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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF TULARE

FIDEL GOMEZ, an individual, on behalf of himself, and on behalf of all persons similarly situated, Plaintiffs, v. KIRBY MANUFACTURING, INC., a California corporation; and DOES 1-50, Inclusive, Defendants.	Case No. VCU308341 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT** Date: June 16, 2025 Time: 8:30 a.m. Judge: Hon. Gary Johnson Dept.: 7

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I. INTRODUCTION

Plaintiff FIDEL GOMEZ ("Plaintiff") seeks preliminary approval of the Stipulation of Settlement of Class Action and PAGA Claims and Release of Claims ("Agreement")[1], which if approved, would provide valuable monetary relief for approximately 88 Class Members and 57 Aggrieved Employees. The basic terms of the Agreement provide for the following:

1. The **"Class"** and **"Class Members"** shall mean "all current and former non-exempt employees who worked for Defendant Kirby Manufacturing, Inc. ("Defendant") in California at any time during the Class Period, defined as April 25, 2020 through February 26, 2025. Agreement at §§ I(E), I(I). As of the date of the Agreement, there were approximately 88 Class Members who worked approximately 11,954 Workweeks during the Class Period. Agreement at § III(A)(2).

2. The **"Settlement Class Member"** refers to all Class Members who do not file a timely and valid Request for Exclusion. Agreement at § I(MM).

3. The **"Aggrieved Employees"** and **"PAGA Period"** refers to all current and former non-exempt employees who worked for Defendant in California at any time during the PAGA Period, defined as April 25, 2023 through February 26, 2025. Agreement at §§ I(C), I(Y). Aggrieved Employees do not have the ability to opt-out of the PAGA portion of the settlement. Agreement at § III(M)(7). As of the date of the Agreement, there were approximately 57 Aggrieved Employees. JKH Dec., ¶ 24.

4. The "**Gross Settlement Amount**" is Two Hundred Thirty Thousand Dollars and Zero Cents ($230,000.00). Agreement at § I(O). The Gross Settlement Amount is non-reversionary and includes the following:

   a. A "**Class Representative Service Award**" in the amount of $10,000 to Plaintiff for his services on behalf of the Class Members. Agreement at §§ I(II), III(N)(9);

   b. A payment of "**Class Counsel Award**" in the amount not to exceed one-third of the Gross Settlement Amount for attorney's fees, currently estimated to be $76,666.66 ***and*** litigation costs and expenses not to exceed $25,000.00, to be paid to Class Counsel. Agreement at §§ III(N)(10).

[1] The final Agreement is attached as Ex "1" to the Declaration of Jackland K. Hom ("JKH Dec.") at ¶ 3. All citations to the Agreement incorporate by this reference a citation to the JKH Dec., ¶ 3. At the time of filing this Motion, the parties have circulated the final Settlement Agreement for signatures. Plaintiff will submit a fully executed Settlement Agreement prior to the June 16, 2025 hearing. Further, unless indicated otherwise, capitalized terms used herein have the same meaning as those defined by the Agreement.

The Attorneys' Fees shall be divided between Class Counsel as follows: 50% to JCL Law Firm, APC and 50% to Zakay Law Group, APLC. Agreement at § I(G). As of the filing of this Motion, Class Counsel worked a total of 168.3 hours successfully litigating this action with the attorney's hourly fee rate of $425-$700 and paralegal rates at $250 per hour, resulting in a current lodestar of $94,143.00. JKH Dec., ¶ 63; Declaration of Shani O. Zakay ("SOZ Dec.") ¶ 5-9; Declaration of Jean-Claude Lapuyade ("JCL Dec.") ¶¶ 11-17. Additionally, Class Counsel has incurred a total of $20,968.99 (JCL Law Firm, APC - $9,534.66 and Zakay Law Group, APLC - $11,434.33) in litigation costs prosecuting this action to date. JKH Dec., ¶ 64; SOZ Dec. ¶¶ 10-11; JCL Dec., ¶¶ 18-19. On Plaintiff's Motion for Final Approval and Motion for Fees, Class Counsel will submit additional declarations providing the Court with sufficient detail regarding Class Counsel's additional lodestar and expenses incurred;

c. A "**PAGA Payment**" in the amount of $10,000.00 shall be set aside from the Gross Settlement Amount for settlement of claims for civil penalties under the Private Attorneys General Act of 2004. Agreement at § I(Z). The Administrator, Apex Class Action, LLC ("Administrator" or "Apex") shall pay $7,500.00 representing 75% of the PAGA Payment to the Labor and Workforce Development Agency ("LWDA Payment"). Agreement at §§ III(N)(11). The Administrator shall distribute $2,500.00 representing 25% of the PAGA Payment to the Aggrieved Employees ("Individual PAGA Payment"). *Id.*; and

d. "**Settlement Administration Costs**" not to exceed $4,950.00 payable to the Administrator for, *inter alia,* the administration of the Class Notice and Individual Class Payments. Agreement at § III(N)(12).

