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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

PEDRO RODRIGUEZ and JOSE GARCIA,
individuals, on behalf of themselves and on
behalf of all persons similarly situated,

Plaintiffs,

v.

FERMA GREENBOX, INC., a California
Corporation; FERMA CORPORATION, a
California Corporation; and DOES 1-50,
Inclusive,

Defendants.

Case No. RG21101104

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

Hearing Date: February 7, 2023
Hearing Time: 10:00 a.m.
Reservation ID: 485754779697

Judge: Evelio Grillo
Dept.: 21

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SECONDARY SOURCES

18	Conte & Newberg, <i>Newberg on Class Actions</i> , §§11.26, 11.51 (4th ed. 2002)	
19		8-9, 17
20	Eisenberg & Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study,	
21	53 UCLA L. Rev. 1303 (2006)	
22		17-18
23	Wright, A. Miller & M. Kane, <i>Federal Practice and Procedure</i> § 1789, at 253 (2d ed. 1986)	
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I. INTRODUCTION

Plaintiffs PEDRO RODRIGUEZ and JOSE GARCIA (“Plaintiffs”) seek 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 46 members of the Settlement Class. The basic terms of the Agreement provide for the following:

1. The “**Settlement Class**” shall mean all truck drivers who are or previously were employed by Defendant and performed work in California during the Class Period. The “**Settlement Class Period**” means the period from May 21, 2017, to September 30, 2022. The Settlement Class excludes any person who submits a timely and valid request for exclusion. Agreement at §§ I(G), (H) and (GG).

2. The “**Aggrieved Employees**” means all truck drivers who are or previously were employed by Defendant and performed work in California during the PAGA Period. The “**PAGA Period**” means the period of March 3, 2020 to September 30, 2022. Agreement at §§ I(B) and (V). Aggrieved Employees who submit a request for exclusion will remain bound by the PAGA Release and will nonetheless receive their portion of the PAGA Settlement.

3. The “**Total Settlement Amount**” is Two Hundred Thousand Dollars (\$200,000). Agreement at §I(O). The releases granted to Defendant only become effective upon the funding of the Total Settlement Amount. §III(B). The Total Settlement Amount is non-reversionary and includes the following:

a. A “**Class Representative Service Award**” in the amount of \$7,500 to each Plaintiff for their services on behalf of the Settlement Class. Agreement at §III(M)(9).

b. A “**Class Counsel Award**” in the amount not to exceed one-third of the Total Settlement Amount for attorney’s fees, currently estimated to be \$66,666.66 *and* litigation costs and expenses not to exceed \$20,000, to be paid to Class Counsel. Agreement at §III(M)(10).

c. A “**PAGA Settlement**” of \$10,000 shall be allocated from the Total Settlement Amount for settlement of claims for civil penalties under the Private Attorneys General Act of 2004 (“PAGA Amount”). The Settlement Administrator shall pay 75% of the PAGA Settlement (“LWDA

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

Payment”) the California Labor and Workforce Development Agency. The Settlement Administrator shall distribute 25% of the PAGA Amount (“Aggrieved Employee Payment”) to members of the Aggrieved Employees. Agreement at §III(M)(11). The Aggrieved Employee Payment will be allocated to all Aggrieved Employees on a pro-rata basis according to the number of pay periods each Aggrieved Employee worked during the PAGA Period. Agreement at §I(U).

d. And “**Settlement Administration Costs**” not to exceed \$8,000 payable to the proposed Settlement Administrator, ILYM Group, Inc., for, *inter alia*, the administration of the Notice Packet and Individual Settlement Payments. Agreement at §III(M)(12).

4. The “**Net Settlement Fund**” of approximately \$80,333.33 (Total Settlement Amount minus the requested Class Representative Service Award, Class Counsel Award, PAGA Settlement and Settlement Administration Costs) which will be allocated to all participating members of the Settlement Class on a pro-rata basis according to the number of Workweeks each Settlement Class member performed during the Class Period. The entire Net Settlement Amount will be paid to all Settlement Class Members who do not opt out of the Settlement Class resulting in an average Individual Settlement Share of **\$1,746.37**. Agreement at §III(M)(1); SOZ Dec., ¶ 5.

An objective evaluation of the Settlement confirms that the relief negotiated on behalf of the Settlement Class is fair, reasonable, and valuable. The Settlement was negotiated by the Parties at arm’s length. The Settlement confers substantial benefits to the Settlement 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. SOZ Dec., ¶ 5.

As discussed below, the proposed Settlement satisfies all criteria for preliminary settlement approval under California law and falls within the range of reasonableness. The average Individual Settlement Share to the Settlement Class meets or exceeds awards in similar wage and hour class actions. Moreover, the proposed Settlement Class is appropriate for provisional certification. Accordingly, Plaintiff respectfully requests that this Court grant preliminary approval of the Settlement. SOZ Dec., ¶ 6.

