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13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **FOR THE COUNTY OF SAN MATEO**
15 **(UNLIMITED JURISDICTION)**

16 CARLOS SIMON, on behalf of himself, and
17 all others similarly situated, and as an
18 “aggrieved employee” on behalf of other
19 “aggrieved employees” under the Labor Code
20 Private Attorneys General Act of 2004,

21 *Plaintiff(s),*

22 vs.

23 AIRPORT VAN RENTAL, INC., a California
24 corporation; YAZDAN IRANI, a natural
25 person; and DOES 1 through 50, inclusive,

26 *Defendant(s).*

Case No.: CIV536624

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

Hearing Date: December 27, 2017

Hearing Time: 1:30 p.m.

Hearing Dept.: 2, Hon. Marie S. Weiner



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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Carlos Simon ("Plaintiff" or "Simon") submits this memorandum of points and authorities in support of his unopposed motion for preliminary approval of the Stipulation of Class Action Settlement and Release (the "Settlement")², which provides for a Gross Settlement Fund ("GSF") of \$300,000 in compromise of all disputed claims on behalf of all persons Defendants Airport Van Rental, Inc. ("AVR" or "Airport Van Rental") and Yazdan "Yaz" Irani (collectively "Defendants") employed in California as hourly employees during the Class Period. Through this motion, Plaintiff respectfully requests for this Court to (1) provisionally certify the below-defined Class for settlement purposes only under Code of Civil Procedure § 382; (2) preliminarily approve the Settlement; (3) provisionally appoint Plaintiff as Class Representative; (4) appoint David Spivak of The Spivak Law Firm and Walter Haines of the United Employees Law Group 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 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 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 Members an opportunity to be heard regarding the Settlement and to give it finality. Further, the § 1542 release only pertains to Plaintiff in exchange for the Enhancement Award he will receive (if approved by the Court) under the Settlement. 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

AVR, a California corporation, is a vehicle rental business. Defendants employed Plaintiff as a rental agent from approximately November of 2012 to approximately July 12, 2014, and from approximately September of 2014 to approximately August 5, 2015. As set forth in the

² The Settlement is attached as Exhibit 1 to the Declaration of David Spivak ("DS"), which is submitted herewith under a separate cover.



1 Action, Plaintiff alleges Defendants failed to correctly pay its hourly non-exempt employees
2 working in California overtime wages at the correct rate; failed to provide lawful meal breaks or
3 pay required premiums; failed to timely pay all wages owed during employment or upon
4 termination; failed to provide lawful itemized wage statements; failed to maintain proper
5 employment records; and by so doing, engaged in unfair competition. Plaintiff has claimed, and
6 continues to claim, that his contentions have merit and give rise to Defendants' liability. DS ¶ 4.

7 By a letter dated December 2, 2015, Plaintiff, on behalf of himself and other aggrieved
8 employees, gave written notice by certified mail to the California Labor and Workforce
9 Development Agency ("LWDA") and Defendant AVR of violations of California Labor Code §§
10 201, 202, 203, 204, 226, 226.7, 510, 512, 1174, 1194, 1197, and 1198. DS ¶ 5, Exhibit 2. In his
11 September 17, 2015 letter, Plaintiff defines the aggrieved employees as all of Defendant AVR's
12 current and former hourly rental agents. *Id.*

13 On December 15, 2015, Plaintiff filed his class action lawsuit against AVR in San Mateo
14 County Superior Court. DS ¶ 6, Exhibit 3. Simon alleged four causes of action: (1) failure to pay
15 for all hours worked at the correct rates of pay, (2) failure to provide rest periods, (3) failure to
16 provide meal periods, (4) failure to provide accurate written wage statements, (5) waiting time
17 penalties, and (6) unfair competition. *Id.* On January 8, 2016, Plaintiff filed a first amended
18 complaint adding a sixth cause of action for civil penalties under the Labor Code Private
19 Attorneys General Action, Labor Code §§ 2698, *et seq.* ("PAGA"). DS ¶ 6, Exhibit 4. On
20 December 1, 2017, Plaintiff filed a second amended complaint that adds Yazdan "Yaz" Irani,
21 Airport Van Rental's part owner and chief executive officer, as a Defendant. In the Action,
22 Plaintiff alleges various wage and hour violations and seeks recovery on behalf of himself and
23 "All persons Defendants employed in California as hourly employees, including rental agents,
24 and in other comparable positions at any time during the period beginning four years prior to the
25 filing of this action and ending on the date that final judgment is entered in this action." DS ¶ 6,
26 Exhibit 5.

