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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

ANGEL GARCIA, individually, and on behalf of
other members of the public similarly situated;

Plaintiff,

vs.

J&B INVESTMENTS, INC. dba J&B
MATERIALS, INC., a California corporation;
PACIFIC GYPSUM SUPPLY, INC., a Georgia
Corporation; GYPSUM MANAGEMENT AND
SUPPLY, INC., a Georgia Corporation; and
DOES 1 through 25, inclusive.

Defendants.

Case No. CIVSB2208601

Honorable David Cohn
Department 26

**PLAINTIFF ANGEL GARCIA'S
UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION, REPRESENTATIVE ACTION
AND COLLECTIVE ACTION
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT
THEREOF**

Date: October 26, 2022

Time: 10:00 a.m.

Dept.: S-26

Complaint Filed: April 25, 2022

Trial Date: Not Set

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2 *Findings of the Study of California Class Action Litigation*, 2000-2006, available at [http://](http://www.courts.ca.gov/documents/class-action-lit-study.pdf)
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1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE THAT** on _____, **2022** at **9:00 a.m.** in Department 26 of
3 the above-captioned Court located at 247 West 3rd Street, San Bernardino, California 92415, pursuant
4 to California Code of Civil Procedure section 382, Rule 3.769 of the California Rules of Court, and
5 California Labor Code section 2699(l), Plaintiff Angel Garcia (“Plaintiff”) will and hereby does move
6 the Court for an Order granting preliminary approval of the class action, representative action, and
7 collective action settlement between Plaintiff and Defendants J&B Investments, Inc. d/b/a J&B
8 Materials, Inc., Pacific Gypsum Supply, Inc., Gypsum Management and Supply, Inc. (“Defendants”).

9 Plaintiff requests that the Court enter an Order:

10 1. Preliminarily approving the Joint Stipulation and Settlement Agreement of Class
11 Action and Representative Action Claims (“Settlement” or “Settlement Agreement”) attached as
12 Exhibit A to the Declaration of Jonathan M. Genish (“Genish Decl.”) in Support of Plaintiff’s Motion
13 for Preliminary Approval of Class Action and PAGA Settlement;

14 3. Certifying the Class for Settlement purposes only;

15 4. Appointing Plaintiff Angel Garcia as the Class Representative for Settlement purposes;

16 5. Appointing Jonathan M. Genish of Blackstone Law, APC as Class Counsel for
17 Settlement purposes;

18 6. Approving the proposed Notice of Class Action Settlement attached as Exhibit 1 to the
19 Settlement Agreement (“Class Notice”) to be mailed to the Class;

20 7. Approving the opt-out and objection procedures provided in the Settlement Agreement
21 and set forth in the Class Notice;

22 8. For each Class Member, directing Defendants to furnish their full names, last known
23 home addresses, last known telephone numbers, social security numbers, start and end dates of
24 employment, total workweeks worked during the Class Period, total workweeks worked during the
25 PAGA Period, and any other information the Settlement Administrator may reasonably need to
26 administer this Settlement, to the Settlement Administrator within thirty (30) calendar days after the
27 Court grants preliminary approval of the Settlement;

28 9. Approving the proposed deadlines for the settlement administration process; and

1 10. Setting a Final Approval Hearing.

2 Pursuant to California Labor Code section 2699(1)(2) and concurrently with the filing of this
3 motion, a copy of the proposed Settlement, as well as information regarding the preliminary approval
4 hearing on this matter, were submitted to the California Labor and Workforce Development Agency
5 (“LWDA”) via online submission through the LWDA’s website. (Genish Decl. ¶ 48).

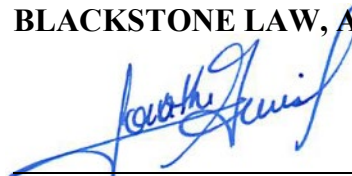
6 This motion is based upon this notice, the attached memorandum of points and authorities, the
7 Declaration of Jonathan M. Genish in Support of Plaintiff’s Motion for Preliminary Approval of Class
8 Action and PAGA Settlement, the Declaration of Angel Garcia in Support of Plaintiff’s Motion for
9 Preliminary Approval of Class Action and PAGA Settlement, the pleadings and other records on file
10 with the Court in this matter, and any other further evidence or argument that the Court may properly
11 receive at or before the hearing.

12 Respectfully submitted,

13 Dated: July 19, 2022

BLACKSTONE LAW, APC

14
15 By:



16 Jonathan M. Genish
17 Miriam L. Schimmel
18 Attorneys for Plaintiff ANGEL GARCIA

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Angel Garcia (“Plaintiff”) seeks preliminary approval of the Joint Stipulation and
4 Settlement Agreement of Class Action and Representative Action¹ (“Settlement” or “Settlement
5 Agreement”) entered into on behalf of all current and former hourly-paid, non-exempt employees
6 employed by Defendants J&B Investments, Inc. d/b/a J&B Materials, Inc., Pacific Gypsum Supply,
7 Inc., Gypsum Management and Supply, Inc. (“Defendants”) in the State of California at any time
8 during the Class Period. (Declaration of Jonathan M. Genish in Support of Plaintiff’s Motion for
9 Preliminary Approval of Class Action and PAGA Settlement [“Genish Decl.”], Exh. A). The
10 Settlement terms are outlined as follows:

- 11 • Class Size: Approximately 621 individuals.
- 12 • Estimated Aggregate Workweeks in Class Period: 55,259
- 13 • Gross Settlement Amount: One Million Seven Hundred Fifty Thousand Dollars and Zero
14 Cents (\$1,750,000.00), exclusive of employer-side payroll taxes.
- 15 • Settlement Administration Costs: Not to exceed Six Thousand Dollars and Zero Cents
16 (\$6,000.00).
- 17 • Class Representative Enhancement Award: Five Thousand Dollars and Zero Cents
18 (\$5,000.00).
- 19 • PAGA Penalties: Two Hundred Thousand Dollars and Zero Cents (\$200,000.00), 75% of
20 which will be paid to the California Labor and Workforce Development Agency
21 (“LWDA”) and the remaining 25% to be paid to the PAGA Members.
- 22 • Requested Attorneys’ Fees and Costs: Attorneys’ fees of Five Hundred Eighty-Three
23 Thousand Two Hundred Seventy-Five Dollars and Zero Cents (\$583,275.00) (thirty-three
24 percent of the Gross Settlement Amount) plus actual litigation costs and expenses not to
25 exceed Twenty Thousand Dollars and Zero Cents (\$20,000.00).

