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7
8 **SUPERIOR COURT OF CALIFORNIA**
9
10 **FOR THE COUNTY OF SACRAMENTO**

11 ARNOLD SERRANO, individually and on
12 behalf of all other similarly situated
13 employees,

14 Plaintiff,

15 vs.

16 COOL TIME, LLC, a California Corporation;
17 and DOES 1 to 100, inclusive,

18 Defendants.

Case No. 34-2021-00312356

*Assigned for All Purposes to Hon. Lauri A. Damrell,
Department 28*

CLASS ACTION

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

Reservation No. 2708254

Date: March 17, 2023

Time: 9:00 a.m.

Dept.: 28

Judge: Hon. Lauri A. Damrell

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Trial Date: None Set

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I. INTRODUCTION AND OPENING SUMMARY OF ARGUMENT

Plaintiff Arnold Serrano (“Plaintiff”) seeks preliminary approval of a wage and hour class action and Private Attorneys General Act (“PAGA”) settlement in the gross amount of \$105,000. *See generally* Exhibit A (Joint Stipulation Regarding Class Action and PAGA Settlement and Release [“Agreement”]). Plaintiff brought this class action individually and on behalf of similarly situated employees who worked for Defendant Cool Time, LLC, (“Defendant”) (Plaintiff and Defendant sometimes collectively referred to as the “Parties”). *See generally* Exhibit B (Plaintiff’s Operative Complaint). There are approximately 74 Class Members.

Plaintiff has alleged that Defendant 1) failed to pay overtime wages, 2) failed to pay minimum wages, 3) failed to provide meal periods, 4) failed to provide rest periods, 5) failed to provide accurate wage statements, 6) failed to timely pay all final wages, 7) failed to reimburse employees for incurred expenses, and 8) engaged in unfair competition. *See generally* Exhibit B; *see also* Declaration of Justin P. Rodriguez (“Decl. Rodriguez”), ¶ 2. Plaintiff has also alleged that Defendant is liable for civil penalties under the PAGA based on these violations. *See id.*; Exhibit C (Plaintiff’s Ltr. to the Labor and Workforce Development Agency [“LWDA”] Regarding PAGA Claims). Defendant has denied all of Plaintiff’s allegations in their entirety and any liability or wrongdoing of any kind. *See* Decl. Rodriguez, ¶ 5. Defendant has also denied that this case is appropriate for class certification other than for purposes of settlement. *See id.* However, subject to Court approval, the Parties have been able to compromise and settle all asserted claims as a result of extensive investigations, document and data exchanges, and extended negotiations. *See* Exhibit A. Plaintiff and Plaintiff’s counsel believe the proposed Agreement is fair, reasonable, and adequate based on the investigations, discovery, employee data exchanges, negotiations, and a detailed knowledge of the issues in this case. *See* Decl. Rodriguez, ¶¶ 6-10.

It is well within the discretion of this Court to grant preliminary approval of the Agreement as it satisfied all applicable criteria under California law. Accordingly, Plaintiff requests that the Court: (1) certify the proposed settlement class on a preliminary and conditional basis; (2) grant preliminary and conditional approval of the proposed Agreement (Exhibit A); (3) approve the form and content of the

1 Notice of Settlement (Exhibit F) and the method for providing notice to Class Members as set forth in
2 the Agreement; and (4) adopt the implementation schedule contained in the proposed order.

3 **II. PROCEDURAL AND LITIGATION HISTORY**

4 Plaintiff filed a class action complaint on approximately December 8, 2021, in Sacramento
5 County Superior Court against Defendant. Plaintiff exhausted administrative remedies under the
6 PAGA by providing notice of the claims and violations to the LWDA. *See* Exhibit C; Cal. Lab. Code §
7 2699.3(a), (c); Decl. Rodriguez, ¶ 3. Then, Plaintiff filed a First Amended Class Action Complaint on
8 approximately February 10, 2022, to include a PAGA claim. *See id.*; Exhibit B. There is no date set
9 for a motion for certification or trial in this matter. *See* Decl. Rodriguez, ¶ 4.