27 On August 10, 2016, the Parties attended and participated in good faith, arms' length
28 settlement discussions at a mediation session with Jeffrey L. Krivis, Esq., a highly experienced
professional mediator, after which they agreed to settlement terms which are encompassed in and
superseded by this Settlement. 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. The Parties conducted significant investigation of the facts and law applicable to the Action, including, inter alia, extensive review and analysis of voluminous documents including Defendants' employment policies, and procedures, interviews of potential witnesses, data analysis including payroll records and records of time worked and work performed by counsel and experts, meetings and conferences between counsel for the Parties before, during and after mediation, as well as the financial position of the Defendant AVR and have diligently pursued investigation of claims alleged against Defendants. DS ¶ 7.

As part of their settlement negotiations, Defendants disclosed certain financial records to Plaintiff's Counsel under a declaration under penalty of perjury by Defendant Yazdan "Yaz" Irani dated December 1, 2017. Plaintiff's Counsel have reviewed the declaration and the financial records attached to it. Based on such records and representations in the declaration, Plaintiff, on his own behalf and on behalf of the Class Members, has agreed to settle the lawsuit on the terms set forth herein.³ DS ¶ 8.

Counsel for the Parties have further investigated the applicable law as applied to the facts discovered regarding Plaintiff's claims, the defenses thereto, the Defendant AVR's ability to pay any settlement and the damages and penalties claimed by Plaintiff in the Action, and exchanged extensive data, documents and information regarding the claims prior to the mediation and negotiating the Settlement. Based on their own independent investigation and evaluation, Plaintiff and Class Counsel believe that this Settlement is fair, reasonable, and adequate and is in the best interest of the Settlement Class in light of all known facts and circumstances, including the financial position of the Defendant AVR, the risks of significant delay, denial of a motion for class certification, decertification, defenses asserted by Defendants, and potential appellate issues. Now that the Parties have finalized the long-form Settlement, Plaintiff submits it to this Court for preliminary approval. DS ¶ 9.

III. OVERVIEW OF SETTLEMENT

A. Settlement Class Definition

"Class Members" (collectively referred to as the "Class") are all persons Defendants employed in California as hourly employees, including rental agents, and in other comparable positions at any time during the Class Period. For purposes of this Settlement, the "Class Period"

³ If the Court wishes to examine the financial records, the Parties will produce them with Mr. Irani's declaration under seal for *in camera* review.



means December 15, 2011 through the date of preliminary approval of the Settlement by the Court. The “Settlement Class Members” (collectively referred to as the “Settlement Class”) mean those Class Members who do not timely and validly exclude themselves from the Settlement in accordance with the requirements set forth in the Settlement. Settlement, ¶¶ 3, 8. Defendants represent that as of August 10, 2016, there were approximately 95 Class Members. Settlement, ¶ 3. There are currently 106 Class Members. The class definition in the operative complaint falls within the Class definition. As such, the Class does not exclude any putative class members or claims currently covered by the operative complaint. DS, ¶ 10.

B. Monetary Terms

In consideration for the release of all claims of the Settlement Class Members against Defendants (described more fully below), Defendants agreed to pay an amount not to exceed Three Hundred Thousand Dollars (\$300,000) (the “Gross Settlement Fund” or “GSF”) as a full and complete settlement of all claims arising from the Action. Settlement, ¶ 15. The GSF is all-inclusive and in no event will Defendants be required to pay any amounts above the GSF under this Settlement. *Id.*

The “Net Settlement Fund” (“NSF”) is the funds available for distribution to Participating Class Members after payments have been made from the GSF for (1) Fee Award for attorneys’ fees of not more than one third of the GSF (\$100,000) and litigation costs (“Expense Award”) not to exceed fifteen thousand dollars (\$15,000), (2) Enhancement Award of not more than \$5,000 (3) PAGA Payment of \$1,000, (from which \$250 (25%) will be payable to the Settlement Class as part of the NSF and \$750 (75%) will be payable to the California Labor and Workforce Development Agency (“LWDA”)), and (4) Administration Costs of not more than \$9,000. Settlement, ¶¶ 15-16, 22-23.

The Parties agreed that the total amount actually distributed to all Participating Class Members will equal at least 50% of the NSF (the “Guaranteed Minimum Payout”). Accordingly, if the total estimated Individual Settlement Awards claimed by Participating Class Members equals less than 50% of the NSF, the Claims Administrator will proportionately increase the Individual Settlement Awards for each Participating Class Member to ensure that the total payout to Participating Class Members equals the Guaranteed Minimum Payout. Any unclaimed amounts above 50% of the NSF will be and remain the exclusive property of Defendants. Settlement, ¶ 19.



1 The estimated payment to each Class Member will be determined as follows. “Qualifying
2 Workshift” means each workshift an individual worked for Defendants in a position covered by
3 the definition of Class Member during the Class Period. The Claims Administrator will
4 determine the actual amount of qualified workshifts that each employee has worked during the
5 Class Period and each employee will be entitled to a proportional share of the NSF based on the
6 number of Qualified Workshifts he or she has worked. *Id.*, ¶18. One half (50%) of each
7 Individual Settlement Award will be allocated as wages and the remaining will be allocated as
8 penalties and interest. Settlement, ¶ 26.

