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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SHASTA

ERIK FOSS, an individual, and on behalf of
himself and on behalf of all persons
similarly situated,

Plaintiff,

v.

ANDERSON HOSPITALITY, INC., a
California Corporation; and DOES 1-50,
Inclusive,

Defendant.

Case No. 195317

Complaint Filed: July 2, 2020

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

Date: March 7, 2022
Time: 8:30 a.m.

Judge: Hon. Stephen H. Baker
Dept.: 3

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I. INTRODUCTION

Plaintiff ERIK FOSS (“Plaintiff”) seeks preliminary approval of the Stipulation of Settlement of Class Action Claims and Release of Claims (“Agreement”)¹, which if approved, would provide valuable monetary relief for approximately 104 members of the Settlement Class. The basic terms of the Agreement provide for the following:

1. The “**Settlement Class**” and “**Settlement Class Period**” shall mean with respect to the class, all of defendant ANDERSON HOSPITALITY, INC.’s (“Defendant”) non-exempt employees employed by Defendant in California during the Class Period, defined as the period between July 2, 2016, and October 31, 2021 (“Class Period”). The Settlement Class excludes any person who submits a timely and valid request for exclusion. Agreement at §§ I(GG)).

2. The “**Aggrieved Employees**” and “**PAGA Period**” means all of Defendant’s non-exempt employees employed by Defendant in California during the PAGA Period, defined as the period between April 24, 2019 and October 31, 2021 (“PAGA Period”). Agreement at §I(B).

3. The “**Total Settlement Amount**” is One Hundred Thousand Dollars (\$100,000). Agreement at §§I(HH). The releases granted to Defendant only become effective upon the funding of the Total Settlement Amount. §III(B). The Total Settlement Amount is non-reversionary and includes the following:

a. A “**Class Representative Service Award**” in the amount of \$7,500 to Plaintiff for his services on behalf of the Settlement Class, and for agreeing to a broad general release of California Civil Code section 1542 as to his individual claims. Agreement at § III(M)(9).

b. A “**Class Counsel Award**” in the amount not to exceed one-third of the Total Settlement Amount for attorney’s fees, currently estimated to be \$33,333.33 **and** litigation costs and expenses not to exceed \$12,500, to be paid to Class Counsel. Agreement at §III(M)(10).

c. A “**PAGA Settlement**” of \$5,000 shall be allocated from the Total Settlement Amount for settlement of claims for civil penalties under the Private Attorneys General Act of 2004 (“PAGA Amount”). The Settlement Administrator shall pay 75% of the PAGA Settlement (“LWDA

¹ The Agreement is attached as Ex “A” to the Declaration of Jean-Claude Lapuyade (“JCL Dec.”) at ¶ 3. All citations to the Agreement incorporate by this reference a citation to the JCL Dec., ¶ 3. Further, unless indicated otherwise, capitalized terms used herein have the same meaning as those defined by the Agreement.

Payment”) the California Labor and Workforce Development Agency. The Settlement Administrator shall distribute 25% of the PAGA Amount (“Aggrieved Employee Payment”) to members of the Aggrieved Employees. Agreement at §III(M)(11).

d. And “**Settlement Administration Costs**” not to exceed \$6,000 payable to the proposed Settlement Administrator, ILYM Group, Inc., for, *inter alia*, the administration of the Notice Packet and Individual Settlement Payments. Agreement at §III(M)(12).

3. The “**Net Settlement Fund**” of approximately \$35,666.66 (Total Settlement Amount minus the requested Class Representative Service Award, Class Counsel Award, PAGA Settlement and Settlement Administration Costs) which will be allocated to all participating members of the Settlement Class on a pro-rata basis according to the number of Workweeks each Settlement Class member performed during the Class Period. The entire Net Settlement Amount will be paid to all Settlement Class Members who do not opt out of the Settlement Class resulting in an average Individual Settlement Share of **\$342.95**. JCL Dec., ¶ 5.

An objective evaluation of the Settlement confirms that the relief negotiated on behalf of the Settlement Class is fair, reasonable, and valuable. The Settlement was negotiated by the Parties at arm’s length, and after conducting a mediation with Judge William Pate (Ret.). The Settlement confers substantial benefits to the Settlement Class. The relief offered by the Settlement is particularly impressive when viewed against the difficulties encountered by plaintiffs pursuing wage and hour cases (*see infra*). Indeed, by settling now rather than proceeding to trial, Class Members will not have to wait (possibly years) for relief, nor will they have to bear the risk of class certification being denied or of Defendant prevailing at trial. JCL Dec., ¶ 5.

As discussed below, the proposed Settlement satisfies all criteria for preliminary settlement approval under California law and falls within the range of reasonableness. The average Individual Settlement Share to the Settlement Class meet or exceeds awards in similar wage and hour class actions. Moreover, the proposed Settlement Class is appropriate for provisional certification. Accordingly, Plaintiff respectfully requests that this Court grant preliminary approval of the Settlement. JCL Dec., ¶ 6.

II. FACTS AND PROCEDURE

A. Overview of the Litigation

Defendant operates a Best Western hotel in Anderson, California. JCL Dec., ¶ 7. Plaintiff worked for Defendant as an hourly, non-exempt front desk clerk during 2020. As a non-exempt employee, Plaintiff was entitled to minimum wages, overtime wages, and compliant meal and rest breaks (which Defendant contends he properly received). Throughout his employment, Plaintiff was subject to Defendant’s written policies and practices. JCL Dec., ¶ 8.

Generally, Plaintiff claims that Defendant failed to pay him for all hours worked, failed to provide compliant meal and rest periods, failed to provide accurate itemized wage statements, and failed to pay all wages due at the time of his separation. Defendant denies liability for each of Plaintiff’s claims. Further, Defendant asserts that it fully complied with all applicable employment laws and raised several other significant defenses to Plaintiff’s claims, including but not limited to, compliant meal and rest period policies and practices, on-duty meal break agreements, and arbitration agreements with class action waivers. JCL Dec., ¶ 9.

On April 24, 2020, Plaintiff served Defendant and the Labor and Workforce Development Agency (“LWDA”) with a Notice of Violations (“PAGA Notice”). Plaintiff’s PAGA Notice set forth the facts and theories supporting Defendant’s alleged violations of various provisions of the California Labor Code and applicable Industrial Welfare Commissions (“IWC”) Wage Order and of his intent to pursue claims under California Labor Code Private Attorneys General Act, Cal. Lab. Code Sections 2698 et seq (“PAGA”). JCL Dec., ¶ 10.

On July 2, 2020, Plaintiff filed a class action complaint in the Shasta County Superior Court for: (1) Unfair Competition in Violation of Bus. and Prof. Code §§ 17200; (2) failure to pay minimum wages in violation of California Labor Code sections 1194, 1197 and 1197.1; (3) failure to pay overtime wages in violation of California Labor Code sections 510 *et seq.*; (4) failure to provide required meal periods in violation of California Labor Code sections 226.7 and 512; (5) failure to provide required rest periods in violation of California Labor Code sections 226.7 and 512; (6) failure to provide accurate itemized wage statements in violation of California Labor Code section 226; (7) failure to provide wages when due in violation of California Labor Code sections 201, 202 and 203; and (8) violations

of the California Labor Code Private Attorney General Act (“PAGA”). In response, Defendant filed a motion to compel Plaintiff’s claims to arbitration, however Defendant’s motion was denied. Thereafter, Defendant answered the Complaint. JCL Dec., ¶ 11.