3. The "**Net Settlement Amount**" means the Gross Settlement Amount less the PAGA Payment, the Class Representative Service Award, the Class Counsel Award, and the Settlement Administration Costs, in the amount approved by the Court. Agreement at § I(S). The Net Settlement Amount is approximately $103,383.34, 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. Agreement at § III(N)(1). The entire Net Settlement Amount will be paid to all Settlement Class Members who do not opt out of the Settlement resulting in an average Individual Class Payment of approximately ***$1,174.81***. JKH Dec., ¶ 24. The uncashed funds will be transmitted to the

State Controller's Unclaimed Property fund in the name of the Class Member who did not claim the funds. Agreement at § III(N)(8).

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, Settlement Class Members will not have to wait (possibly years) for relief, nor will they have to bear the risk of class certification being denied or of Defendant prevailing at trial. JKH Dec., ¶ 6.

As discussed below, the proposed Settlement satisfies all criteria for preliminary settlement approval and falls within the range of reasonableness. The average Individual Class Payment to the Class Members meets or exceeds awards in similar wage and hour class actions. Moreover, the proposed Class is appropriate for provisional certification. Accordingly, Plaintiff respectfully requests the Court grant preliminary approval of the Settlement. JKH Dec., ¶ 7.

II. FACTS AND PROCEDURE

A. Overview of the Litigation

Defendant owns and operates a farming equipment and machinery manufacturing business in the state of California, including Tulare County, where Plaintiff worked. This action asserts claims on behalf of all current and former non-exempt employees who worked for Defendant in California at any time during the Class Period. Plaintiff worked for Defendant as a non-exempt employee in California from March of 2023 to May of 2023. At all times during his employment, Plaintiff earned an hourly wage and was entitled to legally compliant meal and/or rest periods, and minimum, regular and overtime wages for all hours worked. Throughout his employment, Plaintiff was subject to Defendant's policies and procedures contained in, among other documents, the "Kirby Manufacturing, Inc. Employee Handbook." JKH Dec., ¶ 8; Declaration of Fidel Gomez ("Gomez Dec.") at ¶¶ 1-5.

Generally, Plaintiff claims that Defendant failed to pay for all time worked, failed to provide compliant meal and rest periods, failed to reimburse for mandatory business expenses, failed to furnish accurate itemized wage statements, failed to accurately calculate the regular rate of pay for purposes overtime, meal period premiums, and redeemed sick pay, and failed to pay all wages upon separation. 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, asserting that it paid employees for all hours worked, maintained facially compliant meal and rest period policies, reimbursed employees for expenses, issued compliant wage statements, and timely paid all wages due upon separation of employment. JKH Dec., ¶ 9.

On April 25, 2024, Plaintiff served Defendant, and the Labor and Workforce Development Agency ("LWDA") with a Notice of Violations ("PAGA Notice"). Plaintiff's PAGA Notice set forth the facts and theories supporting Defendant's alleged violations of various provisions of the California Labor Code and applicable Industrial Welfare Commissions ("IWC") Wage Order and of his intent to pursue claims under California Labor Code Private Attorneys General Act, Cal. Lab. Code Sections 2698 *et seq.* ("PAGA"). JKH Dec., ¶ 10.

On April 25, 2024, Plaintiff filed a class action complaint in the Tulare Superior Court, Case Number VCU308341 ("Action"). The Action alleged eight causes of action against Defendant for: (1) Unfair Competition in Violation of Cal. Bus. & Prof. Code §§ 17200, *et seq.*; (2) Failure to Pay Minimum Wages in Violation Of Cal. Lab. Code §§ 1194, 1197 & 1197.1; (3) Failure to Pay Overtime Wages in Violation Of Cal. Lab. Code §§ 510, *et seq.*; (4) Failure to Provide Required Meal Periods in Violation Of Cal. Lab. Code §§ 226.7 & 512 and the Applicable IWC Wage Order; (5) Failure to Provide Required Rest Periods in Violation Of Cal. Lab Code §§ 226.7 & 512 and the Applicable IWC Wage Order; (6) Failure to Reimburse Employees for Required Expenses in Violation of Cal. Lab. Code § 2802; (7) Failure to Provide Accurate Itemized Statements in Violation Of Cal. Lab. Code § 226; and (8) Failure to Pay Wages When Due in Violation Of Cal. Labor Code §§ 201, 202 and 203. JKH Dec., ¶ 11.

