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**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF RIVERSIDE**

SCOTT ALLEN ATHEY, as an individual and  
on behalf of all employees similarly situated,

Plaintiff,

v.

WALKER EVANS ENTERPRISES, a  
California Corporation; and DOES 1 through 50,  
inclusive,

Defendants

Case No.: CVRI2301534

[Assigned for all purposes to Hon. Harold W.  
Hopp, Dept. 1]

**CLASS AND PAGA REPRESENTATIVE  
ACTION**

**PLAINTIFF'S NOTICE OF MOTION AND  
MOTION FOR PRELIMINARY APPROVAL  
OF CLASS AND PAGA REPRESENTATIVE  
ACTION SETTLEMENT; MEMORANDUM  
OF POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

Reservation ID: 412063266999  
Date: May 22, 2024  
Time: 8:30 a.m.  
Courtroom: Dept. 1  
Judge: Hon. Harold W. Hopp

Action Filed: March 27, 2023  
Trial Date: Not Set

1  
2 **TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:**

3 PLEASE TAKE NOTICE that on May 22, 2024, at 8:30 a.m., or as soon thereafter as the matter  
4 may be heard, in Department 1 of the above-captioned Court, located at 4050 Main Street, Riverside, CA  
5 92501, Plaintiff SCOTT ALLEN ATHEY (“Plaintiff”) will and hereby does move this Court for an  
6 order:

7 1. Granting class certification of the Class, solely for settlement purposes pursuant to  
8 Code of Civil Procedure § 382;

9 2. Preliminarily approving the JOINT STIPULATION OF CLASS AND PAGA  
10 REPRESENTATIVE ACTION SETTLEMENT (“Settlement” or “Agreement”) (attached as  
11 **Exhibit 1** to the Declaration of Lilit Tunyan;

12 3. Appointing counsel for Plaintiff, Tunyan Law, APC, as Class Counsel;

13 4. Appointing Plaintiff as the Class Representative;

14 5. Approving the use of the proposed notice procedure and related Class Notice Form  
15 attached as **Exhibit 1**, Exclusion Form attached as **Exhibit 2**, and Objection Form attached as  
16 **Exhibit 3** to the [Proposed] Order Granting Preliminary Approval of Class and PAGA Action  
17 Settlement;

18 6. Approving ILYM Group, Inc. as the third-party administrator;

19 7. Directing that the Class Notice, Exclusion Form, and Objection Form (collectively,  
20 “Notice Packet”) be mailed to the Class; and,

21 8. Scheduling a hearing date for motion for final approval of class action settlement  
22 and awards of attorneys’ fees and costs.

23 Good cause exists to grant this Motion because:

24 1. The Class meets all of the requirements for class certification for settlement  
25 purposes under Code of Civil Procedure § 382;

26 2. The Settlement Agreement is a fair, adequate, and reasonable compromise of the  
27 disputed wage and hour claims asserted by Plaintiff;

28 3. Plaintiff and Class Counsel are adequate to represent the Class;

4. The proposed notice procedures and related forms comply with California Rules of Court 3.766(d) and (e), adequately apprise Class Members of their rights, and fully comport with due process; and

5. Based on the foregoing, notice should be directed to the Class Members and a final fairness hearing should be scheduled (Plaintiff suggests about 120 days after preliminary approval is granted).

This Motion is made pursuant to Rule 3.769 and Rule 3.1113(e) of the California Rules of Court, which require approval by the Court of a class action settlement and permit the Court to extend the page limit for memoranda.

This Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the Declarations of Class Counsel Lilit Tunyan, Plaintiff, Defendant, Defendant's counsel, Cy Pres recipient and the proposed Settlement Administrator in support thereof, all papers and pleadings on file with the Court in this action, all matters judicially noticeable, and on such oral and documentary evidence as may be presented in connection with the hearing on the Motion.

Respectfully submitted,

Dated: April 29, 2024

**TUNYAN LAW, APC**

By: SPH/MS

Lilit Tunyan  
Artur Tunyan

Attorneys for Plaintiff SCOTT ALLEN ATHEY

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1     **I.     INTRODUCTION**

2             Pursuant to California Rules of Court, Rules 3.769(d) and (e), Plaintiff SCOTT ALLEN ATHEY  
3     (“Plaintiff”) respectfully requests that this Court preliminarily approve the proposed class action  
4     settlement set forth in the JOINT STIPULATION OF CLASS AND PAGA REPRESENTATIVE  
5     ACTION SETTLEMENT (“Settlement” or “Agreement”) with Defendant WALKER EVANS  
6     ENTERPRISES (“Defendant”).

7             Defendant is a restaurant located in Riverside County of the State of California. Plaintiff was  
8     employed by Defendant and alleged various wage and hour violations, which Defendant denies. After  
9     informal discovery, the exchange of documents, and an arm’s-length mediation session with a mediator  
10    Steven Rottman, Esq., Plaintiff and Defendant (collectively referred to herein as the “Parties”) reached a  
11    proposed class and PAGA representative action settlement with a gross settlement amount (“GSA”) of  
12    **\$175,000.00** in compromise of disputed claims asserted on behalf of the below-defined Class consisting  
13    of approximately **194** members. Plaintiff believes that this settlement is a fair, adequate, and reasonable  
14    compromise of the disputed claims for alleged unpaid wage and hour violations and penalties asserted in  
15    this case.

16            Plaintiff now submits this Motion for Preliminary Approval of Class and PAGA Representative  
17    Action Settlement, along with the Settlement (attached to the Declaration of Lilit Tunyan [“Tunyan  
18    Decl.”], **Exhibit 1** thereto). In order to efficiently present the Court with necessary information to  
19    determine whether to grant preliminary approval of the Settlement and to address the requirements set  
20    forth in the Class Action Case Management Order #1 (“CMO”), Plaintiff also moves for an order  
21    permitting the filing of this single consolidated memorandum, although it exceeds the page limit  
22    established by California Rules of Court, Rule 3.1113(d), instead of filing several separate motions. For  
23    the Court’s convenience, below is a summary of the key provisions of the Settlement.

24    **II.    THE MAJOR TERMS OF SETTLEMENT**

25            The provisions of the proposed Settlement include the following:

- 26            • Defendant agrees not to oppose certification of a Class for purposes of Settlement only  
27            (Settlement, ¶ 21);
- 28            • **Settlement Amount:** Defendant will pay a maximum of **\$175,000**, referred to as the Gross

Settlement Amount (or GSA herein), resulting in an estimated average **gross** payment per Class Member of approximately **\$902.06** (Settlement, ¶ 26(g));