II. FACTS AND PROCEDURE

A. Overview of the Litigation

Defendant provides debris box hauling services to general contractors, residential, industrial, commercial, state and government facilities, including in Alameda County, where Plaintiffs worked.

Plaintiffs worked for Defendants as drivers since 2016. As drivers, at all times during their employment, Plaintiffs earned an hourly wage, including minimum wages for all hours worked. Throughout their employment, Plaintiffs were subject to Defendants' written policies and procedures. SOZ Dec., ¶ 7.

Generally, Plaintiffs claim that Defendants failed to pay them and the Class Members wages for all time worked, including time spent undergoing Covid-19 screening, failed to provide accurate itemized wage statements, and failed to provide wages when due. Defendant asserts that it fully complied with all applicable employment laws and raised several other significant defenses to Plaintiffs' claims. SOZ Dec., ¶ 8.

On March 3, 2021, Plaintiff served Defendant and the Labor and Workforce Development Agency ("LWDA") with a Notice of Violations ("PAGA Notice"). Plaintiff's PAGA Notice set forth the facts and theories supporting Defendants' alleged violations of various provisions of the California Labor Code and applicable Industrial Welfare Commissions ("IWC") Wage Order and of his intent to pursue claims under California Labor Code Private Attorneys General Act, Cal. Lab. Code Sections 2698 et seq ("PAGA"). SOZ Dec., ¶ 9.

On May 21, 2021, Plaintiffs filed a class action complaint in the Alameda Superior Court. On October 18, 2021 Plaintiffs filed a First Amended Complaint, which is the operative complaint, alleging claims for: (1) Unfair Competition in Violation of Bus. and Prof. Code §§ 17200; (2) failure to pay minimum wages in violation of California Labor Code sections 1194, 1197 and 1197.1; (3) failure to provide accurate itemized wage statements in violation of California Labor Code sections 226 and 226.2; (4) failure to provide wages when due in violation of California Labor Code sections 201, 202 and 203; and (5) violations of the Private Attorneys General Act ("PAGA"). SOZ Dec., ¶ 10.

After engaging in extensive formal written discovery, the Parties agreed to attend mediation. To prepare for mediation, the Parties agreed to informally produce certain documents and data points

1 subject to the mediation privilege, including but not limited to, a sample of the Class Members' time
2 and payroll data. As discussed *infra*, Plaintiffs' counsel retained the Berger Consulting Group, to
3 analyze Defendants' time and payroll data. SOZ Dec., ¶ 12.

4 On August 1, 2022, the Parties participated in a full day mediation with Steven J. Rottman, Esq.
5 After arms-length negotiations and bargaining, the mediation concluded without a settlement.
6 However, Mediator Rottman made a mediator's proposal, which was accepted by all Parties, and was
7 memorialized in the form of a Memorandum of Understanding. After reaching an agreement in
8 principle, the parties drafted and negotiated a long-form settlement agreement, which is the subject of
9 the instant motion. SOZ Dec., ¶ 13.

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

11 In November 2020, Class Counsel began its pre-filing investigation into Plaintiffs' complaints.
12 Class Counsel's investigation started with several lengthy interviews with Plaintiffs. As part of the
13 interview process, Plaintiffs produced numerous documents related to their employment for Defendant,
14 including portions of Defendant's written policies, and time and payroll records. Thereafter, Class
15 Counsel summarized the known factual and legal issues in the PAGA Notice addressed to the LWDA.
16 Several weeks later, Class Counsel filed this class action. SOZ Dec., ¶ 15.

17 After engaging in significant written discovery, the Parties agreed to mediate the action. To
18 prepare for mediation, Class Counsel requested several documents and data points to further evaluate
19 Plaintiff's claims and Defendants' liability exposure to the Settlement Class members. In response,
20 Defendants produced the pay statements for a sample of the Settlement Class members. In total,
21 Defendants produced hundreds of pages for Class Counsel to analyze. SOZ Dec., ¶ 17.

22 Class Counsel then retained the statisticians and economists at Berger Consulting Group
23 ("BCG"), to evaluate the Settlement Class Members' payroll and time data. BCG provides data
24 analysis and damage modeling consulting services specializing in wage and hour class actions. BCG's
25 team of financial and data analysts are credentialed and experienced experts in their fields and have
26 provided their expertise on thousands of cases. Stated differently, the BCG is uniquely qualified to
27 analyze Defendants' time and payroll data. SOZ Dec., ¶ 18.

1 BCG analyzed Defendant's time and payroll data to assist in the development of a damage
2 model. Among other things, BCG determined the approximate number of work shift, work weeks, pay
3 periods, average rate of pay, average length of shift and average number of hours worked per week and
4 pay period during the Class Period. BCG also estimated the amount of off-the-clock work performed
5 by the Settlement Class during the Class Period and related penalties. SOZ Dec., ¶ 19.

6 In advance of mediation, Class Counsel created a damage model predicated on BCG analysis.
7 Class Counsel's model calculated Defendants' potential liability exposure while accounting for the
8 uncertainties of continued litigation. This damage model informed and guided Class Counsel during
9 the mediated settlement discussions. SOZ Dec., ¶ 20.