26 ¹ Pursuant to the Parties’ settlement agreement, Plaintiff filed a First Amended Complaint (“FAC”) on June 3, 2022, adding
27 a cause of action under the Fair Labor Standards Act (“FLSA”) and a cause of action pursuant to the Labor Code Private
28 Attorneys General Act of 2004, Cal. Labor Code §§ 2698, *et seq.* (“PAGA”) See Section II below. As of the date this
motion was filed, Plaintiff had not received the conformed copy of the filed FAC back from the Court. (Genish Decl., ¶
10).

- Estimated Net Settlement Amount: The estimated Net Settlement Amount of Nine Hundred Thirty-Five Thousand Seven Hundred Twenty-Five Dollars and Zero Cents (\$935,725.00) to be distributed to Settlement Class Members.
- Average Estimated Individual Settlement Payment, including the 25% of the PAGA Penalties allocated for PAGA Members: \$1,587.31.

As set forth herein, the Settlement is the product of informed discovery, arms-length negotiations, and provides a fair, adequate, and reasonable recovery for the Class. Plaintiff therefore respectfully requests that the Court grant preliminary approval of the proposed Settlement, conditionally certify the Class, approve the proposed Class Notice, and set a hearing date for final settlement approval, among other requested relief.

II. FACTUAL AND PROCEDURAL BACKGROUND

Defendants J&B Investments, Inc. d/b/a J&B Materials Inc. and Pacific Gypsum Supply, Inc. are subsidiaries of Gypsum Management and Supply, Inc. Defendants are a supplier of construction materials to both commercial and residential customers. Defendants represent that they offer the largest inventory of construction supplies in California, with seven locations in the state, and hold themselves out as the largest nationwide distributor of drywall products in the United States. Plaintiff worked for Defendants as a non-exempt, hourly-paid Drywall Stocker and Driver at its Paramount, California location from approximately August 5, 2019 to September 29, 2021. (Declaration of Angel Garcia in Support of Plaintiff's Motion for Preliminary Approval of Class Action and PAGA Settlement ["Garcia Decl."] ¶ 3).

On April 25, 2022, Plaintiff filed a Class Action Complaint ("Complaint") alleging the following causes of action: (1) Failure to Pay Overtime Wages; (2) Failure to pay Minimum Wages; (3) Failure to Pay Prevailing Wage; (4) Failure to Pay Vacation Wages; (5) Failure to Provide Meal Periods (or pay premiums in lieu thereof); (6) Failure to Provide Rest Periods (or pay premiums in lieu thereof); (7) Failure to Provide Accurate Itemized Wage Statements; (8) Failure to Maintain Requisite Payroll Records; (9) Failure to Timely Pay Wages During Employment; (10) Failure to Timely Pay Wages Upon Termination; (11) Failure to Reimburse Business Expenses; and (12) Violation of Business and Professions Code §§ 17200, et seq. (Genish Decl. ¶ 9). On April 25, 2022,

1 Plaintiff provided notice to the LWDA and to Defendants of his intent to seek civil penalties pursuant
2 to the Private Attorneys General Act, Labor Code section 2698, et seq. (“PAGA”). (Genish Decl. ¶
3 9).

4 Following the filing of the Complaint, the Parties met and conferred with respect to the
5 potential resolution of this action by means of a private mediation and agreed to exchange informal
6 discovery as part of that process. (Genish Decl., ¶ 10). Pursuant to the Parties’ decision to mediate,
7 Defendants produced the Class Members’ time and pay records, as well as information and documents
8 concerning the claims set forth in Plaintiff’s Complaint, such as Defendants’ employee handbook(s),
9 relevant wage and hour policies, information regarding the number of putative class members, the
10 number of current versus former employees, the total workweeks worked by the Class, the dates of
11 employment of the Class Members, the rates of pay for each Class Member, and the number of Class
12 Members who had executed arbitration agreements and settlement agreements. (Genish Decl. ¶ 11).

13 After a thorough investigation and analysis of these documents and data, on May 4, 2022, the
14 parties attended a formal mediation with Tripper Ortman, Esq., a neutral and respected mediator with
15 extensive experience in complex wage and hour matters. (Genish Decl., ¶ 12). At the mediation, the
16 Parties engaged in intensive settlement discussions during which they debated their respective
17 positions and exchanged views regarding the strengths and weaknesses of the alleged claims. (Genish
18 Decl., ¶ 13). After a full day of mediation, and with the help of the mediator, the Parties were able to
19 reach an agreement to resolve this dispute on a class and representative basis, and shortly thereafter
20 executed a memorandum of understanding memorializing the key settlement terms. (Genish Decl. ¶
21 13). Following mediation, the parties worked diligently to negotiate and memorialize the terms in a
22 long form settlement agreement. (Genish Decl. ¶ 14). As of June 2, 2022, after multiple discussions
23 and revisions to the agreement, the Settlement Agreement was fully executed. (Genish Decl. ¶ 14,
24 **Exhibit A** thereto).

25 Pursuant to the Parties’ Settlement Agreement, Plaintiff filed a First Amended Complaint
26 (“FAC”) on June 3, 2022, adding a cause of action under the FLSA and a cause of action pursuant to
27 PAGA.) (Genish Decl. ¶ 15). Plaintiff now seeks preliminary approval of the proposed settlement,
28 which will resolve all class, representative and collective claims alleged in the FAC.

1 In accordance with Labor Code sections 2699 et. seq., Plaintiff's counsel provided notice of
2 the proposed settlement to the LWDA concurrently with the filing of this motion via online submission
3 through the LWDA's website. (Genish Decl. ¶ 48).

4 **III. THE SETTLEMENT TERMS**

5 **A. Class Definition**

6 For purposes of settlement only, the Parties have agreed that the Class shall be defined as "All
7 current and former non-exempt, hourly-paid employees of Defendants employed in California at any
8 time during the Class Period." ("Class Members" or "Class"). (Genish Decl. ¶ 16; Settlement
9 Agreement, ¶ 3). The Class Period and release of claims period both begin on April 5, 2014 and end
10 on the date of Preliminary Approval of the Class Settlement. (Genish Decl. ¶ 16; Settlement
11 Agreement, ¶ 4). It is estimated that there are 621 Class Members. (Genish Decl. ¶ 16).

