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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

TYRA TOLER, an individual, on behalf of herself
and on behalf of all persons similarly situated,

Plaintiffs,

v.

TOTAL TESTING SOLUTIONS, LLC, a
California limited liability company and DOES 1
through 50, inclusive,

Defendants.

Case No. 21STCV38452

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

Date: December 13, 2022
Time: 9:00 a.m.

Judge: Hon. Elihu M. Berle
Dept.: 6

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5	<i>Apple Computer, Inc. Derivative Litig.</i>	
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7	<i>A.S.A Cal Ltd.</i>	
8	(2009) 176 Cal.App.4th 1333, 1341.....	17
9	<i>Brinker</i>	
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14	(2008) 162 Cal.App.4th 1193, 1207.....	21
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20	(1975) 50 Cal.App.3d 960, 972.....	19
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26	(2008) 162 Cal.App.4th 43, 66 n.11.....	20
27	<i>Clark v. American Residential Services LLC</i>	
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14	(C.D. Cal. 2009) 2009 WL 4581276, at *7.....	17
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	<i>Officers for Justice v. Civil Serv. Comm'n</i>	
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	<i>Omnivision Tech, Inc.</i>	
	(N.D. Cal. 2008) 559 F.Supp.2d 1036.....	11
	<i>Ordonez v. Radio Shack, Inc.</i>	
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1	<i>Taco Bell Wage & Hour Actions</i>	
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3	<i>Tien v. Tenet Healthcare Corp.</i>	
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5	<i>Trotsky v. Los Angeles Fed Savings & Loan Assn.</i>	
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7	<i>Villa v. United Site Servs. of California, Inc.</i>	
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SECONDARY SOURCES

26	Conte & Newberg, <i>Newberg on Class Actions</i> , § 1 1:38, §§ 11.26, 11.51 (4th ed. 2002)	
27		9, 20
28	Eisenberg & Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study,	
29	53 UCLA L. Rev. 1303 (2006)	
30		20
31	Theodore Eisenberg & Geoffrey P. Miller, <i>Attorney Fees in Class Action Settlements: An Empirical</i>	
32	<i>Study, J. of Empirical Legal Studies</i> , Vol. 1, Issue 1, 27-78, March 2004, at 35	
33		20-21
34	Wright, A. Miller & M. Kane, <i>Federal Practice and Procedure</i> § 1789, at 253 (2d ed. 1986)	
35		19

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I. INTRODUCTION

Plaintiff TYRA TOLER (“Plaintiff”) seeks preliminary approval of the Class Action and PAGA Settlement Agreement (“Agreement”)¹, which if approved, would provide valuable monetary relief for approximately 311 Class Members and 217 Aggrieved Employees. The basic terms of the Agreement provide for the following:

1. The **“Class”** and **“Class Period”** shall mean all individuals who were paid on an hourly basis by Defendant and performed work in California (“Class”) during the period from October 19, 2017, to June 7, 2022 (“Class Period”). Agreement at §§ 1.5, 1.12.

a. The **“Participating Class Members”** means a Class Member who does not submit a valid and timely Request for Exclusion from the Settlement. Agreement at § 1.36.

b. The **“Class Size”** is comprised of 311 individuals who collectively worked approximately 6,150 Workweeks during the Class Period as estimated by Defendant at the time of mediation. Agreement at § 4.1.

2. The **“Aggrieved Employees”** and **“PAGA Period”** means all individuals who were paid on an hourly basis by Defendant and performed work in California (“Aggrieved Employees”) during the period of August 12, 2020, to June 7, 2022 (“PAGA Period”). Agreement at §§ 1.4, 1.32. Aggrieved Employees do not have the ability to opt-out of the PAGA portion of the settlement. Agreement at § 8.5.4. At the time of mediation, there were approximately 217 Aggrieved Employees during the PAGA Period. Agreement at § 4.1.

3. The **“Gross Settlement Amount”** is One Hundred Sixty Thousand Dollars and Zero Cents (\$160,000.00). Agreement at § 1.23. The Gross Settlement Amount is non-reversionary and includes the following:

a. A **“Class Representative Service Payment”** of not more than \$10,000 to Plaintiff in recognition of her efforts and risks in assisting with the prosecution of the Action and in exchange for executing a General Release. Agreement at §§ 1.13, 6.1.

b. A **“Class Counsel Fees Payment”** and **“Class Counsel Litigation Expenses”**

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.

1 **Payment**” (hereinafter, collectively “Class Counsel Fees and Expenses Payment”) in the amount not
2 to exceed one-third of the Gross Settlement Amount for attorney’s fees, currently estimated to be
3 \$53,333.33 *and* litigation expenses not to exceed \$20,000, to be paid to Class Counsel. Agreement at
4 §§ 1.7, 3.2.2;

5 c. A “**PAGA Penalties**” of Five Thousand Dollars (\$5,000) shall be allocated from
6 the Gross Settlement Amount for settlement of claims for civil penalties under the Private Attorneys
7 General Act of 2004 (“PAGA Penalties”). The Settlement Administrator shall pay seventy-five (75%)
8 of the PAGA Penalties (\$3,750) to the Labor and Workforce Development Agency (“LWDA PAGA
9 Payment”). Twenty-five percent (25%) of the PAGA Penalties (\$1,250) will be distributed to the
10 Aggrieved Employees (“Individual PAGA Payment”). Agreement at § 1.25, 1.28, and 1.35; and

11 d. “**Administration Expenses Payment**” not to exceed \$10,000 payable to the
12 Settlement Administrator, ILYM Group, Inc., for, *inter alia*, the administration of the Class Notice and
13 Administration Expenses Payment. Agreement at § 3.2.3.