10 Overall, Class Counsel thoroughly investigated the claims at issue, including: (1) determining
11 Plaintiffs' suitability as a putative class representative through interviews, background investigations,
12 and analysis of their employment files; (2) evaluating all of Plaintiffs' potential claims; (3) researching
13 similar wage and hour class actions as to the claims brought, the nature of the positions, and the type
14 of employer; (4) analyzing the Settlement Class's time and payroll records; (5) analyzing Defendants'
15 labor policies and practices; (6) researching settlements in similar cases as well as outstanding issues
16 which could affect settlement approval; (7) evaluating Plaintiffs' claims and estimating Defendant's
17 liability for purposes of settlement; (8) drafting the mediation brief; and (9) participating in the
18 mediation. This investigation allowed Class Counsel to fully assess the nature and magnitude of the
19 claims being settled, as well as the impediments to recovery, such as to make an independent
20 assessment of the reasonableness of the terms to which the parties have agreed. SOZ Dec., ¶ 21.

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

22 On August 1, 2022, the Parties conducted a full day of mediation with Steven J. Rottman, Esq.,
23 a highly regarded mediator of wage and hour class actions. Mr. Rottman helped to manage the Parties'
24 expectations and provided a useful, neutral analysis of the issues and risks to both sides. The Parties
25 made substantial progress with Mr. Rottman's assistance. Namely, the parties exchanged information
26 regarding their respective claims and defenses, including their respective evaluation of the damages.
27 After hours of arm's length and adversarial negotiations, the mediation concluded without a settlement.
28 However, at the conclusion of the mediation, Mr. Rottman issued a proposal for settlement that the

Parties accepted. The complete and final terms of the Parties' settlement are now set forth in the Agreement. Class Counsel submits that the Settlement constitutes a fair, adequate, and reasonable compromise of the claims at issue. SOZ Dec., ¶ 22.

D. The Proposed Settlement Fully Resolves Plaintiff's Claims

1. The Composition of the Settlement Class Members

The proposed Settlement Class consists of all truck drivers who are or previously were employed by Defendant and performed work in California during the Class Period (between May 21, 2017 to September 30, 2022). The Settlement Class excludes any person who submits a timely and valid request for exclusion. Agreement at §§ I(G), (H) and (GG). There are approximately 46 members of the Settlement Class that worked an estimated 6,052 workweeks during the Class Period. Agreement at §III(A)(2).

2. The Settlement Consideration

The Parties agreed to settle the underlying class claims in exchange for the Total Settlement Amount of \$200,000. The Total Settlement Amount Fund includes: (1) Individual Settlement Payments to the Settlement Class; (2) a Class Representative Service Award of \$7,500 to each Plaintiff for their services on behalf of the Settlement Class and, equally important, for a general release of claims; (3) a PAGA Settlement in the amount of \$10,000; (4) Settlement Administration costs estimated at \$8,000, (5) Class Counsel Award in the amount of \$86,666, comprised of attorneys' fees equal to one-third of the Total Settlement Amount, and up to \$20,000 for actually incurred litigation expenses. Agreement at §III(M).

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

3. Formula for Calculating Individual Settlement Payments

Each participating member of the Settlement Class will receive an Individual Settlement Payment. The Individual Settlement Payment will be proportional to the number of Workweeks each

1 member of the Settlement Class worked for Defendants during the Class Period. Using the Class Data,
2 the Settlement Administrator shall add up the total number of Workweeks for the entire Settlement
3 Class. Each Settlement Class Member's final Individual Settlement Payment for purposes of payment
4 will be calculated by multiplying the Net Settlement Amount by a fraction, the numerator of which is
5 the Settlement Class Member's total number of Workweeks, and the denominator of which is the total
6 number of Workweeks of all Settlement Class Members. Agreement at §III(M)(1).

7 Each Individual Settlement Payment will be reduced by any legally mandated employee tax
8 withholdings (e.g., employee payroll taxes, etc.). Agreement at §III(M)(1). Individual Settlement
9 Payments for members of the Settlement Class who submit valid and timely requests for exclusion will
10 be redistributed to Settlement Class members who do not submit valid and timely requests for exclusion
11 on a pro rata basis. Agreement at §III(M)(1).

12 Given that there are approximately 46 Settlement Class Members, the average gross recovery is
13 approximately \$1,746.37 (Net Settlement Amount divided by Settlement Class Members). SOZ Dec.,
14 ¶ 4. This average net recovery exceeds many wage and hour class action settlements approved by
15 California state and federal courts. (See, e.g., *Shachno et al. v. KT Hotels, LLC, et al.*, San Diego
16 Superior Court Case No. 37-2018-00043601 (average net recovery of \$283.35); *Almanza v. The*
17 *Express Group Inc.*, San Bernardino Superior Court Case No. CIVDS1722542 (average net recovery
18 \$174.68); *Macaspac v. San Antonio Regional Hospital*, San Bernardino Superior Court Case No.
19 CIVDS1512625 (average net recovery \$715.97) and *Crawford et al. v. Outlook Amusements, Inc.*, Los
20 Angeles Superior Court Case No. BC617160 (average net recovery \$333.98).

