

JCL LAW FIRM, APC

Jean-Claude Lapuyade (State Bar #248676)
Sydney Castillo-Johnson (State Bar #343881)
5440 Morehouse Drive, Suite 3600
San Diego, CA 92121
Telephone: (619) 599-8292
Facsimile: (619) 599-8291
jlapuyade@jcl-lawfirm.com
scastillo@jcl-lawfirm.com

ZAKAY LAW GROUP, APLC

Shani O. Zakay (State Bar #277924)
Julieann Alvarado (State Bar #334727)
5440 Morehouse Drive, Suite 3600
San Diego, CA 92121
Telephone: (619) 255-9047
Facsimile: (858) 404-9203
shani@zakaylaw.com
julieann@zakaylaw.com

Attorneys for PLAINTIFFS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

JAMES E. AGUILAR, an individual; PAMELA
CAZARES, an individual, on behalf of
themselves and on behalf of all persons similarly
situated,

Plaintiffs,

vs.

T & K, L.P., a California Limited Partnership; and
DOES 1-50, Inclusive.

Defendants.

Case No. 21CV384674

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

Hearing Date:

Hearing Time:

Judge:

Dept.: 1

Action Filed: July 23, 2021

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	FACTS AND PROCEDURE	4
	A. Overview of the Litigation	4
	B. Class Counsel's Investigation	6
	C. The Parties Settled at Mediation	7
III.	ARGUMENT	7
	A. The Court Should Preliminarily Approve the Proposed Class Action Settlement	7
	1. The Parties Reached the Settlement Through Arm's-Length Bargaining Led by Experienced Counsel	8
	2. Class Counsel's Investigation Provided an Objective Measurement of the Settlement's Reasonableness	9
	3. The Settlement Falls Within the Recognized Range of Reasonableness	9
	(a) Estimated Damages for Meal and Rest Period Violations	10
	(b) Estimated Damages for Miscalculation of the Regular Rate of Pay	11
	(c) Exposure for Off the Clock Work	11
	(d) Exposure for Expense Reimbursement Claim	11
	(e) Exposure for Wage Statement Violations and Waiting Time Penalties	12

1	(f) Defendant’s PAGA Exposure	12
2	4. Inherent Risks of Continued Litigation Support Preliminary Approval	13
3	B. The Notice of Proposed Class Action Settlement	15
4	C. The Court Should Preliminarily Approve the Class Representative Service Awards	16
5	D. The Court Should Preliminarily Approve the Attorneys’ Fees and Expenses	17
6	E. Provisional Certification for Settlement Purposes Is Appropriate	18
7	1. The Standard for Class Certification	18
8	2. The Proposed Settlement Class is Ascertainable and there is a Well-Defined Community of Interest Among the Settlement Class Members	18
9	IV. CONCLUSION	20

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TABLE OF AUTHORITIES

CASES

1		
2	<i>7-Eleven Owners for Fair Franchising v. Southland Corp.</i>	
3	(2000) 85 Cal.App.4th 1135, 1151.....	8
4	<i>Ali v. U.S.A. Cab Ltd.</i>	
5	(2009) 176 Cal.App.4th 1333, 1341.....	14
6	<i>Berry v. Urban Outfitters</i>	
7	(N.D. Cal. Lead Case No. 13-cv-02628-JSW).....	13
8	<i>Brinker v. Superior Court</i>	
9	53 Cal. 4th 1004, 1021-22 (2012).....	14, 18
10	<i>Brown v. Fed Express Corp.</i>	
11	(C.D. Cal. 2008) 249 F.R.D. 580, 587-88.....	14
12	<i>Bufile v. Dollar Financial Group, Inc.</i>	
13	(2008) 162 Cal.App.4th 1193, 1207.....	18
14	<i>Cacho v. Eurostar, Inc.</i>	
15	(2019) 43 Cal.App.5th 885.....	13
16	<i>Campbell v. Best Buy Stores, L.P.</i>	
17	(C.D. Cal. 2013) 2013 WL 5302217 at *11-13.....	14
18	<i>Cardenas v. McLane Foodservice, Inc.</i>	
19	2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011).....	12
20	<i>Carrington v. Starbucks Corp.,</i>	
21	30 Cal. App. 5th 504 (2018).....	13
22	<i>Cart v. Super. Ct.</i>	
23	(1975) 50 Cal.App.3d 960, 972.....	15
24	<i>Cellphone Termination Fee Cases</i>	
25	180 Cal. App. 4th 1110, 1118, 1380, 1389, 1393 (2010).....	7-8, 16
26	<i>Chance v. Super. Ct.</i>	
27	(1962) 58 Cal.2d 275, 290.....	15
28	<i>Chavez v. Netflix, Inc.</i>	
	(2008) 162 Cal.App.4th 43, 66 n.11.....	17
	<i>Clark v. American Residential Services LLC</i>	
	(2009) 175 Cal.App.4th 785.....	16
	<i>D'Amato v. Deutsche Bank</i>	
	(2d. Cir. 2001) 236 F.3d 78, 85.....	8
	<i>Dunk v. Ford Motor Co.</i>	
	48 Cal. App. 4th 1794, 1802 (1996).....	8
	<i>Duran v. U.S. Bank National Association</i>	
	(2014) 59 Cal.4th 1, 31.....	14
	<i>Fleming v. Covidien</i>	
	2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011).....	12
	<i>Fontana v. Elrod</i>	
	(7th Cir. 1987) 826 F.2d 729, 732.....	16
	<i>Frank v. Eastman Kodak Co.</i>	
	(W.D.N.Y. 2005) 228 FRD. 174, 186.....	10
	<i>Hopson v. Hanesbrands, Inc</i>	
	(N.D. Cal. 2009) 2009 WL 928133 * 9.....	13
	<i>In re Apple Computer, Inc. Derivative Litig</i>	
	No. C 06-4128 JF (HRL), 2008 U.S. Dist. LEXIS 108195 (N.D. Cal. Nov. 5, 2008).....	8
	///	