14 4. The “**Net Settlement Amount**” of approximately \$61,666.67 (Gross Settlement Amount
15 less the requested Class Counsel Fees and Expenses Payment, Class Representative Service Payment,
16 PAGA Penalties, and Administration Expenses Payment) which will be allocated to all Participating
17 Class Members on a pro-rata basis according to the number of Workweeks each Settlement Class
18 Member worked during the Class Period. Agreement at §§ 1.29, 3.2.4. The entire Net Settlement
19 Amount will be paid to all Participating Class Members who do not opt out of the Settlement Class
20 resulting in an average Individual Class Payment of **\$198.28**. JCL Dec., ¶ 6.

21 An objective evaluation of the Settlement confirms that the relief negotiated on behalf of the
22 Class is fair, reasonable, and adequate. The Settlement was negotiated by the Parties at arm’s length.
23 The Settlement confers substantial benefits to the Settlement Class. The relief offered by the Settlement
24 is particularly impressive when viewed against the difficulties encountered by plaintiffs pursuing wage
25 and hour cases (*see infra*). Indeed, by settling now rather than proceeding to trial, Class Members will
26 not have to wait (possibly years) for relief, nor will they have to bear the risk of class certification being
27 denied or of Defendant prevailing at trial. JCL Dec., ¶ 6.

28 As discussed below, the proposed Settlement satisfies all criteria for preliminary settlement

1 approval and falls within the range of reasonableness. The average Individual Class Payment to the
2 Settlement Class meets awards in similar wage and hour class actions. Moreover, the proposed
3 Settlement Class is appropriate for provisional certification. Accordingly, Plaintiff respectfully requests
4 the Court grant preliminary approval of the Settlement. JCL Dec., ¶ 7.

5 **II. FACTS AND PROCEDURE**

6 **A. Overview of the Litigation**

7 Defendant provides medical diagnostic services throughout California, including in Los
8 Angeles County where Plaintiff worked. Plaintiff worked for Defendant in California from January
9 of 2021 to April of 2021. At all times during her employment, Plaintiff was denied legally compliant
10 meal and rest periods, and minimum wages and overtime compensation. Throughout her employment,
11 Plaintiff was subject to Defendant's written policies and procedures contained in, among other
12 documents, the "Total Testing Solutions Employee Handbook." JCL Dec., ¶ 8.

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

20 On August 12, 2021, Plaintiff served Defendant and the Labor and Workforce Development
21 Agency ("LWDA") with a Notice of Violations ("PAGA Notice"). Plaintiff's PAGA Notice set forth
22 the facts and theories supporting Defendant's alleged violations of various provisions of the California
23 Labor Code and applicable Industrial Welfare Commissions ("IWC") Wage Order and of her intent to
24 pursue claims under California Labor Code Private Attorneys General Act, Cal. Lab. Code Sections
25 2698 *et seq* ("PAGA"). JCL Dec., ¶ 10.

26 On October 19, 2020, Plaintiff filed a class action complaint in the Los Angeles County Superior
27 Court, Case No. 21STCV38452 ("Action"). The Action alleged nine causes of action against Defendant
28 for: (1) Unfair Competition in violation of Bus. and Prof. Code §§ 17200; (2) Failure to Pay Overtime

1 Wages in Violation of California Labor Code §§ 510; (3) Failure to Pay Minimum Wages in Violation
2 of California Labor Code §§ 1194, 1197, and 1197.1.; (4) Failure to Provide Required Meal Periods in
3 Violation of California Labor Code §§ 226.7 and 512; (5) Failure to Provide Required Rest Periods in
4 Violation of California Labor Code §§ 226.7 and 512; (6) Failure to Reimburse Employees for Required
5 Expenses in Violation of California Labor Code § 2802; (7) Failure to Provide Accurate Itemized Wage
6 Statements in Violation of California Labor Code §§ 226 and 226.2; (8) Failure to Provide Wages
7 When Due in Violation of California Labor Code §§ 201, 202, and 203; and (9) Violation of the Private
8 Attorneys General Act (“PAGA”). JCL Dec., ¶ 11.

9 After Plaintiff commenced written discovery, the Parties agreed to mediate this action. To
10 prepare for mediation, the Parties agreed to informally produce additional documents and data points
11 subject to the mediation privilege, including but not limited to, the Class Members’ time data and
12 certain payroll data points. As discussed *infra*, Plaintiff’s counsel retained the forensic consultants at
13 Berger Consulting Group (“BCG”) to analyze Defendant’s time and payroll data. JCL Dec., ¶ 12.