10 **III. INVESTIGATION AND DISCOVERY CONDUCTED**

11 Plaintiff thoroughly investigated issues affecting certification, the merits of the class claims, and
12 potential damages for such claims. *See id.* at ¶¶ 3, 6-10; Declaration of Arnold Serrano (“Decl.
13 Serrano”) ¶¶ 5-7, 10. Plaintiff worked during the time all of Defendant's policies and practices at issue
14 in the Complaint were in effect and provided information regarding these policies and practices,
15 enabling pre-filing investigations to take place. *See* Decl. Serrano, ¶ 2. The Parties engaged in
16 informal discovery and exchange of documents, including a representative sampling of employee data
17 and relevant policies for the entirety of the statute of limitations applicable to the asserted claims. The
18 discovery covered all aspects of the asserted claims, including certification issues, merits issues,
19 damages, the scope and configuration of Class Members, the content and implementation of the wage
20 and hour policies at issue, issues relating to manageability concerns at trial, among other relevant areas.
21 *See* Decl. Rodriguez, ¶¶ 6-7. The information allowed Plaintiff to determine the extent and frequency
22 of any violations in accordance with Plaintiff's contentions and create an accurate damages model to
23 assess the reasonableness of any settlement. *See id.*

24 **IV. NEGOTIATION AND PROPOSED SETTLEMENT**

25 **a. Plaintiff and Defendant Engaged in Extensive Arm’s Length Negotiations**

26 The final settlement occurred only after extended, arm’s length negotiations. Over the course of
27 approximately seventeen (17) months, Plaintiff has been investigating the claims and discussing with
28 Defendant's counsel the merits of the claims and issues present in this case. *See id.* at ¶ 8. The Parties

1 exchanged substantial amounts of information and legal analysis in connection with these discussions.
2 *See id.* at ¶ 7. It was only after these extended discussions, that the Parties were able resolve all claims
3 and enter into the Agreement. *See id.* at ¶ 8.

4 **b. The Terms of the Agreement**

5 1. The following groups of individuals are covered by the Agreement: (a) Class Members,
6 which include all non-exempt employees who have or continue to work for Defendant in California
7 from December 8, 2017, up to either (1) the Preliminary Approval Date, or (2) April 18, 2023,
8 whichever is earlier; and (b) Aggrieved Employees, which include all non-exempt employees who
9 have, or continue to work for Defendant in California, from November 11, 2020, up to either (1) the
10 Preliminary Approval Date, or (2) April 18, 2023, whichever is earlier. *See* Exhibit A, ¶¶ 1.2, 1.5.
11 There are approximately 74 Class Members and 43 Aggrieved Employees. *See id.*

12 2. Defendant will pay the Gross Settlement Amount of \$105,000, which is exclusive of the
13 employer's share of payroll taxes. *See id.* at ¶ 5.1. No portion of the Gross Settlement Amount will
14 revert to Defendant. *See id.* at ¶ 5.6. Aggrieved Employees will still be paid their share of the PAGA
15 Payment regardless of whether they opt out of being Class Members. *See id.* at ¶¶ 7.5.1, 7.8.3.

16 3. Up to \$10,000 will be paid to Plaintiff as an Enhancement Payment. This amount will
17 be in addition to any amount Plaintiff may be entitled to under the terms of the Agreement. *See id.* at ¶
18 5.4.

19 4. Subject to Court approval, the Parties have selected ILYM Group, Inc. to act as the
20 Settlement Administrator, who has provided a maximum cost estimate of \$6,377.40. *See* Exhibit D
21 (ILYM Group, Inc. Quote); Exhibit A, ¶ 1.33; Decl. Rodriguez, ¶ 20.

22 5. The Parties agree that \$5,000 of the Gross Settlement Amount shall be allocated to
23 resolving claims under the PAGA. Seventy-Five percent (75%) of the PAGA Payment will be paid to
24 the LWDA and Twenty-Five percent (25%) will be paid to Aggrieved Employees. *See* Exhibit A, ¶
25 5.5. Given the risk to proving the claims on the merits, the derivative nature of the penalties, the efforts
26 by Defendant to maintain compliant policies and take corrective action, the presence of what may likely
27 be deemed good faith disputes, and the Court's discretion to reduce any penalty award, Plaintiff
28 believes the \$5,000 PAGA Payment allocation represents a meaningful settlement aimed at deterring

