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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

ANDREW ELLENBERG-WILEY, an individual, on behalf of himself, and on behalf of all persons similarly situated, Plaintiffs, vs. SAN FRANCISCO AIDS FOUNDATION, a California nonprofit corporation; and DOES 1-50, Inclusive, Defendants.	Case No. CGC-23-609040 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT** Date: August 26, 2025 Time: 9:00 a.m. Dept.: 302

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I. INTRODUCTION

Plaintiff Andrew Ellenberg-Wiley ("Plaintiff") seeks preliminary approval of the Class Action and PAGA Settlement And Release of Claims ("Agreement")[1], which if approved, would provide valuable monetary relief for approximately 194 Class Members. The basic terms of the Agreement provide for the following:

1. The **"Class"** and **"Class Period"** shall mean all persons who are or previously were employed by Defendant San Francisco Aids Foundation ("Defendant") in California and classified as non-exempt employees ("Class") at any time during the period between September 13, 2019 and the earlier of the date the Court grants preliminary approval of the class settlement or the date on which the total number of Workweeks worked by Class Members equals 15,500 ("Class Period"). Agreement at § I.J.

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

   b. The "**Class Size**" is comprised of 194 individuals who collectively worked approximately 13,500 Workweeks during the Class Period as estimated by Defendant at the time of mediation. Agreement at § III.A.4.

2. The **"Aggrieved Employees"** and **"PAGA Period"** means all current and former non-exempt California employees employed by Defendant ("Aggrieved Employees") between September 11, 2022 and the earlier of the date the Court grants preliminary approval of the class settlement or the date on which the total number of Workweeks worked by Class Members equals 15,500 ("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.H.7.

3. The "**Gross Settlement Amount**" is Three Hundred Eighty-Five Thousand Dollars and Zero Cents ($385,000.00). 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

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

($10,000.00) to Plaintiff in recognition of his efforts and risks in assisting with the prosecution of the Action and in exchange for executing a General Release. Agreement at §§ I.HH, III.I.9.

b. **"Attorneys' Fees and Attorneys' Expenses"** not to exceed one-third of the Gross Settlement Amount (currently estimated to be $128,333.33) for attorneys' fees, ***and*** attorneys' expenses not to exceed $30,000.00, to be paid to Class Counsel. Agreement at §§ I.D, I.E, III.I.10;

c. A "**PAGA Payment**" of Twenty Thousand Dollars and Zero Cents ($20,000.00) to be allocated from the Gross Settlement Amount for settlement of claims for civil penalties under the Private Attorneys General Act of 2004 ("PAGA Settlement Amount"). The Settlement Administrator shall pay seventy-five (75%) of the PAGA Settlement Amount ($15,000.00) to the Labor and Workforce Development Agency ("LWDA PAGA Payment"). Twenty-five percent (25%) of the PAGA Settlement Amount ($5,000.00) will be distributed to the Aggrieved Employees ("Aggrieved Employee Payment"). Agreement at §§ I.W, III.I.11.

d. "**Claims Administration Expenses**" not to exceed $8,600.00 payable to the Settlement Administrator, Apex Class Action LLC, for, *inter alia,* the administration of the Class Notice and Settlement Administration Expenses. Agreement at § I.F, III.I.12.

4. The "**Net Settlement Amount**" of approximately $188,066.67 (means the Gross Settlement Amount, less the requested Attorneys' Fees and Attorneys' Expenses, Service Award, PAGA Payment, and Claims Administration Expenses, which will be allocated to all Participating Class Members on a pro-rata basis according to the number of Workweeks each Participating Class Member worked during the Class Period. Agreement at §§ I.R, II.I.1. The entire Net Settlement Amount will be paid to all Participating Class Members who do not opt out of the Settlement resulting in an average Individual Settlement Payment of ***$969.42***. JKH Dec., ¶ 24.