On July 25, 2024, Plaintiff filed a First Amended Complaint (the "Operative Complaint") alleging an additional cause of action for violations of PAGA. JKH Dec., ¶ 12.

Plaintiff commenced written discovery in October of 2024. Subsequently, the Parties agreed to mediate the Action. To prepare for mediation, the Parties agreed that Defendant would informally produce additional documents and data points subject to the mediation privilege, including but not limited to, a sample of the Class Members' time and payroll data, certain payroll data points, and pertinent wage and hour policies. As discussed infra, Plaintiff's counsel retained the forensic consultants at Berger Consulting Group ("BCG") to analyze Defendant's time and payroll data. JKH Dec., ¶ 13.

On February 26, 2025, the Parties participated in a full day mediation with Steven Mehta, Esq., an experienced mediator of wage and hour class and PAGA actions. Although the mediation was unsuccessful, the Parties ultimately accepted a mediator's proposal, which was subsequently memorialized in the form of a Memorandum of Understanding. Thereafter, the Parties drafted and negotiated a long-form settlement agreement, which is the subject of the instant motion. JKH Dec., ¶ 14.

B. Class Counsel Thoroughly Investigated the Factual and Legal Issues

Months before filing the Action, Class Counsel began their pre-filing investigation into Plaintiff's complaints. Class Counsel's investigation started with several lengthy interviews with Plaintiff. As part of the interview process, Plaintiff produced documents related to his employment, including, but not limited to, his wage statements. At the conclusion of the interviews and review of documents, Class Counsel determined that each Plaintiff's complaints justified further inquiry. JKH Dec., ¶ 15.

Class Counsel subsequently requested Plaintiff's employee file from Defendant. In response, Defendant produced various documents, including but not limited to, copies of Plaintiff's time and payroll records. Class Counsel reviewed and analyzed the documents and determined the documents appeared to substantiate Plaintiff's claim that Defendant failed to, among other things, accurately record time worked, pay for all time worked, issue accurate itemized wage statements, and provide compliant meal and rest periods or else pay premium wages in lieu thereof. JKH Dec., ¶ 16.

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

BCG analyzed Defendant's time and payroll data to assist in the development of various damage models. Among other things, BCG determined the approximate number of work shifts, workweeks, pay periods, average length of shift, and average number of hours worked per workweek and pay periods during the Class Period. BCG also estimated the number of meal and rest period violations, the amount of unpaid wages, the amount of unreimbursed business expenses, and the amount of off-the-clock work performed by the Class Members during the Class Period. JKH Dec., ¶ 18.

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

During the mediation, Defendant raised the possibility that it would be unable to satisfy a larger class-wide settlement due to its financial condition. JKH Dec., ¶ 20. Class Counsel retained Certified Public Accountant, Kenneth L. Creal, to review and analyze Defendant's financial records. Based on Mr. Creal's review, he determined that Defendant could not afford a larger settlement than the one contemplated here. Moreover, the installment plan contemplated by the Agreement is appropriate because it allows Defendant to work toward accumulating the settlement funds. JKH Dec., ¶ 20; Declaration of Kenneth L. Creal, ¶¶ 1-7.

Overall, Class Counsel thoroughly investigated the claims at issue, including: (1) determining Plaintiff's suitability as a putative class representative through interviews, background investigations, and analysis of his employment file; (2) evaluating all of Plaintiff's potential claims; (3) researching similar wage and hour class actions as to the claims brought, the nature of the positions, and the type of employer; (4) analyzing the Class Members' time and payroll records; (5) analyzing Defendant's labor policies and practices; (6) researching settlements in similar cases as well as outstanding issues which could affect settlement approval; (7) evaluating Plaintiff's claims and estimating Defendant's liability for purposes of settlement; (8) drafting the mediation brief; and (9) participating in the mediation. This investigation allowed Class Counsel to fully assess the nature and magnitude of the claims being settled, as well as the impediments to recovery, such as to make an independent assessment of the reasonableness of the terms to which the Parties have agreed. JKH Dec., ¶ 21.