- **Class Size**: approximately **194** individuals as of the date of mediation. (Settlement, ¶ 4, Tunyan Decl., ¶ 16.)
- **PAGA Group Size**: approximately **165** individuals as of the date of mediation (Tunyan Decl., ¶ 17);
- **Escalator Clause**: The number of workweeks during the Class Period is estimated to be **10,469**. The parties stipulate a 10% escalation of the estimated workweeks without any increase to the Gross Settlement Amount. If the number of actual workweeks during the Class Period exceeds 10% of the estimated workweeks (i.e., exceeds 11,516 workweeks), Defendant can either have the Class Period end on the date that the workweeks exceed 11,516 or increase the Gross Settlement Amount by a pro-rata dollar value equal to the number of workweeks in excess of 11,516 workweeks. For example, if there is a 1% increase over 10% then the Gross Settlement Amount increases by 1%. (the “Escalator Clause”). (Settlement, ¶ 26(d).)
- **Kullar/Munoz Analysis**: Plaintiff addresses the claims analysis herein, at Part V.B.3, and in more detail the Declaration of Tunyan, at Paragraph 18;
- **No Reversion**: The Settlement is a ***non-reversionary*** settlement (Settlement, ¶ 26(e));
- **Certification**: Plaintiff addresses certification requisites herein, at Part V.A., and in the Declaration of Tunyan, at Paragraphs 34-40;
- **No Claim Form**: No claim form is required (Settlement., ¶ 26(f));
- **Class Release**: The Settlement will release specified wage-and-hour claims for Class Members (those Class Members who do not opt out of the Settlement) as defined by the First Amended Complaint and LWDA notice (Settlement, ¶ 37);
- **PAGA Release**: The Class Members will release the PAGA Claims set forth in this Action, that were identified in the Complaint and Plaintiff’s LWDA Notice Letter, regardless of whether they opt out of the class portion of the Settlement (Settlement, ¶¶ 15 and 37(c)(2));

- 1       • **Release Effective Date:** The Release is not active until Defendant tenders all payments  
2       required under the Settlement to the Settlement Administrator (Settlement, ¶ 37(b));
- 3       • **Net Settlement Amount Available to the Class:** After deducting Class Counsel's  
4       attorneys' fees and costs, service payment to Plaintiff, administration costs, and the  
5       payment to the LWDA, the remainder will be available for distribution to Class Members  
6       who do not opt out, with each Class Member receiving a share based on the number of  
7       workweeks each Class Member worked for a Defendant within the Class Period. The Net  
8       Settlement Amount is estimated to be at least **\$72,216.67**, resulting in an average **net**  
9       payment per Class Member of at least **\$372.25**, before any tax withholdings. (Settlement, ¶  
10      26(g));
- 11      • **Tax Allocation:** The amounts distributed to Class Members will be characterized as 20%  
12      alleged unpaid wages, 40% as unpaid penalties and 40% as unpaid interest, and PAGA  
13      Settlement Payments will be allocated as 100% penalties. (Settlement, ¶ 26(k));
- 14      • **Employer's Portion of Payroll Taxes Paid Separately:** Defendant's portion of payroll  
15      taxes (e.g., FICA, FUTA, etc.) owed on any settlement payments to Class Members that  
16      constitute wages will be paid separate and apart from the GSM (Settlement, ¶ 26(h));
- 17      • **Settlement Administrator:** The notice portion of the Settlement and distribution of funds  
18      will be administered by a third-party Administrator, ILYM Group, Inc., and the Parties  
19      estimated that the costs of administration should not reasonably exceed \$15,000.00. ILYM  
20      Group, Inc.'s low bid for settlement administration services in the amount of **\$ 6,950** was  
21      selected as the lowest bid from a competitive bidding process. (Settlement, ¶ 26(p));
- 22      • **Class Data for Administration:** The Settlement Administrator will receive the Class List  
23      within 15 calendar days of Preliminary Approval, use the NCOA database to update the  
24      Class List, and then use skip tracing on returned Notices (Settlement, ¶ 32(a));
- 25      • **Notice:** The Notice will issue within 14 days of receipt of the Class List (Settlement, ¶  
26      32(b)). The Notice describes how to dispute workweeks, submit and objection in writing,  
27      in person, or through an attorney, or request exclusion (Settlement, ¶ 26(s)).
- 28      • **Notice Language:** Notice will issue in English and Spanish (Settlement, ¶ 26(t));

- 1 • **Objections:** Objections can be submitted in person, through an attorney, or in writing to  
2 the Settlement Administrator (Settlement, ¶ 26(x));
- 3 • **Exclusion Requests:** The procedure for exclusion requests, mailing a request to the  
4 Settlement Administrator, is the same as the procedure for submitting a writing objection  
5 (Settlement, ¶ 26(w));
- 6 • **PAGA Allocation:** From the GSA, **\$10,000** will be allocated to settle claims brought  
7 pursuant to the California Private Attorneys General Act, Labor Code § 2699 *et seq.*  
8 (“PAGA”), and seventy-five percent (75%), or **\$7,500**, will be paid to the California Labor  
9 & Workforce Development Agency. (Settlement, ¶ 9.)
- 10 • **Notice to LWDA:** Notice was provided prior to the filing of this Motion. Evidence is  
11 attached to Tunyan Declaration.
- 12 • **Service Payment to Plaintiff:** Defendant will not oppose the application for Class  
13 Representative Service Payment of **\$10,000** for Plaintiff, to be paid from the GSA  
14 (Settlement, ¶ 26(n));
- 15 • **Fees and Costs:** Defendant will not oppose Class Counsel’s application for fees not to  
16 exceed 33 1/3% of the GSA (**\$58,333.33**), and actual costs, in an amount not to exceed  
17 **\$22,000**, to be paid out of the GSA (Settlement, ¶ 26(m)).
- 18 • **Check Void Period:** Settlement checks will be valid for 180 days (Settlement, ¶ 34);
- 19 • **Uncashed Checks:** Any settlement checks that are mailed to the Class Members and  
20 remain uncashed after 180 days of the date of issuance will be cancelled, and the moneys  
21 shall be transmitted to Legal Aid Society of San Bernardino subject to the requirements of  
22 California Code of Civil Procedure § 384(b) (the “Cy Pres Recipient”) (Settlement, ¶ 35);
- 23 • **Judgment Notice:** Judgment will be posted on the Settlement Administrator’s website  
24 after entry (Settlement, ¶ 30);
- 25 • **Confidentiality Provisions:** The Settlement permits Class Counsel to discuss the  
26 Settlement with Class Members (Settlement ¶ 58).

27 (Tunyan Decl., ¶¶ 8-9 and Exhibit 1 thereto.)  
28

### 1     **III.     FACTUAL AND PROCEDURAL BACKGROUND**

#### 2             **A.     Plaintiff's Claims**

3             On March 27, 2023, Plaintiff filed a putative Class Action alleging the following labelled causes  
4 of action: (1) Violation of Labor Code §§ 204, 510, 1194, 1198 (Failure to Pay All Wages); (2) Violation  
5 of Labor Code §§ 226.7, 512 (Failure to Provide Meal Periods); (3) Violation of Labor Code § 226.7  
6 (Failure to Provide Rest Periods); (4) Violation of Labor Code § 226, (Failure to Keep Accurate Itemized  
7 Wage Statements); (5) Violation of Labor Code §§ 201-203 (Failure to Pay Wages Upon Termination of  
8 Employment); (6) Violation of Labor Code § 2802 (Failure to Reimburse for Necessary Expenditures);  
9 (7) Violation of Bus. & Prof. Code § 17200 et seq. (Unfair Business Practices). On May 30, 2023,  
10 Plaintiff filed his First Amended Complaint adding the eighth case of action for civil penalties under the  
11 Labor Code Private Attorneys General Act of 2004 [Lab. Code § 2699, et seq.] (“PAGA”). (The  
12 “Action.”) In the complaint, Plaintiff sought to represent all persons that worked for Defendant in  
13 California as an hourly-paid, non-exempt employee at any time September 22, 2021 through the date  
14 final judgment is entered. (Tunyan Decl., ¶ 3.)