Plaintiff commenced written discovery in Defendant 2020, including interrogatories, requests for production, and requests for admissions. The Parties also engaged in the *Belaire-West* notice procedure and Defendant produced the Class Members contact information to Plaintiff’s Counsel. Plaintiff’s Counsel subsequently conducted interview with many of the Class Members. Thereafter, the Parties agreed to mediate this action. In anticipation of mediation, the Parties stipulated to stay further formal discovery. To prepare for mediation, Defendant agreed to informally produce certain documents and data points subject to the mediation privilege, including but not limited to, a sample of the Class Members’ time and payroll data. As discussed *infra*, Plaintiff’s counsel retained the Berger Consulting Group, to analyze Defendant’s time and payroll data. JCL Dec., ¶ 12.

On June 1, 2021, the Parties participated in a full day mediation with (Ret.) Hon. William Pate. After arms-length negotiations and bargaining, the mediation concluded without a settlement. However, following the mediation after months of negotiations with Judge Pate’s assistance, the Parties were able to reach an agreement to settle the Action pursuant to Judge Pate’s proposal. After reaching an agreement in principle, the parties drafted and negotiated a long-form settlement agreement, which is the subject of the instant motion. JCL Dec., ¶ 13.

B. Class Counsel Thoroughly Investigated the Factual and Legal Issues

In early 2020, Class Counsel began its pre-filing investigation into Plaintiff’s complaints. Class Counsel’s investigation started with several lengthy interviews with Plaintiff. As part of the interview process, Plaintiff produced numerous documents related to his employment for Defendant, including portions of Defendant’s handbooks, compensation policies and time and payroll records. At the conclusion of the interviews, Class Counsel determined that Plaintiff’s complaints justified further inquiry. JCL Dec., ¶ 14. Shortly thereafter, Class Counsel summarized the known factual and legal issues in the PAGA Notice addressed to the LWDA. Several weeks later, Class Counsel filed this class action. JCL Dec., ¶ 15.

After the initiation of the Action, Plaintiff engaged in significant written discovery with

1 Defendant, as described above. Additionally, to prepare for mediation, Class Counsel requested several
2 documents and data points to further evaluate Plaintiff's claims and Defendant's liability exposure to
3 the Settlement Class members. In response to Class Counsel's request, Defendant produced the time
4 and payroll records for the entire Settlement Class, and copies of applicable handbooks containing,
5 *inter alia*, compensation, timekeeping and, meal and rest period policies. In total, Defendant produced
6 approximately 300 pages containing thousands of unique cells of time and payroll data for Class
7 Counsel to analyze. JCL Dec., ¶ 16.

8 Class Counsel then retained the statisticians and economists at Berger Consulting Group
9 ("BCG"), to evaluate the Settlement Class Members' payroll and time data. BCG provides data
10 analysis and damage modeling consulting services specializing in wage and hour class actions. BCG's
11 team of financial and data analysts are credentialed and experienced experts in their fields and have
12 provided their expertise on thousands of cases. Stated differently, Plaintiff's Counsel the BCG is
13 uniquely qualified to analyze Defendant's time and payroll data. JCL Dec., ¶ 17.

14 BCG analyzed Defendant's time and payroll data to assist in the development of various damage
15 models. Among other things, BCG determined the approximate number of work shift, work weeks,
16 pay periods, average rate of pay, average length of shift and average number of hours worked per week
17 and pay period during the Class Period. BCG also estimated the number of missed, late or truncated
18 meal and rest periods, the amount of paid missed meal period premiums paid during the Class Period,
19 and also estimated the amount of off-the-clock work performed by the Settlement Class during the
20 Class Period. JCL Dec., ¶ 18.

21 In advance of mediation, Class Counsel created a damage model predicated on BCG analysis.
22 Class Counsel's model calculated Defendant's potential liability exposure while accounting for the
23 uncertainties of continued litigation. These damage models informed and guided Class Counsel during
24 the mediated settlement discussions. JCL Dec., ¶ 19.

25 Overall, Class Counsel thoroughly investigated the claims at issue, including: (1) determining
26 Plaintiff's suitability as a putative class representative through interviews, background investigations,
27 and analysis of his employment files; (2) evaluating all of Plaintiff's potential claims; (3) researching
28 similar wage and hour class actions as to the claims brought, the nature of the positions, and the type

of employer; (4) analyzing the Settlement Class' time and payroll records; (5) analyzing Defendant's labor policies and practices; (6) researching settlements in similar cases as well as outstanding issues which could affect settlement approval; (7) evaluating Plaintiff's claims and estimating Defendant's liability for purposes of settlement; (8) drafting the mediation brief and (9) participating in the mediation. This investigation allowed Class Counsel to fully assess the nature and magnitude of the claims being settled, as well as the impediments to recovery, such as to make an independent assessment of the reasonableness of the terms to which the parties have agreed. JCL Dec., ¶ 20.

C. The Parties Settled at Mediation

On June 1, 2021, the Parties conducted a full day of mediation with (Ret.) William Pate, a highly regarded mediator, and former San Diego County Superior Court Judge. Judge Pate helped to manage the Parties' expectations and provided a useful, neutral analysis of the issues and risks to both sides. The Parties made substantial progress with Judge Pate's assistance. Namely, the parties exchanged information regarding their respective claims and defense, including their respective evaluation of the damages. After nearly eight hours arm's length and adversarial negotiations, the mediation concluded without a settlement. However, after months of settlement negotiations following the mediation, Judge Pate issued a proposal for settlement that the Parties accepted. The complete and final terms of the Parties' settlement are now set forth in the Agreement. Class Counsel submits that the Settlement constitutes a fair, adequate, and reasonable compromise of the claims at issue. JCL Dec., ¶¶ 21.

D. The Proposed Settlement Fully Resolves Plaintiff's Claims

1. The Composition of the Settlement Class Members

The proposed Settlement Class consists of all Defendant's non-exempt employees employed in California between July 2, 2016, and October 31, 2021. The Settlement Class excludes any person who submits a timely and valid request for exclusion. Agreement at §§ I(G). There are approximately 104 members of the Settlement Class that worked an estimated 3,800 workweeks during the Class Period. Agreement at §III(A)(2).

2. The Settlement Consideration

The Parties agreed to settle the underlying class claims in exchange for the Total Settlement Amount of \$100,000 in order to avoid further litigation. The Total Settlement Amount Fund: (1)

Individual Settlement Payments to the Settlement Class; (2) a Class Representative Service Award of \$7,500 to Plaintiff for his services on behalf of the Settlement Class and, equally important, for a general release of claims; (3) a PAGA Settlement in the amount of \$5,000; (4) Settlement Administration costs estimated at \$6,000, (5) Class Counsel Award in the amount of \$45,833.33, comprised of attorneys' fees equal to one-third of the Total Settlement Amount estimated to be at least \$33,333.33 and an estimated \$12,500 for actually incurred litigation expenses. Agreement at §III(M).