1	<i>In re Global Crossing Sec. and ERISA Litig.</i>	
	(S.D.N.Y. 2004) 225 F.R.D. 436, 460.....	10
2	<i>In re IKON Office Solutions, Inc Sec Litig.</i>	
	(E.D. Pa. 2000) 194 F.R.D. 166, 184.....	10
3	<i>In re Michael Milken and Assoc. Sec. Litig.</i>	
	(S.D.N.Y. 1993) 150 F.R.D. 57, 66).....	10
4	<i>In re Nordstrom Com. Cases</i>	
	186 Cal.App.4th 576, 589 (2010).....	12-13
5	<i>In re Nvidia Derivs. Litig.</i>	
	(N.D. Cal. 2008) 2008 WL 5382544, at *3.....	14
6	<i>In re Omnivision Tech, Inc.</i>	
	(N.D. Cal. 2008) 559 F.Supp.2d 1036.....	10
7	<i>In re Taco Bell Wage & Hour Actions</i>	
	2016 U.S. Dist. LEXIS 48557, *40-43 (E.D. Cal. Apr. 6, 2016).....	12
8	<i>Jack v. Hartford Fire Ins. Co.</i>	
	(S.D. Cal. 2011) 2011 WL 4899942 * 6.....	13
9	<i>Kass v. Young</i>	
	(1977) 67 Cal.App.3d 100, 106.....	15
10	<i>Kullar v. Foot Locker Retail, Inc.</i>	
	(2008) 168 Cal.App.4th 116, 133.....	9
11	<i>Lee v. Dynamex, Inc.</i>	
	(2008) 166 Cal.App.4th 1325, 1332, 1334.....	18
12	<i>Magadia v. Wal-Mart Associates, Inc.</i>	
	(9th Cir. 2021) 999 F.3d 668.....	14-15
13	<i>Misra v. Decision One Mortg. Co.</i>	
	(C.D. Cal. 2009) 2009 WL 4581276, at *7.....	14
14	<i>Moniz v. Adecco</i>	
	(2021) 72 Cal.App.5th 56.....	13
15	<i>Munoz v. BCI Coca-Cola Bottling Co.</i>	
	(2010) 186 Cal.App.4th 399, 409.....	9
16	<i>Nat'l Rural Telecomm. Coop. v. Directv. Inc.</i>	
	(C.D. Cal. 2004) 221 F.R.D. 523, 527.....	10, 15
17	<i>Newman v. Stein</i>	
	(2d. Cir. 2002) 464 F.2d 689, 693.....	10
18	<i>North County Contractor's Assn., Inc. v. Touchstone Ins. Services</i>	
	(1994) 27 Cal.App.4th 1085, 1089-90.....	7
19	<i>O'Conner v. Uber Technologies, Inc.</i>	
	(9th Cir. 2018) 904 F.3d 1087.....	14
20	<i>Officers for Justice v. Civil Serv. Comm'n</i>	
	(9th Cir. 1982) 688 F.2d 615, 625, 628.....	7, 10
21	<i>Rebney v. Wells Fargo Bank</i>	
	(1990) 220 Cal.App.3d 1117, 1140, <i>opinion modified</i> (June 18, 1990).....	15
22	<i>Rodriguez v. West Publishing Corp.</i>	
	(9th Cir. 2009) 563 F.3d 948, 958-59.....	16
23	<i>Sav-On Drug Stores, Inc.</i>	
	(2014) 34 Cal.4th 319, 326, 333.....	18
24	<i>Singer v. Becton Dickinson & Co.</i>	
	(S.D. Cal. 2010) 2010 WL 2196104 *2.....	13
25	///	

1	<i>Stambaugh v. Super. Ct</i>	
	(1976) 62 Cal.App.3d 231, 236.....	8
2	<i>State v. Levi Strauss & Co.</i>	
	(1986) 41 Cal.3d 460, 482, 485.....	8, 16
3	<i>Tien v. Tenet Healthcare Corp.</i>	
	(2012) 209 Cal.App.4th 1077, 1088.....	14
4	<i>Trotsky v. Los Angeles Fed Savings & Loan Assn.</i>	
5	(1975) 48 Cal.App.3d 143, 151-52.....	15

RULES, CODES, AND STATUTES

6	<i>Cal. Bus. & Prof. Code</i> § 17200, et seq.....	3, 5
7	<i>Cal. Bus. & Prof. Code</i> § 17203.....	3
8	<i>Cal. Code of Civ. Proc.</i> § 382.....	18
9	<i>Cal. Lab. Code</i> § 200.....	3
	<i>Cal. Lab. Code</i> § 201.....	3-5
10	<i>Cal. Lab. Code</i> § 201.3.....	3
	<i>Cal. Lab. Code</i> § 201.5.....	3
	<i>Cal. Lab. Code</i> § 202.....	3-5
11	<i>Cal. Lab. Code</i> § 203.....	3-5, 12
12	<i>Cal. Lab. Code</i> § 204.....	3-4
	<i>Cal. Lab. Code</i> § 205.5.....	3
13	<i>Cal. Lab. Code</i> § 206.5.....	3
	<i>Cal. Lab. Code</i> § 210.....	3
14	<i>Cal. Lab. Code</i> § 218.5.....	3
	<i>Cal. Lab. Code</i> § 218.6.....	3
15	<i>Cal. Lab. Code</i> § 226.....	3-5, 12
	<i>Cal. Lab. Code</i> § 226(a).....	12
16	<i>Cal. Lab. Code</i> § 226.2.....	3-4
17	<i>Cal. Lab. Code</i> § 226.3.....	3
	<i>Cal. Lab. Code</i> § 226.7.....	3-5
18	<i>Cal. Lab. Code</i> § 246.....	3
	<i>Cal. Lab. Code</i> § 510, et seq.....	3-5
19	<i>Cal. Lab. Code</i> § 512.....	3-5
20	<i>Cal. Lab. Code</i> § 515.....	3
	<i>Cal. Lab. Code</i> § 558.....	3
21	<i>Cal. Lab. Code</i> § 1174.....	3
	<i>Cal. Lab. Code</i> § 1174(d).....	3
22	<i>Cal. Lab. Code</i> § 1174.5.....	3
	<i>Cal. Lab. Code</i> § 1194.....	3, 5
23	<i>Cal. Lab. Code</i> § 1197.....	3, 5
	<i>Cal. Lab. Code</i> § 1197.1.....	3, 5
24	<i>Cal. Lab. Code</i> § 1197.14.....	3
25	<i>Cal. Lab. Code</i> § 1198.....	3
	<i>Cal. Lab. Code</i> § 1199.....	3
26	<i>Cal. Lab. Code</i> § 2698, et seq.....	2, 5-6
	<i>Cal. Lab. Code</i> § 2699.....	3
27	<i>Cal. Lab. Code</i> § 2699.3.....	3
	<i>Cal. Lab. Code</i> § 2699.3(a).....	3
28	<i>Cal. Lab. Code</i> § 2699.5.....	3

