § 3.06(f). No portion of the Gross Settlement Amount will revert to Defendants. *Id.* at § I(ff). Funds from uncashed or undeliverable checks will be tendered by the Settlement Administrator to the State Controller Unclaimed Property Fund in the name of the Class Member for whom the funds are designated. *Id.* at § 3.06(f).

B. Proposed Opt-Out and Objection Process

The Settlement Administrator will send Class Members the Notice of Class Action Settlement ("Class Notice") by first-class mail after checking for updated addresses through the National Change of

1 Address database. Settlement Agreement, § 3.03. The Class Notice provides information regarding the
2 nature of the lawsuit, a summary of the substance of the settlement terms, the formula for calculating
3 Individual Settlement Payments, the individual's estimated payout, a statement that Class Members who
4 take no action will release their claims and receive settlement checks, instructions regarding how to
5 dispute the calculations, instructions regarding how to request exclusion or object to the Settlement, the
6 date for the final approval hearing, the amounts sought for attorneys' fees and costs, the Settlement
7 Administration Costs, the class representatives' Incentive Awards, the PAGA allocation, and
8 information on how to access the court's website to view the case records. *See* Settlement Agreement,
9 Ex. A (Class Notice).

10 The Class Notice provides instructions for Class Members who choose to exclude themselves
11 from the Settlement. *See* Settlement Agreement § 3.04(b). To opt out, Class Members are instructed to
12 submit a Request for Exclusion to the Settlement Administrator by a specified date (45 days after the date
13 of mailing of the Class Notice). *Id.* Class Members do not need to submit a claim form to participate in
14 the Settlement. *See* Settlement Agreement, Ex. A (Class Notice), p. 1. Class Members are informed of
15 how they can object to the Settlement, and the Class Notice informs Class Members of the date, time, and
16 location of the final fairness and approval hearing so that they can appear in person. *Id.* at pp. 1, 6-7.
17 Notice will be provided in English only, as English was spoken by all class members and aggrieved
18 employees, and their employment agreements were all written in English. As such, providing notice in
19 English only is sufficient to notify class members and aggrieved employees of the settlement, the content
20 of the Class Notice complies with the requirements of Cal. R. Ct. 3.766(d).

21 If Class Notice packets are returned as undeliverable, the Settlement Administrator will perform a
22 skip-trace or other search, and re-mail the Class Notice with an extended deadline, to opt out or object, of
23 15 days from the date of mailing or the original deadline, whichever is later. Settlement Agreement, §
24 3.03. The initial 45-day notice period and extension process ensures the notice program provides due
25 process by giving Class Members enough time to determine whether they want to participate in the
26 Settlement. *Id.* This means of notice is reasonably calculated to apprise Class Members of the pendency
27 of the action. *See* Cal. R. Ct. 3.766 (d)-(f).

28 **C. Proposed Release**

Class Members will release Released Parties (ie., “Defendants and each of its owners, partners, shareholders, directors, affiliated entities, subsidiaries, officers, agents, supervisors, employees, attorneys, insurance carriers, and other insurers, successors, and assigns.”) from the following “Released Claims” against the Released Parties during the period of March 9, 2017 through November 11, 2022: any and all claims alleged in Named Plaintiff’s Operative Complaint, during the Class Period, including but not limited to (1) failure to pay minimum wages (2) failure to pay overtime wages (3) failure to provide meal periods (4) failure to authorize or permit rest periods (5) failure to reimburse business expenses (6) failure to furnish accurate itemized wage statements wage statement violations (7) failure to pay wages upon separation of employment and within the required time and (8) violation of California Business and Professions Code §§17200, *et seq.*, based on the preceding claims.

Settlement Agreement § 5.01.

PAGA Group Members regardless of whether they opt themselves from the Class Settlement will be deemed to have released or waived the following against the Released Parties during the period of September 3, 2020 through November 11, 2022 upon the date of funding the GSA: all claims exhausted in Plaintiff’s notice(s) sent to the LWDA and alleged in the operative complaint, which arose during the PAGA Period, regardless of whether PAGA Group Members opt out of the Class Settlement. *Id* at 5.02.

