ZAKAY LAW GROUP, APLC
Shani O. Zakay (State Bar #277924)
Jackland K. Hom (State Bar #327243)
Rachel Newman (State Bar #350826)
Jennifer Gerstenzang (State Bar #279810)
Jaclyn Joyce (State Bar #285124)
5440 Morehouse Drive, Suite 3600
San Diego, CA 92121
Telephone: (619) 255-9047
shani@zakaylaw.com
jackland@zakaylaw.com
rachel@zakaylaw.com
jenny@zakaylaw.com
jaclyn@zakaylaw.com

JCL LAW FIRM, APC
Jean-Claude Lapuyade (State Bar #248676)
5440 Morehouse Drive, Suite 3600
San Diego, CA 92121
Telephone: (619) 599-8292
jlapuyade@jcl-lawfirm.com

Attorneys for PLAINTIFF

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

SHANE ABBOTT, individually, and on behalf of other members of the general public similarly situated; Plaintiff, vs. SAUNDERS CONSTRUCTION, INC., a California corporation; and DOES 1 through 100, inclusive, Defendants.	Case No. 24CV428659 [Complaint Filed: January 5, 2024] **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS AND PAGA ACTION SETTLEMENT** Dept.: 7 Judge: Hon. Charles F. Adams

TABLE OF CONTENTS

/ / /

I. INTRODUCTION

Plaintiff SHANE ABBOTT (hereinafter "Plaintiff") seeks preliminary approval of the Stipulation of Settlement of Class and PAGA Action Claims and Release of Claims ("Agreement")[1], which if approved, would provide valuable monetary relief for approximately 154 Class Members and approximately 117 Aggrieved Employees. The basic terms of the Agreement provide for the following:

1. The **"Class"** or "**Class Members**" means all current and former hourly-paid or non-exempt employees who worked for SAUNDERS CONSTRUCTION, INC. ("Defendant") within the state of California at any time during the Class Period. Agreement at § I(G). The "**Class Period**" means the period commencing January 5, 2020, and the earlier of March 6, 2025, or the date on which the total number of Workweeks equals 14,282. Agreement at § I(J). The Class is comprised of approximately 154 individuals who collectively worked approximately 12,993 Workweeks during the Class Period. Agreement at § III(A)(2).

2. The **"Settlement Class Members"** means all Class Members who do not submit a valid and timely Request for Exclusion. Agreement at § I(KK).

3. The **"Aggrieved Employees"** means all current and former hourly-paid or non-exempt employees who worked for Defendant within the State of California at any time during the PAGA Period. Agreement at § I(C). The "**PAGA Period**" means the period from October 31, 2022, through the earlier of March 6, 2025, or the date on which the total number of Workweeks equals 14,282. Agreement at § 1(Y). At the time of mediation, there were approximately 117 Aggrieved Employees during the PAGA Period who worked an aggregate of 4,775 PAGA Pay Periods. JCL Dec., at ¶ 7.

4. The "**Maximum Settlement Amount**" is Six Hundred Thousand Dollars ($600,000.00). Agreement at § I(P). The Maximum Settlement Amount is to be paid in full settlement of the Action (defined below), Released PAGA Claims (defined below), and Released Class Claims (defined below). (*Id.*) The Maximum Settlement Amount is non-reversionary and includes the following:

a. "**Service Award**" in the amount not to exceed Ten Thousand Dollars and Zero Cents ($10,000.00) to the Plaintiff. Agreement at §§ I(HH); III(M)(9).

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

b. An award of "**Attorneys' Fees and Expenses**" consisting of attorneys' fees in the amount not to exceed 35% of the Maximum Settlement Amount currently estimated to be Two Hundred Ten Thousand Dollars and Zero Cents ($210,000.00) **and** reimbursement of actually incurred litigation costs by Class Counsel in an amount up to Thirty-Five Thousand Dollars and Zero Cents ($35,000.00). Agreement at §§ I(D); I(E) and III(M)(10).

c. A "**PAGA Payment**" of Twenty-Five Thousand Dollars and Zero Cents ($25,000.00), from the Maximum Settlement Amount, for penalties under the Private Attorneys General Act 2004, as codified at California Labor Code section 2698, et seq., with 25% of the payment going to the Aggrieved Employees and 75% of the payment going to the Labor and Workforce Development Agency ("LWDA Payment"). Agreement at §§ I(W) and III(M)(11).

d. "**Administration Expenses**" not to exceed Six Thousand Four Hundred Ninety Dollars and Zero Cents ($6,490.00) payable to the Settlement Administrator, Apex Class Action LLC., for, *inter alia,* the administration of the Notice Packet and Individual Settlement Payments. Agreement at §§ I(F) and III(M)(12).

e. The "**Net Settlement Amount**" refers to the portion of the Maximum Settlement Amount that is available for distribution to Settlement Class Members and is calculated by subtracting the Attorneys' Fees and Expenses, Service Award, PAGA Payment, and Administration Expenses from the Maximum Settlement Amount. Agreement at § I(R). The Net Settlement Amount is approximately Three Hundred and Thirteen Thousand, Five Hundred and Ten Dollars and Zero Cents ($313,510.00) which will be allocated to all Settlement Class Members on a pro-rata basis according to the number of Workweeks each Settlement Class Member worked during the Class Period. Assuming there are zero opt-outs, the entire Net Settlement Amount will be paid to all Settlement Class Members resulting in an average Individual Class Payment of approximately ***$2,035.78***. JCL Dec., ¶ 7.