12 **B. Amount of Settlement**

13 The parties have agreed to settle the Class and PAGA claims at issue in the FAC for a non-
14 reversionary Gross Settlement Amount of One Million Seven Hundred Fifty Thousand Dollars and
15 Zero Cents (\$1,750,000.00), exclusive of employer-side payroll taxes. (Genish Decl. ¶ 17; Settlement
16 Agreement ¶ 26, 39).

17 **C. Allocation and Funding of the Gross Settlement Amount**

18 The Gross Settlement Amount is a common fund and therefore includes all requested costs,
19 fees, and other allocations. As stated above, the Gross Settlement Amount includes: (1) Class
20 Counsel's fees in the amount of thirty-three percent (33%) of the Gross Settlement Amount, equaling
21 Five Hundred Eighty-Three Thousand Two Hundred Seventy-Five Dollars and Zero Cents
22 (\$583,275.00); (2) Class Counsel's actual litigation costs, not to exceed Twenty Thousand Dollars and
23 Zero Cents (\$20,000.00); (3) Settlement Administration Costs, capped at Six Thousand Dollars and
24 Zero Cents (\$6,000.00); (4) Class Representative Incentive Payment in the amount of Five Thousand
25 Dollars and Zero Cents (\$5,000.00) to Plaintiff; and (5) PAGA Penalties of Two Hundred Thousand
26 Dollars and Zero Cents (\$200,000.00). (Genish Decl. ¶ 17; Settlement Agreement ¶¶ 26, 39, 43, 45-
27 47). After the above-estimated amounts are deducted from the Gross Settlement Amount,
28 approximately 621 Class Members will share in a Net Settlement Amount of approximately Nine

1 Hundred Thirty-Five Thousand Seven Hundred Twenty-Five Dollars and Zero Cents (\$935,725.00).
2 (Genish Decl. ¶ 17).

3 The Net Settlement Amount will be distributed and paid to Settlement Class Members on a
4 pro-rata basis based on the number of workweeks worked during the Class Period. (Genish Decl. ¶ 18;
5 Settlement Agreement ¶ 42(a)-(f)). This will provide Settlement Class Members with an average
6 estimated payment of \$1,506.80. (Genish Decl. ¶ 18). The actual payments to Settlement Class
7 Members will vary based on the actual weeks worked by Settlement Class Members and shall be
8 confirmed by the Settlement Administrator in advance of the final approval hearing. (Genish Decl. ¶
9 18). Additionally, employees who worked during the PAGA Period shall receive a share of the 25%
10 portion of the PAGA Penalties designated for distribution to PAGA Members. (Genish Decl., ¶ 19,
11 Settlement Agreement ¶ 18, 20, 43). These payments will be distributed on a pro rata basis based on
12 the number of pay periods worked during the PAGA Period. (Genish Decl. ¶ 19; Settlement
13 Agreement ¶ 43.)

14 Payments to Settlement Class Members will be allocated as 20% wages, 40% interest, and 40%
15 penalties. (Genish Decl. ¶ 20; Settlement Agreement ¶ 43(d)). The employee share of any applicable
16 payroll taxes on wages will be deducted from the wage portion of each Settlement Class Member's
17 Individual Settlement Payment. (Genish Decl. ¶ 20; Settlement Agreement ¶ 42). Employer-side
18 payroll taxes shall be paid by Defendants separately from and in addition to the Gross Settlement
19 Amount. (Genish Decl. ¶ 20; Settlement Agreement ¶¶ 26, 39).

20 The Settlement Agreement is a non-reversionary and non-claims made settlement. (Genish
21 Decl. ¶ 21; Settlement Agreement ¶ 39). All money from the Net Settlement Amount will be
22 distributed to Settlement Class Members. (Genish Decl. ¶ 21; Settlement Agreement ¶ 39, 42). No
23 money will revert to Defendants. (Genish Decl. ¶ 21; Settlement Agreement ¶¶ 39, 42). Any
24 Individual Settlement Payment checks remaining uncashed after 180 days will be transferred to the
25 California State Controller's Office and held in trust for such Settlement Class Members and PAGA
26 Members. (Genish Decl. ¶ 22; Settlement Agreement, ¶ 42(f)). As such, no "unpaid residue" under
27 California Code of Civil Procedure section 384 will result from the Settlement. (Genish Decl. ¶ 22;
28 Settlement Agreement ¶ 42(f)).

1 **D. Release of Wage and Hour Claims**

2 In exchange for participating in the settlement, Settlement Class Members will release their
3 wage and hour claims against Defendants, and the release given by Settlement Class Members is
4 properly and narrowly tailored to release only claims pleaded in the FAC or which could have been
5 alleged based upon the facts, allegations and/or claims pleaded in the FAC during the Class Period.
6 (Genish Decl. ¶ 23; Settlement Agreement ¶¶ 62, 63).

7 **IV. STANDARD OF REVIEW FOR PRELIMINARY APPROVAL**

8 The settlement of a class action requires court approval. *See Dunk v. Ford Motor Co.*, 48 Cal.
9 App. 4th 1794 (1996). “In general, questions whether a settlement was fair and reasonable, whether
10 notice to the class was adequate, whether certification of the class was proper, and whether the attorney
11 fee award was proper are matters addressed to the trial court’s broad discretion.” *Wershba v. Apple*
12 *Computer, Inc.*, 91 Cal.App.4th 224, 234-35 (2001) (disapproved on other grounds).

