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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

RICARDO COLIN COVARRUBIAS, an
individual(s), on behalf of himself and on
behalf of all persons similarly situated,

Plaintiffs,

v.

PENINSULA CUSTOM HOMES, INC., a
California Corporation; and DOES 1-50,
Inclusive,

Defendants.

Case No. 22-CIV-02733

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

Date: December 6, 2022

Time: 2:00 p.m.

Judge: Hon. Marie S. Weiner

Dept.: 2

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11	<i>Zamora v. Balboa Life & Casualty LLC</i>	
12	No. BC360026 (LA. County Super. Ct. Mar. 7, 2013).....	19

SECONDARY SOURCES

13	Conte & Newberg, <i>Newberg on Class Actions</i> , §§ 11.26, § 1 1:38 (4th ed. 2002)	
14		9, 18
15	Eisenberg & Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study,	
16	53 UCLA L. Rev. 1303 (2006)	
17		18
18	Theodore Eisenberg & Geoffrey P. Miller, <i>Attorney Fees in Class Action Settlements: An Empirical</i>	
19	<i>Study</i> , <i>J. of Empirical Legal Studies</i> , Vol. 1, Issue 1, 27-78, March 2004, at 35	
20		20
21	Wright, A. Miller & M. Kane, <i>Federal Practice and Procedure</i> § 1789, at 253 (2d ed. 1986)	
22		17

I. INTRODUCTION

Plaintiff RICARDO COLIN COVARRUBIAS (“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 58 members of the Class and 40 Aggrieved Employees. The basic terms of the Agreement provide for the following:

1. The “**Class Members**”, “**Settlement Class Members**” and “**Class Period**” shall mean all non-exempt employees who are or previously were employed by PENINSULA CUSTOM HOMES, INC. (“Defendant”) and performed work in California (“Class or “Class Members”) from July 5, 2018 to October 3, 2022 (“Class Period”). Agreement at §§ I(G) and (H). The Settlement Class Members exclude any Class Member that submit a valid and timely request for exclusion. Agreement at § I(CC).

2. The “**Aggrieved Employees**” and “**PAGA Period**” means all non-exempt employees who are or previously were employed by Defendant and performed work in California (“Aggrieved Employees”) between November 9, 2020 and October 3, 2022 (“PAGA Period”). Agreement at §§ I(B) and (X). Aggrieved Employees do not have the ability to opt-out of the PAGA portion of the settlement.

3. The “**Gross Settlement Amount**” is Two Hundred Twenty-Five Thousand Dollars (\$225,000). Agreement at § I(P). The Gross Settlement Amount is non-reversionary and includes the following:

a. A “**Class Representative Service Payment**” of no more than \$10,000 to Plaintiff for his services on behalf of the Class Members. Agreement at § I(I);

b. A “**Class Counsel Award**” of up to one-third of the Gross Settlement Amount for attorney’s fees, currently estimated to be \$75,000 *and* costs to reimburse Class Counsel for their litigation costs and expenses not to exceed \$15,000, to be paid to Class Counsel. Agreement at § I(E);

c. A “**PAGA Settlement**” of \$10,000 shall be allocated from the Gross Settlement Amount for settlement of claims for civil penalties under the Private Attorneys General Act of 2004. The Settlement Administrator shall pay 75% of the PAGA Civil Penalty Payment to the Labor and Workforce Development Agency (“LWDA Payment”). The Settlement Administrator shall distribute

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.

25% of the PAGA Civil Penalty Payment proportionately to all Aggrieved Employees (“Individual PAGA Payment”). Agreement at § I(Y); and

d. “**Settlement Administration Costs**” estimated at \$7,000 payable to the Settlement Administrator, ILYM Group, Inc., for, *inter alia*, the administration of the Notice Packet and Individual Settlement Payments. Agreement at § III(K)(12).

4. The “**Net Settlement Amount**” of approximately \$108,000 (Gross Settlement Amount minus the requested Class Representative Service Award, Class Counsel Award, PAGA Settlement, and Settlement Administration Costs) which will be allocated to all Settlement Class Members on a pro-rata basis according to the number of Workweeks each Settlement Class Member worked during the Class Period. The entire Net Settlement Amount will be paid to all Class Members who do not opt out of the Settlement, i.e., Settlement Class Members. Assuming all Class Members participate in the Settlement, the average Individual Settlement Payment is estimated at **\$1,862.07**. Agreement at § I(R); JCL Dec., ¶ 6.

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 Payment to the Settlement Class Members 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 owns a residential construction business in California.

1 More specifically, Defendant specializes in building custom homes for its clients. This action asserts
2 claims on behalf of Defendant’s non-exempt employees working in California. Plaintiff, in his position
3 as a carpenter building custom homes, worked for Defendant as a non-exempt employee in California
4 between January 2021 to August 2021. At all times during his employment, Plaintiff earned an hourly
5 wage, including overtime, and was entitled to legally compliant meal and/or rest periods. Throughout
6 his employment, Plaintiff was subject to Defendant’s written policies and procedures. JCL Dec., ¶ 8;
7 Declaration of Ricardo Colin Covarrubias (“Covarrubias Dec.”) at ¶¶ 1-5.

8 Generally, Plaintiff claims that Defendant failed to pay for all time worked, including, time spent
9 waiting for and undergoing mandatory COVID-19 screenings, failed to provide compliant meal and
10 rest periods, failed to furnish accurate itemized wage statements, failed to pay all wages when due and
11 failed to reimburse employees for mandatory business expenses. Defendant forcefully denies liability
12 for each of Plaintiff’s claims. Further, Defendant asserts that it fully complied with all applicable
13 employment laws and raised several other significant defenses to Plaintiff’s claims, including but not
14 limited to, facially compliant meal and rest period policies, compliant wage statements, and timely
15 payment all wages due upon separation of employment. JCL Dec., ¶ 9.