8 **C. Deposit of Settlement Funds**

9 Within twenty (20) calendar days following Defendants’ receipt of the routing
10 instructions from the Claims Administrator, Defendants will begin to deposit the amount
11 sufficient to cover the amounts claimed by Class members plus (i) Administration Costs; (ii)
12 Expense Award; (iii) Fee Award; (iv) Enhancement Award; (iv) PAGA Payment and (v) all
13 payroll taxes, including but not limited to employer side taxes. Within twenty (20) calendar days
14 following the date upon which Defendants receive the routing instructions, Defendants will
15 deposit \$3,000. Thereafter, Defendants will by the first day of each and every calendar month
16 make an installment payment until the Gross Settlement Fund, or lesser amount awarded, is paid
17 in full (each payment amount is stated in the Settlement). Settlement, ¶ 20.

17 **D. Release of Claims For Settlement Class Members Limited To Those That**
18 **Could Reasonably Arise From the Facts Alleged In The Action.**

18 Upon final approval of the Settlement, and for the duration of the Class Period, Plaintiff
19 on his own behalf and as the Class Representative, all members of the Settlement Class, and all
20 persons purporting to act on their behalf or purporting to assert a claim under or through them,
21 including, but not limited to, their dependents, attorneys, heirs and assigns, beneficiaries,
22 devisees, legatees, executors, administrators, trustees, conservators, guardians, personal
23 representatives, and successors-in-interest, whether individual, class, representative, legal,
24 equitable, direct or indirect, or any other type or in any other capacity (collectively, the
25 “Releasing Parties”) will forever completely and irrevocably release and discharge Airport Van
26 Rental and any of its past, present, and future parents, affiliates, subsidiaries, divisions,
27 predecessors, successors, and assigns, and each of their officers, directors, board members,
28 trustees, shareholders, employees, agents, attorneys, auditors, accountants, experts, contractors,
stockholders, representatives, partners, insurers, reinsurers, and other persons acting on their



1 behalf (collectively the “Released Parties”), from any and all causes of action, claims, rights,
2 damages, punitive or statutory damages, penalties, liabilities, expenses, and losses (including but
3 not limited to unpaid wages, minimum wages, unpaid overtime, accrued vacation, paid time off,
4 interest, attorneys’ fees, meal and rest period compensation, any claims based on allegedly
5 noncompliant wage statements, any alleged forfeiture or repayment of wages, vacation, or paid
6 time off, and any right or claim for civil penalties pursuant to the PAGA, California Labor Code
7 § 2698 *et seq*, any other claim for civil penalty arising from the California Labor Code or Wage
8 Order, any right or claim for violation of California Business & Professions Code § 17200 *et seq*,
9 and arising out of the action alleged, any violation of or breach of the Fair Labor Standards Act
10 (“FLSA” – only for those who timely submit claim forms as discussed below) and any other
11 claim arising from an alleged violation or breach of the California Labor Code, and issues of any
12 kind or nature whatsoever, that any of the Releasing Parties have or could have had against any
13 of the Released Parties arising out of the acts, facts, transactions, theories, occurrences,
14 representations, or omissions set forth, or which could have been set forth, given the stated
15 predicate allegations in the Complaint in this Action, including but not limited to claims arising
16 out of or under the California Labor Code, or the California Unfair Competition Law, including
17 but not limited to those claims set forth in Paragraph 2 of the Settlement, as well as any other
18 state statute, rule and/or regulation, or similar causes of action arising from or relating to the
19 conduct alleged, through the time of final approval of the Settlement by the Court. Settlement, ¶
20 43.

21 The Claim Forms distributed to the Class will include information regarding each
22 member’s right to participate as an Opt-In Member of a certified collective action for any and all
23 claims raised by Plaintiff pursuant to the Fair Labor Standards Act (“FLSA”). By submitting a
24 Claim Form, the Persons Identified as Class Members will opt-into the FLSA collective action
25 for purposes of releasing any and all FLSA claims raised in the Complaint. Settlement, ¶ 44.

26 In addition, the named Plaintiff will waive and relinquish all rights and benefits of
27 California Civil Code section 1542 and will be bound by a general release of all claims, known
28 or unknown, asserted and unasserted, that he has or may have had against Defendants or any of
the Released Parties. Settlement, ¶¶ 45-46.

E. Notice and Claim Process and Procedures

Within fourteen (14) calendar following the date of preliminary approval, Defendants



1 will provide the Claims Administrator with the names, most recent known mailing address,
2 telephone number, and social security number of each Class Member, and the dates of
3 employment as a Class Member (collectively the “Class List”). Each Class Member’s total
4 Qualifying Workshifts will be derived from Defendants’ records. Settlement, ¶ 34.