Only Plaintiff will agree to a general release of any and all claims, whether known or unknown, which exist or may exist on Plaintiff’s behave as of the date of the Settlement, and a waiver of Civ. Code § 1542. *Id.* at § 5.03.

IV. LEGAL ARGUMENTS SUPPORTING PRELIMINARY APPROVAL

A. Provisional Certification of the Class is Appropriate

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

1. The Proposed Class is Numerous and Ascertainable

Whether a class is “ascertainable” is “determined by examining (1) the class definition, (2) the size of the class, and (3) the means available for identifying class members.” *Reyes v. Bd. of Supervisors*, 196 Cal. App. 3d 1263, 1271 (1987). Here, the Class consists of all non-exempt employees employed by Defendants in California at any time from March 9, 2017, through November 11, 2022. Settlement

1 Agreement, § I(ff). Defendants' records show the Class consists of approximately 183 individuals,
2 making joinder of all Class Members impracticable. McNicholl Decl. ¶ 8. Further, the Class is readily
3 ascertainable from Defendants' business records because all Class Members are current or former
4 employees of Defendants. *Id.*

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

6 “[T]he ‘community of interest requirement embodies three factors: (1) predominant common
7 questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3)
8 class representatives who can adequately represent the class.’” *Fireside Bank v. Superior Court*, 40 Cal.
9 4th 1069, 1089 (2007) (quoting *Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462, 470 (1981)).

10 a. Common Questions Predominate

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

16 Plaintiff alleged that Defendants maintained uniform employment policies and/or practices that
17 illegally deprived Class Members of lawful meal periods, rest breaks, expense reimbursements, accurate
18 wage statements, and waiting time pay. McNicholl Decl. ¶ 9. Plaintiff's allegations present common legal
19 and factual questions of, *inter alia*, whether Defendants applied the same scheduling, timekeeping,
20 expense reimbursement, meal period, and rest break policies to all Class Members; whether these policies
21 and practices resulted in Labor Code violations; whether Defendant's conduct was intentional; and
22 whether Class Members are entitled to penalties. *Id.*

23 These common questions could be resolved using Class Members' schedules, time punches, and
24 payroll records, Defendant's corporate representative's testimony, written communications between
25 Defendants and Class Members, and Class Member declarations. McNicholl Decl. ¶ 10. Thus, the Court
26 can and should exercise its discretion to grant conditional class certification for settlement purposes.

27 b. Plaintiff's Claims are Typical of the Class Claims

28 The typicality requirement is satisfied when the legal theories and facts supporting Plaintiff's

claims are substantially similar to other class members. *See Classen v. Weller*, 145 Cal. App. 3d 27, 46 (1983). Here, Plaintiff alleges that they and other Class Members were employed by Defendants and injured by Defendant's common wage and hour policies and practices, including Defendant's scheduling, timekeeping, meal period, and rest break. McNicholl Decl. ¶¶ 11. Through documents and information exchanged in informal discovery, including production of pay stubs, time card punches, and policies by Defendant, Plaintiff confirmed that these common policies and practices similarly affected Plaintiff and the Class. *Id.* Thus, Plaintiff's claims arise from the same employment practices and are based on the same legal theories as those applicable to other Class Members, as further explained in Plaintiff's exposure analysis below.

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

Certification requires adequacy of both the proposed class representative(s) and proposed class counsel. With respect to the class representative, a plaintiff must adequately represent and protect the interests of other members of the class and demonstrate that his or her claim is not inconsistent with the claims of other members of the class. *See Capitol People First v. State Dep't of Developmental Servs.*, 155 Cal. App. 4th 676, 696-697 (2007). Here, Plaintiff's interests are coextensive with the interests of the Class. Plaintiff demonstrated an ability to advocate for the interests of the Class by initiating this litigation, gathering documents and information, being available on the day of mediation to answer questions, meeting with their attorneys on several occasions to understand the claims and theories of liability at issue, assisting attorneys in preparing for mediation, reviewing the proposed settlement agreement to understand its legal effect, and obtaining a fair settlement on behalf of Class Members who stand to recover a substantial amount under the Settlement. Accordingly, Plaintiff should be appointed Class Representatives, and Plaintiff's Counsel should be appointed Class Counsel.