16 On November 9, 2021, Plaintiff served Defendant and the Labor and Workforce Development
17 Agency (“LWDA”) with a Notice of Violations (“PAGA Notice”). Plaintiff’s PAGA Notice set forth
18 the facts and theories supporting Defendant’s alleged violations of various provisions of the California
19 Labor Code and applicable Industrial Welfare Commissions (“IWC”) Wage Order and of his intent to
20 pursue claims under California Labor Code Private Attorneys General Act, Cal. Lab. Code Sections
21 2698 et seq (“PAGA”). JCL Dec., ¶ 10.

22 On July 5, 2022, Plaintiff filed a class action complaint in the San Mateo Superior Court, Case
23 No. 22-CIV-02733 (“Action”). The Action alleged nine causes of action against Defendant for: (1)
24 Unfair Competition in Violation of California Business and Professions Code §§ 17200; (2) Failure to
25 Pay Minimum Wages in Violation of California Labor Code §§ 1194, 1197 and 1197.1; (3) Failure to
26 Pay Overtime Wages in Violation of California Labor Code §§ 510 *et seq.*; (4) Failure to Provide
27 Required Meal Periods in Violation of Cal. Lab. Code §§ 226.7 and 512; (5) Failure to Provide Required
28 Rest Periods in Violation of Cal. Lab. Code §§ 226.7 and 512; (6) Failure to Provide Accurate Itemized

1 Wage Statements in Violation of Cal. Lab. Code §226; (7) Failure to Provide Wages When Due in
2 Violation of Cal. Lab. Code §§ 201, 202 and 203; (8) Failure to Reimburse Employees for Required
3 Expenses in Violation of Cal. Lab. Code § 2802; and (9) Violation of the Private Attorneys General
4 Act [Labor Code §§ 2698 *et seq.*]. JCL Dec., ¶ 11.

5 Plaintiff and Defendant agreed to mediate the Action with Hon. Carl J. West (Ret.), a respected
6 jurist and experienced mediator of wage and hour class and PAGA actions. In anticipation of mediation,
7 the Parties agreed to stay formal discovery in the Action. To prepare for mediation, Defendant agreed
8 to informally produce documents and data points subject to the mediation privilege, including but not
9 limited to, the Class Members' time data and certain payroll data points. As discussed *infra*, Plaintiff's
10 counsel retained the forensic consultants at Berger Consulting Group ("BCG") to analyze Defendant's
11 time and payroll data. JCL Dec., ¶ 12.

12 On August 3, 2022, the Parties participated in a full day mediation with Judge West. After arms-
13 length negotiations and bargaining, the Parties agreed to a Mediator's Proposal and signed a
14 Memorandum of Understanding. Subsequently, the Parties drafted and negotiated a long-form
15 settlement agreement, which is the subject of the instant motion. The Parties now seek approval of the
16 entire Agreement. JCL Dec., ¶ 13.

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

18 Months before filing the Action, Class Counsel began its pre-filing investigation into Plaintiff's
19 complaints. Class Counsel's investigation started with several lengthy interviews with Plaintiff. As
20 part of the interview process, Plaintiff produced documents related to his employment, including time
21 and payroll records. At the conclusion of the interviews, Class Counsel determined that Plaintiff's
22 complaints justified further inquiry. JCL Dec., ¶ 14.

23 Class Counsel subsequently requested Plaintiff's employee files from Defendant. In response,
24 Defendant produced hundreds of pages of documents, including but not limited to, copies of Plaintiff's
25 hiring documents, payroll and time records, and various policies. Class Counsel reviewed and analyzed
26 the documents and determined the documents appeared to substantiate Plaintiff's claim that
27 Defendant's failed to, among other things, pay for all time worked and to provide compliant meal and
28 rest periods. JCL Dec., ¶ 15.

1 Considering the many anticipated factual disputes, the Parties agreed, relatively early in the
2 litigation, that it would be in the best interest of both Parties to mediate the matter. To prepare for
3 mediation, Class Counsel requested documents and data points to further evaluate Plaintiff's claims
4 and Defendant's liability exposure to the Class Members. In response to Class Counsel's request,
5 Defendant produced the time records for the Class Members, aggregate workweek and pay period data
6 for the Class Members, and copies of applicable handbooks, policies, and agreements containing, *inter*
7 *alia*, compensation, timekeeping and meal and rest period policies. In total, Defendant produced nearly
8 4,000 pages of pertinent policy documents and time and payroll data for Class Counsel to analyze. JCL
9 Dec., ¶ 16.

10 Class Counsel then retained the statisticians and economists at BCG to evaluate the Class
11 Members' payroll and time data. BCG provides data analysis and damage modeling consulting services
12 specializing in wage and hour class actions. BCG's team of financial and data analysts are credentialed
13 and experienced experts in their fields and have provided their expertise on thousands of cases. Stated
14 differently, the BCG is uniquely qualified to analyze Defendant's time and payroll data. JCL Dec., ¶
15 17.

16 BCG analyzed Defendant's time and payroll data to assist in the development of various damage
17 models. Among other things, BCG determined the approximate number of work shifts, workweeks,
18 pay periods, average length of shift and average number of hours worked per week and pay periods
19 during the Class Period. BCG also estimated the number of missed, late or truncated meal and rest
20 periods, the amount of paid missed meal period premiums paid during the Class Period, and the amount
21 of off-the-clock work performed by the Class Members during the Class Period. JCL Dec., ¶ 18.

22 In advance of mediation, Class Counsel created a damage model predicated on the BCG analysis.
23 Class Counsel's model calculated Defendant's potential liability exposure while accounting for the
24 uncertainties of continued litigation. This damage model informed and guided Class Counsel during
25 the mediated settlement discussions. JCL Dec., ¶ 19.