5 Within ten (10) calendar days after receipt of the Class List from Defendants, the Claims
6 Administrator will mail a copy of the Notice Packet in the form approved by the Court in its
7 preliminary approval order to all persons shown by Defendants’ records to be Class Members,
8 via first class U.S. mail, using the most current mailing address available. The Notice Packet will
9 state the total approximate amount each Class Member is estimated to be entitled to receive as
10 his or her Individual Settlement Award under the Settlement. Any Notice Packets returned to the
11 Claims Administrator as undelivered and bearing a forwarding address will be re-mailed by the
12 Claims Administrator within three days following receipt of the returned mail. For any Notice
13 Packets returned to the Claims Administrator without a forwarding address, the Claims
14 Administrator will first conduct a National Change of Address search as required for
15 undeliverable notices, followed by a computer/SSN and “skip trace” search to obtain an updated
16 address, and will promptly re-mail the Notice Packets to any newly-found address or addresses.
17 The re-mailed Notice Packet will be identical to the original Notice Packet. The time period to
18 submit a Claim Form will not be extended on account of a returned or undeliverable Notice
19 Packet. The Claims Administrator and counsel for the Parties will undertake all reasonable
20 efforts to locate and verify the addresses of Class Members and send a copy of the Notice Packet
21 to all Class Members. Any costs incurred by having the Claims Administrator handle these
22 administrative tasks will be included in the Administration Costs approved by the Court.
23 Settlement, ¶ 35.

24 The Notice Packet will provide that Class Members who wish to claim Individual
25 Settlement Awards must mail to the Claims Administrator a fully completed and signed Claim
26 Form not later than forty five (45) calendar days from the date the Notice Packet is mailed by the
27 Claims Administrator (the “Claims Period”). Settlement, ¶ 36.

28 The Parties agree that Plaintiff may not opt out of the Settlement Class or file an
objection to the Settlement, but that any other Class Member or person(s) purporting to act on
behalf of Class Members who wish to object to the Settlement, or to be excluded from the
Settlement must submit timely written objections and/or requests for exclusion. Settlement, ¶ 40.



Any Class Member(s) who wish to object to the Settlement may file with the Claims Administrator a written statement objecting to the Settlement not later than forty five (45) calendar days from the date the Notice Packet is mailed by the Claims Administrator. *Id.*

Class Members who wish to exclude themselves from the Settlement must deliver to the Claims Administrator no later than the last day of the Claims Period a written statement requesting exclusion from the Settlement Class. Class Members who submit a timely request for exclusion will not receive a *pro rata* distribution from the Net Settlement Amount. No request for exclusion will be accepted by the Claims Administrator if postmarked after the last day of the Claims Period. *Id.*

F. Timing of Payments and Uncashed Checks

Following the Effective Date, the Claims Administrator will distribute the payments provided by this Settlement as follows: Within ten (10) calendar days of the Deposit of Settlement Funds (as set forth in Paragraph 19 of the Settlement), the Claims Administrator will distribute, as approved by the Court, the PAGA Payment, the Individual Settlement Awards, the Enhancement Award, the Expense Award, the Fee Award, and the Administration Costs. Settlement, ¶ 29.

Any check issued to any Participating Class Member will remain valid and negotiable for one hundred and twenty (120) calendar days from the date of its issuance, but if not cashed within that time it will be deemed null and void and of no further force and effect, and the amount of the check will escheat to the State of California Department of Industrial Relations, Unpaid Wages Fund in the Settlement Class Member's name. The Claims Administrator will notify Class Counsel and Defense Counsel of any undeliverable and uncashed checks. However, the affected Participating Class Members will nevertheless remain members of the Settlement Class and will be bound by all terms of this Settlement and the Court's final approval order. Settlement, ¶ 30.

IV. ARGUMENT

A. THIS COURT SHOULD CONDITIONALLY CERTIFY THE SETTLEMENT 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 for joinder to be practical; (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 Cal.App.4th 1794, 1807 (1996). As explained below, all of these requirements are met in this case.

1. The Settlement 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, the above-defined Class is ascertainable because its members may be identified by reference to Defendants' records and Defendants have agreed to share the relevant information from their records to facilitate the process. DS, ¶ 11, Settlement, ¶ 34. Therefore, the Settlement Class is ascertainable.

2. The Membership of the Settlement Class Is Sufficiently Numerous.

The Settlement 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. Accordingly, the California Supreme Court has upheld a class of as few as 10 individuals. *See Bowles v. Superior Court* (1955) 44 Cal.2d 574. Defendants estimate that there are approximately 106 Class Members. DS, ¶ 12. 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. In light of these considerations, the Class' 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.*, 183 Cal. App. 4th 723, 732 (2010) (citing *Washington Mut. Bank, FA v. Superior Court*, 248 Cal. 4th 906, 913 (2001)). 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 Settlement Class Members all stem from the same sources.