21 4. Release by Participating Settlement Class Members

22 Generally, as of the Funding Date, Plaintiff and the Settlement Class Members will agree to
23 release the Defendant from the Released Claims, defined as "all class claims alleged or which could
24 have reasonably been alleged, based on the facts set forth in either the Complaint filed on May 21, 2021
25 or the First Amended Complaint filed on October 18, 2021, which occurred during the Class period,
26 and expressly excluding all other claims, including claims for vested benefits, wrongful termination,
27 unemployment insurance, disability, social security, workers' compensation, and class claims outside
28 of the Class Period." Agreement at §§I(BB) and III(B).

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Generally, upon the Funding Date the LWDA and the Aggrieved Employees will release all PAGA claims alleged in the operative complaint and Plaintiffs' PAGA notices to the LWDA which occurred during the PAGA Period, and expressly excluding all other claims, including claims for vested benefits, wrongful termination, unemployment insurance, disability, social security, workers' compensation, and PAGA claims outside of the PAGA Period. Agreement at §§I(CC) and III(C).

III. ARGUMENT

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

The proposed Settlement, including a Total Settlement Amount of \$200,000, meets the standards for preliminary approval. Pre-trial settlement of complex class actions is a judicially favored remedy. (*Officers for Justice v. Civil Serv. Comm’n* (9th Cir. 1982) 688 F.2d 615, 625 (“Voluntary conciliation and settlement are the preferred means of dispute resolution.”).) In California, class action settlement approval requires an early “preliminary” review by the trial court and a subsequent “final” review after notice of the settlement has been distributed to class members for their comments and objections. (C.R.C. 3.769(c)-(g); *Cellphone Termination Fee Cases*, 180 Cal. App. 4th 1110, 1118 (2010) (the court first “preliminarily approves the settlement” and later “conducts a final approval hearing to inquire into the fairness of the proposed settlement”).)

Although California Rule of Court Rule 3.769 does not provide detail as to the scope of review of the proposed settlement, preliminary approval is warranted if the settlement falls within a “reasonable range.” (*See North County Contractor’s Assn., Inc. v. Touchstone Ins. Services* (1994) 27 Cal.App.4th 1085, 1089-90; Conte & Newberg, *Newberg on Class Actions*, §§ 11.26 (4th ed. 2002) (“Newberg”).) Reasonableness and fairness are presumed where: (1) the settlement is reached through “arms-length bargaining;” (2) investigation and discovery are “sufficient to allow counsel and the court to act intelligently;” (3) counsel is “experienced in similar litigation. . . .” (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802.) The presumption of fairness is consistent with California’s public policy goal of favoring settlements. (*Stambaugh v. Super. Ct* (1976) 62 Cal.App.3d 231, 236 (“the law wisely favors settlements”); *Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1118 (“public policy generally favors the compromise of complex class action litigation”); *7-Eleven Owners*

1 for *Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1151 (“voluntary conciliation
2 and settlement are the preferred means of dispute resolution ... [t]his is especially true in complex class
3 action litigation”).)

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

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

12 “[W]hat transpires in settlement negotiations is highly relevant to the assessment of a proposed
13 settlement’s fairness.” (*State v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 482.) Courts presume the
14 absence of fraud or collusion in the negotiation of a settlement, unless evidence to the contrary is
15 offered; thus, there is a presumption that settlement negotiations are conducted in good faith. (Newberg,
16 § 11.51.)

17 The Parties participated in mediation with highly respected mediator, Steven J. Rottman, Esq.
18 Mediator Rottman managed the Parties’ expectations and provided a useful, neutral analysis of the
19 issues and risks to both sides. (*In re Apple Computer, Inc. Derivative Litig.* No. C 06-4128 JF (HRL),
20 2008 U.S. Dist. LEXIS 108195 (N.D. Cal. Nov. 5, 2008) (mediator’s participation weighs considerably
21 against any inference of a collusive settlement); *D’Amato v. Deutsche Bank* (2d. Cir. 2001) 236 F.3d
22 78, 85 (a “mediator’s involvement in pre-certification settlement negotiations helps to ensure that the
23 proceedings were free of collusion and undue pressure.”).) At all times, the Parties’ negotiations were
24 at an arm’s length, adversarial and non-collusive. In fact, despite a full day of mediated negotiations,
25 the Parties reached an impasse and the mediation session concluded without a settlement. The matter
26 resolved only when Mr. Rottman issued a mediator’s proposal that the Parties accepted. Mr. Rottman
27 arrived at his proposal after hearing arguments, reviewing evidence, and evaluating the Parties’
28 respective claims and defenses. SOZ Dec., ¶ 24.

