

JCL LAW FIRM, APC

Jean-Claude Lapuyade (State Bar #248676)
Monnett De La Torre (State Bar #272884)
Andrea Alejandra Amaya Silva (State Bar #348080)
5440 Morehouse Drive, Suite 3600
San Diego, CA 92121
Telephone: (619)599-8292
Facsimile: (619) 599-8291
jlapuyade@jcl-lawfirm.com
mdelatorre@jcl-lawfirm.com
aamaya@jcl-lawfirm.com

ZAKAY LAW GROUP, APLC

Shani O. Zakay (State Bar #277924)
5440 Morehouse Drive, Suite 3600
San Diego, CA 92121
Telephone: (619)255-9047
Facsimile: (858) 404-9203
shani@zakaylaw.com

Attorneys for Plaintiff UVALDO CHAVEZ

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

UVALDO CHAVEZ, individually, and on
behalf of other members of the general public
similarly situated;

Plaintiff,

vs.

BORRMANN METAL CENTER, a California
corporation; and DOES 1 through 100,
inclusive,

Defendants.

Case No. 22STCV34521

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION AND
PAGA SETTLEMENT**

Hearing Date: July 18, 2024

Hearing Time: 10:00 a.m.

Judge: Hon. Elaine Lu

Department: 9

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TABLE OF AUTHORITIES

CASES

1		
2	<i>7-Eleven Owners for Fair Franchising v. Southland Corp.</i>	
3	(2000) 85 Cal.App.4th 1135, 1151.....	9
4	<i>Alvarado v. Dart Container Corp. of California</i>	
5	(2018) 4 Cal.5th 542, 552–54, 559.....	14
6	<i>a.S.A. Cab Ltd.</i>	
7	(2009) 176 Cal.App.4th 1333, 1341.....	18
8	<i>Brinker</i>	
9	53 Cal. 4th at 1021-1022.....	19, 23
10	<i>Brown v. Fed Express Corp.</i>	
11	(C.D. Cal. 2008) 249 F.R.D. 580, 587-88.....	19
12	<i>Bufile v. Dollar Financial Group, Inc.</i>	
13	(2008) 162 Cal.App.4th 1193, 1207.....	22
14	<i>Campbell v. Best Buy Stores, L.P.,</i>	
15	(C.D. Cal. 2013) 2013 WL 5302217 at *11-13.....	19
16	<i>Carrington v. Starbucks Corp.</i>	
17	30 Cal. App. 5th 504 (2018).....	18
18	<i>Cart v. Super. Ct.</i>	
19	(1975) 50 Cal.App.3d 960, 972.....	20
20	<i>Cellphone Termination Fee Cases</i>	
21	180 Cal. App. 4th 1110, 1118 (2010)	9
22	<i>Cellphone Termination Fee Cases</i>	
23	(2009) 180 Cal. App. 4th 1110, 1118.....	10
24	<i>Cellphone Termination Fee Cases</i>	
25	(2010) 186 Cal.App.4th 1380, 1389, 1393.....	10, 21
26	<i>Chance v. Super. Ct.</i>	
27	(1962) 58 Cal.2d 275, 290.....	20
28	<i>Chavez v. Netflix, Inc.</i>	
	(2008) 162 Cal.App.4th 43, 66 n.11.....	21
	<i>Clark v. American Residential Services LLC</i>	
	(2009) 175 Cal.App.4th 785.....	21
	<i>D’Amato v. Deutsche Bank</i>	
	(2d. Cir. 2001) 236 F.3d 78, 85.....	10
	<i>Dunk v. Ford Motor Co.</i>	
	(1996) 48 Cal.App.4th 1794, 1802.....	9
	<i>Duran v. U.S. Bank National Association</i>	
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	<i>Fleming v. Covidien</i>	
	2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011).....	17
	<i>Fontana v. Elrod</i>	
	(7 th Cir. 1987) 826 F.2d 729, 732.....	20
	<i>Frank v. Eastman Kodak Co.</i>	
	(W.D.N.Y. 2005) 228 FRD. 174, 186.....	12
	<i>Hopson v. Hanesbrands Inc.</i>	
	No. CV-08-0844 EDL, 2009 WL 928133, at *1, 9 (N.D. Cal. Apr. 3, 2009).....	17
	<i>In re Apple Computer, Inc. Derivative Litig</i>	
	No. C 06-4128 JF (HRL), 2008 U.S. Dist. LEXIS 108195 (N.D. Cal. Nov. 5, 2008).....	10
	<i>In re Global Crossing Sec. and ERISA Litig.</i>	