26 Overall, Class Counsel thoroughly investigated the claims at issue, including: (1) determining
27 Plaintiff's suitability as a putative class representative through interviews, background investigations,
28 and analysis of his employment files; (2) evaluating all of Plaintiff's potential claims; (3) researching

1 similar wage and hour class actions as to the claims brought, the nature of the positions, and the type
2 of employer; (4) analyzing the Class Members' time and payroll records; (5) analyzing Defendant's
3 labor policies and practices; (6) researching settlements in similar cases as well as outstanding issues
4 which could affect settlement approval; (7) evaluating Plaintiff's claims and estimating Defendant's
5 liability for purposes of settlement; (8) drafting the mediation brief; and (9) participating in the
6 mediation. This investigation allowed Class Counsel to fully assess the nature and magnitude of the
7 claims being settled, as well as the impediments to recovery, such as to make an independent
8 assessment of the reasonableness of the terms to which the Parties have agreed. JCL Dec., ¶ 20.

9 **C. The Parties Settled at Mediation**

10 On August 3, 2022, the Parties conducted a full day of mediation with Judge West. Judge West
11 helped manage the Parties' expectations and provided a useful, neutral analysis of the issues and risks
12 to both sides. The Parties made substantial progress with Judge West's assistance. Namely, the Parties
13 exchanged information regarding their respective claims and defenses, including their respective
14 evaluation of the damages. After a full day of arm's length and adversarial negotiations, the mediation
15 concluded in a Mediator's Proposal and settlement. The complete and final terms of the Parties'
16 settlement are now set forth in the Agreement. Class Counsel submits that the Settlement constitutes a
17 fair, adequate, and reasonable compromise of the claims at issue. JCL Dec., ¶¶ 21-22.

18 **D. The Proposed Settlement Fully Resolves Plaintiff's Claims**

19 1. The Composition of the Class

20 The proposed Class consists of all non-exempt employees who are or previously were employed
21 by Defendant and performed work in California from July 5, 2018 and October 3, 2022. The Settlement
22 Class excludes any Class Member who submits a timely and valid request for exclusion. Through the
23 conclusion of the Class Period, there are approximately 58 Class Members that worked an estimated
24 7,700 Workweeks during the Class Period. Agreement at § III(A)(2).

25 2. The Settlement Consideration

26 The Parties agreed to settle the underlying class claims in exchange for the Gross Settlement
27 Amount of \$225,000. The Gross Settlement Amount includes: (1) Individual Settlement Payments to
28 the Settlement Class; (2) a Class Representative Service Award of \$10,000 to Plaintiff for his services

on behalf of the Class; (3) a PAGA Settlement in the amount of \$10,000; (4) Settlement Administration Costs estimated at \$7,000; (5) a Class Counsel Award in the amount equal to one-third of the Gross Settlement Amount estimated to be \$75,000 plus reimbursement not to exceed \$15,000 for actually incurred litigation expenses. See generally Agreement at § III(K).

Subject to the Court approving the Class Representative Service Award, Class Counsel Award, PAGA Settlement, and the Settlement Administration Costs, the Net Settlement Amount will be distributed to each Settlement Class Member. Agreement at § III(K)(1). There is no reversion to Defendant and Defendant must separately pay for its share of the employer payroll taxes. Agreement at § III(A)(1).

3. The Funding Date

Assuming there are no objectors, and no appeal is filed, Defendant will fund the \$225,000 Gross Settlement Amount no later than sixty-five (65) calendar days after the Judgment becomes final. Agreement at § I(O).

4. Formula for Calculating Individual Settlement Payments

Each Settlement Class Member will receive an Individual Settlement Payment. The Individual Settlement Payment will be proportional to the number of Workweeks each Settlement Class Member worked for Defendant in California during the Class Period. The Class Data provided by Defendant to the Settlement Administrator will include the dates of employment during the Class Period and PAGA Period. Agreement at § I(F). Each Settlement Class Member's final Individual Settlement Payment for purposes of payment will be calculated by using a fraction, the numerator of which is the Settlement Class Member's total number of Workweeks, and the denominator of which is the total number of Workweeks of all Settlement Class Members. Each Individual Settlement Payment will be reduced by any legally mandated employee tax withholdings (e.g., employee payroll taxes, etc.). Individual Settlement Payments for Class Members who submit valid and timely requests for exclusion will be redistributed to the Settlement Class Members on a pro rata basis. Agreement at § III(K)(1).

Given that there are approximately 58 Class Members, the average gross recovery is approximately \$1,862.07 (Net Settlement Amount divided by Class Members). JCL Dec., ¶ 6.

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

Generally, upon 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 all PAGA claims alleged in the operative complaint at the time the Court enters an order preliminarily approving this Settlement and Plaintiff's PAGA notice to the LWDA which occurred during the PAGA Period. Agreement at §§ I(W)² and III(C).

A. The Court Should Preliminarily Approve the Proposed Class Action 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

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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). Reasonableness
3 and fairness are presumed where: (1) the settlement is reached through “arms-length bargaining;” (2)
4 investigation and discovery are “sufficient to allow counsel and the court to act intelligently;” (3)
5 counsel is “experienced in similar litigation. . . .” *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th
6 1794, 1802. The presumption of fairness is consistent with California’s public policy goal of favoring
7 settlements. *Stambaugh v. Super. Ct* (1976) 62 Cal.App.3d 231, 236 (“the law wisely favors
8 settlements”); *Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1118 (“public policy
9 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 Fee*
15 *Cases* (2010) 186 Cal.App.4th 1380, 1389. The inquiry “must be limited to the extent necessary to
16 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 with Judge West, a highly respected jurist and mediator.
27 Judge West managed the Parties’ expectations and provided a useful, neutral analysis of the issues and
28 risks to both sides. *In re Apple Computer, Inc. Derivative Litig*, No. C 06-4128 JF (HRL), 2008 U.S.

1 Dist. LEXIS 108195 (N.D. Cal. Nov. 5, 2008) (mediator’s participation weighs considerably against
2 any inference of a collusive settlement); *D’Amato v. Deutsche Bank* (2d. Cir. 2001) 236 F.3d 78, 85 (a
3 “mediator’s involvement in pre-certification settlement negotiations helps to ensure that the
4 proceedings were free of collusion and undue pressure.”). At all times, the Parties’ negotiations were
5 at an arm’s length, adversarial and non-collusive. The matter resolved only after a full day of mediated
6 negotiations managed by Judge West who heard arguments, reviewed evidence and evaluated the
7 Parties’ respective claims and defenses. JCL Dec., ¶ 21.

