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10 **SUPERIOR COURT OF CALIFORNIA**
11 **IN AND FOR THE COUNTY OF SACRAMENTO**

12
13 RENE VILLAGOMEZ, on behalf himself,
14 the State of California, and others similarly
situated and aggrieved,

15 Plaintiff,

16 vs. BAYER U.S., LLC, a Delaware limited
17 liability company, BAYER
18 CORPORATION, a Delaware corporation,
19 BAYER CROPSCIENCE LP, a Delaware
limited partnership, and DOES 1 to 100,
inclusive,

20 Defendants.

CASE NO. 34-2021-003114259

Assigned for All Purposes to:
Hon. Lauri A. Damrell
Dept. 28

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

[Filed concurrently with Notice of Motion and
Motion; Declarations of Zachary M. Crosner and
Michael Moore; [Proposed] Order]

Date: January 20, 2023
Time: 9:00 a.m.
Dept.: 28

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. FACTUAL BACKGROUND AND PROCEDURAL POSTURE	1
III. THE PROPOSED SETTLEMENT TERMS.....	3
A. Certification of the Settlement Class.....	4
B. The Benefit Conferred on the Settlement Class	4
C. Settlement Administration.....	5
D. The Class Notice	5
E. Right to Correct Information, Opt Out, or Object.....	5
F. Release of Claims.....	6
G. Attorney's Fees and Costs.....	6
H. PAGA Claims and Notice to the LWDA	6
IV. ARGUMENT	6
A. Standard of Review for a Class Action Settlement	6
B. The Proposed Settlement Class Should Be Conditionally Certified	8
C. The Proposed Settlement Meets the Kullar Factors and is within the Range of Reasonableness.....	9
V. PLAINTIFF'S ENHANCEMENT	14
VI. CONCLUSION	15

TABLE OF AUTHORITIES

	Page(s)
Cases	
7-Eleven Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135	13
Amaral v. Cintas Corp. No. 2 (2008) 163 Cal.App.4th 1157	12
Carrington v. Starbucks Corp. (2018) 30 Cal.App.5th 504	12
Class Plaintiffs v. City of Seattle (9th Cir. 1992) 955 F.2d 1268, cert. denied, 506 U.S. 953	6
Cochran v. Schwan's Home Serv., Inc. (2014) 228 Cal.App.4th 113 (2014)	11
Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794	7, 8
Ferra v. Loews Hollywood Hotel, LLC (2021) 11 Cal. 5th 858	11
Fleming v. Covidien (C.D. Cal. 2011) 2011 U.S.	12
Global Minerals & Metals Corp. v. Superior Court (2003) 113 Cal.App.4th 836	8
Jennings v. Open Door Mktg. Inc. (N.D. Cal. Oct. 3, 2018) 2018 U.S. Dist. LEXIS 171356	13
Jones v. Farmers Ins. Exch. (2013) 221 Cal.App.4th 986	9
Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116	9
Lane v. Facebook, Inc. (9th Cir. 2012) 696 F.3d 811	14
North County Contractors Ass'n, Inc. v. Touchstone Ins. Servs. (1994) 27 Cal.App.4th 1085	7
Potter v. Pacific Coast Lumber Co. (1951) 37 Cal.2d 592	6

1	Rodriguez v. W Publ'g Corp.	
2	(9th Cir. 2009) 563 F.3d 948	14
3	Slavkov v. First Water Heater Partners I	
4	(N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS 116303	13
5	Staton v. Boeing	
6	(9th Cir. 2003) 327 F.3d 938	14
7	In re Taco Bell Wage and Hour Actions	
8	(E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. Lexis 48557	12
9	Van Kempen v. Matheson Tri-Gas, Inc.	
10	(N.D. Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182	12
11	Wershba v. Apple Computer	
12	(2001) 91 Cal.App.4th 224	7, 13
13	White v. Experian Information Solutions, Inc.	
14	(C.D. Cal. 2011) 803 F.Supp.2d 1086	14
15	Williams v. Superior Court	
16	(2013) 221 Cal.App.4th 1353	9
17	STATUTES, RULES, CODES	
18	Bus. Code	
19	Bus. & Prof. Code § 17200, et seq.	2
20	Code of Civil Procedure	
21	Code of Civil Procedure § 382	8
22	Labor Code	
23	Labor Code §§ 201-203	12
24	Labor Code § 203	12
25	Labor Code § 226	12
26	Labor Code § 2699(e)(2)	12
27	Labor Code § 2699(l)(2)	6
28	Labor Code § 2802	11
	Rule	
	Cal. Rule of Court. § 3.769	7