1	(S.D.N.Y. 2004) 225 F.R.D. 436, 460.....	12
2	<i>In re IKON Office Solutions, Inc Sec Litig.</i>	
3	(E.D. Pa. 2000) 194 F.R.D. 166, 184.....	12
4	<i>In re Michael Milken and Assoc. Sec. Litig.</i>	
5	(S.D.N.Y. 1993) 150 F.R.D. 57, 66.....	12
6	<i>In re Nordstrom Com. Cases</i>	
7	186 Cal.App.4th 576, 589 (2010).....	17-18
8	<i>In re Nvidia Derivs. Litig.</i>	
9	(N.D. Cal. 2008) 2008 WL 5382544, at *3.....	19
10	<i>In re Omnivision Tech, Inc.</i>	
11	(N.D. Cal. 2008) 559 F.Supp.2d 1036.....	12
12	<i>In re Taco Bell Wage & Hour Actions</i>	
13	2016 U.S. Dist. LEXIS 48557, *40-43 (E.D. Cal. Apr. 6, 2016).....	18
14	<i>Jack v. Hartford Fire Ins. Co.</i>	
15	No. 09cv1683 MMA (JMA), 2011 WL 4899942, at *6 (S.D. Cal. Oct. 13, 2011).....	17
16	<i>Kass v. Young</i>	
17	(1977) 67 Cal.App.3d 100, 106).....	20
18	<i>Kullar v. Foot Locker Retail, Inc.</i>	
19	(2008) 168 Cal.App.4th 116, 133.....	11
20	<i>Lee v. Dynamex, Inc.</i>	
21	(2008) 166 Cal.App.4th 1325, 1332, 1334.....	22-23
22	<i>Magadia v. Wal-Mart Associates, Inc.</i>	
23	(9 th Cir. 2021) 999 F.3d 668.....	18-19
24	<i>McKenzie v. Fed. Express Corp.</i>	
25	No. CV 10-02420 GAF (PLAx), 2012 WL 12882124, at *5 (C.D. Cal. Jan. 23, 2012).....	17
26	<i>Misra v. Decision One Mortg. Co.</i>	
27	(C.D. Cal. 2009) 2009 WL 4581276, at *7.....	18
28	<i>Moniz v. Adecco USA, Inc.</i>	
	(2021) 72 Cal.App.5th 56, 77.....	17
	<i>Morillion v. Royal Packing Co.,</i>	
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	<i>Munoz v. BCI Coca-Cola Bottling Co.</i>	
	(2010) 186 Cal.App.4th 399, 409.....	12
	<i>Nat'l Rural Telecomm. Coop. v. Directv. Inc.</i>	
	(C.D. Cal. 2004) 221 F.R.D. 523, 526-27.....	12, 19
	<i>Newman v. Stein</i>	
	(2d. Cir. 2002) 464 F.2d 689, 693.....	12
	<i>North County Contractor's Assn., Inc. v. Touchstone Ins. Services</i>	
	(1994) 27 Cal.App.4th 1085, 1089-90.....	9
	<i>O'Conner v. Uber Technologies, Inc.</i>	
	(9 th Cir. 2018) 904 F.3d 1087.....	18
	<i>Officers for Justice v. Civil Serv. Comm'n</i>	
	(9th Cir. 1982) 688 F.2d 615, 625, 628.....	9, 12
	<i>Ordonez v. Radio Shack, Inc.</i>	
	(C.D. Cal. Jan. 17, 2013) 2013 WL 210223, at *11.....	15
	<i>Rebney v. Wells Fargo Bank</i>	
	(1990) 220 Cal.App.3d 1117, 1140, <i>opinion modified</i> (June 18, 1990).....	19
	<i>Rodriguez v. West Publishing Corp.</i>	
	(9 th Cir. 2009) 563 F.3d 948, 958-59.....	21

1	<i>Sav-On Drug Stores, Inc.</i>	
2	(2014) 34 Cal.4th 319, 326, 333.....	22
3	<i>Stambaugh v. Super. Ct</i>	
4	(1976) 62 Cal.App.3d 231, 236.....	9
5	<i>State v. Levi Strauss & Co.</i>	
6	(1986) 41 Cal.3d 460, 482, 485.....	10, 21
7	<i>Tien v. Tenet Healthcare Corp.</i>	
8	(2012) 209 Cal.App.4th 1077, 1088.....	18
9	<i>Trotsky v. Los Angeles Fed Savings & Loan Assn.</i>	
10	(1975) 48 Cal. App. 3d 143, 151-52.....	20
11	<i>Villa v. United Site Servs. of California, Inc.</i>	
12	(N.D. Cal. Nov. 13, 2012) 2012 WL 5503550, at *8.....	15

CODES, RULES AND STATUTES

13	<i>Cal. Civ. Proc. Code</i> § 382.....	22-23
14	<i>Cal. Lab. Code</i> § 1509(a).....	14
15	<i>Cal. Lab. Code</i> § 203.....	16-17
16	<i>Cal. Lab. Code</i> § 226.....	17
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19	<i>Cal. Lab. Code</i> § 512.....	17
20	<i>Cal. Lab. Code</i> § 246 <i>et seq</i>	14
21	<i>Cal. Lab. Code</i> § 1197.1.....	17
22	<i>Cal. Lab. Code</i> § 2802.....	16
23	California IWC Wage Order No. 7 § 3(A)(1).....	14, 17
24	<i>C.R.C.</i> 3.769(c)-(g).....	9
25	<i>C.R.C.</i> 3.769(e)-(f).....	21

SECONDARY SOURCES

26	Eisenberg & Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303 (2006)	
27		21
28	<i>Federal Practice and Procedure</i> § 1789, at 253 (2d ed. 1986)	
29		20
30	Newberg & A. Conte, <i>Newberg on Class Actions</i> (3d ed. 1992) at §11.41, p.11-88,	
31		9, 21
32	Theodore Eisenberg & Geoffrey P. Miller, <i>Attorney Fees in Class Action Settlements: An Empirical Study, J. of Empirical Legal Studies</i> , Vol. 1, Issue 1, 27-78, March 2004, at 35	
33		22

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I. INTRODUCTION

Plaintiff UVALDO CHAVEZ (“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 234 Class Members and 253 Aggrieved Employees. The basic terms of the Agreement provide for the following:

1. The “**Class**” and “**Class Period**” shall mean all non-exempt employees who are or previously were employed by Borrmann Metal Center and performed work in California at any time during the period beginning October 27, 2018 through February 29, 2024 (“Class Period”). Agreement at §§ I(E), I(J).

a. The “**Settlement Class Members**” or “**Settlement Class**” means all Class Members who have not submitted a timely and valid request for exclusion as provided in this Agreement and determined by the Settlement Administrator. Agreement at § I(LL).

b. The “**Class Size**” is comprised of 234 individuals who collectively worked no more than 22,881 Workweeks between October 27, 2018, to September 13, 2023, as estimated by Defendants at the time of mediation. Agreement at § III(A)(2).

2. The “**Aggrieved Employees**” and “**PAGA Period**” means all non-exempt employees who are or previously were employed by Borrmann Metal Center and performed work in California (“**Aggrieved Employees**”) at any time during the period beginning on November 30, 2022, through February 29, 2024 (“**PAGA Period**”). 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(O)(1). At the time of mediation, there were approximately 253 Aggrieved Employees during the PAGA Period.

3. The “**Gross Settlement Amount**” is Nine Hundred Thousand Dollars and Zero Cents (\$900,000.00). Agreement at § I(P). The Gross Settlement Amount is non-reversionary and includes the following:

a. A “**Service Award**” of not more than Ten Thousand Dollars and Zero Cents (\$10,000.00) to Plaintiff in recognition of his efforts and risks in assisting with the prosecution of the

¹ The Agreement is attached as Ex “1” 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.

1 Action. Agreement at § I(HH).

2 b. **“Class Counsel Award”** in the amount not more than Three Hundred and Thirty
3 Thousand Dollars and Zero Cents (\$330,000.00) comprised of one-third of the Gross Settlement
4 Amount for attorney’s fees, currently estimated to be Three Hundred Thousand Dollars and Zero Cents
5 (\$300,000.00) **and** litigation expenses not to exceed \$30,000.00, to be paid to Class Counsel.
6 Agreement at § I(G).

