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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

WILLIAM GIRON on behalf of himself,
all others similarly situated, and on behalf
of the general public,

Plaintiffs,

v.

ACCENT BUILDING RESTORATION,
INC.; and DOES 1-100,

Defendants.

Case No. 23STCV08941

*[Assigned for All Purposes to the
Hon. Elihu M. Berle; Dept. 6]*

**PLAINTIFF WILLIAM GIRON'S MOTION
FOR PRELIMINARY APPROVAL OF
CLASS AND PAGA ACTION
SETTLEMENT, CONDITIONAL
CERTIFICATION, APPROVAL OF CLASS
NOTICE, SETTING OF FINAL APPROVAL
HEARING DATE**

Date: April 16, 2024

Time: 10:00 a.m.

Complaint Filed: April 21, 2023

Trial Date: None Set

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1 **I. INTRODUCTION**

2 Plaintiff William Giron (hereinafter “Plaintiff” or “Mr. Giron”), on behalf of himself and
3 the approximately 98-member putative class, respectfully requests that this Court preliminarily
4 approve the Class Action and PAGA Settlement Agreement and Class Notice (hereinafter
5 “Agreement”¹) entered into between Plaintiff and Defendant Accent Building Restoration
6 (hereinafter “Defendant” or “ABR”) (hereinafter Plaintiff and Defendant are collectively referred
7 to as the “Parties”). The Parties’ Agreement seeks to resolve claims raised against Defendant in
8 this matter in exchange for a non-reversionary \$800,000 Gross Settlement Amount. The proposed
9 Class is comprised of all current and former non-exempt hourly, employees who were employed
10 by Defendant in California at any time from April 21, 2019, through November 16, 2023.² It is
11 requested that the Court grant preliminary approval as, when analyzing the strengths and
12 vulnerabilities of the claims and Defendant’s potential liability exposure, this proposed settlement
13 of \$800,000 is well within the range of reasonableness. This settlement is estimated to pay Class
14 Members an average payment of approximately \$4,473.06.³ The proposed Agreement satisfies all
15 the criteria for preliminary approval under Rule 3.769 of the California Rules of Court.

16 As the following sections show, Class Counsel are convinced that the proposed settlement
17 is in the best interests of the Class based on the negotiations and a detailed knowledge of the issues
18 presented in this action. The length and risks of trial and perils of litigation that affect the value of
19 the claims were all carefully weighed. In addition, the defenses asserted by Defendant, the
20 uncertainty of class certification, the difficulties of complex litigation, the lengthy process of
21 establishing specific damages and various possible delays and appeals, were also carefully
22 considered by Class Counsel in arriving at the proposed settlement. The Agreement was the

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24

¹ The Parties’ utilized the Los Angeles County Superior Court Model Class Action and PAGA
25 Settlement Agreement and Class Notice. The Parties’ Agreement is attached to the Declaration of
26 David Mara, Esq. (“Mara Dec.”) as Exhibit 1. “Exhibit 1” herein refers to the Parties’ Agreement.
Attached to the Declaration of David Mara, Esq. as Exhibit 2 is a redlined version of the Agreement
and Class Notice.

27 ² Exhibit 1 at Paragraph 1.5.

28 ³ The Net Settlement Amount is approximately \$438,360. \$438,360 divided by 98 class members
= \$4,473.06.

1 product of an all-day mediation with respected mediator Jeffrey Ross and was the product of non-
2 collusive, arm's-length negotiations by informed counsel and parties. The settlement is fair,
3 reasonable, and adequate. Accordingly, Plaintiff seeks: (1) preliminary approval of the terms
4 contained in the Agreement; (2) provisional certification of the Class; (3) appointment of Plaintiff
5 as Class Representative; (4) appointment of Mara Law Firm, PC, and Lawyers for Employee and
6 Consumer Rights as Class Counsel; (5) approval of the Parties' proposed notice of class action
7 settlement⁴ (referred to herein as the "Class Notice" or "Notice") and method of notifying the Class
8 about the settlement; and (6) a hearing date for final approval of August 16, 2024.

9 **II. BACKGROUND**

10 Defendant offers a wide variety of property improvement services. On April 21, 2023,
11 Plaintiff commenced this Action by filing a Complaint alleging causes of action against Defendant
12 for failure to pay all straight time wages, failure to pay all overtime wages, failure to provide meal
13 periods, failure to authorize and permit rest periods, failure to adopt a compliant sick pay policy,
14 knowing and intentional failure to comply with itemized employee wage statement provisions,
15 failure to pay all wages due at the time of termination of employment, failure to reimburse/illegal
16 deductions, and violation of the Unfair Competition Law. (Mara Dec. ¶ 14).

17 On April 19, 2023, Plaintiff provided notice to the Labor and Workforce Development
18 Agency ("LWDA") and Defendant in accordance with the Private Attorneys General Act of 2004
19 ("PAGA"). On August 14, 2023, Plaintiff filed a First Amended Complaint adding a cause of
20 action against ABR for violation of the PAGA. The First Amended Complaint is the operative
21 complaint in the Action. (Mara Dec. ¶ 15).

22 **III. INVESTIGATION/LITIGATION HISTORY**

23 **a. Discovery and Investigation**

24 After filing, the Parties engaged in informal discovery. These discovery efforts led to
25 Defendant producing policy documents that covered employees' employment with Defendant, and
26 time and wage records. Included within these documents were Defendant's wage and hour policies,
27 including its meal and rest period policies. Defendant also produced time and wage records for a

28 ⁴ The Class Notice is attached to the Agreement as Exhibit A.

20% random sampling of the Class Members which Plaintiff's Counsel analyzed. The sampling should be reflective of the entire Class as the employees included in it were selected at random. Defendant further produced Plaintiff's personnel file and time and pay records. Plaintiff also requested, and Defendant produced, data surrounding the number of current and former employees, as well as the number of workweeks worked by Class Members during the relevant time period, to establish a potential exposure model in preparation for mediation. From this discovery, Plaintiff and his Counsel were able to analyze Defendant's liability in this action and prepare a realistic damage model. (Mara Dec. ¶ 16).

b. The Parties Agreed to Attend Mediation

The Parties attended an all-day mediation presided over by respected wage and hour mediator Jeffrey Ross on November 14, 2023. This mediation was ultimately successful. The Parties then met and conferred over all the terms of the settlement and finalized their settlement in the Parties' Agreement. The Parties seek preliminary approval of the Agreement in the instant motion. (*See* Mara Dec. ¶ 17; *see also* Exhibit 1 attached thereto).

c. The Parties' Staunchly Conflicting Positions

i. Rest Periods

Plaintiff alleges that employees are not provided with lawful rest periods. Employers have an obligation to provide employees with ten (10) minute rest periods. An employer's obligation to provide its employees with rest periods arises under the Industrial Welfare Commission Wage Orders. Wage Order 7-2001, Section 12(A) states, "[e]very employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof." Here, Plaintiff alleges that Defendant only provides two rest periods per shift, regardless of shift length. In addition, Plaintiff alleges that Defendant does not provide employees with a "net" ten-minute rest period meaning that employees must use their rest period time to transit to and from a suitable rest area. (Mara Dec. ¶ 18).

Defendant asserts that its rest period policy is lawful and that it provides employees with

1 rest periods in compliance with California law. Defendant contends that if litigation were to
2 continue, it would provide declarations from employees stating that they knew they were entitled
3 to rest periods in accordance with California law and that they were able to take full ten-minute
4 rest periods at a suitable rest area. (Mara Dec. ¶ 19).