Subject to the Court approving the Class Representative Service Award, Class Counsel Award, PAGA Settlement, and Settlement Administration Costs, the Net Settlement Amount will be distributed to each participating member of the Settlement Class Member. There is no reversion to Defendant and Defendant must separately pay for its share of the employer payroll taxes. Agreement at §III(A)(1).

3. Formula for Calculating Individual Settlement Payments

Each participating member of the Settlement Class will receive an Individual Settlement Payment. The Individual Settlement Payment will be proportional to the number of Workweeks each member of the Settlement Class worked for Defendant during the Class Period. Using the Class Data, the Settlement Administrator shall add up the total number of Workweeks for the entire Settlement Class. Each Settlement Class Member's final Individual Settlement Payment for purposes of payment will be calculated by multiplying the NSF by a fraction, the numerator of which is the Settlement Class Member's total number of Workweeks, and the denominator of which is the total number of Workweeks of all Settlement Class Members. Agreement at §III(M)(1).

Each Individual Settlement Payment will be reduced by any legally mandated employee tax withholdings (e.g., employee payroll taxes, etc.). Agreement at §III(M)(1). Individual Settlement Payments for members of the Settlement Class who submit valid and timely requests for exclusion will be redistributed to Settlement Class member who do not submit valid and timely requests for exclusion on a pro rata basis. Agreement at §III(M)(1).

Given that there are approximately 104 Settlement Class Members, the average gross recovery is approximately \$342.95 (Net Settlement Amount divided by Settlement Class Members). JCL Dec.,

¶ 5.

4. Release by Participating Settlement Class Members

Generally, as of the Funding Date, Plaintiff and the Settlement Class Members will agree to release the Released Parties from the Released Claims (any and all potential or actual claims, rights, debts, wages, liabilities, demands, obligations, penalties, guarantees, costs, expenses, attorneys' fees, costs, interest, restitution, equitable relief, damages, liquidated damages, actions, claims or causes of action arising out of, or based upon, the facts alleged or which reasonably could have been alleged in the operative complaint based on the facts alleged, under any state, federal, or local law, rule, or regulation, including, without limitation, the California Labor Code, and federal Fair Labor Standards Act of 1938, as amended ("FLSA")).² Agreement at §§I(AA).

5. Release by the LWDA and the Aggrieved Employees

Generally, upon the Funding Date the LWDA and the Aggrieved Employees will release any claims, rights, or causes of action for civil penalties, attorneys' fees, interest, costs, or any relief under PAGA, which is predicated upon the alleged Labor Code violations supporting the PAGA claims alleged in the operative complaint and those alleged in Plaintiff's PAGA notice to the LWDA.³ Agreement at §§I(BB).

III. ARGUMENT

A. The Court Should Preliminarily Approve the Proposed Class Action Settlement

The proposed Settlement, including a Total Settlement Amount of \$100,000 meets the standards for preliminary approval. Pre-trial settlement of complex class actions is a judicially favored remedy. (*Officers for Justice v. Civil Serv. Comm'n* (9th Cir. 1982) 688 F.2d 615, 625 ("Voluntary conciliation and settlement are the preferred means of dispute resolution.")) In California, class action settlement approval requires an early "preliminary" review by the trial court and a subsequent "final" review after notice of the settlement has been distributed to class members for their comments and objections. (C.R.C. 3.769(c)-(g); *Cellphone Termination Fee Cases*, 180 Cal. App. 4th 1110, 1118 (2010) (the court first "preliminarily approves the settlement" and later "conducts a final approval hearing to

² A more detailed description of the claims released can be found in the Settlement Agreement, attached as an Exhibit to the Lapuyade Declaration filed in support of this motion.

³ A more detailed description of the claims released can be found in the Settlement Agreement, attached as an Exhibit to the Lapuyade Declaration filed in support of this motion.

1 inquire into the fairness of the proposed settlement”).)

2 Although California Rule of Court Rule 3.769 does not provide detail as to the scope of review
3 of the proposed settlement, preliminary approval is warranted if the settlement falls within a
4 “reasonable range.” (*See North County Contractor’s Assn., Inc. v. Touchstone Ins. Services* (1994) 27
5 Cal.App.4th 1085, 1089-90; Conte & Newberg, *Newberg on Class Actions*, §§ 11.26 (4th ed. 2002)
6 (“Newberg”).) Reasonableness and fairness are presumed where: (1) the settlement is reached through
7 “arms-length bargaining;” (2) investigation and discovery are “sufficient to allow counsel and the court
8 to act intelligently;” (3) counsel is “experienced in similar litigation. . . .” (*Dunk v. Ford Motor Co.*
9 (1996) 48 Cal.App.4th 1794, 1802.) The presumption of fairness is consistent with California’s public
10 policy goal of favoring settlements. (*Stambaugh v. Super. Ct* (1976) 62 Cal.App.3d 231, 236 (“the law
11 wisely favors settlements”); *Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1118
12 (“public policy generally favors the compromise of complex class action litigation”); *7-Eleven Owners*
13 *for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1151 (“voluntary conciliation
14 and settlement are the preferred means of dispute resolution ... [t]his is especially true in complex class
15 action litigation”).)

16 Additionally, in reviewing the fairness of a class action settlement, due regard should be given
17 to what is “otherwise a private consensual agreement between the parties.” (*Cellphone Termination*
18 *Fee Cases* (2010) 186 Cal.App.4th 1380, 1389.) The inquiry “must be limited to the extent necessary
19 to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or
20 collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable
21 and adequate to all concerned.” (*Id.*)

22 1. The Parties Reached the Settlement Through Arm’s-Length Bargaining Led by
23 Experienced Counsel.

24 “[W]hat transpires in settlement negotiations is highly relevant to the assessment of a proposed
25 settlement’s fairness.” (*State v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 482.) Courts presume the
26 absence of fraud or collusion in the negotiation of a settlement, unless evidence to the contrary is
27 offered; thus, there is a presumption that settlement negotiations are conducted in good faith. (Newberg,
28 § 11.51.)

1 The Parties participated in mediation the highly respected mediator and former San Diego
2 Superior Court judge (Ret.) Hon. William Pate. Judge Pate managed the Parties' expectations and
3 provided a useful, neutral analysis of the issues and risks to both sides. (*In re Apple Computer, Inc.*
4 *Derivative Litig*, No. C 06-4128 JF (HRL), 2008 U.S. Dist. LEXIS 108195 (N.D. Cal. Nov. 5, 2008)
5 (mediator's participation weighs considerably against any inference of a collusive settlement);
6 *D'Amato v. Deutsche Bank* (2d. Cir. 2001) 236 F.3d 78, 85 (a "mediator's involvement in pre-
7 certification settlement negotiations helps to ensure that the proceedings were free of collusion and
8 undue pressure.")) At all times, the Parties' negotiations were at an arm's length, adversarial and non-
9 collusive. In fact, despite a full day of mediated negotiations, the Parties reached an impasse and the
10 mediation session concluded without a settlement. The matter resolved only after months of subsequent
11 litigation and settlement negotiations when Judge Pate issued a mediator's proposal that the Parties
12 accepted. Judge Pate only arrived at his proposal after hearing arguments, reviewing evidence and
13 evaluating the Parties' respective claims and defenses. JCL Dec., ¶ 22.

