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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF CONTRA COSTA

JOSE RAMON DE LA CRUZ, an individual, on behalf of himself, and on behalf of all persons similarly situated; Plaintiff, vs. GALPAO GAUCHO TWO, LLC, a Texas limited liability company; GALPAO GAUCHO THREE, LLC, a California limited liability company; GALPAO GAUCHO FOUR LLC, a California limited liability company; GALPAO GAUCHO FIVE LLC, a California limited liability company; GALPAO GAUCHO EIGHT LLC, a California limited liability company; GALPAO GAUCHO NINE LLC, a California limited liability company; and DOES 1-50, Inclusive, Defendants.	Case No. C23-01770 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT** Judge: Hon. Judge Charles S. Treat Dept.: 12

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I. INTRODUCTION

Plaintiff JOSE RAMON DE LA CRUZ ("Plaintiff") seeks preliminary approval of the Joint Stipulation of Class and Representative Action Settlement ("Agreement")[1], which if approved, would provide valuable monetary relief for approximately 1,350 Class Members. The basic terms of the Agreement provide for the following:

1. The **"Class"** and **"Class Period"** shall mean all persons who are or previously were employed by Defendants Galpao Gaucho Two, LLC, Galpao Gaucho Three, LLC, Galpao Gaucho Four LLC, Galpao Gaucho Five LLC, Galpao Gaucho Eight LLC, or Galpao Gaucho Nine LLC in California and classified as non-exempt employees ("Class") during the period from July 20, 2019 to July 1, 2024. Agreement at I (H); I(I). The Settlement Class Members exclude any Class Member that submitted a valid and timely request for exclusion. Agreement at ¶ III(L)(7).

2. The **"Aggrieved Employees"** and **"PAGA Period"** means all non-exempt employees who are or previously were employed by any of the Defendants in California ("Aggrieved Employees") at any time during the period from July 1, 2023 to July 1, 2024 ("PAGA Period"). Agreement at I(B); I(Y). Aggrieved Employees do not have the ability to opt-out of the PAGA portion of the settlement. *See* Agreement at ¶ III(L)(7).

3. The "**Gross Settlement Amount**" is Seven Hundred Twenty-Five Thousand Dollars and Zero Cents ($725,000.00). Agreement at I(P). The Gross Settlement Amount is non-reversionary and includes the following:

a. A "**Class Representative Service Award**" of not more than $10,000.00 to Plaintiff in recognition of his efforts and risks in assisting with the prosecution of the Action and in exchange for a general release. Agreement at III(M)(9);

b. "**Attorneys' Fees and Costs**" in the amount not to exceed one-third of the Gross Settlement Amount for attorney's fees, currently estimated to be $241,666.67 ***and*** litigation costs and expenses not to exceed $30,000, to be paid to Class Counsel. Agreement at III(M)(10);

c. A "**PAGA Payment**" of Thirty Thousand Dollars ($30,000.00) shall be allocated

[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.

from the Gross Settlement Amount for settlement of claims for civil penalties under the Private Attorneys General Act of 2004. The Settlement Administrator shall pay sixty-five (65%) of the PAGA Payment ($19,500.00) to the Labor and Workforce Development Agency ("LWDA Payment"). Thirty-five percent (35%) of the PAGA Payment ($10,500.00) will be distributed to the Aggrieved Employees ("Aggrieved Employee Payment"). Agreement at I(C); I(R); I(V); III(M)(11); and

d. "**Settlement Administration Expenses**" not to exceed $14,000.00 payable to the Settlement Administrator, Apex Class Action LLC, for, *inter alia*, the administration of the Notice Packet and Settlement Administration Costs. Agreement at I(II)-I(JJ).

4. The "**Net Settlement Amount**" of approximately $399,333.33 (Gross Settlement Amount less the requested Class Representative Service Award, Attorneys' Fees and Costs, PAGA Payment and Settlement Administration Costs) will be allocated to all Settlement Class Members on a pro-rata basis according to the number of Workweeks each Settlement Class Member worked during the Class Period. The entire Net Settlement Amount will be paid to all Settlement Class Members who do not opt out of the Settlement Class resulting in an average Settlement Payment of ***$295.80***. Agreement at III(M)(1); JCL Dec., ¶ 6.