14 On June 7, 2022, the Parties participated in a full day mediation with highly regarded wage and
15 hour and PAGA mediator Kelly Knight, Esq. The mediation concluded with a settlement after both
16 sides agreed to a Mediator’s proposal which was subsequently memorialized in the form of a
17 Memorandum of Understanding. Thereafter, the Parties drafted and negotiated a long-form settlement
18 agreement, which is the subject of the instant motion. JCL Dec., ¶ 13.

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

20 Months before filing the Action, Class Counsel began its pre-filing investigation into the
21 Plaintiff’s complaints. Class Counsel’s investigation started with several lengthy interviews with
22 Plaintiff. As part of the interview process, the Plaintiff produced documents related to her employment,
23 including portions of Defendant’s handbooks, compensation policies and time and payroll records. At
24 the conclusion of the interviews, Class Counsel determined that Plaintiff’s complaints justified further
25 inquiry. JCL Dec., ¶ 14.

26 Class Counsel subsequently requested Plaintiff’s employee files from Defendant. In response,
27 Defendant produced hundreds of pages of documents, including but not limited, copies of Plaintiff’s
28 hiring documents and payroll and time records. Class Counsel reviewed and analyzed the documents

1 and determined the documents appeared to substantiate Plaintiff's claim that Defendant's failed to,
2 among other things, provide accurate wage statements and to provide compliant meal and rest periods.
3 JCL Dec., ¶ 15.

4 To prepare for mediation, Defendant produced the time and payroll records for the Class
5 Members, aggregate workweek and pay period data for the Class Members, aggregate meal premiums
6 paid to the Class Members, average hourly rate for the Class Members, and copies of applicable
7 handbooks, policies, and agreements. In total, Class Counsel reviewed more than 800 pages of
8 documents and more than 68,000 unique cells of time and payroll data. JCL Dec., ¶ 16.

9 Class Counsel then retained the statisticians and economists at BCG to evaluate the Class
10 Members' payroll and time data. BCG provides data analysis and damage modeling consulting
11 services, specializing in wage and hour class actions. BCG's team of financial and data analysts are
12 credentialed and experienced experts in their fields and have provided their expertise on thousands of
13 cases. JCL Dec., ¶ 17.

14 BCG analyzed Defendant's time and payroll data to assist in the development of various damage
15 models. Among other things, BCG determined the approximate amount of unpaid wages, amount of
16 unpaid overtime wages, number of workweeks, pay periods, average length of shifts and average
17 number of hours worked per week. BCG also estimated the number of missed, late, or truncated meal
18 and rest periods, the amount of unpaid wages, the amount of unpaid overtime, the amount of
19 unreimbursed business expenses, and the amount of missed meal and rest period premiums paid during
20 the Class Period. JCL Dec., ¶ 18.

21 Overall, Class Counsel thoroughly investigated the claims at issue, including: (1) determining
22 Plaintiff's suitability as a putative class representative through interviews, background investigations,
23 and analysis of her employment files; (2) evaluating all of Plaintiff's potential claims; (3) researching
24 similar wage and hour class actions as to the claims brought, the nature of the positions, and the type
25 of employer; (4) analyzing the Settlement Class's time and payroll records; (5) analyzing Defendant's
26 labor policies and practices; (6) researching settlements in similar cases as well as outstanding issues
27 which could affect settlement approval; (7) evaluating Plaintiff's claims and estimating Defendant's
28 liability for purposes of settlement; (8) drafting the mediation brief; and (9) participating in the

mediation. This investigation allowed Class Counsel to fully assess the nature and magnitude of the claims being settled, as well as the impediments to recovery, such as to make an independent assessment of the reasonableness of the terms to which the Parties have agreed. JCL Dec., ¶ 19.

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. JCL Dec., ¶ 20.

C. The Parties Settled at Mediation

On June 7, 2022, the Parties conducted a full day of mediation with Kelly Knight, Esq.. Mediator Knight 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 Knight'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, after both sides agreed to a Mediator's proposal. The complete and final terms of the Parties' settlement are now set forth in the Agreement. Class Counsel submits that the Settlement constitutes a fair, adequate, and reasonable compromise of the claims at issue. JCL Dec., ¶¶ 21-22.

D. The Proposed Settlement Fully Resolves Plaintiff's Claims

1. The Composition of the Participating Class Members

The proposed Settlement Class consists of all individuals who were paid on an hourly basis by Defendant and performed work in California between October 19, 2017, and June 7, 2022. The Settlement Class excludes any person who submits a timely and valid request for exclusion. At the time of mediation, Defendant estimated that the Settlement Class was comprised of 311 individuals that worked approximately 6,150 workweeks during the Class Period. Agreement at § 4.1.

