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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
(UNLIMITED JURISDICTION)

MARIO CABRAL, on behalf of himself, all
others similarly situated, and the general
public, and as an "aggrieved employee" on
behalf of other "aggrieved employees"
under the Labor Code Private Attorneys
General Act of 2004,

Plaintiff,

vs.

SENTRY INSURANCE COMPANY and
DOES 1 to 25, inclusive,

Defendants.

Case No.: 22STCV21484

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

Action filed: July 1, 2022
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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF’S
UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION
AND PAGA SETTLEMENT

I. INTRODUCTION

Plaintiff Mario Cabral (“Plaintiff” or “Named Plaintiff”) submits this memorandum of points and authorities in support of his motion for preliminary approval of Class Action and PAGA Settlement Agreement (the “Settlement”)¹, which provides for a Settlement Amount of \$225,000 in compromise of all disputed claims on behalf of all individual Defendants employed in California in an hourly, non-exempt position at any time during the Class Period (term as defined below). Through this Motion, Plaintiff respectfully requests for this Court to (1) provisionally certify the below-defined Settlement Class for settlement purposes only under Code of Civil Procedure § 382; (2) preliminarily approve the Settlement; (3) preliminarily appoint Plaintiff as Class Representative; (4) appoint Harout Messrelian of Messrelian Law Inc. as Class Counsel; (5) approve the proposed notice procedures and related forms; and (6) schedule a final approval hearing.

This Court should grant Plaintiff’s motion because: (1) for settlement purposes, the Settlement Class meets the requirements for class certification under Code of Civil Procedure § 382; (2) the Settlement warrants preliminary approval based on all indicia for fairness, reasonableness, and adequacy; (3) for settlement purposes, Plaintiff is adequate to serve as a Class Representative; (4) Plaintiff’s attorney is adequate to serve as Class Counsel; (5) the proposed notice procedures, and related forms, fully comport with due process and adequately apprise Class Members of their rights; and (6) a final approval hearing must be scheduled to allow Class an opportunity to be heard regarding the Settlement and to give it a finality. Accordingly, for the reasons detailed below, this Court should grant Plaintiff’s Motion in its entirety and preliminarily approve the Settlement.

II. FACTUAL AND PROCEDURAL BACKGROUND

Defendant Sentry Insurance Company (hereafter “Sentry”) is a mutual insurance company specializing in business insurance. HM ¶ 5.

¹ The Settlement is attached as Exhibit (Ex.) 1 to the Declaration of Harout Messrelian (“HM”), which is submitted herewith under a separate cover.

1 Defendant employed Plaintiff for over ten (10) years. Plaintiff was classified as an hourly,
2 non-exempt employee and his latest job title was Senior Claims Field Appraiser. Plaintiff's
3 employment with Defendant ended in or around March 2022. HM ¶ 6.

4 **A. Plaintiff's Claims, Procedural History, and Mediation**

5 By a letter dated April 14, 2022, Plaintiff, through his counsel's office, advised the Labor
6 and Workforce Development Agency ("LWDA") and Defendant by certified mail of the specific
7 Labor Code provisions Plaintiff alleges Defendant violated, including the facts and theories to
8 support the alleged violations. HM ¶ 9, Ex. 2.

9 On July 1, 2022, Plaintiff commenced the instant Action by filing a Complaint in the Los
10 Angeles Superior Court, Case No. 22STCV21484, against Defendant alleging causes of action
11 against Sentry for (1) Failure to Pay Wages for All Hours Worked; (2) Failure to Pay Minimum
12 Wages; (3) Failure to Pay Overtime; (4) Failure to Provide Accurate Itemized Wage Statements;
13 (5) Failure to Pay Wages When Employment Ends; (6) Failure to Pay Wages Owed Every Pay
14 Period; (7) Failure to Provide Rest Breaks; (8) Failure to Provide Meal Breaks; (9) PAGA; (10)
15 Failure to Reimburse; (11) FEHA age discrimination; (12) Failure to prevent discrimination; (13)
16 Wrongful Termination; and (14) Violation of Bus. and Professions Code section 17200. HM ¶
17 10, Ex. 3. Sentry filed its Answer to the original Complaint on September 20, 2022 denying the
18 allegations in such Complaint and denying any and all liability for the causes of action alleged
19 therein. HM ¶ 11, Ex. 4. The Parties met and conferred and agreed to participate in a private
20 mediation. HM ¶ 11.

21 On April 19, 2023, the parties participated in an all-day mediation with mediator Todd
22 Smith and engaged in further post-mediation negotiations that resulted in the Settlement
23 Agreement to settle the Action. HM ¶ 12. On August 9, 2023, per the Settlement, Plaintiff filed a
24 First Amended Class Action Complaint for: (1) Failure to Pay Wages at the Correct Rates of Pay;
25 (2) Failure to Provide Rest Breaks; (3) Failure to Provide Meal Periods; (4) Failure to Indemnify;
26 (5) Wage Statement Penalties; (6) Waiting Time Penalties; (7) Failure to Pay Wages Owed Every
27 Pay Period; (8) Unfair Competition; and (9) PAGA. The First Amended Class Action Complaint
28 is the operative complaint in the Action. HM ¶ 13, Ex. 5. Sentry filed its Answer to Plaintiff's
First Amended Class Action Complaint on September 6, 2023, denying any and all liability for
the causes of action alleged therein. HM ¶ 13, Ex. 6.