An objective evaluation of the Settlement confirms that the relief negotiated on behalf of the Class is fair, reasonable, and adequate. The Settlement was negotiated by the Parties at arm's length. The Settlement confers substantial benefits to the 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 Defendants prevailing at trial. JCL Dec., ¶ 6.

As discussed below, the proposed Settlement satisfies all criteria for preliminary settlement approval and falls within the range of reasonableness. The average Settlement Payment to the Settlement Class meets awards in similar wage and hour class actions. Moreover, the proposed Settlement Class is appropriate for provisional certification. Accordingly, Plaintiff respectfully requests the Court grant preliminary approval of the Settlement. JCL Dec., ¶ 7.

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II. FACTS AND PROCEDURE

A. Overview of the Litigation

Defendants operate five Brazilian steakhouse restaurants in California under the name Galpão Gaucho, including in Contra Costa County, where Plaintiff was employed. Plaintiff worked for Defendants as a non-exempt employee and was paid on an hourly basis. In addition to his base hourly rates, Plaintiff was also entitled to, among other things, overtime pay and meal and rest periods. Throughout his employment, Plaintiff was subject to Defendants' written policies and general employment practices. JCL Dec., ¶ 8.

Generally, Plaintiff claims that Defendants, among other claims, failed to provide compliant meal and rest periods, and failed to reimburse employees for all necessary business expenses, failed to pay for all hours worked, and improperly calculated the regular rate of pay for purposes of overtime, sick pay and meal period premiums. Defendants deny liability for each of Plaintiff's claims. Further, Defendants assert that they fully complied with all applicable employment laws and raised several other significant defenses to Plaintiff's claims, including but not limited to, facially compliant meal and rest period polices. JCL Dec., ¶ 9.

On July 20, 2023, Plaintiff filed a class action complaint in the Contra Costa County Superior Court, Case No. C23-01770 (the "Action"). The Action alleged nine causes of action against Defendants 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 pay overtime wages in violation of California *Labor Code* sections 510 et seq.; (4) failure to provide required meal periods in violation of California *Labor Code* sections 226.7 and 512; (5) failure to provide required rest periods in violation of California *Labor Code* sections 226.7 and 512; (6) failure to provide accurate itemized wage statements in violation of California Labor Code section 226; (7) failure to provide wages when due in violation of California *Labor Code* sections 201, 202 and 203; (8) failure to reimburse employees for necessary business expenses in violation of California *Labor Code* section 2802; and (9) failure to provide gratuities in violation of California *Labor Code* section 351. On September 3, 2024, Plaintiff filed a First Amended Complaint to add a claim for violations of the Private Attorneys General Act ("PAGA"). JCL Dec., ¶ 10.

Once the Parties agreed to mediation, the Parties further agreed to informally produce additional documents and data points subject to the mediation privilege, including but not limited to a sampling of the Class Members' time data and certain payroll data points. As discussed *infra,* Plaintiff's counsel retained the forensic consultants at Berger Consulting Group ("BCG") to analyze Defendants' time and payroll data. JCL Dec., ¶ 11.

On July 1, 2024, the Parties participated in a full day mediation with highly regarded wage and hour mediator Tripper Ortman. With the assistance of mediator Ortman, the Parties reached an agreement after both sides agreed to a Mediator's proposal. The agreement was memorialized in the form of a Memorandum of Understanding. Thereafter, the Parties drafted and negotiated a long-form settlement agreement, which is the subject of the instant motion. JCL Dec., ¶ 12.

B. Class Counsel Thoroughly Investigated the Factual and Legal Issues

Months before filing the Action, Class Counsel began its pre-filing investigation into the Plaintiff's complaints. Class Counsel's investigation started with several lengthy interviews with Plaintiff. As part of the interview process, Plaintiff produced documents related to his employment, including portions of Defendants' handbooks, compensation policies and time and payroll records. At the conclusion of the interviews, Class Counsel determined that Plaintiff's complaints justified further inquiry. JCL Dec., ¶ 13.