5 **ii. Meal Periods**

6 Plaintiff contends that Defendant does not provide employees with meal periods that
7 conform with California law. Employers have an obligation under California law to provide
8 employees with thirty (30) minute meal periods. Under California Labor Code § 512(a), “[a]n
9 employer may not employ an employee for a work period of more than five hours per day without
10 providing the employee with a meal period of not less than 30 minutes” Cal. Lab. Code §
11 512(a). An employer “satisfies this obligation [to provide meal periods] if it relieves its employees
12 of all duty, relinquishes control over their activities and permits them a reasonable opportunity to
13 take an uninterrupted 30-minute break, and does not impede or discourage them from doing so.”
14 *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1040. Here, Plaintiff contends
15 that Defendant only provides employees with one meal period per shift regardless of shift length
16 and does not provide first meal periods before the end of the fifth hour of work. (Mara Dec. ¶ 21).

17 Defendant asserts that its meal period policy is lawful and that it provides employees with
18 meal periods in compliance with California law. Further, Defendant alleges that if litigation
19 continues it would be able to show that it advised employees of the right to take a meal period in
20 compliance with California law. Defendant contends that employees either took a lawful meal
21 period or knowingly and voluntarily decided to skip the meal period or take a late or short meal
22 period. Defendant also asserts that the evidence in this case shows that it paid meal period
23 premiums in shifts in which employees were not provided with compliant meal periods. Thus,
24 Defendant contends that to the extent an employee was not provided the opportunity to take a
25 legally compliant meal period, they were provided a meal premium. (Mara Dec. ¶ 22).

26 **iii. Unpaid Wages**

27 Plaintiff contends that Defendant does not pay employees for all time worked. Employees
28 must be paid for all “hours worked,” as that phrase is defined in the Wage Order and interpreted

1 by California courts. Hours worked is defined in the Wage Order as “the time during which an
2 employee is subject to the control of an employer and includes all the time the employee is suffered
3 or permitted to work, whether or not required to do so.” Wage Order 7-2001, Subd. 2(G); *see also*
4 *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833. Under the control standard, “it is
5 only necessary that the worker be subject to the control of the employer in order to be entitled to
6 compensation.” *Morillion v. Royal Packing Co.* (2000) 22 Cal. 4th 575, 584. The *Morillion* Court
7 reasoned that an employee is under the employer’s control and entitled to compensation when the
8 employer “directs, commands or restrains’ an employee.” *Morillion*, 22 Cal. 4th at 583 (*quoting*
9 *Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal. App. 4th 968, 975). Here, Plaintiff contends
10 that Defendant does not pay employees for time employees must commute to and from their job
11 site. (Mara Dec. ¶ 24).

12 Plaintiff argues that the case *Oliver v. Konica Minolta Business Solutions U.S.A.* (“*Oliver*”)
13 (2020) 51 Cal.App.5th 1, supports his position. In *Oliver*, employees were required to drive their
14 personal vehicles for work and the employer did not have an express policy restricting service
15 technicians from using their vehicles for personal use during their commutes. There, the Court of
16 Appeal outlined three factors that must be shown in order for commute time to be compensable:
17 (1) Were employees required to drive their own vehicles; (2) Were employees required to bring
18 tools with them on the commute; and (3) If employees had to bring tools with them on their
19 commute, was there so many tools that the employee was effectively prevented from using the
20 commute time for his or her own purposes. Here, the Parties have a dispute about whether the third
21 factor is met. Plaintiff argues that technicians have to bring so many tools that they are prevented
22 from using their commute time for their own purposes. (Mara Dec. ¶ 25).

23 Defendant contends that commute time is not compensable. Defendant argues that
24 employees do not have to transport a large amount of tools. Defendant asserts that the tools fit into
25 a small box that can be kept in an employee’s trunk. Defendant asserts that, should litigation
26 continue, it will provide the Court with declarations from employees stating that the amount of
27 tools they transport easily fit in their trunk and, thus, commute time is not compensable. (Mara
28 Dec. ¶ 26).

1 **iv. Wage Statements and Waiting Time Penalties**

2 Plaintiff also pursued claims for failure to provide accurate itemized wage statements and
3 waiting time penalty claims. These claims are derivative of Plaintiff's unpaid wage, meal period,
4 and rest period claims. Should Plaintiff's unpaid wage, meal period, and rest period claims fail,
5 these claims would also fail. (Mara Dec. ¶ 28).

6 In addition, Defendant contends that even if Plaintiff were successful in his unpaid wage,
7 meal period, and rest period claims, he would have to prove Defendant "willfully" failed to pay
8 employees the appropriate wages due upon separation of employment. "A willful failure to pay
9 wages within the meaning of Labor Code Section 203 occurs when an employer intentionally fails
10 to pay wages to an employee when those wages are due. However, a good faith dispute that any
11 wages are due will preclude imposition of waiting time penalties under Section 203." Cal. Code
12 Regs. Tit. 8 § 13520. "A 'good faith dispute' that any wages are due occurs when an employer
13 presents a defense, based in law or fact, which would preclude any recovery on the part of the
14 employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good
15 faith dispute did exist." *Id.* Defendant contends that any failure to pay wages due at the separation
16 of employment was not willful. Defendant argues that it would not be liable for waiting time
17 penalties because a "good faith dispute" exists over the payment of those wages. *See* Cal. Code
18 Regs. Tit. 8 § 13520; *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1201. Defendant
19 also argues that Plaintiff's unpaid wage claims cannot form the basis of his wage statement claim.
20 Defendant relies on the case *Maldonado v. Epsilon Plastics, Inc.* (2018) 22 Cal.App.5th 1308, for
21 the position that employees do not suffer injury under California Labor Code § 226(a) so long as
22 the wage statements correctly reflected the hours worked and the pay received even if the pay is
23 later determined to be inaccurate. (Mara Dec. ¶ 29).

24 **IV. TERMS OF THE PROPOSED SETTLEMENT**

25 Under the terms of the settlement, Defendant will create a settlement fund of \$800,000.

26 **a. Deductions from the Settlement**

27 The Parties have agreed (subject to and contingent upon the Court's approval) that this
28 action be settled and compromised for the non-reversionary total sum of \$800,000 ("Gross

Settlement Amount” or “GSA”), which includes, subject to Court approval: (a) attorneys’ fees of up to \$266,640 (33.33% of the GSA)⁵ to compensate Class Counsel for work already performed and all work remaining to be performed in documenting the settlement, administering the settlement, and securing Court approval; (b) litigation costs estimated at approximately, and not to exceed, \$30,000;⁶ (c) a Class Representative Service Payment to the named class representative, William Giron, in a sum not to exceed \$15,000 in consideration for prosecuting this class action, serving as Class Representative, work performed, and risks undertaken for the payment of attorneys’ fees and costs in the event he had been unsuccessful in the matter; (d) settlement administration fees and expenses to ILYM Group, Inc. (hereinafter “ILYM”), estimated not to exceed approximately \$15,000;⁷ and (e) \$50,000 allocated to Plaintiff’s claims under the PAGA. Of this payment, 75%, or \$37,500 will be provided to the LWDA, and 25%, or \$12,500, will be available for distribution to Aggrieved Employees.⁸

b. Calculation of the Settlement Payments to Class Members

After all Court-approved deductions from the GSA, it is estimated that \$438,360 (“Net Settlement Amount” or “NSA”), less employee taxes on the “wage portion” of the settlement payment, will be distributed to Participating Class Members.⁹ Subject to the terms and conditions of the settlement, each Participating Class Member will receive a portion of the Net Class Settlement Amount called their “Individual Class Payment.” An Individual Class Payment will be calculated by (a) dividing the Net Settlement Amount by the total number of Workweeks worked

⁵ Although Plaintiff’s Counsel seeks attorneys’ fees under the percentage method, Plaintiff’s Counsel will also provide the Court with their lodestar information at final approval.

