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8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **FOR THE COUNTY OF SAN DIEGO**

11 DANIEL ESQUIVEL, individually and on
12 behalf of all others similarly situated,

13 Plaintiff,

14 vs.

15 BRADY SOCIAL INCORPORATED; and
16 DOES 1 through 20, inclusive,

17 Defendants.

Case No. 37-2022-00010020-CU-OE-CTL

Assigned for All Purposes to:

Judge Katherine Bacal

Dept. C-69

18 **MEMORANDUM OF POINTS AND**
19 **AUTHORITIES IN SUPPORT OF**
20 **PLAINTIFF'S MOTION FOR**
21 **PRELIMINARY APPROVAL OF**
22 **CLASS ACTION SETTLEMENT**

Date: April 28, 2023

Time: 11:00 A.M.

Dept: C-69

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1 **I. INTRODUCTION**

2 Pursuant to California Rules of Court 3.769 (d) and (e), Plaintiff Daniel Esquivel (“Plaintiff”)
3 request that the Court grant preliminary approval of a class action settlement of wage and hour claims,
4 including claims under the California Private Attorneys General Act of 2004, codified at Lab. Code §
5 2698, *et seq.* (“PAGA”), against Defendant Brady SoCal Incorporated (“Defendant” or “Brady SoCal”)
6 (collectively, Plaintiff and Defendant referred to as, the “Parties”). The putative class consists of 25
7 non-exempt employees who worked for Defendant in California, except those non-exempt employee(s)
8 whose employment is governed by the Southwest Interior/Exterior Master Agreement between the
9 Western Wall & Ceiling Contractors Association, Inc. and the Southwest Regional Council of Carpenters
10 of the United Brotherhood of Carpenters and Joiners of America (individually, “Class Member”;
11 collectively, the “Class”) from September 18, 2017, through September 19, 2022 (the “Class Period”).
12 The basic terms of the Joint Stipulation of Settlement (“Settlement Agreement” or “Settlement”)¹
13 provide for the following:

- 14 (1) A non-reversionary Gross Settlement Amount of \$200,000 allocated to 25 Class
15 Members on a pro rata basis according to the number of weeks each Class Member
16 worked during the Class Period;
- 17 (2) An award of up to one-third of the Gross Settlement Amount (currently
18 \$66,666.66) and up to \$12,000 in reimbursement of costs to Plaintiff’s Counsel for
19 services rendered as counsel on this matter;
- 20 (3) Incentive Awards of up to \$8,500.00 to Plaintiff;
- 21 (4) Settlement Administration fees and costs of up to \$6,000; and
- 22 (5) Payment to the California Labor and Workforce Development Agency (“LWDA”)
23 of \$20,000 for civil penalties pursuant to PAGA. Seventy-five percent (75%) of this
24 payment will be paid to the California Labor and Workforce Development Agency

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

1 (“LWDA Payment”), and twenty-five percent (25%) will be paid to the Net
2 Settlement Amount for distribution to Class Members.

3 With each Class Member allocated an average recovery of approximately \$3,500 from the Net
4 Settlement Amount, the Settlement satisfies the criteria for preliminary approval and falls well within
5 the range of reasonableness given the risks and costs of continued litigation. The Settlement was reached
6 through informed, arms-length bargaining at and after mediation between experienced attorneys. As
7 such, Plaintiff requests that the Court grant preliminary approval of the Settlement, conditionally certify
8 the Class for settlement purposes only, appoint Plaintiff as the Class Representatives, appoint Plaintiff’s
9 Counsel as Class Counsel, appoint ILYM Group, Inc as the Settlement Administrator, authorize the
10 Settlement Administrator to send notice of the Settlement, and set a final approval hearing date.