5. The "**Released Class Claims"** means of all class claims alleged, or reasonably could have been alleged based on the facts alleged, in the Operative Complaint in the Action which occurred during the Class Period, and expressly excluding all other claims, including claims for vested benefits, wrongful termination, unemployment insurance, disability, social security, workers' compensation, or claims based on facts occurring outside the Class Period. Agreement at § (I)(DD).

6. The **"Released PAGA Claims"** means all PAGA claims alleged in the Operative Complaint in the Action and Plaintiff's PAGA Notice to the LWDA which occurred during the PAGA Period, and expressly excluding all other claims, including claims for vested benefits, wrongful termination, unemployment insurance, disability, social security, workers' compensation, and PAGA claims outside of the PAGA Period. Agreement at § (I)(EE).

An objective evaluation of the Settlement confirms that the relief negotiated on behalf of the Class is fair, reasonable, and adequate. The Settlement was negotiated by the Parties at arm's length. The Settlement confers substantial benefits to the Class Members. The relief offered by the Settlement is particularly impressive when viewed against the difficulties encountered by plaintiffs pursuing wage and hour cases (*see infra)*. Indeed, by settling now rather than proceeding to trial, the Class will not have to wait (possibly years) for relief, nor will they have to bear the risk of class certification being denied or of Defendant prevailing at trial. JCL Dec., ¶ 7.

As discussed below, the proposed Settlement satisfies all criteria for preliminary settlement approval and falls within the range of reasonableness. The average Individual Settlement Payment to the Settlement Class meets or exceeds awards in similar wage and hour class actions. Moreover, the proposed Settlement Class is appropriate for provisional certification. Accordingly, Plaintiff respectfully requests the Court grant preliminary approval of the Settlement. JCL Dec., ¶ 8.

II. FACTS AND PROCEDURE

A. Overview of the Litigation

Defendant owns and operates a contracting business, specializing in commercial seismic retrofits, in the state of California, including but not limited to, Santa Clara County. Plaintiff Abbott alleges he worked for Defendant as a non-exempt employee from March 2023 to June 2023. Plaintiff alleges that Defendant, among other things, failed to pay for all hours worked, failed to provide compliant meal and rest periods, furnished facially non-compliant wage statements, miscalculated the regular rate of pay for purposes of paying overtime compensation, and failed to reimburse employees for mandatory business expenses. Throughout his employment, Plaintiff was subject to Defendant's written policies and procedures contained in, among other documents, the "Saunders Construction Code of Safe Practices" and Employee Handbook. JCL Dec., ¶ 9; Declaration of Shane Abbott ("SA Dec.") at ¶¶ 4-5.

Defendant forcefully denies liability for each of Plaintiff's claims. Further, Defendant asserts that it fully complied with all applicable employment laws and raised several other significant defenses to Plaintiff's claims, including but not limited to, compliant compensation policies and plans, compliant meal and rest practices, substantially compliant wage statements, and timely payment of all wages due upon separation of employment. JCL Dec., ¶ 10.

On October 31, 2023, Plaintiff served Defendant and the Labor and Workforce Development Agency ("LWDA") with a Notice of Violations ("PAGA Notice"). Plaintiff's PAGA Notice set forth the facts and theories supporting Defendant's alleged violations of various provisions of the California Labor Code and applicable Industrial Welfare Commissions ("IWC") Wage Order and of their intent to pursue claims under California Labor Code Private Attorneys General Act, California Labor Code Sections 2698 *et seq.* ("PAGA"). JCL Dec., ¶ 11.

On January 5, 2024, Plaintiff filed a complaint in this Court, alleging a single cause of action for violations of PAGA. (the "Action"). JCL Dec., ¶ 12.

On January 5, 2024, Plaintiff also filed a separate class action in the Orange County Superior Court, Case No. 30-2024-01371302-CU-OE-CXC ("Class Action"), alleging claims for: (1) Violation of California Labor Code §§ 510 and 1198 (Unpaid Overtime); (2) Violation of California Labor Code §§ 226.7 and 512(a) (Unpaid Meal Period Premiums); (3) Violation of California Labor Code § 226.7 (Unpaid Rest Period Premiums); (4) Violation of California Labor Code §§1194, 1197, and 1197.1 (Unpaid Minimum Wages); (5) Violation of California Labor Code §§ 201 and 202 (Final Wages Not Timely Paid); (6)Violation of California Labor Code § 204 (Wages Not Timely Paid During Employment); (7) Violation of California Labor Code § 226(a) (Non-Compliant Wage Statements); (8) Violation of California Labor Code § 1174(d) (Failure to Keep Requisite Payroll Records); (9) Violation of California Labor Code §§ 2800 and 2802 (Unreimbursed Business Expenses); and (10) Violation of California Business and Professions Code §§ 17220, *et seq*. JCL Dec., at ¶ 13.