1	Cal. Rule of Court § 3.769(c).....	7
2	Cal. Rules of Court §§ 3.769(f) and 3.766(d)	5
3	OTHER AUTHORITIES	
4	Federal Judicial Center, Managing Class Action Litigation: A Pocket Guide for	
5	Judges (3d ed. 2010).....	14
6	litigation. H. Newberg & A. Conte, 4 Newberg on Class Actions (4th ed. 2002) §	
7	11.41	6
8	Private Attorneys General Act	2

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1 **I. INTRODUCTION**

2 Plaintiff Rene Villagomez hereby moves the Court for an order granting preliminary
3 approval to a proposed non-reversionary class action settlement to resolve wage and hour claims
4 on behalf of at least 332 individuals employed by Defendants Bayer CropScience, L.P., Bayer
5 R&D Services, and Monsanto Company (together “Bayer” or “Defendants”) as non-exempt
6 employees in California during the period of January 21, 2018 through September 6, 2022. The
7 proposed \$835,000 settlement will provide approximately \$478,667 in cash payments to the class,
8 with an average award estimated at about \$1,367. The balance of approximately \$356,333 will
9 cover reasonable attorney’s fees and actual litigation costs, settlement administration costs, an
10 enhancement award to the named plaintiff, and payment of civil penalties to the State. The
11 settlement is the product of Plaintiff’s pre-filing investigation, formal discovery and a pre-
12 mediation exchange of information, and arms-length negotiations overseen by experienced
13 mediator Jill Sperber, Esq.

14 The proposed settlement is within the “range of reasonableness” for approval and.
15 Plaintiff’s counsel believes the settlement is a fair result for the class given the substantial risks
16 inherent in this matter. Accordingly, Plaintiff requests the Court enter an order: (1) granting
17 preliminary approval to the proposed class action settlement; (2) conditionally certifying the
18 settlement class as defined below; (3) appointing Zachary M. Crosner, Michael R. Crosner, and
19 Jamie Serb, and Crosner Legal, P.C. as Class Counsel; (4) appointing Plaintiff Rene Villagomez
20 as the Class Representative; (5) appointing Phoenix Settlement Administrators as the Settlement
21 Administrator; (6) approving the form of notice to the class and the notice procedure; and (7)
22 scheduling a final fairness hearing.

23 **II. FACTUAL BACKGROUND AND PROCEDURAL POSTURE**

24 Defendants all are part of the well-known worldwide conglomerate Bayer. Plaintiff has
25 been employed by Bayer as a full-time, non-exempt employee for the past 30 years, and was employed
26 as a Seed Tech Crew Leader at Bayer’s warehouse facility in Oxnard, California. His job duties
27 included handling both the physical and electronic movement of Bayer’s seed-packaging operations.
28 He typically worked 8-12 hour shifts, five days per week. [Declaration of Zachary M. Crosner

1 (“Crosner Decl., ¶ 4.]

2 Plaintiff alleges a number of wage and hour violations by Defendants. First, he claims that
3 he and class members were not paid for all hours worked in that time spent waiting in line for
4 wellness screenings before entering the work facilities was not counted or paid for. He further
5 alleges Bayer failed to pay overtime and meal/rest period premiums at the correct rate because it did
6 not incorporate “Short Time Incentive” payments and shift differentials into the regular rate of pay
7 calculations. Next, Plaintiff also alleges Defendants failed to maintain a proper written policy meal
8 break policy, failed to provide compliant first and second meal periods, and did not pay premiums for
9 meal break violations despite its own records indicating violations occurred. Plaintiff also alleges
10 he had to use his personal vehicle to commute to off site locations for Covid testing and also had to
11 use his personal cell phone for work purposes, all without reimbursement. Finally, alleges Bayer did
12 not provide accurate, itemized wage statements, including failing to list the name of the legal
13 employer. [Crosner Decl., ¶ 5.]

14 Based on these allegations, on January 21, 2021, Plaintiff filed a class action lawsuit
15 against Defendants asserting claims for (1) failure to pay minimum wages, (2) failure to pay
16 overtime, (3) failure to provide meal periods, (4) failure to provide rest periods, (5) failure to
17 provide reimbursement for business expenses; (6) failure to provide accurate wage statements, (7)
18 waiting time penalties, and (8) unfair competition under Bus. & Prof. Code sections 17200, et seq.
19 Plaintiff also brought a claim under the Private Attorneys General Act based on the same alleged
20 Labor Code violations. [Crosner Decl., ¶ 6.]

21 Bayer has at all times denied Plaintiff’s allegations and maintained its payroll policies and
22 procedures comply with California law, that it paid the class members all wages due, and that its
23 compensation plan properly compensates the class members for all hours worked. Bayer argued
24 further its meal and rest break policies are fully compliant, that it provided employees with all
25 required breaks, and that there was no need for any employee to incur expenses in the performance
26 of their job duties. Defendants also strongly contend the case cannot be maintained as any kind of
27 class or representative action, arguing determining the number of potential off the clock hours
28 worked by each class member, or the number of de facto meal period violations, etc., would result

1 individualized issues predominating and that a trial on a representative basis would be
2 unmanageable. [Crosner Decl., ¶ 7.]