15             Plaintiff satisfied the administrative exhaustion requirement that is a prerequisite to filing a claim  
16 for Civil Penalties under the Labor Code Private Attorneys General Act of 2004 [Lab. Code § 2699, et  
17 seq.] (“PAGA”). (Tunyan Decl., ¶ 4.)

#### 18             **B.     Pre-Mediation Data Production and Analysis**

19             The Parties have conducted informal discovery and investigation of the facts and law. Such  
20 discovery and investigation have included, inter alia, the exchange of data and discoverable information  
21 in preparation for the mediation session. (Tunyan Decl., ¶ 5.) The Parties have analyzed payroll and  
22 other data pertaining to Plaintiff and the Class during the relevant Class Period, including but not limited  
23 to the numbers of former and current members of the Class, average workweeks, and average rate of  
24 hourly pay. (*Id.*) After reviewing the provided documents and data, Class Counsel were able to evaluate  
25 the probability of class certification, success on the merits, and the reasonably obtainable maximum  
26 monetary exposure for all claims. Class Counsel reviewed these records and prepared a damage analysis  
27 prior to mediation. Class Counsel also investigated the applicable law regarding the claims and defenses  
28 asserted in the litigation. (*Id.*)

1           **C.     Settlement**

2           On March 11, 2024, the Parties mediated before a mediator Steven Rottman, Esq., who is a well-  
3           regarded mediator for wage and hour class action litigation. (Tunyan Decl., ¶ 6.) At the mediation, the  
4           Parties discussed at length the burdens and risks of continuing with the litigation as well as the merits of  
5           the claims and defenses. (*Id.*) The Parties have been able to reach a settlement at the mediation. The  
6           Parties have reached an agreement regarding the substantive terms of a class-wide settlement, pending  
7           the Parties’ agreement on a long-form class settlement agreement. The Parties then signed a long form  
8           settlement agreement (“Agreement”). (*Id.*)

9           Plaintiff and Class Counsel are aware of the burdens of proof necessary to establish liability for  
10          the claims asserted in the Action, both generally and in response to Defendant’s defenses thereto.  
11          (Tunyan Decl., ¶ 7.) Plaintiff and Class Counsel have also taken into account Defendant’s agreement to  
12          enter into a Settlement that confers substantial relief upon the Class.

13          Based on the foregoing, Plaintiff and Class Counsel have determined that the Settlement set forth  
14          in this Agreement is a fair, adequate, and reasonable Settlement and is in the best interests of the Class.  
15          (Tunyan Decl., ¶7.) Solely for the purpose of settling this case, the parties agree that the requirements for  
16          establishing class action certification with respect to this class have been met and are met. (*Id.*) If this  
17          Settlement is not approved by the Court for any reason, Defendant reserves its rights to contest class  
18          certification. (*Id.*) This Settlement, if approved by the Court, will result in the termination with  
19          prejudice of the litigation through the entry of the Judgment and the release of all Released Claims for all  
20          Class Members, including all within the class definition who have not elected to exclude themselves  
21          from the Class. (*Id.*)

22       **IV.    CLASS DEFINITION**

23          The Class is defined as follows:

24          All individuals employed by Defendant in California and classified as “non-exempt” at  
25          any time during the Class Period (the “Class Period” is September 22, 2021 to August  
26          31, 2023). “Settlement Class Members” are those Class Members who do not submit  
27          timely exclusion requests to the Settlement Administrator. (Settlement, ¶¶ 3-4.)  
28          (Tunyan Decl., ¶ 36 and Exhibit 1.)

            The PAGA Employee is defined as follows:

1 All Class Members that worked at any time during the PAGA Period (the “PAGA  
2 Period” is March 27, 2022 to August 31, 2023.) All PAGA Employees are “aggrieved  
3 employees” as defined pursuant to PAGA. PAGA Employees cannot opt out of the  
4 settlement of the PAGA claim. (Settlement, ¶¶ 10-11.)

5 **V. DISCUSSION**

6 **A. The Court Should Conditionally Certify the Class Because It Meets All the**  
7 **Requirements for Certification for Settlement Purposes Under CCP § 382**

8 Under Code of Civil Procedure § 382,<sup>1</sup> class certification is warranted so long as there is a  
9 numerous and ascertainable class with a well-defined community of interest among its members and that  
10 a “class action proceeding is superior to other means for a fair and efficient adjudication of the  
11 litigation.” *See, e.g., Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319, 326, 332 (2004). Any  
12 doubts as to the appropriateness of class treatment must be resolved in favor of certification, subject to  
13 later modification. *Richmond v. Dart Indus. Inc.*, 29 Cal. 3d 462, 473-475 (1981). For purposes of this  
14 Settlement only, Defendant has agreed not to oppose conditional certification of the proposed class  
15 action. (Settlement ¶ 21.)

16 “The certification question is ‘essentially a procedural one that does not ask whether an action is  
17 legally or factually meritorious.’” *Id.*, at 326, quoting *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-440  
18 (2000). Indeed, the certification question simply asks whether the theory of recovery advanced by the  
19 plaintiff is likely to prove amenable to class treatment. *See, e.g., Jaimez v. Daiohs USA, Inc.*, 181 Cal.  
20 App. 4th 1286, 1298 (2010). In ruling on certification, a trial court’s task is to determine “whether ... the  
21 issues which may be jointly tried, when compared with those requiring separate adjudication, are so  
22 numerous or substantial that the maintenance of a class action would be advantageous to the judicial  
23 process and to the litigants.” *Id.* Thus, “[t]he relevant comparison lies between the costs and benefits of  
24 adjudicating plaintiffs’ claims in a class action and the costs and benefits of proceeding by numerous  
25 separate actions . . . .” *See, e.g., id.*

26 “[I]t is also well established that trial courts should use different standards to determine the

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27 <sup>1</sup> Code Civ. Proc. § 382, which is the statutory basis for the maintenance of class actions under  
28 California law, states in relevant part, “[W]hen the question is one of a common or general interest, of  
many persons, or when the parties are numerous, and it is impracticable to bring them all before the  
court, one or more may sue or defend for the benefit of all.”

propriety of a settlement class, as opposed to a litigation class certification. Specifically, a lesser standard of scrutiny is used for settlement cases.” *Global Minerals & Metals Corp. v. Superior Court*, 113 Cal. App. 4th 836, 859 (2003), citing *Dunk v. Ford Motor Co.* 48 Cal. App. 4th 1794, 1807 n. 19 (1996). As the court noted in *Dunk*, although certification requirements are intended “to protect the interests of the non-representative class members,” that concern is “protected by the trial court’s fairness review of the settlement.” *Dunk*, 48 Cal. App. 4th at 1807 n.19.