1 non-compliance given the facts of this case. See Decl. Rodriguez, ¶¶ 5-10; see also *Nordstrom Com.*
2 *Cases*, 186 Cal.App.4th 576, 589 (2010) (approving \$0 allocation to the resolution of PAGA claims
3 based on their being disputed and being part of a class settlement which was evaluated based on the
4 terms of the agreement overall); *Junkersfeld v. Med. Staffing Sols., Inc.*, 2022 WL 2318173, at *8 n.2
5 (E.D. Cal. 2022) (collecting cases with PAGA settlement values ranging from .037%-1%); *Jennings v.*
6 *Open Door Marketing, LLC*, 2018 WL 4773057, *9 (N.D. Cal. 2018) (approving settlement of PAGA
7 claims at 0.6% of total estimated value due to risk of no recovery); *Ruch v. AM Retail Grp., Inc.*, 2016
8 WL 5462451, *7 (N.D. Cal. 2016) (approving \$10,00 PAGA settlement allocation where total PAGA
9 penalty exposure was approximately \$5.2 million, or 0.2% of total estimated value); *Davis v. Cox*
10 *Commc'ns California, LLC*, 2017 U.S. Dist. LEXIS 63514, *1 (S.D. Cal. 2017) (preliminarily
11 approving \$4,000 PAGA allocation in \$275,000 settlement); *Moore v. Fitness Int'l, LLC*, 2014 U.S.
12 Dist. LEXIS 8358, *5 (S.D. Cal. 2014) (approving \$2,500 PAGA allocation when attorneys' fees award
13 alone amounted to \$200,000); *Jack v. Hartford Fire Ins. Co.*, 2011 U.S. Dist. LEXIS 118764, *6 (S.D.
14 Cal. 2011) (approving \$3,000 PAGA allocation in \$1,200,000 settlement); *Singer v. Becton Dickinson*
15 *& Co.*, 2010 U.S. Dist. LEXIS 53416, *2 (S.D. Cal. 2010) (approving \$3,000 PAGA allocation in
16 \$1,000,000 settlement); *Hopson v. Hanesbrands Inc.*, 2009 U.S. Dist. LEXIS 33900, *9 (N.D. Cal.
17 2009) (approving \$1,500 PAGA allocation in \$1,026,000 settlement); *Syed v. M-I, L.L.C.*, 2017 U.S.
18 Dist. LEXIS 24880, *34-35 (E.D. Cal. 2017) (approving \$100,000 PAGA allocation in a \$3,950,000
19 settlement even though PAGA exposure was calculated at \$53,600,000, or 0.2% of total estimated
20 value); *Garcia v. Gordon Trucking, Inc.*, 2012 U.S. Dist. LEXIS 160052, at *7 (E.D. Cal. 2012)
21 (approving \$10,000 PAGA allocation in a \$3,700,000 settlement); *Franco v. Ruiz Food Prod., Inc.*,
22 2012 WL 5941801, at *14 (E.D. Cal. 2012) (\$10,000 in PAGA payment from \$2,500,000 settlement
23 fund); *Chu v. Wells Fargo Investments, LLC*, 2011 WL 672645, at *1 (N.D. Cal. 2011) (approving
24 PAGA settlement payment of \$7,500 to the LWDA out of \$6.9 million common-fund settlement).

25 6. The Parties agree that up to thirty-five (35%) of the Gross Settlement Amount (\$36,750)
26 will be paid for Plaintiff's attorneys' fees incurred in the litigation of this case. Defendant will not
27 oppose any application for attorneys' fees so long as it is within this threshold. See *id.* at ¶ 5.2.
28 Additionally, the Parties agree that Plaintiff will also be entitled to the actual litigation costs as

1 approved by the Court in an amount not to exceed \$4,000. *See id.* The proposed notice to be sent to
2 Class Members will state this information. *See* Exhibit F.

3 7. Any allocated amounts under the Agreement for Settlement Administrator Costs, Class
4 Representative Enhancement Payment, and attorney's fees and costs that are not ultimately awarded by
5 the Court will remain part of the Net Settlement Amount and be paid out to Participating Class
6 Members on a pro rata basis as set forth in the Agreement. *See* Exhibit A, ¶¶ 5.1-5.5, 5.8. These
7 amounts will be paid out from the Gross Settlement Amount, not in addition to the Gross Settlement
8 Amount. *See* Exhibit A, ¶¶ 5.1-5.5.

9 8. Class Members who fail to timely opt-out of this settlement will waive all Released
10 Class Claims as set forth in the Agreement. *See* Exhibit A, ¶¶ 1.14, 1.26, 1.30, 1.32, 6.1. Aggrieved
11 Employees will waive all Released PAGA Claims as set forth in the Agreement regardless of whether
12 they opt out of being a Class Member. *See id.* at ¶¶ 1.2, 1.14, 1.31-1.32, 6.2, 7.5.1; *see also* Decl.
13 Rodriguez, ¶ 21.

14 9. For any portion of the Net Settlement Amount or PAGA Payment allocated to
15 Participating Class Members and/or Aggrieved Employees that is not claimed by them by cashing their
16 respective settlement checks within 180 calendar days of issuance, that remaining amount shall be
17 donated equally, *i.e.*, 50/50 to Capital Pro Bono, Inc., and the Center for Workers' Rights under the
18 doctrine of *cy pres*. *See* Exhibit A, at ¶ 5.6. Because the Agreement provides for all funds such that
19 there is no residue, the provisions of California Civil Procedure Code section 384 are inapplicable. *See*
20 *In re Microsoft I-V Cases*, 135 Cal.App.4th 706, 718, 720 (2006). The designated beneficiaries clearly
21 promote the law consistent with the objectives and purposes underlying the lawsuit as they are non-
22 profits aimed at assisting employees with wage and hour claims who cannot afford legal representation,
23 including providing representation for employees in wage claims before the California Labor
24 Commissioner. *See id.* at 722-724; *see also* Decl. Rodriguez, ¶¶ 24-33.