8 Once the Parties reached a settlement, the Parties engaged in protracted negotiations regarding
9 the written terms of the class action settlement. The Parties maintained the arm’s length, non-collusive
10 and adversarial negotiations while arriving at the final terms of the Settlement. The Agreement is the
11 final product of these mediated negotiations. Objectively, the Settlement terms are fair, adequate and
12 represent a reasonable compromise of the claims at issue. JCL Dec., ¶ 22.

13 2. The Settlement Falls Within the Recognized Range of Reasonableness.

14 The Gross Settlement Amount of \$225,000 is within the range of reasonableness. To determine
15 whether a settlement is fair and reasonable, the court should “consider enough information about the
16 nature and magnitude of the claims being settled, as well as the impediments to recovery, to make an
17 independent assessment of the reasonableness of the terms to which the parties have agreed.” *Kullar v.*
18 *Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133. In making this determination, the court is
19 “not to try the case” but rather “satisfy itself that the class action settlement is within the ‘ballpark of
20 reasonableness.’” *Id.* (emphasis added). For this analysis, courts do “not require any such explicit
21 statement of value; [they] require[] a record which allows an understanding of the amount that is in
22 controversy and the realistic range of outcomes of the litigation.” *Munoz v. BCI Coca-Cola Bottling*
23 *Co.* (2010) 186 Cal.App.4th 399, 409 (internal citation omitted). The reasonableness of a settlement is
24 not dependent upon its actual value approaching the potential recovery plaintiffs might have received
25 if they had succeeded at trial.³ Indeed, “[t]he determination whether a settlement is reasonable does

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27 ³ Federal district courts recognize that there is an inherent “range of reasonableness” in determining whether to approve a
28 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

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 \$225,000 is fair and reasonable considering the nature and magnitude of the claims being settled and the various potential impediments to recovery. Prior to mediation, Class Counsel retained BCG to develop economic a damage model measuring Defendant’s liability exposure while accounting for the uncertainties of continued litigation. The model was 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) at approximately \$890,835 for actual damages (excluding interest and penalties), and \$2,151,420 when also including interest and statutory penalties, if successful at trial. Thus, the Gross Settlement Amount of \$225,000 represents approximately 25.2% of Defendant’s liability for damages, and 10.4% of Defendant’s *class-wide* liability exposure, as estimated by Class Counsel at the time of mediation. The following summarizes Defendant’s estimated exposure. JCL Dec., ¶ 23.

(1) Estimated Exposure for Off-the-Clock Work

One of Plaintiff’s primary claims in the Action was that Defendant failed to pay for all hours worked. Specifically, Plaintiff asserted that Defendant employed an unlawful custom, practice, and policy that require employees to manipulate time records to make it appear as though each employee clocked-in and clocked-out in accordance with their scheduled shift without regard for the actual time an employee worked. Defendant did not keep actual time records. Rather, Defendant used pre-printed timesheets which simply show exactly eight hours worked each day, but do not accurately depict the actual start and end times of each employee’s shift. As a result, Plaintiff alleged that he often

only a fraction of the potential recovery”); *In re Global Crossing Sec. and ERISA Litig.* (S.D.N.Y 2004) 225 F.R.D. 436, 460 (“settlement amount’s ratio to the maximum potential recovery need not be the sole, or even dominant, consideration when assessing settlements fairness”); *In re IKON Office Solutions, Inc Sec Litig.* (E.D. Pa. 2000) 194 F.R.D. 166, 184 (“the fact that a proposed settlement constitutes a relatively small percentage of the most optimistic estimate does not, in itself, weigh against the settlement; rather the percentage should be considered in light of strength of the claims”); *Officers for Justice v. Civil Serv. Comm.* (9th Cir. 1982) 688 F.2d 615, 628 (it is “the complete package, taken as a whole rather than the individual component parts, that must be examined for overall fairness”).

1 performed pre-shift and post-shift work while off-the-clock, including but not limited to setting up
2 and breaking down his tools, and beginning his tasks for the day. Further, Plaintiff asserted that
3 Defendant failed to pay for all time spent waiting for and undergoing mandatory COVID-19
4 screenings, as well as attending off-the-clock training and orientation. JCL Dec., ¶ 24. Under
5 California law, any time an employee spends subject to an employer's control is compensable.
6 *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 583.

7 Defendant vigorously denied liability for claim. Defendant asserted that its written policies and
8 procedures directed its employees to accurately record their time and undergo COVID-19 screenings
9 while on-the-clock. Defendant asserted that any deviation from these written policies were employee
10 specific and, thus, created individualized issues of liability unsuitable for class treatment. JCL Dec.,
11 ¶ 25.

12 Notwithstanding Defendant's arguments, Plaintiff perceived the off-the-clock as a strong claim
13 in the Action. Assuming ten (10) minutes of unpaid compensable time per shift worked by the Class
14 Members during the Class Period, made up of COVID-19 screenings and other off-the-clock tasks,
15 plus two and a half (2.5) hours of unpaid training hours per Class Member during the Class Period,
16 BCG estimated Defendant's exposure for this claim at \$248,406, including interest. JCL Dec., ¶ 26.

17 (2) Estimated Damages for Meal Period Violations

18 Plaintiff also alleges that Defendant failed to provide compliant meal periods. Specifically,
19 Plaintiff contends that Defendant maintained records that recorded fictitiously compliant meal periods.
20 Defendant's pre-printed time records show auto-deducted, rounded meal breaks, without accurate
21 recording of when employees clocked in and out. This resulted in a purported 100% *compliance* rate
22 for meal periods. However, Plaintiff contends that despite the time records approximately 25% of all
23 meal periods were either missed, late, or interrupted. JCL Dec., ¶ 27. Conversely, Defendant asserted
24 that it maintained facially compliant meal period policies and practices throughout the Class Period and
25 that time records evidenced a 100% meal period compliance. Thus, Defendant argued that there was
26 no potential liability for Plaintiff's alleged meal period violations. JCL Dec., ¶ 28. Notwithstanding,
27 Plaintiff estimated the damages for this claim at approximately \$377,774, including interest predicated
28 on the assumed 25% violation rate. JCL Dec., ¶ 29.