7 c. A **“PAGA Payment”** of Forty Thousand Dollars and Zero Cents (\$40,000.00)
8 shall be allocated from the Gross Settlement Amount for settlement of claims for civil penalties under
9 the Private Attorneys General Act of 2004 (“PAGA Payment”). Agreement at § I(Z). The Settlement
10 Administrator shall pay seventy-five (75%) of the PAGA Payment, Thirty Thousand Dollars and Zero
11 Cents (\$30,000.00) to the Labor and Workforce Development Agency (“LWDA Payment”). Twenty-
12 five percent (25%) of the PAGA Payment, Ten Thousand Dollars and Zero Cents (\$10,000.00) will be
13 distributed to the Aggrieved Employees (“Aggrieved Employee Payment”). Agreement at § III(P)(11);
14 and

15 d. **“Settlement Administration Costs”** not to exceed Eight Thousand Dollars and
16 Zero Cents (\$8,000.00) payable to the Settlement Administrator, Apex Class Action LLC, for, *inter*
17 *alia*, the administration of the Notice of Pendency of Class and PAGA Representative Action
18 Settlement and Final Hearing Date (“Notice Packet”) and costs associated with administration of the
19 settlement. Agreement at §§ I(JJ), III(P)(12).

20 4. The **“Net Settlement Amount”** of approximately Five Hundred and Twelve Thousand
21 Dollars and Zero Cents (\$512,000.00) (Gross Settlement Amount less the requested Class Counsel
22 Award, Service Award, PAGA Payment, and Settlement Administration Costs) which will be allocated
23 to all Settlement Class Members on a pro-rata basis according to the number of Workweeks each
24 Settlement Class Member worked during the Class Period. Agreement at §§ I(T), (III)(P). The entire
25 Net Settlement Amount will be paid to all Settlement Class Members who do not opt out of the
26 Settlement resulting in an average Individual Settlement Payment of Two Thousand One Hundred and
27 Eighty-Eighty Dollars and Three Cents (**\$2,188.03**). JCL Dec., ¶ 7.

28 An objective evaluation of the Settlement confirms that the relief negotiated on behalf of the

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

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

12 II. FACTS AND PROCEDURE

13 A. Overview of the Litigation

14 Defendant is a family owned and operated leading metal distributor in the State of California,
15 including Riverside County, where Plaintiff worked. Plaintiff was employed by Defendants from
16 November 2019 to approximately April 2020, as a non-exempt employee. Declaration of Uvaldo
17 Chavez ("Chavez Dec.") at ¶ 4. Plaintiff alleges that he was denied legally compliant meal and rest
18 periods, and minimum wages and overtime compensation at all times during his employment.
19 Throughout his employment, Plaintiff was subject to Defendants' written policies and procedures
20 contained in, among other documents, the "Employee Manual." JCL Dec., ¶ 9.

21 Generally, Plaintiff claims that Defendants failed to provide compliant meal and rest periods,
22 failed to pay for all time worked, including time spent performing specific tasks to get ready for their
23 shift, failed to pay overtime and meal period premiums at the correct regular rate of pay, failed to
24 furnish accurate itemized wage statements, and failed to reimburse for mandatory business expenses.
25 Defendant denies liability for each of Plaintiff's claims. Further, Defendants assert that it fully complied
26 with all applicable employment laws and raised several other significant defenses to Plaintiff's claims,
27 including but not limited to, facially compliant meal and rest period policies, compliant wage
28 statements, and compliant reimbursement practices. JCL Dec., ¶ 10. On October 27, 2022, Plaintiff

1 filed a Class Action complaint in the Los Angeles Superior Court, Case No. 22STCV34521 (“Class
2 Action”). JCL Dec., ¶ 11.

3 On February 7, 2024, Plaintiff filed a Notice of Violations with the Labor and Workforce
4 Development Agency (LWDA) and served the same on Defendants. JCL Dec., ¶ 12.

5 On March 20, 2024, Plaintiff filed a First Amended Complaint in Los Angeles Superior Court,
6 Case No., to (i) add (a) all class claims and causes of action falling within the definition of “Released
7 Class Claims” for the Class Period and (b) all PAGA claims and cause of action falling within the
8 definition of “Released PAGA Claims” for the PAGA Covered Period, (ii) allege all facts supporting
9 those claims, including but not limited to all facts alleged by Plaintiff at the mediation on November
10 29, 2023 and/or in Plaintiffs mediation brief, and (iii) amend the class definition, and (iv) add as named
11 defendants all entities identified in the class definition. JCL Dec., ¶ 13.

12 Plaintiff’s counsel investigated the facts relevant to the Action, including conducting an
13 independent investigation as to the allegations, reviewing documents and information exchanged
14 through informal discovery. After meeting and conferring, the Parties agreed to attend private
15 mediation. In preparation for mediation, Defendants produced documents and employment data for
16 Plaintiff’s counsel to review and analyze. On November 29, 2023, the Parties participated in mediation
17 presided over by Honorable Brian C. Walsh (Ret.) a respected jurist and mediator of wage and hour
18 class actions. The Parties accepted a Mediator’s settlement proposal, which was subsequently
19 memorialized in the form of a Memorandum of Understanding. Thereafter, the Parties drafted and
20 negotiated a long-form settlement agreement, which is the subject of the instant motion. JCL Dec., ¶
21 14.

22 As a result of the settlement, the Parties stipulated to the filing of an amended complaint, for
23 purposes of settlement only, in a form acceptable to Defendants, to (i) add (a) all class claims and
24 causes of action falling within the definition of "Released Class Claims" for the Covered Period and
25 (b) all PAGA claims and cause of action falling within the definition of "Released PAGA Claims" for
26 the PAGA Covered Period, (ii) allege all facts supporting those claims, including but not limited to all
27 facts alleged by Plaintiff at the mediation on November 29, 2023 and/or in Plaintiffs mediation brief,
28 and (iii) amend the class definition, and (iv) add as named defendants all entities identified in the class

1 definition. JCL Dec., ¶ 15.

2 **B. Class Counsel Thoroughly Investigated the Factual and Legal Issues**

3 Months before filing the Action, Class Counsel began its pre-filing investigation into the
4 Plaintiff's complaints. Class Counsel's investigation started with several lengthy interviews with
5 Plaintiff. As part of the interview process, the Plaintiff produced documents related to his employment,
6 including portions of his time and payroll records. At the conclusion of the interviews, Class Counsel
7 determined that Plaintiff's complaints justified further inquiry. JCL Dec., ¶ 16.