13 The review and approval of a proposed class action settlement involves a two-step process.
14 *See* Cal. Rules of Court, Rule 3.769(c). First, counsel submit the proposed terms of the settlement and
15 the Court makes a preliminary assessment of whether the settlement appears to be sufficiently within
16 the range of a fair settlement to justify providing notice of the proposed settlement to class members.
17 After notice is provided to the class, the Court must conduct a second inquiry into whether the
18 proposed settlement is fair, reasonable, and adequate. *Id.*

19 The initial evaluation of the settlement at the preliminary approval step “is not a fairness
20 hearing.” *Armstrong v. Board of School Directors of City of Milwaukee*, 616 F.2d 305, 314 (7th Cir.
21 1980). Rather, the limited purpose of this initial inquiry is to determine, at a threshold level, only
22 whether the proposed settlement is within the range of possible approval and, as a result, “whether
23 there is any reason to notify the class members of the proposed settlement and to proceed with a
24 fairness hearing.” A presumption of fairness exists where: (1) the settlement is reached through arm’s
25 length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act
26 intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is
27 small. *See In re Microsoft I-V Cases*, 135 Cal. App. 4th 706, 723 (2006).

1 Preliminary approval does not require a court to make a final determination that the settlement
2 is fair, reasonable, and adequate. Rather, that decision is made only at the final approval stage, after
3 notice of the settlement has been given to the class members and they have had an opportunity to
4 object or exclude themselves from the settlement. *See* Cal. Rules of Court, Rule 3.769(g). In
5 considering a potential class settlement, the court need not reach any ultimate conclusions on the issues
6 of fact and law which underlie the merits of the dispute, and need not engage in a trial on the merits.
7 *See Officers for Justice v. Civil Service Commission*, 688 F.2d 615, 625 (9th Cir. 1982).

8 **V. THE SETTLEMENT IS PRESUMED FAIR**

9 **A. The Settlement Was Reached as a Result of Arm's-Length Bargaining**

10 California courts recognize that “a presumption of fairness exists where . . . [a] settlement is
11 reached through arm's-length bargaining.” *Wershba*, 91 Cal. App. 4th at 245; *see also Clark v. Am.*
12 *Residential Servs. LLC*, 175 Cal. App. 4th 785, 799 (2009). Here, the Parties' settlement negotiations
13 were at all times made at arm's-length and were adversarial. (Genish Decl., ¶ 24). The Settlement
14 was reached following a full day of mediation with a highly respected mediator with substantial
15 experience mediating wage and hour cases. (Genish Decl., ¶ 24). Moreover, Plaintiff engaged in
16 additional negotiations in order to finalize the long-form agreement presently before the Court.
17 (Genish Decl., ¶ 24). At all times, Plaintiff was willing and prepared to litigate this matter through
18 class certification and trial if the parties had been unable to reach a favorable resolution. (Genish Decl.
19 ¶ 24).

20 **B. Sufficient Investigation and Discovery by Experienced Class Counsel**

21 Courts typically assess the status of discovery in determining whether a class action settlement
22 agreement is fair, reasonable, and adequate. *Dunk*, 48 Cal.App.4th at 1801. As discussed above, the
23 parties engaged in extensive informal discovery prior to reaching a settlement at the mediation. Prior
24 to mediation, Defendants produced the Class Members' time and pay records, Defendants' employee
25 handbooks and relevant wage and hour policies and procedures; information regarding the number of
26 putative class members; the total workweeks and pay periods worked by the Class Members; the
27 number of Class Members who executed arbitration agreements and settlement agreement; and the
28 rates of pay for each Class Member. (Genish Decl., ¶ 25). This allowed Plaintiff's counsel to conduct

1 an informed assessment and analysis of the strengths and weaknesses of the claims and the potential
2 class-wide damages. (Genish Decl., ¶ 25). The Parties extensively briefed issues regarding class
3 certification and liability and provided their analyses to the mediator who helped the Parties debate
4 the strengths and weakness of their respective positions. (Genish Decl. ¶ 26). Additionally, settlement
5 negotiations were conducted by highly capable and experienced counsel. Class Counsel are respected
6 members of the bar with strong records of vigorous and effective advocacy and are experienced in
7 handling complex wage and hour class action litigation. (Genish Decl., ¶¶ 2-6). Accordingly, Class
8 Counsel had sufficient information and experience to act intelligently in negotiating the Settlement.

9 **C. The Settlement is Fair and Reasonable in Light of the Parties’ Respective Legal**
10 **Positions and Recovery Risks**

11 A settlement is not judged against what might have been recovered had a plaintiff prevailed at
12 trial, nor does the settlement have to obtain 100% of the damages sought to be fair and reasonable.
13 *Wershba*, 91 Cal.App.4th at 246, 250. In evaluating the reasonableness of a settlement, a trial court
14 must consider “the strength of plaintiffs’ case, the risk, expense, complexity and likely duration of
15 further litigation, the risk of maintaining class action status through trial, the amount offered in
16 settlement, the extent of discovery completed and the stage of the proceedings, the experience and
17 views of counsel, the presence of a governmental participant, and the reaction of the class members to
18 the proposed settlement.” *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 128 (2008).

19 Here, the reasonableness of the Settlement is underscored by the fact that Defendants have
20 legal and factual grounds for defending the action. Based upon Class Counsel’s experience litigating
21 similar complex matters, Plaintiff reasonably expected a vigorous and lengthy defense to both class
22 certification and the merits of the action absent a settlement. (Genish Decl. ¶¶ 28-40).

23 **1. Class Counsel’s Analysis of the Maximum Available Liability and Damages**

24 Prior to mediation, Class Counsel analyzed the time and payroll records provided by
25 Defendants and other relevant documents and discovery. (Genish Decl., ¶ 25). Based on the data and
26 documents provided, Class Counsel estimated with respect to the class claims, with all claims
27 adjudicated in favor of the Class, that Defendants faced a maximum potential liability of
28 approximately \$16,621,564.88. (Genish Decl., ¶ 27). This estimate is based off an estimated

1 maximum liability for all claims at issue and the total aggregate workweeks during the Class Period,
2 based on the analysis of the sampled data as follows: \$2,834,272.79 for meal period violations,
3 \$5,307,626.95 for rest period violations, \$4,777,693.14 for unpaid overtime wages, waiting time
4 penalties of \$1,982,472.00, and wage statement penalties of \$1,719,500.00. (Genish Decl. ¶ 27).
5 Plaintiff further estimated that Defendants faced an additional exposure of \$1,743,200.00 in potential,
6 non-stacked (i.e., one penalty, per employee, per pay period during the PAGA Period) PAGA
7 penalties. (Genish Decl., ¶ 27).