25 **c. Allocation of Settlement Funds**

26 Payment to Participating Class Members and Aggrieved Employees will not require the
27 submission of a claim form. A Net Settlement Amount will be determined by subtracting from the
28 Gross Settlement Amount any attorneys' fees and costs, Enhancement Payment to the Class

Representative, Settlement Administrator Costs, PAGA Payment that are approved and/or awarded by the Court. Each Class Member's share will be determined by dividing their total weeks worked within the Class Period by the total weeks worked by all Class Members within the Class Period. That fraction will then be multiplied by the Net Settlement Amount to arrive at the Class Member's individual share of the Net Settlement Amount. Each Aggrieved Employee's share of the 25% portion of the PAGA Payment will be determined by dividing their total weeks worked within the PAGA Claim Period by the total weeks worked by all Aggrieved Employees within the PAGA Claim Period. That fraction will then be multiplied by the 25% portion of the PAGA Payment to arrive at the Aggrieved Employee's individual share. See Exhibit A, at ¶¶ 1.17, 5.5, 5.8.

V. THE PROPOSED PROCEDURES TO NOTIFY CLASS MEMBERS SATISFY DUE PROCESS AS THEY PROVIDE THE BEST NOTICE PRACTICABLE UNDER THE CIRCUMSTANCES

It is not required that Class Members be given actual notice of a class settlement; instead, the best practicable notice under the circumstances is all that is required. See *Silber v. Mabon*, 18 F.3d 1449, 1453 (9th Cir. 1994); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1129 (9th Cir. 2017); *Walsh v. CorePower Yoga LLC*, 2017 U.S. Dist. LEXIS 163991, at *12-14 (N.D. Cal. 2017); *Wright v. Linkus Enters.*, 259 F.R.D. 468, 474-75 (E.D. Cal. 2009). In *Silber v. Mabon*, 18 F.3d 1449 (9th Cir. 1994), the Court rejected a class member's argument that he had not received due process because he did not receive notice until after the opt out period, finding that, so long as the notice process utilized is the best practicable under the circumstances, due process is satisfied even if there is no actual receipt of the notice. See *Silber*, 18 F.3d at 1453-1454. A similar finding was made in *Briseno v. Conagra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017). With regard to any potential for undeliverable notice mailings, the Court in *Rannis v. Recchia*, 380 F. App'x 646 (9th Cir. 2010) found that class members who did not receive actual notice due to their mailings being deemed undeliverable were still properly held to be part of the class settlement because they received the best notice practicable under the circumstances. See *Rannis v. Recchia*, 380 F. App'x at 650-651. In *Noel v. Thrifty Payless, Inc.*, 7 Cal.5th 955, 980-984 (2019), the California Supreme Court noted that California has adopted a similar approach regarding providing notice to class members.

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1 Under the proposed notice procedures, Class Members will have sixty (60) days from the date
2 of mailing to review and respond to the Notice of Settlement, which will be translated into Spanish and
3 will also be available online. See Exhibit A, ¶¶ 1.21, 7.2. The Notice of Settlement contains all
4 information necessary for a Class Member to assess the litigation, the settlement, and whether they
5 want to participate, object, or opt-out. See *id.* at ¶¶ 7.2, 7.5.1-7.5.3; Exhibit F. National change of
6 address database searches, skip-traces, and surveying of current employees will be utilized as set out in
7 the Agreement to provide the best practical means of ensuring Class Members receive the notice
8 mailing. See Exhibit A, ¶¶ 7.3-7.4. Any individual whose initial mailing was deemed undeliverable
9 will have additional time to respond. See *id.* at ¶ 7.4. Additional time to respond will also be provided
10 to cure any deficiencies in opt-outs, objections, or disputes. See *id.* ¶ 7.5.4. This notice method is
11 regularly utilized in wage and hour class actions and similar to the one approved in *Rannis*. Thus, the
12 proposed procedures for notifying Class Members satisfy due process and should be approved in this
13 case.