2. The Settlement Consideration

The Parties agreed to settle the underlying class claims in exchange for the Gross Settlement Amount of \$160,000. The Gross Settlement Amount includes: (1) Individual Class Payments to the

1 Settlement Class; (2) a Class Representative Service Payment of not more than \$10,000 to Plaintiff for
2 her services on behalf of the Settlement Class and, equally important, for a general release of claims;
3 (3) a PAGA Penalties in the amount of \$5,000; (4) Administration Expenses Payment estimated at
4 \$10,000; (5) Class Counsel Fees and Expenses Payment in the amount of \$73,333.33, comprised of
5 attorneys' fees equal to one-third of the Gross Settlement Amount estimated to be \$53,333.33 and an
6 estimated \$20,000 for actually incurred litigation expenses. See generally Agreement at § 3.

7 Subject to the Court approving the Class Representative Service Payment, Class Counsel Fees
8 and Expenses Payment, PAGA Penalties, and the Administration Expenses Payment, the Net
9 Settlement Amount will be distributed to each participating member of the Settlement Class Member.
10 Agreement at § 1.29. There is no reversion to Defendant and Defendant must separately pay for its
11 share of the employer payroll taxes. Agreement at § 3.1.

12 3. The Funding Date

13 Assuming there are no objectors, and no appeal is filed, Defendant will fund the Gross Settlement
14 Amount within sixty-five (65) days of the Court's entry of the order granting final approval of this
15 Settlement. Agreement at § 4.3.

16 4. Formula for Calculating Individual Class Payments

17 Participating Class Members will receive an Individual Class Payment. The Individual Class
18 Payment will be proportional to the number of Workweeks each Class Member worked for Defendant
19 in California during the Class Period. Agreement at § 3.2.4. The Class Data provided by Defendant to
20 the Settlement Administrator will include the number of Workweeks for each Class Member and the
21 number of PAGA Pay Periods worked during the relevant periods. Agreement at § 1.8. Each Class
22 Member's final Individual Class Payment for purposes of payment will be calculated by using a
23 fraction, the numerator of which is the Class Member's total number of Workweeks, and the
24 denominator of which is the total number of Workweeks of all Class Members. Agreement at § 3.2.4.
25 For purposes of these calculations, a Workweek shall mean any week during which a Class Member
26 worked for Defendant for at least one day during the Class Period. Agreement at § 1.46. Each
27 Individual Class Payment will be reduced by any legally mandated employee tax withholdings (e.g.,
28 employee payroll taxes, etc.). Individual Class Payments for members of the Settlement Class who

submit valid and timely requests for exclusion will be redistributed to Participating Class Members who do not submit valid and timely requests for exclusion on a pro rata basis. Agreement at § 3.4.2.

Given that there are approximately 311 Participating Class Members, the average gross recovery is approximately \$198.28 (Net Settlement Amount divided by Participating Class Members). JCL Dec., ¶ 6.

5. Release by Participating Class Members

Generally, as of the Funding Date, Plaintiff and the Participating Class Members will agree to release the Released Parties from the Released Class Claims (those that were asserted in the Action, or could have been asserted in the Action, based on the facts, claims and theories plead in the operative complaint) that accrued during the Class Period. Agreement at §§ 1.40; 6.2.

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 (those that were asserted in the operative complaint and Plaintiff's PAGA notice to the LWDA) that accrued during the PAGA Period. Agreement at §§ 1.41; 6.3.

III. ARGUMENT

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

The proposed Settlement, including a Gross Settlement Amount of \$160,000.00 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

1 range.” (*See North County Contractor’s Assn., Inc. v. Touchstone Ins. Services* (1994) 27 Cal.App.4th
2 1085, 1089-90; Conte & Newberg, *Newberg on Class Actions*, §§ 11.26 (4th ed. 2002).)
3 Reasonableness and fairness are presumed where: (1) the settlement is reached through “arms-length
4 bargaining;” (2) investigation and discovery are “sufficient to allow counsel and the court to act
5 intelligently;” (3) counsel is “experienced in similar litigation. . . .” (*Dunk v. Ford Motor Co.* (1996)
6 48 Cal.App.4th 1794, 1802.) The presumption of fairness is consistent with California’s public policy
7 goal of favoring settlements. (*Stambaugh v. Super. Ct* (1976) 62 Cal.App.3d 231, 236 (“the law wisely
8 favors settlements”); *Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1118 (“public
9 policy generally favors the compromise of complex class action litigation”); *7-Eleven Owners for Fair
10 Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1151 (“voluntary conciliation and
11 settlement are the preferred means of dispute resolution ... [t]his is especially true in complex class
12 action litigation”).)

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

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

21 “[W]hat transpires in settlement negotiations is highly relevant to the assessment of a proposed
22 settlement’s fairness.” (*State v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 482.) Courts presume the
23 absence of fraud or collusion in the negotiation of a settlement, unless evidence to the contrary is
24 offered; thus, there is a presumption that settlement negotiations are conducted in good faith. (Newberg,
25 § 11.51.)

26 The Parties participated in mediation the highly respected mediator Kelly Knight, Esq. Mediator
27 Knight managed the Parties’ expectations and provided a useful, neutral analysis of the issues and risks
28 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. JCL Dec., ¶ 22.

Once the Parties agreed to the Mediator’s proposal, the Parties engaged in negotiations regarding the written terms of the class action settlement. The Agreement is the final product of the mediated negotiations. Objectively, the Settlement terms are fair, adequate and represent a reasonable compromise of the claims at issue. JCL Dec., ¶ 22.

