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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF FRESNO

EVANGELINA LOZANO and PORFIRIO SANTIAGO, individuals, on behalf of themselves, and on behalf of all persons similarly situated, Plaintiffs, v. CEN CAL BUILDERS & DEVELOPERS, INC., a California corporation; and DOES 1-50, Inclusive, Defendant.	Case No. 23CECG04411 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT** Date: March 19, 2025 Time: 3:30 p.m. Judge: Hon. Jeffrey Y. Hamilton, Jr. Dept.: 503

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I. INTRODUCTION

Plaintiffs EVANGELINA LOZANO and PORFIRIO SANTIAGO ("Plaintiffs") seek preliminary approval of the Stipulation of Settlement of Class and PAGA Action Claims and Release of Claims ("Agreement" or "Settlement Agreement")[1], which if approved, would provide valuable monetary relief for approximately 2,152 Class Members and 932 Aggrieved Employees. The basic terms of the Agreement provide for the following:

1. The **"Class"** or the **"Class Members"** and **"Class Period"** means all persons who are or previously were employed by Defendant Cen Cal Builders & Developers, Inc. ("Defendant") in California and classified as non-exempt employees ("Class" or "Class Members") at any time during the period from January 8, 2020, to August 31, 2024. Agreement at §§ I(E); I(I).

   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 the Agreement. Agreement at § I(LL).

   b. The "**Class Size**" is comprised of 2,152 individuals who collectively worked approximately 60,902 Workweeks during the Class Period as estimated by Defendant at the time of mediation. Agreement at § III(A)(2).

2. The **"Aggrieved Employees"** and **"PAGA Period"** means all current and former non-exempt California employees employed by Defendant at any time during the period beginning October 19, 2022, through August 31, 2024 ("PAGA Period"). Agreement at § I(C), (Y). Aggrieved Employees do not have the ability to opt-out of the PAGA portion of the settlement. Agreement at § III(M)(7). At the time of mediation, there were approximately 932 Aggrieved Employees who worked approximately 16,700 pay periods during the PAGA Period.

3. The "**Gross Settlement Amount**" is Seven Hundred Fifty Thousand Dollars and Zero Cents ($750,000.00). Agreement at § I(O). The Gross Settlement Amount is non-reversionary and includes the following:

   a. A "**Service Award**" of not more than $10,000.00 to each Plaintiff in recognition

[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.

of their efforts and risks in assisting with the prosecution of the Action. Agreement at §§ III(N)(9).

b. A **"Class Counsel Award"** in the amount not to exceed one-third of the Gross Settlement Amount for attorney's fees, currently estimated to be $250,000.00 ***and*** attorneys' expenses not to exceed $30,000.00, to be paid to Class Counsel. Agreement at § III(N)(10);

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

d. "**Settlement Administration Costs**" not to exceed $20,000.00 payable to the Settlement Administrator, Apex Class Action LLC, for, *inter alia,* the administration of the Class Notice and Settlement Administration Costs. Agreement at §§ I(JJ); III(N)(12).

4. The "**Net Settlement Amount**" of approximately $390,000.00 (Gross Settlement Amount less the requested Class Counsel Award, Service Awards, PAGA Payment, and Settlement Administration Costs) 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 Settlement Payment of ***$181.23***. JCL Dec., ¶ 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 Settlement Class. 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, 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. Finally, the Settlement considers Defendant's financial condition and inability to satisfy a larger settlement or verdict. JCL Dec., ¶ 8.

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

II. FACTS AND PROCEDURE

A. Overview of the Litigation and Mediated Settlement

Defendant is a construction company that specializes in both commercial and residential construction and operates throughout the state of California, including in the county of Fresno, where Plaintiffs worked. Plaintiff Lozano was employed by Defendant in California from September 2022 through November 2022 as a non-exempt employee. Declaration of Evangelina Lozano ("Lozano Dec.") ¶ 4. Plaintiff Santiago was employed by Defendant in California from August 2023 through October 2023, as a non-exempt employee. Declaration of Porfirio Santiago ("Santiago Dec.") ¶ 4. Throughout their employment, Plaintiffs were entitled to legally compliant meal and rest periods, and minimum and regular wages. Additionally, Plaintiffs were subject to Defendant's practices and procedures. JCL Dec., ¶ 10; Lozano Dec. ¶ 4; Santiago Dec. ¶ 4.

Generally, Plaintiffs claim that Defendant failed to pay for all time worked, failed to provide compliant meal and rest periods, failed to properly calculate the regular rate of pay for purposes of overtime and redeemed sick pay, failed to reimburse for mandatory business expenses, failed to furnish accurate itemized wage statements, and failed to pay all wages when due. Defendant denies liability for each of Plaintiffs' claims. Further, Defendant asserts that it fully complied with all applicable employment laws and raised several other significant defenses to Plaintiffs' claims, including but not limited to, asserting that it paid its employees for all hours worked, maintained compliant meal and rest period practices, accurately paid all overtime and sick pay wages, provided reimbursements for business expenses, furnished accurate itemized wage statements, and timely paid all wages due upon separation of employment. JCL Dec., ¶ 11.