11 **II. SUMMARY OF THE LITIGATION**

12 On March 16, 2022, Plaintiff Esquivel filed this action on behalf of Defendant’s non-exempt
13 employees and on the same day, Plaintiff provided written notice to the LWDA and Defendant as required
14 by Lab. Code § 2699.3(a). McNicholl Decl. at ¶ 3. Plaintiff alleges the following causes of action in the
15 operative Complaint: (1) failure to pay overtime wages; (2) failure to provide meal periods; (3) failure to
16 permit rest breaks; (4) failure to provide accurate wage statements; (5) failure to pay all wages timely and
17 upon separation of employment; (6) failure to reimburse necessary business expenses; and (7) violation
18 of Business and Professions Code § 17200, *et seq.*, based on the preceding claims. On May 25, 2022,
19 Plaintiff filed a First Amended Complaint adding a PAGA claim *Id.* at ¶ 3.

20 Through informal discovery, Plaintiff requested certain information and documents related to, *inter*
21 *alia*, class information, policy documents, time records, and pay records. Defendant produced a significant
22 amount of documents and information, including Plaintiff’s personnel file, policy documents, and
23 employment dates, and the time and pay records for all non-exempt employees that worked at the
24 Defendants’ locations during the class period. *Id.* at ¶ 5. After engaging in numerous discussions between
25 the Parties’ attorneys, the Parties agreed to attend a private mediation session. *Id.*

26 The Parties attended mediation session with mediator Scott Markus, Esq., a respected mediator, on
27 September 19, 2022. *Id.* at ¶ 4. The Parties were able to settle the matter. The Parties spent the next several
28 months negotiating the terms of the Settlement, which was finalized in February of 2023. *Id.* at ¶ 5. Plaintiff

submitted the Settlement to the LWDA pursuant to Lab. Code § 2699(1)(2). *Id.* at ¶ 6, Ex. 2 (Confirmation of Submission of Settlement to LWDA).

III. SUMMARY OF THE SETTLEMENT

A. Terms of Settlement

Plaintiff and Defendant agreed to settle the class claims in exchange for a Gross Settlement Amount of \$200,000. Settlement Agreement, § 3.06(a). The Gross Settlement Amount will be used to make payments for the following: (1) Individual Settlement Payments to Participating Class Members; (2) attorneys' fees to Class Counsel of up to one-third of the Gross Settlement Amount; (3) reimbursement of Class Counsel's litigation costs of up to \$12,000; (4) Incentive Awards to Plaintiff of up to \$8,500; (5) Settlement Administration fees and costs of \$6,000; and (6) a payment to the LWDA of \$20,000 pursuant to PAGA. *Id.* at § 3.06(a-e). Class Members' Individual Settlement Payments will be distributed after final approval of the Settlement and Defendant funds the Gross Settlement Amount. *Id.* at § 3.06(f). Individual Settlement Payments will be calculated by comparing the total Qualifying Workweeks for the Class to each individual Class Member's Qualifying Workweeks. Settlement Agreement, § 3.06(f). With 25 Class Members, the Gross Settlement Amount allocates an average of \$3,500 per Class Member. The Settlement Administrator will calculate the actual estimated recovery to include in the Class Notice and provide the estimated low and high range of possible recovery at final approval. *Id.*; Settlement Agreement, Ex. A (Notice of Class Action Settlement).

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

B. Proposed Opt-Out and Objection Process

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

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

10 The Class Notice provides instructions for Class Members who choose to exclude themselves
11 from the Settlement. *See* Settlement Agreement § 3.04(b). To opt out, Class Members are instructed to
12 submit a Request for Exclusion to the Settlement Administrator by a specified date (60 days after the date
13 of mailing of the Class Notice). *Id.* at pp. 1, 6-7. Class Members do not need to submit a claim form to
14 participate in the Settlement. *See* Settlement Agreement, Ex. A (Class Notice), p. 1. Class Members are
15 informed of how they can object to the Settlement, and the Class Notice informs Class Members of the
16 date, time, and location of the final fairness and approval hearing so that they can appear in person. *Id.* at
17 pp. 1, 6-7. Accordingly, the content of the Class Notice complies with the requirements of Cal. R. Ct.
18 3.766(d).