1	<i>Cal. Lab. Code</i> § 2802.....	3-4, 6
2	<i>Cal. Lab. Code</i> § 2802(a).....	12
3	<i>Cal. Lab. Code</i> § 2804.....	3
4	<i>Code of Civ. Proc.</i> § 382.....	3
5	<i>Code of Civ. Proc.</i> § 395.....	3
6	<i>Code of Civ. Proc.</i> § 395.5.....	3
7	<i>Code of Civ. Proc.</i> § 410.10.....	3
8	<i>Code of Civ. Proc.</i> § 474.....	3
9	<i>Rule of Court</i> Rule 3.769(c)-(g).....	7
10	<i>Rule of Court</i> Rule 3.776(e)-(f).....	16

SECONDARY SOURCES

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1 I. INTRODUCTION

2 Plaintiffs JAMES E. AGUILAR and PAMELA CAZERES (collectively hereinafter “Plaintiffs”)
3 seek preliminary approval of the Joint Stipulation and Agreement for Class and Representative Action
4 Settlement and Release (“Agreement”)¹, which if approved, would provide valuable monetary relief
5 for approximately 1,904 Class Members and approximately 1,183 Aggrieved Employees. The basic
6 terms of the Agreement provide for the following:

7 1. The “**Class**” or “**Class Members**” means all individuals who are or previously were
8 employed by T&K, L.P. (“Defendant”) in California and classified as a non-exempt employee at any
9 time during the Class Period. Agreement at § 1.5. The “**Class Period**” means the period commencing
10 July 23, 2017, up to and including October 29, 2022. Agreement at § 1.9. The Class is comprised of
11 approximately 1,904 individuals who collectively worked approximately 94,000 Workweeks during the
12 Class Period. Agreement at § 7.3.

13 2. The “**Settlement Class Members**” means a Class Member who does not submit a valid
14 and timely Request for Exclusion. Agreement at § 1.41.

15 3. The “**Aggrieved Employees**” means all individuals who are or previously were employed
16 by Defendant in California and classified as a non-exempt employee at any time during the PAGA
17 Period. Agreement at § 1.3. The “**PAGA Period**” means the period from May 19, 2020, up to and
18 including October 29, 2022. Agreement at § 1.28. At the time of mediation, there were approximately
19 1,183 Aggrieved Employees during the PAGA Period that who worked an aggregate of 22,600 PAGA
20 Pay Periods. JCL Dec., at XX.

21 4. The “**Maximum Settlement Amount**” is Two Million Dollars and Zero Cents
22 (\$2,000,000.00). Agreement at § 1.17. The Maximum Settlement Amount is to be paid in full settlement
23 of the Action (defined below), Released PAGA Claims (defined below), and Released Class Claims
24 (defined below). (*Id.*) The Maximum Settlement Amount is non-reversionary and includes the
25 following:

26 ///

27
28 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 a. “**Service Awards**” in the amount not to exceed Ten Thousand Dollars and Zero
2 Cents (\$10,000.00) to each Plaintiff for a total of Twenty Thousand Dollars and Zero Cents
3 (\$20,000.00). Agreement at §§ 1.38 and 4.1.

4 b. An award of “**Attorneys’ Fees and Expenses**” consisting of attorneys’ fees in
5 the amount not to exceed one-third of the Maximum Settlement Amount currently estimated to be Six
6 Hundred Sixty-Six Thousand Six Hundred Sixty-Six Dollars and Sixty-Six Cents (\$666,666.66) **and**
7 reimbursement of actually incurred litigation costs by Class Counsel in an amount up to Twenty-Five
8 Thousand Dollars and Zero Cents (\$25,000.00). Agreement at §§ 4.4 and 6.1(a)

9 c. A “**PAGA Payment**” of One Hundred Thousand Dollars and Zero Cents
10 (\$100,000.00), from the Maximum Settlement Amount, for penalties under the Private Attorneys
11 General Act 2004, as codified at California Labor Code section 2698, et seq., with 25% of the payment
12 going to the Aggrieved Employees and 75% of the payment going to the Labor and Workforce
13 Development Agency (“LWDA Payment”). Agreement at §§ 1.27 and 4.6.

14 d. “**Administration Expenses**” not to exceed Twenty-Five Thousand Dollars and
15 Zero Cents (\$25,000.00) payable to the Settlement Administrator, ILYM Group, Inc., for, *inter alia*,
16 the administration of the Notice Packet and Individual Settlement Payments. Agreement at §§ 1.2 and
17 4.5. The “**Net Settlement Amount**” refers to the portion of the Maximum Settlement Amount that
18 is available for distribution to Class Members. The Net Settlement Amount means the net amount that
19 Defendant will pay (subject to the occurrence of the Effective Date) to all Settlement Class Members
20 and is calculated by subtracting the Attorneys’ Fees and Expenses, Service Award, PAGA Payment,
21 and Administration Expenses from the Maximum Settlement Amount. Agreement at §§ 1.24 and 6.1.
22 The Net Settlement Amount is approximately One Million One Hundred Sixty-Three Thousand Three
23 Hundred Thirty-Three Dollars and Thirty-Four Cents (\$1,163,333.34) which will be allocated to all
24 Settlement Class Members on a pro-rata basis according to the number of Workweeks each Settlement
25 Class Member worked during the Class Period. Assuming there are zero opt-outs, the entire Net
26 Settlement Amount will be paid to all Settlement Class Members resulting in an average Individual
27 Class Payment of approximately **\$610.99**. JCL Dec., ¶ 7.

28 ///

1 6. The “**Released Class Claims**” means “all claims that were alleged or reasonably could
2 have been alleged in the Complaint based on the facts contained therein, arising during the Class Period,
3 including, but not limited to, California Labor Code sections 200, 201, 201.3, 201.5, 202, 201.3, 202,
4 203, 204, 205.5, 206.5, 210, 218.5, 218.6, 226, 226.2, 226.3, 226.7, 246, 510, et seq., 512, 515, 558,
5 1174, 1174(d), 1174.5, 1194, 1197, 1197.1, 1197.14, 1198, 1199, 2802, 2804, 2698 et seq., 2699,
6 2699.3, 2699.5, and any federal counterparts, Code of Civil Procedure sections 382, 395, 395.5, 410.10,
7 474, and any federal counterparts, California Business and Professions Code section 17200, et seq.,
8 17203, any IWC Wage Orders, any claims involving any alleged unfair competition in violation of Cal.
9 Bus. & Prof. Code § 17200, et seq., failure to pay minimum wages in violation of Cal. Labor Code §§
10 1194, 1197 & 1197.1, failure to pay overtime wages in violation of Cal. Lab. Code §§ 510, et. seq.,
11 failure to provide required meal periods in violation of Cal. Lab Code §§ 226.7 & 512 and the applicable
12 IWC Wage Order, failure to provide required rest periods in violation of Cal. Lab. Code §§ 226.7 &
13 512 and the applicable IWC Wage Order, failure to provide accurate itemized statements in violation
14 of Cal. Lab. Code §§ 226, 226.2, failure to provide wages when due in violation of Cal. Lab. Code §§
15 201, 202, and 203, failure to timely pay wages in violation of Cal. Lab. Code § 204, failure to reimburse
16 employees for required expenses in violation of Cal. Lab. Code § 2802, and unpaid wages due to alleged
17 off the clock work.” Agreement at § 1.33. Section 9.1 of the Agreement provides, in part: “Upon the
18 funding of the Maximum Settlement Amount, each Settlement Class Member and Plaintiffs, each
19 release, discharge, and agree to hold harmless the Released Parties, and each of them, of and from any
20 and all Released Class Claims.”