Indeed, numerous courts have certified settlement classes. For example, the court in *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285 (2d Cir. 1992), cert. dismissed, 506 U.S. 1088, 122 L. Ed. 497, 113 S. Ct 1070 (1993), addressed settlement before a class was certified. After a hearing, the “district court issued an order certifying the class and approving the settlement agreement.” *Id.* at 289; see also *Alaniz v. California Processors, Inc.*, 73 F.R.D. 269, 278 (N.D. Cal. 1976) (“the use of the tentative settlement class procedure was appropriate in this case”), *aff’d*, 572 F.2d 657 (9th Cir.), cert. denied, 439 U.S. 837 (1978). Certification of a settlement class is a regular feature of class action litigation and an approved procedure which ought to be followed in this case. See Newberg on Class Actions (3d ed. 1991) § 11.27, pp. 11-40 to 11-56; Manual for Complex Litigation, 2d (1993) § 30.45.

In view of these standards, and as shown below, the Class should be certified for purposes of settlement. Code Civ. Proc. § 382; Rules of Court, Rule 3.769(c).

**1. The Members of the Class Are Both Objectively Ascertainable and Sufficiently Numerous.**

Whether an ascertainable class exists turns on three factors: (1) the class definition, (2) the size of the class, and (3) the means of identifying class members. See *Miller v. Woods*, 148 Cal. App. 3d 862, 873 (1983). In this case, Plaintiff contends that all three considerations strongly favor class certification.

A class is ascertainable when “it is defined ‘in terms of objective characteristics and common transactional facts’ that make ‘the ultimate identification of class members possible when that identification becomes necessary.’” *Noel v. Thrifty Payless, Inc.*, 7 Cal. 5th 955, 980 (2019). No set number of class members is required to maintain a class action. *Hebbard v. Colgrove*, 28 Cal. App. 3d 1017, 1030 (1972). In fact, the California Supreme Court has upheld a class of as few as ten members. *Bowles v. Superior Court*, 44 Cal. 2d 574 (1955).

1 The class definition is sufficiently specific to enable the Parties, Class Members, and the Court to  
2 determine makeup of the class. *See Clothesrigger, Inc. v. GTE Corp.*, 191 Cal. App. 3d 605, 617 (1987)  
3 (proposed class defined as all persons nationwide subscribing to telephone service since January 1, 1981,  
4 who were charged for one or more unanswered long distance calls, deemed “plainly” ascertainable).

5 The question of whether class members are easily identifiable turns on whether a plaintiff can  
6 establish “the existence of an ascertainable class,” not whether the plaintiff can “identify the individual  
7 members of such class as prerequisite to the class suit.” *Daar*, 67 Cal.2d at 706; *see also, Reyes v. San*  
8 *Diego County Bd. of Supervisors*, 196 Cal. App. 3d 1263, 1275 (1987).

9 In this case, there are approximately 194 Class Members, all of whom may be identified by  
10 reference to Defendant’s records. In addition, to facilitate the administration of the Settlement, Defendant  
11 has agreed to share the information from records and has already demonstrated that it can do so when  
12 providing class-wide discovery to Plaintiff to facilitate settlement discussions. Accordingly, the Class is  
13 not only ascertainable, but also sufficiently numerous. (Tunyan Decl., ¶ 37.)

14 **2. There Are Common Questions That Predominate Over Any Questions That**  
15 **May Be Unique to Individual Class Members.**

16 The community of interest requirement embodies three factors: (1) predominant questions of law  
17 and fact; (2) class representatives with claims or defenses typical of the class; and (3) class  
18 representatives who can adequately represent the class. *Dunk*, 48 Cal. App. 4th at 1806; *Richmond*, 29  
19 Cal. 3d at 473-75. In this case, Plaintiff’s claims satisfy all three factors.

20 A question of law or fact is common to the members of a class if it may be resolved through  
21 common proof. *See, Jaimez*, 181 Cal.App.4th at 1305. As for predominance, it “is a comparative  
22 concept, and ‘the necessity for class members to individually establish eligibility and damages does not  
23 mean individual fact questions predominate.’” *Sav-on*, 34 Cal. 4th at 334, quoting *Reyes v. Los Angeles*  
24 *County Bd. of Supervisors*, 196 Cal. App. 3d 1263, 1278 (1979). Thus, “[i]ndividual issues do not render  
25 class certification inappropriate so long as such issues may effectively be managed.” *Id.* This is  
26 especially so where the key difference between class members solely concerns their damages. *See id.*

27 In this case, common questions include, but are not limited to: i. Whether or not Defendant paid  
28 proper wages to the Class; ii. Whether or not Defendant provided meal periods to the Class; iii. Whether

1 or not Defendant provided rest periods to the Class; iv. Whether or not Defendant paid compensation  
2 timely upon separation of employment to former Class Members; v. Whether or not Defendant paid  
3 compensation timely throughout Class Members' employment; vi. Whether or not Defendant provided  
4 accurate itemized wage statements to the Class; vii. Whether or not waiting-time penalties are available  
5 to the Class for violation of California Labor Code § 203; viii. Whether or not Defendant reimbursed for  
6 necessary business expenses pursuant to California Labor Code § 2802; ix. Whether or not Defendant  
7 engaged in unlawful or unfair business practices affecting the Class in violation of California Business  
8 and Professions Code §§ 17200-17208; and x. Whether or not Plaintiff and the Class are entitled to  
9 penalties pursuant to PAGA (Tunyan Decl., ¶ 39.)

10 In the Action, Plaintiff's claims present sufficient common issues of law and fact that  
11 predominate over individual issues and warrant class certification. From their review of the  
12 documentation provided, Class Counsel determined that for purposes of these claims, Defendant's  
13 policies and practices are either identical, or sufficiently similar, to raise the same questions of liability,  
14 and applied to all Class Members. Because Class Members would have to prove the same issues of law  
15 and fact to prevail, and because their potential legal remedies are identical, it would be preferable to  
16 resolve all Class Members' claims by means of the Settlement than to require each Class Member to  
17 litigate his or her individual claims. Therefore, common questions predominate over any questions that  
18 may be unique to individual Class Members, and class-wide settlement is superior to any other method  
19 of resolution.

### 20 3. Plaintiff's Claims Are Typical of Those of the Class.

21 Typicality "requires a showing that the class representative has claims or defenses typical of the  
22 class." *See, e.g., Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524, 1534 (2008), citing  
23 *Fireside Bank v. Super. Ct.*, 40 Cal. 4th 1069, 1089 (2007), and *Sav-On*, 34 Cal. 4th at 326, approved by  
24 *Jaimez*, 181 Cal. App. 4th at 1298 and *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal. 4th 1004 (2012).

25 To satisfy the typicality requirement, California law does not require that Plaintiff has claims  
26 identical to the other class members. Rather, the test of typicality for a class representative is whether  
27 other members have the same or similar injury, whether the action is based on conduct which is not  
28 unique to the named plaintiffs, and whether other class members have been injured by the same course of

1 conduct. *Seastrom v. Neways, Inc.*, 149 Cal. App. 4th 1496, 1502 (2007). The typicality requirement for  
2 a class representative refers to the nature of the claim or defense of the representative, and not to the  
3 specific facts from which it arose or the relief sought. *Id.*; *Hanon v. Dataproducts Corp.*, 976 F.2d 497,  
4 508 (9th Cir. 1992).