In advance of the mediation, and before agreeing to the terms of the Settlement, the Parties

engaged in informal discovery. Through informal discovery, Defendant produced a sampling of time and pay records, policies and procedures regarding the payment of wages, the provision of meal and rest breaks, time keeping policies, including recording hours, issuance of wage statements, and providing all wages at separation, as well as information regarding the number of putative class members and the mix of current versus former employees, the average number of hours worked, the wage rates in effect, and length of employment for the average putative class member. Now that the Parties have finalized the long-form Settlement, Plaintiff submits it to this Court for preliminary approval. HM ¶ 14.

Pursuant to the Labor Code § 2699(l)(2), Plaintiff submitted a copy of the Settlement with the LWDA at the same time Plaintiff's Motion is being filed with the Court. HM ¶ 43, Ex. 11.

III. OVERVIEW OF SETTLEMENT

A. Class Definition

The Settlement defines the "Class Members" (collectively referred to as the "Class" or "Settlement Class") to mean all individual Defendants employed in California in an hourly, non-exempt position at any time during the Class Period. Settlement ¶ 1.5. The Settlement defines the Class Period to mean July 1, 2018 through the date the Court grants preliminary approval of the Settlement. *Id.* ¶ 1.12; HM ¶ 7.

B. Monetary Terms

In consideration for settlement of the Action, Defendant agrees to pay a total of Two Hundred Twenty Five Thousand Dollars (\$225,000) (the "Gross Settlement Amount" or "GSA") as full and complete settlement of all claims arising from the Action. Settlement ¶ 1.24.

The Settlement Amount will be allocated as follows:

- a) Class Counsel Fees Payment for attorneys' fees in the amount of \$75,000 (one-third of the GSA) and Class Counsel Litigation Expenses Payment not to exceed \$15,000.
- b) Class Representative Service Payment to Plaintiff in the amount of \$2,500.00.
- c) Administration Expenses Payment not to exceed \$15,000 to the Settlement Administrator.
- d) LWDA PAGA Payment of \$15,000, of which \$11,250 (75%) shall be paid to the LWDA and \$3,750 (25%) shall be allocated to the Settlement Class and paid to the Aggrieved Employees according to the number of Pay Periods worked during the PAGA Period.
- e) Individual Class Payments to participating Class Members according to the

number of Workweeks worked during the Class Period.

The “Net Settlement Amount” means the funds available for distribution to participating Class Members after deducting from the Settlement Amount the following, as approved by the Court: Individual PAGA Payments, the LWDA PAGA Payment, the Class Representative Service Payment, the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment, and the Administration Expenses Payment. Settlement ¶ 1.30.

The estimated Individual Class Payment for each participating Class Member will be determined by (a) dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating Class Members during the Class Period and (b) multiplying the result by each participating Class Member's Workweeks, less any applicable withholding taxes. Settlement ¶ 3.2.4-3.2.4.1. Workweek shall mean any week during which a Class Member performed work for Sentry during the Class Period. Settlement ¶ 1.48.

C. Timings of Payments and Procedure

Within twenty (20) business days following the date on which the Settlement becomes Final, Defendant will pay to the Administrator the Gross Settlement Amount, together with the employer's share of payroll taxes on the Net Class Payment. Within twenty (20) business days following the date on which the Settlement is funded, the Settlement Administrator will mail the checks for the LWDA PAGA Payment, the Administration Expenses Payment, the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment, and the Class Representative Service Payment. Settlement ¶ 4.3.

Twenty percent (20%) of each Participating Class Member's Individual Class Payment will be allocated to wages, reported on Form W-2 and eighty percent (80%) shall be allocated to penalties and interest, reported on Form 1099. Settlement ¶ 3.2.4.1.

D. Notice and Claim Process and Procedures

Within fifteen (15) business days following the date of preliminary approval, Defendant will provide the Settlement Administrator with the name, last known mailing address, social security number, and number of Class Period Work Shifts and PAGA Pay Periods during which each Class Member performed work for Defendant (collectively the “Class Data”). Settlement ¶ 4.2. Each Class Member's total eligible Work Shifts/Workweeks will be derived from Defendant's records. *Id.*

Within fourteen (14) days of receipt of the Class Data from Defendant, the Settlement

1 Administrator shall mail a copy of the Notice of Pendency of Proposed Class Action Settlement
2 and Final Hearing (the “Class Notice”), in the form approved by the Court in its preliminary
3 approval order, to all persons shown by Defendant’s records to be Class Members, *via* first class
4 U.S. mail, using the most current mailing address available. Settlement ¶ 8.4.2. The Class Notice
5 will identify the number of eligible Workweeks that each Class Member has worked and the
6 average potential recovery for each proposed Class Member. *Id.* Any Class Notice returned to the
7 Settlement Administrator as undelivered and bearing a forwarding address shall be re-mailed by
8 the Settlement Administrator within three (3) business days following receipt of the returned mail.
9 *Id.* For any Class Notice returned to the Settlement Administrator without a forwarding address,
10 the Settlement Administrator will conduct a search as required for undeliverable notices to obtain
11 an updated address and shall promptly re-mail the Notice to any newly-found address or addresses.
12 *Id.* The re-mailed Notice shall be identical to the original Notice. *Id.*

13 Each Class Member shall have 60 days after the Administrator mails the Class Notice (plus
14 an additional 14 days for Class Members whose Class Notice is re-mailed) to file with the
15 Administrator written objections, Challenges to Workweeks and/or Pay Periods, and Requests for
16 Exclusion. Settlement ¶ 8.4.4. Participating Class Members may send written objections to the
17 Administrator, by fax, email, or mail. In the alternative, Participating Class Members may appear
18 in Court (or hire an attorney to appear in Court) to present verbal objections at the Final Approval
19 Hearing. Settlement ¶ 8.7.2.