⁶ These will be tabulated and presented to the Court at final approval. Plaintiff will only seek the amount of actual costs incurred during the litigation of this case. Should the actual costs exceed \$30,000, Plaintiff will only seek reimbursement of costs up to \$30,000. Should the actual costs be lower than \$30,000, the difference will be added to the Net Settlement Amount for disbursement to Participating Class Members.

⁷ ILYM provided the Parties with the lowest bid for the settlement administration process in this case, meaning that more of the Net Settlement Amount will be available for Participating Class Members. Further, ILYM will present to the Court a declaration in conjunction with the final approval motion outlining the costs of the settlement administration process. If the settlement administration costs are lower than the amount allocated in the Agreement, the difference will be added to the Net Settlement Amount for distribution to Participating Class Members.

⁸ Aggrieved Employees are all Class Members who worked for ABR from April 19, 2022, through November 16, 2023. (Exhibit 1 at Paragraph 1.4).

⁹ Participating Class Members are all Class Members who do not submit a valid and timely Request for Exclusion from the Settlement. (Exhibit 1 at Paragraph 1.35).

1 by all Participating Class Members during the Class Period and (b) multiplying the result by each
2 Participating Class Member's Workweeks. (Exhibit 1 at Paragraph 3.2.4). Therefore, the value of
3 each Class Member's Individual Settlement Share ties directly to the amount of weeks that he or
4 she worked.

5 The Individual Class Payment will be divided into a "wage portion" to compensate
6 Participating Class Members for alleged unpaid wages and a "non-wage portion" to compensate
7 Participating Class Members for alleged interest and penalties. The wage portion will make up
8 40% of each Participating Class Members' Individual Class Payment, and the non-wage portion
9 will make up 60% of each Participating Class Members' Individual Class Payment. (Exhibit 1 at
10 Paragraph 3.2.4.1).

11 In addition, each Aggrieved Employee will receive a will receive a proportionate share of
12 the PAGA Payment that is allocated for distribution to PAGA Aggrieved Employees (i.e., 25% of
13 the PAGA Payment). The Administrator will calculate each Individual PAGA Payment by (a)
14 dividing the amount of the Aggrieved Employees' 25% share of PAGA Penalties (\$12,500) by the
15 total number of PAGA Period Pay Periods worked by all Aggrieved Employees during the PAGA
16 Period and (b) multiplying the result by each Aggrieved Employee's PAGA Period Pay Periods.
17 Aggrieved Employees assume full responsibility and liability for any taxes owed on their
18 Individual PAGA Payment. (Exhibit 1 at Paragraph 3.2.5.1). Therefore, the value of each PAGA
19 Aggrieved Employees' PAGA Settlement Share ties directly to the amount of pay periods that the
20 PAGA Aggrieved Employees worked during the PAGA Period.

21 Under no circumstances will any portion of the \$800,000 settlement revert to Defendant
22 and 100% of the NSA will be paid out to Participating Class Members. In addition, the employer's
23 share of taxes will be paid in addition to and outside of the GSA.

24 **c. Notice to the Class**

25 Not later than 15 days after the Court grants Preliminary Approval of the Settlement,
26 Defendant will simultaneously deliver the Class Data to the Administrator. (Exhibit 1 at Paragraph
27 4.2). The Class Data shall be comprised of Class Member identifying information in Defendant's
28 possession including the Class Member's name, last-known mailing address, Social Security

1 number, and number of Class Period Workweeks and PAGA Pay Periods. (Exhibit 1 at Paragraph
2 1.8).

3 Using best efforts to perform as soon as possible, and in no event later than 14 days after
4 receiving the Class Data, the Administrator will send to all Class Members identified in the Class
5 Data, via first-class USPS mail, the Class Notice substantially in the form attached to the
6 Agreement as Exhibit A. The first page of the Class Notice shall prominently estimate the dollar
7 amounts of any Individual Class Payment and/or Individual PAGA Payment payable to the Class
8 Member, and the number of Workweeks and PAGA Pay Periods (if applicable) used to calculate
9 these amounts. Before mailing Class Notices, the Administrator shall update Class Member
10 addresses using the National Change of Address database. (Exhibit 1 at Paragraph 7.4.2). The
11 Notices will be mailed in English and Spanish.

12 After notices are mailed, Class Members will have forty-five (45) days to respond to the
13 settlement. (Exhibit 1 at Paragraph 1.43). Class Members may respond to the settlement by
14 requesting to be excluded from it or objecting to it. Class Members can also file a dispute as to the
15 number of workweeks attributed to them. The deadlines for Class Members' written objections,
16 Challenges to Workweeks and/or Pay Periods and Requests for Exclusion will be extended an
17 additional 14 days beyond the 45 days otherwise provided in the Class Notice for all Class
18 Members whose notice is re-mailed. The Administrator will inform the Class Member of the
19 extended deadline with the re-mailed Class Notice. (Exhibit 1 at Paragraph 7.4.4).

20 **i. Requests for Exclusion**

21 Class Members who wish to exclude themselves (opt-out of) the Class Settlement must
22 send the Administrator, by fax, email, or mail, a signed written Request for Exclusion not later
23 than 45 days after the Administrator mails the Class Notice (plus an additional 14 days for Class
24 Members whose Class Notice is re-mailed). A Request for Exclusion is a letter from a Class
25 Member or his/her/their representative that reasonably communicates the Class Member's election
26 to be excluded from the Settlement and includes the Class Member's name, address and email
27 address or telephone number. To be valid, a Request for Exclusion must be timely faxed, emailed,
28 or postmarked by the Response Deadline. (Exhibit 1 at Paragraph 7.5.1).

1 **ii. Objections to the Settlement**

2 Participating Class Members may send written objections to the Administrator, by fax,
3 email or mail. In the alternative, Participating Class Members may appear in Court (or hire an
4 attorney to appear in Court) to present oral objections at the Final Approval Hearing. A
5 Participating Class Member who elects to send a written objection to the Administrator must do
6 so not later than 45 days after the Administrator's mailing of the Class Notice (plus an additional
7 14 days for Class Members whose Class Notice was re-mailed). (Exhibit 1 at Paragraph 7.7.2).

8 **iii. Disputes**

9 Each Class Member shall have 45 days after the Administrator mails the Class Notice (plus
10 an additional 14 days for Class Members whose Class Notice is re-mailed) to challenge the number
11 of Class Workweeks and PAGA Pay Periods (if any) allocated to the Class Member in the Class
12 Notice. The Class Member may challenge the allocation by communicating with the Administrator
13 via fax, email or mail. The Administrator must encourage the challenging Class Member to submit
14 supporting documentation. In the absence of any contrary documentation, the Administrator is
15 entitled to presume that the Workweeks contained in the Class Notice are correct so long as they
16 are consistent with the Class Data. The Administrator's determination of each Class Member's
17 allocation of Workweeks and/or Pay Periods shall be final and not appealable or otherwise
18 susceptible to challenge. The Administrator shall promptly provide copies of all challenges to
19 calculation of Workweeks and/or Pay Periods to Defense Counsel and Class Counsel and the
20 Administrator's determination the challenges. (Exhibit 1 at Paragraph 7.6).