On October 19, 2023, Plaintiff Lozano served Defendant and the Labor and Workforce Development Agency ("LWDA") with a Notice of Violations setting 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 Plaintiff Lozano's intent to pursue claims under California Labor Code Private Attorneys General Act, Cal. Lab. Code Sections 2698 *et seq.* ("PAGA"). JCL Dec., ¶ 12.

On October 19, 2023, Plaintiff Lozano filed a class action complaint in the Fresno County Superior Court, Case No. 23CECG04411 ("Action"). The Action alleged eight causes of action against Defendant for: (1) Unfair Competition in violation of Bus. and Prof. Code §§ 17200; (2) Failure to Pay Minimum Wages in Violation of California Labor Code §§ 1194, 1197, and 1197.1.; (3) Failure to Pay Overtime Wages in Violation of California Labor Code §§ 510; (4) Failure to Provide Required Meal Periods in Violation of California Labor Code §§ 226.7 and 512; (5) Failure to Provide Required Rest Periods in Violation of California Labor Code §§ 226.7 and 512; (6) Failure to Provide Wages When Due in Violation of California Labor Code §§ 201, 202, and 203; (7) Failure to Provide Accurate Itemized Wage Statements in Violation of Cal. Lab. Code § 226; and (8) Failure to Reimburse Employees for Required Expenses in Violation of California Labor Code § 2802. JCL Dec., ¶ 13.

On October 31, 2023, Plaintiff Santiago filed a Notice of Violations with the LWDA and served the same on Defendant. JCL Dec., ¶ 14.

On January 8, 2024, Plaintiff Lozano filed a First Amended Complaint in the Action adding a ninth cause of action for violations of PAGA. JCL Dec., ¶ 15.

On January 18, 2024, Plaintiff Santiago filed a representative action complaint in the Fresno County Superior Court, Case No. 24CECG00220 ("*Santiago* Action"), alleging a single cause of action for violations of PAGA. JCL Dec., ¶ 16.

The Parties agreed relatively early to mediate the Actions. To prepare for mediation, the Parties agreed to informally exchange documents and data points subject to the mediation privilege, including but not limited to, the Class Members' time data and certain payroll data points. As discussed *infra,* Plaintiffs' counsel retained the forensic consultants at Berger Consulting Group ("BCG") to analyze Defendant's time and payroll data. JCL Dec., ¶ 17.

On July 31, 2024, the Parties participated in a full day mediation with Tripper Ortman, Esq., an experienced mediator of wage and hour class and PAGA actions. The mediation concluded without a settlement after Defendant raised an inability to pay defense. Class Counsel subsequently requested that Defendant produce various financial documents including, among other things, balance sheets, profit and loss statements, and tax documents. Class Counsel hired Certified Public Accountant Kenneth L. Creal of Creal & Creal to review Defendant's financial documents. The Parties continued settlement negotiations based on Mr. Creal's opinion based on what Defendant could afford to pay. With the assistance of Mediator Ortman, the Parties ultimately reached a settlement, which was subsequently memorialized in the form of a Memorandum of Understanding. JCL Dec., ¶ 18.

On December 16, 2024, the Parties filed a Stipulation and Proposed Order for Leave to file a Second Amended Complaint adding Plaintiff Santiago as a named Plaintiff to the Action. On December 18, 2024, Plaintiffs filed the Second Amended Complaint. Thereafter, the Parties drafted and negotiated a long-form settlement agreement, which is the subject of the instant motion. JCL Dec., ¶ 19.

B. Class Counsel Thoroughly Investigated the Factual and Legal Issues

Months before filing the Action, Class Counsel began their pre-filing investigation into Plaintiffs' complaints. Class Counsel's investigation started with several lengthy interviews with Plaintiffs. As part of the interview process, the Plaintiffs produced documents related to their employment, including time and payroll records. At the conclusion of the interviews, Class Counsel determined that Plaintiffs' complaints justified further inquiry. JCL Dec., ¶ 20.

Class Counsel subsequently requested Plaintiffs' employee file from Defendant. In response, Defendant produced several documents, including, but not limited, copies of Plaintiffs' hiring documents and time and payroll records. Class Counsel reviewed and analyzed the documents and determined the documents appeared to substantiate Plaintiffs' claims that Defendant failed to, among other things, provide accurate itemized wage statements, provide compliant meal and rest periods, provide reimbursement for mandatory business expenses, and pay for all hours worked. JCL Dec., ¶ 21.

Considering the many anticipated factual disputes, the Parties agreed that it would be in the best interest of all Parties to mediate the matter. To prepare for mediation, Class Counsel requested documents and data points to further evaluate Plaintiffs' claims and Defendant's liability exposure to the Class Members. In response to Class Counsel's request, Defendant produced time and payroll records for the Class Members, aggregate workweek and pay period data for the Class Members, and the average hourly rate for the Class Members. In total, Class Counsel reviewed nearly 9,500 pages of timekeeping records and over 174,000 unique cells of payroll data. JCL Dec., ¶ 22.