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 Members. The relief offered by the Settlement is particularly impressive when viewed against the difficulties encountered by plaintiffs pursuing wage and hour cases (*see infra).* Indeed, by settling now rather than proceeding to trial, Class Members will not have to wait (possibly years) for relief, nor will they have to bear the risk of class certification being denied or of Defendant prevailing at trial. JKH Dec., ¶ 6.

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

II. FACTS AND PROCEDURE

A. Overview of the Litigation

Defendant operates sexual health clinics throughout California, including in San Francisco, where Plaintiff worked. Plaintiff was employed by Defendant from September 2021 to October of 2022 as a non-exempt employee. Plaintiff alleges that he was denied legally compliant meal and rest periods, and minimum wages and overtime compensation at all times during his employment. Throughout his employment, Plaintiff was subject to Defendant's written policies and procedures contained in, among other documents, the "Employee Handbook." JKH Dec., ¶ 8.

Generally, Plaintiff claims that Defendant failed to pay for all time worked, including reporting time pay and split shift premiums, failed to provide compliant meal and rest periods, failed to reimburse for mandatory business expenses, failed to furnish accurate itemized wage statements, and failed to pay all wages upon separation. Defendant denies liability for each of Plaintiff's claims. Further, Defendant asserts that it fully complied with all applicable employment laws and raised several other significant defenses to Plaintiff's claims, including but not limited to, facially compliant meal and rest period policies, compliant wage statements, compliant reimbursement practices, and it timely paid all wages due upon separation of employment. JKH Dec., ¶ 9.

On September 11, 2023, Plaintiff served Defendant and the Labor and Workforce Development Agency ("LWDA") with a Notice of Violations ("PAGA Notice"). Plaintiff's PAGA Notice set forth the facts and theories supporting Defendant's alleged violations of various provisions of the California Labor Code and applicable Industrial Welfare Commissions ("IWC") Wage Order and of his intent to pursue claims under California Labor Code Private Attorneys General Act, Cal. Lab. Code Sections 2698 *et seq* ("PAGA"). JKH Dec., ¶ 10.

On September 13, 2023, Plaintiff filed a class action complaint in the San Francisco County Superior Court, Case No. CGC-23-609040 ("Action"). The Action alleged eight causes of action against Defendant for: (1) Unfair Competition in violation of Cal. Bus. & Prof. Code §§ 1700, *et. seq.;* (2) Failure to Pay Minimum Wages in violation of Cal. Lab. Code §§ 1194, 1197, 1197.1; (3) Failure to Pay Overtime Wages in violation of Cal. Lab. Code §§ 510, *et seq.*; (4) Failure to Provide Required Meal Periods in violation of Cal. Lab. Code §§ 226.7 & 512 and the Applicable IWC Wage Order; (5) Failure to Provide Required Rest Periods in violation of Cal. Lab. Code §§ 226.7 & 512 and the Applicable IWC Wage Order; (6) Failure to Provide Wages When Due in violation of Cal. Lab. 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 for Required Expenses in violation of Cal. Lab. Code § 2802. JKH Dec., ¶ 11.

On November 8, 2023, Plaintiff filed a first amended complaint to add a ninth cause of action for Violation of the Private Attorneys General Act [Labor Code §§ 2698, *et. seq.* ("PAGA")]. JKH Dec., ¶ 12.

The Parties agreed to mediate this action. To prepare for mediation, the Parties agreed to informally produce additional 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,* Plaintiff's counsel retained the forensic consultants at Berger Consulting Group ("BCG") to analyze Defendant's time and payroll data. JKH Dec., ¶ 13.

On August 20, 2024, the Parties participated in a full day mediation with highly regarded wage and hour and PAGA mediator Steven Rottman, Esq. At the conclusion of the full-day mediation, the Parties reached an agreement for settlement. The basic terms were set forth in a signed Memorandum of Understanding. Thereafter, the Parties drafted and negotiated a long-form settlement agreement, which is the subject of the instant motion. JKH Dec., ¶ 14.