21 **iv. Returned Notices**

22 Not later than 3 business days after the Administrator's receipt of any Class Notice returned
23 by the USPS as undelivered, the Administrator shall re-mail the Class Notice using any forwarding
24 address provided by the USPS. If the USPS does not provide a forwarding address, the
25 Administrator shall conduct a Class Member Address Search, and re-mail the Class Notice to the
26 most current address obtained. The Administrator has no obligation to make further attempts to
27 locate or send Class Notice to Class Members whose Class Notice is returned by the USPS a
28 second time. (Exhibit 1 at Paragraph 7.4.3).

1 **d. Website**

2 The Administrator will establish and maintain and use an internet website to post
3 information of interest to Class Members including the date, time and location for the Final
4 Approval Hearing and copies of the Settlement Agreement, Motion for Preliminary Approval, the
5 Preliminary Approval, the Class Notice, the Motion for Final Approval, the Motion for Class
6 Counsel Fees Payment, Class Counsel Litigation Expenses Payment and Class Representative
7 Service Payment, the Final Approval and the Judgment. The Administrator will also maintain and
8 monitor an email address and a toll-free telephone number to receive Class Member calls, faxes
9 and emails. (Exhibit 1 at Paragraph 7.8.1).

10 **e. Distribution of Funds**

11 Defendant shall fully fund the Gross Settlement Amount, and also fund the amounts
12 necessary to fully pay Defendant's share of payroll taxes by transmitting the funds to the
13 Administrator no later than 14 days after the Effective Date. (Exhibit 1 at Paragraph 4.3). The
14 Effective Date is the date by when both of the following have occurred: (a) the Court enters a
15 Judgment on its Order Granting Final Approval of the Settlement; and (b) the Judgment is final.
16 The Judgment is final as of the latest of the following occurrences: (a) if no Participating Class
17 Member objects to the Settlement, the day the Court enters Judgment; (b) if one or more
18 Participating Class Members objects to the Settlement, the day after the deadline for filing a notice
19 of appeal from the Judgment; or if a timely appeal from the Judgment is filed, the day after the
20 appellate court affirms the Judgment and issues a remittitur. (Exhibit 1 at Paragraph 1.18).

21 Within 14 days after Defendant funds the Gross Settlement Amount, the Administrator will
22 mail checks for all Individual Class Payments, all Individual PAGA Payments, the LWDA PAGA
23 Payment, the Administration Expenses Payment, the Class Counsel Fees Payment, the Class
24 Counsel Litigation Expenses Payment, and the Class Representative Service Payment.
25 Disbursement of the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment
26 and the Class Representative Service Payment shall not precede disbursement of Individual Class
27 Payments and Individual PAGA Payments. (Exhibit 1 at Paragraph 4.4).

28 The Administrator will issue checks for the Individual Class Payments and/or Individual

1 PAGA Payments and send them to the Class Members via First Class U.S. Mail, postage prepaid.
2 The face of each check shall prominently state the date (not less than 180 days after the date of
3 mailing) when the check will be voided. The Administrator will cancel all checks not cashed by
4 the void date. The Administrator will send checks for Individual Settlement Payments to all
5 Participating Class Members (including those for whom Class Notice was returned undelivered).
6 The Administrator will send checks for Individual PAGA Payments to all Aggrieved Employees
7 including Non-Participating Class Members who qualify as Aggrieved Employees (including
8 those for whom Class Notice was returned undelivered). The Administrator may send Participating
9 Class Members a single check combining the Individual Class Payment and the Individual PAGA
10 Payment. Before mailing any checks, the Settlement Administrator must update the recipients'
11 mailing addresses using the National Change of Address Database. (Exhibit 1 at Paragraph 4.4.1).

12 The Administrator must conduct a Class Member Address Search for all other Class
13 Members whose checks are returned undelivered without United States Postal Service ("USPS")
14 forwarding address. Within 7 days of receiving a returned check the Administrator must re-mail
15 checks to the USPS forwarding address provided or to an address ascertained through the Class
16 Member Address Search. The Administrator need not take further steps to deliver checks to Class
17 Members whose re-mailed checks are returned as undelivered. The Administrator shall promptly
18 send a replacement check to any Class Member whose original check was lost or misplaced,
19 requested by the Class Member prior to the void date. (Exhibit 1 at Paragraph 4.4.2).

20 For any Class Member whose Individual Class Payment check or Individual PAGA
21 Payment check is uncashed and cancelled after the void date, the Administrator shall transmit the
22 funds represented by such checks to the California Controller's Unclaimed Property Fund in the
23 name of the Class Member. (Exhibit 1 at Paragraph 4.4.3).

24 **f. Release of Claims**

25 In exchange for an Individual Class Payment, Participating Class Members will agree to
26 the following release:

27 All Participating Class Members, on behalf of themselves and their respective
28 former and present representatives, agents, attorneys, heirs, administrators,

1 successors and assigns, release Released Parties from (i) all claims that were
2 alleged, or reasonably could have been alleged, based on the Class Period facts
3 stated in the Operative Complaint and ascertained in the course of the Action
4 including, e.g., failure to pay all straight time wages, failure to pay all overtime
5 wages, failure to provide meal periods, failure to authorize and permit rest periods,
6 failure to adopt a compliant sick pay policy, failure to comply with itemized
7 employee wage statement provisions, failure to pay all wages due at the time of
8 termination, failure to reimburse/illegal deductions, and violation of the Unfair
Competition Law. This release will be for the Class Period. Except as set forth in
Section 5.3 of this Agreement, Participating Class Members do not release any
other claims, including claims for vested benefits, wrongful termination, violation
of the Fair Employment and Housing Act, unemployment insurance, disability,
social security, workers' compensation or claims based on facts occurring outside
the Class Period.

9 (Exhibit 1 at Paragraph 5.2).

10 In addition, all Aggrieved Employees will agree to the following release in exchange for
11 an Individual PAGA Payment:

12 All Non-Participating Class Members who are Aggrieved Employees are deemed
13 to release, on behalf of themselves and their respective former and present
14 representatives, agents, attorneys, heirs, administrators, successors and assigns, the
15 Released Parties from all claims for PAGA penalties that were alleged, or
16 reasonably could have been alleged, based on the PAGA Period facts stated in the
17 Operative Complaint, and the PAGA Notice and ascertained in the Action
18 including, e.g., failure to pay all straight time wages, failure to pay all overtime
19 wages, failure to provide meal periods, failure to authorize and permit rest periods,
20 failure to adopt a compliant sick pay policy, failure to comply with itemized
21 employee wage statement provisions, failure to pay all wages due at the time of
22 termination, and failure to reimburse/illegal deductions. This release will be for the
23 PAGA Period.

24 (Exhibit 1 at Paragraph 5.3).

25 In addition, Plaintiff has agreed to a general release of his claims. (*See* Exhibit 1 at
26 Paragraph 5.1).

27 **g. Class Representative Service Payment Award**

28 Subject to the Court's approval, Plaintiff shall receive a payment not to exceed \$15,000 in
consideration for a general release of all his claims against Defendant. The payment shall be made
from the GSA. As just noted, Plaintiff has agreed to a general release of his claims against
Defendant. This general release is far greater than the release proposed for Class Members. This
payment not only compensates Plaintiff for the work he undertook in this case, but also for the

1 claims and potential claims he may have against Defendant that he is releasing. For example,
2 Plaintiff brought this class action lawsuit to seek recourse for other employees instead of filing an
3 individual case on behalf of merely himself. He also brought this case instead of a wrongful
4 termination and/or harassment case against Defendant. Since the inception of this case, he has put
5 the Class's interests ahead of his own. This payment compensates Plaintiff for the claims that he
6 forwent bringing for the betterment of the Class Members.