In this case, Plaintiff asserts that common questions include, but are not limited to: (1) Whether Defendants failed to include their hourly employees' commission in the regular rate of



1 pay for purposes of calculating overtime pay rates; (2) Whether Defendants’ meal and rest period
2 policy did not provide timely meal and rest periods to the hourly employees working in
3 California, and failed to pay the required premiums for workdays with unprovided meal and rest
4 periods under the Wage Order §§ 11 and 12 and Labor Code § 512; and (3) Whether Defendants
5 knowingly and intentionally failed to provide accurate wage statements under Lab. Code §§ 226
6 and willfully failed to pay all wages upon discharge under Lab. Code §§ 201 and 203. DS, ¶ 13.
7 In view of the claims asserted, Plaintiff maintains the answers to these and other common
8 questions could determine liability to Settlement Class Members on the core claims in this case,
9 as well as the derivative claims for statutory and civil penalties. *Id.* Therefore, common questions
predominate.

10 **4. Plaintiff Is Typical of the Settlement Class.**

11 The class representative must be similarly situated to the rest of the purported class. *See*
12 *Classen v. Weller*, 145 Cal. App. 3d 27, 46 (1983) (stating “it has never been the law in
13 California that the class representative must have identical interests with the class members. The
14 only requirements are ... that the class representative be *similarly* situated”) (emphasis in
15 original); *see also* Newberg, § 3:29 (typicality “focuses on whether there exists a relationship
16 between the Plaintiffs claims and the claims alleged on behalf of the class”). Here, Plaintiff’s
17 claims are typical for the purposes of certifying the Class. Plaintiff, like absent Class Members,
18 worked for Defendants as an hourly employee while subject to the same relevant policies and
19 procedures governing his compensation, hours of work and meal and rest periods. Because
20 Plaintiff contends that he was subject to the same general course of conduct as absent Settlement
21 Class Members, resolving the common questions as they apply to Plaintiff will determine
22 Defendants’ *prima facie* liability to the all Settlement Class Members. Moreover, Plaintiff’s
23 claims could potentially be subject to the same primary affirmative defenses as those of absent
24 Class Members. Accordingly, Plaintiff’s claims are typical of the Class. DS, ¶ 14.

25 **5. Plaintiff Will Adequately Represent the Settlement Class.**

26 The adequacy requirement is met where the plaintiff is represented by counsel qualified
27 to conduct the litigation and the plaintiff’s interest in the litigation is not antagonistic to the class’
28 interests. *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 451. In other words, where the
plaintiff has adequate counsel, the plaintiff may represent the entire class absent any disabling
conflicts of interest that might hinder the plaintiff’s ability to represent the class. *Id.*

First, Plaintiff’s counsel have supplied the Court with declarations to show that they are



adequate to represent the Settlement Class and that they have significant experience in employment litigation generally, and wage and hour and employment-related class action litigation specifically. See DS, ¶¶ 15-26; Haines decl., ¶ 2. Thus, Plaintiff's counsel are adequate to serve as Class Counsel.

Second, Plaintiff contends that he is an adequate class representative. Plaintiff and the Class Members have strong and co-extensive interests in this litigation because they all worked for Defendants during the relevant time period, allegedly suffered the same alleged injuries from the same alleged course of conduct, and there is no evidence of any conflict of interest between Plaintiff and the Class Members. DS, ¶ 15. Moreover, Plaintiff has demonstrated his commitment to the Class by, among other things, retaining experienced counsel, providing counsel with documents and extensively speaking with them to assist in identifying the claims asserted in this case, assisting them in contacting Class Members and gathering information from them, meaningfully participating in the negotiations that led to the Settlement, and exposing himself to the risk of attorneys' fees and costs awards against him if this lawsuit had been unsuccessful. DS, ¶ 15. Thus, Plaintiff is adequate to serve as class representative. Accordingly, this Court should find that Plaintiff and his counsel are adequate to represent the Settlement Class as required under Code of Civil Procedure § 382.

6. Class Action Treatment Is The Superior Means For Resolving The Claims Of The Settlement Class Members.

A class action is also superior to other means adjudicating the issues in the Action. The predominance of common legal and factual questions shows that this Court could fairly adjudicate the claims of Class Members through a single class action. In view of the *theoretical* alternatives that proposed class members could potentially utilize—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 them. Thus, this consideration supports conditional class action treatment for purposes of this Settlement only. DS, ¶ 27.