In order to facilitate the settlement, Plaintiff filed a First Amended Complaint in this Action on February 6, 2025, adding the class claims from his class action. On February 11, 2025, Plaintiff dismissed his separate Class Action without prejudice. JCL Dec., at ¶ 14.

B. Class Counsels' Investigation

To prepare for mediation, Class Counsel requested pertinent documents and data points to evaluate Plaintiff's claims and measure Defendant's liability exposure to the Class. In response, Defendant produced, among other things, time, and payroll records for 66% of the Class, aggregate workweek and pay period data, and copies of applicable handbooks, policies, and procedures. In total, Defendant produced nearly 300 pages of documents and hundreds of thousands of unique cells of time and payroll data. JCL Dec., ¶ 15.

Class Counsel then retained the statisticians and economists at Berger Consulting Group ("BCG") to evaluate the Class Members' payroll and time data and to calculate Defendant's liability exposure to the Class. BCG provides data analysis and damage modeling consulting services, specializing in wage and hour class actions. BCG analyzed Defendant's time and payroll data and developed various damage models that assisted Class Counsel at the time of mediation. JCL Dec., ¶ 16.

Overall, Class Counsel thoroughly investigated the claims at issue. Class Counsel (1) reviewed Plaintiff's suitability as a putative class representatives through interviews, background investigations, and analysis of their employment files; (2) evaluated Plaintiff's' potential claims; (3) researched similar wage and hour class actions; (4) analyzed time and payroll records for the Class; (5) analyzed Defendant's labor policies and practices; (6); developed comprehensive damage models which estimated Defendant's liability for purposes of settlement with the assistance of a third party damages consultant, BCG; (7) drafted the mediation brief; and (8) participated in the mediation. This investigation allowed Class Counsel to fully assess the nature and magnitude of the claims being settled, and to make an independent assessment of the reasonableness of the terms to which the Parties have agreed. Based on its investigation of the facts, applicable law, and marketplace for similar settlements, and considering the risk of significant delay and uncertainty associated with litigation, and the various defenses asserted by Defendant, Class Counsel firmly believes this Agreement to be in the best interests of the Class Members. Because the Settlement's terms are fair, reasonable, and adequate, the Court should preliminarily approve the Settlement. JCL Dec., ¶ 17.

C. The Parties Settled at Mediation

On December 6, 2024, the Parties participated in a full day mediation with Jason Marsili, Esq., an experienced mediator of wage and hour class and PAGA actions. The mediation concluded with a settlement, which was subsequently memorialized in the form of a Memorandum of Understanding ("MOU") and then the Agreement. JCL Dec., ¶ 18. Class Counsel submits that the Settlement constitutes a fair, adequate, and reasonable compromise of the claims at issue. JCL Dec., ¶¶ 19.

III. ARGUMENT

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

The proposed Settlement, including a Maximum Settlement Amount of Six Hundred Thousand Dollars and Zero Cents ($600,000.00), meets the standards for preliminary approval. Pre-trial settlement of complex class actions is a judicially favored remedy. (*Officers for Justice v. Civil Serv. Comm'n* (9th Cir. 1982) 688 F.2d 615, 625 ("Voluntary conciliation and settlement are the preferred means of dispute resolution.").) Class action settlement approval requires an early "preliminary" review by the trial court and a subsequent "final" review after notice of the settlement has been distributed to class members for their comments and objections. (C.R.C. 3.769(c)-(g); *Cellphone Termination Fee Cases,* 180 Cal.App.4th 1110, 1118 (2010) (the court first "preliminarily approves the settlement" and later "conducts a final approval hearing to inquire into the fairness of the proposed settlement").) JCL Dec., ¶ 20.

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

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

1. <u>The Parties Reached the Settlement Through Arm's-Length Bargaining Led by Experienced Counsel.</u>

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

The Parties participated in mediation with highly respected mediator Jason Marsili, Esq. Mediator Marsili managed the Parties' expectations and provided a useful, neutral analysis of the issues and risks to both sides. (*In re Apple Computer, Inc. Derivative Litig,* No. C 06-4128 JF (HRL), 2008 U.S. Dist. LEXIS 108195 (N.D. Cal. Nov. 5, 2008) (mediator's participation weighs considerably against any inference of a collusive settlement); *D'Amato v. Deutsche Bank* (2d. Cir. 2001) 236 F.3d 78, 85 (a "mediator's involvement in pre-certification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure.").) The Parties reached a settlement, which was subsequently memorialized in a Memorandum of Understanding ("MOU"). At all times, the Parties' negotiations were at an arm's length, adversarial, and non-collusive. After reaching an agreement in principle, the Parties drafted and negotiated a long-form settlement which is the subject of the instant motion. Objectively, the Settlement terms are fair, adequate and represent a reasonable compromise of the claims at issue. JCL Dec., ¶ 21.