B. Class Counsel Thoroughly Investigated the Factual and Legal Issues

Months before filing the Action, Class Counsel began its pre-filing investigation into the Plaintiff's complaints. Class Counsel's investigation started with several lengthy interviews with Plaintiff. As part of the interview process, Plaintiff produced documents related to his employment, including his offer letter, and time and payroll records. At the conclusion of the interviews, Class Counsel determined that Plaintiff's complaints justified further inquiry. JKH Dec., ¶ 15.

Class Counsel subsequently requested Plaintiff's employee files from Defendant. In response, Defendant produced hundreds of pages of documents, including but not limited, Defendant's handbooks, copies of Plaintiff's hiring documents, and payroll and time records. Class Counsel reviewed and analyzed the documents and determined the documents appeared to substantiate Plaintiff's claim that Defendant's failed to, among other things, provide accurate wage statements and to provide compliant meal and rest periods. JKH Dec., ¶ 16.

To prepare for mediation, Defendant produced the time and payroll records for the Class Members, aggregate workweek and pay period data for the Class Members, average hourly rate for the Class Members, and copies of applicable handbooks, policies, and agreements. In total, Class Counsel reviewed more than 9,000 pages of documents and more than 1 million unique cells of time and payroll data. JKH Dec., ¶ 17.

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 his fields and have provided his expertise on thousands of cases. JKH Dec., ¶ 18.

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 unreimbursed business expenses. JKH Dec., ¶ 19.

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 Defendant's labor policies and practices; (6) researching settlements in similar cases as well as outstanding issues which could affect settlement approval; (7) evaluating Plaintiff's claims and estimating Defendant's liability for purposes of settlement; (8) drafting the mediation brief; and (9) participating in the mediation. This investigation allowed Class Counsel to fully assess the nature and magnitude of the claims being settled, as well as the impediments to recovery, such as to make an independent assessment of the reasonableness of the terms to which the Parties have agreed. JKH Dec., ¶ 21.

Class Counsel only agreed to enter the Settlement following this thorough investigation and evaluation of Plaintiff's claims. Based on its investigation of the facts, applicable law, and marketplace for similar settlements, and considering the risk of significant delay and uncertainty associated with litigation, and the various defenses asserted by Defendant, Class Counsel firmly believe this Agreement to be in the best interests of the Class Members. Because the Settlement's terms are fair, reasonable, and adequate, the Court should preliminarily approve the Settlement. JKH Dec., ¶ 22.

C. The Parties Settled at Mediation

On August 20, 2024, the Parties conducted a full day of mediation with Steven Rottman, Esq. Mediator Rottman 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 Rottman'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. JKH Dec., ¶¶ 23.

D. The Proposed Settlement Fully Resolves Plaintiff's Claims

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

The proposed Class consists of all persons who worked for Defendant as non-exempt employees in California at any time during the Class Period (September 13, 2019, to the date the Court grants preliminary approval of the Settlement). Agreement at § I.G. The Settlement Class excludes any person who submits a timely and valid request for exclusion. Agreement at § I.KK. At the time of mediation, Defendant estimated that the Class was comprised of 194 individuals that worked approximately 13,500 workweeks during the Class Period. Agreement at § III.A.4.

2. The Settlement Consideration

The Parties agreed to settle the underlying class claims in exchange for the Gross Settlement Amount of $385,000.00. The Gross Settlement Amount includes: (1) Individual Settlement Payments to the Settlement Class Members; (2) a Service Award of not more than $10,000.00 to Plaintiff for his services on behalf of the Class and, equally important, for a general release of claims; (3) a PAGA Payment in the amount of $20,000.00; (4) Claims Administration Expenses estimated at $8,600.00; (5) Attorneys' Fees and Attorneys' Expenses in the amount of $158,333.33, comprised of attorneys' fees equal to one-third of the Gross Settlement Amount estimated to be $128,333.33 and an estimated $30,000.00 for actually incurred litigation expenses. See generally Agreement at § III.I.10.