3 Ultimately, after initial discovery and meet and confer discussions about the merits of the
4 case, the Parties agreed to attempt mediation. The Parties also agreed on a protocol for an
5 exchange of additional documents and information before the mediation. Consequently,
6 Plaintiff's counsel reviewed payroll records, personnel policies/handbooks, meal and rest break
7 policies, personnel files, and a random of sampling paystubs and time records for about 20% of
8 the class. Plaintiff had those records analyzed by Berger Consulting Group to look for, inter alia,
9 violation rates for missed, late and/or short meal breaks, potential violations, damages for alleged
10 unpaid double time, etc. [Crosner Decl., ¶ 8.]

11 The Parties then engaged the Jill Sperber, Esq., a respected mediator with substantial wage
12 and hour and class action experience, and on June 6, 2022 the Parties participated in a full day
13 mediation with Ms. Sperber. Throughout the day, the arms-length negotiations were hard-fought
14 and adversarial as the Parties exchanged extensive information on their legal and factual positions,
15 and made numerous offers and counter-offers. By the end of the day the Parties reached agreement
16 on all major issues. [Crosner Decl., ¶ 9.] They then collaboratively drafted the Stipulation of
17 Class and Representative Action Settlement and Release ("Settlement Agreement") setting forth
18 the full and final settlement terms now before the Court for approval, and a true and correct copy
19 of the Settlement Agreement is attached to the Crosner Declaration as Exhibit 1.

20 **III. THE PROPOSED SETTLEMENT TERMS**

21 Under the settlement, Bayer will pay \$835,000 into a common fund, the Total Settlement
22 Amount ("TSA"). Attorney's fees of up to \$278,333.33 (1/3 of the TSA), litigation costs of up to
23 \$25,000, settlement administration costs of no more than \$8,000, a service award to Plaintiff of no
24 more than \$10,000, and \$35,000 for alleged civil penalties under PAGA,¹ all will be paid from the
25 TSA. The remainder of around \$478,667 will be allocated pro rata among the Class Members based
26
27

28 ¹ Per PAGA, this will be allocated \$26,250 (75%) to the Labor & Workforce Development Agency, and the remaining \$8,750 (25%) will go to eligible Class Members.

1 on their total weeks worked during the Class Period. No portion of the TSA will revert to Bayer.
2 [Crosner Decl., ¶ 10.]

3 **A. Certification of the Settlement Class**

4 The settlement provides for conditional certification of a settlement class including all
5 individuals employed by Bayer as non-exempt employees in the State of California during the period
6 from January 21, 2018 to September 6, 2022. As of the mediation, the Settlement Class consisted
7 of approximately 332 individuals. [Crosner Decl., ¶ 11.]

8 **B. The Benefit Conferred on the Settlement Class**

9 As noted, the settlement obligates Bayer to pay \$835,000 to resolve the claims of the
10 Settlement, inclusive of attorney's fees and costs. A minimum of approximately \$478,667 from
11 the TSA will be distributed to the Participating Class Members. This is a cash settlement that does
12 not require Participating Class Members to submit a claim form to receive their settlement share.
13 Participating Class Members will receive their settlement checks automatically via First Class
14 U.S. Mail. Twenty percent of each settlement share will be allocated to wages and the remaining
15 eighty percent will be allocated to penalties and interest, which allocation is consistent with
16 Bayer's potential liability as discussed below. Bayer will pay any and all applicable employer-side
17 payroll taxes separately and in addition to the TSA. Subject to the Court's approval, any amounts
18 not claimed (because a class member does not cash a settlement check) will be forwarded to the
19 State Controller's Unclaimed Property Fund. [Crosner Decl., ¶ 12.]

20 Each participating Class Member will receive a share of the Net Settlement Amount based
21 on his or her total weeks worked for Bayer during the Class Period while employed in a non-
22 exempt position. Thus, each individual settlement payment will be calculated using criteria
23 typically used in determining appropriate amounts of unpaid wages, unpaid premium wages for
24 missed meal and rest breaks, unreimbursed expenses, and potential statutory penalties under
25 applicable law. These methods will ensure each Class Member receives a portion of the settlement
26 funds corresponding to the relative value of his or her potential claims. The proposed allocation
27 provides a reasonable way to compensate Class Members based on the amount of time they
28 worked for Bayer and the number of instances they allegedly missed a meal break and/or rest

1 break, were not provided compensation in lieu of such missed breaks, lost hours worked due to
2 alleged off the clock work, or did not receive expense reimbursement. The average gross award is
3 estimated to be approximately \$1,367. [Crosner Decl., ¶ 13.]

