

Kane Moon (SBN 249834)
kane.moon@moonyanglaw.com
H. Scott Leviant (SBN 200834)
scott.leviant@moonyanglaw.com
Mariam Ghazaryan (SBN 341119)
mariam.ghazaryan@moonyanglaw.com

MOON & YANG, APC
1055 W. Seventh St., Suite 1880
Los Angeles, California 90017
Telephone: (213) 232-3128
Facsimile: (213) 232-3125

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

VANNA WARGA, individually, and on behalf
of all others similarly situated,

Plaintiff,

vs.

ADVANCED INTEGRATED PEST
MANAGEMENT, et al.,

Defendants.

Case No.: MSC21-02131

[Assigned for all purposes to: Hon. Charles S.
Treat]

CLASS ACTION

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR PRELIMINARY APPROVAL
OF CLASS AND REPRESENTATIVE
ACTION SETTLEMENT; MEMORANDUM
OF POINTS AND AUTHORITIES**

Date: TBD
Time: TBD
Courtroom: Dept. 12
Judge: Hon. Charles S. Treat

Action Filed: October 5, 2021
Trial Date: Not Set

1 TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on (a date and time to be set by the Clerk) _____,
3 2023, at _____, or as soon thereafter as the matter may be heard, in Department 12 of the
4 above-captioned Court, located at 725 Court Street, Martinez, CA 94553, Plaintiff VANNA WARGA
5 (“Plaintiff”) will and hereby does move this Court for an order:

- 6 1. Granting class certification of the Class, solely for settlement purposes pursuant to
7 Code of Civil Procedure § 382;
- 8 2. Preliminarily approving the CLASS, COLLECTIVE, AND REPRESENTATIVE
9 SETTLEMENT AGREEMENT (“Settlement” or “Agreement”);
- 10 3. Appointing counsel for Plaintiff, Moon & Yang, APC, as Class Counsel;
- 11 4. Appointing Plaintiff as the Class Representative;
- 12 5. Approving the use of the proposed notice procedure and related notice form;
- 13 6. Approving Simpluris as the third-party administrator;
- 14 7. Directing that notice be mailed to the Class; and,
- 15 8. Scheduling a hearing date for motions for final approval of class action settlement
16 and awards of attorneys’ fees and costs.

17 Good cause exists to grant this Motion because:

- 18 1. The Class meets all of the requirements for class certification for settlement
19 purposes under Code of Civil Procedure § 382;
- 20 2. The Settlement Agreement is a fair, adequate, and reasonable compromise of the
21 disputed wage and hour claims asserted by Plaintiff;
- 22 3. Plaintiff and Class Counsel are adequate to represent the Class;
- 23 4. The proposed notice procedures and related forms comply with California Rules of
24 Court 3.766(d) and (e), adequately apprise Class Members of their rights, and fully comport
25 with due process; and
- 26 5. Based on the foregoing, notice should be directed to the Class Members and a final
27 fairness hearing should be scheduled (Plaintiff suggests about 150 days after preliminary
28 approval is granted).

1 This Motion is made pursuant to Rule 3.769 and Rule 3.1113(e) of the California Rules of Court,
2 which require approval by the Court of a class action settlement and permit the Court to extend the page
3 limit for memoranda.

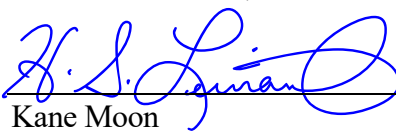
4 **TENTATIVE RULINGS:** Tentative rulings will be available beginning at 1:30 p.m. on the
5 court day preceding the scheduled hearing. If you are unable to access the Civil tentative rulings by the
6 web, you may call (925) 608-1000. The tentative ruling will become the Court's ruling unless by 4:00
7 p.m. of the court day preceding the hearing, counsel or parties call the department rendering the decision
8 to request argument and to specify what issues are to be argued. Calling counsel must advise all other
9 affected counsel and unrepresented parties by no later than 4:00 p.m. of his or her decision to appear and
10 of the issues to be argued. Failure to timely advise the Court and counsel or parties will preclude counsel
11 from arguing the matter.

12 This Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points
13 and Authorities, the Declarations of H. Scott Leviant, Plaintiff, and the Settlement Administrator in
14 support thereof, all papers and pleadings on file with the Court in this action, all matters judicially
15 noticeable, and on such oral and documentary evidence as may be presented in connection with the
16 hearing on the Motion.

17 Respectfully submitted,

18 Dated: February 3, 2023

MOON & YANG, APC

19 By:  _____
20 Kane Moon

21 H. Scott Leviant

22 Mariam Ghazaryan

23 Attorneys for Plaintiff
24
25
26
27
28

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	iii
I. INTRODUCTION.....	1
II. THE MAJOR TERMS OF SETTLEMENT	1
III. FACTUAL AND PROCEDURAL BACKGROUND	4
A. Plaintiff's Claims	4
B. Pre-Mediation Data Production and Analysis.....	5
C. Settlement.....	5
IV. CLASS DEFINITION.....	6
V. DISCUSSION.....	6
A. The Court Should Conditionally Certify the Class for Settlement Purposes.....	6
1. The Members of the Class Are Both Ascertainable and Numerous.	7
2. There Are Common Questions That Predominate Over Any Questions That May Be Unique to Individual Class Members.....	7
3. Plaintiff's Claims Are Typical of Those of the Class.	8
4. Plaintiff and Plaintiff's Counsel Will Adequately Represent the Class.....	9
5. Proceeding as a Class Action is Superior to Individual Actions.....	9
6. The Proposed Class Notice Complies with Rule 3.766(d) and (e)	9
a) The Notice Procedure Satisfies Due Process	10
b) The Notice is Accurate and Informative	10
B. The Court Should Preliminarily Approve the Settlement Because It Is a Fair, Adequate, and Reasonable Compromise of Disputed Wage Claims.....	10
1. Class Action Settlements Are Subject to Review and Approval.	11
2. The Parties Reached the Settlement Through Arms' Length Negotiations Between Experienced Counsel with the Assistance of a Highly Qualified Mediator After Sufficient Data Was Exchanged to Evaluate Settlement.	11

1	3.	The Settlement Represents a Fair, Adequate, and Reasonable Compromise of	
2		Class Members’ Claims Based on Defendant’s Estimated Liability Exposure	
3		Given the Risks Continued Litigation Would Entail.	12
4	4.	The Proposed Method for Allocating Settlement Funds Is Fair.	15
5	5.	The Proposed Enhancement Award to Plaintiff Warrants Approval.	16
6	6.	The Proposed Award of Attorneys’ Fees and Costs Is Also Fair, Adequate,	
7		and Reasonable and Merits Preliminary Approval.	16
8	7.	The Proposed Payment to the Administrator Is Fair and Reasonable.....	17
9	8.	The PAGA Allocation is Reasonable.....	17
10	VI.	THE COURT SHOULD SCHEDULE A FINAL FAIRNESS HEARING	20
11	VII.	CONCLUSION.....	20