Defendants also produced Plaintiff's employee file, which included copies of Plaintiff's hiring documents, payroll and time records, and written policies and agreements. Class Counsel reviewed and analyzed the documents and determined the documents appeared to substantiate Plaintiff's claim that Defendants failed to, among other things, provide accurate wage statements and to provide compliant meal and rest periods. JCL Dec., ¶ 14.

Prior to mediation, Defendants produced time and payroll records for the Class Members, aggregate workweek and pay period data for the Class Members, aggregate meal premiums paid to the Class Members, average hourly rate for the Class Members, and copies of applicable handbooks, policies, and agreements. In total, Class Counsel reviewed hundreds of pages of documents and thousands of unique cells of time and payroll data. JCL Dec., ¶ 15.

Class Counsel then retained the statisticians and economists at BCG to evaluate the Class

Members' payroll and time data. BCG provides data analysis and damage modeling consulting services specializing in wage and hour class actions. BCG's team of financial and data analysts are credentialed and experienced experts in their fields and have provided their expertise on thousands of cases. JCL Dec., ¶ 16.

BCG analyzed Defendant's time and payroll data to assist in the development of various damage models. Among other things, BCG determined the approximate number of work shifts, workweeks, pay periods, average length of shift and average number of hours worked per week and pay periods during the Class Period. BCG also estimated the number of missed, late or truncated meal and rest periods, the amount of paid missed meal period premiums paid during the Class Period, and the amount of unpaid overtime due to the miscalculation of the regular rate of pay during the Class Period. JCL Dec., ¶ 17.

Prior to mediation, Class Counsel created several damage models predicated on BCG's analysis. Class Counsel's models calculated Defendant's potential liability exposure while accounting for the uncertainties of continued litigation. These damage models informed and guided Class Counsel during the mediated settlement discussions. JCL Dec., ¶ 18.

C. The Parties Settled with the Assistance of the Mediator

On July 1, 2024, the Parties conducted a full day of mediation with respected PAGA and class action wage and hour mediator Tripper Ortman. After more than eight hours of arm's length and adversarial negotiations, the mediation concluded without a settlement, but ultimately settled after both sides agreed to a Mediator's proposal. The complete and final terms of the Parties' settlement are now set forth in the Agreement. Class Counsel submits that the Settlement constitutes a fair, adequate, and reasonable compromise of the claims at issue. JCL Dec., ¶ 19.

D. The Proposed Settlement Fully Resolves Plaintiff's Claims

1. <u>The Composition of the Settlement Class Members</u>

The proposed Settlement Class consists of all current and former employees of Defendants who were classified as non-exempt during the Class Period of July 20, 2019 to July 1, 2024. Agreement at I(H)-I(I). The Settlement Class excludes any person who submits a timely and valid request for exclusion. Agreement at III(L)(7). At the time of mediation, Defendants estimated that the Settlement

Class was comprised of 1,350 individuals that worked approximately 25,000 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 Gross Settlement Amount of $725,000.00. The Gross Settlement Amount includes: (1) Individual Class Payments to the Settlement Class; (2) a Service Payment of $10,000.00 to Plaintiff for his services on behalf of the Settlement Class; (3) a PAGA Payment in the amount of $30,000.00; (4) Settlement Administration Costs estimated at $14,000.00; (5) Attorneys' Fees and Costs in the amount of $271,666.67, comprised of attorneys' fees equal to one-third of the Gross Settlement Amount estimated to be $241,666.67 and an estimated $30,000.00 for actually incurred litigation expenses. See generally Agreement at III(M).

Subject to the Court approving the Service Payment, Attorneys' Fees and Costs, PAGA Payment, and the Settlement Administration Costs, the Net Settlement Amount will be distributed to each participating member of the Settlement Class. 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. The Funding Date

After Final Approval and the Judgment becoming final (the "Effective Date"), Defendants will fund the Gross Settlement Amount in one lump sum payment within sixty (60) calendar days (the "Funding Date"). Agreement at I(N); I(O). Within fifteen (15) calendar days after the Funding Date, the Settlement Administrator will pay: all Individual Class Payments, all Individual PAGA Payments, the LWDA Payment, the Administration Expenses Payment, Class Counsel Fees Payment, Class Counsel Litigation Expenses Payment, and the Class Representative Service Payment, all as determined by the Court at the Final Approval Hearing. Agreement at III(M)(7); III(M)(9)-(10); III(M)(12).