Class Counsel then retained the statisticians and economists at 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. JCL Dec., ¶ 23.

BCG analyzed Defendant's time and payroll data to assist in the development of various damage 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 unpaid wages, the amount of unpaid overtime, and the amount of missed meal and rest period premiums paid during the Class Period. JCL Dec., ¶ 24.

Overall, Class Counsel thoroughly investigated the claims at issue, including: (1) determining Plaintiffs' suitability as a putative class representatives through interviews, background investigations, and analysis of their employment files; (2) evaluating all of Plaintiffs' 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 Settlement Class's time and payroll records; (5) analyzing Defendant's labor practices; (6) reviewing and analyzing Defendant's financial records and financial audits; (7) researching settlements in similar cases as well as outstanding issues which could affect settlement approval; (8) evaluating Plaintiffs' claims and estimating Defendant's potential liability for purposes of settlement; (9) drafting the mediation brief; and (10) 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., ¶ 25.

Class Counsel only agreed to enter the Settlement following this thorough investigation and evaluation of Plaintiffs' claims, and evaluation of Defendant's financial condition. Based on their investigation of the facts, applicable law, and marketplace for similar settlements, and considering the risk of significant delay and uncertainty associated with litigation, and the various defenses asserted by Defendant, Class Counsel firmly 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. JCL Dec., ¶ 26.

C. The Proposed Settlement Fully Resolves Plaintiffs' Claims

1. The Composition of the Class

The proposed Settlement Class consists of all persons who are or previously were employed by Defendant as a non-exempt employee in California at any time during the period between January 8, 2020, to August 31, 2024, and who did not submit a timely and valid request for exclusion. Agreement §§ I(E), I(I), I(LL). At the time of mediation, Defendant estimated that the Class was comprised of 2,152 individuals that worked approximately 60,902 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 $750,000. The Gross Settlement Amount includes: (1) Individual Settlement Payments to the Settlement Class; (2) Service Awards of not more than $10,000 to each Plaintiff for their services on behalf of the Settlement Class; (3) a PAGA Payment in the amount of $40,000; (4) Settlement Administration Costs estimated at $20,000.00; (5) Class Counsel Award in the amount of $280,000, comprised of attorneys' fees equal to one-third of the Gross Settlement Amount estimated to be $250,000 and an estimated $30,000 for actually incurred litigation expenses. See generally Agreement at § III(N).

Subject to the Court approving the Service Awards, 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(P). There is no reversion to Defendant and Defendant must separately pay for its share of the employer payroll taxes. Agreement at § III(A)(1).

3. The Funding Date and Installment Plan

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

Amount as follows: the First Installment of $400,000 shall be due within ten (10) days after Final Approval of the settlement; the Second Installment of $350,000 shall be made nine (9) months after the First Installment. Agreement at § I(N).

During the litigation, Defendant raised the possibility that it would be unable to satisfy a larger class-wide settlement or verdict due to its financial condition. Class Counsel retained Certified Public Accountant, Kenneth L. Creal of Creal & Creal, to review and analyze Defendant's financial information and Defendant's financial audit, which were produced by Defendant as part of the settlement negotiations. Based on his review, Mr. Creal determined that Defendant could not afford a larger settlement than the one contemplated here. Moreover, Mr. Creal opined that the installment plan contemplated by the Agreement is appropriate because it allows Defendant to work toward accumulating the settlement funds without causing a detrimentally significant disturbance to its business operations. JCL Dec., ¶ 27; Declaration of Kenneth L. Creal, ¶¶ 2-6.

4. <u>Formula for Calculating Individual Settlement Payments</u>

Each Settlement Class Member will receive an Individual Settlement Payment. The Individual Settlement Payment will be proportional to the number of Workweeks each Settlement Class Member worked for Defendant in California during the Class Period. 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 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 Settlement Payments. Agreement at § III(N)(1).

Each Individual Settlement Payment will be reduced by any legally mandated employee tax withholdings (e.g., employee payroll taxes, etc.). Individual Settlement Payments allocated to 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 Payment Ratios. Agreement at § III(N)(1).

Given that there are approximately 2,152 Settlement Class Members, <u>***the average gross recovery is approximately $181.23***</u> (Net Settlement Amount divided by Settlement Class Members). JCL Dec.,

¶ 8.