21 7. The “**Released PAGA Claims**” means “all claims for PAGA penalties that were alleged,
22 or reasonably could have been alleged, based on the facts stated in the complaint, first amended
23 complaint, and PAGA notice provided to the LWDA pursuant to Labor Code section 2699.3, subd. (a),
24 including but not limited to, claims involving Labor Code sections 200, 201, 201.3, 201.5, 202, 201.3,
25 202, 203, 204, 205.5, 206.5, 210, 218.5, 218.6, 226, 226.2, 226.3, 226.7, 246, 510, et seq., 512, 515,
26 558, 1174(d), 1174.5, 1194, 1197, 1197.1, 1197.14, 1198, 1199, 2802, 2804, 2698 et seq., 2699, 2699.3,
27 2699.5, the applicable IWC Wage Order, any alleged failure to pay minimum wages in violation of
28 Cal. Labor Code §§ 1194, 1197 & 1197.1, failure to pay overtime wages in violation of Cal. Lab. Code

1 §§ 510, et seq., failure to provide required meal periods in violation of Cal. Lab Code §§ 226.7 & 512
2 and the applicable IWC Wage Order, failure to provide required rest periods in violation of Cal. Lab.
3 Code §§ 226.7 & 512 and the applicable IWC Wage Order, failure to provide accurate itemized
4 statements in violation of Cal. Lab. Code §§ 226, 226.2, failure to provide wages when due in violation
5 of Cal. Lab. Code §§ 201, 202, and 203, failure to timely pay wages in violation of Cal. Lab. Code §
6 204, failure to reimburse employees for required expenses in violation of Cal. Lab. Code § 2802, and
7 unpaid wages due to alleged off the clock work, that occurred during the PAGA Period.” Agreement
8 § 1.34. Section 9.3 of the Agreement provides, in part: “Upon the funding of the Maximum Settlement
9 Amount, each Aggrieved Employee, the State of California and Plaintiffs, each release, discharge, and
10 agree to hold harmless the Released Parties, and each of them, of and from any and all Released PAGA
11 Claims.”

12 An objective evaluation of the Settlement confirms that the relief negotiated on behalf of the
13 Class is fair, reasonable, and adequate. The Settlement was negotiated by the Parties at arm’s length.
14 The Settlement confers substantial benefits to the Class Members. The relief offered by the Settlement
15 is particularly impressive when viewed against the difficulties encountered by plaintiffs pursuing wage
16 and hour cases (*see infra*). Indeed, by settling now rather than proceeding to trial, the Class will not
17 have to wait (possibly years) for relief, nor will they have to bear the risk of class certification being
18 denied or of Defendant prevailing at trial. JCL Dec., ¶ 7.

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

24 II. FACTS AND PROCEDURE

25 A. Overview of the Litigation

26 Defendant owns and operates restaurants throughout Northern California, including but not
27 limited to, Santa Clara County. Plaintiff Aguilar alleges he worked for Defendant as a non-exempt
28 employee from August 2020 to April 2021. Plaintiff Cazares alleges she worked for Defendant as a

1 non-exempt employee from November 2020 to April 2021. Plaintiffs allege that Defendant, among
2 other things, failed to provide compliant meal and rest periods, furnished inaccurate itemized wage
3 statements, miscalculated the regular rate of pay for purposes of paying overtime compensation, and
4 failed to reimburse employees for mandatory business expenses. Throughout their employment,
5 Plaintiffs were subject to Defendant's written policies and procedures contained in, among other
6 documents, the T&K, LP Employee Handbook. JCL Dec., ¶ 9; Declaration of James Aguilar ("JA
7 Dec.") at ¶¶ 4-5; Declaration of Pamela Cazares ("PC Dec.") at ¶¶ 4-5.

8 Defendant forcefully denies liability for each of Plaintiffs' claims. Further, Defendant asserts
9 that it fully complied with all applicable employment laws and raised several other significant defenses
10 to Plaintiffs' claims, including but not limited to, compliant compensation policies and plans, compliant
11 meal and rest practices, compliant wage statements, and timely payment of all wages due upon
12 separation of employment. JCL Dec., ¶ 11.

13 On May 19, 2021, Plaintiffs served Defendant and the Labor and Workforce Development
14 Agency ("LWDA") with a Notice of Violations ("PAGA Notice"). Plaintiffs' PAGA Notice set forth
15 the facts and theories supporting Defendant's alleged violations of various provisions of the California
16 Labor Code and applicable Industrial Welfare Commissions ("IWC") Wage Order and of their intent
17 to pursue claims under California Labor Code Private Attorneys General Act, Cal. Lab. Code Sections
18 2698 *et seq.* ("PAGA"). JCL Dec., ¶ 11.

19 On July 23, 2021, Plaintiff James E. Aguilar filed this class action complaint in the Santa Clara
20 Superior Court. The Action alleged ten causes of action against Defendant for: (1) Unfair Competition
21 in Violation of Bus. and Prof. Code sections 17200 *et seq*; (2) Failure to pay minimum wages in
22 violation of California Labor Code sections 1194, 1197 & 1197.1; (3) Failure to pay overtime wages
23 in violation of California Labor Code sections 510 *et seq*; (4) Failure to provide required meal periods
24 in violation of California Labor Code sections 226.7 and 512 and the applicable IWC wage order; (5)
25 Failure to provide required rest periods in violation of California Labor Code sections 226.7 and 512
26 and the applicable IWC wage order; (6) Failure to provide accurate itemized wage statements in
27 violation of California Labor Code section 226; (7) Failure to provide wages when due in violation of
28 Cal. Lab. Code sections 201, 202 and 203; (8) Failure to reimburse employees for required business

1 expenses in violation of California Labor Code section 2802, and (10) Violations of the California
2 Labor Code Private Attorneys General Act [Labor Code section 2698, *et seq.*]. On March 4, 2022, the
3 First Amended Class Action Complaint was filed to add Plaintiff Pamela Cazares as an additional
4 plaintiff and class representative. After commencing written discovery, the Parties agreed to mediation.
5 JCL Dec., at ¶ 12.