7 Moreover, as representative for the absent class members, Plaintiff risked a potential
8 judgment taken against him for attorneys' fees and costs if this matter had not been successfully
9 concluded. Case law holds that a losing party is liable for the prevailing party's costs. *See Early v.*
10 *Superior Court*, 79 Cal.App.4th 1420, 1433 (2000). And in some wage and hour actions, such as
11 this case, pursuant to California Labor Code § 218.5, the prevailing party can be liable for
12 attorneys' fees as well. Though the fee agreement provides that Class Counsel would pay such
13 costs, Plaintiff would nevertheless have had a cost bill entered against him leaving him ultimately
14 liable for potentially hundreds of thousands of dollars in the unexpected possibility that Class
15 Counsel did not meet their obligation to cover those costs. Unfortunately, there have been
16 judgments like this entered against class representatives.¹⁰ The risk of payment of Defendant's
17 costs, alone, is a sufficient basis for an award of the requested service award. Few individuals are
18 willing to take this risk, and Plaintiff championed a cause on behalf of others with potentially huge
19 monetary risks.

20 Additionally, the modern-day work force is mobile, with employees holding several jobs
21 over the span of their career. It is also true that prospective employers in this computer, high-tech
22 age "Google" and/or do extensive background checks and have access to court databases to see if
23 applicants have ever filed a lawsuit or have ever been sued. Here, Plaintiff's conduct will not be
24 lost on a prospective employer who has to choose between an applicant who has never sued an

26 ¹⁰ See, e.g. *Koehl v. Verio, Inc.*, 142 Cal.App.4th 1313, 1328 (2006) (a wage and hour class action
27 where Defendant prevailed at trial, the named Plaintiffs were held liable, jointly and severally for
28 the Defendant's attorneys' fees); *Whiteway v. Fedex Kinkos Office & Print Services, Inc.*, No. 05-
2320, 2007 U.S. Dist. LEXIS 95398 (N.D. Cal. Dec. 17, 2007) (a wage and hour misclassification
case lost on summary judgment, after the case was certified, the named Plaintiff was assessed costs
in the sum of \$56,788.).

1 employer and one who has done so. The requested award far from compensates Plaintiff for
2 opportunities he may lose in the future because of the exercise of a Constitutional right to Petition
3 the Courts for redress of a grievance.

4 **h. Final Judgment**

5 Pursuant to Cal. Rules of Court, Rule 3.771(b), notice of the final judgment will be posted
6 on the Settlement Administrator's website. (*See* Exhibit 1 at Paragraph 7.8.1).

7 **V. ARGUMENT**

8 **a. Class Action Settlements Are Subject to Court Review and Approval Under 9 the California Rules of Court**

10 Rule 3.769 requires court approval for class action settlements.¹¹ "Before final approval,
11 the court must conduct an inquiry into the fairness of the proposed settlement." (California Rules
12 of Court, Rule 3.769(g)). Rule 3.769 further requires a noticed motion for preliminary approval of
13 class settlements:

14 (a) A settlement or compromise of an entire class action, or a cause of action in
15 a class action, or as to a party, requires the approval of the court after
16 hearing.

17 (c) Any party to a settlement agreement may serve and file a written notice of
18 motion for preliminary approval of the settlement. The settlement agreement
19 and proposed notice to class members must be filed with the motion, and
20 the proposed order must be lodged with the motion.

21 Courts act within their discretion in approving settlements that are fair, not collusive, and
22 take into account "all the normal perils of litigation as well as the additional uncertainties inherent
23 in complex class actions." *In re Beef Industry Antitrust Litigation* (5th Cir. 1979) 607 F. 2d 167,
24 179, cert. den. sub nom. *Iowa Beef Processors, Inc. v. Meat Price Investigators Ass'n* (1981) 452
25 U.S. 905.

26 **b. The Settlement is Fair, Reasonable, and Adequate**

27 In deciding whether to approve a proposed class action settlement under Code of Civil
28 Procedure § 382, the Court must find that a proposed settlement is "fair, adequate and reasonable."

¹¹ The California Supreme Court also has authorized California's trial courts to use Federal Rule 23 and cases applying it for guidance in considering class issues. *See Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821; *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146. Where appropriate, therefore, the Parties cite Federal Rule 23 and federal case law in addition to California law.

1 *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. A proposed class action settlement is
2 **presumed** fair under the following circumstances: (1) the parties reached settlement after arms-
3 length negotiations; (2) investigation and discovery were sufficient to allow counsel and the court
4 to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of
5 objectors is small. *Dunk v. Ford Motor Co.*, *supra*, at 1802. As the following shows, all of these
6 elements – with the exception of the percentage of objectors, which cannot be anticipated at this
7 stage of the litigation – bearing on the fairness of the proposed settlement are present here and the
8 Court’s grant of preliminary approval is therefore requested.

9 **i. The Settlement Was Reached as a Result of Arm’s-Length Negotiations**

10 The settlement was reached as a result of arm’s-length negotiations. Though cordial and
11 professional, the settlement negotiations have been, at all times, adversarial and non-collusive in
12 nature. Prior to, at, and after the mediation, Counsel for the Parties conducted extensive arm’s
13 length settlement negotiations until the settlement was reached. The terms of the settlement are
14 memorialized in the Agreement which is attached to the Declaration of David Mara, Esq. as
15 Exhibit 1. While Plaintiff believes in the merits of his case, he also recognizes the inherent risks
16 of litigation and understands the benefit of the class receiving significant settlement funds
17 immediately as opposed to risking continued litigation in achieving class certification, preparing
18 for and conducting a trial, and/or an appeal that may take several more years to litigate.

19 **ii. The Settlement is the Result of Thorough Investigation and Discovery**

20 The Parties thoroughly investigated and evaluated the factual strengths and weaknesses
21 before reaching the proposed settlement, and engaged in sufficient investigation, research and
22 discovery to support the settlement. The settlement was only possible following investigation,
23 discovery, and evaluation of Defendant’s policies and procedures, as well as the data produced for
24 the putative class, which permitted Class Counsel to engage in a comprehensive analysis of
25 liability and potential damages. This litigation has reached the stage where “the Parties certainly
26 have a clear view of the strengths and weaknesses of their cases” sufficient to support the
27 settlement. *Boyd v. Bechtel Corp.* (N.D. Cal. 1979) 485 F. Supp. 610, 617.

28 ///

1 **iii. Counsel for Both Parties are Experienced in Similar Litigation**

2 Both Plaintiff’s Counsel and Defendant’s Counsel are particularly experienced in wage and
3 hour employment law and class actions. Plaintiff’s Counsel has significant experience in litigating
4 unpaid wages, unprovided meal and rest periods, and overtime claims. (Mara Dec. ¶¶ 2-14;
5 Declaration of Peter Horton, Esq. (“Horton Dec.”) ¶¶ 2-4). Indeed, Plaintiff’s Counsel at the Mara
6 Law Firm, PC, was class counsel in *Hohnbaum et al. v. Brinker Restaurant Corp et al.*, which is
7 the subject case in the landmark decision of *Brinker Restaurant Corp. v. Superior Court* (2012) 53
8 Cal.4th 1004. (Mara Dec. ¶ 4). Plaintiff’s Counsel has prosecuted numerous wage and hour class
9 action cases on behalf of employees for California Labor Code violations and thus are experienced
10 and qualified to evaluate the class claims and to evaluate settlement versus trial on a fully informed
11 basis, and to evaluate the viability of the defenses. This experience instructed Plaintiff’s Counsel
12 on the risks and uncertainties of further litigation and guided their determination to endorse the
13 proposed settlement.¹² Defendant’s Counsel practices labor and employment law and have
14 represented numerous employers in similar types of claims. Accordingly, both Parties’ Counsel
15 are experienced in wage and hour employment law and class actions.