4 As discussed below, the overall settlement amount is reasonable in light of the
5 considerable risks associated with Plaintiff's claims, and the delay and risk posed by continuing to
6 litigate such disputed allegations. In counsel's judgment, the total value recovered for the class is
7 substantial and within the range of reasonableness.

8 **C. Settlement Administration**

9 Subject to the Court's approval, the Parties have agreed on Phoenix Settlement
10 Administrators as the Settlement Administrator. Phoenix is qualified and has significant
11 experience administering class action settlements, including numerous wage and hour matters.
12 Phoenix's fees and costs will not exceed \$8,000.00. [Crosner Decl., ¶ 14; Declaration of Michael
13 Moore, ¶¶ __.]

14 **D. The Class Notice**

15 The proposed Notice of Class Action Settlement (Exhibit A to the Settlement Agreement)
16 sets out information about this case and explains the basic settlement terms in plain language. The
17 Notice also sets forth the individualized information used to calculate Class Members' Individual
18 Settlement Payments and each Class Member's estimated settlement award. The Notice likewise
19 details the procedures for Class Members to dispute their individual information, the procedure for
20 submitting an objection to the Settlement, the procedure to request exclusion, and the fact that any
21 final judgment will bind all class members who do not opt out. Cal. Rules of Court 3.769(f) and
22 3.766(d). In sum, the Notice provides the Class Members with the information necessary to
23 evaluate the Settlement and decide to participate in, opt out of, or object, and meets all
24 requirements imposed by the California Rules of Court. Coupled with the notice procedure, the
25 Notice provides the best notice practicable. [Crosner Decl., ¶ 15.]

26 **E. Right to Correct Information, Opt Out, or Object**

27 Class Members will have forty-five (45) days to dispute the information in their Notice
28 used to calculate their settlement award, and also have 45 days to submit any objections to the

1 settlement or to request exclusion. If a Class Member disputes their individual information, the
2 Settlement Administrator will review the Class Member's records and any other information
3 submitted, and make a final determination. [Crosner Decl., ¶ 16.]

4 **F. Release of Claims**

5 All Participating Class Members will release Bayer from all claims alleged in the operative
6 complaint, or that could have been brought based on the factual allegations in the operative
7 complaint, including PAGA claims, during the Class Period. The release is limited to the claims
8 that were actually pleaded or could have been pleaded based on the alleged facts in the operative
9 complaint. [Crosner Decl., ¶ 17.]

10 **G. Attorney's Fees and Costs**

11 The terms of the Parties' settlement also allow Plaintiff's counsel to apply for an award of
12 attorney's fees of up to 1/3 of the TSA, or \$278,333.33, and reimbursement of actual costs and
13 expenses of up to \$25,000.00. In advance of the Final Approval Hearing, Plaintiff's counsel will
14 submit a separate motion for attorney's fees and actual litigation costs per the terms of the
15 Settlement Agreement and applicable law, and will provide the Court with appropriate
16 information and evidence regarding hourly rates, tasks performed, and time expended on the case.
17 [Crosner Decl., ¶ 18.]

18 **H. PAGA Claims and Notice to the LWDA**

19 The Parties allocated \$35,000 of the GSA to payment of civil penalties under PAGA, as
20 addressed below. Per Labor Code section 2699(1)(2), Plaintiff gave notice of the settlement and the
21 approval hearing to the LWDA via its online portal. [Crosner Decl., ¶ 19; Exh. 2.]

22 **IV. ARGUMENT**

23 **A. Standard of Review for a Class Action Settlement**

24 The law favors settlement, particularly in class actions where substantial resources can be
25 conserved by avoiding the time, costs and rigors of formal litigation. H. Newberg & A. Conte, 4
26 Newberg on Class Actions (4th ed. 2002) § 11.41; Class Plaintiffs v. City of Seattle (9th Cir.
27 1992) 955 F.2d 1268, 1276, cert. denied, 506 U.S. 953; Potter v. Pacific Coast Lumber Co. (1951)
28 37 Cal.2d 592, 602. Nevertheless, to ensure the rights of absent class members are not unjustly

1 compromised, settlement of a class action requires court approval. Cal. Rule of Court. 3.769;
2 Wershba v. Apple Computer (2001) 91 Cal.App.4th 224, 245; Dunk v. Ford Motor Co. (1996) 48
3 Cal.App.4th 1794, 1801. This judicial review protects against fraud or collusion, and ensures
4 fairness to the absent class members. Dunk, 48 Cal.App.4th at 1800-01. Judicial review occurs
5 via a two-step process to determine, under all the circumstances, if the proposed settlement is fair,
6 reasonable and adequate. Id. at 1801; Wershba, 91 Cal.App.4th at 245.