1 Once the Parties agreed to the Mediator’s proposal, the Parties engaged in protracted negotiations
2 regarding the written terms of the class action settlement. The Parties maintained the arm’s length, non-
3 collusive and adversarial negotiations while arriving at the final terms of the Settlement. The
4 Agreement is the final product of these mediated negotiations. Objectively, the Settlement terms are
5 fair, adequate and represent a reasonable compromise of the claims at issue. SOZ Dec., ¶ 25.

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

8 As set forth in greater detail above, Class Counsel conducted a very thorough investigation into
9 the factual and legal issues in dispute. In addition to extensive informal discovery, document review,
10 data analysis and legal research, Class Counsel also researched similar wage and hour actions.
11 Although no two cases are identical, this research provided Class Counsel with a marker to inform
12 settlement discussions, and ultimately, to measure this settlement against. The investigation allowed
13 to Class Counsel to realistically assess the value of Plaintiff’s claims and intelligently engage defense
14 counsel in settlement discussions that culminated in the proposed settlement now before the Court.
15 SOZ Dec., ¶ 22.

16 Class Counsel only agreed to enter the Settlement following thorough investigation and
17 evaluation of Plaintiffs’ claims. Based on their investigation of the facts, applicable law, and
18 marketplace for similar settlements, and in light of the risk of significant delay, uncertainty associated
19 with litigation, and the various defenses asserted by Defendant, Class Counsel firmly believes this
20 Agreement to be in the best interests of Settlement Class. Because the Settlement’s terms are fair,
21 reasonable, and adequate, the Court should preliminarily approve the Settlement. SOZ Dec., ¶ 22.

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

23 The Total Settlement Amount of \$200,000 is well within the range of reasonable settlement for
24 preliminary approval. To determine whether a settlement is fair and reasonable, the court should
25 “consider enough information about the nature and magnitude of the claims being settled, as well as
26 the impediments to recovery, to make an independent assessment of the reasonableness of the terms to
27 which the parties have agreed.” (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133.)
28 In making this determination, the court is “not to try the case” but rather “satisfy itself that the class

1 action settlement is within the ‘ballpark of reasonableness.’” (*Id.* (emphasis added).) For this analysis,
2 courts do “not require any such explicit statement of value; [they] require[] a record which allows an
3 understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.
4 ” (*Munoz v. BCI Coca-Cola Bottling Co.* (2010) 186 Cal.App.4th 399, 409 (internal citation omitted).)
5 The reasonableness of a settlement is not dependent upon its actual value approaching the potential
6 recovery plaintiffs might have received if they had succeeded at trial.² Indeed, “[t]he determination
7 whether a settlement is reasonable does not involve the use of a ‘mathematical equation yielding a
8 particularized sum.’” (*Frank v. Eastman Kodak Co.* (W.D.N.Y. 2005) 228 FRD. 174, 186 (*quoting In*
9 *re Michael Milken and Assoc. Sec. Litig.* (S.D.N.Y. 1993) 150 F.R.D. 57, 66).)

10 **a. The Total Settlement Amount Meets the Recognized Range of**
11 **Reasonableness.**

12 The Total Settlement Amount of \$200,000 is fair and reasonable in light of the nature and
13 magnitude of the claims being settled and the various potential impediments to recovery. Prior to
14 mediation, Class Counsel retained BCG to develop a damage model measuring Defendant’s liability
15 exposure while accounting for the uncertainties of continued litigation. The model was informed by
16 Class Counsel’s investigation, including the analysis of a significant sample of time and payroll data.
17 Class Counsel projected Defendant’s liability exposure for the Settlement Class for damages and
18 statutory penalties to be approximately \$544,248 (inclusive of interest), if successful at trial. This
19 reflects the uncertainty regarding several of Plaintiffs’ claims, together with the uncertainty surrounding
20 derivative liability for inaccurate wage statements and waiting time penalties. Thus, the Total
21 Settlement Amount of \$200,000 represents approximately 36.7% of Defendant’s liability exposure for
22 damages and penalties (including interest, but excluding PAGA penalties), as estimated by Class

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”).

Counsel at the time of mediation. The following summarizes Defendants’ estimated exposure. SOZ Dec., ¶ 26.

(1) Defendant’s Estimated Exposure for Unpaid Wages due to Off the Clock Work

Plaintiffs alleged that because of Defendant’s practice of requiring employees to perform work off the clock before their shift started and after their shift ended, including an off-the-clock Covid-19 screening, it failed to pay Plaintiffs and the Settlement Class Members all wages due. Based on their conversation with the Plaintiffs and other Class Members, Class Counsel assumed, for purposes of mediation, that each Class Member worked 30 minutes off-the-clock and without compensation on every shift worked. Defendant denied liability and asserted that its employees were paid for all time worked. Defendant argued that employees manually recorded their own hours of work, and were paid according to their own reported time. Furthermore, Defendant argued that, even if successful, this claim resulted in only a few unpaid minutes per shift, and therefore minimal actual damage to the Class Members. Plaintiff estimated Defendants’ exposure for this claim to be approximately **\$239,916**, including interest. SOZ Dec., ¶ 29.