Subject to the Court approving the Service Award, Attorneys' Fees and Attorneys' Expenses, PAGA Payment, and the Claims Administration Expenses, the Net Settlement Amount will be distributed to each Settlement Class Member. Agreement at § III.I.9. There is no reversion to Defendant and Defendant must separately pay for its share of the employer payroll taxes. Agreement at § III.I.1.

3. The Funding Date

Assuming there are no objectors, and no appeal is filed, Defendant will fund the Gross Settlement Amount within thirty (30) days of the Court's entry of the order granting final approval of this Settlement. Agreement at §§ I.N, III.I.

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 Defendant in California during the Class Period. Agreement at § III.I.I. The Class Data provided by Defendant to the Settlement Administrator will include the start and end dates of employment so that the Settlement Administrator can calculate the number of Workweeks for each Class Member and the number of PAGA Pay Periods worked during the relevant periods. Agreement at § III.A.4. Each Class Member's final Individual Settlement Payment will be calculated by using a fraction, the numerator of which is the Class Member's total number of Workweeks, and the denominator of which is the total number of Workweeks of all Class Members. Agreement at § III.I.1. For purposes of these calculations, a Workweek shall mean any week during which a Class Member worked for Defendant for at least a portion of one day during the Class Period. Agreement at § I.LL. Each Individual Settlement Payment will be reduced by any legally mandated employee tax withholdings (e.g., employee payroll taxes, etc.). Individual Settlement Payments for members of the Settlement 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. Agreement at § III.I.1.

Given that there are approximately 194 Participating Class Members, ***the average gross recovery is approximately $969.42*** (Net Settlement Amount divided by Settlement Class Members). JKH Dec., ¶ 24.

5. Release by Settlement Class Members

Generally, as of the Funding Date, Plaintiff and the Settlement Class Members will agree to release the Released Parties from the Released Class Claims that accrued during the Class Period. Agreement at §§ I.DD; III.A.2.

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

Generally, as of the Funding Date, Plaintiff, acting as the representative of the State of California, on behalf of the Aggrieved Employees, will release the Released Parties from the Released PAGA Claims that accrued during the PAGA Period. Agreement at §§ I.EE; III.A.3.

III. ARGUMENT

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

The proposed Settlement, including a Gross Settlement Amount of $385,000.00 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 the highly respected mediator Steven Rottman, Esq. Mediator Rottman 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, the Parties reached an agreement and the mediation session concluded with a settlement. JKH Dec., ¶ 25.

Following the mediation, 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. JKH Dec., ¶ 26.

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

As set forth in greater detail above, Class Counsel conducted a very thorough investigation into the factual and legal issues in dispute. In addition to informal discovery, document review, data analysis and legal research, Class Counsel also researched similar wage and hour actions. Although no two cases are identical, this research provided Class Counsel with a marker to inform settlement discussions and, ultimately, to measure this settlement against. The investigation allowed Class Counsel to realistically assess the value of Plaintiff's claims and intelligently engage defense counsel in settlement discussions that culminated in the proposed settlement now before the Court. JKH Dec., ¶ 27.

Class Counsel only agreed to enter the Settlement following their thorough investigation and evaluation of Plaintiff's claims. Based on 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. JKH Dec., ¶ 28.

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

The Gross Settlement Amount of $385,000.00 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 plaintiff 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 $385,000.00 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 Berger to develop economic damage models measuring Defendant's

[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").

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 $1,146,218.48 ("Realistic Damages") and $2,292,816.00 ("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 33.59% ("Realistic Damages") and 16.79% ("Maximum Damages") of Defendant's class-wide exposure – well within the recognized range of reasonableness. The following summarizes Defendant's liability exposure. JKH Dec., ¶ 29.