TABLE OF AUTHORITIES

CALIFORNIA DECISIONAL AUTHORITY

<i>7-Eleven Owners for Fair Franchising v. Southland Corp.</i> , 85 Cal. App. 4th 1135 (2000)	12
<i>Amaral v. Cintas Corp.</i> , 163 Cal. App. 4th 1157 (2008)	19
<i>Amaro v. Anaheim Arena Mgmt., LLC</i> , 69 Cal. App. 5th 521 (2021)	17
<i>Bell v. Farmers Ins. Exchange</i> , 115 Cal. App. 4th 715 (2004)	16
<i>Brinker Rest. Corp. v. Super. Ct.</i> , 53 Cal. 4th 1004 (2012)	6, 8, 15
<i>Cartt v. Sup. Ct.</i> , 50 Cal. App. 3d 960 (1975)	10
<i>Clothesrigger, Inc. v. GTE Corp.</i> , 191 Cal. App. 3d 605 (1987)	7
<i>Dunk v. Ford Motor Co.</i> 48 Cal. App. 4th 1794 (1996)	7, 11, 16, 18
<i>Duran v. US Bank Nat’l Ass’n</i> , 59 Cal. 4th 1 (2014)	13
<i>Ghazaryan v. Diva Limousine, Ltd.</i> , 169 Cal. App. 4th 1524 (2008)	8
<i>Global Minerals & Metals Corp. v. Superior Court</i> , 113 Cal. App. 4th 836 (2003)	7
<i>Jaimez v. Daiohs USA, Inc.</i> 181 Cal. App. 4th 1286 (2010)	7
<i>Kullar v. Foot Locker Retail, Inc.</i> , 168 Cal. App. 4th 116 (2008)	11
<i>Laffitte v. Robert Half Intern. Inc.</i> , 1 Cal. 5th 480 (2016)	16, 17
<i>Linderv. Thrifty Oil Co.</i> , 23 Cal. 4th 429 (2000)	6, 9
<i>Malibu Outrigger Bd. of Governors v. Superior Court</i> , 103 Cal. App. 3d 573 (1980)	11
<i>McGhee v. Bank of America</i> , 60 Cal. App. 3d 442 (1976)	9
<i>Miller v. Woods</i> , 148 Cal. App. 3d 862 (1983)	7
<i>Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles</i> , 186 Cal. App. 4th 399 (2010)	11
<i>Noel v. Thrifty Payless, Inc.</i> , 7 Cal. 5th 955, 980 (2019)	7
<i>Sav-on Drug Stores, Inc. v. Superior Court</i> , 34 Cal. 4th 319 (2004)	6, 8
<i>Seastrom v. Neways, Inc.</i> , 149 Cal. App. 4th 1496 (2007)	8
<i>Stambaugh v. Superior Court</i> , 62 Cal. App. 3d 231 (1976)	11
<i>Wershba v. Apple Computer, Inc.</i> , 91 Cal. App. 4th 224 (2001)	12

FEDERAL DECISIONAL AUTHORITY

<i>Air Line Stewards & Stewardesses Ass’n, Local 550 v. American Airlines, Inc.</i> , 455 F.2d 101 (7th Cir. 1972).....	13
<i>Cotter v. Lyft, Inc.</i> , 176 5 F. Supp. 3d 930 (N.D. Cal. 2016)	20
<i>Miller v. CEVA Logistics U.S.A., Inc.</i> , 2015 WL 729638 (E.D. Cal. Feb. 19, 2015).....	15
<i>O’Connor v. Uber Technologies, Inc.</i> , 201 F.Supp.3d 1110 (N.D. Cal. 2016).....	18
<i>Rodriguez v. West Publishing Corp.</i> , 563 F.3d 948 (9th Cir. 2000).....	15
<i>Van Vranken v. Atlantic Richfield Co.</i> , 901 F.Supp. 294 (N.D. Cal. 1995)	16
<i>Viceral v. Mistras Group</i> , 2016 WL 5907869 (N.D. Cal. 2016).....	18
<i>Willis v. Xerox Bus. Servs., LLC</i> , 2013 WL 6053831 (E.D. Cal. 2013)	19

STATUTES

Code of Civil Procedure § 382.....	6, 7, 20
------------------------------------	----------

RULES

Rules of Court, rule 3.766	9
Rules of Court, Rule 3.769.....	7, 10, 11

OTHER AUTHORITIES

<i>Findings of the Study of California Class Action Litigation</i> , 2000-2006	15
--	----

1 **I. INTRODUCTION**

2 Pursuant to California Rules of Court, Rules 3.769, Plaintiff requests that this Court preliminarily
3 approve the class action settlement set forth in the CLASS, COLLECTIVE, AND REPRESENTATIVE
4 SETTLEMENT AGREEMENT (“Settlement” or “Agreement”) with ADVANCED INTEGRATED
5 PEST MANAGEMENT (“Defendant”).

6 After informal discovery, the exchange of documents and data, and an arm’s-length mediation
7 session with mediator Kelly Knight, Esq., Plaintiff and Defendant (collectively referred to herein as the
8 “Parties”) reached a proposed class action settlement with a gross settlement amount (“GSA”) of
9 **\$390,000.00** in compromise of disputed claims asserted on behalf of the below-defined Class consisting
10 of approximately **273** members. Plaintiff believes this settlement is a fair, adequate, and reasonable
11 compromise of disputed claims for alleged wage and hour violations and penalties asserted in this case.

12 Plaintiff now submits this Motion for Preliminary Approval of Class Action Settlement, along
13 with the Settlement (attached to the Declaration of H. Scott Leviant [“Leviant Decl.”], Exhibit 1 thereto).
14 For the Court’s convenience, below is a summary of the key provisions of the Settlement.

15 **II. THE MAJOR TERMS OF SETTLEMENT**

16 The provisions of the proposed Settlement include the following:

- 17 • Defendant agrees not to oppose certification for purposes of Settlement (Settlement, ¶
18 13.20);
- 19 • Class: All current and former non-exempt employees of Defendant who worked in the
20 State of California at any time during the Class Period (the “Class Period” is October 5,
21 2017, through to and including January 1, 2022). (Settlement, ¶ 1.5, 1.12.) “Participating
22 Class Members” are those Class Members who do not submit timely exclusion requests to
23 the Settlement Administrator. (Settlement, ¶ 1.8, 1.11, 1.32);
- 24 • Settlement Amount: Defendant will pay a maximum of **\$390,000.00**, referred to as the
25 Gross Settlement Amount (or GSA herein), resulting in an estimated average **gross**
26 payment per Class Member of approximately **\$1,428.57** (Settlement, ¶ 1.19);
- 27 • Class Size: approximately **273** individuals who worked an approximately **20,263**
28 workweeks. (Settlement, ¶¶ 1.8, 4.1);

- 1 • PAGA Group Size: an estimated **165** individuals, who worked roughly **3,170** pay periods
2 (Leviant Decl., ¶ 18);
- 3 • PAGA Period: October 5, 2020, through and including January 1, 2022 (Settlement, ¶
4 1.29);
- 5 • Escalator Clause: If the actual number of Workweeks encompassed within the Class Period
6 exceeds 20,263 by more than 10%, then, Defendant at its exclusive discretion may either (a)
7 increase the Gross Settlement Amount by a pro-rata dollar value for those workweeks in
8 excess of the escalation margin; or (b) ending the Class Period on the date on which the
9 number of workweeks is no more than 10% higher than 20,263. Under the latter option no
10 additional payment is necessary. (the “Escalator Clause”). (Settlement, ¶ 4.1);
- 11 • Kullar/Munoz Analysis: Plaintiff addresses the claims analysis herein, at Part V.B.3, and in
12 more detail the Declaration of Leviant, at Paragraph 18;
- 13 • No Reversion: The Settlement is a **non-reversionary** settlement (Settlement, ¶ 3.1);
- 14 • Certification: Plaintiff addresses certification requisites herein, at Part V.A., and in the
15 Declaration of Leviant, at Paragraphs 34-40;
- 16 • No Claim Form: No claim form is required (Settlement., ¶ 3.1);
- 17 • Class Release: The Settlement will release specified wage-and-hour claims for Class
18 Members (those Class Members who do not opt out of the Settlement) as defined by the
19 First Amended Complaint (Settlement, ¶¶ 2.3, 5.3);
- 20 • PAGA Release: Class Members will release the PAGA Claims set forth in this Action, that
21 were identified in the Operative Complaint and Plaintiff’s LWDA Notice Letter, regardless
22 of whether they opt out of the class portion of the Settlement (Settlement, ¶¶ 2.1, 5.2);
- 23 • Release Effective Date: The Release is not active until Defendant tenders all payments
24 required under the Settlement to the Settlement Administrator (Settlement, ¶ 5);
- 25 • Net Settlement Amount Available to the Class: After deducting Class Counsel’s attorneys’
26 fees and costs, service payment to Plaintiff, administration costs, and the PAGA penalty,
27 the remainder will be available for distribution to Class Members who do not opt out, with
28 each Class Member receiving a share based on the number of workweeks each Class

