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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

JOSE GARCIA VALLE, as an individual and on
behalf of all others similarly situated,

Plaintiff,

v.

PACIFIC SHELLFISH, INC., a California
corporation; and DOES 1 through 100, Inclusive,

Defendants.

Case No. 37-2021-00021898-CU-OE-CTL

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

Date: May 26, 2023

Time: 8:30 a.m.

Department: 65

Trial Date: N/A

Action Filed: May 17, 2021

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I. INTRODUCTION

Plaintiff JOSE GARCIA VALLE (“Plaintiff”) seeks preliminary approval of the Stipulation of Settlement of Class and PAGA Action Claims and Release of Claims (“Agreement”)¹, which if approved, would provide valuable monetary relief for approximately 273 Class Members. The terms of the Agreement provide for the following:

1. The “**Class Members**,” “**Class**,” and “**Class Period**” shall mean all non-exempt employees who are or previously were employed for Pacific Shellfish, Inc. (“Defendant”) and performed work in California during the period between May 17, 2017 and July 5, 2022 (“Class Period”). Agreement at §§ I(G) and (H). The Class is comprised of approximately 273 individuals who collectively worked approximately 10,635 Workweeks during the Class Period. Agreement at §§III(A)(2).

2. The “**Settlement Class Members**” and “**Settlement Class**” means all Class Members who have not submitted a timely and valid request for exclusion by the Response Deadline. Agreement at § I(HH).

3. The “**Aggrieved Employees**” and “**PAGA Period**” shall mean all current and former non-exempt employees who worked at any time during the period April 6, 2021 and July 5, 2022 (“PAGA Period”) for Defendant in California. Agreement at §§ I(B), (V). At the time of mediation, there were approximately 137 Aggrieved Employees and 2,450 pay periods during the PAGA Period. (JCL Dec., ¶ 6).

4. The “**Gross Settlement Amount**” is Three Hundred Eighty-Five Thousand Dollars and Zero Cents (\$385,000.00). Agreement at § I(O). The Gross Settlement Amount is non-reversionary and includes the following:

a. A “**Class Representative Service Award**” in the amount of Ten Thousand Dollars (\$10,000.00) to Plaintiff in recognition of his effort and risk assumed in assisting with the prosecution of the Action. Agreement at §§ I(I); III(N)(9);

b. A “**Class Counsel Award**” consisting of Attorneys’ Expenses of up to Twenty-Five

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

Thousand Dollars (\$25,000.00) **and** Attorneys' Fees not to exceed one-third of the Gross Settlement Amount, currently estimated to be One Hundred Twenty-Eight Thousand Three Hundred Thirty-Three Dollars and Thirty-Three Cents (\$128,333.33) paid to Class Counsel. Agreement at §§ I(E), and III(N)(10);

c. A "**PAGA Payment**" of Twenty Thousand Dollars (\$20,000) to be allocated from the Gross Settlement Amount, with 25% of the payment going to the Aggrieved Employees ("Aggrieved Employee Payment") and 75% of the payment going to the Labor and Workforce Development Agency ("LWDA Payment"). Agreement at §§ I(W) and III(N)(11);

d. "**Claims Administration Expenses**" or "**Settlement Administration Expenses**" not to exceed \$9,000.00 payable to the Settlement Administrator, ILYM Group, Inc., for, *inter alia*, the administration of the Notice Packet and Individual Settlement Payments. Agreement at § III(N)(12).

5. The "**Net Settlement Amount**" refers to the portion of the Gross Settlement Amount less Class Counsel Award, Class Representative Service Award, PAGA Payment, and Settlement Administration Expenses. Agreement at § I(Q). The Net Settlement Amount is approximately \$192,666.67 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. 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 approximately **\$705.37**. JCL Dec., ¶ 6.

6. The "**Released Class Claims**" means all class claims that were pled or could have been pled in the operative complaint in Valle v. Pacific Shellfish, Inc., San Diego Superior Court, Case No. 37-2021-00021898-CU-OE-CTL, and which were pled or could have been pled in the operative complaint based on the facts alleged or ascertained during the pendency of the Action that arose during the Class Period, but expressly excluding all other claims, including claims for vested benefits, wrongful termination, unemployment insurance, disability, social security, workers' compensation, PAGA claims outside the PAGA Period, and class claims outside the Class Period. Agreement at §§I(BB) and III(B).