Class Counsel only agreed to enter the Settlement following this thorough investigation and evaluation of Plaintiff's claims. Based on their investigation of the facts, applicable law, and marketplace for similar settlements, and considering the risk of significant delay, uncertainty associated with litigation, Defendant's financial condition, and the various defenses asserted by Defendant, Class Counsel firmly believe 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. JKH Dec., ¶ 22.

C. The Parties Settled after Mediation

On February 26, 2025, the Parties conducted a full day of mediation with Steven Mehta, Esq., a mediator of wage and hour class and representative actions. Mediator Mehta helped manage the Parties' expectations and provided a useful, neutral analysis of the issues and risks to both sides. The Parties made substantial progress with Mediator Mehta's assistance. Namely, the Parties exchanged information regarding their respective claims and defense, including their respective evaluation of the damages. The mediation did not conclude with a settlement. During the mediation, Defendant raised the possibility that it would be unable to satisfy a larger class-wide settlement due to its financial condition. Class Counsel retained Certified Public Accountant, Kenneth L. Creal, to review and analyze Defendants' financial records. Following Mr. Creal's financial analysis, the Parties continued settlement discussions, with Mediator Mehta's assistance. The Parties subsequently reached a settlement via a Mediator's Proposal, the complete and final terms of which are now set forth in the Agreement. Class Counsel submit that the Settlement constitutes a fair, adequate, and reasonable compromise of the claims at issue. JKH Dec., ¶ 23.

D. The Proposed Settlement Fully Resolves Plaintiff's Claims

1. <u>The Composition of the Settlement Class Members</u>

The Settlement Class Members consist of all current and former non-exempt employees who worked for Defendant in California at any time during the period between April 25, 2020 through February 26, 2025. Agreement at §§ I(E), I(I). At the time the Agreement was executed, there were approximately 88 Class Members who worked approximately 11,954 Workweeks. Agreement III(A)(2).

2. The Settlement Consideration

The Parties agreed to settle the underlying class claims in exchange for the Gross Settlement Amount of $230,000.00. The Gross Settlement Amount includes: (1) Individual Class Payments to the Settlement Class Members; (2) a Class Representative Service Award of $10,000.00 to Plaintiff for his services on behalf of the Settlement Class Members; (3) a PAGA Payment in the amount of $10,000.00; (4) Settlement Administration Costs estimated at $4,950.00; (5) Class Counsel Award in the amount of $101,666.66 comprised of attorneys' fees equal to one-third of the Gross Settlement Amount estimated to be $76,666.66 and an estimated $25,000.00 for actually incurred litigation expenses. *See generally* Agreement at § III(N)(9)-(12).

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

3. The Funding Date and Installment Plan

Assuming there are no objectors, and no appeal is filed, Defendant will fund the $230,000.00 Gross Settlement Amount in ten (10) equal installment payments of $23,000.00, on the first of each month, beginning on April 1, 2026, and ending on January 1, 2027. Agreement at § III(A)(3).

4. Formula for Calculating Individual Class Payments

Each Settlement Class Member will receive an Individual Class Payment. The Class Data provided by Defendant to the Settlement Administrator will include the number of eligible Workweeks for each Settlement Class Member. The Individual Class Payments will be calculated by adding up the total number of Workweeks for all Class Members. The respective Workweeks for each Class Member will be divided by the total Workweeks for all Class Members, resulting in the Payment Ratio for each Class Member. Each Class Member's Payment Ratio will then be multiplied by the Net Settlement Amount to calculate each Class Member's estimated Individual Class Payments. Agreement at §

III(N)(1). Each Individual Class Payments will be reduced by any legally mandated employee tax withholdings *(e.g.*, employee payroll taxes, etc.). *Id.*

Given that there are approximately 88 Class Members, ***the average gross recovery is approximately $1,174.81*** (Net Settlement Amount divided by Settlement Class Members). JKH Dec., ¶ 24.

5. Release by Settlement Class Members

Generally, as of the Funding Date, Plaintiff and the Settlement Class Members will agree to release the Released Parties from the Released Class Claims that accrued during the Class Period. Agreement at §§ III(B).