14 **VI. THE AGREEMENT WARRANTS PRELIMINARY APPROVAL AS IT IS FAIR,**
15 **REASONABLE, AND ADEQUATE AS TO ALL CLASS MEMBERS BASED ON THE**
16 **FACTS OF THIS CASE**

17 A class action may not be dismissed, compromised, or settled without Court approval and the
18 decision to approve or reject a settlement is committed to the Court's sound discretion. See Cal. Rules
19 of Court, Rule 3.769; Fed. R. Civ. Proc., Rule 23(e)¹; *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th
20 224, 234-35 (2001); see also Cal. Lab. Code §§ 2699(1)(2). However, "[d]ue regard should be given to
21 what is otherwise a private consensual agreement between the parties. The inquiry 'must be limited to
22 the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or
23 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole,
24 is fair, reasonable and adequate to all concerned.'" See *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794,
25 1801 (1996); see also *Cellphone Termination Fee Cases*, 180 Cal.App.4th 1110, 1118 (2009); *In re*
26 *Microsoft I-V Cases*, 135 Cal.App.4th at 723; *Nordstrom Com. Cases*, 186 Cal.App.4th at 581. The law
27 favors settlement of lawsuits, particularly class actions and other complex cases where substantial

28 ¹The California Supreme Court has authorized California's trial courts to rely on these federal resources to decide class certification issues. See *Green v. Obledo*, 29 Cal.3d 126, 145-46 (1981).

resources can be conserved by avoiding the time, expense, and rigors of formal litigation. See *Cellphone Termination Fee Cases*, 180 Cal.App.4th at 1117-1118; *In re Microsoft I-V Cases*, 135 Cal.App.4th at 723 n.14; *Nordstrom Com. Cases*, 186 Cal.App.4th at 581; see also *Neary v. Regents of Univ. of Cal.*, 3 Cal.4th 273, 277-81 (1992).

a. The Terms of The Settlement Are Fair and Within the Range of Reasonableness

The purpose of the Court’s preliminary evaluation of a proposed class action settlement is to determine only whether it is within the range of possible approval such that notice to the class of its terms and conditions and the scheduling of a formal fairness hearing is warranted. See *Wershba*, 91 Cal.App.4th at 234-35. If the Court finds a proposed settlement falls within “the range of reasonableness,” it should grant preliminary approval of the class action settlement. See, e.g., *North County Contr.’s Assn., Inc. v. Touchstone Ins. Svcs.*, 27 Cal.App.4th 1085, 1089-90 (1994); *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 133 (2008). Factors to consider in determining whether the settlement is fair, reasonable, and adequate include the strength of the Plaintiff’s case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement. See *Dunk v. Ford Motor Co.*, 48 Cal.App.4th at 1801. However, this Court should begin its analysis with a presumption that the proposed settlement is fair. “A presumption of fairness exists where: (1) the settlement is reached through arm’s length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small.” *Id.* at 1802.

i. The Agreement is a Result of Extensive, Non-Collusive Arm’s Length Negotiations Between the Parties

Settlement of this case was reached only after substantial litigation and extensive arm’s length negotiations lasting nearly seventeen (17) months. See Decl. Rodriguez, ¶¶ 3, 6-10. At all times, the negotiations were adversarial, although still professional in nature. See *id.*

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1 **ii. The Extent of Investigation and Discovery Completed Provided Ample**
2 **Information to Enter Into an Informed and Reasonable Settlement**

3 The Parties were in possession of all necessary information during the negotiations. The Parties
4 engaged in substantial informal discovery, which included all necessary components for evaluating the
5 class claims and creating an accurate damages model. *See id.* at ¶¶ 6-10. Plaintiff was in possession of
6 this information prior to calculating any damages in this case. *See id.* As a result, Plaintiff was able to
7 make a reasonable estimation of Defendant's potential liability. *See id.* For these reasons, the
8 settlement now before the Court was reached at a stage where “the parties certainly have a clear view of
9 the strengths and weaknesses of their cases” sufficient to support the settlement. *See Boyd v. Bechtel*
10 *Corp.*, 485 F.Supp. 610, 617 (N.D. Cal. 1979).

11 **iii. Plaintiff's Counsel are Experienced in Similar Litigation**

12 Plaintiff's counsel have considerable experience in complex litigation such as class and PAGA
13 actions. *See Decl. Rodriguez*, ¶¶ 12-18. Thus, Plaintiff's counsel are qualified to evaluate the class
14 claims, the value of settlement versus moving forward with litigation, and viability of possible
15 affirmative defenses. Plaintiff's counsel believe that the Agreement is fair, reasonable, and adequate in
16 light of the risks associated with the claims, the uncertainties of complex litigation, and the secured
17 benefit to Class Members. *See id.*

18 **iv. The Settlement is Fair, Reasonable, and Adequate Based on the Strength of**
19 **Plaintiff's Case and the Risks and Costs of Further Litigation**

20 Plaintiff's claims and the ability to obtain and maintain certification all the way through trial
21 were heavily disputed by Defendant. *See Decl. Rodriguez*, ¶¶ 5-9. Based on the records and facts of
22 this case, Plaintiff has secured a gross recovery of approximately 7.21% of the maximum value of the
23 claims in this matter and between 23.4% to 53.5% of the more realistic range of recovery. *See Decl.*
24 *Rodriguez*, ¶¶ 9-10. The net recovery represents approximately 3% of the maximum value of the
25 claims in this matter and between 9% and 21% of the more realistic range of recovery. The average net
26 award is approximately \$547.30. *See id.* This settlement is a reasonable compromise of the class and
27 PAGA claims, and is within the percentile ranges of the total available damages that have been
28 approved in other class settlements. *See Wershba*, 91 Cal.App.4th at 246, 250; *Rebney v. Wells Fargo*