14 Once the Parties agreed to the Mediator's proposal, the Parties engaged in protracted negotiations
15 regarding the written terms of the class action settlement. The Parties maintained the arm's length, non-
16 collusive and adversarial negotiations while arriving at the final terms of the Settlement. The
17 Agreement is the final product of these mediated negotiations. Objectively, the Settlement terms are
18 fair, adequate and represent a reasonable compromise of the claims at issue. JCL Dec., ¶ 23.

19 2. Class Counsel's Thorough Investigation Provided an Objective Measurement of the
20 Settlement's Reasonableness.

21 As set forth in greater detail above, Class Counsel conducted a very thorough investigation into
22 the factual and legal issues in dispute. In addition to formal and informal discovery, witness interview,
23 document review, data analysis and legal research, Class Counsel also researched similar wage and
24 hour actions. Although no two cases are identical, this research provided Class Counsel with a marker
25 to inform settlement discussions and, ultimately, to measure this settlement against. The investigation
26 allowed to Class Counsel to realistically assess the value of Plaintiff's claims and intelligently engage
27 defense counsel in settlement discussions that culminated in the proposed settlement now before the
28 Court. JCL Dec., ¶¶ 14-20.

1 Class Counsel only agreed to enter the Settlement following thorough investigation and
2 evaluation of Plaintiff's claims. Based on their investigation of the facts, applicable law, and
3 marketplace for similar settlements, and in light of the risk of significant delay, uncertainty associated
4 with litigation, and the various defenses asserted by Defendant, Class Counsel firmly believes this
5 Agreement to be in the best interests of Settlement Class. Because the Settlement's terms are fair,
6 reasonable, and adequate, the Court should preliminarily approve the Settlement. JCL Dec., ¶ 24.

7 3. The Settlement Falls Within the Recognized Range of Reasonableness.

8 The Total Settlement Amount of \$100,000 is well within the range of reasonable for preliminary
9 approval. To determine whether a settlement is fair and reasonable, the court should "consider enough
10 information about the nature and magnitude of the claims being settled, as well as the impediments to
11 recovery, to make an independent assessment of the reasonableness of the terms to which the parties
12 have agreed." (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133.) In making this
13 determination, the court is "not to try the case" but rather "satisfy itself that the class action settlement
14 is within the 'ballpark of reasonableness.' " (*Id.* (emphasis added).) For this analysis, courts do "not
15 require any such explicit statement of value; [they] require[] a record which allows an understanding
16 of the amount that is in controversy and the realistic range of outcomes of the litigation. " (*Munoz v.*
17 *BCI Coca-Cola Bottling Co.* (2010) 186 Cal.App.4th 399, 409 (internal citation omitted).) The
18 reasonableness of a settlement is not dependent upon its actual value approaching the potential recovery
19 plaintiffs might have received if they had succeeded at trial.⁴ Indeed, "[t]he determination whether a
20 settlement is reasonable does not involve the use of a 'mathematical equation yielding a particularized
21 sum.' " (*Frank v. Eastman Kodak Co.* (W.D.N.Y. 2005) 228 FRD. 174, 186 (quoting *In re Michael*
22 *Milken and Assoc. Sec. Litig.* (S.D.N.Y. 1993) 150 F.R.D. 57, 66).)

23 ⁴ Federal district courts recognize that there is an inherent "range of reasonableness" in determining whether to approve a
24 settlement "which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs
25 necessarily inherent in taking any litigation to completion." *Newman v. Stein* (2d. Cir. 2002) 464 F.2d 689, 693; see *In re*
26 *Omnivision Tech, Inc.* (N.D. Cal. 2008) 559 F.Supp.2d 1036; see also *Nat'l Rural Telecomm. Coop. v. Directv. Inc.* (C.D.
27 Cal. 2004) 221 F.R.D. 523, 527 ("well settled law that a proposed settlement may be acceptable even though it amounts to
28 only a fraction of the potential recovery"); *In re Global Crossing Sec. and ERISA Litig.* (S.D.N.Y 2004) 225 F.R.D. 436,
460 ("settlement amount's ratio to the maximum potential recovery need not be the sole, or even dominant, consideration
when assessing settlements fairness"); *In re IKON Office Solutions, Inc Sec Litig.* (E.D. Pa. 2000) 194 F.R.D. 166, 184
("the fact that a proposed settlement constitutes a relatively small percentage of the most optimistic estimate does not, in
itself, weigh against the settlement; rather the percentage should be considered in light of strength of the claims"); *Officers*
for Justice v. Civil Serv. Comm. (9th Cir. 1982) 688 F.2d 615, 628 (it is "the complete package, taken as a whole rather than
the individual component parts, that must be examined for overall fairness").

1 **a. The Total Settlement Amount Meets the Recognized Range of**
2 **Reasonableness.**

3 The Total Settlement Amount of \$100,000 is fair and reasonable considering the nature and
4 magnitude of the claims being settled and the various potential impediments to recovery. Prior to
5 mediation, Class Counsel retained BCG to develop varied economic a damages model measuring
6 Defendant's liability exposure while accounting for the uncertainties of continued litigation. The model
7 was informed by Class Counsel's investigation, including the analysis of a significant sample of time
8 and payroll data. Class Counsel projected Defendant's liability exposure for the Settlement Class was
9 approximately \$311,338 for *damages* and \$561,141 for *damages and penalties* (excluding PAGA
10 penalties), if successful at trial. This estimate does not take into account the uncertainty regarding
11 several of Plaintiff's claims, together with the uncertainty surrounding derivative liability for inaccurate
12 wage statements and alleged waiting time penalties resulting from meal and rest period violations.
13 Thus, the Total Settlement Amount of \$100,000 represents approximately 32% of Defendant's liability
14 exposure for damages, and 17.8% of Defendant's liability exposure for damages and penalties, as
15 estimated by Class Counsel and BCG at the time of mediation. The following summarizes Defendant's
16 estimated exposure. JCL Dec., ¶ 24.

17 (1) Estimated Damages for Meal Period Violations

18 Plaintiff alleges that Defendant failed to provide compliant meal periods. Specifically, Plaintiff
19 alleges that because of their rigorous work schedules and Defendant's requirement that some of the
20 Class Members remain on duty for their breaks, Plaintiff and the Settlement Class Members, regularly
21 worked through what should have been off-the-clock and duty-free meal periods without compensation.
22 Consequently, Plaintiff alleges that he is owed meal period premiums and compensation for the off-
23 the-clock work performed during what should have been his duty-free meal periods. JCL Dec., ¶ 25.