8 **2. Class Counsel's Risk-Based Analysis and Risk-Based Adjustments**

9 While Plaintiff believes that Defendants faced significant exposure, substantial barriers to a
10 recovery existed. Defendants strongly contended that Plaintiff's claims are not suitable for class
11 certification because individual issues and affirmative defenses would predominate should this case
12 go to trial. *See Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012); *Duran v. U.S.*
13 *Bank Nat. Assn.*, 59 Cal.4th 1, 35-36 (2014); *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541,
14 2551(2011). While Plaintiff and Class Counsel disagree with Defendants' predictions, they also
15 recognize that there is a significant risk that the Court may deny class certification. (Genish Decl. ¶¶
16 28-30); *see also, Findings of the Study of California Class Action Litigation*, 2000-2006, available at
17 <http://www.courts.ca.gov/documents/class-action-lit-study.pdf> (finding that only 21.4% of all class
18 actions were certified either as part of a settlement or as part of a contested certification motion).

19 For example, a large portion of Defendants' overall liabilities lie in Plaintiff's meal period
20 claims. These claims have been increasingly difficult to certify in recent years, and Defendants
21 contended their written policies and practices were lawful. *See Brinker*, 53 Cal. 4th at 1034-35.
22 Plaintiff's theory of liability for meal period violations was based on allegations that Defendants had
23 failed to implement policies and practices that allowed Class Members to take meal breaks in the
24 manner required under California law. *See Bradley v. Networkers Int'l, LLC*, 211 Cal.App.4th 1129
25 (2012) (holding that "the lack of a meal/rest break policy and uniform failure to authorize such breaks
26 are matters of common proof."). In contrast, Defendants argued that their practices at all times during
27 the class period were lawful. Defendants further argued that the rate of purported meal period
28 violations reflected in the data would require individualized inquiry and that such inquiry would
prohibit a class from being certified. Class Counsel disagreed with Defendants' assessment but had

1 to consider the risk that the Court would find validity in an individualized proof defense to certification
2 of Plaintiff's meal period claim, given what appeared to be a lawful written policy. (Genish Decl. ¶
3 31).

4 Plaintiff's rest period allegations were based on a similar failure to provide employees with
5 timely, full, and uninterrupted rest periods. As with the meal period allegations, Defendants contended
6 that they had a lawful written rest period policy, provided compliant rest breaks and relieved Class
7 Members of all duties as required under California law. Additionally, this claim was even more
8 uncertain given the difficulties associated with proving the alleged rest period violations, as
9 Defendants were not required to record these breaks. Given the lack of records demonstrating rest
10 period violations, there were legitimate concerns Plaintiff would not be able to certify these claims or
11 prove substantial damages with requisite certainty. (Genish Decl. ¶ 32).

12 Plaintiff also faced challenges certifying and proving liability for his minimum wage and
13 overtime claims. These claims were largely based on unrecorded, off-the-clock work performed by
14 the Class Members such as donning and doffing uniforms and Personal Protective Equipment both
15 before and after their shifts, as well as waiting in line in order to submit to COVID-19 screening prior
16 to clocking-in. Employees also receive phone calls and text messages on their personal phones when
17 they are not at work about topics such as scheduling, checking up on the status of a project, and
18 questions about deliveries. However, the individualized nature of why this work was performed and
19 the individualized nature of damages presented substantial concerns regarding the manageability of
20 the case and the risk the Court could find these issues prevented certification. (Genish Decl. ¶ 33).

21 Plaintiff's regular rate claim also presented challenges because, although the claim did not face
22 the same certification hurdles as Plaintiff's meal and rest break claims, Plaintiff's damage analysis
23 revealed that the total amount of alleged underpaid wages based on Defendants' alleged failure to pay
24 overtime at the lawful regular rate was low: only about \$29,820. (Genish Decl. ¶ 34).

25 There are also substantial risks associated with Plaintiff's waiting time penalties and wage
26 statement claims. First, these claims were derivative of Plaintiff's claims for unpaid meal period
27 premiums, unpaid rest period premiums, unpaid minimum wages, and unpaid overtime wages, and if
28 certification was denied on those underlying claims, these derivative claims for penalties would also

likely fail. Further, even if Plaintiff prevailed on his underlying claims, he would still be required to demonstrate that Defendants' violations of Labor Code section 203 were *willful* violations. *See, e.g., Choate v. Celite Corp.*, 215 Cal App. 4th 1460, 1468 (2013) (holding that "an employer's reasonable, good faith belief that wages are not owed may negate a finding of willfulness"). Wage statement claims have also seen varying treatment at the appellate level because such claims have an element of discretion attached to them rather than a pure calculation of damages after liability is proven. *Cf., Jaimez v. DAIOHS USA, Inc.*, 181 Cal.App.4th 1286 (2010) with *Price v. Starbucks Corp.*, 192 Cal.App.4th 1136 (2011). Accordingly, these derivative claims, which comprised a substantial portion of Defendants' estimated liability, were therefore uncertain. (Genish Decl. ¶ 35).

Class Counsel also recognized that, even if Plaintiff prevailed at class certification, proving the amount of wages due to Class Members would be an expensive, time-consuming, and uncertain proposition. In order to prove liability and damages, Class Counsel will need to request and analyze thousands of pages of documents, obtain the Class Members' contact information, contact them and obtain declarations at great expense. Obtaining the cooperation of current employees would also be difficult, given the likely reluctance to aid prosecution of a lawsuit against a current employer. On the other hand, Defendants would likely be able to obtain the cooperation of their employees. Moreover, even if Plaintiff prevailed at class certification and trial, possible appeals would substantially delay any recovery by the Class. (Genish Decl. ¶ 36).

Perhaps most significant to Plaintiff's analysis of both liability and damages is that of the 621 Class Members and Aggrieved Employees, Defendants revealed during mediation that only 99 Class Members and Aggrieved Employees had **not** signed a release agreement or an arbitration agreement which included a class action waiver. (Genish Decl. ¶ 37). Therefore, had this case proceeded, the Class size (and accordingly, the alleged damages contemplated by Plaintiff's analysis) would have been significantly less. (Genish Decl. ¶ 37).