6 **B. Class Counsels' Investigation**

7 To prepare for mediation, Class Counsel requested pertinent documents and data points to
8 evaluate Plaintiffs' claims and measure Defendant's liability exposure to the Class. In response,
9 Defendant produced, among other things, time, and payroll records for 25% of the Class, aggregate
10 workweek and pay period data, and copies of applicable handbooks, policies, and procedures. In total,
11 Defendant produced nearly 15,000 pages of documents and approximately 2.7 million unique cells of
12 time and payroll data. JCL Dec., ¶ 13.

13 Class Counsel then retained the statisticians and economists at Berger Consulting Group
14 ("BCG") to evaluate the Class Members' payroll and time data and to calculate Defendant's liability
15 exposure to the Class. BCG provides data analysis and damage modeling consulting services,
16 specializing in wage and hour class actions. BCG analyzed Defendant's time and payroll data and
17 developed various damage models that assisted Class Counsel at the time of mediation. JCL Dec., ¶
18 14.

19 Overall, Class Counsel thoroughly investigated the claims at issue. Class Counsel (1) reviewed
20 Plaintiffs' suitability as a putative class representatives through interviews, background investigations,
21 and analysis of their employment files; (2) evaluated Plaintiffs' potential claims; (3) researched similar
22 wage and hour class actions; (4) analyzed time and payroll records for the Class; (5) analyzed
23 Defendant's labor policies and practices; (6); developed comprehensive damage models which
24 estimated Defendant's liability for purposes of settlement with the assistance of a third party damages
25 consultant, BCG; (7) drafted the mediation brief; and (8) participated in the mediation. This
26 investigation allowed Class Counsel to fully assess the nature and magnitude of the claims being settled,
27 and to make an independent assessment of the reasonableness of the terms to which the Parties have
28 agreed. Based on its investigation of the facts, applicable law, and marketplace for similar settlements,

1 and considering the risk of significant delay and uncertainty associated with litigation, and the various
2 defenses asserted by Defendants, Class Counsel firmly believes this Agreement to be in the best
3 interests of the Class Members. Because the Settlement’s terms are fair, reasonable, and adequate. JCL
4 Dec., ¶ 15.

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

6 On August 29, 2022, the Parties participated in a full day mediation with the Hon. Carl J. West
7 (Ret.), an experienced wage and hour mediator and retired Los Angeles County Superior Court Judge.
8 The mediation concluded with a settlement after the Parties accepted a Mediator’s proposal, which was
9 subsequently memorialized in the form of a Memorandum of Understanding (“MOU”) and then the
10 Agreement. JCL Dec., ¶ 16. Class Counsel submits that the Settlement constitutes a fair, adequate,
11 and reasonable compromise of the claims at issue. JCL Dec., ¶¶ 17.

12 **III. ARGUMENT**

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

14 The proposed Settlement, including a Maximum Settlement Amount of One Million Two
15 Hundred Thousand Dollars and Zero Cents (\$2,000,000.00), meets the standards for preliminary
16 approval. Pre-trial settlement of complex class actions is a judicially favored remedy. (*Officers for*
17 *Justice v. Civil Serv. Comm’n* (9th Cir. 1982) 688 F.2d 615, 625 (“Voluntary conciliation and settlement
18 are the preferred means of dispute resolution.”).) Class action settlement approval requires an early
19 “preliminary” review by the trial court and a subsequent “final” review after notice of the settlement
20 has been distributed to class members for their comments and objections. (C.R.C. 3.769(c)-(g);
21 *Cellphone Termination Fee Cases*, 180 Cal.App.4th 1110, 1118 (2010) (the court first “preliminarily
22 approves the settlement” and later “conducts a final approval hearing to inquire into the fairness of the
23 proposed settlement”).) JCL Dec., ¶ 18.

24 Although Rule of Court Rule 3.769 does not provide detail as to the scope of review of the
25 proposed settlement, preliminary approval is warranted if the settlement falls within a “reasonable
26 range.” (*See North County Contractor’s Assn., Inc. v. Touchstone Ins. Services* (1994) 27 Cal.App.4th
27 1085, 1089-90; Conte & Newberg, *Newberg on Class Actions*, §§ 11.26 (4th ed. 2002).)
28 Reasonableness and fairness are presumed where: (1) the settlement is reached through “arms-length

1 bargaining;” (2) investigation and discovery are “sufficient to allow counsel and the court to act
2 intelligently;” (3) counsel is “experienced in similar litigation. . . .” (*Dunk v. Ford Motor Co.* (1996)
3 48 Cal.App.4th 1794, 1802.) The presumption of fairness is consistent with California’s public policy
4 goal of favoring settlements. (*Stambaugh v. Super. Ct* (1976) 62 Cal.App.3d 231, 236 (“the law wisely
5 favors settlements”); *Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1118 (“public
6 policy generally favors the compromise of complex class action litigation”); *7-Eleven Owners for Fair
7 Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1151 (“voluntary conciliation and
8 settlement are the preferred means of dispute resolution ... [t]his is especially true in complex class
9 action litigation”).)

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

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

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

23 The Parties participated in mediation with highly respected mediator Judge West. Judge West
24 managed the Parties’ expectations and provided a useful, neutral analysis of the issues and risks to both
25 sides. (*In re Apple Computer, Inc. Derivative Litig*, No. C 06-4128 JF (HRL), 2008 U.S. Dist. LEXIS
26 108195 (N.D. Cal. Nov. 5, 2008) (mediator’s participation weighs considerably against any inference
27 of a collusive settlement); *D’Amato v. Deutsche Bank* (2d. Cir. 2001) 236 F.3d 78, 85 (a “mediator’s
28 involvement in pre-certification settlement negotiations helps to ensure that the proceedings were free

1 of collusion and undue pressure.”.) The Parties only reached a settlement after both sides agreed to a
2 Mediator’s proposal, which was subsequently memorialized in a Memorandum of Understanding
3 (“MOU”). At all times, the Parties’ negotiations were at an arm’s length, adversarial, and non-
4 collusive. After reaching an agreement in principle, the Parties drafted and negotiated a long-form
5 settlement which is the subject of the instant motion. Objectively, the Settlement terms are fair,
6 adequate and represent a reasonable compromise of the claims at issue. JCL Dec., ¶ 19.