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

California courts favor settlement. See *e.g.*, *Stambaugh v. Superior Court* (1976) 62 Cal.App.3d 231, 236. Unlike most settlements, class action settlements involve a court approval



process that exists to prevent fraud, collusion, and unfairness to class members. *Malibu Outrigger Bd. of Governors v. Superior Court* (1980) 103 Cal.App.3d 573, 578-579. This approval process consists of preliminary settlement approval, notice being given to class members, and a final fairness and approval hearing being held at which class members may be heard with respect to the settlement. *See e.g., id.* For the reasons discussed below, this Court should preliminarily approve the Settlement, allow the Parties to give notice to the Settlement Class, and schedule a final approval hearing.

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

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

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

[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 maximum amount plaintiffs might have obtained at trial on the complaint, but rather whether the settlement is reasonable

⁴ Because the fourth prerequisite cannot be addressed until the final approval hearing, only the first three are relevant at this stage of the approval process.



1 under all of the circumstances.” *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224,
2 250 (“*Wershba*”). Because settlements inherently involve compromise, even settlements providing
3 for substantially narrower relief than likely would be obtained if the suit were successfully
4 litigated can be reasonable because “the public interest may indeed be served by a voluntary
5 settlement in which each side gives ground in the interest of avoiding litigation.” *Id.* (quoting *Air*
6 *Line Stewards, etc., Local 550 v. Am. Airlines, Inc.* (7th Cir. 1972) 455 F.2d 101, 109). In
7 addition, courts review the discovery process and information received through it to aid them in
8 assessing whether the Parties sufficiently developed the claims and their supporting factual bases
9 before reaching settlement. *See Kullar v. Foot Locker Retail Inc.* (2008) 168 Cal.App.4th 116,
10 129-131 (“*Kullar*”). Information is sufficient where it allows the Parties and the court to form
11 “an understanding of the amount that is in controversy and the realistic range of outcomes of the
12 litigation.” *Clark v. Am. Residential Servs. LLC* (2009) 175 Cal.App.4th 785, 801. This
13 requirement exists so that the Parties can provide the court with “a meaningful and substantiated
14 explanation of the manner in which the factual and legal issues have been evaluated.” *Kullar*,
15 168 Cal.App.4th at p. 118.

16 Here, the Settlement resulted from thorough, arms’ length, negotiations between
17 experienced counsel with the assistance of a respected mediator after sufficient discovery was
18 exchanged to assess the relative strengths and weaknesses of their respective cases and
19 Defendants’ estimated exposure. DS, ¶ 7. Plaintiff prepared damages estimates in connection
20 with the settlement negotiations. DS, ¶ 28, Exhibit 6. Plaintiff initially estimated that
21 Defendants’ exposure was about \$1.6 million, of which interest and statutory and civil penalties
22 accounted for approximately \$1.25 million. *Id.* However, Plaintiff is aware of no significant
23 awards under the PAGA and in Class Counsel’s personal experience, PAGA penalty awards are
24 small even for egregious, intentional violations of the Labor Code. *Id.* Plaintiff also estimated
25 that Defendants’ liability for unpaid overtime and meal and rest period premium wages was at
26 best approximately \$406,000. This estimate does not account for the risks outlined below or the
27 risk that a class will not be certified. DS, ¶ 28.

28 The most important factor favoring the Settlement amount is Defendants’ financial
condition. As discussed above, during settlement negotiations, Defendants informed Plaintiff that
they were experiencing great difficulty meeting their onerous financial obligations. Plaintiff also
reviewed Defendants’ financial statements which show significant income problems. DS, ¶ 29.



Defendants are also facing other lawsuits, including one against Mr. Irani for sexual harassment by the former chief financial officer. One of the causes of Defendants' financial problems is the CFO's alleged embezzlement of over one million from AVR. *Id.*

Further, there are great risks that Plaintiff will not recover an award of premium wages against Defendants for unprovided rest and meal periods. Defendants had meal and rest period policies at least for a portion of the Class Period. Though Plaintiff contends Defendants' policies are silent on many requirements of the applicable Wage Order, there is a risk that Plaintiff would recover little or no premium wages under Labor Code § 226.7. Further risk arises from the absence of evidence that Defendants forbade meal and rest periods. As part of the settlement negotiations, Defendants provided several declarations from Class Members stating that they received their meal and rest periods. DS, ¶ 30.

There are other risks to Plaintiff's rest period claim. Employers are not required to record rest periods and such periods are paid. Thus, unlike meal periods, where there are often records showing whether an employee clocked out or not, there is no such evidence to prove a missed rest period or that the employer refused to authorize and permit one. Managing such claims at trial has become exceedingly difficult. Plaintiff will depend on sample witness testimony and surveys to prove the claims. While a victory with such evidence is certainly possible, relevant caselaw makes such claims risky from a trial management and due process perspective. *See Duran v. U.S. Bank National Assn.*, 59 Cal. 4th 1, 31 (2014) (explaining "[I]f sufficient common questions exist to support class certification, it may be possible to manage 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. DS, ¶ 31.