1 (3) Estimated Damages for Rest Period Violations

2 Plaintiff also alleged that Defendant failed to provide compliant rest periods. Specifically, Plaintiff
3 alleged that because of the practical reality of working on a construction site, Class Members were not able
4 to take timely and duty-free rest periods because of the expectation that all employees were to remain on
5 premise during rest breaks. Plaintiff's testimony supported a similar 25% violation rate for missed, late,
6 and/or interrupted rest periods. JCL Dec., ¶ 30.

7 Again, Defendant denied liability and asserted that it maintained legally compliant rest period
8 policies and practices throughout the Class Period. Further, the District Court for the Central District
9 recently held that the plaintiffs failed to show that Defendant's rest period policy requiring employees to
10 remain on site is facially invalid. *Ritenour v. Carrington Mortg. Servs.* (C.D. Cal. Sept. 12, 2018) 2018 WL
11 5858658, at *7. More specifically, the Court held that the policy did not conflict with *Augustus v. ABM*
12 *Security Services, Inc.* (2016) 2 Cal.5th 257, noting that the California Supreme Court never stated that an
13 employer cannot require an employee to remain on the premises during a rest period. (*Id.*) Moreover,
14 Plaintiff recognizes the evidentiary burdens establishing this claim. Establishing Plaintiff's rest period claim
15 would rely, almost entirely, on Class Member testimony, making it a riskier claim at class certification and
16 liability stages. Defendant likely would have argued that only a small number of Class Members missed
17 their rest breaks. Certification likely would have required depositions of Class Members who provided
18 declarations, and Defendant surely would have obtained opposing declarations stating either rest breaks
19 were taken, or rest breaks were voluntarily waived. *See, e.g., Ordonez v. Radio Shack, Inc.* (C.D. Cal. Jan.
20 17, 2013) 2013 WL 210223, at *11 ("Because of the competing testimony before the Court, plaintiff's
21 evidence that defendant may have an illegal, written rest break policy is insufficient for this Court to find
22 that common issues predominate."); *Villa v. United Site Servs. of California, Inc.* (N.D. Cal. Nov. 13, 2012)
23 2012 WL 5503550, at *8 ("Indeed, Plaintiff's own evidence confirms that the written policy does not
24 generate uniform practices."). Plaintiff estimated the damages for this claim at approximately \$377,774,
25 including interest. JCL Dec., ¶ 31.

26 (4) Exposure for Failure to Reimburse for Mandatory Business Expenses

27 Plaintiff alleges that Defendant failed to reimburse its employees for mandatory business
28 expenses. Specifically, Plaintiff and Class Members, as business expenses, were required by Defendant

1 to use their own personal cellular phones and their personal vehicles as a result of and in furtherance of
2 their job duties as employees for Defendant but were not reimbursed or indemnified by Defendant for
3 the cost associated with the use of their personal cellular phones or personal vehicles for Defendant's
4 benefit. JCL Dec., ¶ 32. California employers who require employees to use a personal cellular device
5 and vehicle for work purposes must reimburse the employee for the cost incurred in furnishing the
6 device, costs associated with such use, and the appropriate mileage expenses. *See* Cal. Labor Code §
7 2802, providing that "[a]n employer shall indemnify his or her employee for all necessary expenditures
8 or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his
9 or her obedience to the directions of the employer..."

10 Plaintiff estimated Defendant's exposure for this claim at approximately \$51,725, which accounts
11 for a \$25 monthly reimbursement, including interest. JCL Dec., ¶ 33.

12 (5) Exposure for Wage Statement Violations and Waiting Time Penalties

13 Plaintiff alleges that Defendant's alleged violations resulted in derivative violations of Labor
14 Code sections 203 and 226(a). Class Counsel considered these penalties and weighed the potential
15 recoveries against probable defenses. Specifically, Defendant could argue that Plaintiff could not prove
16 the "willful" prong needed to obtain waiting time penalties under Labor Code section 203. Additionally,
17 Defendant could argue that Plaintiff could not show that Class Members suffered an "injury" because
18 of wage statement violations, as required by Labor Code section 226. Plaintiff would have to overcome
19 precedent to prove the Class deserved the penalties. *See, e.g., Howard v. CVS Caremark Corp.*, 2014
20 U.S. Dist. LEXIS 172406 (C.D. Cal. Dec. 9, 2014) (denying class certification for the same penalty
21 claims); *Alonzo v. Maximus, Inc.*, 832 F. Supp. 2d 1122, 1134-1137 (C.D. Cal. 2011) (finding
22 insufficient evidence of bad faith or actual injury). Notwithstanding the uncertain nature of the claims,
23 Plaintiff estimated Defendant's *maxim* exposure for these claims at approximately \$314,740
24 (approximately \$187,740 for waiting time and \$128,000 for wage statement). JCL Dec., ¶ 34.

25 (6) Defendant's PAGA Exposure

26 Class Counsel's damage models also estimated Defendant's exposure for PAGA penalties. At
27 the time of mediation, Plaintiff estimated Defendant's PAGA exposure was approximately \$780,000.
28 JCL Dec., ¶ 35.

1 Under PAGA, Courts have considerable discretion to reduce the penalty award. In *Fleming v.*
2 *Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011), a federal court reduced PAGA penalties
3 from \$2,800,000 to \$500,000, a reduction of 82.2%, because the court found maximum penalties
4 “unjust” because the employees had suffered no injuries. Some trial courts have actually awarded no
5 civil penalties, even when Labor Code violations are established. See *In re Nordstrom Com. Cases*, 186
6 Cal.App.4th 576, 589 (2010) (affirming an award of \$0 in PAGA penalties in a wage and hour class
7 action); *In re Taco Bell Wage & Hour Actions*, 2016 U.S. Dist. LEXIS 48557, *40-43 (E.D. Cal. Apr.
8 6, 2016) (PAGA penalties denied after trial).