8 Class Counsel subsequently requested Plaintiff's employee files from Defendants. In response,
9 Defendants produced hundreds of pages of documents, including but not limited to, copies of
10 Defendants' written policies and Plaintiff's hiring documents and payroll and time records. Class
11 Counsel reviewed and analyzed the documents and determined the documents appeared to substantiate
12 Plaintiff's claim that Defendants failed to, among other things, provide compliant meal and rest periods,
13 to provide accurate wage statements, to compensate overtime wages at the correct regular rate of pay,
14 and to reimburse for mandatory business expenses. JCL Dec., ¶ 17.

15 To prepare for mediation, Class Counsel requested documents and data points to further evaluate
16 Plaintiff's claims and Defendants' liability exposure to the Class Members. In response to Class
17 Counsel's request, Defendant produced, among other things, the time and payroll records for all of the
18 Class Members, aggregate workweek and pay period data for the Class Members and copies of
19 applicable handbooks, policies and agreements. In total, Defendant produced hundreds of pages of
20 pertinent policy documents, time records and payroll records for Class Members for Class Counsel to
21 analyze. JCL Dec., ¶ 18.

22 Class Counsel then retained the statisticians and economists at Berger Consulting Group
23 ("BCG") to evaluate the Class Members' payroll and time data. BCG provides data analysis and
24 damage modeling consulting services, specializing in wage and hour class actions. BCG's team of
25 financial and data analysts are credentialed and experienced experts in their fields and have provided
26 their expertise on thousands of cases. JCL Dec., ¶ 19.

27 BCG analyzed Defendants' time and payroll data to assist in the development of various damage
28 models. Among other things, BCG determined the approximate amount of unpaid wages, amount of

unpaid overtime wages, number of workweeks, pay periods, average length of shifts and average number of hours worked per week. BCG also estimated the number of missed, late, or truncated meal and rest periods, the amount of unreimbursed expenses, and the amount of missed meal and rest period premiums paid during the Class Period. JCL Dec., ¶ 20.

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 files; (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 Member's time and payroll records; (5) analyzing Defendants' 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 Defendants' 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. JCL Dec., ¶ 21.

Class Counsel only agreed to enter the Settlement following this thorough investigation and evaluation of Plaintiff's claims. 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 Defendants, 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.

C. The Parties Settled at Mediation

On November 29, 2023, the Parties conducted a full day of mediation with Honorable Brian C. Walsh (Ret.) Mediator Walsh 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 Walsh's assistance. Namely, the Parties exchanged information regarding their respective claims and defenses, including their respective evaluation of the damages. The mediation concluded with a settlement. The complete and final terms of the Parties' settlement are now set forth in the Agreement.

Class Counsel submits that the Settlement constitutes a fair, adequate, and reasonable compromise of the claims at issue. JCL Dec., ¶¶ 23-24.

D. The Proposed Settlement Fully Resolves Plaintiff's Claims

1. The Composition of the Settlement Class Members

The proposed Class consists of all non-exempt employees who worked for Borrmann Metal Center in California during the period beginning October 27, 2018, through February 29, 2024. Agreement at § I(J). The Settlement Class Members excludes any person who submits a timely and valid request for exclusion. Agreement at § I(LL). At the time of mediation, Defendants estimated that the Class was comprised of 234 class members that worked approximately 22,881 Workweeks during the Class Period. Agreement at § III(A)(2).

2. The Settlement Consideration

The Parties agreed to settle the underlying class claims in exchange for the Gross Settlement Amount of Nine Hundred Thousand Dollars and Zero Cents (\$900,000.00). The Gross Settlement Amount includes: (1) Individual Settlement Payments to the Settlement Class Members; (2) a Service Award of not more than Ten Thousand Dollars and Zero Cents (\$10,000.00) to Plaintiff for his services on behalf of the Class; (3) a PAGA Payment in the amount of Forty Thousand Dollars and Zero Cents (\$40,000.00); (4) Settlement Administration Costs estimated at Eight Thousand Dollars and Zero Cents (\$8,000.00); (5) Class Counsel Award in the amount of Three Hundred and Thirty Thousand Dollars and Zero Cents (\$330,000.00), comprised of attorneys' fees equal to one-third of the Gross Settlement Amount estimated to be Three Hundred Thousand Dollars and Zero Cents (\$300,000.00) and an estimated Thirty Thousand Dollars and Zero Cents (\$30,000.00) for actually incurred litigation expenses. See generally Agreement at § III(P).

Subject to the Court approving the Service Award, Class Counsel Award, PAGA Payment, and the Settlement Administration Costs, the Net Settlement Amount will be distributed to each Settlement Class Member. Agreement at §§ I(T), III(P)(9-12). There is no reversion to Defendants and Defendants must separately pay for their share of the employer payroll taxes. Agreement at § I(P).

3. The Funding Date

Assuming there are no objectors, and no appeal is filed, Defendants will fund the Gross

Settlement Amount within three (3) calendar days of the Effective Date. Agreement at § I(O).

4. Formula for Calculating Individual Settlement Payments

Settlement Class Members will receive an Individual Settlement Payment. The Individual Settlement Payment will be proportional to the number of Workweeks each Class Member worked for Defendants in California during the Class Period. Agreement at § III(P)(1). The Class Data provided by Defendants to the Settlement Administrator will include the number of Workweeks for each Class Member and the number of PAGA Pay Periods worked during the relevant periods. Agreement at § I(H). Using the Class Data, the Settlement Administrator shall add 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 Class Payment Ratio for each Class Member. Each Class Member's Class Payment Ratio will then be multiplied by the Net Settlement Amount to calculate each Class Member's estimated Individual Settlement Payments. Each Individual Settlement Payment will be reduced by any legally mandated employee tax withholdings (e.g., employee payroll taxes, etc.). Individual Settlement Payments for Class Members who submit valid and timely requests for exclusion will be redistributed to Settlement Class Members who do not submit valid and timely requests for exclusion on a pro rata basis based on their respective Class Payment Ratios. Agreement at § III(P)(1).

Given that there are approximately 234 Class Members, *the average gross recovery is approximately Two Thousand One Hundred and Eighty-Eighty Dollars and Three Cents (\$2,188.03)* (Net Settlement Amount divided by Settlement Class Members). Agreement at § III(P)(1).