(1) Estimated Damages for Meal Period Violations

Plaintiff's primary claim in this Action alleges that Defendant failed to provide compliant meal periods. Specifically, Plaintiff alleges that due to Defendant failed to maintain time records for a significant portion of meal periods taken during the Class Period. Instead, Plaintiff alleges Defendant instead simply deducted 30 minutes from the total number of hours worked in shifts in which a meal period was triggered. The absence of clock-out or clock-in data for meal periods makes it impossible to analyze whether a meal break was actually taken, and if so, whether it was taken timely, and for at least 30-minutes. However, Plaintiff alleges that due to Defendant's understaffing and rigorous workloads, Plaintiff, Class Members, and Aggrieved Employees were often unable to take timely and duty-free meal periods, and Defendant failed to pay meal period premiums. Plaintiff estimated Defendant's exposure for failure to provide compliant meal periods to be between $138,303.56 and $184,404.75. JKH Dec., ¶ 30.

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

Plaintiff also alleged that Defendant failed to provide compliant rest periods. Specifically, Plaintiff alleged that due to Defendant's understaffing and rigorous workloads, Plaintiffs, Class Members, and Aggrieved Employees were often unable to take timely and duty-free rest periods, and Defendant failed to pay rest period premiums. Defendants denied liability and asserted that they maintained legally compliant rest period practices throughout the Class Period. In valuing this claim, Plaintiff recognizes the evidentiary burdens in establishing the claim. Specifically, establishing

Plaintiff's rest period claim would depend, almost entirely, on Class Member testimony, making it a riskier claim at class certification and liability stages. Defendant likely would have argued that only a small number of Class Members missed their rest breaks. 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 Defendants 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, Plaintiff estimated Defendant's exposure stemming from this claim to be between $138,303.56 and $184,404.75, based on Plaintiff's testimony and investigation. JKH Dec., ¶ 31.

(3) <u>Defendant's Estimated Exposure for Unreimbursed Business Expenses</u>

Plaintiff alleged that Defendant required Class Members and Aggrieved Employees to use their personal cellular phones as a result of and in furtherance of their job duties but were not reimbursed by Defendant. California employers who require employees to incur personal business expenses for work purposes must reimburse the employee for the cost incurred. (*See* Cal. Labor Code § 2802(a), providing that "An 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…"). Specifically, Plaintiffs, Class Members, and Aggrieved Employees were required to use their personal cell phones for essential work-related communications, such as communicating with managers and supervisors about job duties and about various Covid-19 protocols. Plaintiff estimated Defendant's exposure stemming from this claim to be between $86,212.50 and $172,425.00. JKH Dec., ¶ 32.

7-Eleven Generally, Plaintiffs allege that Defendants' aforementioned violations resulted in derivative violations of California Labor Code sections 203 and 226(a). Class Counsel considered the arguable presence of various penalties and weighed the potential recoveries against probable defenses, including potential obstacles in proving the "willful" prong needed to obtain waiting time penalties under Labor Code section 203, showing that Class Members suffered an "injury" because of wage statement violations, as required by Labor Code 226, or that meal and rest period violations may not entitle employees like Plaintiffs and the Class Members to pursue the derivative waiting time and itemized wage statement penalties. (*See Naranjo v. Spectrum Security Services, Inc.*, (2019) 40 Cal. App. 5th 444 (review granted); *Maldonado v. Epsilon Plastics, Inc*. (2018) 22 Cal. App. 5th 1308.) Although the Class arguably could have seen a significant payout for these penalties if Plaintiffs prevailed on every penalty claim, Plaintiffs would not recover any derivative penalties if they failed to prove the underlying claims. Moreover, Plaintiff would have to establish class certification to prove the Class deserved the penalties. *See, e.g., Howard v. CVS Caremark Corp*., 2014 U.S. Dist. LEXIS 172406 (C.D. Cal. Dec. 9, 2014) (denying class certification for the same penalty claims); *Alonzo v. Maximus, Inc*., 832 F. Supp. 2d 1122, 1134-1137 (C.D. Cal. 2011) (finding insufficient evidence of bad faith or actual injury). Plaintiffs could not give the penalty claims great weight given that they depended on proving the underlying claims, which according to Defendants, were not supported by the facts. In light of the above, Plaintiff estimated the exposure for wage statement penalties to be between $177,356.25 and $236,475.00, and Defendant's exposure for waiting time penalties to be between $606,042.60 and $1,515,106.50. JKH Dec., ¶ 33.