Member worked for Defendant within the Class Period. The Net Settlement Amount is estimated to be at least **\$185,000.00**, resulting in an average **net** payment per Class Member of at least **\$677.66**, before any tax withholdings. (Settlement, ¶ 3);

- Tax Allocation: The amounts distributed to Class Members will be characterized as 25% alleged unpaid wages, 75% to penalties and interest, and PAGA Settlement Payments will be allocated as 100% penalties. (Settlement, ¶ 3.2.4.1, 3.2.5.2);
- Employer's Portion of Payroll Taxes Paid Separately: Defendant's portion of payroll taxes (e.g., FICA, FUTA, etc.) owed on any settlement payments to Class Members that constitute wages will be paid separate and apart from the GSM (Settlement, ¶ 3.1);
- Settlement Administrator: The notice portion of the Settlement will be administered by a third-party Administrator, Simpluris, and the Parties estimated that the costs of administration should not reasonably exceed \$15,000.00. Simpluris's estimate for settlement administration services in the amount of **\$7,000.00** was selected as the lowest bid from a competitive bidding process. (Settlement, ¶ 3.2.3; Simpluris Decl., Exh. C.)
- Class Data for Administration: The Settlement Administrator will receive the Class List within 14 calendar days of Preliminary Approval, use the NCOA database to update the Class List, and then use skip tracing on returned Notices (Settlement, ¶ 4.2);
- Notice: The Notice will issue within 14 days of receipt of the Class List (Settlement, ¶ 7.4.2). The Notice describes how to dispute workweeks, submit an objection in writing, in person, or through an attorney, or request exclusion (Settlement, ¶¶ 8.4 – 8.7);
- Notice Language: Notice will issue in English and Spanish (Settlement, ¶ 8.4.2);
- Objections: Objections can be submitted in person, through an attorney, or in writing to the Settlement Administrator, with no pre-requisite to being heard (Settlement, ¶ 8.7);
- Exclusion Requests: The procedure for exclusion requests, mailing a request to the Settlement Administrator, is the same as the procedure for submitting a written objection (Settlement, ¶¶ 8.5 and 8.7);
- PAGA Allocation: From the GSA, **\$40,000** will be allocated to settle claims brought pursuant to the California Private Attorneys General Act, Labor Code § 2699 *et seq.*

1 (“PAGA”), and seventy-five percent (75%), or **\$30,000**, will be paid to the California Labor
2 & Workforce Development Agency. (Settlement, ¶¶ 1.31, 3.2.5.);

- 3 • Notice to LWDA: Notice was provided prior to the filing of this Motion. Evidence is
4 attached to the Leviant Declaration;
- 5 • Enhancement/Service Awards to Plaintiff: Defendant will not oppose the application for
6 Class Representative Service Payment of up to **\$7,500.00** for Plaintiff, to be paid from the
7 GSA (Settlement, ¶ 3.2.1);
- 8 • Fees and Costs: Defendant will not oppose Class Counsel’s application for fees not to
9 exceed 33 1/3% of the GSA (**\$130,000.00**), and actual costs, in an amount not to exceed
10 **\$12,500**, to be paid out of the GSA (Settlement, ¶ 3.2.2);
- 11 • Check Void Period: Settlement checks will be valid for 180 days (Settlement, ¶ 4.4.3);
- 12 • Uncashed Checks: Any settlement checks that are mailed to the Class Members and remain
13 uncashed after 180 days of the date of issuance will be cancelled, and the moneys will be
14 directed to the *cy pres* State Bar’s Justice Gap Fund (Settlement, ¶ 4.4.3);
- 15 • Judgment Notice: Judgment will be posted on the Settlement Administrator’s website after
16 entry (Settlement, ¶ 8.8.1);
- 17 • Confidentiality Provisions: The Settlement permits Class Counsel to discuss the Settlement
18 with Class Members (Settlement ¶ 13.3).

19 (Leviant Decl., ¶¶ 11-12 and Exhibit 1 thereto.)

20 **III. FACTUAL AND PROCEDURAL BACKGROUND**

21 **A. Plaintiff’s Claims**

22 On October 5, 2021, Plaintiff filed a Complaint purporting to allege causes of action against
23 Defendant for: failure to pay minimum wages; failure to pay overtime compensation; failure to provide
24 meal periods; failure to authorize and permit rest breaks; failure to indemnify necessary business
25 expenses; failure to timely pay final wages at termination; failure to provide accurate itemized wage
26 statements; and unfair business practices. On December 10, 2021, Plaintiff filed a First Amended
27 Complaint (“FAC”) alleging an additional cause of action against Defendant for violation of PAGA. The
28 FAC is the operative complaint in the Action (the “Operative Complaint.”) (Leviant Decl., ¶ 4.)

Pursuant to Labor Code § 2699.3(a), on October 3, 2021, Plaintiff gave timely written notice to Defendant and the LWDA by sending the PAGA Notice. (Leviant Decl., ¶ 5.)

B. Pre-Mediation Data Production and Analysis

The Parties conducted informal discovery and investigation of the facts and law. Such investigation included, inter alia, the exchange of extensive informal data and discoverable information in preparation for the mediation sessions. (Leviant Decl., ¶ 6.) The Parties have analyzed payroll and other data pertaining to Plaintiff and the Class during the relevant Settlement Period, including but not limited to the numbers of former and current members of each purported subclass within the Class, average workweeks, and average rate of hourly pay. (*Id.*) In addition, Defendant also provided documents reflecting its wage and hour policies and practices during the Settlement Period and information regarding the total number of current and former employees in the Class. (*Id.*)

After reviewing documents regarding Defendant's wage and hour policies and practices and other information obtained during the informal exchange of discovery, Class Counsel were able to evaluate the probability of class certification, success on the merits, and the reasonably obtainable maximum monetary exposure for all claims. Class Counsel reviewed these records and prepared a damage analysis prior to mediation. Class Counsel also investigated the applicable law regarding the claims and defenses asserted in the litigation. (Leviant Decl., at ¶ 7.)

C. Settlement

On May 20, 2022, the Parties participated in an all-day mediation presided over by mediator Kelly Knight, Esq., which led to this Agreement to settle. (Leviant Decl., ¶ 8.) The Parties discussed at length the burdens and risks of continuing with the litigation as well as the merits of claims and defenses. (*Id.*) After the mediation, the Parties then signed a long form settlement agreement (the Agreement). (*Id.*)

Plaintiff and Class Counsel are aware of the burdens of proof necessary to establish liability for the claims asserted in the Action, both generally and in response to Defendant's defenses thereto. (Leviant Decl., ¶ 9.) Plaintiff and Class Counsel have also taken into account Defendant's agreement to enter into a Settlement that confers substantial relief upon the Class.

Based on the foregoing, Plaintiff and Class Counsel have determined that the Settlement set forth in this Agreement is a fair, adequate, and reasonable Settlement and is in the best interests of the Class.