9 In order to recover any PAGA penalties, Plaintiff would be required at trial to prove each of the
10 underlying Labor Code violations. See *Cardenas v. McLane Foodservice, Inc.*, 2011 U.S. Dist. LEXIS
11 13126, *10 (C.D. Cal. 2011) (“Given the statutory language [of PAGA], a plaintiff cannot recover on
12 behalf of individuals whom the plaintiff has not proven suffered a violation of the Labor Code by the
13 defendant.”). Here, Plaintiff would need to prove that each Aggrieved Employee suffered a violation for
14 each pay period the employee worked. Again, Defendant raised several defenses that presented serious
15 threats to the claims of the Plaintiff and the Aggrieved Employees. In addition to those arguments
16 discussed *supra*, Defendant also argued that the Court of Appeals decision in *Cacho v. Eurostar, Inc.*
17 (2019) 43 Cal.App.5th 885, weakened Plaintiff’s claims, on liability, value, and manageability as to the
18 rest period claims. In all, Plaintiff’s PAGA liability exposure is hotly contested. JCL Dec., ¶ 36.

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

25 **b. Inherent Risks of Continued Litigation Support Preliminary Approval.**

26 “It can be difficult to ascertain with precision the likelihood of success at trial. The Court cannot
27 and need not determine the merits of the contested facts and legal issues at this stage, [Citation], and to
28 the extent courts assess this factor, it is to ‘determine whether the decision to settle is a good value for a

1 relatively weak case or a sell-out of an extraordinary strong case.” *Misra v. Decision One Mortg. Co.*
2 (C.D. Cal. 2009) 2009 WL 4581276, at *7.

3 With respect to the most immediate challenge, i.e., class certification, the risks attendant to the
4 certification of similar wage and hour claims are demonstrated by *Magadia v. Wal-Mart Associates,*
5 *Inc.* (9th Cir. 2021) 999 F.3d 668. There, the Ninth Circuit, vacated reversed and remanded a \$110
6 million judgement against an employer for, *inter alia*, inaccurately paying overtime, and directed the
7 trial court to enter judgement in favor of the employer. *See also O’Conner v. Uber Technologies, Inc.*
8 (9th Cir. 2018) 904 F.3d 1087 (decertification of wage and hour misclassification action); *see also*
9 *Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, 31 (reversing a trial verdict in favor
10 plaintiffs in a wage and hour class action)); *Tien v. Tenet Healthcare Corp.* (2012) 209 Cal.App.4th
11 1077, 1088 (“[T]he reason, if any, that employees might not take their breaks were predominantly
12 individualized questions of fact not susceptible to class treatment.”); *Ali v. U.S.A. Cab Ltd.* (2009) 176
13 Cal.App.4th 1333, 1341 (affirming denial of certification because employees’ declarations attesting to
14 having taken meal and rest breaks demonstrated that individualized inquiries were required to show
15 harm); *Campbell v. Best Buy Stores, L.P.*, (C.D. Cal. 2013) 2013 WL 5302217 at *11-13 (following
16 *Brinker* and denying certification of proposed off-the-clock and rest and meal break classes due to lack
17 of uniform policy); *Brown v. Fed Express Corp.* (C.D. Cal. 2008) 249 F.R.D. 580, 587-88 (denying
18 certification of driver meal and rest period claims based on the predominance of individual issues).
19 Collectively, the examples cited above illustrate the uncertain nature of class litigation. Consequently,
20 the uncertainty of obtaining certification through a contested motion is a significant risk factor favoring
21 settlement. JCL Dec., ¶¶ 37-38.

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

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

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

2 Finally, continuing to litigate this action would require continued and extensive resources
3 coupled with significant court time to proceed through trial and post-trial motions; which can often take
4 years. Furthermore, wage and hour litigation is complex and expensive, as it often necessitates
5 extensive expert testimony, particularly with regards to damages. But even if Plaintiff is successful at
6 trial, Plaintiff is acutely aware that a judgment does not end the litigation. Plaintiff fully expects that
7 Defendant would appeal any favorable judgment. JCL Dec., ¶ 39. As demonstrated by *Magadia, supra*,
8 999 F.3d 668, the risk of an appeal and subsequent reversal is real. “Avoiding such a trial and the
9 subsequent appeals in this complex case strongly militates in favor of settlement rather than further
10 protracted and uncertain litigation.” *Nat’l Rural Telecomms. Coop v. DirecTV* (C.D. Cal. 2004) 221
11 F.R.D. 523, 527. Thus, “unless the settlement is clearly inadequate, its acceptance and approval are
12 preferable to lengthy and expensive litigation with uncertain results.” *Id.* at 526.

13 In this matter, Class Counsel negotiated a Gross Settlement Amount of \$225,000 that is roughly
14 10.4%-25.2% of Defendant’s maximum class wide liability exposure. Given the amount of the
15 settlement here, as compared to potential value of the claims, offset by the various inherent risks to
16 continued litigation, the settlement is fair and reasonable. JCL Dec., ¶ 40.

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

18 The Settlement Class is entitled to the best practical notice under the circumstances. *Kass v.*
19 *Young* (1977) 67 Cal.App.3d 100, 106. The purpose of the notice is to give class members sufficient
20 information to decide whether they should accept the benefits offered, opt out and pursue their own
21 remedies, or object to the settlement. (*Trotsky v. Los Angeles Fed Savings & Loan Assn.* (1975) 48 Cal.
22 App. 3d 143, 151-52.) The notice must advise class members “that they may be excluded from the class
23 if they so request and that they will be bound by the judgment, whether favorable or not, if they do not
24 request exclusion.” *Kass*, 67 Cal.App.3d at 106. Authorities generally require service of the class notice
25 by mail or similar reliable means. *Chance v. Super. Ct.* (1962) 58 Cal.2d 275, 290; *Cart v. Super. Ct.*
26 (1975) 50 Cal.App.3d 960, 972.⁴

27
28 ⁴ Due process does not require that each class member actually receive a notice, but rather a procedure reasonably certain to reach class members. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1789, at 253 (2d ed. 1986). If appropriate notice is given, class members will be bound by the judgment even if they never actually receive the notice.