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

Generally, Plaintiffs allege that Defendants’ aforementioned violation resulted in derivative violations of Labor Code sections 203 and 226(a). Class Counsel considered the arguable presence of various penalties and weighed the potential recoveries against probable defenses. Specifically, Defendant could argue that Plaintiff could not prove the “willful” prong needed to obtain waiting time penalties under Cal. Lab. Code § 203. Additionally, Defendant could argue that Plaintiff could not show that Class Members suffered an “injury” as a result of wage statement violations, as required by Cal. Lab. Code § 226. Although the Settlement Class arguably could have seen a payout of \$304,332 (\$166,982 in waiting time penalties and \$137,350 in wage statement penalties) for these penalties if Plaintiffs prevailed on every penalty claim, Plaintiffs would not recover any derivative penalties if they failed to prove the underlying claim. Moreover, Plaintiffs would have to overcome damaging precedent to prove the Class deserved the penalties. *See, e.g., Howard v. CVS Caremark Corp.*, 2014 U.S. Dist. LEXIS 172406 (C.D. Cal. Dec. 9, 2014) (denying class certification for the same penalty claims);

1 *Alonzo v. Maximus, Inc.*, 832 F. Supp. 2d 1122, 1134-1137 (C.D. Cal. 2011) (finding insufficient
2 evidence of bad faith or actual injury). Plaintiffs could not give the penalty claims great weight given
3 that they depended on proving the underlying claims, which had their own risks. SOZ Dec., ¶ 33.

4 (3) Defendants' PAGA Exposure

5 Class Counsel's damage models also estimated Defendants' exposure for PAGA penalties arising
6 from the aforementioned violations. At the time of mediation, Plaintiff estimated Defendants' PAGA
7 exposure at approximately \$550,000. SOZ Dec., ¶ 34.

8 Under PAGA, Courts have considerable discretion to reduce the penalty award. In *Fleming v.*
9 *Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011), a federal court reduced PAGA penalties
10 from \$2,800,000 to \$500,000, a reduction of 82.2%, because the court found maximum penalties
11 "unjust" because the employees had suffered no injuries. Some trial courts have actually awarded no
12 civil penalties, even when Labor Code violations are established. *See also In re Nordstrom Com. Cases*,
13 186 Cal.App.4th 576, 589 (2010) (affirming an award of \$0 in PAGA penalties in a wage and hour class
14 action); *In re Taco Bell Wage & Hour Actions*, 2016 U.S. Dist. LEXIS 48557, *40-43 (E.D. Cal. Apr.
15 6, 2016) (PAGA penalties denied after trial).

16 In order to recover any PAGA penalties, Plaintiffs would be required at trial to prove each of the
17 underlying Labor Code violations. See *Cardenas v. McLane Foodservice, Inc.*, 2011 U.S. Dist. LEXIS
18 13126, *10 (C.D. Cal. 2011) ("Given the statutory language [of PAGA], a plaintiff cannot recover on
19 behalf of individuals whom the plaintiff has not proven suffered a violation of the Labor Code by the
20 defendant."). Here, Plaintiffs would need to prove that each Aggrieved Employee suffered a violation
21 for each pay period the employee worked. Again, Defendant raised a number of defenses that presented
22 serious threats to the claims of the Plaintiffs and the Aggrieved Employees. Defendant asserted that
23 their employment practices complied with all applicable Labor Laws. In all, Plaintiffs' PAGA liability
24 exposure is hotly contested. SOZ Dec., ¶ 34.

25 *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), illustrates the risk of PAGA claims.
26 In *Carrington*, while the plaintiff prevailed on his PAGA claim upon trial, the trial court reduced the
27 maximum PAGA penalty amount by 90%, citing the employer's good faith attempt at complying with
28 the law. *Id.* at 517. Upon review, the Court of Appeal found such reduction to be proper. *Id.* at 539.

Again, the *Carrington* decision was after Plaintiff actually prevailed at trial, and even then, the PAGA penalties were reduced by 90%.

The proposed Settlement allocates \$10,000 to satisfy the PAGA claims. This amount represents 5% of the Gross Settlement Amount. This is well within the range *See, e.g., Nordstrom Comm’n Cases* (2010) 186 Cal.App.4th 576, 589 (approving 0% PAGA allocation); *Berry v. Urban Outfitters* (N.D. Cal. Lead Case No. 13-cv-02628-JSW) (approving 1% PAGA allocation in \$5M settlement); *Jack v. Hartford Fire Ins. Co.* (S.D. Cal. 2011) 2011 WL 4899942 * 6 (approving \$3,000 PAGA allocation in \$1.2M settlement); *Singer v. Becton Dickinson & Co.* (S.D. Cal. 2010) 2010 WL 2196104 *2 (approving \$3,000 PAGA allocation in \$1M settlement); and *Hopson v. Hanesbrands, Inc* (N.D. Cal. 2009) 2009 WL 928133 * 9 (approving \$1,500 PAGA allocation in \$1.026M settlement.) SOZ Dec., ¶ 32.

b. Inherent Risks of Continued Litigation Support Preliminary Approval.