6. PAGA Release by the Aggrieved Employees

Generally, as of the Funding Date, Plaintiff, the LWDA, and the State of California, will release the Released Parties from the Released PAGA Claims that accrued during the PAGA Period. Agreement at §§ III(C).

III. ARGUMENT

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

The proposed Settlement, including a Gross Settlement Amount of $230,000.00, 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").)

Although Rule of Court Rule 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 the highly respected mediator Steven Mehta, Esq. Mediator Mehta 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.").) At all times, the Parties' negotiations were at an arm's length, adversarial, and non-collusive. Mediator Mehta only arrived at his proposal after hearing arguments, reviewing evidence, and evaluating the Parties' respective claims and defenses. JKH Dec., ¶ 25.

Once the Parties agreed to the Mediator's proposal, the parties subsequently executed a binding and enforceable Memorandum of Understanding. The Agreement is the final product of these mediated negotiations. Objectively, the Settlement terms are fair, adequate and represent a reasonable compromise of the claims at issue. JKH Dec., ¶ 26.

2. <u>Class Counsel's Thorough 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. In addition to informal discovery, document review, data analysis and legal research, Class Counsel also researched similar wage and hour actions. Although no two cases are identical, this research provided Class Counsel with a marker to inform settlement discussions and, ultimately, to measure this settlement against. The investigation allowed Class Counsel to realistically assess the value of the claims and intelligently engage defense counsel in settlement discussions that culminated in the proposed settlement now before the Court. JKH Dec., ¶ 27.

Class Counsel only agreed to enter the Settlement following their thorough investigation and evaluation of Plaintiff's claims. Based on an investigation of the facts, applicable law, and marketplace for similar settlements, and considering the risk of significant delay, uncertainty associated with litigation, Defendant's financial condition, and the various defenses asserted by Defendant, Class Counsel firmly believe 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. JKH Dec., ¶ 28.

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

The Gross Settlement Amount of $230,000.00 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 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).)

a. The Gross Settlement Amount Meets the Recognized Range of Reasonableness.

The Gross Settlement Amount of $230,000.00 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 liability exposure for *class claims* (excluding

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

penalties) to be approximately $1,684,531 and Defendant's *maximum* exposure (including waiting time and wage statement penalties) at $2,238,401. This projection reflects the uncertainty regarding several of the claims, together with the uncertainty surrounding derivative liability for inaccurate wage statements and waiting time penalties. Thus, the Gross Settlement Amount of $230,000.00 represents approximately 13.6% of Defendant's *class-wide* liability exposure and 10.2% of Defendant's *maximum* exposure. The following summarizes Defendant's estimated exposure. JKH Dec., ¶ 29.

(1) <u>Estimated Exposure for Unpaid Wages</u>

Plaintiff's primary claim in this Action alleges that Defendant failed to pay its employees for all hours worked. Specifically, Plaintiff alleges that throughout the Class Period, Defendant rounded Plaintiff and Class Members' time cards to avoid paying their employees for all time worked. As a result, Plaintiff, Class Members, and Aggrieved Employees forfeited compensation, including overtime wages, for all the time they spent working under Defendant's control. Plaintiff's expert estimated that Defendant underpaid its employees, due to its unlawful rounding, in around 86% of pay periods during the Class Period. Further, Plaintiff alleges that Defendant regularly required Plaintiff and other Class Members to perform work while off-the-clock. Specifically, Plaintiff alleges that Defendant required Plaintiff to perform post-shift work, such as moving trucks inside the workplace, putting away tools, and performing various work-related tasks after their shifts. JKH Dec., ¶ 30.

Defendant vigorously denied liability for this claim. As a preliminary matter, Defendant argued that the practice of rounding start and end times is lawful under *See's Candy Shops, Inc. v. Super. Ct*. (2012) 210 Cal. App. 4th 889, 907 and any rounding was, as a matter of practice, done in favor of the employees. Defendant also maintained that employees did not, and would have no reason to, perform work off-the-clock. JKH Dec., ¶ 31.

Further, Defendant argued that this claim was not suitable for class treatment because individualized issues predominated. Defendant argued that there is no common policy or practice of requiring employees to perform work off-the-clock. Accordingly, proof of liability would necessarily require individualized evidence as to whether any time was spent working off-the-clock, and whether Defendant knew or should have known that such work was allegedly being performed. Liability cannot, according to Defendant, be established by common proof. As a result, Plaintiff estimated Defendant's exposure for unpaid wages at $234,039. JKH Dec., ¶ 32.