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7. The “**Released PAGA Claims**” means all PAGA claims that were pled or could have been pled in the operative complaint in the Action and Plaintiff’s PAGA Notice to the LWDA which occurred during the PAGA Period, and expressly excluding all other claims, including claims for vested benefits, wrongful termination, unemployment insurance, disability, social security, workers’ compensation, and PAGA claims outside the PAGA Period. Agreement §§ I(CC) and III(C).

An objective evaluation of the Settlement confirms that the relief negotiated on behalf of the Class is fair, reasonable, and adequate. The Settlement was negotiated by the Parties at arm's length. The Settlement confers substantial benefits to the Class. 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. JCL 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 Payments to the Class meets or exceeds awards in similar wage and hour class actions. Moreover, the proposed Class is appropriate for provisional certification. Accordingly, Plaintiff respectfully requests the Court grant preliminary approval of the Settlement. JCL Dec., ¶ 7.

II. FACTS AND PROCEDURE

A. Overview of the Litigation

Defendant is a California corporation that distributes seafood to restaurants, hotels, bars, and caterers across Southern California, including in San Diego where Plaintiff worked. Defendant additionally operates the Fishery, an upscale seafood restaurant in San Diego. Plaintiff worked for Defendant as a non-exempt employee in San Diego, California from approximately 2011 to September 2020. Plaintiff alleges that Defendant failed to, among other things, maintain accurate time records, pay for all hours worked, provide compliant meal and rest periods, issued non-compliant wage statements, and failed to pay all wages when due. Throughout his employment, Plaintiff was subject to Defendant's written policies and procedures contained in, relevant part, the 2021 Pacific Shellfish Employee Handbook. JCL Dec., ¶ 8; Declaration of Jose Garcia Valle ("Valle Dec.") at ¶¶ 1-7.

1 Defendant forcefully denies liability for each of Plaintiff's claims. Further, Defendant asserts
2 that it fully complied with all applicable employment laws and raised several other significant defenses,
3 including but not limited to, compliant compensation policies and plans, complaint meal and rest
4 practices, compliant wage statements, and timely payment of all wages when due. JCL Dec., ¶ 9.

5 On August 10, 2022, Plaintiff served Defendant and the Labor and Workforce Development
6 Agency ("LWDA") with a Notice of Violations ("PAGA Notice"). JCL Dec., ¶ 10. On May 17,
7 2021, Plaintiff filed his class action complaint in the San Diego Superior Court. The Action alleged
8 six causes of action against Defendant for: (1) Unfair Competition in Violation of Bus. and Prof. Code
9 sections 17200 *et seq*; (2) Failure to pay minimum wages in violation of California Labor Code sections
10 1194, 1197 & 1197.1; (3) Failure to pay overtime wages in violation of California Labor Code sections
11 510 *et seq*; (4) Failure to provide required meal periods in violation of California Labor Code sections
12 226.7 and 512 and the applicable IWC wage order; (5) Failure to provide required rest periods in
13 violation of California Labor Code sections 226.7 and 512 and the applicable IWC wage order; and (6)
14 Failure to provide accurate itemized wage statements in violation of California Labor Code section 226.
15 JCL Dec., ¶ 11. On December 9, 2022, Plaintiff filed the operative First Amended Complaint and
16 asserted a seventh cause of action for violations of the California Labor Code Private Attorneys General
17 Act [Labor Code section 2698, *et seq.*]. After commencing written discovery, the Parties agreed to
18 mediation. JCL Dec., ¶ 12.

19 **B. Class Counsels' Investigation**

20 To prepare for mediation, Class Counsel requested pertinent documents and data points to
21 evaluate Plaintiff's claims and measure Defendant's liability exposure to the Class. In response,
22 Defendant produced, among other things, time and payroll records for 100% of the Class Members,
23 aggregate workweek and pay period data, copies of applicable handbooks, policies, and procedures and
24 Plaintiff's personnel file. JCL Dec., ¶ 13.