There is also the risk that Plaintiff will not recover statutory penalties for the class members if he prevails on the meal and rest periods claims in view of the decisions of other courts that statutory penalties under Labor Code §§ 203 (waiting time penalties) and 226 (pay stubs penalties) are not derivative of a successful claim for premium wages under Labor Code § 226.7. *Nguyen v. Baxter Healthcare Corp.*, 2011 U.S. Dist. LEXIS 141135, *24-25 (C.D. Cal. 2011); *Elliot v. Spherion Pacific Work* (C.D. Cal. 2008) 572 F. Supp. 2d 1169, 1179-1180. DS, ¶ 32. As is evident from Plaintiff's damages model (Exhibit 6), the vast majority of the potential relief available to Plaintiff and the Class Members are civil and statutory penalties. In light of the great difficulties involved in proving that wage and hour violations are knowing, intentional, or



willful – predicates for recovery of penalties, Plaintiff had to dramatically discount the value of the penalties claims in settlement negotiations. It is difficult to imagine a Court awarding substantially more in penalties than the restitution it awards. The PAGA expressly counsels against such awards. See Lab. Code § 2699(e)(2) (“...a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.”). Under the PAGA, penalties can accrue per pay period (as with Labor Code § 226), at rates of \$50, \$100, \$250, and even \$1,000 per employee, plus unpaid wages. See Lab.Code §§ 226.3, 558, 1197.1, and 2699(f). There are no decisions under the PAGA to date with substantial awards of civil penalties. There is a substantial risk that the Court could reduce civil penalties to an insignificant amount if it is unpersuaded by Plaintiff’s evidence of willful and intentional conduct. *Id.* It could also award no civil penalties if it determines that an award of premium wages (which many view as a penalty) is sufficient to punish Defendants’ conduct. For similar reasons, a large award of penalties seems unlikely with respect to the rounding, regular rate, or uniform deduction claims because the amount Defendants allegedly underpaid or deducted is small. *Id.*

While the evidence gathered through Plaintiff’s discovery supports the merits of the claims asserted in this lawsuit, Plaintiff recognizes that continued litigation presents significant risks that support a downward departure from Defendants’ estimated liability exposure. DS, ¶ 33. In view of the risks, the Settlement reflects Class Counsel’s estimate of the total amount of damages, monetary penalties or other relief that the class could reasonably expect to be awarded at trial, taking into account the likelihood of prevailing and other attendant risks. It also represents a fair, adequate, and reasonable compromise amount for these claims and warrants preliminary approval. See *Laguna v. Coverall N. Am., Inc.*, Case No. 12-55479 (9th Cir. June 3, 2014) 2014 WL 2465049, * 3. DS, ¶ 33.

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

The GSF will be paid to each Participating Class Member based on his or her Qualifying Workshifts compared to other Class Members’ Qualifying Workshifts. Settlement, ¶ 18. Because this method compensates Settlement Class Members based on the extent of their potential



injuries, in that Settlement Class Members who worked for Defendants longer would have been subject to more alleged violations, it is fair, adequate, and reasonable.

3. The Proposed Fee and Expense Awards of Attorneys' Fees and Expenses Are 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. DS, ¶ 34. Here, Class Counsel intend to request attorneys’ fees of up to \$100,000 (1/3 of the GSF) and reasonable litigation expenses incurred which Class Counsel currently estimates is approximately \$11,442.71 and will be no more than \$15,000 at the conclusion of matters related to the Settlement. DS, ¶ 34. 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 approval. *Id.*

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

Courts routinely approve incentive awards to compensate named plaintiffs for the services they provide and the risks they incur during class action litigation, often in much higher amounts than that sought here. *See, e.g., Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 726 (upholding “service payments” to named plaintiffs for their efforts in bringing the case); *Van Vranken v. Atlantic Richfield Co.* (N.D.Cal.1995) 901 F.Supp. 294 (approving \$50,000 enhancement award). Here, the Settlement provides that Plaintiff may seek an Enhancement Award of up to \$5,000 (approximately 1.6% of the GSF). This amount is entirely reasonable given Plaintiff’s efforts in the Action and the risks he undertook on behalf of the Class Members. DS, ¶ 35. Here, Plaintiff has devoted many hours advancing the interests of the Class. Plaintiff has done this by, among other things, retaining experienced counsel, providing them with information about his work history with Defendants and Defendants’ policies and practices with respect to the wage and hour claims at issue, assisting in contacting absent Class Members to gather information, and being actively involved in the settlement process to ensure a fair result for the Class as a whole. In doing this, Plaintiff has been exposed to significant risks,



including the risk of an order to pay Defendants' attorneys' fees and costs if this action had been unsuccessful (see Lab. Code §§ 218.5-218.6). The efforts and risks that Plaintiff undertook on behalf of Class show that the proposed Enhancement Award is fair, adequate, and reasonable, and thus warrant preliminary approval. DS, ¶ 35.