Therefore, taking into account the risk of not obtaining class certification, the cost and delay in recovering the alleged potential damages, and the significant impact of the release agreements and arbitration agreements/class waivers signed by the majority of the potential Class Members, Class Counsel discounted Defendants' estimated liability by 50%. The merits-based risk factors also reduced

1 Defendants' estimated liability by an additional 40%. This resulted an adjusted estimated liability of
2 \$1,750,000. (Genish Decl. ¶ 38).

3 Class Counsel also contemplated the risks of proceeding with the PAGA action and potential
4 liability Defendants could face from this claim as part of the global resolution. First, and most
5 significantly, as discussed above, only 99 out of 621 Class Members and Aggrieved Employees did
6 *not* sign a release agreement or an arbitration agreement. In the vast majority of the release
7 agreements, each alleged aggrieved employee acknowledged that they had not been aggrieved in the
8 manner alleged by Plaintiff Garcia. In addition, at the time the parties mediated this case, there was
9 ambiguity with respect to U.S. Supreme Court's forthcoming decision in *Viking River Cruises, Inc. v.*
10 *Moriana* and how the Court's decision would impact Defendants' arbitration agreements. Separate
11 from that, existing case law makes PAGA claims subject to the same defenses and risks as Plaintiff's
12 underlying wage claims. (Genish Decl. ¶ 39); see, *Elliot v. Spherion Pac. Work, LLC*, 572 F.Supp.2d
13 1169, 1181-82 (C.D. Cal. 2008) ("Plaintiff's claim under [PAGA] is wholly dependent upon her other
14 claims. Because Plaintiff's other claims fail as a matter of law, so does her PAGA claim"). Moreover,
15 although California case law clearly states that PAGA actions need not satisfy class action
16 requirements, Class Counsel remained mindful of the fact that some courts have nevertheless held that
17 PAGA claims must meet a threshold "manageability" requirement. See, e.g., *Wesson v. Staples the*
18 *Office Superstore, LLC*, 68 Cal.App.5th 746 (2021). Class Counsel also anticipated that even if
19 successful on the merits at trial, the imposition of cumulative civil penalties based on the alleged wage
20 and hour violations could be considered unjust, arbitrary and oppressive, or confiscatory, and that
21 Defendants would argue that they made a good faith attempt to comply with their legal obligations
22 warranting a reduction in penalties. (Genish Decl. ¶ 39).² Class Counsel also anticipated Defendants
23

24 ² See, e.g., *Thurman v. Bayshore Transit Management, Inc.*, 203 Cal.App.4th 1112, 1131 (2012) (imposition of both
25 statutory and civil penalties for same conduct is impermissible double recovery) (disapproved on other grounds); *Aguirre*
26 *v. Genesis Logistics*, 2013 WL 10936035, at *3 (C.D. Cal. 2013) ("duplicative effect" of penalties is a factor in favor of
27 "reducing ...the PAGA penalty"); *Smith v. Lux Retail North America, Inc.*, 2013 WL 2932243, at *3 (N.D. Cal. June 13,
28 2013) (declining to stack penalties based on the same conduct); *Castillo v. ADT, LLC*, 2017 WL 363108, at *4 (E.D. Cal.
Jan. 25, 2017); *Sanchez v. McDonalds Restaurants of California, Inc.*, 2017 WL 4620746 (LA Super. Ct. July 6, 2017)
(declining to stack penalties arising out of the same conduct); *Fleming v. Covidien, Inc.*, 2011 WL 756304718, at *4 (C.D.
Cal. Aug. 12, 2011) (reducing PAGA penalties by 80%); *Cotter v. Lyft, Inc.*, 193 F.Supp.3d 1030 (N.D. Cal. 2016)

1 would argue that they made a good faith attempt to comply with their legal obligations and that the
2 violations per pay period were low, warranting an additional reduction in civil penalties. (Genish
3 Decl. ¶ 39). Finally, Class Counsel was also mindful of the fact that PAGA is fundamentally not
4 intended to be compensatory in nature, but is instead intended to facilitate enforcement of California's
5 labor laws by financing state activities and educating and deterring non-compliance. (Genish Decl., ¶
6 39).

7 Therefore, after considering this multitude of factors, Plaintiff and Class Counsel concluded
8 that it was in the best interest of the State of California and the Aggrieved Employees to enter into the
9 Settlement, and to allocate Two Hundred Thousand Dollars and Zero Cents (\$200,000.00) of the
10 Settlement towards the PAGA claims, which represents approximately 11.43% of the Gross
11 Settlement Amount. This percentage of the settlement is well-within the range of wage and hour
12 settlements regularly approved in both state and federal court for cases that include both a class and
13 PAGA action. Typically, such hybrid cases allocate only 1% of the gross settlement value to resolve
14 PAGA claims, and, indeed, settlements allocations as little as 0.22% of the gross settlement amount
15 have been approved as reasonable by courts. (Genish Decl., ¶ 40). Moreover, the overall relief
16 obtained by the Settlement is significant, not only from a monetary perspective, but also because it
17 fulfills the public policy objectives of PAGA—to promote enforcement of California's labor laws,
18 provide funds to the state, and deter future non-compliance by the employer. (Genish Decl., ¶ 40).

19 In light of the parties' respective legal positions and the risks of continued litigation, the Gross
20 Settlement Amount for resolution of the class and PAGA claims, is fair, adequate, and reasonable.
21 (Genish Decl., ¶ 41).

22 **VI. CERTIFICATION FOR SETTLEMENT PURPOSES IS WARRANTED**

23 Code of Civil Procedure Section 382 provides that three basic requirements must be met in
24 order to sustain any class action: (1) there must be an ascertainable class; (2) there must be a well-
25 defined community of interest in the question of law or fact affecting the parties to be represented; and
26

27 (indicating that a substantial reduction is warranted where good faith dispute exists in legal obligations); *Carrington v.*
28 *Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018) (approving reduction in penalties from \$50 per pay period to \$5 per pay
period based on good faith attempts to comply with obligations and minimal violations).

(3) certification will provide substantial benefits to litigants and the courts, i.e., proceeding as a class action is superior to other methods. *See Dunk*, 48 Cal.App.4th at 1806. Plaintiff contends that this action, which is based upon Defendants’ wage and hour policies and practices, satisfies the class certification requirements under California Code of Civil Procedure section 382. Defendants deny Plaintiff’s allegations, but for purposes of this Settlement only, Defendants have stipulated to certification of the proposed class action.