7 The first step is a motion for preliminary approval, through which the parties present the
8 court with the proposed settlement and seek a determination that it is sufficiently fair and
9 reasonable to warrant notice to the class and further proceedings as to its fairness and adequacy.
10 Cal. Rule of Court 3.769(c). This preliminary evaluation determines if the proposed settlement is
11 within the “range of reasonableness” and if notice should be provided to the class regarding the
12 settlement’s proposed terms and conditions, and whether a final fairness hearing should be
13 scheduled. Wershba, 91 Cal.App.4th at 234-35; North County Contractors Ass’n, Inc. v.
14 Touchstone Ins. Servs. (1994) 27 Cal.App.4th 1085, 1089-90. Considering the strong judicial
15 policy favoring settlement of class actions, courts generally apply a presumption of fairness to
16 class action settlements when (1) the settlement results from arms-length bargaining, (2)
17 investigation and discovery are sufficient to allow counsel and the court to act intelligently, (3)
18 counsel is experienced in similar litigation, and (4) the percentage of objectors is small. Dunk, 48
19 Cal.App.4th at 1802; Wershba, 91 Cal.App.4th at 245.

20 If the court grants preliminary approval, it then orders the class be given notice in an
21 appropriate manner, establishes a schedule and procedures for class members to request exclusion
22 or object, and sets the matter for a final fairness hearing. Typically, any motion for attorney’s fees
23 and costs is filed subsequent to preliminary approval and heard with the motion for final approval,
24 as part of the second step of the two-step approval process. Dunk, 48 Cal.App.4th at 1800;
25 Wershba, 91 Cal.App.4th at 232. The proposed settlement in this matter warrants preliminary
26 approval under the liberal standard discussed above, as it is fair, reasonable and adequate under all
27 the circumstances, and represents a favorable result for the class.

28 /////

1 **B. The Proposed Settlement Class Should Be Conditionally Certified**

2 The purpose of conditional class certification for purposes of settlement is to facilitate
3 provision of notice of the proposed settlement’s terms, and the date and time of the final fairness
4 hearing. In this context, courts apply lesser scrutiny than they would otherwise in the context of
5 certifying a class. Dunk, 48 Cal.App.4th at 1807, n.19; Global Minerals & Metals Corp. v.
6 Superior Court (2003) 113 Cal.App.4th 836, 839 (“[I]t is well established that trial courts should
7 use different standards to determine the propriety of a settlement class.”)

8 In the present matter, conditional certification is proper since this matter satisfies all
9 requirements for class certification under Code of Civil Procedure section 382. First, the class is
10 both sufficiently numerous, consisting of at least 332 individuals, and ascertainable by reference
11 to Defendants’ personnel and payroll records. [Crosner Decl., ¶ 20.] Next, Plaintiff is an adequate
12 class representative, as his claims do not conflict with and are not antagonistic to the claims of
13 other class members. Further, his claims are typical given he is a member of the class and his
14 claims arise from the same employment practices giving rise to the claims of the other class
15 members. [Crosner Decl., ¶ 21.] Lastly, his counsel is experienced and adequate class counsel.
16 [Crosner Decl., ¶¶ 37-42.]

17 Next, common questions of law and fact predominate – particularly for purposes of a
18 settlement class – as the Class Members all were subject to the same payroll scheme and policies
19 that Plaintiff contends violates California labor law. Since the focus of the claims against Bayer
20 concerns the legality of common policies applied uniformly to the entire class, common issues
21 predominate over individualized inquiries concerning liability. For instance, whether Bayer
22 included all required forms compensation when calculating the “regular rate of pay” and paid fo
23 overtime and sick pay at the correct rate is a common question that will decide liability for all
24 class members one way or another. Similarly, whether Bayer’s wage statements identified the
25 correct, legal employer or not raises another common issue, and the wage statements either
26 comply with California law or they do not. Regardless of that determination, it again will decide
27 liability for all Class Members. [Crosner Decl., ¶ 22.]
28

1 By now it is well-settled a theory of recovery asserting the existence of a uniform policy
2 violating California law is sufficient to satisfy the requirements for class certification. Jones v.
3 Farmers Ins. Exch. (2013) 221 Cal.App.4th 986, 996 (“Claims alleging that a uniform policy
4 consistently applied to a group of employees is in violation of the wage and hour laws are of the
5 sort routinely, and properly, found suitable for class treatment”); Williams v. Superior Court
6 (2013) 221 Cal.App.4th 1353 (“A company-wide practice can sustain a common question of fact
7 or law that supports commonality for class certification”). Lastly, a class action is superior to
8 other means for the fair and efficient adjudication of this controversy. [Crosner Decl., ¶ 23.]