20 **E. Uncashed Checks**

21 Participating Class Members shall have one hundred and eighty (180) days from the date
22 of the check's issuance to cash their individual Net Settlement Payment checks. Settlement ¶ 4.3.1.
23 After the expiration of the 180-day period, the Settlement Administrator shall remit any settlement
24 checks that remain uncashed and otherwise unclaimed, to the California Controller's Unclaimed
25 Property Fund in the name of the Class Member or Aggrieved Employee. Settlement ¶ 4.3.3, HM
26 ¶ 42.

27 **F. Release of Claims**

28 Upon the Date of Final Approval, and subject to the occurrence of the Effective Date and
Defendant's full payment of the Gross Settlement Amount, Named Plaintiff and all Participating
Class Members, except those that make a valid and timely request to be excluded from the Class,

1 waive, release, discharge, and promise never to assert in any forum any and all claims against
2 Defendant Sentry and its parents, subsidiaries, affiliates and related entities, their predecessors,
3 successors and assigns, and each of their respective former and present directors, officers,
4 shareholders, owners, members, managers, partners, agents, employees, attorneys and insurers
5 (the “Released Parties”) from all claims that were alleged, or reasonably could have been alleged,
6 based on the Class Period facts stated in the Operative Complaint and ascertained in the course of
7 the Action. The Participating Class Members’ release includes, but is not limited to:

8 all claims, rights, demands, liabilities, damages, attorneys’ fees, costs, and causes
9 of action of every nature and description, whether known or unknown, arising from
10 or related to the claims litigated in the Action, or arising during the Class Period of
11 this settlement, including statutory, constitutional or common law claims for wages,
12 damages, unpaid costs, penalties, interest, attorneys’ fees, litigation costs,
13 restitution, equitable relief, or other relief under California Business & Professions
14 Code § 17200 et seq. or the federal Fair Labor Standards Act, based on the
15 following categories of allegations as set forth in the Operative Complaint: (a) all
16 claims for unpaid wages (including any and all claims for, among other things,
17 alleged failure to pay overtime or properly calculate the overtime rate, improper
18 rounding, or off-the-clock work); (b) all claims for failure to provide meal periods
19 (including claims for late or short meal periods); (c) all claims for failure to
20 authorize and permit rest periods; (d) all claims for the failure to promptly pay all
21 wages due and owing at the time of an employee’s termination or discharge; (e) all
22 claims for the failure to issue properly itemized wage statements; (f) all related
23 claims for Unfair Competition or Business Practices under California’s Business
24 and Professions Code or similar laws related to the alleged claims; (g) all claims
25 for any and all penalties pursuant to the California Labor Code and/or the Private
26 Attorneys General Act of 2004; and (h) all other claims that were or could have
27 been asserted based on the facts alleged in the Action.

28 Settlement ¶ 6.2.

IV. ARGUMENT

A. THIS COURT SHOULD CONDITIONALLY CERTIFY THE CLASS FOR PURPOSES OF SETTLEMENT ONLY BECAUSE IT MEETS ALL OF THE REQUIREMENTS FOR CLASS CERTIFICATION UNDER CODE OF CIVIL PROCEDURE § 382.

Under Code of Civil Procedure § 382, a class may be certified if: (1) it is ascertainable and its members are too numerous to render joinder impractical; (2) the representative and absent class members share a community of interest and questions of law and fact common to the class predominate over questions unique to individual class members; (3) the representative’s claims are typical of the class’ claims; and (4) the representative will fairly and adequately represent the

class' interests. *See, e.g., Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470. Moreover, in the settlement context, the Court can use a lesser standard to determine the appropriateness of a settlement class as opposed to a litigated class certification. *Dunk v. Ford Motor Co.*, 48 (1996) Cal.App.4th 1794, 1807. As explained below, all of these requirements are met in this case.

1. The Class Is Objectively Ascertainable.

A class is ascertainable when it may be readily identified without unreasonable expense or time by reference to official records. *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932 (citing *Hypolite v. Carlson* (1975) 52 Cal.App.3d 566, 579). Here, Plaintiff maintains that the above-defined Class is ascertainable because its members may be identified by reference to Defendant's records and Defendant has agreed to share the relevant information from their records to facilitate the process. Therefore, the Settlement Class is ascertainable. HM ¶ 15.

2. The Membership of the Class Is Sufficiently Numerous.

The Class has sufficiently numerous members to render joinder impractical. No set number is required as a matter of law to maintain a class action. *Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1030. Defendant estimates that it has employed about 121 Class Members during the Class Period. HM ¶¶ 8, 16.

Plaintiff maintains that it would be impractical and economically inefficient to require each Class Member to separately maintain an individual action or be joined as a named plaintiff in this action. The California Supreme Court has upheld a class of as few as 10 individuals. HM ¶ 16. *See Bowles v. Superior Court* (1955) 44 Cal.2d 574. In light of these considerations, the Settlement Class's membership is sufficiently numerous. *See Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695.