25 Class Counsel then retained the statisticians and economists at Berger Consulting Group to
26 evaluate the Class Members' payroll and time data and to calculate Defendant's liability exposure to
27 the Class. Berger Consulting Group analyzed Defendant's time and payroll data and developed various
28 damage models that assisted Class Counsel at the time of mediation. See JCL Dec., ¶ 14.

Overall, Class Counsel thoroughly investigated the claims at issue. The investigation included the review of time and payroll records, applicable policies and communications with Plaintiff, among other things as detailed in the supporting declaration. See JCL Dec., ¶ 15.

C. The Parties Settled at Mediation

On April 5, 2022, the Parties participated in a full day mediation with Steve Serratore an experienced wage and hour mediator. The mediation concluded with a settlement. Thereafter, the Parties memorialized the settlement terms agreed to in the form of a Memorandum of Understanding (“MOU”). Class Counsel submits that the Settlement constitutes a fair, adequate, and reasonable compromise of the claims at issue. JCL Dec., ¶ 16.

III. ARGUMENT

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

The proposed Settlement, including a Gross Settlement Amount of Three Hundred Eighty-Five Thousand Dollars (\$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). 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. The Parties Reached the Settlement Through Arm’s-Length Bargaining Led by Experienced Counsel.

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

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

adequate and represent a reasonable compromise of the claims at issue. JCL Dec., ¶ 16.

2. Class Counsel’s 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. The investigation allowed Class Counsel to fully assess the nature and magnitude of the claims being settled, as well as the impediments to recovery, such as to make an independent assessment of the reasonableness of the terms to which the Parties have agreed. Based on this investigation of the facts, applicable law, and marketplace for similar settlements, and considering the risk of significant delay, uncertainty associated with litigation, and the various defenses asserted by Defendant, Class Counsel firmly believes this Agreement to be in the best interests of the Class Members. Because the Settlement’s terms are fair, reasonable, and adequate, the Court should preliminarily approve the Settlement. JCL Dec., ¶¶ 13-16.

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 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*

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.

1 v. *Eastman Kodak Co.* (W.D.N.Y. 2005) 228 FRD. 174, 186 (*quoting In re Michael Milken and Assoc.*
2 *Sec. Litig.* (S.D.N.Y. 1993) 150 F.R.D. 57, 66).)

3 The Gross Settlement Amount of \$385,000.00 is fair and reasonable considering the nature and
4 magnitude of the claims being settled and the various potential impediments to recovery. Prior to
5 mediation, Class Counsel retained Berger Consulting Group to develop economic damage models
6 measuring Defendant's liability exposure while accounting for the uncertainties of continued litigation.
7 The various models were informed by Class Counsel's investigation, including the analysis of a
8 significant sample of time and payroll data. Class Counsel projected Defendant's liability exposure for
9 *class claims* (excluding PAGA Penalties) at \$2,348,547 dollars. Thus, the Gross Settlement Amount of
10 \$385,000 represents approximately 16.4% of Defendant's *class-wide* liability exposure. The following
11 summarizes Defendant's estimated exposure. JCL Dec., ¶ 17.

12 (a) **Estimated Damages for Meal and Rest Period Violations and Defendant's**
13 **Failure to Maintain Records.**

14 Plaintiff's primary claim in this Action is that Defendant as a matter of policy and practice,
15 consistently violated the law by completely failing to provide meal breaks. Even when Defendant did,
16 it regularly violated the law by providing late, short and interrupted meal periods. Plaintiff also asserted
17 that Defendant's written policy was facially unlawful. Furthermore, Defendant failed to maintain
18 accurate records due to only tracking the length of shifts and not the meal periods. Defendant's time
19 and payroll data evidenced 40,800 meal break violations during the Class period. Although
20 Defendant's policies did provide for rest periods, it was Plaintiff's own experience that due to
21 understaffing, he never took rest periods and even if he could take a rest period, he was required to
22 remain on premises. In total, Class Counsel estimated Defendant's exposure for the meal claims at
23 \$727,683, rest periods at \$864,124. JCL Dec., ¶ 18.

24 Defendant argued, *inter alia*, that it provided the Class Members and Aggrieved Employees
25 with compliant meal and rest periods despite any inaccurate information found in its written policies.
26 Defendant also argued that despite the time records not including time entries for meal periods, it did
27 provide employees with compliant meal periods. Thus, Defendant argued that there was no potential
28 liability for Plaintiff's alleged meal and rest period violations and any claimed violations required a

highly individualized inquiry not suitable to class treatment. JCL Dec., ¶ 19.