(2) Estimated Exposure for Meal Period Violations.

Plaintiff also alleges that Defendant failed to provide compliant meal periods. Specifically, Plaintiff alleges that as a result of their rigorous work schedules, Plaintiff, Class Members, and Aggrieved Employees were not able to take timely and duty-free meal periods. Further, Plaintiff alleges that Defendant failed to record the actual time that Class Members worked. As a result, many of the meal periods were allegedly rounded to exactly thirty (30) minutes, which Plaintiff argued creates a presumption of a meal period violation. JKH Dec., ¶ 33.

Defendant denies liability for this claim. Defendant argued that the work schedules were not so "rigorous" that employees were unable to stop working. Defendant also argued that it did not engage in rounding of meal period start and end times and provided all its employees, i.e., Class Members and Aggrieved Employees, with the opportunity to take compliant meal periods. Further, Defendant argued that it maintained facially complaint meal period policies. Thus, Defendant argued that there was no potential liability for Plaintiff's alleged meal period violations and any claimed violations required a highly individualized inquiry not suitable to class treatment. Finally, Defendant argued that Plaintiff, along with other Class Members, signed a valid meal period waiver. Consequently, Plaintiff applied a 50% discount to this claim and estimated Defendant's exposure for this claim at $665,855.50. JKH Dec., ¶ 34.

(3) Estimated Exposure for Rest Period Violations

Plaintiff also alleged that Defendant failed to provide compliant rest periods. Specifically, Plaintiff alleged that because of their rigorous work schedules, Plaintiff, Class Members, and Aggrieved Employees were not able to take timely and duty-free rest periods. Specifically, Plaintiff argued that he was required to work through his rest periods in order to finish work-related tasks. Further, Plaintiff argued that Defendant maintained a facially unlawful rest period policy that required its employees to remain on the premises during their rest periods. JKH Dec., ¶ 35.

Again, Defendant denied liability and asserted that the workload is not such that it prevented employees from taking a break. Defendant argued that it maintained legally compliant written policies and actual practices concerning rest periods 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 argued that they 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"). Since rest breaks were not recorded, Plaintiff estimated that the violation rate for this claim is similar to Plaintiff's meal break claim. Thus, Plaintiff estimated Defendant's exposure for this claim to be $665,855.50. JKH Dec., ¶ 36.

(4) <u>Estimated Damages for Unreimbursed Business Expenses</u>

Plaintiff alleged that Defendant required Class Members to incur personal expenses for the use of their own personal cell phones without any reimbursement. Specifically, Plaintiff alleged that Plaintiff's supervisor would call him on his personal cell phone for work purposes. California employers who require employees to incur personal business expenses for work purposes must reimburse the employee for the cost incurred. (See Cal. Lab. Code § 2802(a), providing that "[a]n employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer…."). Conservatively assuming $25 a month in unreimbursed cell phone costs, Plaintiff estimated Defendant's exposure for this claim to be $92,875. JKH Dec., ¶ 37.

(5) <u>Estimated Exposure for Regular Rate Violations</u>

Plaintiff also alleged that Defendant miscalculated the regular rate of pay for purposes of overtime, meal period premiums, and redeemed sick pay. Specifically, Plaintiff alleges that Class Members received flat-sum bonus, similar to those in *Alvarado v. Dart Container Corp. of America* (2018) 4 Cal.5th 542, labeled on wage statements as "OC Hours" and "On Call." Plaintiff argues that these flat-sum bonuses should have been treated as non-discretionary incentive compensation for purposes of calculating the overtime rate, meal period premiums, and redeemed sick pay rate for Class Members. However, Plaintiff alleges that Defendant failed to do so. JKH Dec., ¶ 38.

Defendant argued that all "OC Hours" and "On Call" payments operated more as discretionary bonuses, and, thus, were properly excluded from the regular rate of pay. Further, Defendant argued that even assuming these items of compensation were non-discretionary – which Defendant denied – Plaintiff never received such a payment. Thus, Defendant argued Plaintiff lacked standing to pursue the claim. Finally, Defendant argued that less than 1/3 of the Class Members ever received any of these payments. Consequently, Defendant argued any resulting liability was minimal. Given these defenses, Plaintiff estimated Defendant's exposure for this claim to be $25,906. JKH Dec., ¶ 39.