5 The purpose of this requirement is to ensure that the representative plaintiff has interests that are  
6 reasonably co-extensive with those of absent class members. *See id.* “The test of typicality ‘is whether  
7 other members have the same or similar injury, whether the action is based on conduct which is not  
8 unique to the named plaintiffs, and whether other class members have been injured by the same course of  
9 conduct.’” *Id.*, quoting *Schwartz v. Harp* 108 F.R.D. 279, 282 (C.D. Cal. 1985). Notably, “it has never  
10 been the law in California that the class representative must have *identical* interest with the class  
11 members.” *Classen v. Weller*, 145 Cal. App. 3d 27, 46 (1983). In light of these standards, Plaintiff is  
12 typical of class members.

13 Here, like other Class Members, Defendant employed Plaintiff in a non-exempt position during  
14 the Class Period, and Plaintiff was subject to the same policies alleged to have impacted the entire class.  
15 (Tunyan Decl., ¶ 38.) Plaintiff and other Class Members share the same claims stemming from  
16 Defendant’s alleged violations of the Labor Code and relevant wage order. Thus, Plaintiff is typical of  
17 the Class.

#### 18 **4. Plaintiff and Plaintiff’s Counsel Will Adequately Represent the Class.**

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

24 In the Action, Plaintiff has no conflicts of interest with other Class Members and has agreed to  
25 place Class interests above Plaintiff’s own. (Athey Decl., ¶¶ 4-23; Tunyan Decl., ¶ 41.) Moreover,  
26 Plaintiff’s counsel are experienced in wage and hour class action litigation and have no conflicts of  
27 interest with absent Class Members. (Tunyan Decl., ¶¶ 22-28, 41.) As such, this Court should appoint  
28 Plaintiff as Class Representative for the Class and appoint Plaintiff’s Counsel as Class Counsel.

1                               **5.       Proceeding as a Class Action is Superior to Individual Actions**

2               Under the circumstances, proceeding as a class action is a superior means of resolving this  
3       dispute, as the Class Members and the Court will derive substantial benefits. Class certification would  
4       serve as the only means to deter and redress the alleged Labor Code violations. *See Linder v. Thrifty Oil*  
5       *Co.* 23 Cal. 4th at 434 (relevant considerations include the probability that each class member will come  
6       forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the  
7       class approach would actually serve to deter and redress the alleged wrongdoing). Furthermore,  
8       individual actions arising out of the same operative facts would unduly burden the courts and could result  
9       in inconsistent results, which may be avoided by class certification.

10                   **B.       The Court Should Preliminarily Approve the Settlement Because It Is a Fair,**  
11                   **Adequate, and Reasonable Compromise of Disputed Wage Claims in View of**  
12                   **Defendants’ Potential Liability Exposure and the Risks of Continued Litigation**

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

21                   **1.       Class Action Settlements Are Subject to Review and Approval.**

22               Any settlement of class litigation must be reviewed and approved by the presiding court. Rules  
23       of Court, Rule 3.769(a). Approval occurs in two steps: (1) an early (preliminary) review by the trial  
24       court and (2) a subsequent (final) review after notice has been distributed to the class members. The  
25       Preliminary Approval Hearing and Final Approval Hearing coincide with these two steps. The present  
26       motion seeks *preliminary approval* and the setting of a Final Approval Hearing.

27               To evaluate a settlement, the trial court must receive “basic information about the nature and  
28       magnitude of the claims in question and the basis for concluding that the consideration being paid for the

1 release of those claims represents a reasonable compromise.” *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.  
2 App. 4th 116, 133 (2008). However, the record need *not* contain an explicit statement of the maximum  
3 theoretical amount that the class could recover:

4       Greenwell misunderstands *Kullar*, apparently interpreting it to require the record in all  
5 cases to contain evidence in the form of an explicit statement of the maximum amount  
6 the plaintiff class could recover if it prevailed on all its claims—a number which  
7 appears nowhere in the record of this case. But *Kullar* does not, as Greenwell claims,  
require any such explicit statement of value; it requires a record which allows “an  
understanding of the amount that is in controversy and the realistic range of outcomes  
of the litigation.”

8 *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal. App. 4th 399, 409 (2010).

9                   **2.       The Parties Reached the Settlement Through Arms’ Length Negotiations**  
10                   **Between Experienced Counsel with the Assistance of a Highly Qualified**  
11                   **Mediator After Sufficient Data Was Exchanged to Evaluate Settlement.**

12       A settlement is presumptively fair where it is reached through arms’ length bargaining, based on  
13 sufficient discovery and investigation to allow counsel and the court to act intelligently, counsel is  
14 experienced in similar litigation, and the percentage of objectors is small.<sup>2</sup> *Dunk*, 48 Cal.App.4th at 1802;  
15 *In re Microsoft I-V Cases*, 135 Cal. App. 4th 706, 723 (2006); *7-Eleven Owners for Fair Franchising v.*  
16 *Southland Corp.*, 85 Cal. App. 4th 1135, 1146 (2000). In deciding whether to approve a settlement, a  
17 trial court has broad powers to determine whether it is fair under the circumstances of the case. *See, e.g.,*  
18 *Mallick v. Superior Court*, 89 Cal. App. 3d 434, 438 (1979). In exercising these powers, the overriding  
19 concern is to ensure that a proposed settlement is “fair, adequate, and reasonable.” *Dunk*, at 1801,  
20 quoting *Officers for Justice v. Civil Serv. Comm’n of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

21       Relevant factors in making this determination, include, but are not limited to:

22       [T]he complexity and likely duration of further litigation, the risk of maintaining class  
23 action status through trial, the amount offered in settlement, the extent of discovery  
24 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.

25 *Id.* These factors require balancing, are non-exhaustive, and, as such, trial courts should tailor the factors

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27       <sup>2</sup> Because the fourth prerequisite for the presumption to arise cannot be addressed until the final  
28 approval hearing, only the first three prerequisites are relevant at this preliminary stage of the settlement  
approval process.

1 considered to each case and give due regard to “what is otherwise a private consensual agreement  
2 between the parties.” *Id.*

3 Here, the Settlement resulted from thorough, arms’ length negotiations between experienced  
4 counsel with the assistance of highly regarded mediator. (Tunyan Decl., ¶¶ 6-7, 16.) With respect to the  
5 claims at issue in this case, Plaintiff obtained data from Defendant and then carefully reviewed that  
6 information. Counsel for Plaintiff also examined relevant policies in detail about their work experiences  
7 and Defendant’s practices.

8 Based on the totality of that review, Plaintiff estimated the potential exposure and then estimated  
9 risk factors to adjust the reasonable expected outcome. The investigation and discovery that Plaintiff’s  
10 counsel conducted were sufficient to provide them with enough information to intelligently evaluate the  
11 estimated exposure in this action for purposes of negotiating the Settlement in view of the risks discussed  
12 below and are also sufficient to allow this Court to do the same. *See, e.g., Wershba v. Apple Computer,*  
13 *Inc.*, 91 Cal. App. 4th 224, 245 (2001).