1 The Parties jointly drafted the Class Notice which fairly and neutrally informs the Class
2 Members of their rights and remedies. The Settlement Administrator will first verify addresses, then
3 mail the proposed Class Notice to all Class Members. The Notice will include information regarding
4 the nature of the lawsuit, a summary of the substance of the Settlement's terms, the class definition, the
5 procedure and time period within which to request for exclusion or to object to the Settlement, the date
6 for the final approval hearing, the formula used to calculate settlement payments, and the terms and
7 scope of the Released Claims. This method was negotiated by the Parties to ensure delivering the most
8 reasonable method of notice to the Class Members while ensuring cost effective administration of the
9 Settlement. JCL Dec., ¶¶ 41-42.

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

14 **C. The Court Should Preliminarily Approve the Class Representative Service Award**

15 Enhancement payments "are fairly typical in class action cases." *Cellphone Termination Fee*
16 *Cases* (2010) 186 Cal.App.4th 1380, 1393 (affirming incentive awards of \$10,000); *Rodriguez v. West*
17 *Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958, *citing* 4 Newberg on Class Actions (4th ed. 2002)
18 § 1 1:38, and Eisenberg & Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53
19 UCLA L. Rev. 1303 (2006). Enhancement payments "are intended to compensate class representatives
20 for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing
21 the action, and, sometimes, to recognize their willingness to act as a private attorney general."
22 *Rodriguez*, 563 F.3d at 958-59. "[T]he rationale for making enhancement or incentive awards to named
23 plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a
24 benefit on other members of the class." *Clark v. American Residential Services LLC* (2009) 175
25 Cal.App.4th 785.

26 The Settlement provides for a Class Representative Service Award of \$10,000⁵ for Plaintiff. The
27
28 *Fontana v. Elrod* (7th Cir. 1987) 826 F.2d 729, 732.

⁵ The amount of the requested enhancement payment-\$10,000-is reasonable by reference to the amounts that California courts (both federal

1 service award is fair and reasonable compensation for the Plaintiff's efforts bringing the action,
2 assisting Class Counsel with the litigation and settlement, regularly conferring with Class Counsel on
3 the status of his case and the strategies for prosecuting the claims, and reviewing the proposed
4 Settlement to ensure that its terms are fair and provide adequate relief for the Settlement Class. JCL
5 Dec., ¶ 43.

6 Class Counsel on behalf of Plaintiff will file a formal motion for the negotiated Class
7 Representative Service Award once preliminary approval of the Settlement is granted. Plaintiff
8 respectfully submits that the above showing is sufficient for preliminary approval of the negotiated
9 Class Representative Service Award. JCL Dec., ¶ 44.

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

11 The purpose of a Class Counsel Award in class action litigation is to reward counsel who took
12 the risk of non-payment and invested in a case that achieved a substantial positive result for the class.
13 California courts routinely award attorneys' fees equaling one-third or more of the potential value of
14 the common fund, the amount requested under this settlement. *See Chavez v. Netflix, Inc.* (2008) 162

15
16 and state) have repeatedly found to be reasonable for wage and hour class action settlements: *See Baker v. LA. Fitness Int'l, LLC*, No. BC438654 (L.A. County Super. Ct. Dec. 12, 2012) (awarding \$10,000 enhancement payments to three of the named plaintiffs); *Blue v. Codwell Banker Residential Brokerage Co.*, No. BC417335 (L.A. County Super. Ct. Mar. 21, 2011) (awarding \$10,000 enhancement payment); *Buckmire v. Jo-Ann Stores, Inc.*, No. BC394795 (L.A. County Super. Ct. June 11, 2010) (awarding \$10,000 enhancement payments to the named plaintiff); *Coleman v. Estes Express Lines, Inc.*, No. BC429042 (L.A. County Super. Ct. Oct. 3, 2013) (awarding \$10,000 enhancement payment); *Ethridge v. Universal Health Services, Inc.*, No. BC391958 (L.A. County Super. Ct. May 27, 2011) (awarding \$10,000 enhancement payment); *Hickson v. South Coast Auto Insurance Marketing, Inc.*, No. BC390395 (L.A. County Super. Ct. Mar. 27, 2012) (awarding \$10,000 enhancement payment); *Hill v. Sunglass Hut Int'l, Inc.*, No. BC422934 (L.A. County Super. Ct. July 2, 2012) (awarding \$10,000 enhancement payments to the named plaintiffs); *Kabamba v. Victoria's Secret Stores, LLC*, No. BC368528 (L.A. County Super. Ct. Aug. 19, 2011) (awarding enhancement payments of \$ 10,000 to the named plaintiffs along with additional compensation for their general release of claims); *Magee v. American Residential Services, LLC*, No. BC423798 (L.A. County Super. Ct. Apr. 21, 2011) (awarding \$15,000 enhancement payment); *Mares v. BFS Retail & Commercial Operations, LLC*, No. BC375967 (L.A. County Super. Ct. June 24, 2010) (awarding \$15,000 enhancement payments to the named plaintiffs); *Nevarez v. Trader Joe's Co.*, No. BC373910 (L.A. County Super. Ct. Jan. 29, 2010) (awarding \$10,000 enhancement payment); *Ordaz v. Rose Hills Mortuary, LP.*, No. BC386500 (L.A. County Super. Ct. Mar. 19, 2010) (awarding 10,000 enhancement payments to the named plaintiffs); *Sheldon v. AHMC Monterey Park Hospital LP*, No. BC440282 (L.A. County Super. Ct. Feb. 22, 2013) (awarding \$10,000 enhancement payment); *Silva v. Catholic Moray Services, Inc.*, No. BC408054 (L.A. County Super. Ct. Feb. 8, 2011) (awarding \$10,000 enhancement payments to the named plaintiffs); *Weisbarth v. Banc West Investment Services, Inc.*, No. BC422202 (L.A. County Super. Ct. May 24, 2013) (awarding \$10,000 enhancement payment); *Zamora v. Balboa Life & Casualty LLC*, No. BC360026 (L.A. County Super. Ct. Mar. 7, 2013) (awarding \$25,000 enhancement payments to the named plaintiffs); *Acheson v. Express, LLC*, No. 109CV135335 (Santa Clara County Super. Ct. Sep. 13, 2011) (awarding \$10,000 enhancement payment); *Aguilar v. Cingular Wireless, LLC*, No. CV 06-8197 DDP (AJWx) (C.D. Cal. Mar. 17, 2011) (awarding \$14,767 enhancement payment); *Bejarano v. Amerisave Mortgage Corp.*, No. EDCV 08-00599 SGL (Opx) (C.D. Cal. June 22, 2010) (awarding \$10,000 enhancement payment); *Carbajal v. Sally Beauty Supply LLC*, No. CIVVS 1004307 (San Bernardino Super. Ct. Aug. 6, 2012) (awarding \$10,000 enhancement payments to the named Plaintiffs); *Contreras v. Serco Inc.*, No. 10-cv-04526-CAS-JEMx (CD. Cal. Sep. 10, 2012) (awarding \$10,000 enhancement payment); *Guerrero v. R.R. Donnelley & Sons Co.*, No. RIC 10005196 (Riverside Super. Ct. July 16, 2013) (awarding \$10,000 enhancement payment); *Kisliuk v. ADT Security Services, Inc.*, No. CV08-0324 DSF (RZx) (C.D. Cal. Jan. 10, 2011) (awarding \$10,000 enhancement payment); *Morales v. BCBG Maxaria Int'l Holdings, Inc.*, No. JCCP 4582 (Orange County Super. Ct. Jan. 24, 2013) (awarding \$10,000 enhancement payment); and *Barrett v. Doyon Security Services, LLC*, Nos. BS900199, BS900517 (San Bernardino County Super. Ct. Apr. 23, 2010) (awarding \$10,000 enhancement payment).