(Leviant Decl., ¶ 10.) Solely for the purpose of settling this case, the parties agree that the requirements for establishing class action certification with respect to this class have been met and are met. (*Id.*) If this Settlement is not approved by the Court for any reason, Defendant reserves its rights to contest class certification. (*Id.*) This Settlement, if approved, will result in the termination of the litigation through the entry of the Judgment and the release of all Released Claims for all Class Members, including all within the class definition who have not elected to exclude themselves from the Class. (*Id.*)

IV. **CLASS DEFINITION**

The Class is defined as follows:

All current and former non-exempt employees of Defendant who worked in the State of California at any time during the Class Period (the “Class Period” is October 5, 2017, through January 1, 2022.) “Participating Class Members” are those Class Members who do not submit timely exclusion requests from the Settlement. (Settlement, ¶¶ 1.8, 1.32.)

(Leviant Decl., ¶ 34 and Exhibit 1.)

The Aggrieved Employees are defined as follows:

All current and former non-exempt employees of Defendant employed in California at any time during the PAGA Period (the “PAGA Period” is October 5, 2020, through January 1, 2022.). (Settlement, ¶¶ 1.2, 1.29.)

V. **DISCUSSION**

A. **The Court Should Conditionally Certify the Class for Settlement Purposes**

The Class should be provisionally certified for settlement because: (1) the Class is ascertainable and sufficiently numerous; (2) there exists a well-defined community of interest; and (3) a class action is the superior method of adjudication for this settlement. Code of Civ. Proc. § 382; *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 1021 (2012); *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 435 (2000).

Under Code of Civil Procedure § 382, class certification is warranted so long as there is a numerous and ascertainable class with a well-defined community of interest among its members and a “class action proceeding is superior to other means for a fair and efficient adjudication of the litigation.” *See, e.g., Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319, 326, 332 (2004). For purposes of this Settlement *only*, Defendant stipulates to conditional certification. (Settlement ¶ 12.1.)

“The certification question is ‘essentially a procedural one that does not ask whether an action is legally or factually meritorious.’” *Id.*, at 326, quoting *Linder*. Indeed, the certification question simply

1 asks whether the theory of recovery advanced by the plaintiff is likely to prove amenable to class
2 treatment. *See, e.g., Jaimez v. Daiohs USA, Inc.*, 181 Cal. App. 4th 1286, 1298 (2010). “[I]t is also well
3 established that trial courts should use different standards to determine the propriety of a settlement class,
4 as opposed to a litigation class certification. Specifically, a lesser standard of scrutiny is used for
5 settlement cases.” *Global Minerals & Metals Corp. v. Superior Court*, 113 Cal. App. 4th 836, 859
6 (2003), citing *Dunk v. Ford Motor Co.* 48 Cal. App. 4th 1794, 1807 n. 19 (1996).

7 In view of these standards, and as shown below, the Class should be certified for purposes of
8 settlement. Code Civ. Proc. § 382; Rules of Court, Rule 3.769(c).

9 **1. The Members of the Class Are Both Ascertainable and Numerous.**

10 Whether an ascertainable class exists turns on three factors: (1) the class definition, (2) the size of
11 the class, and (3) the means of identifying the class members. *See Miller v. Woods*, 148 Cal. App. 3d
12 862, 873 (1983). In this case, Plaintiff contends that all three considerations favor class certification.

13 A class is ascertainable when “it is defined ‘in terms of objective characteristics and common
14 transactional facts’ that make ‘the ultimate identification of class members possible when that
15 identification becomes necessary.’” *Noel v. Thrifty Payless, Inc.*, 7 Cal. 5th 955, 980 (2019).

16 The class definition is sufficiently specific to enable the Parties, Class Members, and the Court to
17 readily determine the parameters of the class. *See Clothesrigger, Inc. v. GTE Corp.*, 191 Cal. App. 3d
18 605, 617 (1987). In this case, there are approximately 273 Class Members, all of whom may be
19 identified by reference to Defendant’s records that pertain to non-exempt status and dates of
20 employment. Accordingly, the Class is not only ascertainable, but also numerous. (Levant Decl., ¶ 35.)

21 **2. There Are Common Questions That Predominate Over Any Questions That**
22 **May Be Unique to Individual Class Members.**

23 The community of interest requirement embodies three factors: (1) predominant questions of law
24 and fact; (2) class representatives with claims or defenses typical of the class; and (3) class
25 representatives who can adequately represent the class. *Dunk*, 48 Cal. App. 4th at 1806; *Richmond*, 29
26 Cal. 3d at 473-75. A question of law or fact is common to the members of a class if it may be resolved
27 through common proof. *See, Jaimez*, 181 Cal.App.4th at 1305. As for predominance, it “is a comparative
28 concept, and ‘the necessity for class members to individually establish eligibility and damages does not

mean individual fact questions predominate.” *Sav-on*, 34 Cal. 4th at 334.

In this case, common questions include, but are not limited to: i. Whether or not Defendant paid proper wages to the Class; ii. Whether or not Defendant provided meal periods to the Class; iii. Whether or not Defendant provided rest periods to the Class; iv. Whether or not Defendant paid compensation timely upon separation of employment to former Class Members; v. Whether or not Defendant paid compensation timely throughout Class Members’ employment; vi. Whether or not Defendant provided accurate itemized wage statements to the Class; vii. Whether or not waiting-time penalties are available to the Class for violation of California Labor Code § 203; viii. Whether or not Defendant engaged in unlawful or unfair business practices affecting the Class in violation of California Business and Professions Code §§ 17200-17208; and ix. Whether or not Plaintiff and the Class are entitled to penalties pursuant to PAGA. (Levant Decl., ¶¶ 37-38.)

In the Action, Plaintiff’s claims present sufficient common issues of law and fact that predominate over individual issues and warrant class certification. From their review of the documentation provided, Class Counsel determined that for purposes of these claims, Defendant’s policies and practices are either identical, or sufficiently similar, to raise the same questions of liability, and applied to all Class Members. Because Class Members would have to prove the same issues of law and fact to prevail, and because their potential legal remedies are identical, it would be preferable to resolve all Class Members’ claims by means of the Settlement than to require each Class Member to litigate his or her individual claims. Therefore, common questions predominate over questions that may be unique to individual Class Members, and class-wide settlement is superior to any other resolution.

3. Plaintiff’s Claims Are Typical of Those of the Class.

Typicality “requires a showing that the class representative has claims or defenses typical of the class.” *See, e.g., Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524, 1534 (2008), approved by *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal. 4th 1004 (2012). California law does not require that plaintiffs have claims identical to the other class members. Rather, the test of typicality for a class representative is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct. *Seastrom v. Neways, Inc.*, 149 Cal. App. 4th 1496, 1502 (2007).

1 In light of these standards, Plaintiff is typical of class members. Like other Class Members,
2 Defendant employed Plaintiff in a non-exempt position during the Class Period, and Plaintiff claims that
3 she was subject to the same policies alleged to have impacted the entire class. (Leviant Decl., ¶ 36.)
4 Plaintiff alleges that she and other Class Members share the same claims stemming from Defendant's
5 alleged violations of the Labor Code and relevant wage order. In addition, Defendant's main defenses,
6 including that the wage and hour policies and practices fully comply with California law, apply equally
7 to the claims of all Class Members. Thus, Plaintiff is typical of the Class.