5. Release by Settlement Class Members

Upon funding by Defendants of the Gross Settlement Amount, Plaintiff and the Settlement Class Members shall be deemed to have, and by operation of the final judgment approved by the Court, shall have, fully, finally, and forever settled and released all of the Released Class Claims. The Parties understand and specifically agree that the scope of the release described in this paragraph is a material part of this settlement and without it Defendants would not have agreed to the consideration provided; and is narrowly drafted and necessary to ensure that Defendants are obtaining peace of mind regarding the resolution of claims that were or could have been alleged based on the facts, causes of action, and legal theories contained in the Operative Complaint. Agreement at § III(B).

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Upon funding by Defendants of the Gross Settlement Amount, Plaintiff and the State of California will be deemed to have fully, finally, and forever released, settled, compromised, relinquished, and discharged the Released Parties of all Released PAGA Claims. However, to be clear, the scope of this release is limited to the Released PAGA Claims. By virtue of this Agreement, Plaintiff and the State of California shall be deemed to have, and by operation of the final judgment approved by the Court, shall have, fully, finally, and forever settled, and released all of the Released PAGA Claims. 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 Nine Hundred Thousand Dollars and Zero Cents (\$900,000.00) 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

1 favors settlements”); *Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1118 (“public
2 policy generally favors the compromise of complex class action litigation”); *7-Eleven Owners for Fair
3 Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1151 (“voluntary conciliation and
4 settlement are the preferred means of dispute resolution ... [t]his is especially true in complex class
5 action litigation”).)

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

12 1. The Parties Reached the Settlement Through Arm’s-Length Bargaining Led by
13 Experienced Counsel.

14 “[W]hat transpires in settlement negotiations is highly relevant to the assessment of a proposed
15 settlement’s fairness.” (*State v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 482.) Courts presume the
16 absence of fraud or collusion in the negotiation of a settlement, unless evidence to the contrary is
17 offered; thus, there is a presumption that settlement negotiations are conducted in good faith. (Newberg,
18 § 11.51.)

19 The Parties participated in mediation presided over by Honorable Brian C. Walsh (Ret.)
20 Mediator Walsh managed the Parties’ expectations and provided a useful, neutral analysis of the issues
21 and risks to both sides. (*In re Apple Computer, Inc. Derivative Litig.* No. C 06-4128 JF (HRL), 2008
22 U.S. Dist. LEXIS 108195 (N.D. Cal. Nov. 5, 2008) (mediator’s participation weighs considerably
23 against any inference of a collusive settlement); *D’Amato v. Deutsche Bank* (2d. Cir. 2001) 236 F.3d
24 78, 85 (a “mediator’s involvement in pre-certification settlement negotiations helps to ensure that the
25 proceedings were free of collusion and undue pressure.”).) After a full day of mediated negotiations,
26 the Parties reached an agreement and the mediation session concluded with a settlement. JCL Dec., ¶
27 25.

28 Once the Parties reached a settlement, the Parties engaged in negotiations regarding the written

terms of the class action settlement. The Agreement is the final product of the mediated negotiations. Objectively, the Settlement terms are fair, adequate and represent a reasonable compromise of the claims at issue. JCL Dec., ¶ 26.

2. Class Counsel’s Thorough Investigation Provided an Objective Measurement of the Settlement’s Reasonableness.

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 Plaintiff’s claims and intelligently engage defense counsel in settlement discussions that culminated in the proposed settlement now before the Court. JCL Dec., ¶ 27.

Class Counsel only agreed to enter the Settlement following their thorough investigation and evaluation of Plaintiff’s claims. 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 Defendants, 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., ¶ 28.

3. The Settlement Falls Within the Recognized Range of Reasonableness.

The Gross Settlement Amount of Nine Hundred Thousand Dollars and Zero Cents (\$900,000.00) 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 Nine Hundred Thousand Dollars and Zero Cents (\$900,000.00) 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 Defendants’ 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 Defendants’ liability exposure for *class claims* (excluding PAGA Penalties) ranged between \$4,950,105 (“Realistic Damages”) and \$7,157,405 (“Maximum Damages”) if successful at trial. This range reflects the uncertainty regarding several of the claims. Thus, the Gross Settlement Amount represents a recovery of between 18.2% (“Realistic Damages”) and 12.6% (“Maximum Damages”) of Defendants’ class-wide exposure – well within the recognized range of reasonableness. The following summarizes Defendants’ liability exposure. JCL Dec., ¶ 29.

(1) Defendants’ Estimated Exposure for Unpaid Wages Due to Rounding

Plaintiff also alleged that Defendants failed to pay its employees for all hours worked. In

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”).

1 reviewing Defendant's pre-mediation time and payroll sampling, there is clear evidence of unlawful
2 rounding as to hours worked and meal breaks. In analyzing these claims, Plaintiff's expert found 255.9
3 net number of underpaid hours due to rounding, affecting 29.8% of employees. Plaintiff estimated
4 Defendants' exposure for this claim to be approximately \$6,088. JCL Dec., ¶ 30.

5 (2) Defendants' Estimated Exposure for Unpaid Off-the-Clock Penalties

6 Plaintiff further alleges that Defendants required Class Members and Aggrieved Employees to
7 perform off-the-clock pre and post shift work in addition to off-the-clock work during meal breaks.
8 Plaintiff, Class Members and Aggrieved Employees were not compensated for their time. JCL Dec., ¶
9 31.

10 Under California law, any time an employee spends subject to an employer's control is
11 compensable. *Morillion v. Royal Packing Co.*, (2000) 22 Cal.4th 575, 583. Employees must be
12 compensated "for all hours worked" in accordance with California's Minimum Wage Order. See MW-
13 2014 §2. "Hours worked" means the time during which an employee is subject to the control of the
14 employer and includes all the time the employee is suffered or permitted to work whether required to
15 do so. 8 Cal. Code Regs. §11090, subd.2(A).

16 Defendant also required employees like Plaintiff to show up prior to the start of their shift and
17 perform specific tasks to "get ready for their shift". Plaintiff and others were required to check the water
18 levels in the forklift batteries, fill the reservoir with water if needed and ensure that the forklifts were
19 charged and ready for the shift. This amounted to 30 minutes of off-the-clock work. Plaintiff advised
20 that this was performed before clocking in for his shift. Plaintiff also indicated that on Fridays, he and
21 others were required to lock up both gates (two entrances) after clocking out for their shift. Plaintiff
22 further advised that they were often told to "clock out for lunch" but continue working and/or told to "clock
23 out for lunch" but to eat at their station while they continued to work. Plaintiff estimated Defendants'
24 exposure for this claim to be approximately \$919,982. JCL Dec., ¶ 32.