5. Release by Settlement Class Members

Generally, as of the Funding Date, Plaintiffs and the Settlement Class Members will agree to release the Released Parties from the Released Class Claims. Agreement at § III(B). The Released Class Claims are all class claims alleged, or that reasonably could have been alleged based on the facts alleged, in the operative complaint in the Action which occurred during the Class Period, including but not limited to violations of California Labor Code sections 201, 202, 203, 204, 226, 226.7, 510, 512, 558, 1174, 1174.5, 1185, 1194, 1194.2, 1197, 1197.1, 1199, 2698, and 2802, and California Business & Professions Code §§ 17200, et seq., and the applicable IWC Wage Orders and California Code of Regulations from the following claims for relief: unfair competition; failure to pay minimum wages; failure to pay overtime wages; failure to provide required meal periods; failure to provide required rest periods; failure to provide wages when due; failure to provide accurate itemized wage statements; failure to reimburse employees for required expenses; and all damages, penalties, interest and other amounts recoverable under said claims, causes of action or legal theories of relief, and expressly excluding all other claims, including claims for vested benefits, wrongful termination, unemployment insurance, disability, social security, workers' compensation, and class claims outside of the Class Period. Agreement at § I(EE).

6. PAGA Release by the State of California on behalf of the Aggrieved Employees

Generally, as of the Funding Date, Plaintiffs, the Aggrieved Employees, the LWDA, and the State of California will release the Released Parties from the Released PAGA Claims. Agreement at § III(C). The Released PAGA Claims are all PAGA claims alleged in the operative complaint in the Action and Plaintiffs' PAGA notices to the LWDA which occurred during the PAGA Period, including but not limited to violations of California Labor Code sections 201, 202, 203, 204, 226, 226.7, 510, 512, 558, 1174, 1174.5, 1185, 1194, 1194.2, 1197, 1197.1, 1199, 2698, and 2802, and California Business & Professions Code §§ 17200, et seq., and the applicable IWC Wage Orders and California Code of Regulations from the following claims for relief: unfair competition; failure to pay minimum wages; failure to pay overtime wages; failure to provide required meal periods; failure to provide required rest periods; failure to provide wages when due; failure to provide accurate itemized wage statements; failure to reimburse employees for required expenses; and all damages, penalties, interest and other amounts recoverable under said claims, causes of action or legal theories of relief, and expressly excluding all other claims, including claims for vested benefits, wrongful termination, unemployment insurance, disability, social security, workers' compensation, and PAGA claims outside of the PAGA Period. Agreement at § I(FF).

III. ARGUMENT

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

The proposed Settlement, including a Gross Settlement Amount of $750,000.00, 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 Tripper Ortman, Esq., an experienced mediator of wage and hour class and PAGA actions. Mediator Ortman 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.").) After a full day of mediated negotiations, and only after several additional weeks of negotiations with the assistance of an expert and the mediator, the Parties reached an agreement via a mediator's proposal, and the settlement efforts concluded with a settlement. JCL Dec., ¶ 28.

Once the Parties memorialized the settlement in the form of a Memorandum of Understanding, 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., ¶ 29.

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 Plaintiffs' claims and intelligently engage defense counsel in settlement discussions that culminated in the proposed settlement now before the Court. JCL Dec., ¶ 30.

Class Counsel only agreed to enter the Settlement following their thorough investigation and evaluation of Plaintiffs' 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 Defendant, Class Counsel firmly believes this Agreement to be in the best interests of the Class Members. Because the Settlement's terms are fair, reasonable, and adequate, the Court should preliminarily approve the Settlement. JCL Dec., ¶ 31.

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

The Gross Settlement Amount of $750,000.00 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 $750,000.00 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 PAGA Penalties) ranged between $3,523,804.19 ("Realistic Damages") and $8,870,105.00 ("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 21.28% ("Realistic Damages") and 5.14% ("Maximum Damages") of Defendant's class-wide exposure –within the recognized range of reasonableness. The following summarizes Defendant's liability exposure. JCL Dec., ¶ 32.

(1) Defendant's Estimated Exposure for Unpaid Wages

Plaintiffs' primary claim in this Action alleges that Defendant failed to pay its employees for all hours worked. Specifically, throughout the Class Period, Defendant failed to utilize a timekeeping

[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").

system. Instead, Defendant kept handwritten and rounded time records that artificially reflected employees' schedules rather than the time they actually spent working. Based on Plaintiffs' testimony and Class Counsel's investigation, BCG assumed that Class Members and Aggrieved Employees spent a total of 5 minutes of unpaid work every shift completing work-related tasks such as, among other things, cleaning job sites and doffing personal protective equipment after the end of their shifts. As a result, Plaintiffs, Class Members, and Aggrieved Employees forfeited compensation, including overtime wages, for all the time they spent working under Defendant's control. JCL Dec., ¶ 33.

Defendant vigorously denied liability for this claim. Defendant argued, among other things, that employees filled in their time sheets themselves and recorded their time in line with their actual work. Based on these arguments, Plaintiffs discounted this claim by 75% and estimated Defendant's exposure for this claim ranged from $206,591.50 and approximately $826,366.00. JCL Dec., ¶ 34.

(2) Estimated Damages for Meal Period Violations

Plaintiffs also allege that Defendant failed to provide compliant meal periods. Specifically, Plaintiffs allege that as a result of their rigorous work schedules, Plaintiffs, Class Members, and Aggrieved Employees were not able to take timely and duty-free meal periods. Consequently, Plaintiffs alleges that they are owed meal period premiums for meal period violations that occurred during the Class Period. An analysis of the Class Members' time and payroll date revealed that 100% of meal periods were artificially recorded and rounded to exactly thirty (30) minutes. JCL Dec., ¶ 35.