(b) Exposure for Wage Statement Violations and Waiting Time Penalties

Plaintiff alleges that Defendant's alleged violations resulted in derivative violations of Labor Code sections 203 and 226(a). Class Counsel considered the arguable presence of various penalties and weighed the potential recoveries against probable defenses. Specifically, Defendant could argue that Plaintiff could not prove the "willful" prong needed to obtain waiting time penalties under Labor Code section 203. Additionally, Defendant could argue that Plaintiff could not show that Class Members suffered an "injury" because of wage statement violations, as required by Labor Code section 226. Plaintiff estimated Defendant's exposure for these claims to be approximately \$663,798 (\$425,648 for LC 203 penalties and \$238,150 for LC 226 penalties). JCL Dec., ¶ 20.

(c) Defendant's PAGA Exposure

Class Counsel's damage models also estimated Defendant's exposure for PAGA penalties. At the time of mediation, Plaintiff estimated Defendant's PAGA exposure to be approximately \$1,428,900 dollars. JCL Dec., ¶ 21. Under PAGA, Courts have considerable discretion to reduce the penalty award. In *Fleming v. Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011), a federal court reduced PAGA penalties from \$2,800,000 to \$500,000, a reduction of 82.2%, because the court found maximum penalties "unjust" because the employees had suffered no injuries. Some trial courts have actually awarded no civil penalties, even when Labor Code violations are established. See *In re Nordstrom Com. Cases*, 186 Cal.App.4th 576, 589 (2010) (affirming an award of \$0 in PAGA penalties in a wage and hour class action); *In re Taco Bell Wage & Hour Actions*, 2016 U.S. Dist. LEXIS 48557, *40-43 (E.D. Cal. Apr. 6, 2016) (PAGA penalties denied after trial).

To recover any PAGA penalties, Plaintiff would be required at trial to prove each of the underlying Labor Code violations. See *Cardenas v. McLane Foodservice, Inc.*, 2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011) ("Given the statutory language [of PAGA], a plaintiff cannot recover on behalf of individuals whom the plaintiff has not proven suffered a violation of the Labor Code by the defendant."). Here, Plaintiff would need to prove that each Aggrieved Employee suffered a violation for each pay period the employee worked. Again, Defendant raised several defenses that presented serious threats to the claims of the Plaintiff and the Aggrieved Employees. JCL Dec., ¶ 22. *Carrington v.*

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

6 The proposed Settlement allocates \$20,000 to satisfy the PAGA claims. This amount represents
7 approximately 5.2% of the Gross Settlement Amount. This achieves a fair, reasonable, and adequate
8 resolution of Plaintiff's PAGA claim. See *Moniz v. Adecco* (2021) 72 Cal.App.5th 56. Further, the
9 amount allocated to the satisfaction of Plaintiff's PAGA claim, is well within the range of
10 reasonableness. See, e.g., *Nordstrom Comm'n Cases* (2010) 186 Cal.App.4th 576, 589 (approving 0%
11 PAGA allocation); *Berry v. Urban Outfitters* (N.D. Cal. Lead Case No. 13-cv-02628-JSW) (approving
12 1% PAGA allocation in \$5M settlement); *Jack v. Hartford Fire Ins. Co.* (S.D. Cal. 2011) 2011 WL
13 4899942 * 6 (approving \$3,000 PAGA allocation in \$1.2M settlement); *Singer v. Becton Dickinson &*
14 *Co.* (S.D. Cal. 2010) 2010 WL 2196104 *2 (approving \$3,000 PAGA allocation in \$1M settlement);
15 and *Hopson v. Hanesbrands, Inc* (N.D. Cal. 2009) 2009 WL 928133 * 9 (approving \$1,500 PAGA
16 allocation in \$1.026M settlement.) JCL Dec., ¶ 23.

17 4. Inherent Risks of Continued Litigation Support Preliminary Approval.