16 **iv. The Proposed Settlement is a Reasonable Compromise of Claims**

17 An understanding of the amount in controversy is an important factor in determining
18 whether the settlement “of the class members’ claims is reasonable in light of the strengths and
19 weaknesses of the claims and the risks of the particular litigation.” *Kullar v. Foot Locker Retail,*
20 *Inc.* (2008) 168 Cal.App.4th 116, 129; *see also Munoz v. BCI Coca-Cola Bottling Co. of Los*
21 *Angeles* (2010) 186 Cal.App.4th 399, 409. The most important factor in this regard is “the strength
22 of the case for plaintiffs on the merits, balanced against the amount offered in settlement.” *Id.*

23 In weighing the strength of the plaintiff’s case, *Kullar* instructs that the court is not to
24 “decide the merits of the case or to substitute its evaluation of the most appropriate settlement for
25 that of the attorneys.” *Kullar, supra*, 168 Cal.App.4th at 133. *Kullar* does not require an explicit
26 statement of the maximum amount the plaintiff class could recover if it prevailed on all its claims,

27 ¹² The final factor mentioned in *Dunk* – the number of objectors – is not determinable until the
28 Class Notice has been provided to the class and they have had an opportunity to respond. This
information will be provided to the Court in conjunction with the final approval motion.

provided there is a record which allows “an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.” *Munoz*, 186 Cal.App.4th at 409. Put differently, “as the court does when it approves a settlement as in good faith under Code of Civil Procedure § 877.6, the court must at least satisfy itself that the class settlement is within the ‘ballpark’ of reasonableness.” *Kullar, supra*, 168 Cal.App.4th at 133, citing *Tech-Bilt v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 499-500. As the following subsections show, the Parties’ investigation and discovery revealed many reasons to discount claims and agree to this settlement.

1. The Settlement is Fair and Reasonable Based on the Strengths of Plaintiff’s Case and the Risks and Costs of Further Litigation

The proposed settlement was only possible following significant discovery and an evaluation of Defendant’s relevant policies and procedures, as well as the data that Defendant produced for the putative class as referenced above. This permitted Class Counsel to engage in a comprehensive analysis of liability and potential damages. The discovery conducted allowed Plaintiff to evaluate the strengths and weaknesses of his central theories of liability, which are predicated on Plaintiff’s claims that Defendant failed to provide compliant meal and rest periods. As explained herein, Defendant maintains that the discovery produced demonstrates that it would succeed at both in denying class certification and on the merits.

Although, Plaintiff believes this case is suitable for certification on the claimed bases that there are company-wide policies that Plaintiff contends violate California law and uniformly affect the Class Members, Defendant’s counterarguments raise uncertainties with respect to both class certification and success on the merits. As the California Supreme Court ruled in *Sav-On v. Superior Court* (2004) 34 Cal.4th 319, class certification is always a matter of the trial court’s sound discretion. Decisions following *Sav-On* have reached different conclusions, with respect to certification of wage and hour claims.¹³ While remaining confident in the strengths of his claims, all of these factors led Plaintiff to discount the following maximum potential damage exposure.

¹³ See, e.g., *Harris v. Superior Court* (2007) 154 Cal. App. 4th 164 (reversing decertification of class claiming misclassification and ordering summary adjudication in favor of employees), *review granted*, 171 P.3d 545 (2007) (not cited as precedent, but rather for illustrative purposes only); *Walsh v. IKON Solutions, Inc.* (2007) 148 Cal. App. 4th 1440 (affirming decertification of class claiming misclassification); *Aguilar v. Cintas Corp. No. 2* (2006) 144 Cal. App. 4th 121 (reversing denial of certification); *Dunbar v. Albertson’s Inc.* (2006) 141 Cal. App. 4th 1422 (affirming denial of certification).

2. Maximum Potential Exposure

The settlement encompasses 7,264 workweeks.¹⁴ This equates to approximately 29,056 shifts worked by class members during the Class Period. Employees average rate of pay is approximately \$18.00 per hour.

Plaintiff alleges that Defendant failed to provide employees with rest periods in accordance with California law because Plaintiff asserts that employees were not provided with rest periods in accordance with the timeframes outlined by California law and were not provide with net ten-minute rest periods. If Plaintiff were to prevail on this claim for the entire class period, Plaintiff and the Class Members would be entitled to the following **maximum** potential damages: \$523,008 (29,056 shifts x \$18.00 average hourly rate = \$523,008). (Mara Dec. ¶ 20). Defendant contends that this amount should be zero because it has a lawful rest period policy. Defendant contends that it would provide declarations confirming this is the case if litigation were to continue.

Plaintiff alleges that Defendant failed to provide employees with meal periods in accordance with California law because Defendant fail only provides one meal period per shift regardless of shift length and does not provide meal periods before the end of the fifth hour of work. If Plaintiff were to prevail on this claim for the entire class period, Plaintiff and the Class Members would be entitled to the following **maximum** potential damages: \$523,008 (29,056 shifts x \$18.00 average hourly rate = \$523,008). (Mara Dec. ¶ 23). Defendant contends that this amount is too high as it has paid meal period premiums to employees. Defendant asserts that no damages would be attributable to shifts in which a premium has already been paid. Defendant also contends that that this amount should be zero because provided meal periods to employees in accordance with California law.

In addition, Plaintiff alleges that Defendant failed to pay all wages owed for commute time. Plaintiff estimates that Defendant owes Plaintiff and the Class Members thirty minutes per shift in commute time. If Plaintiff were to prevail on this claim for the entire class period, Plaintiff and the Class Members would be entitled to the following **maximum** potential damages: \$261,504 (29,056 shifts x \$18.00 average hourly rate x 0.5 hours = \$261,504). (Mara Dec. ¶ 27). Defendant contends

¹⁴ See Exhibit 1 at Paragraph 4.1.

1 that commute time is not compensable.

2 If Plaintiff were to prevail on his unpaid wages, meal period, and/or rest period claims,
3 Plaintiff may be entitled to penalties for inaccurate wage statements. The statute of limitations for
4 Plaintiff's wage statement claim is one year. Under California Labor Code § 226(e)(1), the
5 damages for breach of this section are fifty dollars (\$50) for the initial pay period in which a
6 violation occurs and one hundred dollars (\$100) per employee for each violation in a subsequent
7 pay period, not to exceed an aggregate penalty of four thousand dollars (\$4,000). If Plaintiff were
8 to prevail on this claim, the **maximum** damages would be \$166,250 (\$50 for an initial violation x
9 75 pay periods = \$3,750 plus \$100 for a subsequent violation x 1,625 pay periods = \$162,500).
10 (Mara Dec. ¶ 30). As these damages are derivative of Plaintiff's unpaid wages, meal period and
11 rest period claims, if Plaintiff's unpaid wages, meal period, and rest period claims fail, this claim
12 also would fail. Defendant also contends that Plaintiff would not be able to show that this violation
13 was knowing and intentional. On this basis, Defendant contends that Plaintiff would not be entitled
14 to any damages for unlawful wage statements.