Defendant argued, among other things, that it provided all its employees, i.e., Class Members and Aggrieved Employees, with the opportunity to take compliant meal periods. Defendant also argued that employees were responsible for managing their own time and complying with company meal period practices. Thus, Defendant argued that there was no potential liability for Plaintiffs' alleged meal period violations. JCL Dec., ¶ 36.

Consequently, Plaintiffs applied a 50% discount to this claim and estimated that the damages for this claim ranged from approximately $791,844.11 to approximately $1,583,688.21. JCL Dec., ¶ 37.

(3) Defendant's Estimated Exposure of Rest Period Violations

Plaintiffs also alleged that Defendant failed to provide compliant rest periods. On many occasions, Plaintiffs were required to take late or interrupted rest periods or forfeit rest periods altogether. Again, Defendant denied liability and asserted that it maintained legally compliant rest period practices throughout the Class Period. Moreover, Plaintiffs recognize the evidentiary burdens establishing this claim. Establishing Plaintiffs' rest period claim would rely, almost entirely, on Class Member testimony, making it a riskier claim at class certification and liability stages. Certification likely would have required depositions of Class Members who provided declarations, and Defendant surely would have obtained opposing declarations stating either rest breaks were taken, or rest breaks were voluntarily waived. *See, e.g., Ordonez v. Radio Shack, Inc*. (C.D. Cal. Jan. 17, 2013) 2013 WL 210223, at *11 ("Because of the competing testimony before the Court, plaintiff's evidence that defendant may have an illegal, written rest break policy is insufficient for this Court to find that common issues predominate."); *Villa v. United Site Servs. of California, Inc*. (N.D. Cal. Nov. 13, 2012) 2012 WL 5503550, at *8 ("Indeed, Plaintiff's own evidence confirms that the written policy does not generate uniform practices."). Accordingly, Plaintiffs' Realistic Damage model applied a 50% discount to the rest break claim and estimated the range of potential outcomes for this claim was between approximately $791,844.11 to approximately $1,583,688.21. JCL Dec., ¶ 38.

(4) <u>Defendant's Estimated Exposure for Regular Rate Violations</u>

Plaintiffs allege that Defendant failed to include certain non-discretionary bonuses when calculating the regular rate of pay when paying overtime wages and redeemed sick pay. Specifically, Defendant paid Class Members non-discretionary incentive compensation in the form of "Bonus" payments, which were not properly calculated into the regular rate of pay for purposes of overtime and redeemed sick pay. JCL Dec., ¶ 39. The regular rate of pay, which can change from pay period to pay period, includes adjustments to the straight time rate, reflecting, among other things, non-discretionary bonuses and awards, shift differentials and the per-hour value of any non-hourly compensation the employee has earned. *Alvarado v. Dart Container Corp. of California* (2018) 4 Cal.5th 542, 552-554. For overtime work, "an employee must receive a 50 percent premium on top of his or her regular rate of pay[.]" *Id.* at 553. California law also requires meal period premiums and rest period premiums to be paid at an employee's regular rate of pay. See *Ferra v. Lowes Hollywood Hotel, LLC* (2021) 11 Cal.5th 858.)

Conversely, Defendant denied liability and asserted its paid the correct rate of pay for purposes of overtime wages and redeemed sick pay. Defendant also argued that the bonuses paid were discretionary and did not need to be included in the regular rate calculation for the overtime wages and redeemed sick pay. As a result, Plaintiffs discounted this claim by 50% to account for these defenses. Plaintiffs estimated the range of damages for this claim was between $27,962.50 and $55,925.00. JCL Dec., ¶ 40.

(5) Defendant's Exposure for Unreimbursed Business Expenses

Plaintiffs further alleged that Defendant failed to reimburse its employees for mandatory business expenses. Specifically, Plaintiffs allege that they and other Class Members were required to use their own personal cellular phones as a result of and in furtherance of their job duties but were not reimbursed for the cost associated with the use of their personal cellular phones. Cal. Labor Code § 2802, provides 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…" Plaintiffs allege they and other Class Members were required to use their personal cell phones in order to, among other things, communicate with supervisors and other employees, and to receive information about job sites and job duties. Defendant denies these claims and also noted that even if these claims were true, they would affect only a small subset of that Class. Considering Defendant's defenses, Plaintiffs applied an 85% discount to this claim. Plaintiffs estimated Defendant's exposure for this claim ranged from $6,851.48 to $45,676.50. JCL Dec., ¶ 41.