(6) <u>Estimated Exposure for Wage Statement Violations</u>

Plaintiff also alleged that Defendant failed to furnish its employees with accurate itemized wage statements. Specifically, Plaintiff alleges that Defendant failed to list the inclusive pay period dates, as required by California Labor Code section 226(a)(6), and Plaintiff alleges that Defendant failed to include all applicable hourly rates in effect, as required by California Labor Code section 226(a)(9). Further, as a result of Defendant's failure to provide meal and rest periods as required by the California Labor Code, Plaintiff and other Class Members are entitled to derivative wage statement penalties. (See *Naranjo v. Spectrum Security Services* (2022) 13 Cal. 5th 93 (concluding that meal premiums are "wages" entitling employees to derivative wage statement penalties). JKH Dec., ¶ 40.

Defendant argued that even if it failed to furnish accurate wage statements, Plaintiff could not establish the injury requirement on a class-wide basis. As a result, Plaintiff discounted this claim 75% to account for this risk. Plaintiff estimated that Defendant's exposure on this claim to be $340,000. JKH Dec., ¶ 41.

(7) <u>Estimated Exposure for Waiting Time Penalties</u>

Plaintiff also alleged that the Defendant's labor code violations resulted in derivative liability for waiting time penalties. Defendant argued that Plaintiff could not prove the "willful" prong needed to obtain waiting time penalties under Labor Code section 203. Notwithstanding the uncertain nature of the claims, Plaintiff estimated Defendant's exposure for this claim to be $213,870. JKH Dec., ¶ 42.

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(8) Defendant's PAGA Exposure

In all, Class Counsel projected Defendant's liability exposure for PAGA claims to be $1,759,125 if successful at trial. JKH Dec., ¶ 43. The proposed PAGA allocation of the Gross Settlement Amount is fair, just, and reasonable. *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 77. Where settlements "negotiate a good faith amount" for PAGA Payment and "there is no indication that this amount was the result of self-interest at the expense of class members," such amounts are generally considered reasonable. *Hopson v. Hanesbrands Inc.,* No. CV-08-0844 EDL, 2009 WL 928133, at *9 (N.D. Cal. Apr. 3, 2009). Courts routinely approve of amounts for PAGA Payment in the range of zero to two percent of the settlement. *See id.* at *1, 9 (approving a PAGA payment of 0.3%); *Jack v. Hartford Fire Ins. Co.*, No. 09cv1683 MMA (JMA), 2011 WL 4899942, at *6 (S.D. Cal. Oct. 13, 2011) (approving a PAGA payment of 0.25%); *McKenzie v. Fed. Express Corp.*, No. CV 10-02420 GAF (PLAx), 2012 WL 12882124, at *5 (C.D. Cal. Jan. 23, 2012) (acknowledging that courts approve PAGA claim settlements in the range of zero to two percent of the total settlement).

Here, the Parties negotiated a good faith PAGA Payment in the amount of $10,000 which is 4.34% of the Gross Settlement Amount. This amount falls well within the range of approved PAGA Payment. The LWDA Payment of $7,500 represents seventy-five percent (75%) of the PAGA Payment and will be paid to the LWDA. The Aggrieved Employee Payment of $2,500 represents the remaining twenty-five percent (25%) of the PAGA Payment, which shall be distributed to the Aggrieved Employees and is within the range of PAGA Payment approved by courts and should be approved. JKH Dec., ¶ 44.

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).

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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 Plaintiff actually prevailed at trial, and even then, the PAGA penalties were reduced by 90%.

For the aforementioned reasons, the PAGA allocation of the Gross Settlement Amount is fair, just, and reasonable.

b. Inherent Risks of Continued Litigation Support Preliminary Approval.

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

With respect to the most immediate challenge, i.e., class certification, the risks attendant to the certification of similar wage and hour claims are demonstrated by *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."); *a.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. JKH Dec., ¶ 45.

"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).)

Defendant's financial condition was one key factor in reaching this Settlement. JKH Dec., ¶ 46. Due to Defendant's financial condition, even if Plaintiff prevailed on all claims at trial, he may never recover the damages. *Id*. Defendant provided Plaintiff with confidential financial records reflecting debt. *Id*. A large class action judgment likely would put the company out of business and/or would interfere with the company's ability to carry out their contractual obligations. *Id*. In short, the "poor financial health of [the defendants will] seriously increase [] the chance that Plaintiffs would be left with nothing if they continued to litigate their claims." *Torrisi v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370, 1376 (the financial condition of defendant predominated in assessing the reasonableness of settlement); *Spann v. J.C. Penney Corp.* (C.D. Cal. 2016) 211 F. Supp. 3d 1244, 1256 (uncertainty concerning defendant's financial stability "strongly supports the reasonableness of the settlement"); *Laguna v. Coverall N. Am., Inc.* (9th Cir. 2014) 2014 U.S. App. LEXIS 10259 at *11 (finding potential insolvency to be additional risk that favors approval of a class action settlement). Accordingly, Defendant's financial condition supports this settlement. *Id*.