15 If Plaintiff were to prevail on his unpaid wages, meal period, and/or rest period claims, he
16 and the Class Members may also be entitled to waiting time penalties. Plaintiff calculates the
17 potential **maximum** exposure under his waiting time penalties cause of action as \$151,200 (35
18 former employees within the three-year statute of limitations x 30 days x 8 hour shift x \$18.00
19 average hourly rate = \$151,200). (Mara Dec. ¶ 31). As these damages are derivative of Plaintiff's
20 meal and rest period claims, if Plaintiff's meal and rest period claims fail, this claim also would
21 fail. Defendant also contends that Plaintiff would not be able to show that this violation was willful.
22 On this basis, Defendant contends that Plaintiff would not be entitled to any damages for waiting
23 time penalties.

24 Plaintiff also seeks PAGA penalties. PAGA allows the private enforcement of certain
25 California Labor Code sections relating to wage and hour violations. PAGA Section 2699(f)(2)
26 reads, in part, as follows:

1 [T]he civil penalty is one hundred dollars (\$100) for each aggrieved employee per
2 pay period for the initial violation and two hundred dollars (\$200) for each
aggrieved employee per pay period for each subsequent violation.

3 The statute of limitations for PAGA violations go back one year. The maximum potential damages
4 under Plaintiff's PAGA claim is: \$687,500 (\$100 x 4 PAGA violations (meal periods, rest periods,
5 unpaid wages, and wage statements) x 1,700 pay periods = \$680,000 plus \$100 x 1 PAGA violation
6 (waiting time penalties x 75 pay periods = \$7,500). (Mara Dec. ¶ 32). As Plaintiff's PAGA claims
7 are based on the same alleged unlawful conduct as his class claims, Plaintiff's PAGA claims are
8 subject to the same risks on the merits as Plaintiff's class claims. In addition, the Court may reduce
9 any PAGA penalties awarded under Section 2699, subdivision (e)(2). The likelihood of the Court
10 reducing the PAGA penalties awarded to Plaintiff and the Aggrieved Employees – assuming
11 liability is proven as to each of Plaintiff's claims – is higher in this case where these same
12 individuals may also be receiving money for the same unlawful conduct under the class claims.
13 *See Avila v. Cold Spring Granite Co.* (E.D. Cal. Jan. 12, 2018) Case No. 1:16-cv-001533-AWI-
14 SKO, 2018 U.S. Dist. LEXIS 6142 *17 (“Because the PAGA penalties sought are at least partially
15 duplicative of penalties granted by the underlying Labor Code violations, *see, e.g.*, Cal. Lab. Code
16 §§ 203, 226, 558(a), 1194.2, and because a Court has discretion in whether and in what amount to
17 award PAGA penalties, *see* Cal. Lab. Code § 2699(e)(2), Plaintiff recognizes that the potential
18 PAGA penalties are highly uncertain.”). As such, the Court may reduce any PAGA penalty amount
19 awarded to Plaintiff and the Aggrieved Employees.¹⁵

20 Thus, not taking into account any of its defenses or arguments, Plaintiff estimated that if
21 he were successful in his core claims, Defendant's total exposure would be approximately
22 \$1,307,520 [\$523,008 (rest period exposure) + \$523,008 (meal period exposure) + \$261,504
23 (unpaid wage exposure) = \$1,307,520]. If Plaintiff is successful in his unpaid wage, meal period,
24 and rest period claims, he may also be entitled to damages for wage statements and waiting time
25 penalties in the amount of \$317,450 [\$166,250 (wage statements) and \$151,200 (waiting time
26 penalties) = \$317,450]. If Plaintiff's claims are successful, he may also be entitled to PAGA

27 ¹⁵ The amount allocated to Plaintiff's PAGA claims takes into account the risk that the Court will
28 likely reduce Plaintiff's PAGA exposure for the reasons outlined above. It should be noted that all
Aggrieved Employees are also Class Members.

1 penalties in the amount of \$687,500. (Mara Dec. ¶ 34).

2 **3. The Settlement Amount of \$800,000 is Reasonable**

3 In light of the risks Plaintiff's claims faced, Plaintiff and his Counsel believe that the
4 settlement amount of \$800,000 – with an average settlement share amount estimated at \$4,473.06
5 – is a reasonable and fair settlement amount. (Mara Dec. ¶ 35).

6 It should be noted that a settlement is not judged solely against what might have been
7 recovered, had the plaintiff prevailed at trial, nor does the settlement have to provide 100% of the
8 damages sought to be fair and reasonable. *Wershba v. Apple Computers, Inc.* (2001) 91
9 Cal.App.4th 224, 246, 250; *Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1139;
10 “Compromise is inherent and necessary in the settlement process...even if the relief afforded by
11 the proposed settlement is substantially narrower than it would be if the suits were to be
12 successfully litigated, this is no bar to a class settlement because the public interest may indeed be
13 served by a voluntary settlement in which each side gives ground in the interest of avoiding
14 litigation.” *Wershba, supra*, at 250; *Officers for Justice v. Civil Serv. Comm’n* (9th Cir. 1982) 688
15 F.2d 615, 628 (“It is well-settled law that a cash settlement amounting to only a fraction of the
16 potential recovery does not...render the settlement inadequate or unfair”); *see also In re*
17 *Omnivision Technologies, Inc.* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 95616, *21 , (noting that
18 certainty of recovery in settlement of 6% of maximum potential recovery after reduction for
19 attorneys’ fees was higher than median percentage for recoveries in shareholder class action
20 settlements, averaging 2.2%-3% from 2002 through 2006).

21 **c. Provisional Certification Should be Granted**

22 Under California law, a class action is appropriate when the class is ascertainable and there
23 is “a well defined community of interest in the questions of law and fact involved affecting the
24 parties to be represented.” Cal. Civ. P. Code § 382. State law requirements under California Code
25 of Civil Procedure section 382 for class certification follow federal law according to Rule 23 of
26 the Federal Rule of Civil Procedure: numerosity, typicality of the class representatives’ claims,
27 adequacy of representation, predominance of common issues, and superiority. Fed. R. Civ. P.
28 23(a); *see also Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1019. It should be noted

1 that while a court must certify a class for settlement purposes if a class has not already been
2 certified, “it is well established that trial courts should use different standards to determine the
3 propriety of a settlement class, as opposed to a litigation class certification. Specifically, a lesser
4 standard of scrutiny is used for settlement cases.” *Glob. Minerals & Metals Corp. v. Superior*
5 *Court* (2013) 113 Cal.App.4th 836, 859 citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th
6 1794, 1807, fn. 19.

7 Plaintiff contends, and Defendant does not dispute for settlement purposes only, each of
8 these elements must be present. *See Wershba v. Apple Computer* (2001) 91 Cal. App. 4th 224,
9 237-38. Plaintiff seeks approval of the following Class for settlement purposes only: All current
10 and former non-exempt hourly, employees who were employed by ABR in California at any time
11 from April 21, 2019, through November 16, 2023.

12 **i. The Proposed Settlement Class is Ascertainable**

13 Plaintiff contends that the proposed Class is ascertainable because of all of the Class
14 Members have worked for Defendant as non-exempt employees and have been identified through
15 Defendant’s own records, such as employee and payroll files. *See Rose v City of Hayward* (1981)
16 126 Cal.App.3d 926, 932 (finding that “Class Members are ‘ascertainable’ where they may be
17 readily identified without unreasonable expense or time by reference to official records.”); *Sevidal*
18 *v. Target Corp.* (2010) 189 Cal.App.4th 905, 919 (“[c]lass members are ‘ascertainable’ where they
19 may be readily identified without unreasonable expense or time by reference to official [or
20 business] records.”). Thus, the ascertainability requirement is met.