14 **3. The Settlement Represents a Fair, Adequate, and Reasonable Compromise**  
15 **of Class Members’ Claims Based on Defendant’s Estimated Liability**  
16 **Exposure Given the Risks Continued Litigation Would Entail.**

17 A settlement is not judged against what might have been recovered had a plaintiff prevailed at  
18 trial and does not have to provide 100% of damages sought to be fair and reasonable. “In the context of a  
19 settlement agreement, the test is not the maximum amount plaintiffs might have obtained at trial on the  
20 complaint, but rather whether the settlement is reasonable under all of the circumstances.” *Wershba*, 91  
21 Cal.App.4th at 250. Accordingly, because settlements involve compromise, even one that provides for  
22 substantially narrower relief than would likely be obtained if the suit were successfully litigated can be  
23 reasonable given that “the public interest may indeed be served by a voluntary settlement in which each  
24 side gives ground in the interest of avoiding litigation.” *Id.*, quoting *Air Line Stewards & Stewardesses*  
25 *Ass’n, Local 550 v. American Airlines, Inc.*, 455 F.2d 101, 109 (7th Cir. 1972).

26 With respect to the claims asserted on behalf of the Class in this case, there are serious risks that  
27 support the reduced compromise amount. These risks include, but are not limited to: (i) the risk that  
28 Plaintiff would be unable to establish liability for unpaid straight time or overtime wages, *see Duran v.*

1 *US Bank Nat'l Ass'n*, 59 Cal. 4th 1, 39 & n. 33 (2014) ("*Duran*"), citing *Dilts v. Penske Logistics, LLC*  
2 2014 WL 205039 (S.D. Cal. 2014); (ii) the risk that Defendant's meal and rest period policies might not  
3 ultimately support class certification or a class-wide liability finding, see *Duran*, 59 Cal. 4th at 14, n. 28  
4 (citing Court of Appeal decisions favorable on class certification issue without expressing opinion as to  
5 ultimate viability of proposition); (iii) the risk that uncertainties pertaining to the ultimate legality of  
6 Defendant's policies and practices could preclude class-wide awards of statutory penalties under Labor  
7 Code §§ 203 and 226(e); (iv) the risk that individual differences between Class Members could be  
8 construed as pertaining to liability and not solely to damages, see *Duran*, 59 Cal. 4th at 19; (v) the risk  
9 that any civil penalties award under the PAGA could be reduced by the Court in its discretion, see Labor  
10 Code § 2699(e)(1); (vi) the risk that class treatment could be deemed improper as to one or more claims,  
11 except for settlement purposes; (vii) the risk that Defendant can wind down its legal entity and/or not be  
12 financially viable to continue litigation since it ceased its operation and sold assets on August 31, 2023;  
13 and, (viii) the risk that lengthy appellate litigation could ensue. (Tunyan Decl., ¶ 15.) These risks are non-  
14 exhaustive.

15 In light of the uncertainties of protracted litigation, the settlement amount reflects a fair and  
16 reasonable recovery for the Class Members. (Tunyan Decl. ¶¶ 10-15.) The settlement amount is, of  
17 course, a compromise figure. (Tunyan Decl. ¶ 16.) By necessity it took into account risks related to  
18 liability, damages, and the defenses asserted by Defendant. (*Id.*) Moreover, each Class Member will be  
19 given the opportunity to opt-out of the Settlement, allowing those who feel they have claims that are  
20 greater than the benefits they can receive under this Settlement to pursue their own claims. (*Id.*) For the  
21 approximately **194** members of the Class, the average **gross** recovery is at least **\$902.06** per class  
22 member, and the estimated average **net** recovery for each Class Member is approximately **\$372.25**. (*Id.*)  
23 Given that Defendant could challenge certification and liability, this is a significant sum to have achieved  
24 in settlement. Moreover, a Class Member who worked a greater number of weeks for Defendant will  
25 receive a larger share of the Settlement than a Class Member who worked for a shorter amount of time  
26 during the class period. (*Id.*)

27 After analyzing the claims in this matter, Plaintiff has concluded that the value of this Settlement  
28 is fair, adequate, and reasonable. (Tunyan Decl., ¶ 17.) The Gross Settlement Amount of **\$175,000.00** is

about 75% of the **\$232,627.16** estimate of *risk-adjusted* recovery (excluding interest) at this stage in the litigation. On that basis, it would be unwise to pass up this settlement opportunity. This assessment is based on a carefully constructed model of the current fair value of the case, using estimated risks, average wage rates, numbers of employees, and the amount of time covered by the class period. (*Id.*) The maximum calculated reasonable exposure is **\$2,316,776.15**, including PAGA penalties. (*Id.*)

- A reasonably estimated exposure for unpaid wages for the off-the clock work was calculated, with the assistance of an expert, to be approximately **\$315,640.35**. However, with the risk factor discounts for certification and liability proof, the value of that claim is estimated by Plaintiff’s counsel to be approximately **\$37,876.84**, assuming certification probability of 40% and merits success at 30%.
- A reasonably estimated exposure for rest break violations over the class period was calculated at **\$210,426.90**, but with chances of certification and proof of liability (50% and 40% respectively) for a risk-adjusted exposure of **\$42,085.38**.
- A reasonably estimated exposure for meal break violations over the class period was calculated at **\$210,426.90**, with chances of certification and liability risks (50% and 40% respectively) resulting in a risk-adjusted exposure of **\$42,085.38**.
- Risk-adjusted penalty recoveries for wage statement and Labor Code § 203 penalties with chances of certification and liability risks (30% and 20% respectively) were estimated to be approximately **\$21,303.00** and **\$56,151.36**, respectively, on maximum exposures of **\$355,050.00** and **\$935,856.00**, respectively.
- A reasonably estimated exposure for unreimbursed expenses over the class period was calculated at **\$41,876.00**, with chances of certification and liability risks (50% and 40% respectively) resulting in a risk-adjusted exposure of **\$8,375.00**.
- Performing risk-adjusted valuations for all claims yields a total value in the range of **\$207,877.16**, excluding PAGA.<sup>3</sup> (*Id.*)

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<sup>3</sup> In a sense, it is nonsensical to assign specific percentages to future events, but it does provide a specific method for attempting to reduce the concept of “very high risk” or “high risk” to a quantifiable amount. Certification of a claim is typically a binary event. One does not obtain a 20% certification; a

- PAGA penalties were calculated as having a maximum realistic exposure of **\$247,500.00**, but a risk adjusted value of **\$24,750.00**, after factoring in risks of reduction in penalties pursuant to Court discretion and the high risk of the inability to prove violations for all aggrieved employees.

The concurrently filed Declaration of Lilit Tunyan sets forth claim valuation in additional detail. (See, Tunyan Decl., ¶ 17.)

This result here is fully supportable as reasonable. First, it is important to recognize the wilfulness finding required for Labor Code §§ 203 and 226 is challenging to establish. (Tunyan Decl., ¶ 18.) Second, rest break and meal period claims have been challenging to certify for many years, even after *Brinker*. (Tunyan Decl., ¶ 18.) Third, the certification rates in California are lower than conventional wisdom holds. See, H. Scott Leviant, *Second Interim Report on class actions in California sheds new light on certification* (February 19, 2010), [www.thecomplexlitigator.com](http://www.thecomplexlitigator.com), available at <http://www.thecomplexlitigator.com/post-data/2010/2/19/second-interim-report-on-class-actions-in-california-sheds-n.html>; see also, *Findings of the Study of California Class Action Litigation, 2000-2006*, available at <http://www.courtinfo.ca.gov/reference/documents/class-action-lit-study.pdf> (finding, at page 5, and in Table 9, at page 15, that only 21.4% of all class actions were certified either as part of a settlement **or** as part of a contested certification motion).