3. Commonality and Predominance Factors are Satisfied.

To justify certification, the class proponent "must show ... that questions of law or fact common to the class predominate over the questions affecting the individual members" *See, Arenas v. El Torito Rests., Inc.*, (2010) 183 Cal. App. 4th 723, 732 (citing *Washington Mut. Bank, FA v. Superior Court*, (2001) 248 Cal. 4th 906, 913). In light of the more lenient standard for certification of a settlement class, the Parties agree that for the purposes of the Settlement only, the claims of the Class Members all stem from the same sources.

In this case, there are many predominant common questions. HM ¶ 17. Plaintiff asserts all class members were subject to the same or similar operations and employment policies, practices, and procedures. *Id.* The claims arise from Defendant's alleged uniform policy of failing to properly

account for all time worked and failing to, among other things, properly pay overtime wages, provide off-duty meal and rest periods, indemnify the Class Members for all business expenses, timely pay wages upon termination, and provide compliant wage statements, all of which Plaintiff claims constitute unfair business practices and give rise to PAGA penalties. Plaintiff asserts that common questions include, but are not limited to: (1) Whether Defendant failed to provide the Class Members with all meal and rest periods, and failed to pay the required premiums for workdays with unprovided meal and rest periods; (2) Whether Defendant failed to pay all wages earned to Class Members for all hours worked at the correct rates of pay; (3) Whether Defendant failed to indemnify the Class Members for all business expenses; (4) Whether Defendant willfully failed to provide the Class Members with timely final wages; (5) Whether Defendant engaged in unfair competition within the meaning of Business and Professions Code §§ 17200, et seq., with respect to the Class Members; (6) Whether Defendant knowingly and intentionally failed to provide the Class Members with accurate wage statements. Therefore, common questions predominate.

4. Plaintiff Is Typical of the Settlement Class.

The class representative must be similarly situated to the rest of the purported class. *See Classen v. Weller*, (1983) 145 Cal. App. 3d 27, 46 (stating “it has never been the law in California that the class representative must have identical interests with the class members. The only requirements are ... that the class representative be *similarly* situated”) (emphasis in original); *see also* Newberg, § 3:29 (typicality “focuses on whether there exists a relationship between the Plaintiff’s claims and the claims alleged on behalf of the class”). Here, Plaintiff contends that his claims are typical for the purposes of certifying the Settlement Class. HM ¶ 18. Plaintiff, like absent Class Members was subject to the same relevant policies and procedures governing his compensation, hours of work, meal and rest periods, and reimbursement of expenses *Id.* Because Plaintiff contends that he was subject to the same general course of conduct as absent Class Members, resolving the common questions as they apply to the Plaintiff will determine Defendant’s *prima facie* liability to all the Class Members. *Id.* Moreover, Plaintiff’s claims could potentially be subject to the same primary affirmative defenses as those of absent Class Members. Accordingly, Plaintiff’s claims are typical of the Class. *Id.*

5. Plaintiff Will Adequately Represent the Settlement Class.

The adequacy requirement is met where the plaintiff is represented by counsel qualified to

1 conduct the litigation and the plaintiff's interest in the litigation is not antagonistic to the class's
2 interests. *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 451. In other words, where the
3 plaintiff has adequate counsel, the plaintiff may represent the entire class absent any disabling
4 conflicts of interest that might hinder the plaintiff's ability to represent the class. HM ¶ 19.

5 First, Plaintiff's counsel has supplied the Court with a declaration to show that he is
6 adequate to represent the Settlement Class and that he has significant experience in employment
7 litigation generally, and wage and hour and employment-related class action and PAGA litigation
8 specifically. HM ¶ 2. Thus, Plaintiff's counsel is adequate to serve as Class Counsel.

9 Second, Plaintiff contends that he is an adequate class representative. HM ¶ 20. Plaintiff
10 and the Class Members have strong and co-extensive interests in this litigation because they all
11 worked for Defendant during the relevant time period, allegedly suffered the same alleged injuries
12 from the same alleged course of conduct, and there is no evidence of any conflict of interest
13 between Plaintiff and the Class Members. *Id.* Moreover, Plaintiff has demonstrated his
14 commitment to the Class by, among other things, retaining experienced counsel, providing counsel
15 with documents and extensively speaking with them to assist in identifying the claims asserted in
16 this case, assisting them in contacting Class Members and gathering information from them,
17 meaningfully participating in the negotiations that led to the Settlement, and exposing himself to
18 the risk of attorneys' fees and costs awards against him if the complaint had been unsuccessful.
19 *Id.*, See *Generally Declaration of Mario Cabral*. Thus, Plaintiff is adequate to serve as a Class
20 Representative. *Id.*

21 Accordingly, this Court should find that Plaintiff and his counsel are adequate to represent
22 the Class as required under Code of Civil Procedure § 382.