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

As set forth in greater detail above, Class Counsel conducted a very thorough investigation into the factual and legal issues in dispute. In addition to informal discovery, document review, data analysis and legal research, Class Counsel also researched similar wage and hour actions. Although no two cases are identical, this research provided Class Counsel with a marker to inform settlement discussions and, ultimately, to measure this settlement against. The investigation allowed Class Counsel to realistically assess the value of Plaintiff’s claims and intelligently engage defense counsel in settlement discussions that culminated in the proposed settlement now before the Court. JCL Dec., ¶ 19.

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. JCL Dec., ¶ 20.

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

The Gross Settlement Amount of \$160,000.00 is within the range of reasonableness. To

determine whether a settlement is fair and reasonable, the court should “consider enough information about the nature and magnitude of the claims being settled, as well as the impediments to recovery, to make an independent assessment of the reasonableness of the terms to which the parties have agreed.” (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133.) In making this determination, the court is “not to try the case” but rather “satisfy itself that the class action settlement is within the ‘ballpark of reasonableness.’ ” (*Id.* (emphasis added).) For this analysis, courts do “not require any such explicit statement of value; [they] require[] a record which allows an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.” (*Munoz v. BCI Coca-Cola Bottling Co.* (2010) 186 Cal.App.4th 399, 409 (internal citation omitted).) The reasonableness of a settlement is not dependent upon its actual value approaching the potential recovery plaintiffs might have received if they had succeeded at trial.² Indeed, “[t]he determination whether a settlement is reasonable does not involve the use of a ‘mathematical equation yielding a particularized sum.’ ” (*Frank v. Eastman Kodak Co.* (W.D.N.Y. 2005) 228 FRD. 174, 186 (quoting *In re Michael Milken and Assoc. Sec. Litig.* (S.D.N.Y. 1993) 150 F.R.D. 57, 66).)

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

The Gross Settlement Amount of \$160,000.00 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 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 \$963,769.61 (“Realistic Damages”) and \$1,898,078.73 (“Maximum

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”).

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 16.60% (“Realistic Damages”) and 8.43% (“Maximum Damages”) of Defendant’s class-wide exposure – well within the recognized range of reasonableness. The following summarizes Defendant’s liability exposure. JCL Dec., ¶ 23.

(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 as a result of their rigorous work schedules, Plaintiff, Class Members, and Aggrieved Employees were not able to take timely and duty-free meal periods. Consequently, Plaintiff alleges that she is owed meal period premiums for meal period violations that occurred during the Class Period. An analysis of the Class Members’ time and payroll data revealed a modest 30.3% meal period violation rate. JCL Dec., ¶ 24.

Conversely, Defendant argued, among other things, that it provided all their employees, i.e., Class Members and Aggrieved Employees, with the opportunity to take compliant meal and rest periods. Defendant also argued that it maintained facially compliant meal and rest period policies. Thus, Defendant argued that there was no potential liability for Plaintiff’s alleged meal and rest period violations and any claimed violations required a highly individualized inquiry not suitable to class treatment. Further, payroll data evidenced that Defendant paid meal period premiums on 53% of all potential meal period violations identified by BCG, totaling \$110,006 in meal premium payments. Thus, Defendant argued that its practice of paying meal period premiums for reported meal period violations evidenced that all remaining potential violations were voluntary and did not give rise to any potential liability. At a minimum Defendant argued that any potential recovery for meal period violations would be drastically reduced by the amount of meal period premium payments. JCL Dec., ¶ 25.

Consequently, Plaintiff applied a 50% discount to this claim to account for the modest violation rate, facially compliant policies, and payment of meal period premiums. Plaintiff estimated that the damages for this claim ranged from approximately \$52,729.00 dollars to approximately \$105,458.00 dollars. JCL Dec., ¶ 26.

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

2 Plaintiff also alleged that Defendant failed to provide compliant rest periods. Specifically,
3 Plaintiff alleged that because of their rigorous work schedules, Plaintiff and Class Members were not
4 able to take timely and duty-free rest periods. Like the meal period violations, BCG assumed an
5 identical 30.3% violation rate for rest periods based on Plaintiff's testimony and investigation.
6 However, unlike the meal period premium payments, there was no evidence Defendant ever paid a
7 premium for missed rest periods. JCL Dec., ¶ 27.

8 Again, Defendant denied liability and asserted that it maintained legally compliant rest period
9 policies and practices throughout the Class Period. Moreover, Plaintiff recognizes the evidentiary
10 burdens establishing this claim. Establishing Plaintiff's rest period claim would rely, almost entirely,
11 on Class Member testimony, making it a riskier claim at class certification and liability stages.
12 Certification likely would have required depositions of Class Members who provided declarations, and
13 Defendant surely would have obtained opposing declarations stating either rest breaks were taken, or
14 rest breaks were voluntarily waived. *See, e.g., Ordonez v. Radio Shack, Inc.* (C.D. Cal. Jan. 17, 2013)
15 2013 WL 210223, at *11 ("Because of the competing testimony before the Court, plaintiff's evidence
16 that defendant may have an illegal, written rest break policy is insufficient for this Court to find that
17 common issues predominate."); *Villa v. United Site Servs. of California, Inc.* (N.D. Cal. Nov. 13, 2012)
18 2012 WL 5503550, at *8 ("Indeed, Plaintiff's own evidence confirms that the written policy does not
19 generate uniform practices."). Accordingly, Plaintiff's Realistic Damage model applied a 50% discount
20 to the rest break claim. Plaintiff estimated the range of potential outcomes for this claim was between
21 approximately \$101,954.88 dollars to approximately \$203,909.77 dollars. JCL Dec., ¶ 28.