1 *Bank*, 220 Cal.App.3d 1117, 1139 (1990); *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615,
2 628 (9th Cir. 1982); *see also In re Omnivision Technologies, Inc.*, 559 F.Supp.2d 1036, 1042 (2007)
3 (noting that certainty of recovery in settlement of 6% of maximum potential recovery after reduction
4 for attorney’s fees was higher than median percentage for recoveries in shareholder class action
5 settlements, averaging 2.2%-3% from 2000 through 2002); *Bravo v. Gale Triangle, Inc.*, 2017 U.S.
6 Dist. LEXIS 77714 (C.D. Cal. 2017) (approving a settlement where the net recovery to class members
7 was approximately 7.5% of the projected maximum recovery amount); *Avila v. Cold Spring Granite*
8 *Co.*, 2017 U.S. Dist. LEXIS 130878 (E.D. Cal. 2017) (approving a settlement with a gross recovery of
9 11% of the projected maximum damages available and a net recovery of approximately 6.7% of the
10 projected maximum recovery); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245 (N.D. Cal. 2015)
11 (approving a settlement where the gross recovery was approximately 8.5% of the projected maximum
12 recovery); *Schiller v. David’s Bridal, Inc.*, 2012 U.S. Dist. LEXIS 80776 at *48 (E.D. Cal. 2012)
13 (“Class Members will receive an average of approximately \$198.70, with the highest payment to a
14 Class Member being \$695.78 . . . Overall, the Court finds that the results achieved are good, which is
15 highlighted by the fact that there was no objection to the settlement amount or the attorneys’ fees
16 requested.”); *Gardner v. GC Servs., LP*, 2012 U.S. Dist. LEXIS 47043, 18 (S.D. Cal. 2012) (“the
17 results achieved in this case were very favorable. Class members are provided with immediate
18 monetary relief, with an average award of around several hundred dollars and a minimum award of
19 \$50”).

20 **v. The Proposed Settlement is a Reasonable Compromise of Claims**

21 In *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116 (2008), the Court required additional
22 information be presented in class action settlements “to ensure that the recovery represents a reasonable
23 compromise, given the magnitude and apparent merit of the claims being released, discounted by the
24 risks and expenses of attempting to establish and collect on those claims by pursuing the
25 litigation” *Id.* at 129. *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal.App.4th 399
26 (2010), clarified that *Kullar* does not require an illusory prediction of the outer reaches of exposure
27 without taking into account the actual risks of litigation such as dispositive motions and trial. *Kullar*
28 also does not require an explicit statement of the maximum amount to be recovered if a plaintiff

1 prevailed on all the claims, provided there is a record that allows “an understanding of the amount that
2 is in controversy and the realistic range of outcomes of the litigation.” *Id.* at 409.

3 Plaintiff has thoroughly set forth the realistic range of outcomes in this litigation as well as the
4 data points relied upon in reaching these ranges. *See* Decl. Rodriguez ¶¶ 9-10. The record
5 demonstrates that the compromises made by Plaintiff was reasonable and have resulted in a settlement
6 with recovery percentage well within the range of what has been found to be sufficient in several other
7 cases. *See, supra*, Section VI.a.iv; *see also* *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th
8 Cir. 1998) (“The fact that a proposed settlement may only amount to a fraction of the potential recovery
9 does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be
10 disapproved”); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974) (“In fact there is no
11 reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a
12 thousandth part of a single percent of the potential recovery”).

13 **b. Provisional Certification of the Class is Appropriate**

14 Class certification is appropriate when (1) the class is ascertainable and (2) there is “a well-
15 defined community of interest in the questions of law and fact involved affecting the parties to be
16 represented.” *Dunk*, 48 Cal.App.4th at 1806. The “community of interest” element “embodies three
17 factors: (1) common questions of law or fact predominate; (2) class representatives with claims or
18 defenses typical of the class; and (3) class representatives who can adequately represent the class.” *Id.*
19 Here, the Parties agree that, for the purposes of settlement, these prerequisites are met. *See* Exhibit A.