24 Labor Code 512 requires employers to provide employees with thirty (30) minute uninterrupted
25 and duty-free meal period within the first five hours of work. Moreover, an employee who works more
26 than ten (10) hours per day is entitled to receive a second thirty (30) minute uninterrupted and duty-free
27 meal period. Pursuant to Labor Code§ 512, an employer may not employ an employee for a work period of
28 more than ten (10) hours, without providing the employee with a second meal period of not less than thirty

(30) minutes. Moreover, the second meal period may not be waived if the total hours worked is more than twelve (12) hours. California Lab. Code § 226.7(c) provides that "if an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including ... an ... order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided."

Defendant argued that it fully complied with California meal period laws and maintained legally compliant policies and practices. Courts have found that where an employer's meal period policies are compliant, individualized issues exist as to the reasons for missed, late or truncated meal periods. *See e.g. Lampe v. Queen of the Valley Medical Center*, 19 Cal.App.5th 832, 851 (2018) (holding that although only 11.1% of the employees' time punches for meal periods were within the first 5 hours, the claim was not certifiable because individualized issues existed as to the reasons for the late meal periods). JCL Dec., ¶ 26.

Further, Defendant argued that many of the Settlement Class members executed valid On-Duty Meal Period Waivers, and that only a small number of Class Members were subject to the on-duty meal break agreements. Again, if successful, Defendant availed itself to a significant defense of Plaintiff's meal period claim. Plaintiff estimated that this claim gives rise to approximately \$112,465 in liability. JCL Dec., ¶ 27. Furthermore, Defendant argued that it had valid, signed, and enforceable arbitration agreement with approximately one half of the putative class which, it argued, would have precluded their participation in any class proceeding.

(2) Estimated Damages for Rest Period Violations

Plaintiff also alleged that Defendant failed to provide compliant rest periods. Specifically, Plaintiff alleged that as a result of their rigorous work schedule they were not able to take timely and duty-free rest periods. JCL Dec., ¶ 28. WC Wage Orders 5-2001 and 7-20017 provide that "[a]uthorized rest period times shall be counted as hours worked for which there shall be no deduction from wages." Lab. Code § 226.7(c) provides that "if an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including ... an ... order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that

1 the meal or rest or recovery period is not provided."

2 Again, Defendant denied liability and asserted that it maintained legally compliant rest period
3 policies and practices throughout the Class Period. Moreover, Plaintiff recognizes the evidentiary
4 burdens establishing this claim. Establishing Plaintiff's rest period claim would rely, almost entirely,
5 on Class Member testimony, making it a riskier claim at class certification and liability stages.
6 Defendant likely would have argued that only a small number of Class Members missed their rest
7 breaks, and that any omitted breaks were of Class Members voluntary volition. Certification likely
8 would have required depositions of Class Members who provided declarations, and Defendant surely
9 would have obtained opposing declarations stating either rest breaks were taken, or rest breaks were
10 voluntarily waived. *See, e.g., Ordonez v. Radio Shack, Inc.* (C.D. Cal. Jan. 17, 2013) 2013 WL 210223,
11 at *11 ("Because of the competing testimony before the Court, plaintiff's evidence that defendant may
12 have an illegal, written rest break policy is insufficient for this Court to find that common issues
13 predominate."); *Villa v. United Site Servs. of California, Inc.* (N.D. Cal. Nov. 13, 2012) 2012 WL
14 5503550, at *8 ("Indeed, Plaintiff's own evidence confirms that the written policy does not generate
15 uniform practices."). The rest break claim was estimated to give rise to \$160,572 in liability. JCL Dec.,
16 ¶ 28.

17 (4) Exposure for Unpaid Wages

18 Plaintiff alleged that during portions of the Class Period, Defendant failed to pay Plaintiff and
19 the Class Members for all hours worked, including time worked for more than 8 hours in a single work
20 shift. More specifically, Plaintiff alleged that because Plaintiff and Class Members had to work during
21 what should have been their off-duty meal periods, they were also underpaid for wages, including
22 overtime wages. JCL Dec., ¶ 29.

23 Defendant denied Plaintiff's allegations and argued that its meal break policies and practices
24 were compliant with California law, and did not result in any work off-the-clock. Defendant kept all
25 time worked, and required employees to certify the accuracy of same. Plaintiff's consultant estimated
26 Defendant's exposure for the unpaid wages claim at approximately \$38,301. JCL Dec., ¶ 29.

27 (5) Exposure for Wage Statement Violations and Waiting Time Penalties
28

1 Generally, Plaintiff alleges that Defendant's aforementioned violations resulted in derivative
2 violations of Labor Code sections 203 and 226(a). Plaintiff also alleged that Defendant failed to include
3 the employer's address on wage statements issued to Class Members in violation of section 226(a).
4 Class Counsel considered the arguable presence of various penalties and weighed the potential
5 recoveries against probable defenses. Specifically, Defendant could argue that Plaintiff could not prove
6 the "willful" prong needed to obtain waiting time penalties under Cal. Lab. Code § 203. Additionally,
7 Defendant could argue that Plaintiff could not show that Class Members suffered an "injury" because
8 of wage statement violations, as required by Cal. Lab. Code § 226. Defendant could also argue that
9 that meal and rest period violations do not entitled employees like Plaintiff and the Settlement Class
10 Members to pursue the derivative waiting time and itemized wage statement penalties. JCL Dec., ¶ 32;
11 *See Naranjo v. Spectrum Security Services, Inc.*, (2019) 40 Cal. App. 5th 444; *Maldonado v. Epsilon*
12 *Plastics, Inc.* (2018) 22 Cal. App. 5th 1308.) Although the Settlement Class arguably could have seen
13 a payout of nearly \$1.1 million for these penalties if Plaintiff prevailed on every penalty claim, Plaintiff
14 would not recover any derivative penalties if they failed to prove the underlying claims. Moreover,
15 Plaintiff would have to overcome damaging precedent to prove the Class deserved the penalties. JCL
16 Dec., ¶ 30; *See, e.g., Howard v. CVS Caremark Corp.*, 2014 U.S. Dist. LEXIS 172406 (C.D. Cal. Dec.
17 9, 2014) (denying class certification for the same penalty claims); *Alonzo v. Maximus, Inc.*, 832 F.
18 Supp. 2d 1122, 1134-1137 (C.D. Cal. 2011) (finding insufficient evidence of bad faith or actual injury).
19 The wage statement and waiting time claims were estimated to give rise to \$249,803 in liability. JCL
20 Dec., ¶ 30.

21 (6) Defendant's PAGA Exposure

22 Class Counsel's damage models also estimated Defendant's exposure for PAGA penalties arising
23 from the aforementioned violations. At the time of mediation, Plaintiff estimated Defendant's PAGA
24 exposure at approximately \$586,800. JCL Dec., ¶ 31.

25 Under PAGA, Courts have considerable discretion to reduce the penalty award. In *Fleming v.*
26 *Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011), a federal court reduced PAGA penalties
27 from \$2,800,000 to \$500,000, a reduction of 82.2%, because the court found maximum penalties
28 "unjust" because the employees had suffered no injuries. Some trial courts have actually awarded no

civil penalties, even when Labor Code violations are established. *See also In re Nordstrom Com. Cases*, 186 Cal.App.4th 576, 589 (2010) (affirming an award of \$0 in PAGA penalties in a wage and hour class action); *In re Taco Bell Wage & Hour Actions*, 2016 U.S. Dist. LEXIS 48557, *40-43 (E.D. Cal. Apr. 6, 2016) (PAGA penalties denied after trial).