22 (3) Defendant's Estimated Exposure for Unpaid Wages

23 Plaintiff also alleged that Defendant failed to pay its employees for all hours worked.
24 Specifically, Plaintiff asserted that Defendant failed to pay employees for time spent donning and
25 doffing before starting their shifts. Based on Plaintiff's testimony and Class Counsel's investigation,
26 BCG estimated that Class Members performed a total of 5 minutes of unpaid work donning and doffing
27 personal protective equipment ("PPE") before and after every shift. As a result, Plaintiff and Class
28 Members forfeited compensation, including overtime wages, for all the time they spent working under

1 Defendant's control. JCL Dec., ¶ 29.

2 Defendant vigorously denied liability for this claim. Further, Defendant asserted that it had in
3 place a written policy required its employees to accurately record all their time worked daily and
4 argued that such written policies and procedures directed its employees not to work while off the
5 clock. Further, Defendant argued that the off-the-clock claim was not suitable to class treatment
6 because individualized issues predominated. For example, even assuming Plaintiff performed work
7 while off-the-clock, which Defendant disputes, the time spent would vary drastically from class
8 member to class member that it could not be established by common proof. Defendant further argued
9 that not all Class Members were required to wear PPE to perform their job duties, thus, creating
10 additional individualized issues. Plaintiff recognized the risks and uncertainties of certifying this
11 claim. Consequently, Plaintiff's Realistic Damage model applied a 25% discount to this claim.
12 Plaintiff estimated Defendant's exposure for this claim ranged between \$44,271.72 dollars and
13 \$59,028.96 dollars. JCL Dec., ¶ 30.

14 (4) Defendant's Estimated Exposure for Unreimbursed Business Expenses

15 Plaintiff alleged that Defendant required the Class Members to use their personal cellular phones
16 as a result of and in furtherance of their job duties but were not reimbursed by Defendant. California
17 employers who require employees to incur personal business expenses for work purposes must
18 reimburse the employee for the cost incurred. (See Cal. Labor Code § 2802(a), providing that "An
19 employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the
20 employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the
21 directions of the employer..."). Specifically, Plaintiff and other Class Members were required to
22 download the mobile application "Advance MD" on their personal cell phone to register Defendant's
23 patients. BCG estimated a reasonable \$25 monthly reimbursement rate for Class Members for the use
24 of their personal cell phones. JCL Dec., ¶ 31.

25 Again, Defendant denied any liability for this claim. Defendant argued that its written policies
26 provide for reimbursement to employees for necessary business expenses incurred in the discharge of
27 the employees' duties or at Defendant's direction. Further, Defendant argued that not all Class
28 Members were required to use "Advance MD" in the performance of their job duties. Thus, Defendant

1 argued, that even if Plaintiff were successful in this claim only a small number – approximately half –
2 of the Settlement Class would be entitled to relief. This claim was also heavily discounted by 50%
3 based on Defendant’s defenses. Plaintiff estimated Defendant’s exposure for this claim ranged between
4 approximately \$21,012.50 dollars and approximately \$42,025.00 dollars. JCL Dec., ¶ 32.

5 (5) Defendant’s Estimated Exposure for Wage Statement Violations

6 Plaintiff also alleged that Defendant failed to furnish its employees with accurate itemized wage
7 statements. Specifically, Plaintiff alleges that as a result of Defendant’s failure to provide meal and rest
8 periods as required by the California Labor Code, Plaintiff and other Class Members are entitled to
9 derivative wage statement penalties. (*See Naranjo v. Spectrum Security Services* (2022) 13 Cal. 5th 93
10 (concluding that meal premiums are “wages” entitling employees to derivative wage statement
11 penalties). Further, Defendant argued that even it failed to furnish accurate wage statements, Plaintiff
12 could not establish the injury requirement on a class-wide basis. As a result, Plaintiff discounted this
13 claim 50% to account for this risk. Plaintiff estimated that Defendant’s exposure on this claim ranged
14 between \$150,425.00 dollars and \$300,850.00 dollars. JCL Dec., ¶ 33.