25 (3) Defendants' Estimated Exposure for Failing to Calculate Regular Rate of
26 Pay for Purposes of Overtime Wages and Sick Pay

27 Defendant failed to include certain non-discretionary bonuses and commissions when
28 calculating the regular rate of pay when paying overtime wages and sick pay. Plaintiff's expert found

evidence of the following additional compensation: 1) sign on bonus, bonus, referral bonus, commission (monthly), incentive pay (monthly), performance bonus(monthly), B-Bonus: additional earnings (monthly), and C-Commission: additional earnings (monthly). JCL Dec., ¶ 33.

Under California law, overtime work must be paid at a rate of “no less than one-and-one-half times the regular rate of pay” for non-exempt employees. Cal. Lab. Code § 5109(a); California IWC Wage Order No. 7 § 3(A)(1). Significantly, an employee’s “regular rate of pay” for purposes of Labor Code section 510 and the IWC wage orders is not the same as the employee’s straight time rate (i.e., his or her normal hourly wage rate). 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, 552–54.

The Division of Labor Standards Enforcement (“DLSE”) Enforcement Policies and Interpretations Manual addresses how to calculate the “regular rate” or pay (“RROP”). For purposes of applying the overtime pay requirements, an employer must factor the per-hour value of all non-discretionary compensation, like bonuses and awards, into an employee’s RROP for the relevant pay period. See *Alvarado*, 4 Cal.5th at 559. Once the regular rate of pay is determined, the employer must pay overtime hours at 1.5 times the regular rate of pay.

California Labor Code section 246(1)(1) expressly mandates that sick pay for non-exempt employees based on either “the regular rate of pay for the workweek in which the employee uses paid sick time” or the regular rate of pay in the 90 days preceding the use of the sick leave. Cal. Labor Code § 246(1)(1)-(2). Both calculation options require an employer to consider remuneration other than base hourly wages when calculating the rate at which to pay redeemed sick leave.

Here, Defendant completely failed to calculate non-discretionary bonus and incentive compensation and commissions into the regular rate of pay, resulting in the underpayment of overtime and sick pay. Plaintiff estimated Defendants’ exposure for this regular rate of pay claim as to overtime and sick pay is approximately \$185,955. JCL Dec., ¶ 34.

(4) Defendants’ Estimated Exposure of Rest Period Violations

Plaintiff also alleges that Defendants failed to provide compliant rest periods. Specifically,

1 Plaintiff indicated he often did not get rest breaks, worked through rest breaks, was interrupted and/or
2 at times when he worked a 12-hour shift, would only receive 15 minutes total as a rest break for the
3 day. Consequently, Plaintiff alleges that he is owed rest period premiums for violations that occurred
4 during the Class Period. JCL Dec., ¶ 35.

5 Defendants denied liability and asserted that it maintained legally compliant rest period policies
6 and practices throughout the Class Period. Moreover, Plaintiff recognizes the evidentiary burdens
7 establishing this claim. Establishing Plaintiff's rest period claim would rely, almost entirely, on Class
8 Member testimony, making it a riskier claim at class certification and liability stages. Certification
9 likely would have required depositions of Class Members who provided declarations, and Defendants
10 surely would have obtained opposing declarations stating either rest breaks were taken, or rest breaks
11 were voluntarily waived. *See, e.g., Ordonez v. Radio Shack, Inc.* (C.D. Cal. Jan. 17, 2013) 2013 WL
12 210223, at *11 ("Because of the competing testimony before the Court, plaintiff's evidence that
13 defendant may have an illegal, written rest break policy is insufficient for this Court to find that
14 common issues predominate."); *Villa v. United Site Servs. of California, Inc.* (N.D. Cal. Nov. 13, 2012)
15 2012 WL 5503550, at *8 ("Indeed, Plaintiff's own evidence confirms that the written policy does not
16 generate uniform practices."). Accordingly, Plaintiff estimated liability for this claim to be
17 approximately \$1,770,340. JCL Dec., ¶ 36.

18 (5) Estimated Damages for Meal Period Violations

19 Plaintiff alleges that Defendants regularly violated the law by (a) failing to provide meal
20 periods, (b) providing late meal periods, (c) providing short meal periods, and/or (d) requiring
21 employees to work through their meal periods. Defendants' rigorous workload requirements and
22 understaffing meant that Plaintiff and Class members were forced to take late meals, work through their
23 meal periods and/or get interrupted during their meal breaks, to complete various tasks. Consequently,
24 Plaintiff alleges that he is owed meal period premiums for violations that occurred during the Class
25 Period. JCL Dec., ¶ 37.

26 Defendant will argue that Plaintiff and others signed a first and second meal break waivers.
27 Plaintiff estimated that the damages for this claim to be approximately \$1,770,340. JCL Dec., ¶ 38.

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1 (6) Defendants’ Estimated Exposure for Unreimbursed Business Expenses

2 Plaintiff alleged that Defendants required Class Members and Aggrieved Employees to use their
3 personal cellular phones and purchase work-related tools as a result of and in furtherance of their job
4 duties but were not reimbursed by Defendants. California employers who require employees to incur
5 personal business expenses for work purposes must reimburse the employee for the cost incurred. (See
6 Cal. Labor Code § 2802(a), providing that “An employer shall indemnify his or her employee for all
7 necessary expenditures or losses incurred by the employee in direct consequence of the discharge of
8 his or her duties, or of his or her obedience to the directions of the employer...”). Specifically, Plaintiff,
9 Class Members, and Aggrieved Employees were required to use their cell phone to send and receive
10 work-related communications. Further, Plaintiff also purchased work boots, gloves, back braces and
11 digital gauges, items that were necessary for them to perform their work duties. JCL Dec., ¶ 39.

12 Defendants argued that any alleged expenses incurred were not necessary business expenses and
13 that Defendants provided employees with any necessary work-related tools. Plaintiff estimated
14 Defendants’ exposure for this claim ranged between approximately \$297,400. JCL Dec., ¶ 40.