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

23 With respect to the most immediate challenge, i.e., class certification, the risks attendant to the
24 certification of similar wage and hour claims are demonstrated by *Magadia v. Wal-Mart Associates,*
25 *Inc.* (9th Cir. 2021) 999 F.3d 668. There, the Ninth Circuit, vacated reversed and remanded a \$110
26 million judgement against an employer for, *inter alia*, inaccurately paying overtime, and directed the
27 trial court to enter judgement in favor of the employer. See also *O'Conner v. Uber Technologies, Inc.*
28 (9th Cir. 2018) 904 F.3d 1087 (decertification of wage and hour misclassification action); see also

1 *Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, 31 (reversing a trial verdict in favor
2 plaintiffs in a wage and hour class action)); *Tien v. Tenet Healthcare Corp.* (2012) 209 Cal.App.4th
3 1077, 1088 (“[T]he reason, if any, that employees might not take their breaks were predominantly
4 individualized questions of fact not susceptible to class treatment.”); *Ali v. U.S.A. Cab Ltd.* (2009) 176
5 Cal.App.4th 1333, 1341 (affirming denial of certification because employees’ declarations attesting to
6 having taken meal and rest breaks demonstrated that individualized inquiries were required to show
7 harm); Consequently, the uncertainty of obtaining certification through a contested motion is a
8 significant risk factor favoring settlement. JCL Dec., ¶ 24.

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

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

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

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

1 of the settlement here, as compared to potential value of the claims, offset by the various inherent risks
2 to continued litigation, the settlement is fair and reasonable. JCL Dec., ¶ 26.

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

4 The Class is entitled to the best practical notice under the circumstances. (*Kass v. Young* (1977)
5 67 Cal.App.3d 100, 106.) The purpose of the notice is to give class members sufficient information to
6 decide whether they should accept the benefits offered, opt out and pursue their own remedies, or object
7 to the settlement. (*Trotsky v. Los Angeles Fed Savings & Loan Assn.* (1975) 48 Cal.App.3d 143, 151-
8 52.) The notice must advise class members “that they may be excluded from the class if they so request
9 and that they will be bound by the judgment, whether favorable or not, if they do not request exclusion.”
10 (*Kass*, 67 Cal.App.3d at 106.) Authorities generally require service of the class notice by mail or similar
11 reliable means. (*Chance v. Super. Ct.* (1962) 58 Cal.2d 275, 290; *Cart v. Super. Ct.* (1975) 50
12 Cal.App.3d 960, 972.)³

13 The Parties jointly drafted the Notice Packet which fairly and neutrally informs the Class
14 Members of their rights and remedies. The Settlement Administrator will first verify addresses, then
15 mail the proposed Notice Packet to all Class Members. The Notice Packet will include information
16 regarding the nature of the lawsuit, a summary of the substance of the Settlement’s terms, the procedure,
17 and time within which to requests for exclusions or objections to the Settlement, the date for the final
18 approval hearing, the formula used to calculate settlement payments, and the terms and scope of the
19 Released Class Claims. Agreement at § III(R). The Parties negotiated this method to ensure delivering
20 the most reasonable method of notice to the Class Members while ensuring cost effective administration
21 of the Settlement. JCL Dec., ¶27.

22 Accordingly, both the method of disseminating the Notice Packet and content of the Notice
23 Packet satisfy due process. (See C.R.C. 3.776(e)-(f); *State of Cal. v. Levi Strauss* (1986) 41 Cal.3d
24 460,485 (the class notice must “fairly apprise the class members of the terms of the proposed
25 compromise and of the options open to dissenting class members.”).)

26
27 ³ Due process does not require that each class member actually receive a notice, but rather a procedure reasonably certain to
28 reach class members. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1789, at 253 (2d ed. 1986). If
appropriate notice is given, class members will be bound by the judgment even if they never actually receive the notice.
Fontana v. Elrod (7th Cir. 1987) 826 F.2d 729, 732.

C. The Court Should Preliminarily Approve the Enhancement 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); 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.) The Settlement provides for an Enhancement Award of \$10,000 for Plaintiff. JCL Dec., ¶29. Class Counsel on behalf of Plaintiff will file a formal motion for the negotiated Class Representative Service Award once preliminary approval of the Settlement is granted. Plaintiff respectfully submits that the above showing is sufficient for preliminary approval of the negotiated Class Representative Service Award. JCL Dec., ¶ 31.