20 **i. The Proposed Settlement Class is Ascertainable and Sufficiently Numerous**

21 The proposed settlement class is ascertainable because all putative Class Members can be
22 readily identified through employee personnel and payroll files. *See* *Noel v. Thrifty Payless, Inc.*, 7
23 Cal.5th at 980; *Rose v. City of Hayward*, 126 Cal.App.3d 926, 932 (1981); *Lee v. Dynamex, Inc.*, 166
24 Cal.App.4th 1325, 1334 (2008). The numerosity requirement is met because there are 74 individuals
25 who fall within the definition of Class Member, which makes joinder of all members impracticable.
26 *See* *Gay v. Waiters' & Dairy Lunchmen's Union*, 489 F.Supp. 282 (N.D. Cal. 1980), *aff'd* 694 F.2d 531
27 (9th Cir. 1982); *Hebbard v. Calgrove*, 28 Cal.App.3d 1017, 1030 (1972) (noting no set minimum to
28

1 meet the numerosity prerequisite, but a class as few as twenty-eight (28) members is acceptable). Thus,
2 these requirements are satisfied.

3 **ii. The Commonality, Predominance, and Typicality Requirements are Met**

4 The commonality requirement is met when there are questions of law or fact regarding the class
5 as a whole. *See Hanlon*, 150 F.3d 1011, 1019 (9th Cir. 1998). Commonality requires only that some
6 common legal or factual questions exist; Plaintiff need not show that all issues in the litigation are
7 identical. *See Richmond v. Dart Ind., Inc.*, 29 Cal.3d 462, 473 (1981); *City of San Jose v. Superior*
8 *Court*, 12 Cal.3d 447, 460 (1974). Common questions of law or fact must also predominate over
9 individual questions and class-wide treatment of a dispute must be superior to individual litigation.²
10 *See Richmond*, 29 Cal.3d at 469. Predominance requires a putative class be sufficiently cohesive to
11 warrant adjudication by representation. *See Hanlon*, 150 F.3d at 1022. The typicality requirement is
12 met when claims of the named representative are typical of those of the class, though “they need not be
13 substantially identical.” *Id.* at 1020; *Classen v. Weller*, 145 Cal.App.3d 27, 46-47 (1983).

14 The common questions of law and fact in this case stem from Plaintiff's contention that
15 Defendant violated California law by 1) failing to pay minimum wages for off-the-clock work, 2)
16 failing to pay overtime wages for off-the-clock-work, 3) failing to properly record and pay for all hours
17 worked, 4) by failing to pay for being on-call, 5) failing to authorize and permit timely and
18 uninterrupted meal periods, 6) failing to authorize and permit timely and uninterrupted rest periods, and
19 failing to pay for reimbursement for mileage, cell phone use, and other work related incurred expenses.
20 *See Exhibit B.* The waiting time penalties, unfair competition, and PAGA claims are derivative of
21 these violations. *See id.* Plaintiff and the Class Members seek the same remedies under state law.
22 Under these specific circumstances, the commonality and predominance requirements are satisfied.
23 Regarding the typicality requirement, Plaintiff contends he suffered from the same unlawful policies,
24 treatment, and circumstances as Class Members did, will request the same remedies, and will rely on
25 the same methods of proof to establish liability and damages. *See id.* Thus, the typicality requirement
26 is also satisfied for settlement purposes.

27
28 ²When assessing predominance and superiority, a court may consider that the class will be certified for settlement purposes only and that manageability of trial is therefore irrelevant. *See Amchem Products v. Windsor*, 521 U.S. 591 (1997).

1 **iii. The Adequacy Requirement is Met**

2 The adequacy of representation requirement is met if the named representative and counsel have
3 no interests adverse to those of the putative class members and are committed to vigorously prosecuting
4 the case on behalf of the class. *See Hanlon*, 150 F.3d at 1020; *McGhee v. Bank of America*, 60
5 Cal.App.3d 442, 450-51 (1976). Those standards are met here. Under the proposed Agreement,
6 Plaintiff and the putative Class Members will receive a pro rata share of the settlement based on the
7 number of workweeks they worked for Defendant. *See Exhibit A*. Finally, any settlement class
8 member who wishes to opt-out of the settlement may do so, and he or she may also dispute the number
9 of workweeks stated in the Notice of Settlement (Exhibit F).

10 There is no conflict of interest between Plaintiff and Class Members. Plaintiff and Plaintiff's
11 counsel have pursued the claims made in the operative Complaint vigorously on behalf of the class.
12 Plaintiff's counsel, with Plaintiff's assistance, thoroughly investigated the claims made in this case by
13 speaking with Plaintiff and reviewing substantial amounts of documents. Plaintiff's counsel thereafter
14 engaged Defendant's counsel in settlement discussions over the course of approximately seventeen (17)
15 months. Moreover, Plaintiff's counsel has experience defending and bringing wage and hour claims.
16 Because Plaintiff's counsel has vigorously pursued Plaintiff's and the Class Members' claims, the
17 adequacy requirement is met. *See generally* Decl. Rodriguez.