23 **6. Class Action Treatment Is the Superior Means For Resolving The**
24 **Claims Of The Class Members.**

25 A class action is also superior to other means adjudicating the issues in this action. HM ¶
26 21. The predominance of common legal and factual questions shows that this Court could fairly
27 adjudicate the claims of Class Members through a single class action. *Id.* In view of the *theoretical*
28 alternatives that proposed class members could potentially utilize, such as representative PAGA
action (where there is less relief available), individual civil lawsuits or wage claims through the
Division of Labor Standards Enforcement (where there would be relatively little money at stake,
but the claims would be time-consuming to litigate)—a class action is plainly superior to all of

1 them. *Id.* Thus, this consideration supports conditional class action treatment for purposes of this
2 Settlement only. *Id.*

3 **B. THIS COURT SHOULD PRELIMINARILY APPROVE THE**
4 **SETTLEMENT BECAUSE IT IS A FAIR, ADEQUATE, AND**
5 **REASONABLE COMPROMISE OF ALL DISPUTED CLAIMS.**

6 California courts favor settlement. See *e.g.*, *Stambaugh v. Superior Court* (1976) 62
7 Cal.App.3d 231, 236. Unlike most settlements, class action settlements involve a court approval
8 process that exists to prevent fraud, collusion, and unfairness to class members. *Malibu Outrigger*
9 *Bd. of Governors v. Superior Court* (1980) 103 Cal.App.3d 573, 578-579. This approval process
10 consists of preliminary settlement approval, notice being given to class members, and a final
11 fairness and approval hearing being held at which class members may be heard with respect to the
12 settlement. See *e.g.*, *id.* For the reasons discussed below, this Court should preliminarily approve
13 the Settlement, allow the Parties to give notice to the Settlement Class, and schedule a final
14 approval hearing.

15 **1. The Settlement Was Reached at Arms' Length Through Experienced**
16 **Counsel with Sufficient Information to Intelligently Negotiate a Fair**
17 **Settlement in View of the Claims Asserted and Risks of Continued**
18 **Litigation.**

19 A settlement is presumptively fair where it is reached through arms' length bargaining,
20 based on sufficient discovery and investigation to allow counsel and the Court to act intelligently,
21 counsel is experienced in similar litigation, and the percentage of objectors is small. *Dunk v. Ford*
22 *Motor Co.* (1996) 48 Cal.App.4th 1794, 1802 ("*Dunk*"). In deciding whether to approve a proposed
23 settlement, a trial court has broad powers to determine if the proposed settlement is fair under the
24 circumstances of the case. *Mallick v. Superior Court* (1979) 89 Cal.App.3d 434, 438. In exercising
25 these powers, the overriding concern is to ensure that a proposed settlement is "fair, adequate, and
26 reasonable." *Dunk*, 48 Cal.App.4th at p. 1801 (internal quotations omitted).

27 Relevant factors for that determination, include, but are not limited to:

28 [T]he 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 state 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.

Id. These factors require balancing, are non-exhaustive, and, as such, trial courts should tailor the
factors considered to each case and give due regard to "what is otherwise a private consensual

agreement between the Parties.” *Id.*

“In the context of a settlement agreement, the test is not the Gross amount plaintiffs might have obtained at trial on the complaint, but rather whether the settlement is reasonable under all of the circumstances.” *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 250 (“*Wershba*”). Because settlements inherently involve compromise, even settlements providing for substantially narrower relief than likely would be obtained if the suit were successfully litigated can be reasonable because “the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation.” *Id.* (quoting *Air Line Stewards, etc., Local 550 v. Am. Airlines, Inc.* (7th Cir. 1972) 455 F.2d 101, 109). In addition, courts review the discovery process and information received through it to aid them in assessing whether the Parties sufficiently developed the claims and their supporting factual bases before reaching settlement. *See Kullar v. Foot Locker Retail Inc.* (2008) 168 Cal.App.4th 116, 129-131 (“*Kullar*”). Information is sufficient where it allows the Parties and the court to form “an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.” *Clark v. Am. Residential Servs. LLC* (2009) 175 Cal.App.4th 785, 801. This requirement exists so that the Parties can provide the court with “a meaningful and substantiated explanation of the manner in which the factual and legal issues have been evaluated.” *Kullar*, 168 Cal.App.4th at p. 118.

Here, this Settlement was reached after substantial exchanges of data, information and documents before and during the mediation, and is a result of extensive arms-length negotiations with the aid of a respected mediator. HM ¶ 22. Plaintiff’s counsel prepared damages estimates to determine the settlement value of this controversy. HM ¶ 23, Ex. 7. Plaintiff’s counsel determined that such monetary remedies could reach approximately \$5,887,246.69 (of which \$1,954,500 consists of civil penalties, \$256,350 in wage statement penalties, and \$434,055.19 in waiting time penalties). *Id.* The estimates are in essence “home run” projections that do not factor in any of the risks involved in litigating this Action and not in line with reality, especially when considering Defendant’s policies and its position on the issues. HM ¶ 23.