In order to recover any PAGA penalties, Plaintiff would be required at trial to prove each of the underlying Labor Code violations. *See Cardenas v. McLane Foodservice, Inc.*, 2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011) ("Given the statutory language [of PAGA], a plaintiff cannot recover on behalf of individuals whom the plaintiff has not proven suffered a violation of the Labor Code by the defendant."). Here, Plaintiff would need to prove that each Aggrieved Employee suffered a violation for each pay period the employee worked. Again, Defendant raised several defenses that presented serious threats to the claims of the Plaintiff and the Aggrieved Employees. Defendant asserted that the employment practices complied with all applicable Labor Laws. In addition to those arguments discussed *supra*, Defendant also argued that the Court of Appeals decision in *Cacho v. Eurostar, Inc.* (2019) 43 Cal.App.5th 885, weakened Plaintiff's claims, on liability, value, and manageability as to the rest period claims. In all, Plaintiff's PAGA liability exposure is hotly contested. JCL Dec., ¶ 32.

Accordingly, the Gross Settlement Fund of \$100,000 represents approximately 32% of Defendant's liability exposure for damages, and 17.8% of Defendant's liability exposure for damages and penalties, as estimated by Class Counsel and BCG at the time of mediation. JCL Dec., ¶ 24. This is well within the bounds of reasonableness. (*See Viceria v. Mistras Grp., Inc.* (N.D. Cal. 2016) 2016 WL 5907869, at *3, 7 (approving a California wage and hour settlement where the class received 11.6% of the estimated total liability); *Leverage v. Traeger Pellet Grills, LLC* (N.D. Cal. 2017) 2017 WL 2797811, at *7 (Approving a California wage and hour settlement where the class received 18% of the estimated total liability); *Stovall-Gusman v. W.W. Granger, Inc.*, (N.D. Cal. 2015) 2015 WL 3776765 at * 4 (Approving California wage and hour misclassification settlement where the class received approximately 7.3% of the estimated trial award was within the "range of reasonableness."))

b. Inherent Risks of Continued Litigation Support Preliminary Approval.

"It can be difficult to ascertain with precision the likelihood of success at trial. The Court cannot and need not determine the merits of the contested facts and legal issues at this stage, [Citation], and to

the extent courts assess this factor, it is to ‘determine whether the decision to settle is a good value for a relatively weak case or a sell-out of an extraordinary strong case.’” (*Misra v. Decision One Mortg. Co.* (C.D. Cal. 2009) 2009 WL 4581276, at *7.)

With respect to the most immediate challenge, i.e., class certification, the risks attendant to the certification of similar wage and hour claims are demonstrated by *Donohue v. AMN Services, LLC* (2018) 29 Cal.App.5th 1068 (cert granted.) In *Donohue*, Fourth District Court of Appeal affirmed Hon. Joel Pressman’s denial of class certification for missed meal and rest periods by call center employees. (*See also O’Conner v. Uber Technologies, Inc.* (9th Cir. 2018) 904 F.3d 1087 (decertification of wage and hour misclassification action); *see also Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, 31 (reversing a trial verdict in favor plaintiffs in a wage and hour class action)); *Tien v. Tenet Healthcare Corp.* (2012) 209 Cal.App.4th 1077, 1088 (“[T]he reason, if any, that employees might not take their breaks were predominantly individualized questions of fact not susceptible to class treatment.”); *Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333, 1341 (affirming denial of certification because employees’ declarations attesting to having taken meal and rest breaks demonstrated that individualized inquiries were required to show harm); *Campbell v. Best Buy Stores, L.P.*, (C.D. Cal. 2013) 2013 WL 5302217 at *11-13 (following *Brinker* and denying certification of proposed off-the-clock and rest and meal break classes due to lack of uniform policy); *Brown v. Fed Express Corp.* (C.D. Cal. 2008) 249 F.R.D. 580, 587-88 (denying certification of driver meal and rest period claims based on the predominance of individual issues).) Plaintiff is confident about the strength of his claims. Nonetheless, Plaintiff recognizes that Defendant has factual and legal defenses that, if successful, would potentially defeat or substantially impair the value of Plaintiff’s lawsuit. Collectively, the examples cited above illustrate the uncertain nature of class litigation. Consequently, the uncertainty of obtaining certification through a contested motion is a significant risk factor favoring settlement. JCL Dec., ¶ 33.

“The Settlement eliminates these and other risks of continued litigation, including the very real risk of no recovery after several years of litigation.” (*In re Nvidia Derivs. Litig.* (N.D. Cal. 2008) 2008 WL 5382544, at *3.) Indeed, potential appeals aside, litigating a complex case through trial is inherently perilous regardless of the strengths of merits of the claims:

[N]othing is assured when litigating against commercial giants with vast litigative resources, particular in such complex litigation as this, which would strain the cognitive capacities of any jury. Defense judgments were hardly beyond the realm of possibility. Accordingly, this factor weighs in favor of preliminary approval.

(*Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1140, *opinion modified* (June 18, 1990).)

Finally, continuing to litigate this action would require continued and extensive resources coupled with significant Court time to proceed through trial and post-trial motions; which can often take years. Furthermore, wage and hour litigation are complex and expensive, as it often necessitates extensive expert testimony, particularly with regards to damages. But even if Plaintiff is successful at trial, Plaintiff is acutely aware that a judgment does not end the litigation. Plaintiff fully expects that Defendants would appeal any favorable judgment. JCL Dec., ¶¶ 34. “Avoiding such a trial and the subsequent appeals in this complex case strongly militates in favor of settlement rather than further protracted and uncertain litigation.” (*Nat’l Rural Telecomms. Coop v. DirecTV* (C.D. Cal. 2004) 221 F.R.D. 523, 527.) Thus, “unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.” (*Id.* at 526.)

In this matter, Class Counsel negotiated a Total Settlement Amount of \$300,000 that is roughly between 17.8% and 32% Defendant’s maximum liability exposure. Given the amount of the settlement here, as compared to potential value of the claims, offset by the various inherent risks to continued litigation, the settlement is fair and reasonable. JCL Dec., ¶ 35.