15 (6) Defendant’s Estimated Exposure for Waiting Time Penalties

16 Plaintiff also alleged that the Defendant’s labor code violations resulted in derivative liability for
17 waiting time penalties. Although these *penalties* represented Defendant’s largest dollar amount of
18 exposure, this is Plaintiff’s most uncertain claim. Specifically, Defendant argued that Plaintiff could
19 not prove the “willful” prong needed to obtain waiting time penalties under Labor Code section 203.
20 Notwithstanding the uncertain nature of the claims, Plaintiff estimated Defendant’s exposure for these
21 claims ranged between \$572,391.00 dollars and \$1,144,782.00 million dollars. However, Class
22 Counsel’s Realistic Model discounted the waiting time penalty claim by 50% to approximately
23 \$572,391.00 because of the aforementioned risk factors. JCL Dec., ¶ 34.

24 (7) Defendant’s PAGA Exposure

25 Class Counsel’s damage models also estimated Defendant’s exposure for PAGA penalties. At
26 the time of mediation, Plaintiff estimated Defendant’s PAGA exposure ranged between \$157,850.00
27 dollars and \$883,750.00 dollars. JCL Dec., ¶ 35. The proposed PAGA allocation of the Gross Settlement
28 Amount is fair, just and reasonable. *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 77. Where

1 settlements “negotiate a good faith amount” for PAGA penalties and “there is no indication that this
2 amount was the result of self-interest at the expense of class members,” such amounts are generally
3 considered reasonable. *Hopson v. Hanesbrands Inc.*, No. CV-08-0844 EDL, 2009 WL 928133, at *9
4 (N.D. Cal. Apr. 3, 2009). Courts routinely approve of amounts for PAGA penalties in the range of zero
5 to two percent of the settlement. *See id.* at *1, 9 (approving a PAGA payment of 0.3%); *Jack v. Hartford*
6 *Fire Ins. Co.*, No. 09cv1683 MMA (JMA), 2011 WL 4899942, at *6 (S.D. Cal. Oct. 13, 2011)
7 (approving a PAGA payment of 0.25%); *McKenzie v. Fed. Express Corp.*, No. CV 10-02420 GAF
8 (PLAx), 2012 WL 12882124, at *5 (C.D. Cal. Jan. 23, 2012) (acknowledging that courts approve PAGA
9 claim settlements in the range of zero to two percent of the total settlement).

10 Here, the Parties negotiated a good faith PAGA Penalties in the amount of \$5,000 which is 3.1%
11 of the Gross Settlement Amount. This amount falls well within the range of approved PAGA Penalties.
12 Seventy-Five percent (75%) of the PAGA Penalties (\$3,750.00) will be paid to the LWDA (“LWDA
13 PAGA Payment”) with the remaining twenty-five percent (25%) of the PAGA Penalties (\$1,250.00)
14 will be distributed to the Aggrieved Employees, which is within the range of PAGA penalties approved
15 by courts and should be approved. JCL Dec., ¶ 36.

16 Under PAGA, Courts have considerable discretion to reduce the penalty award. In *Fleming v.*
17 *Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011), a federal court reduced PAGA penalties
18 from \$2,800,000 to \$500,000, a reduction of 82.2%, because the court found maximum penalties
19 “unjust” because the employees had suffered no injuries. Some trial courts have actually awarded no
20 civil penalties, even when Labor Code violations are established. *See In re Nordstrom Com. Cases*, 186
21 Cal.App.4th 576, 589 (2010) (affirming an award of \$0 in PAGA penalties in a wage and hour class
22 action); *In re Taco Bell Wage & Hour Actions*, 2016 U.S. Dist. LEXIS 48557, *40-43 (E.D. Cal. Apr.
23 6, 2016) (PAGA penalties denied after trial).

24 *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), illustrates the risk of PAGA claims.
25 In *Carrington*, while the plaintiff prevailed on his PAGA claim upon trial, the trial court reduced the
26 maximum PAGA penalty amount by 90%, citing the employer's good faith attempt at complying with
27 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

1 settlement. JCL Dec., ¶ 37.

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

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

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

12 Finally, continuing to litigate this action would require continued and extensive resources
13 coupled with significant Court time to proceed through trial and post-trial motions; which can often
14 take years. Furthermore, wage and hour litigation is complex and expensive, as it often necessitates
15 extensive expert testimony, particularly with regards to damages. But even if Plaintiff is successful at
16 trial, Plaintiff is acutely aware that a judgment does not end the litigation. Plaintiff fully expects that
17 Defendant would appeal any favorable judgment. As demonstrated by *Magadia, supra*, 999 F.3d 668,
18 the risk of an appeal and subsequent reversal is real. JCL Dec., ¶ 38. “Avoiding such a trial and the
19 subsequent appeals in this complex case strongly militates in favor of settlement rather than further
20 protracted and uncertain litigation.” (*Nat’l Rural Telecomms. Coop v. DirecTV* (C.D. Cal. 2004) 221
21 F.R.D. 523, 527.) Thus, “unless the settlement is clearly inadequate, its acceptance and approval are
22 preferable to lengthy and expensive litigation with uncertain results.” (*Id.* at 526.)

23 In this matter, Class Counsel negotiated a Gross Settlement Amount of \$160,000.00 that is
24 roughly between approximately 16.06% of Defendant’s *class-wide* liability exposure for damages, and
25 approximately 8.43% of Defendant’s maximum class wide liability exposure for damages and statutory
26 penalties. Given the amount of the settlement here, as compared to potential value of the claims, offset
27 by the various inherent risks to continued litigation, the settlement is fair and reasonable. JCL Dec., ¶
28 39.