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

The purpose of the Attorneys’ Fees in class action litigation is to reward counsel who took the risk of non-payment and invested in a case that achieved a substantial positive result for the class. California courts routinely award attorneys’ fees equaling one-third or more of the potential value of the common fund, the amount requested under this settlement. (*See Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66 n.11 (“Empirical studies show that regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.”).

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 Class Members. Considering the positive outcome, and considering the supporting authority, the proposed Attorneys’ Fees and reimbursement of Attorneys’ Expenses are fair and reasonable. JCL Dec., ¶ 32.

Plaintiff will file a formal motion for the Attorneys’ Fees and Attorneys’ Expenses once preliminary approval of the Settlement is granted. Plaintiff respectfully submits that the above showing is sufficient for preliminary approval of the negotiated attorneys’ fees. JCL Dec., ¶ 33.

E. Provisional Certification for Settlement Purposes Is Appropriate

For Settlement, Plaintiff contends, and Defendant does not dispute, that provisional certification

1 of the Class is appropriate. JCL Dec., ¶ 34.

2 1. The Standard for Class Certification

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

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

13 Whether a class is “ascertainable” within the meaning of Code of Civil Procedure section 382 is
14 “determined by examining (1) the class definition, (2) the size of the class, and (3) the means available
15 for identifying class members.” (*Lee*, 166 Cal.App.4th at 1334.) Class members are ascertainable
16 where they may be readily identified without unreasonable expense or time by reference to official
17 records. (*Id.*). The community of interest requirement embodies three factors: (1) predominant common
18 questions of law or fact; (2) a class representative with claims or defenses typical of the class; and (3)
19 a class representative and counsel who can adequately represent the class. (*Cal. Civ. Proc. Code* § 382.)

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

25 Because all Class Members are Defendant’s current and former non-exempt employees, the class
26 is readily ascertainable from Defendant’s regular business records, i.e., payroll records. JCL Dec., ¶ 35.

27 The statutes relating to each of Plaintiff’s claims apply with equal force and effect to the entire
28 Class. Factually, Defendant’s policies and practices apply class-wide and Defendant’s liability can be

1 determined by facts common to all members of the class. The wage and hour issues are both numerous
2 and substantial, and a class action is the most advantageous method of dealing with the claims of the
3 Class. JCL Dec., ¶ 36.

4 Plaintiff's wage and hour claims are typical of the proposed Class because they arise from the
5 same factual basis and are based on the same legal theories applicable to the other Class Members.
6 Likewise, Plaintiff's interests are entirely coextensive with the interests of the Class. Plaintiff alleges
7 that he was injured by the same company-wide practices to which the proposed Class Members were
8 subject to and seeks the same relief. Plaintiff has already demonstrated his ability to advocate for the
9 interests of the Class Members by initiating this litigation, undertaking extensive class discovery, and
10 evaluating the proposed settlement to assure that it is fair. JCL Dec., ¶ 37.

11 Additionally, Plaintiff is represented by competent Class Counsel who have extensive experience
12 in litigating wage and hour class action cases. Class Counsel successfully briefed, argued, certified, and
13 gained state court settlement approval of the same class-wide causes of action that are at issue in this
14 case. Class Counsel's wage and hour class action experience establishes that they are well qualified to
15 represent the interests of this Class. JCL Dec., ¶39, JCL Dec. Exhibit 3; Declaration of Shani Zakay,
16 ¶¶ 1-4; Exhibit 1 to Declaration of Shani Zakay; Declaration of Paul K. Haines, ¶¶1-9.

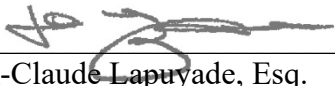
17 A class action is superior to a multitude of individual lawsuits. Given the size and amount of
18 each individual claim, the Class Members likely have little incentive to litigate their claims on an
19 individual basis because the out-of-pocket expense and personal commitment necessary to litigate each
20 claim outweighs any potential recovery. In sum, class treatment is superior to individual, case-by-case
21 adjudication. JCL Dec., ¶ 38.

22 IV. CONCLUSION

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

26
27 Dated: May 3, 2023

JCL LAW FIRM, APC

28 By: 
Jean-Claude Lapuyade, Esq.