B. The Proposed Notice Informs the Class about the Case and Settlement

The Settlement Class is entitled to the best practical notice under the circumstances. (*Kass v. Young* (1977) 67 Cal.App.3d 100, 106.) The purpose of the notice is to give class members sufficient information to decide whether they should accept the benefits offered, opt out and pursue their own remedies, or object to the settlement. (*Trotsky v. Los Angeles Fed Savings & Loan Assn.* (1975) 48 Cal. App. 3d 143, 151-52.) The notice must advise class members “that they may be excluded from the class if they so request and that they will be bound by the judgment, whether favorable or not, if they do not request exclusion.” (*Kass*, 67 Cal.App.3d at 106.) In a case such as this involving a significant number

of class members, California authorities generally require service of the class notice by mail or similar reliable means. (*Chance v. Super. Ct.* (1962) 58 Cal.2d 275, 290; *Cart v. Super. Ct.* (1975) 50 Cal.App.3d 960, 972.)⁵

The Parties jointly drafted the Class Notice which fairly and neutrally informs the Settlement Class of their rights and remedies in this action. The Settlement Administrator will first verify addresses, then mail the proposed Class Notice to entire Settlement Class. The Notice will include information regarding the nature of the lawsuit, a summary of the substance of the Settlement's terms, the class definition, the procedure and time period within which to requests for exclusions or objections to the Settlement, the date for the final approval hearing, the formula used to calculate settlement payments, and the terms and scope of the Released Claims. This method was negotiated by the Parties to ensure delivering the most reasonable method of notice to the Settlement Class while ensuring cost effective administration of the Settlement. JCL Dec., ¶¶36-37.

Accordingly, both the method of disseminating the Class Notice and content of the Class Notice satisfy due process and the requirements of California law. (See C.R.C. 3.776(e)-(f); *State of Cal. v. Levi Strauss* (1986) 41 Cal.3d 460,485 (the class notice must "fairly apprise the class members of the terms of the proposed compromise and of the options open to dissenting class members.").)

C. The Court Should Preliminarily Approve the Class Representative Enhancement Award

Enhancement payments "are fairly typical in class action cases." (*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1393 (affirming incentive awards of \$10,000); *Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958, citing 4 Newberg on Class Actions (4th ed. 2002) § 1 1:38, and Eisenberg & Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303 (2006).) Enhancement payments "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." (*Rodriguez*, 563 F.3d at 958-59.) "[T]he rationale for making enhancement or incentive awards to

⁵ Due process does not require that each class member actually receive a notice, but rather a procedure reasonably certain to reach class members. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1789, at 253 (2d ed. 1986). If appropriate notice is given, class members will be bound by the judgment even if they never actually receive the notice. *Fontana v. Elrod* (7th Cir. 1987) 826 F.2d 729, 732.

1 named plaintiffs is that they should be compensated for the expense or risk they have incurred in
2 conferring a benefit on other members of the class.” (*Clark v. American Residential Services LLC*
3 (2009) 175 Cal.App.4th 785.)

4 Approximately 104 members of the Settlement Class will share in the Net Settlement Amount
5 due entirely to the effort and commitment of Plaintiff. Subject to Court approval, therefore, the
6 Settlement provides for a Class Representative Service Award of \$7,500⁶ for Plaintiff. The service
7 award is fair and reasonable compensation for Plaintiff’s efforts bringing the action, assisting Class
8 Counsel with the litigation and settlement, regularly conferring with Class Counsel on the status of his
9 case and the strategies for prosecuting the claims, reviewing the proposed Settlement to ensure that its
10 terms are fair and provide adequate relief for the Settlement Class, and agreeing to provide Defendant
11 a general release of all claims arising out of his employment. JCL Dec., ¶ 38.

12 Class Counsel on behalf of Plaintiff will file a formal motion for the negotiated Class
13 Representative Service Award once preliminary approval of the Settlement is granted. Plaintiff
14 respectfully submits that the above showing is sufficient for preliminary approval of the negotiated

15
16 ⁶ The amount of the requested enhancement payment-\$7,500-is reasonable by reference to the amounts that California courts (both federal
17 and state) have repeatedly found to be reasonable for wage and hour class action settlements: *See Baker v. LA. Fitness Int’l, LLC*, No.
18 BC438654 (L.A. County Super. Ct. Dec. 12, 2012) (awarding \$10,000 enhancement payments to three of the named plaintiffs); *Blue v.*
19 *Codwell Banker Residential Brokerage Co.*, No. BC417335 (L.A. County Super. Ct. Mar. 21, 2011) (awarding \$10,000 enhancement
20 payment); *Buckmire v. Jo-Ann Stores, Inc.*, No. BC394795 (L.A. County Super. Ct. June 11, 2010) (awarding \$10,000 enhancement
21 payments to the named plaintiff); *Coleman v. Estes Express Lines, Inc.*, No. BC429042 (L.A. County Super. Ct. Oct. 3, 2013) (awarding
22 \$10,000 enhancement payment); *Ethridge v. Universal Health Services, Inc.*, No. BC391958 (L.A. County Super. Ct. May 27, 2011)
23 (awarding \$10,000 enhancement payment); *Hickson v. South Coast Auto Insurance Marketing, Inc.*, No. BC390395 (L.A. County Super.
24 Ct. Mar. 27, 2012) (awarding \$10,000 enhancement payment); *Hill v. Sunglass Hut Int’l, Inc.*, No. BC422934 (L.A. County Super. Ct. July
25 2, 2012) (awarding \$10,000 enhancement payments to the named plaintiffs); *Kabamba v. Victoria’s Secret Stores, LLC*, No. BC368528
26 (L.A. County Super. Ct. Aug. 19, 2011) (awarding enhancement payments of \$ 10,000 to the named plaintiffs along with additional
27 compensation for their general release of claims); *Magee v. American Residential Services, LLC*, No. BC423798 (L.A. County Super. Ct.
28 Apr. 21, 2011) (awarding \$15,000 enhancement payment); *Mares v. BFS Retail & Commercial Operations, LLC*, No. BC375967 (L.A.
County Super. Ct. June 24, 2010) (awarding \$15,000 enhancement payments to the named plaintiffs); *Nevarez v. Trader Joe’s Co.*, No.
BC373910 (L.A. County Super. Ct. Jan. 29, 2010) (awarding \$10,000 enhancement payment); *Ordaz v. Rose Hills Mortuary, LP.*, No.
BC386500 (L.A. County Super. Ct. Mar. 19, 2010) (awarding 10,000 enhancement payments to the named plaintiffs); *Sheldon v. AHMC*
Monterey Park Hospital LP, No. BC440282 (L.A. County Super. Ct. Feb. 22, 2013) (awarding \$10,000 enhancement payment); *Silva v.*
Catholic Moray Services, Inc., No. BC408054 (L.A. County Super. Ct. Feb. 8, 2011) (awarding \$10,000 enhancement payments to the
named plaintiffs); *Weisbarth v. Banc West Investment Services, Inc.*, No. BC422202 (L.A. County Super. Ct. May 24, 2013) (awarding
\$10,000 enhancement payment); *Zamora v. Balboa Life & Casualty LLC*, No. BC360026 (L.A. County Super. Ct. Mar. 7, 2013) (awarding
\$25,000 enhancement payments to the named plaintiffs); *Acheson v. Express, LLC*, No. 109CV135335 (Santa Clara County Super. Ct.
Sep. 13, 2011) (awarding \$10,000 enhancement payment); *Aguilar v. Cingular Wireless, LLC*, No. CV 06-8197 DDP (AJWx) (C.D. Cal.
Mar. 17, 2011) (awarding \$14,767 enhancement payment); *Bejarano v. Amerisave Mortgage Corp.*, No. EDCV 08-00599 SGL (Opx)
(C.D. Cal. June 22, 2010) (awarding \$10,000 enhancement payment); *Carbajal v. Sally Beauty Supply LLC*, No. CIVVS 1004307 (San
Bernardino Super. Ct. Aug. 6, 2012) (awarding \$10,000 enhancement payments to the named Plaintiffs); *Contreras v. Serco Inc.*, No. 10-
cv-04526-CAS-JEMx (CD. Cal. Sep. 10, 2012) (awarding \$10,000 enhancement payment); *Guerrero v. R.R. Donnelley & Sons Co.*, No.
RIC 10005196 (Riverside Super. Ct. July 16, 2013) (awarding \$10,000 enhancement payment); *Kisliuk v. ADT Security Services, Inc.*, No.
CV08-0324 DSF (RZx) (C.D. Cal. Jan. 10, 2011) (awarding \$10,000 enhancement payment); *Morales v. BCBG Maxaria Int’l Holdings,*
Inc., No. JCCP 4582 (Orange County Super. Ct. Jan. 24, 2013) (awarding \$10,000 enhancement payment); and *Barrett v. Doyon Security*
Services, LLC, Nos. BS900199, BS900517 (San Bernardino County Super. Ct. Apr. 23, 2010) (awarding \$10,000 enhancement payment).