8 **4. Plaintiff and Plaintiff's Counsel Will Adequately Represent the Class.**

9 The adequacy requirement is met where the plaintiff is represented by counsel qualified to
10 conduct the litigation and the plaintiff's interest in the litigation is not antagonistic to class members'
11 interests. *McGhee v. Bank of America*, 60 Cal.App.3d 442, 451(1976). In other words, where the plaintiff
12 has adequate counsel, the plaintiff may represent the entire class absent any disabling conflicts of interest
13 that might hinder the plaintiff's ability to represent the class. *Id.*

14 In the Action, Plaintiff has no conflicts of interest with other Class Members and has agreed to
15 place Class interests above Plaintiff's own. (Warga Decl., ¶¶ 5-20; Leviant Decl., ¶ 39.) Moreover,
16 Plaintiff's counsel are experienced in wage and hour class action litigation and have no conflicts of
17 interest with absent Class Members. (Leviant Decl., ¶¶ 21-26, 39.) As such, this Court should appoint
18 Plaintiff as Class Representative for the Class and appoint Plaintiff's Counsel as Class Counsel.

19 **5. Proceeding as a Class Action is Superior to Individual Actions**

20 Plaintiff contends that proceeding as a class action is a superior means of resolving this dispute,
21 as the Class Members and the Court will derive substantial benefits. Class certification would serve as
22 the only means to deter and redress the alleged Labor Code violations. *See Linder v. Thrifty Oil Co.* 23
23 Cal. 4th at 434. Furthermore, individual actions arising out of the same operative facts would unduly
24 burden the courts and could result in inconsistent results, which may be avoided by class certification.

25 **6. The Proposed Class Notice Complies with Rule 3.766(d) and (e)**

26 Notice requirements are set forth in Rules of Court, Rule 3.766. In determining the manner of
27 notice, the court must consider interests of the class, relief requested, stakes of individual class members,
28 costs of notifying class members, resources of the parties, possible prejudice to class members who do

not receive notice, and the *res judicata* effect on class members. Rules of Court, Rule 3.766(e).

a) The Notice Procedure Satisfies Due Process

The proposed procedure for distributing the Proposed Notice is robust and meets the requirement that it have “a reasonable chance of reaching a substantial percentage of the class members.” *Cartt v. Sup. Ct.*, 50 Cal.App.3d 960, 974 (1975). There is no statutory or due process requirement that all class members receive actual notice, but in this matter, the Class Members will receive direct notice. Here, the proposed procedure includes safeguards, including, but not limited to, mailing notice to Class Members’ last known addresses; skip tracing; searches for address changes; and the re-mailing of returned notices to any forwarding addresses. This manner of giving notice complies with Rule of Court 3.766(c) because it provides a reasonable chance that Class Notice will reach most if not all Class Members.

b) The Notice is Accurate and Informative

The proposed Notice of Class Action Settlement should be approved for dissemination to the Class Members because its content complies with Rule of Court 3.766(d) in that it contains a brief explanation of the case, including the basic contentions or denials of the Parties, detailed information about Class Members’ rights to be excluded from the Settlement and object to the Settlement; a statement that the Settlement will bind all members who do not timely opt-out. Thus, the Notice also satisfies Rule of Court 3.769(f) regarding the contents of settlement notices.

The Notice also fulfills the requirement of neutrality in class notices. 3 NEWBERG § 8.39. It summarizes the proceedings and the terms and conditions of the proposed Settlement, in an informative and coherent manner, in compliance with the Manual for Complex Litigation (“MANUAL”), (2d Ed. 1993), which states that “the notice should be accurate, objective, and understandable to Class Members . . .” MANUAL, § 30.211. It makes clear that the Settlement does not constitute an admission of liability by Defendant and recognizes that this Court has not ruled on the merits. It also states that the final settlement approval decision has yet to be made. Accordingly, the Notice complies with the standards of fairness, completeness, and neutrality required of a combined settlement-certification class notice.

B. The Court Should Preliminarily Approve the Settlement Because It Is a Fair, Adequate, and Reasonable Compromise of Disputed Wage Claims

California courts favor settlement. *See, e.g., Stambaugh v. Superior Court*, 62 Cal. App. 3d 231,

236 (1976). Unlike most settlements, class action settlements involve a court approval process that exists to prevent fraud, collusion, and unfairness to class members. *Malibu Outrigger Bd. of Governors v. Superior Court*, 103 Cal.App.3d 573, 578-579 (1980). This approval process consists of preliminary settlement approval, notice being given to class members, and a final fairness and approval hearing being held at which class members may be heard with respect to the settlement. *Id.* For the reasons discussed below, this Court should preliminarily approve the Settlement, allow the Parties to give notice to the Class as proposed, and schedule a final fairness and final approval hearing.

1. Class Action Settlements Are Subject to Review and Approval.

Any settlement of class litigation must be reviewed and approved by the presiding court. Rules of Court, Rule 3.769(a). Approval occurs in two steps: (1) an early (preliminary) review and (2) a subsequent (final) review after notice has been distributed to the class members. The Preliminary Approval Hearing and Final Approval Hearing coincide with these two steps. The present motion seeks *preliminary approval* and the setting of a Final Approval Hearing.

To evaluate a settlement, the trial court must receive “*basic*” information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise.” *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 133 (2008). However, the record need *not* contain an explicit statement of the maximum theoretical amount that the class could recover. *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal. App. 4th 399, 409 (2010).

2. The Parties Reached the Settlement Through Arms’ Length Negotiations Between Experienced Counsel with the Assistance of a Highly Qualified Mediator After Sufficient Data Was Exchanged to Evaluate Settlement.

A settlement is presumptively fair where it is reached through arms’ length bargaining, based on sufficient discovery and investigation to allow counsel and the court to act intelligently, counsel is experienced in similar litigation, and the percentage of objectors is small.¹ *Dunk*, 48 Cal.App.4th at 1802;

¹ Because the fourth prerequisite for the presumption to arise cannot be addressed until the final approval hearing, only the first three prerequisites are relevant at this preliminary stage of the settlement approval process.

1 *In re Microsoft I-V Cases*, 135 Cal. App. 4th 706, 723 (2006); *7-Eleven Owners for Fair Franchising v.*
2 *Southland Corp.*, 85 Cal. App. 4th 1135, 1146 (2000). In exercising the power to approve a settlement,
3 the overriding concern is to ensure that a proposed settlement is “fair, adequate, and reasonable,” *Dunk*,
4 at 1801, considering “the complexity and likely duration of further litigation, the risk of maintaining class
5 action status through trial, the amount offered in settlement, the extent of discovery completed and the
6 state of the proceedings, the experience and views of counsel, the presence of a governmental participant,
7 and the reaction of the class members to the proposed settlement. *Id.* These factors require balancing, are
8 non-exhaustive, and, as such, trial courts should tailor the factors considered to each case and give due
9 regard to “what is otherwise a private consensual agreement between the parties.” *Id.*

10 Here, the Settlement resulted from thorough, arms’ length negotiations between experienced
11 counsel with the assistance of highly regarded mediator Kelly Knight, Esq. (Leviant Decl., ¶¶ 8-10.)
12 With respect to the claims at issue in this case, Plaintiff obtained data from Defendant and then carefully
13 reviewed that information. Counsel for Plaintiff also examined relevant policies and interviewed
14 witnesses in detail about their work experiences and Defendant’s practices.

15 Based on that review, Plaintiff estimated potential exposure and then estimated risk factors to
16 adjust the reasonable expected outcome. The investigation that Plaintiff’s counsel conducted was
17 sufficient to provide them with enough information to intelligently evaluate the estimated exposure for
18 purposes of negotiating the Settlement in view of the risks discussed below and was sufficient to allow
19 this Court to do the same. *See, e.g., Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 245 (2001).