21 **ii. The Proposed Settlement Class is Sufficiently Numerous**

22 The numerosity requirement is met if the class is so large that joinder of all members would
23 be impracticable. *Gay v. Waiters’ & Dairy Lunchmen’s Union* (N.D. Cal. 1980) 489 F. Supp. 282,
24 *aff’d* (9th Cir. 1982) 694 F.2d 531. “There is no set number required to maintain a class action,
25 and the statutory test is whether a class is so numerous that ‘it is impracticable to bring them all
26 before the court.’” *Henderson v. Ready to Roll Transportation, Inc.* (2014) 228 Cal.App.4th 1213,
27 1223 (reversing superior court ruling that nine class members was too few); *Bowles v. Superior*
28 *Court* (1995) 44 Cal.2d 574 (upholding a class of ten members). “The numerosity requirement is

1 more readily met when a class contains employees suing their present employer . . . This is because
2 class members may be unwilling to sue their employer individually out of fear of retaliation.”
3 *Romero v. Producers Dairy Foods* (E.D. Cal. 2006) 235 F.R.D. 474, 485. As explained by the
4 California Supreme Court, “fear of retaliation for individual suits against an employer is a
5 justification for class certification in the arena of employment litigation, even when it is otherwise
6 questionable that the numerosity requirements were satisfied . . . It needs no argument to show that
7 fear of economic retaliation might often operate to induce aggrieved employees quietly to accept
8 substandard conditions.” *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 460 (citation omitted),
9 overruled on other grounds in *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348.

10 Here, Defendant’s records show that they proposed Class has approximately 98 members.
11 Plaintiff contends that joinder of all Class Members is impracticable and, therefore, a class wide
12 proceeding is preferable. *See Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1030 (noting that
13 there is no set minimum to meet the numerosity prerequisite, but that a class of as few as 28 is
14 acceptable.). In fact, a class of ten (10) has been certified as a class action. *Id.*, citing *Bowles v.*
15 *Superior Court* (1995) 44 Cal.2d 574. Several federal cases on this issue have held that classes of
16 over forty (40) individuals are numerous enough to meet the numerosity requirement. *See Ikonen*
17 *v. Hartz Mountain Corp.* (S.D. Cal. 1988) 122 F.R.D. 258, 262. Accordingly, the Class is
18 comprised of approximately 98 members and is sufficient to satisfy the numerosity requirement.

19 **iii. The Commonality Requirement is Met**

20 The commonality requirement is met if there are questions of law and fact common to the
21 class. *Hanlon, supra*, 150 F.3d at 1019 (“The existence of shared legal issues with divergent factual
22 predicates is sufficient, as it a common core of salient facts coupled with disparate legal remedies
23 within the class.”). “Predominance is a comparative concept, and ‘the necessity for class members
24 to individually establish eligibility and damages does not mean individual fact questions
25 predominate.’” *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 334.
26 Commonality exists if there is a predominant common legal question regarding how an employer’s
27 policies impact its employees. *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal.App.4th 1524, 1536
28 (2008) (“[T]he common legal question remains the overall impact of Diva’s policies on its

1 drivers.”). Whether Plaintiff is likely to prevail on his theory of recovery is irrelevant at the
2 certification stage since the question is “essentially a procedural one that does not ask whether an
3 action is legally or factually meritorious.” *Linder v. Thrifty Oil Co.* (2003) 23 Cal.4th 429, 439-
4 440.

5 Here, Plaintiff contends that the proposed Class Members’ claims all stem from the same
6 allegedly unlawful policies and practices, which were addressed previously in this motion. Plaintiff
7 seeks the same legal remedies under state law on behalf of himself and all Class Members. As
8 liability as to all Class Members is predicated on the same policies and practices, which Plaintiff
9 alleges violates California law, the commonality requirement has been satisfied.

10 **iv. The Typicality Requirement is Met**

11 The typicality requirement is met if the claims of the named representative are typical of
12 those of the class, though “they need not be substantially identical.” *Hanlon, supra*, 150 F.3d at
13 1020; *Classen v. Weller* (1983) 145 Cal.App.3d 27, 46-47. Plaintiff contends that his claims are
14 typical of the Class Members’ claims because they arise from the same factual basis and are based
15 on the same legal theory as those applicable to the Class Members. *See Wehner v. Syntex Corp.*
16 (N.D. Cal. 1987) 117 F.R.D. 641, 644. Each Class Member is challenging the same policies and
17 practices. Plaintiff alleges that Defendant’s policies applied to all Class Members. Factual
18 differences may exist between Plaintiff’s and the Class Members so long as the claims arise from
19 the same events or course of conduct and are based on the same legal theories. *Hanlon, supra*, 150
20 F. 3d at 1020; *see also Wehner, supra*, 117 F.R.D. at 644; *Newberg on Class Actions*, 4th ed. §
21 3:15, p.335 [When it is alleged that the same unlawful conduct was directed at or affected both the
22 named plaintiff and the class sought to be represented, the typicality requirement is usually met
23 irrespective of varying fact patterns which underlie individual claims.] As such, the typicality
24 requirement is satisfied.

25 **v. The Adequacy Requirement is Met**

26 The adequacy requirement is met if Plaintiff has no interests adverse to the interests of the
27 proposed Class Members and is committed to vigorously prosecuting the case on behalf of the
28 class. *Hanlon, supra*, 150 F.3d at 1020; *McGhee v. Bank of America* (1976) 70 Cal.App.3d 442,

1 450-51. Plaintiff contends those standards are met here. Plaintiff does not have any conflicts of
2 interest with the Class. He has been and continues to be committed to vigorously prosecuting this
3 case. If any Class Member wishes to opt-out of the Settlement, he or she may do so. Therefore,
4 there is no conflict of interest between Plaintiff and the Class Members.

5 **d. Notice to the Class Complies with California Rule of Court 3.769(f)**

6 California Rule of Court 3.769(f), provides:

7 If the court has certified the action as a class action, notice of the final approval
8 hearing must be given to class members in the manner specified by the court. The
9 notice 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.

10 The proposed Class Notice meets all of these requirements. The proposed Class Notice advises the
11 class of their rights to participate in the settlement, how to and when to object to or request
12 exclusion from the settlement, and the date, time, and location of the final approval hearing. The
13 proposed Class Notice is attached as Exhibit A to the Agreement.

14 **VI. CONCLUSION¹⁶**

15 Plaintiff respectfully submits that the proposed settlement is in the best interests of the
16 Class and Class Members, as it is fair, adequate, and reasonable, and one that should ultimately be
17 granted final approval. Under the applicable class action criteria and guidelines, the proposed
18 settlement should be preliminarily approved by the Court, the class should be conditionally
19 certified for purposes of settlement only, and the Class Notice should be approved. Plaintiff also
20 respectfully requests the Court set a final approval hearing date of August 16, 2024.

21 Dated: March 11, 2024

MARA LAW FIRM, PC

22 

23 David Mara, Esq.

24 Jill Vecchi, Esq.

25 Attorneys for Plaintiff William Giron on behalf of
26 himself, all others similarly situated, and on behalf of
the general public

27
28 ¹⁶ Attached hereto as Exhibit A is proof of submission of the proposed settlement agreement to the
LWDA.