9 C. **The Proposed Settlement Meets the Kullar Factors and is within the Range of**
10 **Reasonableness**

11 The proposed settlement resulted from serious, arms-length negotiations facilitated by
12 respected mediator, Jill Sperber, Esq., who has considerable experience mediating wage and hour
13 class action cases. [Crosner Decl., ¶ 9.] Plaintiff’s counsel Michael R. Crosner, Zachary M. Crosner,
14 and Jamie Serb of Crosner Legal, P.C. have years of experience litigating wage and hour class
15 actions. Plaintiff’s counsel are well-qualified to evaluate the risks and benefits of further litigation
16 versus settling the matter. [Crosner Decl., ¶¶ 37-42.]

17 Next, California law recognizes several factors bearing on the fairness, adequacy, and
18 reasonableness of a proposed class settlement. Kullar v. Foot Locker Retail, Inc. (2008) 168
19 Cal.App.4th 116, 128. In relevant part, these factors include: 1) the amount offered in settlement 2)
20 the strength of plaintiff’s case; 3) the risk, expense, complexity, and likely duration of further
21 litigation; 4) the risk of maintaining class action status throughout trial; and 5) the experience and
22 views of counsel. Id. Here, the proposed settlement satisfies these requirements.

23 Prior to mediation, the parties engaged in formal and informal discovery to facilitate
24 settlement discussions. Thus, Plaintiff reviewed documents and information regarding Bayer’s
25 payroll practices, a random sampling of pay stubs and time records for sampling of class members,
26 applicable compensation plans, etc., and information from Defendants regarding class size and
27 breakdown, work weeks/pay periods, rates of pay, and other relevant information. Plaintiff then had
28 that information analyzed by a consulting expert to assist in determining potential violation rates

1 and other data used to formulate a damages model. Plaintiff's counsel are confident they obtained
2 sufficient information to understand the law and facts of this case and make an informed decision
3 regarding the proposed settlement. [Crosner Decl., ¶¶ 8, 24.]

4 Next, the proposed settlement falls within the range of reasonableness warranting
5 preliminary approval. The proposed settlement involves a significant sum that, when distributed,
6 will confer direct monetary benefits on the class members. Each class member will be entitled to a
7 monetary payment without having to file a claim and each payment will be relative to the value of
8 his or her potential claims. Through the information exchanged and analysis undertaken, Plaintiff
9 weighed the risks of continued litigation against the benefits of the proposed settlement and
10 determined settlement to be the most reasonable option.

11 That analysis was supported by the pre-mediation production of payroll and other data
12 permitting counsel to estimate potential damages on various theories of liability. Using that data,
13 Plaintiff ran calculations and estimated Bayer's likely maximum exposure on the class claims at
14 approximately \$4,262,000, including about \$465,515 on the unpaid minimum wage/off the clock
15 claims, about \$184,000 on the underpaid overtime/sick pay/regular rate issue, approximately
16 \$1,759,165 on the meal break claims, approximately \$237,780 on the expense reimbursement
17 claims, approximately \$808,700,000 on the wage statement claims, and approximately \$806,875
18 on the waiting time penalty claims. [Crosner Decl., ¶¶ 25-26.] Plaintiff's counsel substantially
19 discounted the value of these claims, however, in light of the multiple and considerable risks
20 posed by proceeding with the litigation, as Defendants raised numerous defenses and vigorously
21 defended against these claims.

22 On the unpaid minimum wage/off the clock claim, Plaintiff contends he and the class
23 members had to undergo a "wellness check" before starting work, and these were conducted before
24 clocking in. Since employees frequently had to wait in line for the wellness check, they oftentimes
25 spent some 10 minutes either waiting their turn and/or undergoing the actual process, without
26 compensation even though they were subject to employer control. In response, Bayer argued to the
27 extent wellness checks occurred off the clock it was against policy and without the company's
28 knowledge, and thus individualized inquiries would be required to determine if any such time was

1 compensable. Bayer further argued the wellness checks were extremely brief and any time lost
2 would be de minimis in any event. [Crosner Decl., ¶ 27.]

3 Plaintiff also contends that he and the class members received shift differential pay and other
4 non-discretionary, non-hourly compensation that Bayer failed to incorporate into the “regular rate
5 of pay” as required under California law and Ferra v. Loews Hollywood Hotel, LLC (2021) 11 Cal.
6 5th 858. As a result, per Plaintiff, Bayer underpaid overtime hours and sick pay because it did
7 calculate the correct regular rate. In response, Defendants took the position that its time keeping
8 policies are legally compliant, that it paid employees for all hours worked at the correct rates
9 consistent with those policies. [Crosner Decl., ¶ 28.]