20 **3. The Settlement Represents a Fair, Adequate, and Reasonable Compromise**
21 **of Class Members’ Claims Based on Defendant’s Estimated Liability**
22 **Exposure Given the Risks Continued Litigation Would Entail.**

23 A settlement is not judged against what might have been recovered had a plaintiff prevailed at
24 trial and does not have to provide 100% of damages sought to be fair and reasonable. “In the context of a
25 settlement agreement, the test is not the maximum amount plaintiffs might have obtained at trial on the
26 complaint, but rather whether the settlement is reasonable under all of the circumstances.” *Wershba*, 91
27 Cal. App. 4th at 250. Accordingly, because settlements involve compromise, even one that provides for
28 substantially narrower relief than would likely be obtained if the suit were successfully litigated can be

1 reasonable given that “the public interest may indeed be served by a voluntary settlement in which each
2 side gives ground in the interest of avoiding litigation.” *Id.*

3 With respect to the claims asserted on behalf of the Class in this case, there are serious risks that
4 support the reduced compromise amount. These risks include, but are not limited to: (i) the risk that
5 Plaintiff would be unable to establish liability for unpaid straight time or overtime wages, *see Duran v.*
6 *US Bank Nat’l Ass’n*, 59 Cal. 4th 1, 39 & n. 33 (2014) (“*Duran*”); (ii) the risk that Defendant’s meal and
7 rest period policies might not ultimately support class certification or a class-wide liability finding; (iii)
8 the risk that uncertainties pertaining to the ultimate legality of Defendant’s policies and practices could
9 preclude class-wide awards of statutory penalties; (iv) the risk that individual differences between Class
10 Members could be construed as pertaining to liability and not solely to damages; (v) the risk that any
11 civil penalties award under the PAGA could be reduced by the Court in its discretion; (vi) the risk that
12 class treatment could be deemed improper as to one or more claims, except for settlement purposes; and,
13 (vii) the risk that appellate litigation could ensue. (Leviant Decl., ¶ 16.) These risks are non-exhaustive.

14 In light of the uncertainties of protracted litigation, the settlement amount reflects a fair and
15 reasonable recovery for the Class Members. (Leviant Decl. ¶¶ 13-20.) The settlement amount is, of
16 course, a compromise figure. (Leviant Decl. ¶ 17.) By necessity it took into account risks related to
17 liability, damages, and the defenses asserted by Defendant. (*Id.*) Moreover, each Class Member will be
18 given the opportunity to opt-out of the Settlement, allowing those who feel they have claims that are
19 greater than the benefits they can receive under this Settlement to pursue their own claims. (*Id.*) For the
20 approximately **273** members of the Class, the average **gross** recovery is at least **\$1,428.57** per class
21 member, and the estimated average **net** recovery for each Class Member is approximately **\$677.66**. (*Id.*)
22 Given that Defendant could challenge certification and liability, this is a significant sum to have achieved
23 in settlement. Moreover, a Class Member who worked a greater number of weeks for Defendant will
24 receive a larger share of the Settlement than a Class Member who worked for a shorter amount of time
25 during the class period. (*Id.*)

26 The maximum calculated plausible exposure is **\$2,095,246.10**, including PAGA penalties.
27 (Leviant Decl., ¶ 18.) However, after analyzing the claims in this matter, Plaintiff has concluded that the
28 Gross Settlement Amount of **\$390,000.00** is about 92% of the **\$422,261.69** estimate of *risk-adjusted*

recovery (excluding interest) at this stage in the litigation. (*Id.*) This assessment is based on a carefully constructed model of the current fair value of the case, using estimated risks, average wage rates, numbers of employees, and the amount of time covered by the class period. (*Id.*)

- A reasonably estimated exposure for unpaid wages due to regular rate issues was calculated, with the assistance of an expert, to be approximately **\$698.00**. However, with the risk factor discounts for certification and liability proof, the value of that claim is estimated by Plaintiff's counsel to be approximately **\$146.58**, assuming certification probability of 60% and merits success at 35%.
- A reasonably estimated exposure for unpaid off-the-clock work (which includes overtime where applicable) was calculated, with the assistance of an expert, to be approximately **\$95,481.00**. However, with the risk factor discounts for certification and liability proof, the value of that claim is estimated by Plaintiff's counsel to be approximately **\$20,051.01**, assuming certification probability of 60% and merits success at 35%.
- A reasonably estimated exposure for rest break violations over the class period was calculated at **\$299,384.60**, but with chances of certification and proof of liability (30% and 20% respectively) for a risk-adjusted exposure of **\$17,963.08**. Plaintiff assumes that 100% of the Class missed one rest break per week.
- A reasonably estimated exposure for meal break violations over the class period was calculated at **\$217,466.00**, with chances of certification and liability risks (40% and 40% respectively) resulting in a risk-adjusted exposure of **\$34,791.36**.
- Risk-adjusted penalty recoveries for wage statement and Labor Code § 203 penalties were estimated to be approximately **\$32,418.75** and **\$79,140.92**, respectively, on maximum exposures of **\$154,375.00** and **\$376,861.50**, respectively (60% and 35% respectively).
- Performing risk-adjusted valuations for all claims yields a total value in the range of **\$184,511.69**, excluding PAGA.² (*Id.*)
- PAGA penalties were calculated as having a maximum realistic exposure of **\$951,000.00**, but a risk adjusted value of **\$237,750.00**, after factoring in risks of reduction in penalties pursuant to Court discretion and the high risk of the inability to prove violations for all aggrieved employees.

The concurrently-filed Declaration of H. Scott Leviant sets forth claim valuation in additional detail. (*See*, Leviant Decl., ¶ 18.)

This result here is fully supportable as reasonable. First, it is important to recognize the wilfulness finding required for Labor Code §§ 203 and 226 is challenging to establish. (Leviant Decl., ¶

² In a sense, it is nonsensical to assign specific percentages to future events, but it does provide a specific method for attempting to reduce the concept of “very high risk” or “high risk” to a quantifiable amount. Certification of a claim is typically a binary event. One does not obtain a 20% certification; a claim is either certified or it is not. But the current expected value is best quantified by applying a risk reduction, based on the total experience of counsel.

19.) Second, rest break and meal period claims have been challenging to certify for many years, even after *Brinker*. (Leviant Decl., ¶ 19.) Third, the certification rates in California are lower than conventional wisdom holds. See, H. Scott Leviant, *Second Interim Report on class actions in California sheds new light on certification* (February 19, 2010), www.thecomplexlitigator.com, available at <http://www.thecomplexlitigator.com/post-data/2010/2/19/second-interim-report-on-class-actions-in-california-sheds-n.html>; see also, *Findings of the Study of California Class Action Litigation, 2000-2006*, available at <http://www.courtinfo.ca.gov/reference/documents/class-action-lit-study.pdf> (finding, at page 5, and in Table 9, at page 15, that only 21.4% of all class actions were certified either as part of a settlement *or* as part of a contested certification motion). Here, the estimated certification probabilities are *above* the average rate at which cases were certified in California over the study years, based upon data available through the California Courts websites. (Leviant Decl., ¶ 19.) In sum, well *under* 20% of all cases filed as proposed class actions are ultimately certified by way of a *contested* motion. (*Id.*) The recovery is roughly **19%** of the maximum plausible recovery (estimated to be approximately **\$2,095,246.10**, including PAGA), which falls within the expected outcome under the likelihood of success metric. (*Id.*) It would also be appropriate to evaluate the result by examining only the premium wages at issue (approximately \$613,009.60, with no risk reduction), excluding penalties and interest; the settlement is about 64% of the premium wages (unpaid wages, meal period premiums, and rest break premiums) at maximum realistic exposure value.³ This Settlement achieves the goals of the litigation.