18 **VII. ATTORNEY'S FEES AND COSTS, ENHANCEMENT PAYMENT TO THE CLASS**
19 **REPRESENTATIVE, AND SETTLEMENT ADMINISTRATOR COSTS TO BE**
20 **REQUESTED IN CONNECTION WITH FINAL APPROVAL**

21 Plaintiff is not requesting any determination with respect to attorney's fees and costs,
22 Enhancement Payment, or Settlement Administrator Costs at this time. Rather, should the Court grant
23 preliminary approval, Plaintiff will make the request for these amounts as set out in the Agreement as
24 part of their final approval briefing. Specifically, Plaintiff will request the Court award attorney's fees
25 in the amount of \$36,750 (35% of the Gross Settlement Amount), costs in an amount not to exceed
26 \$4,000, Settlement Administrator Costs in an amount not to exceed \$10,000, and an Enhancement
Payment for the Class Representative in the amount of \$10,000.

27 Plaintiff believes an award of attorney's fees under the common fund doctrine is appropriate in
28 this case as there is a sufficiently identifiable class of beneficiaries (*e.g.* the settlement class), the

benefits received can be accurately traced to the settlement Plaintiff and Class Counsel were able to negotiate on behalf of Class Members, and the fee can be shifted with exactitude to those benefiting as the fee request is a specific, lump-sum percentage of the fund. *See Laffitte v. Robert Half Internat., Inc.*, 1 Cal.5th 480, 506 (2016); *Paul, Johnson, Alston & Hunt v. Grauly*, 886 F.2d 268, 271 (9th Cir. 1989); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 477-478 (1980) (“A lawyer who recovers a common fund for the benefit of persons other than . . . her client is entitled to a reasonable attorney’s fee from the fund as a whole.”); *see also Martin v. Ameripride Servs.*, 2011 U.S. Dist. LEXIS 61796, *22-23 (S.D. Cal. 2011) (collecting cases); *Birch v. Office Depot, Inc.*, USDC Southern District, Case No. 06cv1690 DMS (WMC) (awarding 40% fee on a \$16 million wage and hour class action settlement); *Rippee v. Boston Mkt. Corp.*, USDC Southern District, Case No. 05cv1359 BTM (JMA) (awarding a 40% fee on a \$3.75 million wage and hour class action settlement); *West v. Circle K Stores, Inc.*, 2006 U.S. Dist. LEXIS 76558, at *7-*8, *12, *27 (E.D. Cal. 2006) (awarding a \$15,000 representative enhancement where 10,000 class members were to receive a gross award of approximately \$500 each from the \$5,000,000 settlement); *Dent v. ITC Serv. Group*, 2013 U.S. Dist. LEXIS 139359, at *9-*10, *15-*16 (D. Nev. 2013) (awarding a \$15,000 representative enhancement out of a \$150,000 settlement for approximately 530 class members); *Patel v. Nike Retail Services, Inc.*, 2019 WL 2029061 at *2 (N.D. Cal. 2019) (\$5,261 for settlement administrator’s fees was not excessive where PAGA group consisted of 40 employees).

Plaintiff’s final approval briefing will include information and analysis regarding the appropriateness of the fee percentage sought, a lodestar cross check of the requested fee, a detailed declaration from Plaintiff regarding their time spent on the case as well as any risks and burdens incurred as the Class Representative, an itemized costs spreadsheet, and a declaration from the Settlement Administrator detailing the work performed and Settlement Administrator Costs incurred. *See Decl. Rodriguez* ¶ 19. The Notice of Settlement will state the amounts to be requested to provide Class Members the ability to comment thereon, providing evidence of whether the requested amounts are reasonable. *See Exhibit F* at pg. 2, § II.A; *see also In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555, 71 (C.D. Cal. 2005) (“the absence of objections or disapproval by class members to class counsel’s fee request further supports finding the fee request reasonable”). Any allocated

1 amounts not ultimately awarded by the Court will be distributed to Class Members pro rata. See
2 Exhibit A, ¶¶ 5.2-5.4, 5.8.

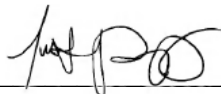
3 **VIII. CONCLUSION**

4 For all of the foregoing reasons, Plaintiff respectfully requests that this Court preliminarily and
5 conditionally certify the class for settlement purposes; grant preliminary and conditional approval of
6 the proposed settlement; approve the proposed notification procedures, including the Notice of
7 Settlement and proposed deadlines relating thereto; and schedule the final approval hearing. A copy of
8 Plaintiff's proposed order is being filed concurrently herewith.

9
10 **Shimoda & Rodriguez Law, PC**

11
12 Dated: February 21, 2023

By: _____


Galen T. Shimoda
Justin P. Rodriguez
Renald Konini
Attorneys for Plaintiff