A. An Ascertainable Class Exists Which is So Numerous That Joinder of All Members is Impracticable

Whether an ascertainable class exists turns on three factors: (1) the class definition, (2) the size of the class, and (3) the means of identifying the class members. *See Miller v. Woods*, 148 Cal.App.3d 862, 873 (1983). In this case, all three considerations strongly favor class certification. Here, the Class is defined as all current and former hourly-paid, non-exempt employees employed by Defendants J&B Investments, Inc. d/b/a J&B Materials, Inc., Pacific Gypsum Supply, Inc., Gypsum Management and Supply, Inc. in the State of California at any time during the Class Period. (Genish Decl. ¶ 16; Settlement Agreement, ¶ 3). This provides a clear and definite scope for the proposed Class.

Next, the class is sufficiently numerous. There is no magic number that satisfies the numerosity requirement. Courts have certified classes with as few as ten or twenty-eight class members. *Rose v. City of Hayward*, 126 Cal. App. 3d 926, 934 (1981); *Bowles v. Superior Court*, 44 Cal. 2d 574 (1995); *Hebbard v. Colgrove*, 28 Cal. App. 3d 1017, 1030 (1972). Here, the estimated Class size of 621 individuals meets the numerosity requirement.

Finally, the question of whether class members are easily identifiable turns on whether a plaintiff can establish “the existence of an ascertainable class.” *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695 at 706 (1967). The existence of an ascertainable class in this case can be established through Defendants’ payroll records, and the class definition is sufficiently specific to enable the parties, potential Class Members and the Court to determine the parameters of the Class. *See Clothesrigger, Inc. v. GTE Corp.*, 191 Cal.App.3d 605, 617 (1987).

1 **B. The Class Shares a Well-Defined Community of Interest**

2 The community of interest requirement embodies three factors: (1) predominant questions of
3 law and fact; (2) class representatives with claims or defenses typical of the class; and (3) class
4 representatives who can adequately represent the class. *Dunk*, 48 Cal.App. 4th at 1806. Here, all three
5 requirements are easily satisfied.

6 The commonality criterion requires the existence of common question of law or fact and is
7 generally established with the issues of predominance and typicality. *See Daar*, 67 Cal. 2d 695, 706.
8 What is required is that a common question of fact or law exist which predominates over issues unique
9 to individual plaintiffs. The existence of individual issues or facts—generally present in any case
10 arising from employment—is not a bar to class certification as long as they do not render class
11 litigation unmanageable or predominate over the common issues. *See B.W.I. Custom Kitchen v.*
12 *Owens-Illinois, Inc.*, 191 Cal.App.3d 1341, 1354 (1987).

13 Here, Plaintiff’s claims present common issues of law and fact that predominate and warrant
14 class certification. Plaintiff alleges that Defendants denied compliant meal and rest periods to
15 employees, required employees to perform work off-the-clock, and failed to fully compensate
16 employees for all time actually worked. These policies and practices meant that Defendants allegedly
17 failed to pay minimum and overtime wages, and other related claims. Plaintiff alleges that Defendants’
18 policies and practices were uniform as to all Class Members. Thus, class treatment is appropriate.

19 To satisfy the typicality requirement, California law does not require that Plaintiff’s claims be
20 identical to the other class members. Rather, the test of typicality for a class representative is whether
21 other members have the same or similar injury, whether the action is based on conduct which is not
22 unique to the named plaintiff, and whether other class members have been injured by the same course
23 of conduct. *See Seastrom v. Neways, Inc.*, 149 Cal.App. 4th 1496, 1502 (2007). The typicality
24 requirement for a class representative refers to the nature of the claim or defense of the representative,
25 and not to the specific facts from which it arose or the relief sought. *See id.*

26 Here, Plaintiff alleges that his claims are similar to that of the other Class Members and that
27 Plaintiff’s claims arise out of the same alleged course of conduct giving rise to the claims of the other
28 Class Members. Because Plaintiff’s claims are based upon the same alleged conduct and business

practices as those of Class Members, the typicality requirement has been satisfied.

Finally, the question of adequacy of representation “depends on whether the plaintiff’s attorney qualifies to conduct the proposed litigation in the plaintiff’s interest or not antagonistic to the interests of the class.” *McGee v. Bank of America*, 60 Cal.App.3d 442, 450 (1976). Here, these considerations are satisfied. Class Counsel are well-regarded and accomplished lawyers who are qualified and experienced in employment-related, class-action litigation. (Genish Decl. ¶¶ 2-7). Plaintiff will vigorously, adequately and fairly represent the interests of the class. Plaintiff has at all times throughout the course of the litigation considered the interests of the class and understood that she must take steps to adequately represent the class and their interests. (Garcia Decl. ¶¶ 3-8). Because Plaintiff’s claims are typical of other Class Members and are not based on unique circumstances, there is no antagonism between the interests of Plaintiff and the Class.

C. A Class Action is Superior to a Multiplicity of Litigation

Under the circumstances, proceeding as a class action is a superior means of resolving this dispute, as the class members and the court will derive substantial benefits. Class certification would serve as the only means to deter and redress the alleged violations. *See Linder v. Thrifty Oil Co.*, 23 Cal.4th 429, 434 (2000) (relevant considerations include the probability that each class member will come forward to prove his or her separate claim and whether the class approach would actually serve to deter and redress the alleged wrongdoing). Further, individual actions arising out of the same operative facts would unduly burden the courts and could result in inconsistent results. Therefore, class action proceedings are superior to individual litigation.

VII. THE REQUESTED INCENTIVE PAYMENT IS REASONABLE

Plaintiffs in class action lawsuits are eligible for reasonable incentive payments as compensation “for the expense or risk they have incurred in conferring a benefit on other members of the class.” *Munoz v. BCI Coca-Cola Bottling Co.*, 186 Cal.App.4th 399, 412 (2010). Courts routinely grant approval of class action settlement agreements containing enhancements for the class representative, which are necessary to provide incentive to represent the class and are appropriate given the benefit the class representatives help to bring about for the class. *See In re Online DVD Rental*, 779 F.3d 934, 947-948 (9th Cir. 2014) (approving incentive award 417 times larger than

individual payments where incentive award made up a mere .17% of the settlement); *Gaudin v. Saxon Mortgage Servs., Inc.*, 2015 WL 7454183, at *10 (N.D. Cal. Nov. 23, 2015) (finding service award of \$15,000 to be “fair and reasonable”).