Plaintiff’s primary theory of recovery – that Defendant failed to pay him and other putative class members minimum wages for travel time and off the clock work– is subject to significant risk. HM ¶ 24. Regarding travel time, Defendant contends that Plaintiff and the others were on the clock during all travel time and as such, properly compensated. Furthermore, Defendant provided evidence at mediation that due to the Covid-19 Pandemic, any issues with travel time

1 ceased to exist as all of the employees began to work remotely. Regarding off-the clock- work
2 Plaintiff contends that Defendant required him and the other Class Members to continue working
3 after 4:30 p.m., including emails, calls, working on reports and other such work. It is Defendant's
4 position that such off-the-clock work was not a requirement. Plaintiff will rely on declarations
5 and witness statements to prove this claim. Generally, a court will not certify a class unless it can
6 determine an appropriate classwide methodology. *See, e.g., Duran v. U.S. Bank National Assn.*
7 (2014) 59 Cal. 4th 1. Here, Plaintiff may rely heavily on anecdotal evidence to prove the off-the-
8 clock claim, especially given the lack of records indicating when and how long such off-the-clock
9 work may have taken place. Individualized inquiries would need to be conducted person-by-
10 person, day-by-day, to determine if an individual in fact spent "minutes" off-the-clock on a
11 "regular" basis. Accordingly, there is a significant risk that the Court would consider this
evidentiary showing insufficient as a classwide methodology. HM ¶ 24.

12 There are risks to Plaintiff's meal period claim. The employee handbook Defendant
13 produced prior to mediation appears to be fully consistent with California law and required all the
14 employees to take meal periods in accordance with the relevant laws. Moreover, based on the
15 sample time records provided by Defendant, out of 15,562 workdays recorded in the sample that
16 were greater than 5 hours, only 10.6% were workdays with a late, short, or no meal period
recorded. HM ¶ 25. As such, this required a discount on the meal period claim.

17 There are risks to Plaintiff's rest period claim. HM ¶ 26. Employers are not required to
18 record rest periods and such periods are paid. *Id.* Thus, unlike unpaid meal periods where there
19 are often records showing whether an employee clocked out or not, there is no such evidence to
20 prove a missed rest period or that the employer refused to authorize and permit one. *Id.* Managing
21 such claims at trial has become exceedingly difficult. Plaintiff will depend on sample witness
22 testimony and surveys to prove the claims. *Id.* While a victory with such evidence is certainly
23 possible, relevant caselaw makes such claims risky from a trial management and due process
24 perspective. *See Duran v. U.S. Bank National Assn.*, (2014) 59 Cal. 4th 1, 31 (explaining "[I]f
25 sufficient common questions exist to support class certification, it may be possible to manage
26 individual issues through the use of surveys and statistical sampling."); *Tyson Foods, Inc. v.*
Bouphakeo (2015) 136 S.Ct. 382; *Comcast Corporation v. Behrend* (2013) 133 S.Ct. 1426. *Id.*

27 There also risks to Plaintiff's claims as to Defendant's alleged failure to indemnify for
28 business expenses. HM ¶ 27. Plaintiff alleges that Defendant required him and the others to use

1 their personal cell phones, personal computers, and home internet in the course of performing
2 their duties. There is a risk that the Court may consider Plaintiff's claims to be individual in nature
3 and unfit for class wide resolution. Furthermore, Defendant had expense reimbursement policies
4 in place during the relevant time period. *Id.*

5 Plaintiff's claims for wage statement violations, waiting time penalties, and PAGA civil
6 penalties, are all derivative claims that have no value on their own, and especially when the
7 substantive labor code violations, such as off-the-clock work or business expense reimbursement
8 is being used as a predicate. *See Naranjo v. Spectrum Security Services, Inc.*, 40 Cal App 5th 444.
9 HM ¶ 28.

10 Regarding PAGA (Labor Code, section 2698 *et seq.*), the Parties discounted potential
11 penalties under this claim for multiple reasons. HM ¶ 29. For one, Plaintiff's PAGA claims are
12 predicated on the wage underpayment, meal, rest, business expense reimbursement, and wage
13 statement violations described above, and thus subject to the same disputes and defenses. *Id.*
14 Additionally, PAGA states a court has discretion to award a lesser amount than the maximum
15 penalty. Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.* (2012) 203
16 Cal.App.4th 1112, 1135 (reducing PAGA award). It is also difficult to imagine a Court awarding
17 substantially more in penalties than the restitution it awards. In Plaintiff's counsel's experience,
18 PAGA penalty awards in State court are small even for egregious, intentional violations of the
19 Labor Code. The PAGA expressly counsels against such awards. *See* Labor Code § 2699(e)(2)
20 ("...a court may award a lesser amount than the maximum civil penalty amount specified by this
21 part if, based on the facts and circumstances of the particular case, to do otherwise would result
22 in an award that is unjust, arbitrary and oppressive, or confiscatory."). There is a substantial risk
23 that the Court could reduce civil penalties to an insignificant amount if it is unpersuaded by
24 Plaintiff's evidence of willful and intentional conduct. The Court could also award no civil
25 penalties if it determines that an award of premium wages (which many view as a penalty) is
26 sufficient to punish Defendant's conduct. In *Carrington v. Starbucks* (2018) 30 Cal. App. 5th 504,
27 court made a significant reduction from \$50 per violation to \$5 per violation in imposing penalty
28 and declined to impose penalties for the additional statutory violations. Under the logic of
Carrington, Plaintiff and aggrieved employees could not hope to recover a substantial amount.
Defendant has also posed valid defenses to the Labor Code claims underlying Plaintiff's
allegations. Thus, the chance of Plaintiff recovering the maximum value of the claims is highly

1 unlikely. HM ¶ 29.