4. The Proposed Method for Allocating Settlement Funds Is Fair.

The proposed method of allocating the Settlement Fund to Class Members also is fair and reasonable. As noted, the parties agreed to allocate the Settlement Fund between all Class Members based on time worked by the Class Member during the Class Period, in relation to the total amount of

³ The exclusion of interest and penalties from the fairness evaluation is proper because, first, PAGA penalties are discretionary (*see* Lab. Code § 2699(e)(2) (the court in its discretion “may award a lesser amount than the maximum civil penalty amount specified by this part...”), and, second, courts evaluate the strength of a proposed settlement without taking potential penalties or interest into consideration. *See Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 955 (9th Cir. 2000); *see also Miller v. CEVA Logistics U.S.A., Inc.*, 2015 WL 729638, at *7 (E.D. Cal. Feb. 19, 2015) (court utilized calculation of a defendant’s exposure exclusive of interest and penalties to determine whether the settlement fell within the range of possible approval).

1 time worked by all participating Class Members collectively during the class period. This proposed
2 method is fair and reasonable because each Class Member's actual potential damages vary based on the
3 number of workweeks he or she actually worked (e.g., Lab. Code § 226.7 provides for an extra hour of
4 pay at the employee's regular rate of pay for each violation, resulting in a higher potential damage when
5 a higher number of incidents occur). A Class Member who worked a greater number of weeks for
6 Defendant will receive a larger payment under the Settlement than a Class Member who worked for a
7 shorter amount of time during the relevant period. (Leviant Decl., ¶¶ 11, 17.)

8 **5. The Proposed Enhancement Award to Plaintiff Warrants Approval.**

9 The proposed enhancement payment to Plaintiff is intended to recognize the substantial initiative
10 and significant efforts on behalf of the Class. Courts routinely approve incentive awards to compensate
11 named plaintiffs for the services they provide and the risks they incur during class action litigation, often
12 in much higher amounts than that sought here. *See, e.g., Bell v. Farmers Ins. Exchange*, 115 Cal. App.
13 4th 715, 726 (2004) (upholding "service payments" to named plaintiffs for their efforts in bringing the
14 case); *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294 (N.D.Cal. 1995) (approving a \$50,000
15 enhancement award). Plaintiff contributed time to the prosecution of this matter, including assistance
16 prior to the mediation with information and substantial time conferring with counsel over the course of
17 this litigation and before it was filed. (Warga Decl., ¶¶ 5-20; Leviant Decl., ¶ 33.) The enhancement also
18 recognizes the considerable risks Plaintiff undertook on behalf of the Class to be personally liable for all
19 costs incurred regardless of the success of the litigation or class certification, as well as the personal risk
20 of facing intrusive discovery and potential disclosure to future employers that Plaintiff sued a former
21 employer, making future employment prospects uncertain.

22 **6. The Proposed Award of Attorneys' Fees and Costs Is Also Fair, Adequate,** 23 **and Reasonable and Merits Preliminary Approval.**

24 The California Supreme Court removed any lingering doubt about the use of the percentage of
25 the fund method to award attorney's fees in California Courts. *Laffitte v. Robert Half Intern. Inc.*, 1 Cal.
26 5th 480, 503 (2016).⁴ Thus, this Court may and, pursuant to *Laffitte*, should award fees to Plaintiff's

27
28 ⁴ The Supreme Court also corrected the misconception that *Dunk* should be viewed as expressing
doubt about the use of the percentage method: "The *Dunk* court, while finding the percentage method

1 counsel based upon the percentage of the fund methodology.

2 Setting *Laffitte* aside, whether the once-again-confirmed percentage of the fund method or the
3 lodestar method is used, the outcome is roughly the same: “[F]ee awards in class actions average around
4 one-third of the recovery’ regardless of ‘whether the percentage method or the lodestar method is used.’”
5 *Amaro v. Anaheim Arena Mgmt., LLC*, 69 Cal. App. 5th 521 (2021). This is also consistent with
6 counsels’ experience in class cases. Here, Plaintiff’s attorneys intend to request attorneys’ fees of up to
7 \$83,333.33 (one-third of the GSA), and costs capped at \$20,000 (which includes payment for two
8 mediations, filing fees, service of process fees, and other standard expenses). (Leviant Decl., ¶ 32.)
9 Given the efforts and risks involved in this case, as well as the results achieved, these amounts are within
10 the range of reasonableness and warrant *preliminary approval*.

11 **7. The Proposed Payment to the Administrator Is Fair and Reasonable**

12 Simpluris, which has been selected due to its competitive bid, estimates that administration can
13 be performed for **\$7,000.00**. In counsel’s experience, based on similar wage-and-hour actions, an
14 estimated cost of **\$7,000.00** is a fair and reasonable amount for administration fees, is below the \$15,000
15 estimate, and should be preliminarily approved. (Leviant Decl., ¶ 34.)

16 **8. The PAGA Allocation is Reasonable**

17 The ultimate decision as to the amount of PAGA penalties is always up to the discretion of the
18 Court. Labor Code § 2699(e)(2) states: “In any action by an aggrieved employee seeking recovery of a
19 civil penalty available under subdivision (a) or (f), a court may award a lesser amount than the maximum
20 civil penalty amount specified by this part if, based on the facts and circumstances of the particular case,
21 to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.”

22 Prior to the issuance of *Moniz v. Adecco USA, Inc.*, 72 Cal. App. 5th 56 (2021), the only sources
23 of persuasive guidance as to how to assess the reasonableness of a PAGA allocation were found in
24 federal court decisions addressing that question. In their view, a PAGA allocation, even if a small
25 portion of the total settlement, could be reasonable if the settlement of the underlying wage and hour
26 claims is robust and serves the deterrent purpose of the PAGA statute. *O’Connor v. Uber Technologies*,

27 _____
28 inapplicable to the settlement before it due to the lack of a readily valued common fund, did not purport
to bar its usage generally in common fund cases.” *Laffitte*, 1 Cal. 5th at 501.

1 *Inc.*, 201 F.Supp.3d 1110, 1135 (N.D. Cal. 2016) (“By providing fair compensation to the class members
2 as employees and substantial monetary relief, a settlement not only vindicates the rights of class
3 members as employees, but may have a deterrent effect upon the defendant employer and other
4 employers, an objective of PAGA.”); *see also Vicerat v. Mistras Group*, 2016 WL 5907869 *9 (N.D.
5 Cal. 2016) (applying O’Connor’s sliding scale approach) *Moniz* then provided explicit confirmation that
6 this was an appropriate measure of reasonableness of a PAGA settlement. *Moniz*, 72 Cal. App. 5th at 77.
7 *Moniz* also held it appropriate to consider of the settlement furthers “PAGA’s purposes to remediate
8 present labor law violations, deter future ones, and to maximize enforcement of state labor laws.”

9 As to the first set of elements (the class-type analysis), it is embodied in Plaintiff’s discussion of
10 the adequacy of the settlement generally. Using class settlements as a source of analogous settlement
11 review standards, to assess the fairness, adequacy, and reasonableness of a settlement, the court should
12 also consider the expense, complexity and likely duration of further litigation. *Dunk*, 48 Cal. App. 4th at
13 1801. Here, the expense, complexity and likely duration of future litigation as it pertained to Plaintiff’s
14 PAGA claims was to some extent an unknown. However, what is certain is that to adequately establish
15 the foundational violations that would support a substantial penalty award, tremendous time and expense
16 would be invested. To adequately establish that aggrieved employees experience the alleged violations,
17 and at what frequency, most of the aggrieved employees would need to be interviewed in a systematic
18 fashion and their testimony cataloged in way sufficiently meaningful to permit the submission of
19 summary evidence at trial, such as via survey. *First*, the burdensome nature of such a process would be
20 expensive and time-consuming. *Second*, the individuals already interviewed confirmed substantial risk
21 that the Court would either substantially reduce any penalty ultimately awarded *or* conclude that the
22 conduct was insufficient to support a penalty award. *Third*, it would be essentially impossible to
23 formulate an objectively reliable means of summarizing testimonial experiences, other than by an
24 extraordinarily detailed survey. And formulating such a survey would have been important, since
25 frequency of violations would need to be established before any penalties could be recovered. In sum,
26 the evidence collected to date leads Plaintiff to conclude that, to the extent violations occurred, a fact
27 which Defendant disputes, the violations were *not* systematic and *not* uniform across all of Defendant’s
28 roughly 70 employees who worked during the PAGA period. Alternatively, direct testimony would have

1 been required from as many of the aggrieved employees as could be obtained, which would be, at best,
2 very difficult. Proof of this sort gives rise to a manageability argument.