2. <u>Class Counsel's Investigation Provided an Objective Measurement of the Settlement's Reasonableness.</u>

As set forth in greater detail above, Class Counsel conducted a very thorough investigation into the factual and legal issues in dispute. The investigation allowed Class Counsel to fully assess the nature and magnitude of the claims being settled, as well as the impediments to recovery, such as to make an independent assessment of the reasonableness of the terms to which the Parties have agreed. Based on this investigation of the facts, applicable law, and marketplace for similar settlements, and considering the risk of significant delay, uncertainty associated with litigation, and the various defenses asserted by Defendant, Class Counsel firmly believes this Agreement to be in the best interests of the Class Members. Because the Settlement's terms are fair, reasonable, and adequate, the Court should preliminarily approve the Settlement. JCL Dec., ¶ 22.

3. <u>The Settlement Falls Within the Recognized Range of Reasonableness.</u>

The Maximum Settlement Amount of $600,000.00 is within the range of reasonableness. To determine whether a settlement is fair and reasonable, the court should "consider enough information about the nature and magnitude of the claims being settled, as well as the impediments to recovery, to make an independent assessment of the reasonableness of the terms to which the parties have agreed." (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133.) In making this determination, the court is "not to try the case" but rather "satisfy itself that the class action settlement is within the 'ballpark of reasonableness.'" (*Id.* (emphasis added).) For this analysis, courts do "not require any such explicit statement of value; [they] require[] a record which allows an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation. " (*Munoz v. BCI Coca-Cola Bottling Co.* (2010) 186 Cal.App.4th 399, 409 (internal citation omitted).) The reasonableness of a settlement is not dependent upon its actual value approaching the potential recovery plaintiffs might have received if they had succeeded at trial.[2] Indeed, "[t]he determination whether a settlement is

[2] Federal district courts recognize that there is an inherent "range of reasonableness" in determining whether to approve a

reasonable does not involve the use of a ‘mathematical equation yielding a particularized sum.’” (*Frank v. Eastman Kodak Co.* (W.D.N.Y. 2005) 228 FRD. 174, 186 (*quoting In re Michael Milken and Assoc. Sec. Litig.* (S.D.N.Y. 1993) 150 F.R.D. 57, 66).)

The Maximum Settlement Amount of $600,000.00 is fair and reasonable considering the nature and magnitude of the claims being settled and the various potential impediments to recovery. Prior to mediation, Class Counsel retained BCG to develop economic damage models measuring Defendant’s liability exposure while accounting for the uncertainties of continued litigation. The various models were informed by Class Counsel’s investigation, including the analysis of a significant sample of time and payroll data. Class Counsel projected Defendant’s realistic liability exposure for *class claims* (excluding PAGA Penalties) to be $1,747,937.70 if successful at trial. Thus, the Maximum Settlement Amount of $600,000.00 represents approximately 34.33% of Defendant’s *class-wide* liability - within the recognized range for reasonableness. The following summarizes Defendant’s estimated exposure. JCL Dec., ¶ 23.

(a) Estimated Damages for Issuing Non-Compliant Wage Statements

24. One of Plaintiff’s primary claims in this action is that Defendant issued Plaintiff, Class Members, and Aggrieved Employees non-compliant wage statements. Specifically, Defendant issued wage statements that failed to include Defendant’s address in violation of California Labor Code Sections 226(a)(8). Defendant contends that it substantially complied, and further, that Plaintiff has not demonstrated any actual injury. California courts have made clear that “[t]he injury requirement in [section 226(e)] cannot be satisfied simply if one of the nine itemized requirements in [section 226(a)] is missing from a wage statement.” *Price v. Starbucks Corp*. (2011) 192 Cal.App.4th 1136, 1142; *see also Jaimez v. DAIOHS USA, Inc.* (2010) 181 Cal.App.4th 1286, 1306–07, 105 Cal.Rptr.3d 443

---

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

(employees “must establish ‘actual injury’ arising from the receipt of inaccurate paystubs”). Rather, “the statute requires that an employee may not recover for violations of [section 226(a)] unless he or she demonstrates an injury arising from the missing information.” *Price*, *supra*, 192 Cal.App.4th at 1142–43, 122 Cal.Rptr.3d 174.Taking into account Defendant’s defenses, Plaintiff applied a 75% discount to this claim and estimates Defendant’s liability to be $117,000.00. JCL Dec., ¶ 24.