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

26 **C. Proposed Release**

27 The release to be given by Class Members is limited to the Defendant as well as Defendant's
28 officers, shareholders, directors, agents, clients, employees, attorneys, insurers, predecessors, and

1 successors (“Released Parties”). Settlement Agreement, § I, p. ff. Under the proposed release, Class
2 Members who do not exclude themselves from the Settlement will be deemed to have released or
3 waived the following “Released Claims” against the Released Parties during the period of September
4 18, 2017, through September 19, 2022:

5 any and all claims alleged, or that could have been alleged, in Named Plaintiff’s Action and
6 the PAGA Letter during the Class Period based on the facts alleged therein, including but
7 not limited to (1) failure to pay minimum wages under Labor Code §§ 1194, 1194.2, 1197
8 and Industrial Welfare Commission Wage (“IWC”) Order 4, § 3-4; (2) failure to pay
9 overtime wages under Labor Code §§ 510, 1194, 1198 and IWC Order 4, § 3; (3) failure to
10 authorize or provide meal periods under Labor Code §§ 226.7 and 512 and IWC Order 4, §
11 11; (4) failure to authorize or permit rest periods under Labor Code §§ 226.7 and IWC Order
12 4, § 12; (5) failure to reimburse necessary business expenses under Labor Code §§2800 and
13 2802; (6) failure to furnish accurate itemized wage statements wage statement violations
under Labor Code § 226 and IWC Order 4; (7) failure to pay weekly wages in violation of
Labor Code § 201.3; (8) failure to pay wages upon separation of employment and within
the required time in violation of Labor Code §§ 201-203; (9) violation of California
Business and Professions Code §§17200, *et seq.*, based on the preceding claims (“Released
Claims”); and (10) all Labor Code provisions, other statutes, and Wage Orders similar to or
associated with those enumerated in this Section.

14 *Id* at § 5.01.

15 The release to be given by PAGA Group Members is limited to the Defendant as well as
16 Defendant’s officers, shareholders, directors, agents, clients, employees, attorneys, insurers,
17 predecessors, and successors (“Released Parties”). Settlement Agreement, § I at p. ff. Under the
18 proposed release, the State of California and PAGA Group Members will be deemed to have released
19 or waived all claims for civil penalties under Labor Code § 2698 *et seq.* exhausted in Plaintiff’s notice(s)
20 sent to the LWDA and alleged in the Action, which arose during the PAGA Period, regardless of whether
21 PAGA Group Members opt out of the Class Settlement. This settlement is also conditioned on the
22 covenant that PAGA Group members will not participate in or receive recovery or monies in connection
23 with any further proceeding seeking penalties under Section 2699, which arose during the PAGA Period
24 for claims based on the same facts or theories of the Released Claims facts which were or could have been
25 alleged in the Action. *Id* at § 5.02.

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

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

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

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

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

8 Whether a class is “ascertainable” is “determined by examining (1) the class definition, (2) the
9 size of the class, and (3) the means available for identifying class members.” *Reyes v. Bd. of Supervisors*,
10 196 Cal. App. 3d 1263, 1271 (1987). Here, the Class consists of all current and former non-exempt
11 employees who are and/or were employed by Defendant in California at any time from September 18,
12 2017 through September 19, 2022, except those non-exempt employee(s) whose employment is governed
13 by the Southwest Interior/Exterior Master Agreement between the Western Wall & Ceiling Contractors
14 Association, Inc. and the Southwest Regional Council of Carpenters of the United Brotherhood of
15 Carpenters and Joiners of America. Settlement Agreement, § I(ff). Defendant’s records show the Class
16 consists of 25 individuals, making joinder of all Class Members impracticable. McNicholl Decl. ¶ 7.
17 Further, the Class is readily ascertainable from Defendant’s business records because all Class Members
18 are current or former employees of Defendant. *Id.*

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

20 “[T]he ‘community of interest requirement embodies three factors: (1) predominant common
21 questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3)
22 class representatives who can adequately represent the class.’” *Fireside Bank v. Superior Court*, 40 Cal.
23 4th 1069, 1089 (2007) (quoting *Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462, 470 (1981)).