10 On the meal period claims, Plaintiffs allege Defendants’ policies were deficient because they
11 did not inform employees (1) when meal periods should be taken, (2) the number of meal periods
12 they were entitled to receive; and, (3) what they should do when a meal period is not provided.
13 Further, regardless of the legitimacy of the applicable written policies, Plaintiff argued Defendants’
14 own records show a large number of de facto violations for missed, untimely, short, and otherwise
15 non-compliant breaks. In fact, Plaintiff’s review of the sampling of time records suggests substantial
16 de facto violations for late and short meal and rest periods, including an approximate 31.8%
17 violation rate on meal periods. In response, Defendants argued the break policies were fully
18 compliant with California law, and that it provided all required meal periods and thereby met its
19 obligations under the Labor Code and applicable Wage Order. Further, Defendants argued to the
20 extent employees missed a break or took a non-compliant break, any such discrepancies were
21 aberrational and against company policy and a myriad of individual issues would be required to
22 determine whether the potential violation resulted from employee choice or some other reason.
23 Consequently, per the Defendants, individualized inquiries would dominate on this issue and render
24 class certification inappropriate. [Crosner Decl., ¶ 29.]

25 Plaintiff based the expense reimbursement claim on the need to use personal mobile devices
26 for company business, primarily communicating with management both during shifts, and use of
27 personal automobiles to travel to and from mandatory covid testing, for which he and the class
28 members were not reimbursed as required by Labor Code section 2802 and Cochran v. Schwan’s

1 Home Serv., Inc. (2014) 228 Cal.App.4th 113 (2014). On the other hand, Defendants argued to the
2 extent employees used their personal phones for work-related communications, it was purely for
3 personal preference, was not “necessary,” and therefore not compensable. [Crosner Decl., ¶ 30.]

4 Finally, Plaintiff alleged claims under Labor Code § 226 (alleged inaccurate wage statement
5 violations), both directly for failing to identify the name of the legal entity that employed the clas
6 members and derivatively, and derivative claims under Labor Code §§ 201-203 (waiting time
7 penalties). On a derivative basis, these claims were both based on the failure to properly record and
8 pay for all hours worked, and pay all overtime owed, and these claims will rise or fall along with
9 the primary claims, in addition to being subject to “good faith” and other defenses available to
10 Defendants. E.g., Amaral v. Cintas Corp. No. 2 (2008) 163 Cal.App.4th 1157, 1203-04 (holding
11 employer did not willfully fail to pay wages under Labor Code § 203 even though the class prevailed
12 on the merits on the underlying claim for failing to pay living wages). Accordingly, Plaintiff
13 discounted the derivative claims significantly in light of these multiple potential defenses. [Crosner
14 Decl., ¶ 31.]

15 As far as potential PAGA liability, the theoretical penalties totaled at least \$6 million
16 should Plaintiff prevail on all claims and establish violations of the multiple Labor Code sections
17 at issue for every single eligible pay period. [Crosner Decl., ¶ 32.] As with the class claims,
18 Plaintiff discounted the potential PAGA penalties for the multi-layered defenses proffered by
19 Defendants on the merits, and further discounted these claims since the Court possesses wide
20 discretion to reduce such penalties even if Plaintiff ultimately prevailed. Labor Code § 2699(e)(2);
21 Fleming v. Covidien (C.D. Cal. 2011) 2011 U.S. Dist. LEXIS 154590, *8-9 (court reduced the
22 potential penalties by over 82% after a bench trial); Carrington v. Starbucks Corp. (2018) 30
23 Cal.App.5th 504 (after a bench trial, the trial court awarded penalties of just \$5 per pay period, a
24 90% reduction, which decision was upheld on appeal); In re Taco Bell Wage and Hour Actions
25 (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. Lexis 48557 (PAGA penalties denied after trial).

26 Accordingly, the Parties allocated \$35,000 to PAGA penalties, which amount is reasonable
27 and in line with comparable settlements in other class actions in California. Van Kempen v.
28 Matheson Tri-Gas, Inc. (N.D. Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182 (granting final

1 approval of \$5,000 PAGA penalty from \$370,000 settlement, or 1.4 percent of total settlement);
2 Slavkov v. First Water Heater Partners I (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS 116303
3 (finding a \$7,500 PAGA payment reasonable when measured against the overall settlement of
4 \$345,000 and the possible weaknesses in plaintiffs' case, or 2.2 percent of total settlement).
5 Additionally, the LWDA has been informed of the terms of the PAGA portion of the settlement,
6 and will be able to weigh in as necessary. Jennings v. Open Door Mktg. Inc. (N.D. Cal. Oct. 3,
7 2018) 2018 U.S. Dist. LEXIS 171356, at *27 (approving settlement with PAGA penalties of 0.6%
8 where "[p]laintiffs [have] submitted the settlement agreement to the LWDA, and the LWDA has
9 not objected to the settlement").