(4) <u>Defendant's PAGA Exposure</u>

Class Counsel's damage models also estimated Defendant's exposure for PAGA penalties. At the time of mediation, Plaintiff estimated Defendant's PAGA exposure ranged between $346,706 and $524,587. JKH Dec., ¶ 34. 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 penalties 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 penalties 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 $20,000.00 which is 5.2% of the Gross Settlement Amount. This amount falls well within the range of approved PAGA Settlement Amount. Seventy-Five percent (75%) of the PAGA Settlement Amount ($15,000.00) will be paid to the LWDA ("LWDA Payment") with the remaining twenty-five percent (25%) of the PAGA Settlement Amount ($5,000.00) will be distributed to the Aggrieved Employees, which is within the range of PAGA Settlement Amount approved by courts and should be approved. JKH Dec., ¶ 35.

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%.

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

b. Inherent Risks of Continued Litigation Support Preliminary Approval.

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

With respect to the most immediate challenge, i.e., class certification, the risks attendant to the certification of similar wage and hour claims are demonstrated by *Magadia v. Wal-Mart Associates, Inc.* (9th Cir. 2021) 999 F.3d 668. There, the Ninth Circuit vacated, reversed, and remanded a $110 million judgement against an employer for, *inter alia*, inaccurately paying overtime, and directed the trial court to enter judgement in favor of the employer. *See also O'Conner v. Uber Technologies, Inc.* (9th Cir. 2018) 904 F.3d 1087 (decertification of wage and hour misclassification action); *see also Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, 31 (reversing a trial verdict in favor plaintiffs in a wage and hour class action)); *Tien v. Tenet Healthcare Corp.* (2012) 209 Cal.App.4th 1077, 1088 ("[T]he reason, if any, that employees might not take their breaks were predominantly individualized questions of fact not susceptible to class treatment."); *a.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333, 1341 (affirming denial of certification because employees' declarations attesting to having taken meal and rest breaks demonstrated that individualized inquiries were required to show harm); *Campbell v. Best Buy Stores, L.P.*, (C.D. Cal. 2013) 2013 WL 5302217 at *11-13 (following *Brinker* and denying certification of proposed off-the-clock and rest and meal break classes due to lack of uniform policy); *Brown v. Fed Express Corp.* (C.D. Cal. 2008) 249 F.R.D. 580, 587-88 (denying certification of driver meal and rest period claims based on the predominance of individual issues). Collectively, the examples cited above illustrate the uncertain nature of class litigation. Consequently, the uncertainty of obtaining certification through a contested motion is a significant risk factor favoring settlement. JKH Dec., ¶ 36.

"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).) JKH Dec., ¶ 37.

Finally, continuing to litigate this action would require continued and extensive resources coupled with significant Court time to proceed through trial and post-trial motions; which can often take years. Furthermore, wage and hour litigation is complex and expensive, as it often necessitates extensive expert testimony, particularly with regards to damages. But even if Plaintiff was successful at trial, Plaintiff is acutely aware that a judgment does not end the litigation. Plaintiff fully expects that Defendant would appeal any favorable judgment. As demonstrated by *Magadia, supra,* 999 F.3d 668, the risk of an appeal and subsequent reversal is real. JKH Dec., ¶ 38. "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 $385,000.00 that is roughly between approximately 48.89% of Defendant's *class-wide* liability exposure for damages, and approximately 11.51% of Defendant's maximum class wide liability exposure for damages and statutory 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. JKH Dec., ¶ 39.

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

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

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 shall set forth the scope of the release, stating the number of Workweeks and the estimated amount of their Individual Settlement Payment. Agreement at § III.H.2.a. The Parties negotiated this method to ensure delivering the most reasonable method of notice to the Class Members while ensuring cost effective administration of the Settlement. JKH Dec., ¶ 40.