24 **a. Common Questions Predominate**

25 To assess whether common questions predominate, courts focus on whether the theories of
26 recovery advanced are likely to prove amenable to class treatment. *See Sav-On Drug Stores, Inc. v.*
27 *Superior Court*, 34 Cal. 4th 319, 327 (2004). In other words, courts determine whether the elements
28

1 necessary to establish liability are susceptible of common proof, even if the class members must
2 individually prove their damages. *Brinker, supra*, 53 Cal. 4th at 1021-1022, 1024.

3 Plaintiff alleged that Defendant maintained uniform employment policies and/or practices that
4 illegally deprived Class Members of lawful meal periods, rest breaks, accurate wage statements, and
5 waiting time pay. McNicholl Decl. ¶ 8. Plaintiff's allegations present common legal and factual questions
6 of, *inter alia*, whether Defendant applied the same scheduling, timekeeping, meal period, and rest break
7 policies to all Class Members; whether these policies and practices resulted in Labor Code violations;
8 whether Defendant's conduct was intentional; and whether Class Members are entitled to penalties. *Id.*

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

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

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

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

26 Certification requires adequacy of both the proposed class representative(s) and proposed class
27 counsel. With respect to the class representative, a plaintiff must adequately represent and protect the
28 interests of other members of the class and demonstrate that his or her claim is not inconsistent with the

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

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

Class treatment is superior to other methods of adjudication when the probability is small that each class member will come forward to prove his or her claim and when the class approach would deter and redress the alleged wrongdoing. *See Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 435, 446 (2000); *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524, 1537-1538 (2008). Here, none of the other 25 Class Members had shown any interest in bearing the expense and burden of litigating their own claims. McNicholl Decl. ¶ 20. Thus, a class action is the superior method for seeking relief.

B. The Settlement Meets the Standards for Preliminary Approval

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

Reasonableness and fairness are presumed where (1) the settlement is reached through "arms-length bargaining"; (2) investigation and discovery are "sufficient to allow counsel and the court to act intelligently"; (3) counsel is "experienced in similar litigation"; and (4) the percentage of objectors "is

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

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

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

5 Courts presume the absence of fraud or collusion in the negotiation of a settlement, unless
6 evidence to the contrary is offered. Thus, there is a presumption that settlement negotiations are
7 conducted in good faith. Here, the Settlement was the product of a full day mediation session with a
8 respected mediator after formal discovery. McNicholl Decl. ¶¶ 4-5. The negotiations were adversarial,
9 conducted at arm’s length and tempered by the efforts of both sides to serve the interests of their clients.
10 *Id.* at ¶ 5. The amounts of Plaintiff’s requested Incentive Award were not negotiated until after the
11 Parties agreed to the Gross Settlement Amount and many other terms. *Id.* at ¶ 21.

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

13 Plaintiff’s Counsel thoroughly investigated the class claims, applicable law, and potential
14 defenses. *See generally*, McNicholl Decl. In particular, Plaintiff’s Counsel assessed the value of the
15 class claims using Defendant’s data and documents produced through informal discovery. McNicholl
16 Decl. ¶¶ 4, 9, 11-18. Plaintiff’s counsel personally reviewed time records and compared them to payroll
17 documents to identify potential violations. *Id.* Accordingly, Plaintiff’s Counsel fully understood the
18 strengths and weaknesses of the claims before the Parties reached a settlement. *Id.*

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

20 Plaintiff is represented by Aegis Law Firm (“Class Counsel”). Class Counsel prosecute wage and
21 hour class actions on behalf of employees and others who have had their rights violated. McNicholl
22 Decl. ¶¶ 23-35; *see generally* McNicholl Decl. The attorneys working on this case have been appointed
23 class counsel in many cases, through both contested motions and settlement approval motions. *Id.* Thus,
24 Plaintiff’s Counsel has extensive experience in similar litigation and should be appointed as Class
25 Counsel.