1 Cal.App.4th 43, 66 n.11 (“Empirical studies show that regardless whether the percentage method or the
2 lodestar method is used, fee awards in class actions average around one-third of the recovery.”);
3 Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical*
4 *Study*, *J. of Empirical Legal Studies*, Vol. 1, Issue 1, 27-78, March 2004, at 35 (independent studies of
5 class action litigation nationwide have come to a similar conclusion that a one-third fee is consistent
6 with market rates).

7 Class Counsel took this matter on a contingency fee basis and invested significant time and
8 expense successfully prosecuting Plaintiff’s claims. As discussed *supra*, the estimated average
9 Individual Settlement Payment illustrates the demonstrably positive outcome for the Settlement Class
10 Members. Considering the positive outcome for the Class Members, and in light of the supporting
11 authority, the proposed Class Counsel Award is fair and reasonable. JCL Dec., ¶ 45.

12 Plaintiff will file a formal motion for the negotiated Class Counsel Award once preliminary
13 approval of the Settlement is granted. Plaintiff respectfully submits that the above showing is sufficient
14 for preliminary approval of the negotiated attorneys’ fees. JCL Dec., ¶ 46.

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

16 For Settlement, Plaintiff contends, and Defendant does not dispute, that provisional certification
17 of the Class is appropriate. JCL Dec., ¶ 47; Covarrubias Dec. ¶¶ 6-9.

18 1. The Standard for Class Certification

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

27
28 ///

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

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

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

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

Because all Class Members are Defendant’s current and former employees, the class is readily ascertainable from Defendant’s regular business records, i.e., payroll records. JCL Dec., ¶ 48.

The statutes relating to each of Plaintiff’s claims apply with equal force and effect to the entire Settlement Class. Factually, Defendant’s policies and practices apply class-wide and Defendant’s liability can be determined by facts common to all members of the class. The wage and hour issues are both numerous and substantial, and a class action is the most advantageous method of dealing with the claims of the Settlement Class. JCL Dec., ¶ 49.

Plaintiff’s wage and hour claims are typical of the proposed Settlement Class because they arise from the same factual basis and are based on the same legal theories applicable to the other Class Members. Likewise, Plaintiff’s interests are entirely coextensive with the interests of the Settlement Class. Plaintiff alleges that he was injured by the same company-wide practices to which the proposed Class Members were subject to and seeks the same relief. Plaintiff has already demonstrated his ability to advocate for the interests of the Class Member by initiating this litigation, participating in mediation,

1 and evaluating the proposed settlement to assure that it is fair. JCL Dec., ¶ 50.

2 Additionally, Plaintiff is represented by competent Class Counsel who have extensive experience
3 in litigating wage and hour class action cases. Class Counsel successfully briefed, argued, certified, and
4 gained state court settlement approval of the same class-wide causes of action that are at issue in this
5 case. Class Counsel's wage and hour class action experience establishes that they are well qualified to
6 represent the interests of this Class. JCL Dec., ¶¶ 52-59, Declaration of Shani Zakay, ¶¶ 1-3.

7 A class action is superior to a multitude of individual lawsuits. Given the size and amount of
8 each individual claim, the Class Members likely have little incentive to litigate their claims on an
9 individual basis because the out-of-pocket expense and personal commitment necessary to litigate each
10 claim outweighs any potential recovery. In sum, class treatment is superior to individual, case-by-case
11 adjudication. JCL Dec., ¶ 51.

12 IV. CONCLUSION

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

16 Dated: November 9, 2022

JCL LAW FIRM, APC

18 By: 
19 Jean-Claude Lapuyade, Esq.