(b) Estimated Damages for Failure to Pay Proper Wages

25. Plaintiff also claims that Defendant failed to pay proper wages to Plaintiff, Class Members, and Aggrieved Employees. Specifically, Plaintiff alleges that the timekeeping system recorded Class Members’ schedules rather than their actual hours worked, which benefited Defendant by not recording all hours worked by Class Members. Plaintiff further contends that the scheduled time recorded did not account for time spent donning and doffing safety equipment, including harnesses and self-retracting lifelines. Defendant argued, among other things, that their records were compliant and accurately reflected the time worked by the Class Members. Defendant further argued that the only way Plaintiff would be able to overcome their claim is by providing highly individualized testimonial evidence by obtaining either sworn depositions or declarations from individual class members. Plaintiff estimates Defendant’s liability stemming from this claim is approximately $145,625.00. JCL Dec., ¶ 25.

(c) Estimated Damages for Meal Period Violations

Plaintiff further claims that Defendant also failed to provide compliant meal periods. Specifically, Plaintiff and Class Members’ meal periods were always exactly 30 minutes in length and always taken at the exact same time every day. Their records indicate Defendant failed to record and track the actual time Class Members spent taking meal breaks, which is facially unlawful, triggers a presumption of violations, and therefore lends itself to a class-certifiable claim. Defense again argued that their records accurately recorded Class Members’ meal breaks, and that in order to rebut this defense Plaintiff would need to take and provide highly individualized testimonial evidence. Taking into account Defendant’s defenses, Plaintiff applied a 55% discount to this claim and estimates that Defendant’s exposure resulting from meal period violations to be $800,535.00. JCL Dec., ¶ 26.

/ / /

(d) Estimated Damages for Rest Period Violations

Plaintiff also alleges that he and the Class Members were unable to take compliant rest periods. Again, Defendant denied liability and asserted that it maintained legally compliant rest period practices throughout the Class Period. Moreover, Plaintiff recognizes the evidentiary burdens establishing this claim. Establishing Plaintiff's rest period claim would rely, almost entirely, on Class Member testimony, making it a riskier claim at class certification and liability stages. Certification likely would have required depositions of Class Members who provided declarations, and Defendant surely would have obtained opposing declarations stating either rest breaks were taken, or rest breaks were voluntarily waived. *See*, e.g., *Ordonez v. Radio Shack, Inc.* (C.D. Cal. Jan. 17, 2013) 2013 WL 210223, at *11 ("Because of the competing testimony before the Court, plaintiff's evidence that defendant may have an illegal, written rest break policy is insufficient for this Court to find that common issues predominate."); *Villa v. United Site Servs. of California, Inc.* (N.D. Cal. Nov. 13, 2012) 2012 WL 5503550, at *8 ("Indeed, Plaintiff's own evidence confirms that the written policy does not generate uniform practices."). Taking into account Defendant's defenses, Plaintiff applied a 55% discount to this claim and estimates Defendant's exposure resulting from rest period violations to be $813,520.00. JCL Dec., ¶ 27.

(e) Exposure for Expense Reimbursement Claim

Plaintiff claims that Defendant failed to reimburse Class Members for necessary expenses as they were required to use their own personal tools in order to perform their jobs but were not paid twice the minimum wage. Plaintiff also alleges he and the Class Members were also required to use their own cellular phones for work purposes. Plaintiff applied a 15% discount to this claim and estimates Defendant's liability as a result of its failure to reimburse employees for their use of personal tools and cell phones to be approximately $39,270.00. JCL Dec., ¶ 28.

(f) Estimated Damages for Miscalculation of the Regular Rate of Pay

Plaintiff additionally claims that Defendant failed to include certain non-discretionary bonuses, specifically compensation identified as "additional taxable" when calculating the regular rate of pay when paying overtime. The regular rate of pay, which can change from pay period to pay period, includes adjustments to the straight time rate, reflecting, among other things, non-discretionary bonuses and awards, shift differentials and the per-hour value of any non-hourly compensation the employee has earned. *Alvarado v. Dart Container Corp. of California* (2018) 4 Cal.5th 542, 552-554. For overtime work, "an employee must receive a 50 percent premium on top of his or her regular rate of pay[.]" *Id.* at 553. California law also requires meal period premiums and rest period premiums to be paid at an employee's regular rate of pay. See *Ferra v. Lowes Hollywood Hotel, LLC* (2021) 11 Cal.5th 858.) Defendants argued that all "additional taxable" payments were discretionary and, thus, were properly excluded from the regular rate of pay. Further, Defendants argued that even assuming these items of compensation were non-discretionary – which Defendants denied – none of the named Plaintiffs ever received such a payment. Thus, Defendants argued Plaintiffs lacked standing to pursue the claim. Finally, Defendants argued that less than 1/3 of the Class Members ever received any of these payments. Consequently, Defendants argued any resulting liability was minimal. Due to the material question of fact as to whether the bonuses paid to the Class Members were non-discretionary, Plaintiff estimates Defendant's liability as a result of its alleged failure to properly calculate the regular rate of pay is $ $35,455.00. JCL Dec., ¶ 29.