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

Class treatment is superior to other methods of adjudication when the probability is small that each class member will come forward to prove his or her claim and when the class approach would deter and redress the alleged wrongdoing. *See Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 435, 446 (2000); *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524, 1537-1538 (2008). Here, none of the other

271 Class Members had shown any interest in bearing the expense and burden of litigating their own claims. McNicholl Decl. ¶ 12. Thus, a class action is the superior method for seeking relief.

B. The Settlement Meets the Standards for Preliminary Approval

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

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”; and (4) the percentage of objectors “is small.” *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1802 (1996). The Settlement satisfies the first three factors. Plaintiff will analyze the fourth factor at the final approval stage.

1. The Settlement is Entitled to a Presumption of Fairness

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

Courts presume the absence of fraud or collusion in the negotiation of a settlement, unless evidence to the contrary is offered. Thus, there is a presumption that settlement negotiations are conducted in good faith. Here, the Settlement was the product of a full day mediation session and two months of continued negotiations with a respected mediator after informal discovery and litigating a Motion to Compel. McNicholl Decl. ¶¶ 4-6. The negotiations were adversarial, conducted at arm’s length and tempered by the efforts of both sides to serve the interests of their clients. *Id.* at ¶ 4-6. The amount of Plaintiff’s requested Incentive Award were not negotiated until after the Parties agreed to the Gross Settlement Amount and many other terms. *Id.* at ¶ 22.

b. Plaintiff’s Counsel Conducted Sufficient Investigation and Discovery

1 Plaintiff's Counsel thoroughly investigated the class claims, applicable law, and potential
2 defenses. *See generally*, McNicholl Decl. In particular, Plaintiff's Counsel assessed the value of the
3 class claims using Defendant's data and documents produced through informal discovery. McNicholl
4 Decl. ¶¶ 4, 13-22. Plaintiff's counsel personally reviewed time records and compared them to payroll
5 documents to identify potential violations. *Id.* Accordingly, Plaintiff's Counsel fully understood the
6 strengths and weaknesses of the claims before the Parties reached a settlement. *Id.*

7 c. Plaintiff's Counsel is Experienced in Similar Litigation

8 Plaintiff is represented by Aegis Law Firm ("Class Counsel"). Class Counsel prosecute wage and
9 hour class actions on behalf of employees and others who have had their rights violated. McNicholl
10 Decl. ¶¶ 25-38; *see generally* McNicholl Decl. The attorneys working on this case have been appointed
11 class counsel in many cases, through both contested motions and settlement approval motions. *Id.* Thus,
12 Plaintiff's Counsel has extensive experience in similar litigation and should be appointed as Class
13 Counsel. *Id.* at ¶ 39.

14 **2. The Settlement is Reasonable Given the Strengths of Plaintiff's Claims and**
15 **the Risks and Expense of Litigation**

16 Courts have discretion to approve class settlements by assessing several factors, including the
17 "strength of plaintiff's case, risk, expense, complexity and likely duration of further litigation and risk
18 of maintaining the class action through trial." *Munoz v. BCI Coca-Cola Bottling Co. of L.A.*, 186 Cal.
19 App. 4th 399, 407 (2010); *see Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 129 (2008).

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

1 a. Exposure Analysis

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

5 Compromise is inherent and necessary in the settlement process . . . even if “the relief afforded
6 by the proposed settlement is substantially narrower than it would be if the suits were to be
7 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.”

8 *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 250 (2001) (citation omitted). Here, Plaintiff
9 contends that her claims are based on Defendant’s common, class-wide policies and procedures, and
10 that liability could be determined on a class-wide basis without dependence on individual assessments
11 of liability. McNicholl Decl. ¶¶ 8-10. Although the amount of Defendants’ potential exposure – if
12 proven – is substantial, the legitimate and serious risks of succeeding at class certification and trial
13 compelled a serious consideration of the benefit of a settlement. *Id.* at ¶¶ 13-22.