3 The second element (the PAGA purposes element) is also satisfied here. As held by *Moniz*,
4 PAGA's purposes include (1) remediation of present labor law violations, (2) deterrence of future
5 violations, and (3) maximization of enforcement of state labor laws. Here the allocation of a major
6 portion of settlement funds to class members still advances the goal of labor law violation remediation.
7 Class members benefit from payments intended to offset the harm of alleged violations of wage and hour
8 requirements. The allocation of a major portion of settlement funds to class members also deters future
9 violations, since, from the perspective of an employer, where settlement funds go is less significant than
10 the fact that settlement funds are issuing at all.

11 A final note on the analysis discussion in *Moniz* is appropriate. *Moniz* was concerned with the
12 standard applied to a standalone PAGA action, not a settlement in which money was allocated between
13 class and PAGA claims. Here, the adequacy of the settlement as a whole impacts the factors approved of
14 by *Moniz*. It would be misleading to examine only the PAGA portion of the settlement without asking
15 how this Settlement as a whole is consistent with the purposes of PAGA. Second, the discussion of
16 "fairness" to those impacted by the settlement in *Moniz* does not play a role in this matter. In *Moniz*, the
17 Court found the record lacked any support for the disparate allocation of PAGA penalties between
18 different types of employees: "[T]he settlement's allocation of shares of civil penalties to Colleagues that
19 are fifteen times greater than the shares allocated to Associates does not seem to have been justified
20 below and may be contrary to PAGA's purposes." *Moniz*, 72 Cal. App. 5th at 87. Here, PAGA
21 penalties are allocated by pay period, irrespective of job classification, an equitable method of allocation.

22 In addition, there is no evidence that a court or a commissioner had informed Defendant that any
23 conduct violated the Labor Code. *Amaral v. Cintas Corp.*, 163 Cal. App. 4th 1157, 1209 (2008); *Willis*
24 *v. Xerox Bus. Servs., LLC*, 2013 WL 6053831, *7-8 (E.D. Cal. 2013) ("Under California law, courts have
25 held that employers are not subject to heightened penalties for subsequent violations until and unless a
26 court or commissioner notified the employer that it is in violation of the Labor Code.") And in *Cotter*,
27 the court found a significant reduction of the PAGA claim would be appropriate because "[t]his does not
28 appear to be a case where a company has deliberately sought to evade the law." *Cotter v. Lyft, Inc.*, 176

1 5 F. Supp. 3d 930, 941 (N.D. Cal. 2016). Here, Defendant can state a strong case that, as the Court
2 concluded in *Cotter*, the efforts to devise compliant operational policies do not indicate an organization
3 that has deliberately sought to evade the law. This is a very significant risk factor.

4 Finally, the PAGA allocation is fair. The LWDA is receiving **\$30,000.00**. The Class is
5 receiving, net, an estimated **\$185,000.00** for the releases for eight theories of recovery (excluding the
6 \$10,000.00 as the aggrieved employees' share of the PAGA Allocation). The allocation to the LWDA is
7 not unfair and satisfies the policies underlying California's wage and hour laws.

8 **VI. THE COURT SHOULD SCHEDULE A FINAL FAIRNESS HEARING**

9 The last step in the settlement approval process is the fairness hearing, where the Court makes a
10 final determination about the propriety of settlement. Plaintiff requests that the fairness hearing in this
11 case be scheduled for about 145 days after issuance of the Court's Order granting preliminary approval
12 of the Settlement. Under the Settlement, the Defendant will have 14 **business** days to provide the data to
13 the Settlement Administrator, which will then have 14 calendar days to mail out class notice. Class
14 Members have 60 days after mailing of the notice to submit exclusions or objections (with a 14-day
15 extension available for re-mailed notices). Therefore, Plaintiff proposes a final approval hearing
16 scheduled for the first available hearing date that is about 150 days after preliminary approval is granted.

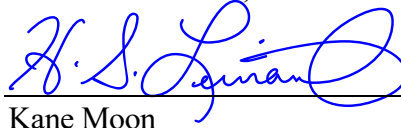
17 **VII. CONCLUSION**

18 For all the foregoing reasons, because the Class meets the requirements for certification, because
19 the Settlement bears all requisite indicia of fairness, reasonableness, and adequacy, and because the
20 proposed notice procedure and forms comport with Rule 3.766 and due process, this Court should grant
21 this Motion for Preliminary Approval, adopt the [Proposed] Order Granting Preliminary Approval of
22 Class Action Settlement submitted herewith, and schedule a Final Fairness Hearing.

23 Respectfully submitted,

24 Dated: February 3, 2023

MOON & YANG, APC

25 By: 
26 _____

Kane Moon
H. Scott Leviant
Mariam Ghazaryan

27 Attorneys for Plaintiff
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the State of California, County of Los Angeles. I am over the age of 18 and not a party to the within suit; my business address is 1055 W. 7th Street, Suite 1880, Los Angeles, CA 90017.

On the date indicated below, I served the document described as: **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS AND REPRESENTATIVE ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action by sending ☐ the original ☐ [or] ☒ a true copy thereof ☒ to interested parties as follows ☐ [or] ☐ as stated on the attached service list:

Beth A. Kahn
Ryan C. McKim
CLARK HILL LLP
1055 West Seventh Street, Suite 2400
Los Angeles, CA 90017
BKahm@ClarkHill.com
RMcKim@ClarkHill.com

Counsel for Defendant

☐ **BY MAIL (ENCLOSED IN A SEALED ENVELOPE):** I deposited the envelope(s) for mailing in the ordinary course of business at Los Angeles, California. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, sealed envelopes are deposited with the U.S. Postal Service that same day in the ordinary course of business with postage thereon fully prepaid at Los Angeles, California.

☒ **BY E-MAIL:** I hereby certify that this document was served from Los Angeles, California, by e-mail delivery on the parties listed herein at their most recent known e-mail address or e-mail of record in this action.

☐ **BY ELECTRONIC SERVICE:** Pursuant to the Court's Order directing Electronic Service, the above-named document(s) has (have) been electronically served on counsel of record by an approved electronic service provider. The transmission of these documents was reported complete and a copy of the service confirmation will be maintained, along with the original document(s) and proof of service in our office.

☐ **BY PERSONAL SERVICE:** I delivered the document, enclosed in a sealed envelope, by hand to the offices of the addressee(s) named herein.

☐ **BY OVERNIGHT DELIVERY:** I am "readily familiar" with this firm's practice of collection and processing correspondence for overnight delivery. Under that practice, overnight packages are enclosed in a sealed envelope with a packing slip attached thereto fully prepaid. The packages are picked up by the carrier at our offices or delivered by our office to a designated collection site.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct. Executed this **February 3, 2023** at Los Angeles, California.

H. Scott Leviant
Type or Print Name


Signature