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

C. The Court Should Preliminarily Approve the Service Award

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

[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.

(2009) 175 Cal.App.4th 785.)

The Settlement provides for a Service Award of $10,000.00 to Plaintiff. The Service Award is fair and reasonable compensation for Plaintiff's efforts bringing the action, assisting Class Counsel with the litigation and settlement, regularly conferring with Class Counsel on the status of his case and the strategies for prosecuting the claims, reviewing the proposed Settlement to ensure that its terms are fair and provide adequate relief for the Settlement Class Members, and agreeing to provide Defendant a general release of all claims arising out of his employment. JKH Dec., ¶ 42.

Class Counsel on behalf of Plaintiff will file a formal motion for the negotiated Service Award once preliminary approval of the Settlement is granted. Plaintiff respectfully submits that the above showing is sufficient for preliminary approval of the negotiated Service Award. JKH Dec., ¶ 43.

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

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

Class Counsel took this matter on a contingency fee basis and invested significant time and expense successfully prosecuting Plaintiff's claims. As discussed *supra*, the estimated average Individual Settlement Payment illustrates the demonstrably positive outcome for the Settlement Class Members. Considering the positive outcome for the Class Members, and in light of the supporting authority, the proposed Attorneys' Fees and Expenses are fair and reasonable. JKH Dec., ¶ 44.

Plaintiff will file a formal motion for the negotiated Attorneys' Fees and Expenses once preliminary approval of the Settlement is granted. Plaintiff respectfully submits that the above showing is sufficient for preliminary approval of the negotiated attorneys' fees. JKH Dec., ¶ 45.

E. Provisional Certification for Settlement Purposes Is Appropriate

For Settlement purposes only, Plaintiff contends, and Defendant does not dispute, that provisional certification of the Class is appropriate. JKH Dec., ¶ 46.

1. The Standard for Class Certification

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

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

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

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

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

Because all Class Members are Defendant's current and former employees, the class is readily ascertainable from Defendant's regular business records, i.e., payroll records. JKH Dec., ¶ 47.

The statutes relating to each of Plaintiff's claims apply with equal force and effect to the entire Class. Factually, Defendant's policies and practices apply class-wide and Defendant's liability can be determined by facts common to all members of the class. The wage and hour issues are both numerous and substantial, and a class action is the most advantageous method of dealing with the claims of the Settlement Class Members. JKH Dec., ¶ 48.

Plaintiff's wage and hour claims are typical of the proposed Class because they arise from the same factual basis and are based on the same legal theories applicable to the other Class Members. Likewise, Plaintiff's interests are entirely coextensive with the interests of the Class. Plaintiff alleges that he was injured by the same company-wide practices to which the proposed Class Members were subject to and seek the same relief. Plaintiff has already demonstrated his ability to advocate for the interests of the Class Member by initiating this litigation and evaluating the proposed settlement to assure that it is fair. JKH Dec., ¶ 49.

Additionally, Plaintiff is represented by competent Class Counsel who have extensive experience in litigating wage and hour class action cases. Class Counsel successfully briefed, argued, certified, and gained state court settlement approval of the same class-wide causes of action that are at issue in this case. Class Counsel's wage and hour class action experience establishes that they are well qualified to represent the interests of this Class. JKH Dec., ¶¶ 52, Declaration of Shani Zakay, ¶¶ 3.

A class action is superior to a multitude of individual lawsuits. Given the size and amount of each individual claim, the Class Members likely have little incentive to litigate their claims on an individual basis because the out-of-pocket expense and personal commitment necessary to litigate each claim outweighs any potential recovery. In sum, class treatment is superior to individual, case-by-case adjudication. JKH Dec., ¶ 50.

/ / /

IV. CONCLUSION

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

Dated: July 24, 2025

ZAKAY LAW GROUP, APLC

By: ______________________________

Jaclyn Joyce, Esq.