4. Formula for Calculating Settlement Class Payments

Each Class Member will receive an Individual Class Payment. The Individual Class Payments will be proportional to the number of Workweeks each Class Member worked for Defendants in California during the Class Period. The Class Data provided by Defendants to the Settlement Administrator will include the number of Workweeks for each Class Member and the number of PAGA

Pay Periods worked during the relevant periods. Each Class Member's final Individual Class Payment will be calculated by using a fraction, the numerator of which is the Class Member's total number of Workweeks, and the denominator of which is the total number of Workweeks of all Class Members. Each Individual Class Payment will be reduced by any legally mandated employee tax withholdings (e.g., employee payroll taxes, etc.). Individual Class Payments for members of the Settlement Class who submit valid and timely requests for exclusion will be redistributed to Settlement Class Members who do not submit valid and timely requests for exclusion on a pro rata basis. Agreement at ¶ II(M)(1).

Given that there are approximately 1,350 Settlement Class Members, ***the average gross recovery is approximately $295.80*** (Net Settlement Amount divided by Settlement Class Members). JCL Dec., ¶ 6.

5. Release by Settlement Class Members

As of the Funding Date, Plaintiff and the Settlement Class Members will release the Released Parties from the Released Class Claims, which are defined as all class claims alleged, or reasonably could have been alleged based on the facts alleged, in the operative complaint in the Jose Ramon De La Cruz v. Galpão Gaucho Two, LLC *et al.* action which occurred during the Class Period, and expressly excluding all other claims, including claims for vested benefits, wrongful termination, unemployment insurance, disability, social security, workers' compensation, and class claims outside of the Class Period. Agreement at I(DD); III(B).

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

As of the Funding Date, Plaintiff and the Aggrieved Employees, the LWDA, and the State of California will release the Released Parties from the Released PAGA Claims for the PAGA Period. The Released PAGA Claims are defined as all PAGA claims alleged in the operative complaint in the Action and Plaintiff's PAGA notice to the LWDA which occurred during the PAGA Period, and expressly excluding all other claims, including claims for vested benefits, wrongful termination, unemployment insurance, disability, social security, workers' compensation, and PAGA claims outside of the PAGA Period. Agreement at I(EE); III(C).

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III. ARGUMENT

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

The proposed Settlement, including a Gross Settlement Amount of $725,000.00, meets the standards for preliminary approval. Pre-trial settlement of complex class actions is a judicially favored remedy. (*Officers for Justice v. Civil Serv. Comm'n* (9th Cir. 1982) 688 F.2d 615, 625 ("Voluntary conciliation and settlement are the preferred means of dispute resolution.").) Class action settlement approval requires an early "preliminary" review by the trial court and a subsequent "final" review after notice of the settlement has been distributed to class members for their comments and objections. (C.R.C. 3.769(c)-(g); *Cellphone Termination Fee Cases*, 180 Cal. App. 4th 1110, 1118 (2010) (the court first "preliminarily approves the settlement" and later "conducts a final approval hearing to inquire into the fairness of the proposed settlement").)

Although Rule of Court Rule 3.769 does not provide detail as to the scope of review of the proposed settlement, preliminary approval is warranted if the settlement falls within a "reasonable range." (*See North County Contractor's Assn., Inc. v. Touchstone Ins. Services* (1994) 27 Cal.App.4th 1085, 1089-90; Conte & Newberg, *Newberg on Class Actions*, §§ 11.26 (4th ed. 2002).) Reasonableness and fairness are presumed where: (1) the settlement is reached through "arms-length bargaining;" (2) investigation and discovery are "sufficient to allow counsel and the court to act intelligently;" (3) counsel is "experienced in similar litigation. . . . ." (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802.) The presumption of fairness is consistent with California's public policy goal of favoring settlements. (*Stambaugh v. Super. Ct* (1976) 62 Cal.App.3d 231, 236 ("the law wisely favors settlements"); *Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1118 ("public policy generally favors the compromise of complex class action litigation"); *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1151 ("voluntary conciliation and settlement are the preferred means of dispute resolution ... [t]his is especially true in complex class action litigation").)