(6) Defendant's Estimated Exposure for Waiting Time Penalties

Plaintiffs also alleged that the Defendant's labor code violations resulted in derivative liability for waiting time penalties. Although these *penalties* represented one of Defendant's largest dollar amount of exposure, this is Plaintiffs' most uncertain claim. Specifically, Defendant argued that Plaintiffs could not prove the "willful" prong needed to obtain waiting time penalties under Labor Code section 203. Additionally, for the reasons stated above, *Naranjo v. Spectrum Security Services* (2024) 15 Cal. 5th 1056, creates difficulty in Plaintiffs succeeding in a purely derivative waiting time penalty claim. Consequently, Plaintiffs applied a 90% discount and estimated that Defendant's exposure for this claim ranged from $887,010.50 to $8,870,105.00. JCL Dec., ¶ 42.

(7) Defendant's Estimated Exposure for Wage Statement Violations

Plaintiffs also alleged that Defendant failed to furnish its employees with accurate itemized wage statements. Specifically, Plaintiffs allege that as a result of Defendant's failure to provide meal and rest periods as required by the California Labor Code and pay for all wages, Plaintiffs and other Class Members are entitled to derivative wage statement penalties. (*See Naranjo, supra,* 15 Cal.App.1056 (concluding that meal premiums are "wages" entitling employees to derivative wage statement penalties). Defendant argued that this claim would fail because the underlying claims would fail and that, even if it failed to furnish accurate wage statements, Plaintiffs could not establish the injury requirement on a class-wide basis. As a result, Plaintiffs discounted this claim by 50% to account for this risk. Plaintiffs estimated that Defendant's exposure on this claim ranged between $811,700.00 and $1,623,400.00. JCL Dec., ¶ 43.

(8) Defendant's Estimated PAGA Exposure

Class Counsel's damage model also estimated Defendant's exposure for PAGA violations. At the time of mediation, Plaintiffs estimated Defendant's PAGA exposure ranged from $83,500 to $3,526,400. JCL Dec., ¶ 44. 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 Settlement 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 Settlement 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 which is approximately 5.33% of the Gross Settlement Amount. This amount falls well within the range of approved PAGA Payments. Seventy-Five percent (75%) of the PAGA Payment ($30,000.00) will be paid to the LWDA ("LWDA Payment") with the remaining twenty-five percent (25%) of the PAGA Payment ($10,000.00) will be distributed to the Aggrieved Employees ("Aggrieved Employee Payment"), which is within the range of PAGA Payments approved by courts and should be approved. JCL Dec., ¶ 45.

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 actually prevailed at trial, and even then, the PAGA penalties were reduced by 90%. Moreover, in *Carrington*, the Court of Appeal affirmed a judgment after trial which only provided for a PAGA penalty of $5 per pay period. Therefore, at trial, any PAGA penalties awarded in this case could be less than Plaintiffs' calculation, even had Plaintiffs prevailed on the PAGA claim. Here, multiplying the number of pay periods (approximately 16,700) by $5 results in a total potential liability of $83,500. JCL Dec., ¶ 46. 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 *Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333, 1341. There, the Court of Appeal affirmed the Trial Court's denial of class certification because employees' declarations attesting to having taken meal and rest breaks demonstrated that individualized inquiries were required to show harm. *See also 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). JCL Dec., ¶ 47.

Further, even if a class is certified, liability remains uncertain. The risks attendant to the issue of Defendant's liability in similar wage and hour actions are demonstrated by *Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, 31. There, the Court reversed a trial verdict in favor plaintiffs in a wage and hour class action. *See also 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."). JCL Dec., ¶ 48.

Finally, even if a class is certified and Defendants are found liable for the class claims alleged, post-certification risks remain, including a reversal of a favorable judgment for Plaintiffs and decertification of the class. These post-certification risks 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). JCL Dec., ¶ 49.

Collectively, the examples cited above illustrate the uncertain nature of class litigation. Consequently, the uncertainty of obtaining certification through a contested motion is a significant risk factor favoring settlement. JCL Dec., ¶ 50.

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

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

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

Finally, continuing to litigate this action would require continued and extensive resources coupled with significant Court time to proceed through trial and post-trial motions; which can often take years. Furthermore, wage and hour litigation is complex and expensive, as it often necessitates extensive expert testimony, particularly with regards to damages. But even if Plaintiffs are successful at trial, Plaintiffs are acutely aware that a judgment does not end the litigation. Plaintiffs fully expect that Defendant would appeal any favorable judgment. As demonstrated by *Magadia, supra,* 999 F.3d 668, the risk of an appeal and subsequent reversal is real. JCL Dec., ¶ 51. "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 $750,000.00 that is between approximately 5.14% and 21.28% of Defendant's *class-wide* liability exposure for damages and statutory penalties, and between approximately 4.14% and 20.79% of Defendant's maximum class wide liability exposure for damages and penalties, including PAGA Penalties. 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. Notably, as discussed above, Defendant raised the possibility that it would be unable to satisfy a class-wide settlement due to its financial condition. Based on Defendant's financial condition, Mediator Ortman proposed an installment plan to allow Defendant time to work toward accumulating the settlement funds. Accordingly, the Gross Settlement Amount accounts for the risk that Defendant would be unable to satisfy a larger settlement or verdict than the one contemplated here. JCL Dec., ¶ 52.