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

With respect to the most immediate challenge, i.e., class certification, the risks attendant to the certification of similar wage and hour claims are demonstrated by *Donohue v. AMN Services, LLC* (2018) 29 Cal.App.5th 1068 (cert granted.) In *Donohue*, Fourth District Court of Appeal affirmed Hon. Joel Pressman’s denial of class certification for missed meal and rest periods by call center employees. (*See also O’Conner v. Uber Technologies, Inc.* (9th Cir. 2018) 904 F.3d 1087 (decertification of wage and hour misclassification action); *see also Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, 31 (reversing a trial verdict in favor plaintiffs in a wage and hour class action)); *Tien v. Tenet Healthcare Corp.* (2012) 209 Cal.App.4th 1077, 1088 (“[T]he reason, if any, that employees might not take their breaks were predominantly individualized questions of fact not susceptible to class treatment.”); *Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333, 1341 (affirming denial of certification because employees’ declarations attesting to having taken meal and rest breaks demonstrated that individualized inquiries were required to show harm); *Campbell v. Best Buy Stores,*

1 *L.P.*, (C.D. Cal. 2013) 2013 WL 5302217 at *11-13 (following *Brinker* and denying certification of
2 proposed off-the-clock and rest and meal break classes due to lack of uniform policy); *Brown v. Fed*
3 *Express Corp.* (C.D. Cal. 2008) 249 F.R.D. 580, 587-88 (denying certification of driver meal and rest
4 period claims based on the predominance of individual issues.) Plaintiffs are confident about the
5 strength of their claims. Nonetheless, Plaintiffs recognize that Defendant has factual and legal defenses
6 that, if successful, would potentially defeat or substantially impair the value of Plaintiffs' lawsuit.
7 Collectively, the examples cited above illustrate the uncertain nature of class litigation. Consequently,
8 the uncertainty of obtaining certification through a contested motion is a significant risk factor favoring
9 settlement. SOZ Dec., ¶ 36.

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

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

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

20 Finally, continuing to litigate this action would require continued and extensive resources
21 coupled with significant Court time to proceed through trial and post-trial motions; which can often
22 take years. Furthermore, wage and hour litigations are complex and expensive, as it often necessitates
23 extensive expert testimony, particularly with regards to damages. But even if Plaintiffs are successful
24 at trial, Plaintiffs are acutely aware that a judgment does not end the litigation. Plaintiffs fully expect
25 that Defendant would appeal any favorable judgment. SOZ Dec., ¶¶ 36-37. "Avoiding such a trial and
26 the subsequent appeals in this complex case strongly militates in favor of settlement rather than further
27 protracted and uncertain litigation." (*Nat'l Rural Telecomms. Coop v. DirecTV* (C.D. Cal. 2004) 221
28

1 F.R.D. 523, 527.) Thus, “unless the settlement is clearly inadequate, its acceptance and approval are
2 preferable to lengthy and expensive litigation with uncertain results.” (*Id.* at 526.)

3 In this matter, Class Counsel negotiated a Total Settlement Amount of \$200,000 that is roughly
4 36.7% of Defendant’s liability exposure for damages and penalties. Given the amount of the settlement
5 here, as compared to potential value of the claims, offset by the various inherent risks to continued
6 litigation, the settlement is fair and reasonable. SOZ Dec., ¶ 38.

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

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

18 The Parties jointly drafted the Class Notice which fairly and neutrally informs the Settlement
19 Class of their rights and remedies in this action. The Settlement Administrator will first verify
20 addresses, then mail the proposed Class Notice to entire Settlement Class. The Notice will include
21 information regarding the nature of the lawsuit, a summary of the substance of the Settlement’s terms,
22 the class definition, the procedure and time period within which to submit requests for exclusions or
23 objections to the Settlement, the date for the final approval hearing, the formula used to calculate
24 settlement payments, and the terms and scope of the Released Claims. Agreement at §III(L). This

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

method was negotiated by the Parties to ensure delivering the most reasonable method of notice to the Settlement Class while ensuring cost effective administration of the Settlement. SOZ Dec., ¶¶ 39-40.

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

C. The Court Should Preliminarily Approve the Class Representative Enhancement Award

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

Approximately 46 members of the Settlement Class will share in the estimated \$80,333 Net Settlement Amount due entirely to the effort and commitment of Plaintiffs. Subject to Court approval, therefore, the Settlement provides for a Class Representative Service Award of \$7,500⁴ for each Plaintiff. The service awards are fair and reasonable compensation for Plaintiffs’ efforts bringing the action, assisting Class Counsel with the litigation and settlement, regularly conferring with Class Counsel on the status of their case and the strategies for prosecuting the claims, reviewing the proposed

⁴ The amount of the requested enhancement payment-\$7,500-is reasonable by reference to the amounts that California courts (both federal and state) have repeatedly found to be reasonable for wage and hour class action settlements: *See 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 Settlement to ensure that its terms are fair and provide adequate relief for the Settlement Class. SOZ
2 Dec., ¶ 41.