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

9 As set forth in greater detail above, Class Counsel conducted a very thorough investigation into
10 the factual and legal issues in dispute. The investigation allowed Class Counsel to fully assess the
11 nature and magnitude of the claims being settled, as well as the impediments to recovery, such as to
12 make an independent assessment of the reasonableness of the terms to which the Parties have agreed.
13 Based on this investigation of the facts, applicable law, and marketplace for similar settlements, and
14 considering the risk of significant delay, uncertainty associated with litigation, and the various defenses
15 asserted by Defendant, Class Counsel firmly believes this Agreement to be in the best interests of the
16 Class Members. Because the Settlement’s terms are fair, reasonable, and adequate, the Court should
17 preliminarily approve the Settlement. JCL Dec., ¶ 20.

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

19 The Maximum Settlement Amount of \$2,000,000.00 is within the range of reasonableness. To
20 determine whether a settlement is fair and reasonable, the court should “consider enough information
21 about the nature and magnitude of the claims being settled, as well as the impediments to recovery, to
22 make an independent assessment of the reasonableness of the terms to which the parties have agreed.”
23 (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133.) In making this determination,
24 the court is “not to try the case” but rather “satisfy itself that the class action settlement is within the
25 ‘ballpark of reasonableness.’” (*Id.* (emphasis added).) For this analysis, courts do “not require any such
26 explicit statement of value; [they] require[] a record which allows an understanding of the amount that
27 is in controversy and the realistic range of outcomes of the litigation.” (*Munoz v. BCI Coca-Cola*
28 *Bottling Co.* (2010) 186 Cal.App.4th 399, 409 (internal citation omitted).) The reasonableness of a

1 settlement is not dependent upon its actual value approaching the potential recovery plaintiffs might
2 have received if they had succeeded at trial.² Indeed, “[t]he determination whether a settlement is
3 reasonable does not involve the use of a ‘mathematical equation yielding a particularized sum.’” (*Frank*
4 *v. Eastman Kodak Co.* (W.D.N.Y. 2005) 228 FRD. 174, 186 (*quoting In re Michael Milken and Assoc.*
5 *Sec. Litig.* (S.D.N.Y. 1993) 150 F.R.D. 57, 66).)

6 The Maximum Settlement Amount of \$2,000,000.00 is fair and reasonable considering the
7 nature and magnitude of the claims being settled and the various potential impediments to recovery.
8 Prior to mediation, Class Counsel retained BCG to develop economic damage models measuring
9 Defendant’s liability exposure while accounting for the uncertainties of continued litigation. The
10 various models were informed by Class Counsel’s investigation, including the analysis of a significant
11 sample of time and payroll data. Class Counsel projected Defendant’s maximum liability exposure at
12 \$18,966,252.00 comprised of \$10,723,752.00 dollars for *class* liability and another \$8,242,500.00 for
13 PAGA penalties. Thus, the Maximum Settlement Amount of \$2,000,000.00 represents approximately
14 18.6% of Defendant’s *class-wide* liability exposure and approximately 10.5% of Defendant’s
15 maximum liability exposure – before applying any discount factors. The following summarizes
16 Defendant’s estimated exposure. JCL Dec., ¶ 21.

17 **(a) Estimated Damages for Meal and Rest Period Violations**

18 One of Plaintiffs’ primary claims in this action is that because of their rigorous work schedules,
19 Plaintiffs, Class Members, and Aggrieved Employees were not able to take timely and duty-free meal
20 and rest periods. Plaintiffs also alleged that Defendant implemented a so-called “on premises” rest
21 period practice. Based on the review of the Class Members’ time and payroll data, BCG estimated
22 modest violation rate of **39.1%** for meal periods. Plaintiffs utilized the same violation rate for purposes

23 ² Federal district courts recognize that there is an inherent “range of reasonableness” in determining whether to approve a
24 settlement “which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs
25 necessarily inherent in taking any litigation to completion.” *Newman v. Stein* (2d. Cir. 2002) 464 F.2d 689, 693; *see In re*
26 *Omnivision Tech, Inc.* (N.D. Cal. 2008) 559 F.Supp.2d 1036; *see also Nat’l Rural Telecomm. Coop. v. Directv. Inc.* (C.D.
27 Cal. 2004) 221 F.R.D. 523, 527 (“well settled law that a proposed settlement may be acceptable even though it amounts to
28 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 of quantifying damages for rest period violations. In total, Class Counsel estimated Defendant's
2 exposure for the meal and rest claims at \$5,020,621. JCL Dec., ¶ 22.

3 Defendant argued, *inter alia*, that it provided the Class Members and Aggrieved Employees
4 with compliant meal and rest periods as evidenced by the modest violation rate. Defendant also argued
5 that they maintained facially compliant meal and rest period policies and began paying missed meal
6 and rest period premiums in 2021. Thus, Defendant argued, any missed meal and rest periods were
7 done so voluntarily and not eligible for premium payments. In sum, Defendant argued that there was
8 no potential liability for Plaintiffs' alleged meal and rest period violations and any claimed violations
9 required a highly individualized inquiry not suitable to class treatment. JCL Dec., ¶ 23.

10 **(b) Estimated Damages for Miscalculation of the Regular Rate of Pay**

11 One of Plaintiffs' primary claims in this Action is that Defendant failed to calculate certain non-
12 discretionary compensation into the regular rate of pay for purposes of paying overtime and redeemed
13 sick pay. Based on the review of the Class Members' time and payroll data, BCG estimated Defendant
14 underpaid the Class Members approximately \$57,248. Defendant vigorously denied liability and
15 asserted that all incentive compensation was either properly calculated into the regular rate of pay or
16 properly excluded as discretionary compensation. JCL Dec., ¶ 24.

17 **(c) Exposure for Off the Clock Work**

18 Plaintiffs also alleged that they were required to perform work while off-the-clock. Specifically,
19 Plaintiffs alleged that during portions of the Class Period, Defendant required the Class to work while
20 off-the-clock. Specifically, Plaintiffs were required to spend time completed working related tasks
21 before and after their shifts while off-the-clock. Plaintiffs' expert estimated Defendant's exposure for
22 this claim to be \$124,515 based on an assumed 5 minutes of uncompensated time spent working off-
23 the-clock. Defendant argued that any time spent performing this task was voluntary and/or de minimis,
24 and, thus, not compensable. JCL Dec., at ¶ 25.