14 Meal Break Claims: Plaintiff mainly alleged Defendants subjected non-exempt employees to on-
15 duty meal periods for all shifts. Plaintiff estimated \$1,045,698 in meal premium payments owed based
16 on a 50% violation assumption rate reported by Plaintiff. Plaintiff allege Defendants meal break policy
17 is facially illegal because it did not authorize a third meal break. Plaintiff’s Meal Break-On Duty waiver
18 stated “[c]ustomers and tenants are constantly coming into the office and on the property.” Employees
19 need to be available to assist them at all times.” Defendants argued that two employees were present at
20 all times allowing one employee take an uninterrupted meal break at any time. Defendants also
21 produced signed meal waivers for some class members and Defendants claimed they paid meal
22 premiums when warranted. In addition, testimony will likely not establish a 100% violation rate. As
23 such, Plaintiff discounted these claims, to \$209,000 to account for a 80% risk of failing to prevail on
24 the claims if Defendants defeated class certification or Plaintiff failed to convince the trier of fact to
25 find in their favor at trial. McNicholl Decl. ¶ 16.

26 Rest Break Claims: Plaintiff alleged Defendants required Plaintiff and class members to take
27 interrupted rest breaks. Plaintiff estimated \$418,279 in rest break premium payments owed based on a
28 20% violation assumption rate reported by Plaintiff. Plaintiff also alleges Defendant’s rest break policy

1 was illegal because it denied Plaintiff and Class Members a third rest break. The sample of pay data
2 provided showed zero rest break premiums were paid to Class Members. Plaintiff is unsure if he could
3 certify this claim since it would depend heavily on class member testimony. In addition, testimony will
4 likely not establish a high violation rate. Defendants maintained that uninterrupted rest breaks were
5 provided to all employees. Consequently, Plaintiff discounted these claims, to about \$84,000 to account
6 for an 80% risk of failing to prevail on those claims. McNicholl Decl. ¶ 17.

7 Failed to Pay Overtime at the Regular Rate: Plaintiff alleged Defendants failed to pay overtime
8 at the regular rate. Plaintiff's expert found \$22,312 in unpaid overtime wages for failing to include the
9 regular rate. Plaintiff and Class Members allege they were paid a non-discretionary bonus. Plaintiff's
10 and the sampling of Class Members' pay records allegedly show non-discretionary bonuses were not
11 calculated in the regular rates for overtime and sick pay. In addition, Defendants' policy only promises
12 to pay 1.5x the "normal hourly wage," not the regular rate of pay. Defendants assert the bonus was a
13 quarterly discretionary bonus. Consequently, Plaintiff discounted these claims, to about \$20,000 to
14 account for an 10% risk of failing to prevail on those claims. McNicholl Decl. ¶ 18.

15 Unreimbursed Business Expenses: Plaintiff alleged Defendants failed to reimburse for Plaintiff
16 and Class Members for cell phone expenses for mandatory use of personal cell phones. Plaintiff's expert
17 estimated \$758,064 in unreimbursed business expenses assuming \$30 in cell phone expenses per month.
18 Plaintiff used his personal cell phone to take notes, pictures, and document security violations.
19 However, Defendants' employee policy forbids class members from using their cellular phones for
20 personal use without prior manager's approval. Consequently, Plaintiff discounted these claims, to about
21 \$75,000 to account for an 90% risk of failing to prevail on those claims. McNicholl Decl. ¶ 19.

22 Derivative Waiting Time and Wage Statement Penalty Claims: Plaintiff's Counsel also considered
23 the arguable presence of various penalties, and weighed the potential recoveries against probable defenses.
24 Specifically, Defendants could argue that Plaintiff could not prove the "willful" prong needed to obtain
25 waiting time penalties under Lab. Code § 203. Additionally, Defendants could argue that Plaintiff could
26 not show that Class Members suffered an "injury" as a result of wage statement violations, as required by
27 Cal. Lab. Code § 226. Although the Class arguably could have seen a payout of approximately \$339,648
28 for waiting time penalties (based on 80 terminated employees) and about \$487,400 for wage statement

1 penalties (based on 112 employees who worked 4,935 pay periods), Plaintiff would not recover any of
2 these derivative penalties if they failed to prove the underlying claims. Consequently, Plaintiff discounted
3 these claims, assigning about \$33,000 to the waiting time claim and \$48,000 to the wage statement
4 claim, to account for a 90% risk of failing to prevail on the underlying claims and overcome defenses
5 to the penalty claims. McNicholl Decl. ¶ 20.