3 Class Counsel on behalf of Plaintiffs will file a formal motion for the negotiated Class
4 Representative Service Award once preliminary approval of the Settlement is granted. Plaintiffs
5 respectfully submit that the above showing is sufficient for preliminary approval of the negotiated Class
6 Representative Service Award. SOZ Dec., ¶ 42.

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

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

18 Class Counsel took this matter on a contingency fee basis and invested significant time and
19 expense successfully prosecuting Plaintiffs' claims. As discussed *supra*, the estimated average
20 Individual Settlement Share illustrates the demonstrably positive outcome for the Settlement Class
21 Members. The Agreement provides for a Class Counsel Award in the amount of one-third of the Total
22 Settlement Amount and litigation costs and expenses not to exceed \$20,000. Agreement at §III(M)(10).
23 In light of the positive outcome for the Settlement Class, and in light of the supporting authority, the
24 proposed Class Counsel award is fair and reasonable. SOZ Dec., ¶ 43.

25 Plaintiffs will file a formal motion for the negotiated Class Counsel Award once preliminary
26 approval of the Settlement is granted. Plaintiffs respectfully submit that the above showing is sufficient
27 for preliminary approval of the negotiated attorneys' fees. SOZ Dec., ¶ 44.

1 **E. California Law Authorizes Provisional Certification for Settlement Purposes**

2 For the purpose of Settlement, Plaintiffs contend, and Defendant does not dispute, that
3 provisional certification of the Settlement Class is appropriate. SOZ Dec., ¶ 45.

4 1. The California 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
16 is “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 where
18 they may be readily identified without unreasonable expense or time by reference to official records.
19 (*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 of 2012, the California Supreme Court expounded on the element of predominance:
24 The “ultimate question” the element of predominance presents is whether “the issues which may be
25 jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial
26 that the 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).)

1 Generally, the proposed Settlement Class consists of all of Defendant's current and former
2 California truck drivers during the Class Period. Defendant's records show that the Settlement Class
3 Members consists of approximately 46 individuals, making joinder of all Settlement Class Members
4 impracticable. Further, because all Settlement Class Members are Defendant's current and former
5 employees, the class is readily ascertainable from Defendant's regular business records, i.e., payroll
6 records. SOZ Dec., ¶ 46.

7 The California statutes relating to each of Plaintiff's claims apply with equal force and effect to
8 the entire Settlement Class. Factually, Defendant's policies and practices apply class-wide and
9 Defendant's liability can be determined by facts common to all members of the class. The wage and
10 hour issues are both numerous and substantial, and a class action is the most advantageous method of
11 dealing with the claims of the Settlement Class. SOZ Dec., ¶ 47.

12 Plaintiffs' wage and hour claims are typical of the proposed Settlement Class because they arise
13 from the same facts and are based on the same legal theories applicable to the other Class Members.
14 Likewise, Plaintiffs' interests are entirely coextensive with the interests of the Settlement Class.
15 Plaintiffs allege that they were injured by the same company-wide practices to which the proposed
16 Settlement Class was subject and seeks the same relief. Plaintiffs have already demonstrated their
17 ability to advocate for the interests of the Settlement Class by initiating this litigation, undertaking
18 extensive class discovery, and evaluating the proposed settlement to assure that it is fair. SOZ Dec., ¶
19 48. Plaintiffs' declaration in support of their ability to meet these requirements is filed concurrently
20 herewith.

21 Additionally, Plaintiffs are represented by competent Class Counsel who have extensive
22 experience in litigating wage and hour class action cases. Class Counsel have successfully briefed,
23 argued, certified, and gained state court settlement approval of the same class-wide causes of action
24 that are at issue in this case. Class Counsel's wage and hour class action experience establishes that
25 they are well qualified to represent the interests of this Class. SOZ Dec., ¶¶ 50-57 and the Zakay Dec.

26 A class action is superior to a multitude of individual lawsuits. Given the size and amount of
27 each individual Settlement Class Member's claim, Class Settlement Members likely have little
28 incentive to litigate their claims on an individual basis because the out-of-pocket expense and personal

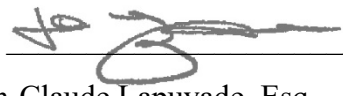
1 commitment necessary to litigate each claim outweighs any potential recovery. In sum, class treatment
2 is superior to individual, case-by-case adjudication. SOZ Dec., ¶ 49.

3 **IV. CONCLUSION**

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

7
8 Dated: January __, 2023

JCL LAW FIRM, APC

9 By: 
10 Jean-Claude Lapuyade, Esq.