25 **(d) Exposure for Expense Reimbursement Claim**

26 Plaintiffs further alleged that Defendant required the Class to regularly pay out-of-pocket to use
27 their cell phones for work-related purposes. California law requires "[a]n employer shall indemnify
28 his or her employee for all necessary expenditures or losses incurred by the employee in direct

1 consequence of the discharge of his or her duties, or of his or her obedience to the directions of the
2 employer...” (See *Cal. Labor Code* § 2802(a).) Plaintiffs estimated Defendant’s exposure for this
3 claim at \$152,302 or \$5 per month for each member of the Class during the Class Period. JCL Dec., ¶
4 26.

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

6 Plaintiffs allege that Defendant’s alleged violations resulted in derivative violations of Labor
7 Code sections 203 and 226(a). Class Counsel considered the arguable presence of various penalties
8 and weighed the potential recoveries against probable defenses. Specifically, Defendant could argue
9 that Plaintiffs could not prove the “willful” prong needed to obtain waiting time penalties under Labor
10 Code section 203. Additionally, Defendant could argue that Plaintiffs could not show that Class
11 Members suffered an “injury” because of wage statement violations, as required by Labor Code section
12 226. Plaintiffs estimated Defendant’s exposure for these claims to be approximately \$5,369,066
13 (\$3,337,316 for Labor Code section 203 waiting time penalties and \$2,031,750 for Labor Code section
14 226 penalties). JCL Dec., ¶ 27.

15 **(f) Defendant’s PAGA Exposure**

16 Class Counsel’s damage models also estimated Defendant’s exposure for PAGA penalties. At
17 the time of mediation, Plaintiffs estimated Defendant’s PAGA exposure to be approximately \$8,242,500
18 dollars. JCL Dec., ¶ 28. Under PAGA, Courts have considerable discretion to reduce the penalty award.
19 In *Fleming v. Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011), a federal court reduced PAGA
20 penalties from \$2,800,000 to \$500,000, a reduction of 82.2%, because the court found maximum
21 penalties “unjust” because the employees had suffered no injuries. Some trial courts have actually
22 awarded no civil penalties, even when Labor Code violations are established. See *In re Nordstrom Com.*
23 *Cases*, 186 Cal.App.4th 576, 589 (2010) (affirming an award of \$0 in PAGA penalties in a wage and
24 hour class action); *In re Taco Bell Wage & Hour Actions*, 2016 U.S. Dist. LEXIS 48557, *40-43 (E.D.
25 Cal. Apr. 6, 2016) (PAGA penalties denied after trial).

26 To recover any PAGA penalties, Plaintiffs would be required at trial to prove each of the
27 underlying Labor Code violations. See *Cardenas v. McLane Foodservice, Inc.*, 2011 U.S. Dist. LEXIS
28 13126, *10 (C.D. Cal. 2011) (“Given the statutory language [of PAGA], a plaintiff cannot recover on

1 behalf of individuals whom the plaintiff has not proven suffered a violation of the Labor Code by the
2 defendant."). Here, Plaintiffs would need to prove that each Aggrieved Employee suffered a violation
3 for each pay period the employee worked. Again, Defendant raised several defenses that presented
4 serious threats to the claims of the Plaintiffs and the Aggrieved Employees. In addition to those
5 arguments discussed *supra*, Defendant also argued that the Court of Appeals decision in *Cacho v.*
6 *Eurostar, Inc.* (2019) 43 Cal.App.5th 885, weakened Plaintiffs' claims, on liability, value, and
7 manageability as to the rest period claims. JCL Dec., ¶ 29.

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

14 The proposed Settlement allocates \$100,000 to satisfy the PAGA claims. This amount represents
15 approximately 5% of the Maximum Settlement Amount. This achieves a fair, reasonable, and adequate
16 resolution of Plaintiffs' PAGA claim. See *Moniz v. Adecco* (2021) 72 Cal.App.5th 56. Further, the
17 amount allocated to the satisfaction of Plaintiffs' PAGA claim, is well within the range of
18 reasonableness. See, e.g., *Nordstrom Comm'n Cases* (2010) 186 Cal.App.4th 576, 589 (approving 0%
19 PAGA allocation); *Berry v. Urban Outfitters* (N.D. Cal. Lead Case No. 13-cv-02628-JSW) (approving
20 1% PAGA allocation in \$5M settlement); *Jack v. Hartford Fire Ins. Co.* (S.D. Cal. 2011) 2011 WL
21 4899942 * 6 (approving \$3,000 PAGA allocation in \$1.2M settlement); *Singer v. Becton Dickinson &*
22 *Co.* (S.D. Cal. 2010) 2010 WL 2196104 *2 (approving \$3,000 PAGA allocation in \$1M settlement);
23 and *Hopson v. Hanesbrands, Inc* (N.D. Cal. 2009) 2009 WL 928133 * 9 (approving \$1,500 PAGA
24 allocation in \$1.026M settlement.) JCL Dec., ¶ 30.

25 4. 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., ¶ 31.

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
25 inherently 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

1 hardly beyond the realm of possibility. Accordingly, this factor weighs in
2 favor of preliminary approval.

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

4 Finally, continuing to litigate this action would require continued and extensive resources
5 coupled with significant Court time to proceed through trial and post-trial motions, which can often
6 take years. Furthermore, wage and hour litigation is complex and expensive, as it often necessitates
7 extensive expert testimony, particularly with regards to damages. But even if Plaintiffs are successful
8 at trial, Plaintiffs are acutely aware that a judgment does not end the litigation. Plaintiffs fully expect
9 that Defendant would appeal any favorable judgment. As demonstrated by *Magadia, supra*, 999 F.3d
10 668, the risk of an appeal and subsequent reversal is real. JCL Dec., ¶ 32. “Avoiding such a trial and
11 the subsequent appeal in this complex case strongly militates in favor of settlement rather than further
12 protracted and uncertain litigation.” (*Nat’l Rural Telecomms. Coop v. DirecTV* (C.D. Cal. 2004) 221
13 F.R.D. 523, 527.) Thus, “unless the settlement is clearly inadequate, its acceptance and approval are
14 preferable to lengthy and expensive litigation with uncertain results.” (*Id.* at 526.)

15 Given the amount of the settlement here, as compared to potential value of the claims, offset by
16 the various inherent risks to continued litigation, the settlement is fair and reasonable. JCL Dec., ¶ 33.