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

1. <u>The Parties Reached the Settlement Through Arm's-Length Bargaining Led by Experienced Counsel.</u>

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

The Parties participated in mediation with the highly respected mediator Tripper Ortman. Mediator Ortman managed the Parties' expectations and provided a useful, neutral analysis of the issues and risks to both sides. (*In re Apple Computer, Inc. Derivative Litig,* No. C 06-4128 JF (HRL), 2008 U.S. Dist. LEXIS 108195 (N.D. Cal. Nov. 5, 2008) (mediator's participation weighs considerably against any inference of a collusive settlement); *D'Amato v. Deutsche Bank* (2d. Cir. 2001) 236 F.3d 78, 85 (a "mediator's involvement in pre-certification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure.").) At all times, the Parties' negotiations were at an arm's length, adversarial and non-collusive. The matter resolved only when Mediator Ortman issued a Mediator's proposal that the Parties accepted after further settlement discussions. Mediator Ortman only arrived at his proposal after hearing arguments, reviewing evidence and evaluating the Parties' respective claims and defenses. JCL Dec., ¶ 20.

Once the Parties agreed to the Mediator's proposal, the Parties engaged in protracted negotiations regarding the written terms of the class action settlement. The Parties maintained the arm's length, non-collusive and adversarial negotiations while arriving at the final terms of the Settlement. The Agreement is the final product of these mediated negotiations. Objectively, the Settlement terms are fair, adequate and represent a reasonable compromise of the claims at issue. JCL Dec., ¶ 21.

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

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

Class Counsel only agreed to enter the Settlement following their thorough investigation and evaluation of Plaintiff's claims. Based on their investigation of the facts, applicable law, and marketplace for similar settlements, and considering the risk of significant delay, uncertainty associated with litigation, and the various defenses asserted by Defendants, Class Counsel firmly believe this Agreement to be in the best interests of the Class Members. Because the Settlement's terms are fair, reasonable, and adequate, the Court should preliminarily approve the Settlement. JCL Dec., ¶ 23.

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

The Gross Settlement Amount of $725,000.00 is within the range of reasonableness. To determine whether a settlement is fair and reasonable, the court should "consider enough information about the nature and magnitude of the claims being settled, as well as the impediments to recovery, to make an independent assessment of the reasonableness of the terms to which the parties have agreed." (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133.) In making this determination, the court is "not to try the case" but rather "satisfy itself that the class action settlement is within the 'ballpark of reasonableness.' " (*Id.* (emphasis added).) For this analysis, courts do "not require any such explicit statement of value; [they] require[] a record which allows an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation. " (*Munoz v. BCI Coca-Cola Bottling Co.* (2010) 186 Cal.App.4th 399, 409 (internal citation omitted).) The reasonableness of a settlement is not dependent upon its actual value approaching the potential recovery plaintiffs might have received if they had succeeded at trial.[2] Indeed, "[t]he determination whether a settlement is reasonable does not involve the use of a 'mathematical equation yielding a particularized sum.' " (*Frank v. Eastman Kodak Co.* (W.D.N.Y. 2005) 228 FRD. 174, 186 (*quoting In re Michael Milken and Assoc. Sec. Litig.* (S.D.N.Y. 1993) 150 F.R.D. 57, 66).)

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

The Gross Settlement Amount is fair and reasonable considering the nature and magnitude of the claims being settled and the various potential impediments to recovery. Prior to mediation, Class Counsel retained BCG to develop economic damage models measuring Defendants' liability exposure while accounting for the uncertainties of continued litigation. The various models were informed by Class Counsel's investigation, including the analysis of all available time and payroll data. Class Counsel projected Defendants' liability exposure for *class claims* (PAGA Penalties) at $3,499,826.10 if successful at trial. Thus, the Gross Settlement Amount represents a recovery of approximately 20.7% of Defendants' class-wide exposure. The following summarizes Plaintiff's analysis of Defendants' liability exposure. JCL Dec., ¶ 24.