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

With regard to the Settlement Administration Costs provision (Settlement, ¶ 24), it is reasonable. Before agreeing to Phoenix Class Action Administrative Solutions, the Parties sought and reviewed bids from four reputable third party administrators, one of which was over \$23,000. DS, ¶¶ 38-39, Exhibits 7-10. Thus, the Settlement Administration Costs provision should be given preliminary approval.

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

This Court should approve the proposed plans for giving notice to the Settlement Class and administering the Settlement. The standard for determining the adequacy of notice is whether the notice has "a reasonable chance of reaching a substantial percentage of the class members." *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974. The notice process includes multiple measures to ensure that as many Class Members as practicable receive actual notice of the Settlement and have enough time to exercise their rights. The Settlement requires distribution of the Notice Packet by First Class U.S. mail only. Settlement, ¶ 35. Although there are current employee Class Members, it is uncertain whether Defendants' records of their contact information include email addresses and Class Members might not be in a position to check their emails. As such, notice by mail alone is fair, adequate, and reasonable. DS, ¶ 36.

With respect to its content, "[The] notice given to the class must fairly apprise the class members of the terms of the proposed compromise and of the options open to dissenting class members." *Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* (1975) 48 Cal.App.3d 134, 151-152. The purpose of the notice in class settlement context 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. *Id.* Here, the Notice (Exhibit to the Settlement) provides Class Members with all pertinent information that they need to fully evaluate their options and exercise their rights under the Settlement. Specifically, they clearly and concisely



1 explain, among other things: (1) what the Settlement is about; (2) who is a Class Member; (3)
2 how Class Counsel will be paid; (4) how to submit an exclusion request not to be bound by the
3 Settlement; (5) how to object to the Settlement; (6) how the Settlement will be allocated; (7) how
4 payments to Settlement Class Members will be calculated; (8) how the disputes will be resolved;
5 and (9) the estimated Individual Settlement Award for each Settlement Class Member.
6 Accordingly, the Notice should be approved because it describes the Settlement with sufficient
7 clarity and specificity to explain to Class Members what this Action is about, their rights under
8 the Settlement, and how to exercise those rights.

9 Further, to avoid unnecessary costs and challenges to potential objectors, the Settlement
10 does not require an objector to file his objection with the Court or serve it on Counsel for the
11 Parties. Instead, it merely requires the objector to mail the objection to the Claims Administrator
12 for distribution. DS, ¶ 37; Settlement, ¶ 40.

13 **V. CONCLUSION**

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

16 Respectfully submitted,

17 THE SPIVAK LAW FIRM

18 Dated: December 4, 2017

19 By: _____

20 DAVID SPIVAK, Attorney for Plaintiff,
21 CARLOS SIMON



1 PROOF OF SERVICE

2 State of California,
3 County of Los Angeles

4 1. I am a citizen of the United States and am employed in the County
5 of Los Angeles, State of California. I am over the age of 18 years, and not a
6 party to the within action. My business address is 16530 Ventura Blvd., Suite
7 312, Encino, California 91436.

8 2. I am familiar with the practice of The Spivak Law Firm, for
9 collection and processing of correspondence for mailing with the United
10 States Postal Service. It is the practice that correspondence is deposited
11 with the United States Postal Service the same day it is submitted for
12 mailing.

13 On Monday, December 04, 2017, I served the foregoing document described
14 as **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S UNOPPOSED**
15 **MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT** on interested
16 parties by placing a true and correct copy thereof enclosed in a sealed
17 envelope, with postage fully prepaid, addressed as follows:

18
19 Joel Perry Glaser, Esq.
20 Gillian Mellon, Esq.
21 JOEL GLASER APC
22 11300 W. Olympic Blvd., Suite 910
23 Los Angeles, CA 90064
24 joel@glaserlaw.org
25 gillian@glaserlaw.org

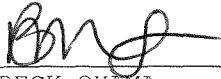
26 XXXX (BY OVERNIGHT DELIVERY) I enclosed the documents in an envelope or
27 package provided by an overnight delivery carrier and addressed to the
28 persons at the addresses above. I placed the envelope or package for
collection and overnight delivery at an office or a regularly utilized drop
box of the overnight delivery carrier.

19 Hon. Marie Weiner, Department 2
20 San Mateo Superior Court
21 Courtroom 2E
22 400 County Center
23 Redwood City, CA 94063
24 complexcivil@sanmateocourt.org

23 XXXX (BY EMAIL) Based on a court order, I caused the documents to be sent to
24 the persons at the electronic service addresses listed above from my
25 electronic service address breck@spivaklaw.com or boyama@spivaklaw.com.

25 EXECUTED on Monday, December 04, 2017, at Encino, California.

26 XXXX (State) I declare under penalty of perjury under the laws of the State
27 of California that the above is true and correct.

28 
BRECK OYAMA