17 **B. The Notice of Proposed Class Action Settlement**

18 The Class is entitled to the best practical notice under the circumstances. (*Kass v. Young* (1977)
19 67 Cal.App.3d 100, 106.) The purpose of the notice is to give class members sufficient information to
20 decide whether they should accept the benefits offered, opt out and pursue their own remedies, or object
21 to the settlement. (*Trotsky v. Los Angeles Fed Savings & Loan Assn.* (1975) 48 Cal.App.3d 143, 151-
22 52.) The notice must advise class members “that they may be excluded from the class if they so request
23 and that they will be bound by the judgment, whether favorable or not, if they do not request exclusion.”
24 (*Kass*, 67 Cal.App.3d at 106.) Authorities generally require service of the class notice by mail or similar
25 reliable means. (*Chance v. Super. Ct.* (1962) 58 Cal.2d 275, 290; *Cart v. Super. Ct.* (1975) 50
26 Cal.App.3d 960, 972.)³

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

1 The Parties jointly drafted the Notice of Proposed Class Action Settlement (“Class Notice”)
2 which fairly and neutrally informs the Class of their rights and remedies. The Settlement Administrator
3 will first verify addresses, then mail the proposed Class Notice to the entire Class. The Class Notice
4 includes information regarding the nature of the lawsuit, a summary of the substance of the Settlement’s
5 terms, the procedure, and time within which to requests for exclusions or objections to the Settlement,
6 the date for the final approval hearing, the formula used to calculate settlement payments, and the terms
7 and scope of the Released Class Claims. Agreement at §§ 1.25 and 5.2. The Parties negotiated this
8 method to ensure delivering the most reasonable method of notice to the Class while ensuring cost
9 effective administration of the Settlement. JCL Dec., ¶¶ 34.

10 Accordingly, both the content and method of disseminating the Class Notice satisfy due process.
11 (See C.R.C. 3.776(e)-(f); *State of Cal. v. Levi Strauss* (1986) 41 Cal.3d 460,485 (the class notice must
12 “fairly apprise the class members of the terms of the proposed compromise and of the options open to
13 dissenting class members.”).) JCL Dec., ¶ 35.

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

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

26 The Settlement provides for a Service Awards of \$10,000 to each Plaintiff Aguilar and Plaintiff

27
28 *Fontana v. Elrod* (7th Cir. 1987) 826 F.2d 729, 732.

1 Cazares. The Service Awards are fair and reasonable compensation for the Plaintiffs efforts bringing
2 the action, assisting Class Counsel with the litigation and settlement, regularly conferring with Class
3 Counsel on the status of the case and the strategies for prosecuting the claims, reviewing the proposed
4 Settlement to ensure that its terms are fair and provide adequate relief for the Settlement Class. JCL
5 Dec., ¶ 36.

6 Class Counsel on behalf of Plaintiffs will file a formal motion for the negotiated Class
7 Representative Service Award once preliminary approval of the Settlement is granted. Plaintiffs
8 respectfully submit that the above showing is sufficient for preliminary approval of the negotiated Class
9 Representative Service Award. JCL Dec., ¶ 37.

10 **D. The Court Should Preliminarily Approve the Attorneys' Fees and Expenses**

11 The purpose of the attorneys' fees in class action litigation is to reward counsel who took the
12 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 Cal.App.4th 43, 66 n.11 ("Empirical studies show that regardless whether the percentage method or the
16 lodestar method is used, fee awards in class actions average around one-third of the recovery.");
17 Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical*
18 *Study, J. of Empirical Legal Studies*, Vol. 1, Issue 1, 27-78, March 2004, at 35 (independent studies of
19 class action litigation nationwide have come to a similar conclusion that a one-third fee is consistent
20 with market rates).)

21 Class Counsel took this matter on a contingency fee basis and invested significant time and
22 expense successfully prosecuting Plaintiffs' claims. As discussed *supra*, the estimated average
23 Individual Settlement Payments illustrates the demonstrably positive outcome for the Class.
24 Considering the positive outcome, and considering the supporting authority, the proposed Attorneys'
25 Fees and Expenses are fair and reasonable. JCL Dec., ¶ 38.

26 Plaintiffs will file a formal motion for the Attorneys' Fees and Expenses once preliminary
27 approval of the Settlement is granted. Plaintiffs respectfully submit that the above showing is sufficient
28 for preliminary approval of the negotiated attorneys' fees. JCL Dec., ¶ 39.

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

2 For Settlement, Plaintiffs contend, and Defendant does not dispute, that provisional certification
3 of the Class is appropriate. JCL Dec., ¶ 40.

4 1. The Standard for Class Certification

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

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

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

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

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

28 Because all members of the Class are Defendant’s current and former non-exempt employees,

1 the class is readily ascertainable from Defendant's regular business records, i.e., payroll records. JCL
2 Dec., ¶ 41.

3 The statutes relating to each of Plaintiffs' claims apply with equal force and effect to the entire
4 Settlement Class. Factually, Defendant's policies and practices apply class-wide, and Defendant's
5 liability can be determined by facts common to all members of the class. The wage and hour issues are
6 both numerous and substantial, and a class action is the most advantageous method of dealing with the
7 claims of the Settlement Class. JCL Dec., ¶ 42.

8 Plaintiffs' wage and hour claims are typical of the proposed Class because they arise from the
9 same factual basis and are based on the same legal theories applicable to the other Class Members.
10 Likewise, Plaintiffs' interests are entirely coextensive with the interests of the Class. Plaintiffs allege
11 that they were injured by the same company-wide practices to which the proposed Class Members were
12 subject to and seek the same relief. Plaintiffs have already demonstrated their ability to advocate for
13 the interests of the Class Member by initiating this litigation, undertaking extensive class discovery,
14 and evaluating the proposed settlement to assure that it is fair. JCL Dec., ¶ 43.

15 Additionally, Plaintiffs are represented by competent Class Counsel who have extensive
16 experience in litigating wage and hour class action cases. Class Counsel successfully briefed, argued,
17 certified, and gained state court settlement approval of the same class-wide causes of action that are at
18 issue in this case. Class Counsel's wage and hour class action experience establishes that they are well
19 qualified to represent the interests of this Class. JCL Dec., ¶¶ 44-52; Declaration of Shani Zakay, ¶¶ 1-
20 3.

21 A class action is superior to a multitude of individual lawsuits. Given the size and amount of
22 each individual claim, the Class Members likely have little incentive to litigate their claims on an
23 individual basis because the out-of-pocket expense and personal commitment necessary to litigate each
24 claim outweighs any potential recovery. In sum, class treatment is superior to individual, case-by-case
25 adjudication. JCL Dec., ¶ 44.

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Dated: March 6, 2023

By: 
Jean-Claude Lapuyade, Esq.