15 (7) Defendants’ Estimated Exposure for Wage Statement and Waiting Time Penalties

16 Plaintiff also alleged that the Defendants’ labor code violations resulted in derivative liability for
17 waiting time and wage statement penalties. This is Plaintiff’s most uncertain claim. Specifically,
18 Defendants argued that Plaintiff could not prove the “willful” prong needed to obtain waiting time
19 penalties under Labor Code section 203. Notwithstanding the uncertain nature of the claims, Plaintiff’s
20 expert estimated Defendants’ exposure for these claims was approximately \$2,207,300. JCL Dec., ¶
21 41.

22 (8) Defendants’ PAGA Exposure

23 Class Counsel’s damage models also estimated Defendants’ exposure for PAGA Payment.
24 Plaintiffs estimated Defendants’ PAGA exposure to be approximately \$1,332,250 if successful at trial.
25 JCL Dec., ¶ 42. Plaintiffs’ claims and corresponding PAGA penalties can be broken down as follows:

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Labor Code Section	Statutory penalty	Number of pay periods / employees	Total Penalties
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512 and 226.7 (meal period violations)	\$50	3,949	\$197,450
226.7 (rest period violations)	\$50	3949	\$197,450
510, 1197.1 (unpaid wages)	\$50	4,375	\$218,750
226 (wage statement violation)	\$100	6,381	\$623,750
203 (waiting time)	\$100	64 employees	\$1,583,550
2802 (unreimbursed business expenses)	\$50	4,375	\$218,750
TOTAL			\$1,332,250

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 \$40,000.00 which is 4.5% of the Gross Settlement Amount. This amount falls well within the range of approved PAGA Payment. Seventy-Five percent (75%) of the PAGA Payment (\$30,000.00) will be paid to the LWDA (“LWDA PAGA Payment”) with the remaining twenty-five percent (25%) of the PAGA Payment (\$10,000.00) will be distributed to the PAGA Class Members, which is within the range of PAGA Payment approved by courts and should be approved. JCL Dec., ¶ 43.

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).

Carrington v. Starbucks Corp., 30 Cal. App. 5th 504 (2018), 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 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

1 harm); *Campbell v. Best Buy Stores, L.P.*, (C.D. Cal. 2013) 2013 WL 5302217 at *11-13 (following
2 *Brinker* and denying certification of proposed off-the-clock and rest and meal break classes due to lack
3 of uniform policy); *Brown v. Fed Express Corp.* (C.D. Cal. 2008) 249 F.R.D. 580, 587-88 (denying
4 certification of driver meal and rest period claims based on the predominance of individual issues).
5 Collectively, the examples cited above illustrate the uncertain nature of class litigation. Consequently,
6 the uncertainty of obtaining certification through a contested motion is a significant risk factor favoring
7 settlement. JCL Dec., ¶ 44.

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

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

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

18 Finally, continuing to litigate this action would require continued and extensive resources
19 coupled with significant Court time to proceed through trial and post-trial motions; which can often
20 take years. Furthermore, wage and hour litigation is complex and expensive, as it often necessitates
21 extensive expert testimony, particularly with regards to damages. But even if Plaintiff is successful at
22 trial, Plaintiff is acutely aware that a judgment does not end the litigation. Plaintiff fully expects that
23 Defendants would appeal any favorable judgment. As demonstrated by *Magadia, supra*, 999 F.3d 668,
24 the risk of an appeal and subsequent reversal is real. JCL Dec., ¶ 46. “Avoiding such a trial and the
25 subsequent appeals in this complex case strongly militates in favor of settlement rather than further
26 protracted and uncertain litigation.” (*Nat’l Rural Telecomms. Coop v. DirecTV* (C.D. Cal. 2004) 221
27 F.R.D. 523, 527.) Thus, “unless the settlement is clearly inadequate, its acceptance and approval are
28 preferable to lengthy and expensive litigation with uncertain results.” (*Id.* at 526.)

1 In this matter, Class Counsel negotiated a Gross Settlement Amount of Nine Hundred Thousand
2 Dollars and Zero Cents (\$900,000.00) that is roughly between approximately 18.3% of Defendants’
3 *class-wide* liability exposure for damages, and approximately 12.6% of Defendants’ maximum class
4 wide liability exposure for damages and statutory penalties. Given the amount of the settlement here,
5 as compared to potential value of the claims, offset by the various inherent risks to continued litigation,
6 the settlement is fair and reasonable. JCL Dec., ¶ 46.

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

8 The Settlement Class Members are entitled to the best practical notice under the circumstances.
9 (*Kass v. Young* (1977) 67 Cal.App.3d 100, 106.) The purpose of the notice is to give class members
10 sufficient information to decide whether they should accept the benefits offered, opt out and pursue
11 their own remedies, or object to the settlement. (*Trotsky v. Los Angeles Fed Savings & Loan Assn.*
12 (1975) 48 Cal. App. 3d 143, 151-52.) The notice must advise class members “that they may be excluded
13 from the class if they so request and that they will be bound by the judgment, whether favorable or not,
14 if they do not request exclusion.” (*Kass*, 67 Cal.App.3d at 106.) Authorities generally require service
15 of the class notice by mail or similar reliable means. (*Chance v. Super. Ct.* (1962) 58 Cal.2d 275, 290;
16 *Cart v. Super. Ct.* (1975) 50 Cal.App.3d 960, 972.)³

17 The Parties jointly drafted the Notice Packet which fairly and neutrally informs the Class
18 Members of their rights and remedies. The Settlement Administrator will first verify addresses, then
19 mail the proposed Notice Packet to all Class Members. The Notice will include information regarding
20 the nature of the lawsuit, a summary of the substance of the Settlement’s terms, the class definition, the
21 procedure, and time period within which to requests for exclusions or objections to the Settlement, the
22 date for the final approval hearing, the formula used to calculate settlement payments, and the terms
23 and scope of the Released Claims. Agreement at § III(K)(2). The Parties negotiated this method to
24 ensure delivering the most reasonable method of notice to the Class Members while ensuring cost
25 effective administration of the Settlement. JCL Dec., ¶ 47.

26
27 ³ Due process does not require that each class member actually receive a notice, but rather a procedure reasonably certain to
28 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.

1 Accordingly, both the method of disseminating the Notice Packet and the contents of the Notice
2 Packet satisfy due process. (See C.R.C. 3.776(e)-(f); *State of Cal. v. Levi Strauss* (1986) 41 Cal.3d
3 460,485 (the class notice must “fairly apprise the class members of the terms of the proposed
4 compromise and of the options open to dissenting class members.”).) JCL Dec., ¶ 48.