Class Representative Service Award. JCL Dec., ¶ 39.

D. The Court Should Preliminarily Approve the Negotiated Class Counsel Award

The purpose of a Class Counsel Award in class action litigation is to reward counsel who took the risk of non-payment and invested in a case that achieved a substantial positive result for the class. California courts routinely award attorneys' fees equaling one-third or more of the potential value of the common fund, the amount requested under this settlement. (*See Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66 n.11 ("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."); Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, *J. of Empirical Legal Studies*, Vol. 1, Issue 1, 27-78, March 2004, at 35 (independent studies of class action litigation nationwide have come to a similar conclusion that a one-third fee is consistent with market rates).)

Class Counsel took this matter on a contingency fee basis and invested significant time and expense successfully prosecuting Plaintiff's claims. As discussed *supra*, the estimated average Individual Settlement Share illustrates the demonstrably positive outcome for the Settlement Class Members. The Agreement provides for a Class Counsel Award in the amount of one-third of the Total Settlement Amount and litigation costs and expenses not to exceed \$12,500. Agreement at §III(M)(10). In light of the positive outcome for the Settlement Class, and in light of the supporting authority, the proposed Class Counsel award is fair and reasonable. JCL Dec., ¶ 40.

Plaintiff will file a formal motion for the negotiated Class Counsel Award once preliminary approval of the Settlement is granted. Plaintiff respectfully submits that the above showing is sufficient for preliminary approval of the negotiated attorneys' fees. JCL Dec., ¶ 41.

E. California Law Authorizes Provisional Certification for Settlement Purposes

For the exclusive purpose of Settlement, Plaintiff contends, and Defendant does not dispute, that provisional certification of the Settlement Class is appropriate. JCL Dec., ¶ 42.

1. The California Standard for Class Certification

Class actions are statutorily authorized "when the question is one of common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the

1 court” (*Cal.Civ.Proc.* Code § 382; *Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325, 1332.) Class
2 certification is appropriate when there is an “ascertainable class and a well-defined community of
3 interest among class members.” (*Sav-On Drug Stores, Inc.* (2014) 34 Cal.4th 319, 326.) Class treatment
4 is appropriate even if class members at some point may be required to make an individual showing as
5 to eligibility for recovery. (*Bufile v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1207;
6 *Sav-On*, 34 Cal.4th at 333.)

7 2. The Proposed Settlement Class is Ascertainable and there is a Well-Defined
8 Community of Interest Among the Settlement Class Members.

9 Whether a class is “ascertainable” within the meaning of Code of Civil Procedure Section 382
10 is “determined by examining (1) the class definition, (2) the size of the class, and (3) the means available
11 for identifying class members.” (*Lee*, 166 Cal.App.4th at 1334.) Class members are ascertainable where
12 they may be readily identified without unreasonable expense or time by reference to official records.
13 (*Id.*)

14 The community of interest requirement embodies three factors: (1) predominant common
15 questions of law or fact; (2) a class representative with claims or defenses typical of the class; and (3)
16 a class representative and counsel who can adequately represent the class. (*Cal. Civ. Proc. Code* § 382.)

17 In April of 2012, the California Supreme Court expounded on the element of predominance:
18 The “ultimate question” the element of predominance presents is whether “the issues which may be
19 jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial
20 that the maintenance of a class action would be advantageous to the judicial process and to the litigants.”
21 (*Brinker*, 53 Cal. 4th at 1021-1022 (citations omitted).)

22 Generally, the proposed Settlement Class consists of all of Defendant’s current and former
23 California employees during the Class Period. Defendant’s records show that the Settlement Class
24 Members consists of approximately 104 individuals, making joinder of all Settlement Class Members
25 impracticable. Further, because all Settlement Class Members are Defendant’s current and former
26 employees, the class is readily ascertainable from Defendant’s regular business records, i.e., payroll
27 records. JCL Dec., ¶ 43.

28 The California statutes relating to each of Plaintiff’s claims apply with equal force and effect to

the entire Settlement Class. Factually, Defendant's policies and practices applied to the putative Class. The wage and hour issues are both numerous and substantial, and a class action is the most advantageous method of dealing with the claims of the Settlement Class. JCL Dec., ¶ 44.

Plaintiff's wage and hour claims are typical of the proposed Settlement Class because they arise from the same factual basis and are based on the same legal theories applicable to the other Class Members. Likewise, Plaintiff's interests are entirely coextensive with the interests of the Settlement Class. Plaintiff alleges that they were injured by the same company-wide practices to which the proposed Settlement Class was subject and seeks the same relief. Plaintiff has already demonstrated his ability to advocate for the interests of the Settlement Class by initiating this litigation, undertaking class discovery, and evaluating the proposed settlement to assure that it is fair. JCL Dec., ¶ 45.

Additionally, Plaintiff is represented by competent Class Counsel who has extensive experience in litigating wage and hour class action cases. Class Counsel successfully briefed, argued, certified, and gained state court settlement approval of the same class-wide causes of action that are at issue in this case. Class Counsel's wage and hour class action experience establishes that they are well qualified to represent the interests of this Class. JCL Dec., ¶¶ 47-54.

A class action is superior to a multitude of individual lawsuits. Given the size and amount of each individual Settlement Class Member's claim, Class Settlement Members likely have little incentive to litigate their claims on an individual basis because the out-of-pocket expense and personal commitment necessary to litigate each claim outweighs any potential recovery. In sum, class treatment is superior to individual, case-by-case adjudication. JCL Dec., ¶ 46.

IV. CONCLUSION

The Parties have negotiated a fair and reasonable settlement of claims. Having appropriately presented the materials and information necessary for preliminary approval, the Parties request that the Court preliminarily approve the settlement.

Dated: January 21, 2022

JCL LAW FIRM, APC

By: 
Jean-Claude Lapuyade, Esq.