(g) Exposure for Waiting Time Penalties

Plaintiff alleges that Defendant's alleged violations resulted in derivative violations of Labor Code sections 203. Although these penalties represented one of Defendant's largest dollar amount of exposure, this is Plaintiffs' most uncertain claim. Specifically, Defendant argued that Plaintiffs could not prove the "willful" prong needed to obtain waiting time penalties under Labor Code section 203. Additionally, for the reasons stated above, *Naranjo v. Spectrum Security Services* (2024) 15 Cal. 5th 1056, creates difficulty in Plaintiffs succeeding in a purely derivative waiting time penalty claim. Taking Defendant's defenses into account, Plaintiff applied a 65% discount to this claim and estimates Defendant's liability for waiting time penalties to be $178,916.15. JCL Dec., ¶ 30.

(h) Defendant's PAGA Exposure

Class Counsel's damage models also estimated Defendant's exposure for PAGA penalties. At the time of mediation, Plaintiff estimated Defendant's PAGA exposure to be approximately $1,499,000.00. JCL Dec., ¶ 31. Under PAGA, Courts have considerable discretion to reduce the penalty award. In *Fleming v. Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011), a federal court reduced

PAGA penalties from $2,800,000 to $500,000, a reduction of 82.2%, because the court found maximum penalties "unjust" because the employees had suffered no injuries. Some trial courts have actually awarded no civil penalties, even when Labor Code violations are established. *See In re Nordstrom Com. Cases*, 186 Cal.App.4th 576, 589 (2010) (affirming an award of $0 in PAGA penalties in a wage and hour class action); *In re Taco Bell Wage & Hour Actions*, 2016 U.S. Dist. LEXIS 48557, *40-43 (E.D. Cal. Apr. 6, 2016) (PAGA penalties denied after trial).

To recover any PAGA penalties, Plaintiff would be required at trial to prove each of the underlying Labor Code violations. *See Cardenas v. McLane Foodservice, Inc.*, 2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011) ("Given the statutory language [of PAGA], a plaintiff cannot recover on behalf of individuals whom the plaintiff has not proven suffered a violation of the Labor Code by the defendant."). Here, Plaintiff would need to prove that each Aggrieved Employee suffered a violation for each pay period the employee worked. Defendant argued that the changes to PAGA post June 13, 2024, made the imposition of penalties even more difficult. Defendant argued that Courts would likely exercise considerable discretion on penalties, even on old PAGA cases like this one, and only award penalties consistent with the new PAGA statute. The new PAGA statute reduced penalty amounts by as much as 85% if the employer took reasonable steps to be in compliance prior to the lawsuit being filed. Here, Defendant argued that it took more than reasonable steps to ensure compliance and that they would argue for an 85% reduction in PAGA penalties. JCL Dec., ¶ 32.

Carrington v. Starbucks Corp. (2018) 30 Cal.App.5th 504, illustrates the risk of PAGA claims. In *Carrington*, while the plaintiff prevailed on his PAGA claim upon trial, the trial court reduced the maximum PAGA penalty amount by 90%, citing the employer's good faith attempt at complying with the law. *Id.* at 517. Upon review, the Court of Appeal found such reduction to be proper. *Id.* at 539. Again, the *Carrington* decision was after the plaintiff there prevailed at trial, and even then, the PAGA penalties were reduced by 90%.

The proposed Settlement allocates $25,000 to satisfy the PAGA claims. This amount represents approximately 4.2% of the Maximum Settlement Amount. This achieves a fair, reasonable, and adequate resolution of Plaintiff's' PAGA claim. See *Moniz v. Adecco* (2021) 72 Cal.App.5th 56. Further, the amount allocated to the satisfaction of Plaintiff's' PAGA claim, is well within the range of reasonableness. *See, e.g.*, *Nordstrom Comm'n Cases* (2010) 186 Cal.App.4th 576, 589 (approving 0% PAGA allocation); *Berry v. Urban Outfitters* (N.D. Cal. Lead Case No. 13-cv-02628-JSW) (approving 1% PAGA allocation in $5M settlement); *Jack v. Hartford Fire Ins. Co.* (S.D. Cal. 2011) 2011 WL 4899942 * 6 (approving $3,000 PAGA allocation in $1.2M settlement); *Singer v. Becton Dickinson & Co*. (S.D. Cal. 2010) 2010 WL 2196104 *2 (approving $3,000 PAGA allocation in $1M settlement); and *Hopson v. Hanesbrands, Inc* (N.D. Cal. 2009) 2009 WL 928133 * 9 (approving $1,500 PAGA allocation in $1.026M settlement.) JCL Dec., ¶ 33.

4. <u>Inherent Risks of Continued Litigation Support Preliminary Approval.</u>

"It can be difficult to ascertain with precision the likelihood of success at trial. The Court cannot and need not determine the merits of the contested facts and legal issues at this stage, [Citation], and to the extent courts assess this factor, it is to 'determine whether the decision to settle is a good value for a relatively weak case or a sell-out of an extraordinary strong case.'" (*Misra v. Decision One Mortg. Co.* (C.D. Cal. 2009) 2009 WL 4581276, at *7.)