Plaintiff initiated this litigation on behalf of his former co-workers who will now be entitled to receive payment from the Settlement. Plaintiff invested substantial time and effort into litigation including his own research, reviewing documents, contacting other putative class members to obtain their participation in the action, and extensive discussions with Class Counsel. (Garcia Decl. ¶¶ 3-8). Further, the requested amount is also reasonable given the average award and the benefit gained by other Class Members. For these reasons, Plaintiff requests that an incentive payment of \$5,000.00 to Plaintiff be preliminarily approved by the Court. (Genish Decl. ¶ 42; Garcia Decl. ¶¶ 8, 9).

VIII. THE REQUESTED ATTORNEYS’ FEES AND COSTS ARE REASONABLE

Trial courts have “wide latitude” in assessing the value of attorneys’ fees and their decisions will “not be disturbed on appeal absent a manifest abuse of discretion.” *Lealao v. Beneficial Cal, Inc.*, 82 Cal.App.4th 19, 41 (2000). California law provides that attorney fee awards should be equivalent to fees paid in the legal marketplace to compensate for the result achieved and risk incurred. *Id.* at 47. In cases where class members present claims against a common fund and the defendant agrees to a percentage of the fund as part of the settlement, use of the percentage method is appropriate. *Id.* at 32.

Here, the requested attorneys’ fees of \$583,275.00, which is thirty-three percent of the common fund, are disclosed to Class Members in the proposed Class Notice. (Settlement Agreement, Exh. 1). The requested fee was freely negotiated, is common in the legal marketplace, and is not opposed by Defendants. The Motion for Final Approval will elaborate on the nature of the legal services provided and will also support Class Counsel’s request for the reimbursement of litigation costs not to exceed \$20,000.00. (Genish Decl., ¶¶ 44-45). Any costs and fees that are not ultimately approved by the Court shall instead be included in the Net Settlement Amount and distributed to Settlement Class Members. (Settlement Agreement, ¶ 46).

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1 **IX. THE CLASS NOTICE AND THE OPT-OUT AND OBJECTION PROCESS MEETS**
2 **DUE PROCESS REQUIREMENTS**

3 The Parties have jointly drafted a Class Notice which will be delivered to the Class Members.
4 (Settlement Agreement, Exh. 1). The Class Notice will include information regarding the nature of
5 the lawsuit, a summary of the terms of the Settlement, the Class definition, information on how to
6 object and opt-out, and the date of the Final Approval Hearing. (Settlement Agreement, ¶¶ 50-54). It
7 will list each Class Member's total Workweeks and the estimated Individual Settlement Payment to
8 be paid to the Class Members. (Settlement Agreement, ¶ 54(e)). The Class Notice shall be provided
9 to Class Members in both English and Spanish. (Settlement Agreement, ¶ 54(a)).

10 No later than 30 days after the Court grants preliminary approval of the Settlement, Defendants
11 will provide the list to the Settlement Administrator containing the following information for each
12 Class Member: full name, last known home address, last known telephone number, social security
13 number, start and end dates of active employment as a non-exempt employee of Defendants in the
14 State of California, total Workweeks during the Class Period, total workweeks worked during the
15 PAGA Period, and any other information required by the Settlement Administrator in order to
16 effectuate the terms of the Settlement ("Class List"). (Settlement Agreement, ¶ 4). The Settlement
17 Administrator shall perform any searches necessary to confirm Class Members' addresses, and within
18 14 days of receiving the Class List from Defendants, the Settlement Administrator shall mail the Class
19 Notice to all Class Members via first class mail. (Settlement Agreement, ¶ 52). The parties have
20 agreed to use Simpluris, Inc. as the Settlement Administrator. (Genish Decl. ¶ 46; Settlement
21 Agreement, ¶ 33).

22 In determining whether to approve a settlement of a class action, a trial court has virtually
23 complete discretion as to the manner of giving notice to class members, and review on appeal is
24 governed by the abuse of discretion standard. *See In re Cellphone Fee Termination Cases*, 186
25 Cal.App.4th 1380 (2010). Here, Class Counsel is not aware of an alternative method of providing
26 notice to the Class which would result in a higher likelihood of actual notice. (Genish Decl., ¶ 47).
27 The original source of the mailing addresses is from Class Members, who provided the information to
28 Defendants. (Genish Decl., ¶ 47). As a fail-safe, additional searches will be performed on any notice

1 returned as non-deliverable. (Genish Decl., ¶ 47, Settlement Agreement, ¶ 52). The Settlement
2 Administrator will report any and all opt outs, objections and disputes. (Settlement Agreement, ¶ 54).

3 Any Class Members who wish to object to the approval of this Settlement shall provide a
4 signed and dated written statement stating the specific reason for the objection as well as their full
5 name, address, telephone number, and the last 4 digits of their social security number or employee
6 identification number. (Settlement Agreement, ¶ 58). Objections must be mailed to the Settlement
7 Administrator within 60 days following the initial mailing of the Class Notice. (Settlement Agreement,
8 ¶ 58). Class Members may also appear and object at the final approval hearing, regardless of whether
9 they have submitted a written objection. (Settlement Agreement, ¶ 58).

10 Any Class Members who wish to be excluded from the Settlement must mail the Settlement
11 Administrator a signed and dated written request for exclusion including their name, address,
12 telephone number, and the last 4 digits of their social security number. The request for exclusion must
13 be postmarked no later than 60 days after mailing of the Class Notice. (Settlement Agreement, ¶ 55).

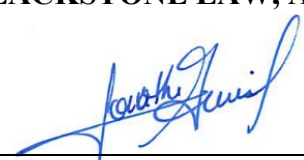
14 **X. CONCLUSION**

15 For all of the foregoing reasons, Plaintiff respectfully requests that this Court grant Plaintiff's
16 Motion for Preliminary Approval and the relief requested herein.

17 Respectfully submitted,

18 DATED: July 19, 2022

BLACKSTONE LAW, APC

20 By: 

21 Jonathan M. Genish

22 Miriam L. Schimmel

23 Attorneys for Plaintiff ANGEL GARCIA