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

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

The Parties jointly drafted the Class Notice which fairly and neutrally informs the Class Members of their rights and remedies. The Settlement Administrator will first verify addresses, then mail the proposed Class Notice 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 class definition, the procedure, and time period within which to request exclusion 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 Claims. *See* Class Notice, attached as Exhibit A to the Agreement. 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. JCL Dec., ¶ 53.

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

[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.

of the options open to dissenting class members."). JCL Dec., ¶ 54.

D. The Court Should Preliminarily Approve the Service Award

Enhancement payments "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).) Enhancement payments "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." (*Rodriguez,* 563 F.3d at 958-59.) "[T]he rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class." (*Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785.)

The Settlement provides for a Service Award of $10,000 to each Plaintiff. The Service Award is fair and reasonable compensation for the Plaintiffs' efforts bringing the action, assisting Class Counsel with the litigation and settlement, regularly conferring with Class Counsel on the status of their case and the strategies for prosecuting the claims, and reviewing the proposed Settlement to ensure that its terms are fair and provide adequate relief for the Settlement Class. JCL Dec., ¶ 55.

Class Counsel on behalf of Plaintiffs will file a formal motion for the negotiated Service Awards once preliminary approval of the Settlement is granted. Plaintiffs respectfully submit that the above showing is sufficient for preliminary approval of the negotiated Service Award. JCL Dec., ¶ 56.

E. The Court Should Preliminarily Approve the Class Counsel Award

The purpose of a 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).) Courts have long recognized that when class counsel's efforts result in the creation of a common fund that benefits plaintiffs and unnamed class members, class counsel have an equitable right to be compensated from that fund. *See, e.g.*, *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("recogniz[ing] consistently that a litigant or a lawyer who recovers a common fund…is entitled to a reasonable attorney's fee from the fund as a whole"); *Laffitte v. Robert Half Int'l, Inc.* (2016) 1 Cal.5th 480, 488-89 ("Laffitte") (common fund doctrine "long recognized" under California law). In *Laffitte*, the California Supreme Court upheld the trial court's award of 33.33% of the settlement amount of $19 million with a 2.13 multiplier and affirmed that "empirical studies show the percentage method with a lodestar cross-check is the most prevalent form of fee method in practice." Id. at 497.

Here, Class Counsel requests attorneys' fees in the amount of $250,000.00, representing one-third of the Gross Settlement Amount. Class Counsel's request is consistent with many fee awards in similar wage and hour class actions that Class Counsel has received in California Superior Courts, over the past five years. Moreover, the requested one-third attorneys' fee award is in the middle of historically recognized range of attorneys' fees awarded in common fund class action settlements. The attorneys' fees request should be awarded based upon the Gross Settlement Amount in accordance with *Laffitte*, i.e., percentage of the fund with a lodestar cross check. As further explained below, the reasonableness of the requested $250,000.00 attorneys' fees award is further supported by the lodestar cross-check. JCL Dec., ¶ 57.

Class Counsel's lodestar to date is $194,025.00, ***exclusive of costs***, with significant work remaining. JCL Dec., ¶¶ 7, 58-65; Declaration of Shani Zakay ("Zakay Dec.") ¶ 4; Declaration of Justin Lo ("Lo Dec") ¶¶ 4-8. Thus, Class Counsel's fee request at this time is equal to Class Counsel's lodestar with a 1.28 multiplier – well below the 2.13 multiplier approved in *Laffitte*. See also *Taylor v. FedEx Freight, Inc.*, 2016 U.S. Dist. LEXIS 142202 (E.D. Cal. 2016) (following *Laffitte,* approved 30% fee award with cross-check lodestar multiplier of 2.26); *Emmons v. Quest Diagnostics Clinical Labs., Inc.*, 2017 U.S. Dist. LEXIS 27249 (E.D. Cal. 2017) (following *Laffitte,* approved 33% fee award with cross-check lodestar multiplier of 1.7).

Because the Settlement in this case is a pure common fund case, and the percentage of the fund is the comparable marketplace for fee awards in common fund cases, *Laffitte* supports an award based upon the percentage of the common fund. Further, as noted above, the one-third fee request is in the middle of comparable awards for common fund cases, which establishes the requested award as reasonable. Moreover, Class Counsel's lodestar supports the requested attorneys' fees with a multiplier well within the recognized range reasonableness, and in fact, below what the California Supreme Court approved in *Laffitte.*

Regarding costs, the appropriate analysis in deciding if costs are compensable is whether the costs are of the type typically billed by attorneys to paying clients in the marketplace. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994); *see also Hartless*, 273 F.R.D. at 645-46 (common fund class action settlement where court awarded litigation costs for consultants, online legal research, copying, postage, long distance charges, travel expenses, filing fees, mediation fees and investigation fees). Collectively, Class Counsel expended $20,004.74 prosecuting this action, with additional costs remaining. JCL Dec. ¶¶ 6, 66; Zakay Dec., ¶¶ 7-8; Lo Dec., ¶ 8. All of Class Counsel's out-of-pocket expenses are the types of expenses normally charged to paying clients including the following: filing fees; copying; postage; factual and legal research charges; mediation fees; and expert costs, which were all incurred during, and were necessary for the successful prosecution of the litigation and, thus, should be reimbursed. JCL Dec., ¶ 67; Zakay Dec., ¶ 8; Lo Dec., ¶ 8.