With respect to the most immediate challenge, i.e., class certification, the risks attendant to the certification of similar wage and hour claims are demonstrated by *Magadia v. Wal-Mart Associates, Inc.* (9th Cir. 2021) 999 F.3d 668. There, the Ninth Circuit, vacated reversed and remanded a $110 million judgement against an employer for, *inter alia*, inaccurately paying overtime, and directed the trial court to enter judgement in favor of the employer. *See also O'Conner v. Uber Technologies, Inc.* (9th Cir. 2018) 904 F.3d 1087 (decertification of wage and hour misclassification action); *see also Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, 31 (reversing a trial verdict in favor plaintiffs in a wage and hour class action)); *Tien v. Tenet Healthcare Corp.* (2012) 209 Cal.App.4th 1077, 1088 ("[T]he reason, if any, that employees might not take their breaks were predominantly individualized questions of fact not susceptible to class treatment."); *Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333, 1341 (affirming denial of certification because employees' declarations attesting to having taken meal and rest breaks demonstrated that individualized inquiries were required to show harm); *Campbell v. Best Buy Stores, L.P.*, (C.D. Cal. 2013) 2013 WL 5302217 at *11-13 (following *Brinker* and denying certification of proposed off-the-clock and rest and meal break classes due to lack of uniform policy); *Brown v. Fed Express Corp.* (C.D. Cal. 2008) 249 F.R.D. 580, 587-88 (denying certification of driver meal and rest period claims based on the predominance of individual issues). Collectively, the examples cited above illustrate the uncertain nature of class litigation. Consequently, the uncertainty of obtaining certification through a contested motion is a significant risk factor favoring settlement. JCL Dec., ¶ 34.

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

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

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

Finally, continuing to litigate this action would require continued and extensive resources coupled with significant Court time to proceed through trial and post-trial motions, which can often take years. Furthermore, wage and hour litigation is complex and expensive, as it often necessitates extensive expert testimony, particularly with regards to damages. But even if Plaintiff is successful at trial, Plaintiff is acutely aware that a judgment does not end the litigation. Plaintiff fully expects that Defendant would appeal any favorable judgment. As demonstrated by *Magadia, supra,* 999 F.3d 668, the risk of an appeal and subsequent reversal is real. JCL Dec., ¶ 35 "Avoiding such a trial and the subsequent appeal in this complex case strongly militates in favor of settlement rather than further protracted and uncertain litigation." (*Nat'l Rural Telecomms. Coop v. DirecTV* (C.D. Cal. 2004) 221 F.R.D. 523, 527.) Thus, "unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." (*Id*. at 526.)

Given the amount of the settlement here, as compared to potential value of the claims, offset by the various inherent risks to continued litigation, the settlement is fair and reasonable. JCL Dec., ¶ 36.

/ / /

B. The Notice of Proposed Class Action Settlement

The Class is entitled to the best practical notice under the circumstances. (*Kass v. Young* (1977) 67 Cal.App.3d 100, 106.) The purpose of the notice is to give class members sufficient information to decide whether they should accept the benefits offered, opt out and pursue their own remedies, or object to the settlement. (*Trotsky v. Los Angeles Fed Savings & Loan Assn.* (1975) 48 Cal.App.3d 143, 151-52.) The notice must advise class members "that they may be excluded from the class if they so request and that they will be bound by the judgment, whether favorable or not, if they do not request exclusion." (*Kass,* 67 Cal.App.3d at 106.) Authorities generally require service of the class notice by mail or similar reliable means. (*Chance v. Super. Ct.* (1962) 58 Cal.2d 275, 290; *Cart v. Super. Ct.* (1975) 50 Cal.App.3d 960, 972.)[3]

The Parties jointly drafted the Notice of Proposed Class Action Settlement ("Class Notice") which fairly and neutrally informs the Class of their rights and remedies. The Settlement Administrator will first verify addresses, then mail the proposed Class Notice to the entire Class. The Class Notice includes information regarding the nature of the lawsuit, a summary of the substance of the Settlement's terms, the procedure, and time within which to requests for exclusions or objections to the Settlement, the date for the final approval hearing, the formula used to calculate settlement payments, and the terms and scope of the Released Class Claims. Agreement at § III(L)(2)(a). The Parties negotiated this method to ensure delivering the most reasonable method of notice to the Class while ensuring cost effective administration of the Settlement. JCL Dec., ¶ 37.

Accordingly, both the content and method of disseminating the Class Notice satisfy due process. (*See* C.R.C. 3.776(e)-(f); *State of Cal. v. Levi* Strauss (1986) 41 Cal.3d 460,485 (the class notice must "fairly apprise the class members of the terms of the proposed compromise and of the options open to dissenting class members.").) JCL Dec., ¶ 38.