6 PAGA Claim: The PAGA claim presented even higher hurdles. Although Plaintiff's Counsel
7 found Defendant's exposure could potentially reach a maximum of approximately \$502,200 under Lab.
8 Code § 2699(f), assuming the initial penalty rate of \$100 for each pay period (\$100 x 5,022 pay periods),
9 Plaintiff would have to prove a violation in every pay period. Based on the time and pay data Defendants
10 provided to Plaintiff, Plaintiff calculated there are 123 PAGA Group Members within this settlement
11 and 5,022 total pay periods worked during the PAGA Period from March 26, 2020 through the date of
12 mediation, November 11, 2022. McNicholl Decl. ¶ 21.

13 However, the Court would have the discretion to reduce the PAGA award based on whether the
14 amount of the award would be "unjust, arbitrary and oppressive, or confiscatory." Lab. Code §
15 2699(e)(2). In theory, the Court could reduce the award by 99% if it so wished. Plaintiff was doubtful
16 he could recover any PAGA penalties, given Defendant's allegations that it paid at least some meal
17 premiums, maintained mostly compliant policies, and it did an overtime "true-up" regularly to include
18 bonuses when required, especially if a large class judgment was entered for the same violations.
19 Accordingly, Plaintiff could not place a high value on the PAGA penalties, and therefore allocated
20 \$40,000 of the Gross Settlement Amount to settle these claims. McNicholl Decl. ¶ 22.

21 **C. The Requested Incentive Award for Plaintiff**

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

1 Here, Plaintiff had the option to pursue her claims individually, but instead chose to pursue this
2 class action, delaying individual recovery until approval of a class action settlement. McNicholl Decl.
3 ¶ 23. Throughout the case, Plaintiff assisted counsel in gathering the evidence necessary to prosecute
4 the class claims, maintained regular contact with counsel, was available on the day of mediation and
5 communicated with his attorneys during the day of mediation to answer critical questions, and reviewed
6 the Settlement to make sure it was fair to the Class. *Id.* No action would likely have been taken by Class
7 Members individually, and no compensation would have been recovered for them, but for Plaintiff's
8 services on behalf of the Class. *Id.*

9 By actively pursuing this action, Plaintiff furthered the California public policy goal of enforcing
10 the State's wage and hour laws. *See Sav-On Drug Stores, Inc., supra*, 34 Cal. 4th at 340. The requested
11 Incentive Award for Plaintiff's service as the class representative and for a general release of all
12 employment claims is reasonable and should be preliminarily approved. At the final approval stage,
13 Plaintiff will further support the request for Incentive Awards by declarations addressing the factors for
14 the award. McNicholl Decl. ¶ 24.

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

16 The purpose of an attorneys' fee award in class action litigation is to reward counsel who invested
17 in a case despite the risk of non-payment and achieved a substantial positive result for the class.
18 Attorneys' fees are awarded as a matter of equity. California courts routinely award attorneys' fees
19 equaling one-third or more of the potential value of the common fund. *See Chavez v. Netflix, Inc.*, 162
20 Cal. App. 4th 43, 66, n.11 (2008) ("Empirical studies show that, regardless of whether the percentage
21 method or the lodestar method is used, fee awards in class actions average around one-third of the
22 recovery").

23 Plaintiff seeks appointment of Aegis Law Firm, PC as Class Counsel. The attorneys performed
24 significant work and expended litigation costs in prosecuting the matter with no guarantee of any
25 payment. McNicholl Decl. ¶ 39. Plaintiff's Counsel seeks preliminary approval for \$166,666.66 in
26 attorneys' fees, which is up to one-third of the Gross Settlement Amount, and up to \$25,000 in
27 reimbursement of litigation costs. Given the work performed in this matter, the extensive information
28 exchange, and substantial recovery obtained on behalf of Plaintiff and the Class, Plaintiff's Counsel

1 achieved a settlement through efficient and diligent work. *See generally*, McNicholl Decl. At final
2 approval, Plaintiff's Counsel will fully brief the merits of its request for the award of attorneys' fees
3 and litigation costs. *Id.* at ¶ 40.

4 **V. CONCLUSION**

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

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10 Dated: March 29, 2023

AEGIS LAW FIRM, PC

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12 By: Steven McNicholl
13 Steven A. McNicholl
14 Attorneys for Plaintiff
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