26 ///

27 ///

28 ///

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

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

7 While Plaintiff and his counsel believed and continue to believe this is a strong case for
8 certification, the significant risks and expenses associated with class certification and liability
9 proceedings were taken into account. McNicholl Decl. ¶ 11. To determine if the amount offered at
10 mediation was reasonable, Plaintiff’s Counsel weighed that figure against many risk factors. If Plaintiff
11 continued to prosecute the claims rather than accept a settlement, Plaintiff would have faced deadlines
12 to file a motion for class certification, had to have engaged in more formal written discovery and taken
13 depositions, expended time and resources to resolve disputes, prepared and filed potential dispositive
14 motions and/or discovery motions, and engaged in extensive trial preparation. An adverse ruling at any
15 one of these stages could have prevented the Class from obtaining any recovery. *Id* ¶¶ 12-13.

16 a. Exposure Analysis

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

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

23 *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 250 (2001) (citation omitted). Here, Plaintiff
24 contends that his claims are based on Defendant’s common, class-wide policies and procedures, and
25 that liability could be determined on a class-wide basis without dependence on individual assessments
26 of liability. McNicholl Decl. ¶¶ 9. Although the amount of Defendant’s potential exposure – if proven
27 – is substantial, the legitimate and serious risks of succeeding at class certification and trial compelled
28 a serious consideration of the benefit of a settlement. *Id.* at ¶¶ 11-18.

1 Minimum Wage and Overtime Claims: Plaintiff’s theories of liability for unpaid wage claims
2 were based on Defendants alleged failure to properly adopt an Alternative Workweek Schedule
3 (“AWS”). Plaintiff’s expert reviewed the time and pay records and found approximately \$139,150 in
4 underpayments of overtime. Additionally, Plaintiff argued that Class Members were required to work
5 off-the-clock. If Plaintiff could prove that Class Members were required to work at least 10 minutes per
6 shift unpaid, then the damages could reach up to \$108,735. However, Defendants argued the AWS was
7 valid. Defendants also argued that class members did not work off-the-clock and determining whether
8 they worked off-the-clock would require individual inquiries, barring class certification. Consequently,
9 Plaintiff discounted these claims, assigning about \$55,660 to the AWS overtime claim and \$32,620 to
10 the off-the-clock work claim, to account for a 60% risk of failing to prevail on the AWS claim and a
11 70% risk of failing to prevail on the off-the-clock claim. McNicholl Decl. ¶ 14.

12 Rest Break Claims: Plaintiff alleged Defendants failed to provide rest breaks at the required
13 intervals. Plaintiff assumed an 80% violation rate, which resulted in about \$278,300 in exposure for this
14 claim. However, Defendants argued they complied with their obligations to provide rest breaks and
15 Plaintiff was unsure if they could certify this claim since it would depend heavily on class member
16 testimony. Consequently, Plaintiff discounted these claims, to \$55,000 to account for an 80% risk of
17 failing to prevail on those claims. McNicholl Decl. ¶ 15.

18 Meal Break Claims: Plaintiff mainly alleged Defendants failed to provide second meal periods in
19 shifts over 10 hours. Plaintiff’s expert found 14,375 violations, resulting in about \$278,300 in premium
20 payments owed. However, Plaintiff assumed an 80% violation rate. Plaintiff discounted these claims, to
21 \$55,000 to account for 80% risk of failing to prevail on the claims if Defendants defeated class
22 certification or Plaintiff failed to convince the trier of fact to find in their favor at trial. McNicholl Decl.
23 ¶ 16.