10 Thus, Defendants raised various defenses to each of Plaintiff's claims, any one of which, if
11 successful, could have derailed Plaintiff's case. Accordingly, Plaintiff faced risky issues going
12 forward with this litigation, and given the need to secure class certification, try the case, and deal
13 with post-trial appeals, it would have taken years to realize any recovery in this action. Plaintiff's
14 counsel discounted the value of the class claims consistent with the risks discussed above, and
15 carefully weighed the likelihood of the class receiving substantially greater benefit if the litigation
16 continued. Plaintiff's counsel concluded – in light of these very real and substantial risks –
17 settlement on the proposed terms and without prolonged and costly litigation was in the best
18 interests of the class. The overall \$835,000 recovery represents a significant percentage of
19 Defendants' potential exposure and given these risks addressed above, a total recovery for the
20 class of \$835,000, with an average award of over \$1,360 per class member, is a fair result within
21 the range of reasonableness considering all potential outcomes. [Crosner Decl., ¶¶ 33-35.]

22 Importantly, the mere fact that a settlement does not provide the same recovery as might be
23 achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and
24 adequate. Wershba, 91 Cal.App.4th at 246, 250 ("even if the relief afforded by the proposed
25 settlement is substantially narrower than it would be if the suits were to be successfully litigated,
26 this is no bar to a class settlement because the public interest may indeed be served by a voluntary
27 settlement in which each side gives ground in the interest of avoiding litigation"); 7-Eleven
28 Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135, 1150 ("The fact that

1 a proposed settlement may amount to only a fraction of the potential recovery does not, in and of
2 itself, mean that the proposed settlement is grossly inadequate and should be disapproved”); Lane
3 v. Facebook, Inc. (9th Cir. 2012) 696 F.3d 811, 819 (“[T]he question whether a settlement is
4 fundamentally fair . . . is different from the question whether the settlement is perfect in the
5 estimation of the reviewing court”); White v. Experian Information Solutions, Inc. (C.D. Cal.
6 2011) 803 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable even
7 though it represented 99% discount off the maximum value of the claims). Importantly as well,
8 the proposed settlement is non-reversionary and will provide benefits to the Class Members
9 without a claims process. White, 803 F.Supp.2d at 1098; c.f., Federal Judicial Center, Managing
10 Class Action Litigation: A Pocket Guide for Judges (3d ed. 2010) at 20, available at
11 www.fjc.gov/sites/default/files/2012/ClassGd3.pdf (reversionary provisions and/or cumbersome
12 claims process may indicate lack of fairness). Plaintiff and his counsel submit the settlement is
13 within the “range of reasonableness,” and is fair and adequate for the Class.

14 V. **PLAINTIFF’S ENHANCEMENT**

15 A modest incentive award for Plaintiff is appropriate under applicable law. See Staton v.
16 Boeing (9th Cir. 2003) 327 F.3d 938, 977 (collecting cases awarding class representatives service
17 and incentive payments ranging from \$2,000 to \$25,000). He devoted time and resources to the
18 litigation, provided documents, assisted Class Counsel with investigating the claims asserted and
19 in preparing for mediation. The service payment provided to Plaintiff as the class representative is
20 typical in class action cases and reasonable. Rodriguez v. W Publ'g Corp. (9th Cir. 2009) 563 F.3d
21 948, 958-59 (incentive awards are “intended to compensate class representatives for work done on
22 behalf of the class, to make up for financial or reputational risk undertaken in bringing the action,
23 and, sometimes, to recognize their willingness to act as a private attorney general.”).

24 Here, the Settlement Agreement provides for (a) an enhancement of up to \$10,000.00 to
25 Plaintiff and (b) a payment of \$3,500.00 to Plaintiff as compensation for the loss of his employer-
26 sponsored Health Savings Account (which amount will be paid separately from the TSA). These
27 requests are reasonable given the risks he undertook on behalf of the Class Members, and
28 considering his employment and corresponding health benefits are ending after 30 years of

1 service. By contacting and retaining counsel to pursue these claims, Plaintiff helped make this
2 settlement possible for the absent Class Members, while shouldering the risk of being liable for
3 Defendants' litigation costs. Plaintiff also exposed himself to unwanted notoriety related to filing a
4 public lawsuit (discoverable even through a simple google search) for the benefit of other
5 employees, placing himself at risk of discrimination by future prospective employers. Among
6 taking many other actions assisting in the successful litigation of this case, Plaintiff provided
7 substantial factual information and documents to counsel, attended numerous meetings/phone
8 conferences with counsel to discuss the case, and kept abreast of all significant developments. He
9 will provide the Court with a detailed declaration in advance of the Final Approval Hearing.

10 [Crosner Decl., ¶ 36.]

11 **VI. CONCLUSION**

12 For all the foregoing reasons, Plaintiff respectfully requests that the Court grant this motion,
13 conditionally certify the settlement class, grant preliminary approval to the proposed class action
14 settlement, and enter the [Proposed] Order filed herewith.

15 Dated: December 22, 2022

CROSNER LEGAL, P.C.

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