Here, the estimated certification probabilities are **above** the average rate at which cases were certified in California over the study years, based upon data available through the California Courts websites. (Tunyan Decl., ¶ 18.) In sum, well *under* 20% of all cases filed as proposed class actions are ultimately certified by way of a *contested* motion. (*Id.*) The recovery is roughly 8% of the maximum theoretical recovery (estimated to be approximately **\$2,316,776.15**, including PAGA), which falls within the expected outcome under the likelihood of success metric. This Settlement achieves the goals of the litigation. (*Id.*)

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claim is either certified or it is not. But the current expected value is best quantified by applying a risk reduction, based on the total experience of counsel.

1                   **4.       The Proposed Method for Allocating Settlement Funds Is Fair, Adequate,**  
2                   **and Reasonable.**

3           The proposed method of allocating the Settlement Fund to Class Members also is fair and  
4 reasonable. As noted, the parties agreed to allocate the Settlement Fund between all Class Members  
5 based on time worked by the Class Member during the Class Period, in relation to the total amount of  
6 time worked by all participating Class Members collectively during the class period. This proposed  
7 method is fair and reasonable because each Class Member’s actual potential damages vary based on the  
8 number of workweeks he or she actually worked (e.g., Lab. Code § 226.7 provides for an extra hour of  
9 pay at the employee’s regular rate of pay for each violation, resulting in a higher potential damage when  
10 a higher number of incidents occur). A Class Member who worked a greater number of weeks for  
11 Defendant will receive a larger payment under the Settlement than a Class Member who worked for a  
12 shorter amount of time during the relevant period. (Tunyan Decl., ¶¶ 9, 16.)

13                   **5.       The Proposed Service Payment to Plaintiff Is Fair, Adequate, and**  
14                   **Reasonable and Warrants Preliminary Approval.**

15           The proposed service payment to Plaintiff is intended to recognize the substantial initiative and  
16 significant efforts on behalf of the Class. Courts routinely approve incentive awards to compensate  
17 named plaintiffs for the services they provide and the risks they incur during class action litigation, often  
18 in much higher amounts than that sought here. *See, e.g., Bell v. Farmers Ins. Exchange*, 115 Cal. App.  
19 4th 715, 726 (2004) (upholding “service payments” to named plaintiffs for their efforts in bringing the  
20 case); *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294 (N.D.Cal. 1995) (approving a \$50,000  
21 enhancement award). Plaintiff contributed time to the prosecution of this matter, including assistance  
22 prior to the mediation with discovery, information and substantial time conferring with counsel over the  
23 course of this litigation and before it was filed. (Athey Decl., ¶¶ 4-23; Tunyan Decl., ¶ 34.) The  
24 enhancement also recognizes the considerable risks Plaintiff undertook on behalf of the Class to be  
25 personally liable for all costs incurred regardless of the success of the litigation or class certification, as  
26 well as the personal risk of facing intrusive discovery and potential disclosure to future employers that  
27 Plaintiff sued a former employer, making future employment prospects uncertain and giving up his right  
28 to sue Defendant for any non-wage related claims to stand in for Class Members.

1                   **6.       The Proposed Award of Attorneys’ Fees and Costs Is Also Fair, Adequate,**  
2                   **and Reasonable and Merits Preliminary Approval.**

3                   The California Supreme Court removed any lingering doubt about the use of the percentage of  
4                   the fund method to award attorney’s fees in California Courts:

5                   We join the overwhelming majority of federal and state courts in holding that when  
6                   class action litigation establishes a monetary fund for the benefit of the class members,  
7                   and the trial court in its equitable power awards class counsel a fee out of that fund, the  
8                   court may determine the amount of a reasonable fee by choosing an appropriate  
9                   percentage of the fund created. The recognized advantages of the percentage method—  
10                  including relative ease of calculation, alignment of incentives between counsel and the  
11                  class, a better approximation of market conditions in a contingency case, and the  
12                  encouragement it provides counsel to seek an early settlement and avoid unnecessarily  
13                  prolonging the litigation (See pt. I, *ante*; *Lealao, supra*, 82 Cal.App.4th at pp. 48–49, 97  
14                  Cal.Rptr.2d 797; *Rawlings v. Prudential–Bache Properties, Inc., supra*, 9 F.3d at p.  
15                  516)—convince us the percentage method is a valuable tool that should not be denied  
16                  our trial courts.

17                  *Laffitte v. Robert Half Intern. Inc.*, 1 Cal. 5th 480, 503 (2016).<sup>4</sup> Thus, this Court may and, as strongly  
18                  encouraged by the California Supreme Court, *should* award attorney’s fees to Plaintiff’s counsel based  
19                  upon the percentage of the fund methodology.

20                  Setting *Laffitte* aside, whether the once-again-confirmed percentage of the fund method or the  
21                  lodestar method is used, the outcome is roughly the same: “Empirical studies show that, regardless  
22                  whether the percentage method or the lodestar method is used, fee awards in class actions average  
23                  around one-third of the recovery.” *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 47 n. 11 (2008), quoting  
24                  *Shaw v. Toshiba America Information Systems, Inc.*, 91 F.Supp.2d 942, 972 (E.D. Tex. 2000). This is  
25                  also consistent with Plaintiff’s counsel’s experience in these types of cases. Here, Plaintiff’s attorneys  
26                  intend to request attorneys’ fees of up to \$58,333.33 (one-third of the GSA), and costs capped at \$22,000  
27                  (which includes payment for mediation, filing fees, and other standard expenses). (Tunyan Decl., ¶¶ 29-  
28                  33.) Given the efforts and risks involved in this case, as well as the results achieved, these amounts are  
29                  within the range of reasonableness and warrant *preliminary approval*.

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30                  <sup>4</sup> The Supreme Court also corrected the misconception that *Dunk* should be viewed as expressing  
31                  doubt about the use of the percentage method: “The *Dunk* court, while finding the percentage method  
32                  inapplicable to the settlement before it due to the lack of a readily valued common fund, did not purport  
33                  to bar its usage generally in common fund cases.” *Laffitte*, 1 Cal. 5th at 501.

1                   **7.       The Proposed Payment to the Administrator Is Fair and Reasonable**

2           In deciding whether to approve a proposed settlement, a trial court must determine if the  
3   proposed settlement is fair under the circumstances of the case. *Mallick*, 89 Cal.App.3d at 438. In  
4   exercising this power, the overriding concern is to ensure that a proposed settlement is “fair, adequate,  
5   and reasonable.” *Dunk*, 48 Cal.App.4th at 1801 (internal quotations omitted). ILYM Group, Inc., which  
6   has been selected due to its competitive bid, estimates that administration can be performed for  
7   \$6,950.00. In counsel’s experience, based on similar wage-and-hour actions, an estimated cost of \$  
8   6,950 is a fair and reasonable amount for administration fees and should be preliminarily approved.  
9   (Tunyan Decl., ¶ 35.)

10                   **8.       The Proposed Class Notice Complies with Rule 3.766(d) and (e)**

11           Notice requirements are set forth in Rules of Court, Rule 3.766. In determining the manner of  
12   the notice, the court must consider the interests of the class, the type of relief requested, the stake of the  
13   individual class members, the cost of notifying class members, the resources of the parties, the possible  
14   prejudice to class members who do not receive notice, and the *res judicata* effect on class members.  
15   Rules of Court, Rule 3.766(e).