24 Derivative Waiting Time and Wage Statement Penalty Claims: Plaintiff’s Counsel also considered
25 the arguable presence of various penalties, and weighed the potential recoveries against probable defenses.
26 Specifically, Defendant could argue that Plaintiff could not prove the “willful” prong needed to obtain
27 waiting time penalties under Lab. Code § 203. Additionally, Defendant could argue that Plaintiff could
28 not show that Class Members suffered an “injury” as a result of wage statement violations, as required by

1 Cal. Lab. Code § 226. Although the Class arguably could have seen a payout of approximately \$58,080
2 for waiting time penalties and about \$68,000 for wage statement penalties, Plaintiff would not recover any
3 of these derivative penalties if they failed to prove the underlying claims. Consequently, Plaintiff
4 discounted these claims, assigning about \$13,900 to the waiting time claim and \$16,300 to the wage
5 statement claim, to account for a 80% risk of failing to prevail on the underlying claims plus another
6 30% risk of failing to overcome defenses to the penalty claims. McNicholl Decl. ¶ 17.

7 PAGA Claim: The PAGA claim presented even higher hurdles. Although Plaintiff's Counsel
8 found Defendant's exposure could potentially reach approximately \$119,500 under Lab. Code §
9 2699(f), assuming the initial penalty rate of \$100 for each pay period (\$100 x 1,195 pay periods),
10 Plaintiff would have to prove a violation in every pay period. Most importantly, the Court would have
11 discretion to reduce the PAGA award based on whether the amount of the award would be "unjust,
12 arbitrary and oppressive, or confiscatory." Lab. Code § 2699(e)(2). In theory, the Court could reduce
13 the award by 99% if it so wished. Given the severe financial issues described below, Plaintiff were
14 doubtful they could recover any PAGA penalties, especially if a large class judgment was entered for
15 the same violations. Accordingly, Plaintiff could not place a high value on the PAGA penalties, and
16 therefore allocated \$20,000 of the Gross Settlement Amount to settle these claims. McNicholl Decl. ¶
17 18.

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

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

25 Here, Plaintiff had the option to pursue his claims individually, but instead chose to pursue this
26 class action, delaying individual recovery until approval of a class action settlement. McNicholl Decl.
27 ¶ 19. Throughout the case, Plaintiff assisted counsel in gathering the evidence necessary to prosecute
28 the class claims, maintained regular contact with counsel, was available on the day of mediation and

1 communicated with his attorneys during the day of mediation to answer critical questions, and reviewed
2 the Settlement to make sure it was fair to the Class. *Id.* No action would likely have been taken by Class
3 Members individually, and no compensation would have been recovered for them, but for Plaintiff's
4 services on behalf of the Class. *Id.*

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

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

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

19 Plaintiff seeks appointment of Aegis Law Firm, PC as Class Counsel. The attorneys performed
20 significant work and expended litigation costs in prosecuting the matter with no guarantee of any
21 payment. McNicholl Decl. ¶ 35. Plaintiff's Counsel seeks preliminary approval for \$66,666.66 in
22 attorneys' fees, which is up to one-third of the Gross Settlement Amount, and up to \$12,000 in
23 reimbursement of litigation costs. Given the work performed in this matter, the extensive information
24 exchange, and substantial recovery obtained on behalf of Plaintiff and the Class, Plaintiff's Counsel
25 achieved a settlement through efficient and diligent work. *See generally*, McNicholl Decl. At final
26 approval, Plaintiff's Counsel will fully brief the merits of its request for the award of attorneys' fees
27 and litigation costs. *Id.* at ¶ 36.

28 ///

1 **V. CONCLUSION**

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

6
7 Dated: March 30, 2023

AEGIS LAW FIRM, PC

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9 By: Steven McNicholl
10 Steven A. McNicholl
11 Attorneys for Plaintiff
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