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

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

11 The Parties jointly drafted the Class Notice which fairly and neutrally informs the Class
12 Members of their rights and remedies. The Settlement Administrator will first verify addresses, then
13 mail the proposed Class Notice to all Class Members. The Notice will include information regarding
14 the nature of the lawsuit, a summary of the substance of the Settlement’s terms, the class definition, the
15 procedure, and time period within which to requests for exclusions or objections to the Settlement, the
16 date for the final approval hearing, the formula used to calculate settlement payments, and the terms
17 and scope of the Released Claims. Agreement at § 1.1. The Parties negotiated this method to ensure
18 delivering the most reasonable method of notice to the Class Members while ensuring cost effective
19 administration of the Settlement. JCL Dec., ¶ 40.

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

24 **C. The Court Should Preliminarily Approve the Class Representative Service Payment**

25 Enhancement payments “are fairly typical in class action cases.” (*Cellphone Termination Fee*
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.

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

The Settlement provides for a Class Representative Service Payment of \$10,000 for Plaintiff. The service award is fair and reasonable compensation for the Plaintiff’s efforts bringing the action, assisting Class Counsel with the litigation and settlement, regularly conferring with Class Counsel on the status of her 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, and agreeing to provide Defendant a general release of all claims arising out of her employment. JCL Dec., ¶ 42.

Class Counsel on behalf of Plaintiff will file a formal motion for the negotiated Class Representative Service Payment 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 Payment. JCL Dec., ¶ 43.

D. The Court Should Preliminarily Approve the Class Counsel Fees and Expenses Payment

The purpose of a Class Counsel Fees and Expenses Payment 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*

1 *Settlements: An Empirical Study, J. of Empirical Legal Studies*, Vol. 1, Issue 1, 27-78, March 2004, at
2 35 (independent studies of class action litigation nationwide have come to a similar conclusion that a
3 one-third fee is consistent with market rates).)

4 Class Counsel took this matter on a contingency fee basis and invested significant time and
5 expense successfully prosecuting Plaintiff's claims. As discussed *supra*, the estimated average
6 Individual Class Payment illustrates the demonstrably positive outcome for the Participating Class
7 Members. Considering the positive outcome for the Class Members, and in light of the supporting
8 authority, the proposed Class Counsel Fees and Expenses Payments are fair and reasonable. JCL Dec.,
9 ¶ 44.

10 Plaintiff will file a formal motion for the negotiated Class Counsel Fees and Expenses Payment
11 once preliminary approval of the Settlement is granted. Plaintiff respectfully submits that the above
12 showing is sufficient for preliminary approval of the negotiated attorneys' fees. JCL Dec., ¶ 45.

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

14 For Settlement, Plaintiff contends, and Defendant does not dispute, that provisional certification
15 of the Class is appropriate. JCL Dec., ¶ 46.

16 1. The Standard for Class Certification

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

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

27 Whether a class is "ascertainable" within the meaning of Code of Civil Procedure section 382 is
28 "determined by examining (1) the class definition, (2) the size of the class, and (3) the means available

1 for identifying class members.” (*Lee*, 166 Cal.App.4th at 1334.) Class members are ascertainable where
2 they may be readily identified without unreasonable expense or time by reference to official records.
3 (*Id.*)

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

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

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

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

19 Plaintiff’s wage and hour claims are typical of the proposed Settlement Class because they arise
20 from the same factual basis and are based on the same legal theories applicable to the other Class
21 Members. Likewise, Plaintiff’s interests are entirely coextensive with the interests of the Settlement
22 Class. Plaintiff alleges that she was injured by the same company-wide practices to which the proposed
23 Class Members were subject to and seek the same relief. Plaintiff has already demonstrated her ability
24 to advocate for the interests of the Class Member by initiating this litigation, undertaking extensive
25 class discovery, and evaluating the proposed settlement to assure that it is fair. JCL Dec., ¶ 49.

26 Additionally, Plaintiff is represented by competent Class Counsel who have extensive experience
27 in litigating wage and hour class action cases. Class Counsel successfully briefed, argued, certified, and
28 gained state court settlement approval of the same class-wide causes of action that are at issue in this

1 case. Class Counsel's wage and hour class action experience establishes that they are well qualified to
2 represent the interests of this Class. JCL Dec., ¶¶ 51-58, Declaration of Shani Zakay, ¶¶ 1-3.

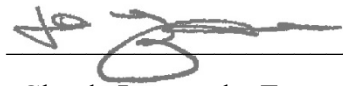
3 A class action is superior to a multitude of individual lawsuits. Given the size and amount of
4 each individual claim, the Class Members likely have little incentive to litigate their claims on an
5 individual basis because the out-of-pocket expense and personal commitment necessary to litigate each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

8 IV. CONCLUSION

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

12
13 Dated: November 9, 2022

JCL LAW FIRM, APC

14 By:  _____

15 Jean-Claude Lapuyade, Esq.
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