In light of the above, Class Counsel respectfully requests this Court approve a Class Counsel Award in the amount of $280,000.00 comprised of $250,000.00 for attorneys' fees and up to $30,000.00 for reimbursable litigation costs. Plaintiffs will file a formal motion for the negotiated Class Counsel Award once preliminary approval of the Settlement is granted. Plaintiffs respectfully submit that the above showing is sufficient for preliminary approval of the negotiated attorneys' fees. JCL Dec., ¶ 68.

F. Provisional Certification for Settlement Purposes Is Appropriate

For Settlement, Plaintiffs contend, and Defendant do not dispute, that provisional certification of the Class is appropriate. JCL Dec., ¶ 69.

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a. <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 requires proof (1) of a sufficiently numerous, ascertainable class, (2) of a well-defined community of interest, and (3) that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods. In turn, the community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (*In re Tobacco II Cases* (2009) 46 Cal. 4th 298, 313.) 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.)

i. <u>Numerosity and Ascertainability</u>

"Ascertainability is achieved by defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible when that identification becomes necessary. While often it is said that class members are ascertainable where they may be readily identified without unreasonable expense or time by reference to official records, that statement must be considered in light of the purpose of the ascertainability requirement. Ascertainability is required in order to give notice to putative class members as to whom the judgment in the action will be res judicata." (*Nicodemus v. Saint Francis Memorial Hospital* (2016) 3 Cal.App.5th 1200, 1212, internal citations and quote marks omitted.)

Here, Plaintiffs seek to certify a class consisting of all persons who are or previously were employed by Defendant as a non-exempt employee in California at any time during the period from January 8, 2020, to August 31, 2024. Plaintiffs estimate that the Class has 2,152 members. Therefore, the Class is sufficiently numerous to warrant certification. Moreover, the class is readily ascertainable by reference to Defendant's payroll records and other personnel information. Therefore, the proposed class is sufficiently numerous and ascertainable to be certified for the purpose of settlement. JCL Dec.,

¶ 70.

ii. Community of Interest

"[T]he 'community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.'" (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021, internal citations omitted.) "The focus of the typicality requirement entails inquiry as to whether the plaintiff's individual circumstances are markedly different or whether the legal theory upon which the claims are based differ from that upon which the claims of the other class members will be based." (*Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46.) "[T]he adequacy inquiry should focus on the abilities of the class representative's counsel and the existence of conflicts between the representative and other class members." (*Caro v. Procter & Gamble Co.* (1993) 18 Cal. App. 4th 644, 669.)

Here, there are common questions of law and fact. The statutes relating to each of Plaintiffs' claims apply with equal force and effect to the entire Settlement Class. Factually, Defendant's practices apply class-wide and Defendant's liability can be determined by facts common to all members of the class. Plaintiffs' wage and hour claims are typical of the proposed Settlement Class because they arise from the same factual basis and are based on the same legal theories applicable to the other Class Members. Likewise, Plaintiffs' interests are entirely coextensive with the interests of the Settlement Class. Plaintiffs allege that they were injured by the same company-wide practices to which the proposed Class Members were subject to and seeks the same relief. Plaintiffs have already demonstrated their ability to advocate for the interests of the Class Members by initiating this litigation, participating in mediation, and evaluating the proposed settlement to assure that it is fair. Accordingly, Plaintiffs will be able to adequately represent the class and do not have any conflicts that would make them unable to represent the class. JCL Dec., ¶ 71.

Additionally, Plaintiffs are represented by competent Class Counsel who have extensive experience in litigating wage and hour class action cases. Class Counsel successfully briefed, argued, certified, and gained state court settlement approval of the same class-wide causes of action that are at issue in this case. Class Counsel's wage and hour class action experience establishes that they are well qualified to represent the interests of this Class. JCL Dec., ¶¶ 73-76, Zakay Dec., ¶ 3; Lo Dec., ¶ 3. Accordingly, the community of interest requirement has been met.

iii. Superiority of Class Certification

Certifying the class would be superior to any other available means of resolving the disputes between the Parties. Absent class certification, the employees would have to litigate their claims individually, which would result in wasted time and resources relitigating the same issues and presenting the same testimony and evidence. Moreover, 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. JCL Dec., ¶ 72. Class certification will allow the employees' claims to be resolved in a relatively efficient and fair manner. (*Sav-On Drugs Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340.) Also, class certification is frequently granted in employee wage and hour claims, as class litigation eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation. *Id*.

IV. CONCLUSION

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

Dated: February 24, 2025

JCL LAW FIRM, APC

By: ____________________________
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Attorney for Plaintiffs