5 **C. The Court Should Preliminarily Approve the Service Award**

6 Service awards “are fairly typical in class action cases.” (*Cellphone Termination Fee Cases*
7 (2010) 186 Cal.App.4th 1380, 1393 (affirming incentive awards of \$10,000); *Rodriguez v. West*
8 *Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958, *citing* 4 Newberg on Class Actions (4th ed. 2002)
9 § 1 1:38, and Eisenberg & Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53
10 UCLA L. Rev. 1303 (2006).) Service awards “are intended to compensate class representatives for
11 work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing
12 the action, and, sometimes, to recognize their willingness to act as a private attorney general.”
13 (*Rodriguez*, 563 F.3d at 958-59.) “[T]he rationale for making enhancement or incentive awards to
14 named plaintiffs is that they should be compensated for the expense or risk they have incurred in
15 conferring a benefit on other members of the class.” (*Clark v. American Residential Services LLC*
16 (2009) 175 Cal.App.4th 785.)

17 The Settlement provides for a Service Award of \$10,000.00 to Plaintiff. The service award is
18 fair and reasonable compensation for the Plaintiff’s efforts bringing the action, assisting Class Counsel
19 with the litigation and settlement, regularly conferring with Class Counsel on the status of his case and
20 the strategies for prosecuting the claims, reviewing the proposed Settlement to ensure that its terms are
21 fair and provide adequate relief for the Settlement Class Members, and agreeing to provide Defendants
22 a general release of all claims arising out of his employment. JCL Dec., ¶ 49.

23 Class Counsel on behalf of Plaintiff will file a formal motion for the negotiated Service Award
24 once preliminary approval of the Settlement is granted. Plaintiff respectfully submit that the above
25 showing is sufficient for preliminary approval of the negotiated Service Award. JCL Dec., ¶ 50.

26 **D. The Court Should Preliminarily Approve the Class Counsel Award**

27 The purpose of a payment of a Class Counsel Award in class action litigation is to reward counsel
28 who took the risk of non-payment and invested in a case that achieved a substantial positive result for

1 the class. California courts routinely award attorneys' fees equaling one-third or more of the potential
2 value of the common fund, the amount requested under this settlement. (*See Chavez v. Netflix, Inc.*
3 (2008) 162 Cal.App.4th 43, 66 n.11 ("Empirical studies show that regardless whether the percentage
4 method or the lodestar method is used, fee awards in class actions average around one-third of the
5 recovery."); Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An*
6 *Empirical Study*, *J. of Empirical Legal Studies*, Vol. 1, Issue 1, 27-78, March 2004, at 35 (independent
7 studies of class action litigation nationwide have come to a similar conclusion that a one-third fee is
8 consistent with market rates).)

9 Class Counsel took this matter on a contingency fee basis and invested significant time and
10 expense successfully prosecuting Plaintiff's claims. As discussed *supra*, the estimated average
11 Individual Settlement Payment illustrates the demonstrably positive outcome for the Settlement Class
12 Members. Considering the positive outcome for the Class Members, and in light of the supporting
13 authority, the proposed Class Counsel Award is fair and reasonable. JCL Dec., ¶ 51.

14 Plaintiff will file a formal motion for the negotiated Class Counsel Award once preliminary
15 approval of the Settlement is granted. Plaintiff respectfully submit that the above showing is sufficient
16 for preliminary approval of the negotiated attorneys' fees. JCL Dec., ¶ 52.

17 **E. Provisional Certification for Settlement Purposes Is Appropriate**

18 For Settlement purposes only, Plaintiff contends, and Defendants do not dispute, that provisional
19 certification of the Class is appropriate. JCL Dec., ¶ 53.

20 1. The Standard for Class Certification

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

1 ///

2 2. The Proposed Participating Class is Ascertainable and there is a Well-Defined
3 Community of Interest Among the Class Members.

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

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

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

17 Because all Class Members are Defendants’ current and former employees, the class is readily
18 ascertainable from Defendants’ regular business records, i.e., payroll records. JCL Dec., ¶ 54.

19 The statutes relating to each of Plaintiff’s claims apply with equal force and effect to the entire
20 Class. Factually, Defendants’ policies and practices apply class-wide and Defendants’ liability can be
21 determined by facts common to all members of the class. The wage and hour issues are both numerous
22 and substantial, and a class action is the most advantageous method of dealing with the claims of the
23 Settlement Class Members. JCL Dec., ¶ 55.

24 Plaintiff’s wage and hour claims are typical of the proposed Class because they arise from the
25 same factual basis and are based on the same legal theories applicable to the other Class Members.
26 Likewise, Plaintiff’s interests are entirely coextensive with the interests of the Class. Plaintiff allege
27 that she was injured by the same company-wide practices to which the proposed Class Members were
28 subject to and seek the same relief. Plaintiff has already demonstrated his ability to advocate for the

1 interests of the Class Member by initiating this litigation, undertaking extensive class discovery, and
2 evaluating the proposed settlement to assure that it is fair. JCL Dec., ¶ 56.

3 Additionally, Plaintiff is represented by competent Class Counsel who have extensive experience
4 in litigating wage and hour class action cases. Class Counsel successfully briefed, argued, certified, and
5 gained state court settlement approval of the same class-wide causes of action that are at issue in this
6 case. Class Counsel's wage and hour class action experience establishes that they are well qualified to
7 represent the interests of this Class. JCL Dec., ¶¶ 57-65., Declaration of Shani Zakay, ¶¶ 1-3.

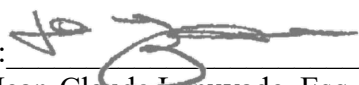
8 A class action is superior to a multitude of individual lawsuits. Given the size and amount of
9 each individual claim, the Class Members likely have little incentive to litigate their claims on an
10 individual basis because the out-of-pocket expense and personal commitment necessary to litigate each
11 claim outweighs any potential recovery. In sum, class treatment is superior to individual, case-by-case
12 adjudication. JCL Dec., ¶ 58.

13 IV. CONCLUSION

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

17
18 Dated: May 7, 2024

JCL LAW FIRM, APC

19 By : 
20 Jean-Claude Lapuyade, Esq.
21 Attorney for Plaintiff
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