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

Service or enhancement awards "are fairly typical in class action cases." (*Cellphone Termination*

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

Fee Cases (2010) 186 Cal.App.4th 1380, 1393 (affirming incentive awards of $10,000); *Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958, *citing* 4 Newberg on Class Actions (4th ed. 2002) § 1 1:38, and Eisenberg & Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study,* 53 UCLA L. Rev. 1303 (2006).) Service Awards "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." (*Rodriguez,* 563 F.3d at 958-59.) "[T]he rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class." (*Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785.)

The Settlement provides for a Service Award of $10,000 to Plaintiff. The Service Award is fair and reasonable compensation for Plaintiff's efforts bringing the action, assisting Class Counsel with the litigation and settlement, regularly conferring with Class Counsel on the status of the case and the strategies for prosecuting the claims, reviewing the proposed Settlement to ensure that its terms are fair and provide adequate relief for the Settlement Class. JCL Dec., ¶ 39.

Class Counsel on behalf of Plaintiff will file a formal motion for the negotiated Class Representative Service Award once preliminary approval of the Settlement is granted. Plaintiff respectfully submits that the above showing is sufficient for preliminary approval of the negotiated Class Representative Service Award. JCL Dec., ¶ 40.

D. The Court Should Preliminarily Approve the Attorneys' Fees and Expenses

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

Class Counsel took this matter on a contingency fee basis and invested significant time and expense successfully prosecuting Plaintiff's' claims. As discussed *supra*, the estimated average Individual Settlement Payments illustrates the demonstrably positive outcome for the Class. Considering the positive outcome, and considering the supporting authority, the proposed Attorneys' Fees and Expenses are fair and reasonable. JCL Dec., ¶ 41.

Plaintiff will file a formal motion for the Attorneys' Fees and Expenses once preliminary approval of the Settlement is granted. Plaintiff respectfully submits that the above showing is sufficient for preliminary approval of the negotiated attorneys' fees. JCL Dec., ¶ 42.

E. Provisional Certification for Settlement Purposes Is Appropriate

For Settlement, Plaintiff contends, and Defendant does not dispute, that provisional certification of the Class is appropriate. JCL Dec., ¶ 43.

1. <u>The Standard for Class Certification</u>

Class actions are statutorily authorized "when the question is one of common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court" (*Cal.Civ.Proc*. Code § 382; *Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325, 1332.) Class certification is appropriate when there is an "ascertainable class and a well-defined community of interest among class members." (*Sav-On Drug Stores, Inc.* (2014) 34 Cal.4th 319, 326.) Class treatment is appropriate even if class members at some point may be required to make an individual showing as to eligibility for recovery. (*Bufil v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1207; *Sav-On,* 34 Cal.4th at 333.)

2. <u>The Proposed Settlement Class is Ascertainable and there is a Well-Defined Community of Interest Among the Settlement Class Members.</u>

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

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

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

Because all members of the Class are Defendant's current and former non-exempt employees, the class is readily ascertainable from Defendant's regular business records, i.e., payroll records. JCL Dec., ¶ 44.

The statutes relating to each of Plaintiff's claims apply with equal force and effect to the entire Settlement Class. Factually, Defendant's policies and practices apply class-wide, and Defendant's liability can be determined by facts common to all members of the class. The wage and hour issues are both numerous and substantial, and a class action is the most advantageous method of dealing with the claims of the Settlement Class. JCL Dec., ¶ 45.

Plaintiff's wage and hour claims are typical of the proposed Class because they arise from the same factual basis and are based on the same legal theories applicable to the other Class Members. Likewise, Plaintiff's interests are entirely coextensive with the interests of the Class. Plaintiff alleges that he was injured by the same company-wide practices to which the proposed Class Members were subject to and seek the same relief. Plaintiff has already demonstrated his ability to advocate for the interests of the Class Member by initiating this litigation, undertaking extensive class discovery, and evaluating the proposed settlement to assure that it is fair. JCL Dec., ¶ 46.

Additionally, Plaintiff is represented by competent Class Counsel who have extensive experience in litigating wage and hour class action cases. Class Counsel successfully briefed, argued, certified, and gained state court settlement approval of the same class-wide causes of action that are at issue in this case. Class Counsel's wage and hour class action experience establishes that they are well qualified to represent the interests of this Class. JCL Dec., ¶¶ 48-55; Declaration of Shani Zakay, ¶¶ 1-3; ¶¶ 2-4 Declaration of Melissa LeBlanc-Mansell.

A class action is superior to a multitude of individual lawsuits. Given the size and amount of each individual claim, the Class Members likely have little incentive to litigate their claims on an individual basis because the out-of-pocket expense and personal commitment necessary to litigate each claim outweighs any potential recovery. In sum, class treatment is superior to individual, case-by-case adjudication. JCL Dec., ¶ 47.

IV. CONCLUSION

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

Dated: April 14, 2025

JCL LAW FIRM, APC

By: ______________________________

Jean-Claude Lapuyade, Esq.