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. JKH Dec., ¶ 47. "Avoiding such a trial and the subsequent appeals in this complex case strongly militates in favor of settlement rather than further protracted and uncertain litigation." (*Nat'l Rural Telecomms. Coop v. DirecTV* (C.D. Cal. 2004) 221 F.R.D. 523, 527.) Thus, "unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." (*Id*. at 526.)

In this matter, Class Counsel negotiated a Gross Settlement Amount of $230,000.00 that is 13.6% of Defendant's *class-wide* liability exposure and 10.2% of Defendant's *maximum* exposure. Given the amount of the settlement here, as compared to potential value of the claims, offset by the various inherent risks to continued litigation, the settlement is fair and reasonable. JKH Dec., ¶ 48.

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

The Class Members are 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]

[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.

The Parties jointly drafted the Class Notice which fairly and neutrally informs the Class Members of their rights and remedies. The Administrator will first verify addresses, then mail the proposed Class Notice in English and Spanish to all Class Members. The Notice will include information regarding the nature of the lawsuit, a summary of the substance of the Settlement's terms, the procedure, and time period within which to requests for exclusions or objections to the Settlement, the date for the final approval hearing, the formula used to calculate settlement payments, and the terms and scope of the Released Class Claims. Agreement at § III(M)(2). The Parties negotiated this method to ensure delivering the most reasonable method of notice to the Class Members while ensuring cost effective administration of the Settlement. JKH Dec., ¶ 49.

Accordingly, both the method of disseminating the Class Notice and content of 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.").)

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

Service awards "are fairly typical in class action cases." (*Cellphone Termination Fee* Cases (2010) 186 Cal.App.4th 1380, 1393 (affirming incentive awards of $10,000); *Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958, *citing* 4 Newberg on Class Actions (4th ed. 2002) § 1 1:38, and Eisenberg & Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study,* 53 UCLA L. Rev. 1303 (2006).) 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 Class Representative Service Award of $10,000.00 for Plaintiff. The Class Representative Service Award is fair and reasonable compensation for the Plaintiff's efforts bringing the action, assisting Class Counsel with the litigation and settlement, regularly conferring with

Class Counsel on the status of his 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 Class Members, and agreeing to provide Defendants a general release of all claims arising out of his employment. JKH Dec., ¶ 50; Gomez Dec., ¶ 6-17.

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. JKH Dec., ¶ 51.

D. The Court Should Preliminarily Approve the Class Counsel Award

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

Class Counsel took this matter on a contingency fee basis and invested significant time and expense successfully prosecuting Plaintiff's claims. As discussed *supra*, the estimated average Individual Class Payment illustrates the demonstrably positive outcome for the Settlement Class Members. Considering the positive outcome for the Class Members, and in light of the supporting authority, the proposed Class Counsel Award payment is fair and reasonable. JKH Dec., ¶ 52.

Plaintiff will file a formal motion for the negotiated Class Counsel Award, including arguments and lodestar information in support of the request, 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. JKH Dec., ¶ 53.

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. JKH Dec., ¶ 54.

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 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, supra,* 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 Class Members are Defendant's current and former employees, the class is readily ascertainable from Defendant's regular business records, i.e., payroll records. JKH Dec., ¶ 55.

The statutes relating to each of Plaintiff's claims apply with equal force and effect to the entire 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 Class Members. JKH Dec., ¶ 56.

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 Members. 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. JKH Dec., ¶ 57.

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. JKH Dec., ¶¶ 60-62; JCL Dec., ¶¶ 3-9; SOZ Dec., ¶ 3.

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. JKH Dec., ¶ 58. Finally, Class Counsel is not aware of any other pending matters or actions asserting claims that will be extinguished or adversely affected by the Settlement. JKH Dec., ¶ 59; SOZ Dec., ¶ 4; JCL Dec., ¶ 10.

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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: May 19, 2025

ZAKAY LAW GROUP, APLC

By: Rachel Newman

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