16                   a)       *The Notice Procedure Satisfies Due Process*

17           Plaintiff requests that the Court approve the proposed plan for giving notice to the Class and  
18   administering the Settlement. The notice process is set forth in the Settlement. The standard for  
19   determining the adequacy of notice is whether the notice has “a reasonable chance of reaching a  
20   substantial percentage of the class members.” *Cartt v. Sup. Ct.*, 50 Cal.App.3d 960, 974 (1975).  
21   California law vests the Court with broad discretion in fashioning an appropriate notice program. *Cartt*,  
22   50 Cal. App. 3d at 973-74. There is no statutory or due process requirement that all class members  
23   receive actual notice, but in this matter, the Class Members will receive direct mailed notice. Direct mail  
24   notice to Class Members’ last known address is the best possible notice under the circumstances.  
25   *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

26           As the Court of Appeal has explained, “[t]he notice given should have a reasonable chance of  
27   reaching a substantial percentage of the Class Members . . . .” *Cartt*, 50 Cal. App. 3d at 974. For class  
28   claims “for money damages or similar relief at law, notice sent by first class mail to the last known

1 address of each member of the plaintiff class is sufficient.” *Phillips Petroleum Co. v. Shutts*, 472 U.S.  
2 797, 811 (1985). Here, the proposed procedure includes safeguards, including, but not limited to,  
3 searches for address changes and the re-mailing of returned notices after skip traces. As such, the  
4 proposed procedure provides a reasonable chance that Class members will receive notice.

5 *b) The Notice is Accurate and Informative*

6 The proposed Notice of Class Action Settlement should be approved for dissemination to the  
7 Class Members. It will be disseminated through direct mail to the last known address for each Class  
8 Member. It informs the Class Members of the terms of the settlement and their right to be excluded from  
9 the Settlement. If there are Class Members who wish to object to this proposed class action settlement,  
10 they will have the opportunity to file their objections and be heard at the Final Approval Hearing.

11 Rule 3.769(f) of the Rules of Court provides as follows:

12 If the court has certified the action as a class action, notice of the final approval hearing  
13 must be given to the class members in the manner specified by the court. The notice  
14 must contain an explanation of the proposed settlement and procedures for class  
members to follow in filing written objections to it and in arranging to appear at the  
settlement hearing and state any objections to the proposed settlement.

15 Rules of Court, rule 3.769(f).

16 The Notice also fulfills the requirement of neutrality in class notices. 3 NEWBERG § 8.39. It  
17 summarizes the proceedings and the terms and conditions of the proposed Settlement, in an informative  
18 and coherent manner, in compliance with the Manual for Complex Litigation (“MANUAL”), (2d Ed.  
19 1993), which states that “the notice should be accurate, objective, and understandable to Class Members .  
20 . . .” MANUAL, § 30.211. It makes clear that the Settlement does not constitute an admission of liability  
21 by the Defendant and recognizes that this Court has not ruled on the merits. It also states that the final  
22 settlement approval decision has yet to be made. Accordingly, the Notice complies with the standards of  
23 fairness, completeness, and neutrality required of a combined settlement-certification class notice.

24 Upon the Court’s approval, the Notice of Class Action Settlement will be mailed by the  
25 Administrator to each Class Member, in Spanish as well.

26 **9. The PAGA Allocation is Reasonable**

27 The PAGA allocation is reasonable because the settlement of the underlying wage and hour  
28 claims is robust and serves the deterrent purpose of the PAGA statute. *O’Connor v. Uber Technologies*,

1 *Inc.*, 201 F.Supp.3d 1110, 1135 (N.D. Cal. 2016) (“By providing fair compensation to the class members  
2 as employees and substantial monetary relief, a settlement not only vindicates the rights of class  
3 members as employees, but may have a deterrent effect upon the defendant employer and other  
4 employers, an objective of PAGA.”); *see also Viceria v. Mistras Group*, 2016 WL 5907869 \*9 (N.D.  
5 Cal. 2016) (“Applying O’Connor’s sliding scale approach, settlement of the PAGA claim may be  
6 substantially reduced below its standalone settlement value without sacrificing its statutory purposes  
7 because the non PAGA settlement is relatively substantial.”)

8 In addition, there is no evidence that a court or a commissioner had informed Defendant that its  
9 conduct violated the Labor Code. *Amaral v. Cintas Corp.*, 163 Cal. App. 4th 1157, 1209 (2008); *Willis v.*  
10 *Xerox Bus. Servs., LLC*, 2013 WL 6053831, \*7-8 (E.D. Cal. 2013) (“Under California law, courts have  
11 held that employers are not subject to heightened penalties for subsequent violations until and unless a  
12 court or commissioner notified the employer that it is in violation of the Labor Code.”).

13 Finally, the PAGA allocation is fair. The LWDA is receiving **\$7,500.00**. The Class is receiving,  
14 net, an estimated **\$72,216.67** for the releases for eight theories of recovery (including the \$2,500 as the  
15 aggrieved employees’ share of the PAGA Allocation). An allocation to the LWDA equal to  
16 approximately **10%** of the Net Settlement Amount is not unfair and satisfies the policies underlying  
17 California’s wage and hour laws.

## 18 **VI. THE COURT SHOULD SCHEDULE A FINAL FAIRNESS HEARING**

19 The last step in the settlement approval process is the fairness hearing, where the Court makes a  
20 final determination about the propriety of settlement. Plaintiff requests that the fairness hearing in this  
21 case be scheduled for about 120 days after issuance of the Court’s Order granting preliminary approval  
22 of the Settlement. Under the Settlement, Defendant will have 15 days to provide the mailing data to the  
23 Settlement Administrator, which will then have 14 days to mail out class notice. Class Members have 45  
24 days after mailing of the notice to submit exclusions or objections (with a 14-day extension available for  
25 late-returned and re-mailed notices). Therefore, Plaintiff proposes a final approval hearing scheduled for  
26 the first available hearing date that is about 120 days after preliminary approval is granted.

## 27 **VII. CONCLUSION**

28 For all the foregoing reasons, because the Class meets the requirements for certification, because

1 the Settlement bears all requisite indicia of fairness, reasonableness, and adequacy, and because the  
2 proposed notice procedure and forms comport with Rule 3.766 and due process, this Court should grant  
3 this Motion for Preliminary Approval, adopt the [Proposed] Order Granting Preliminary Approval of  
4 Class Action Settlement submitted herewith, and schedule a Final Fairness Hearing.

5  
6 Respectfully submitted,

7 Dated: April 29, 2024

TUNYAN LAW, APC

8  
9 By:  \_\_\_\_\_

Lilit Tunyan  
Artur Tunyan

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11 Attorneys for Plaintiff SCOTT ALLEN ATHEY  
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STATE OF CALIFORNIA )  
 ) ss  
COUNTY OF LOS ANGELES )

On the date indicated below, I served the document described as: **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS AND PAGA REPRESENTATIVE ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** on the interested parties in this action by sending a true copy thereof to interested parties as follows and as stated on the attached service list:

Facsimile: (951) 274- 7770