2 For mediation purposes, Plaintiff's counsel estimated a maximum exposure of
3 approximately \$1,954,500 in civil penalties. HM ¶ 30. As mentioned above, this estimate does
4 not reflect the realities of this case and did not take into account any of the risks discussed above
5 and assumed a violation for every single pay period. Plaintiff's counsel also assessed multiple
6 penalties for the same pay period for the same alleged violations of different Labor Code
7 provisions and derivative violations. Plaintiff's counsel is not aware of any California state courts
8 awarding plaintiffs multiple PAGA penalties for the same violation for the same pay period under
9 different Labor Code provisions. This may be because the PAGA does not provide for what many
employers characterize as claim splitting and not merely stacking. *Id.*

10 In view of the risks, the Settlement reflects Plaintiff's counsel's estimate of the total
11 amount of damages, monetary penalties or other relief that the Plaintiff and the putative class
12 members could reasonably expect the Court to award them at trial, taking into account the
13 likelihood of prevailing and other attendant risks. HM ¶ 31. It also represents a fair, adequate, and
14 reasonable compromise amount for these claims and warrants approval. *Id.*

15 The settlement of PAGA penalties in the sum of \$15,000, of which 75% (\$11,250) will be
16 paid to the LWDA and 25% (\$3,750) will be distributed to the Class, is reasonable and appropriate
17 under the circumstances. HM ¶ 32. The Parties negotiated a good faith amount for PAGA
18 penalties to be paid to the LWDA and to the Class. *Id.* The portion to be paid to the LWDA was
19 not the result of self-interest at the expense of other Class Members. *Id.* Where settlements
20 "negotiate[] a good faith amount" for PAGA penalties and "there is no indication that this amount
21 was the result of self-interest at the expense of other Class Members," such amounts are generally
22 considered reasonable. *Id. Hopson v. Hanesbrands Inc.* (N.D. Cal. Apr. 3, 2009) No. CV-08-0844
23 EDL, 2009 WL 928133, at *9. Likewise, where the employer did not act willfully, and made good
24 faith attempts to comply with wage and hour laws, a reduction or lesser penalty is warranted
25 because imposing maximum PAGA penalty for each violation would have been unjust, arbitrary,
26 and oppressive. *Id. Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 528-529 (affirming
27 trial court's award of only 10% of maximum PAGA penalty for meal break violations). *Id.*
28 Finally, the amount to be paid to the LWDA comports with PAGA settlement amounts approved

by other courts.² *Id.*

2. The Settlement Fairly, Reasonably, and Adequately Compensates Class Members Because Each Class Member Will Be Paid Based on the Potential Extent of His or Her Injury Compared to Other Class Members.

The Gross Settlement Amount will be paid to each Class Member based on his or her total number of eligible Workweeks compared to other Class Members' workweeks. Settlement ¶ 1.25. Because this method compensates Class Members based on the extent of their potential injuries, in that Class Members who worked for Defendant longer would have been subject to more alleged violations, it is fair, adequate, and reasonable.

3. The Proposed Class Counsel Award of Attorney's Fees and Expenses Is Fair, Adequate, and Reasonable and Should Be Preliminarily Approved.

Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery. *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 47 fn. 11 (quoting *Shaw v. Toshiba America Information Systems, Inc.* (E.D. Tex. 2000) 91 F.Supp.2d 942, 972); *see also Laffitte v. Robert Half Int'l Inc.* (Cal. Aug. 11, 2016) 1 Cal.5th 480, 503, 376 P.3d 672, 686, (holding that courts can use the percentage method for the calculation of attorneys' fees). This is also consistent with Class Counsel's experience in these types of cases.

Here, Class Counsel intends to request Attorney's Fees of \$75,000 (33.33% of the GSA) and reasonable litigation costs incurred which Class Counsel currently estimates is approximately \$8,966.00 and will be no more than \$15,000.00 at the conclusion of matters related to the Settlement. HM ¶ 33. In view of Class Counsel's efforts and risks in pursuing this case, these amounts are well within the range of reasonableness and thus warrant this Court's preliminary

² *See, e.g., Chu v. Wells Fargo Investments, LLC* (N.D. Cal., Feb. 16, 2011) 2011 WL 67245, 81 (approving PAGA payment of \$7,500 to LWDA out of \$6.9 million common fund); *Lazarin v. Pro Unlimited, Inc.* (N.D. Cal., July 11, 2013) 2013 WL 3541217 (approving PAGA payment of \$7,500 to LWDA out of \$1.25 million common fund settlement); *Hopson v. Hanesbrands, Inc.* (N.D. Cal. Aug. 8, 2008) 2008 WL 3385452, at *1 (approving PAGA settlement of 0.3% or \$1,500); *see Nordstrom Com'n Cases* (2010) 186 Cal.App.4th 576, 589 (approving PAGA settlement and release that allocated \$0 to PAGA claim). Courts have also approved settlements for \$20,000 or less. *See, e.g., Hicks v. Toys 'R' Us-Delaware, Inc.*, (C.D. Cal. Sept. 2, 2014) 2014 WL 4703915, at *1 (approving \$5,000 PAGA payment in a case involving \$4 million settlement); *Franco v. Ruiz Food Prods., Inc.* (E.D. Cal. Nov. 27, 2012) 2012 WL 5941801 at *14 (approving PAGA penalties of \$10,000 as part of \$2.5 million settlement); *Garcia v. Gordon Trucking* (E.D. Cal. Oct. 31, 2012) 2012 WL 5364575, at *3 (approving PAGA payment of \$10,000 as part of \$3.7 million common-fund settlement).

1 approval. HM ¶¶ 34-35. Plaintiff's counsel will provide total hours spent on this matter with the
2 final approval hearing. HM ¶ 35.

3 **4. The Enhancement Award to Plaintiff Is Fair, Adequate, and**
4 **Reasonable and Should Be Preliminarily Approved.**

5 Courts routinely approve incentive awards to compensate named plaintiffs for the
6 services they provide and the risks they incur during class action litigation, often in much higher
7 amounts than that sought here. *See, e.g., Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th
8 715, 726 (upholding "service payments" to named plaintiffs for their efforts in bringing the case);
9 *Van Vranken v. Atlantic Richfield Co.* (N.D.Cal.1995) 901 F.Supp. 294 (approving \$50,000
10 enhancement award). Here, the Settlement provides that Plaintiff may seek a Class
11 Representative Service Payment of \$2,500. This amount is entirely reasonable given Plaintiff's
12 efforts in this action and the risks he undertook on behalf of the Class Members. HM ¶ 36, *See*
13 *generally* Declaration of Mario Cabral. Here, Plaintiff has devoted many hours advancing the
14 interests of the Class. *Id.* Plaintiff has done this by, among other things, retaining experienced
15 counsel, providing them with information about his work history with Defendant and
16 Defendant's policies and practices with respect to the wage and hour claims at issue, and being
17 actively involved in the settlement process to ensure a fair result for the Class as a whole. *Id.* In
18 doing this, Plaintiff has been exposed to significant risks, including the risk of an order to pay
19 Defendant's attorneys' fees and costs if this action had been unsuccessful (*see* Lab. Code §§
20 218.5-218.6). *Id.* The efforts and risks that Plaintiff undertook on behalf of the Class shows that
21 the proposed payment is fair, adequate, and reasonable, and thus warrants preliminary approval.
22 *Id.*, *See generally* Declaration of Mario Cabral.

23 **5. The Proposed Settlement Administration Costs Are Fair and**
24 **Reasonable and Should Be Preliminarily Approved.**

25 With regard to the settlement administration costs provision, it is reasonable. Before
26 agreeing to Phoenix Settlement Administrators, the Parties sought and reviewed bids from other
27 reputable third party administrator and mutually decided to go with Phoenix Settlement
28 Administrators. HM ¶ 41, Exhibits 8-10. Thus, the settlement administration costs provision
should be given preliminary approval.

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1 **C. THE PROPOSED NOTICE AND SETTLEMENT ADMINISTRATION**
2 **PLAN SHOULD BE APPROVED BECAUSE IT IS REASONABLY**
3 **CALCULATED TO GIVE ACTUAL NOTICE TO CLASS MEMBERS**
4 **AND SUFFICIENT TIME TO EXERCISE THEIR RIGHTS.**

5 This Court should approve the proposed plans for giving notice to the Class and
6 administering the Settlement. The standard for determining the adequacy of notice is whether the
7 notice has “a reasonable chance of reaching a substantial percentage of the class members.” *Cartt*
8 *v. Superior Court* (1975) 50 Cal.App.3d 960, 974. The notice process includes multiple measures
9 to ensure that as many Class Members as practicable receive actual notice of the Settlement and
10 have enough time to exercise their rights. The Settlement requires distribution of the Class Notice
11 by First Class U.S. mail only. Settlement ¶ 8.4.2, HM ¶ 38. Although there are current employee
12 Class Members, it is uncertain whether Defendant’s records of their contact information include
13 email addresses and Class Members may not be in a position to check their emails on electronic
14 device. *Id.* As such, notice by mail alone is fair, adequate, and reasonable. *Id.*

15 With respect to its content, “[The] notice given to the class must fairly apprise the class
16 members of the terms of the proposed compromise and of the options open to dissenting class
17 members.” *Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* (1975) 48 Cal.App.3d 134, 151-152.
18 The purpose of the notice in class settlement context is to give class members sufficient
19 information to decide whether they should accept the benefits offered, opt out and pursue their
20 own remedies, or object to the settlement. *Id.* Here, the Class Notice (Exhibit A to the Settlement)
21 provides Class Members with all pertinent information that they need to fully evaluate their
22 options and exercise their rights under the Settlement. Specifically, it clearly and concisely
23 explains, among other things: (1) what the Settlement is about; (2) who is a Settlement Class
24 Member; (3) how Class Counsel will be paid; (4) how to submit an exclusion request not to be
25 bound by the Settlement; (5) how to object to the Settlement; (6) how the Settlement will be
26 allocated; (7) how payments to Settlement Class Members will be calculated; and (8) how the
27 disputes will be resolved. Additionally, the Class Notice will include the number of eligible
28 Workweeks a Class Member had during the Class Period. Accordingly, the Class Notice should
29 be approved because it describes the Settlement with sufficient clarity and specificity to explain
30 to Settlement Class Members what this action is about, their rights under the Settlement, and how
31 to exercise those rights. HM ¶ 39.

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1 **V. CONCLUSION**

2 For the reasons stated above, this Court should grant Plaintiff's Motion in its entirety and
3 adopt the proposed order submitted concurrently herewith.

4 Respectfully submitted,

MESSRELIAN LAW INC.

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6 Dated: November 29, 2023

By:  _____
7 HAROUT MESSRELIAN
8 Attorneys for Plaintiff, MARIO CABRAL
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