(1) <u>Estimated Damages for Meal Period Violations</u>

Plaintiff alleges that Defendants failed to provide compliant meal periods. Specifically, Plaintiff asserts that Defendants failed to maintain records of Class Members' meal periods at most locations from the beginning of the Class Period through 2022. Accordingly, Plaintiff argues, there is no evidence that meal breaks were taken, and certainly no evidence that meal breaks were *timely* taken, *i.e.* taken before the end of the fifth hour of an employee's shift. Defendants deny that proper meal breaks were denied, and argued that employees used separate point of sale software to clock out for

[2] Federal district courts recognize that there is an inherent "range of reasonableness" in determining whether to approve a settlement "which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman v. Stein* (2d. Cir. 2002) 464 F.2d 689, 693; *see In re Omnivision Tech, Inc.* (N.D. Cal. 2008) 559 F.Supp.2d 1036; *see also Nat'l Rural Telecomm. Coop. v. Directv. Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 527 ("well settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery"); *In re Global Crossing Sec. and ERISA Litig.* (S.D.N.Y 2004) 225 F.R.D. 436, 460 ("settlement amount's ratio to the maximum potential recovery need not be the sole, or even dominant, consideration when assessing settlements fairness"); *In re IKON Office Solutions, Inc Sec Litig.* (E.D. Pa. 2000) 194 F.R.D. 166, 184 ("the fact that a proposed settlement constitutes a relatively small percentage of the most optimistic estimate does not, in itself, weigh against the settlement; rather the percentage should be considered in light of strength of the claims"); *Officers for Justice v. Civil Serv. Comm.* (9th Cir. 1982) 688 F.2d 615, 628 (it is "the complete package, taken as a whole rather than the individual component parts, that must be examined for overall fairness").

meal breaks until 2022, which were timely taken and recorded, though Defendants have thus far been unable to recover that data. Defendants maintain that they fully complied with California meal period laws and maintained legally compliant policies and practices. Defendants further contended that any perceived issues were resolved by 2022, when employees began recording their breaks using the same system as their clock in and clock out times, and Defendants also began paying meal period premiums. Plaintiff's meal period claim (together with the rest period claim) likely represented the most factually contested claim in the Action. Accounting for the strength of Defendants' defenses, and the arguably individualized nature of the claim, Plaintiffs estimated the damages for this claim at $440,317.00. JCL Dec., ¶ 25.

(2) Estimated Damages for Rest Period Violations

Plaintiff also alleged that Defendants failed to provide compliant rest periods. Specifically, Plaintiff alleged that because of their rigorous work schedules, Plaintiff and Class Members were required to remain on the premises and were unable to take timely and duty-free rest periods. Again, Defendants denied liability and asserted that they maintained legally compliant rest period policies and practices throughout the Class Period. Moreover, Plaintiff recognizes the evidentiary burdens in establishing this claim. Establishing Plaintiff's rest period claim would depend, almost entirely, on Class Member testimony, making it a riskier claim at class certification and liability stages. Defendants likely would have argued that only a small number of Class Members missed their rest breaks. Certification likely would have required depositions of Class Members who provided declarations, and Defendants surely would have obtained opposing declarations stating either rest breaks were taken, or rest breaks were voluntarily waived. *See, e.g., Ordonez v. Radio Shack, Inc*. (C.D. Cal. Jan. 17, 2013) 2013 WL 210223, at *11 ("Because of the competing testimony before the Court, plaintiff's evidence that Defendants may have an illegal, written rest break policy is insufficient for this Court to find that common issues predominate."); *Villa v. United Site Servs. of California, Inc*. (N.D. Cal. Nov. 13, 2012) 2012 WL 5503550, at *8 ("Indeed, Plaintiff's own evidence confirms that the written policy does not generate uniform practices.") Plaintiff estimated Defendants' exposure for this claim at $1,136,344.40. JCL Dec., ¶ 26.

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(3) Defendants' Estimated Exposure for Failure to Pay for All Hours Worked

Plaintiff further alleges that Defendants failed to pay its employees for all hours worked. Specifically, Plaintiff asserts that Class Members worked off-the-clock for approximately ten minutes after the end of each shift in order to participate in Defendants' policy of tip pooling. Under this policy, cash tips were pooled among the servers, bartenders and hosts after the end of each shift. One Class member would be assigned to count the cash tips and allocate them among the other Class Members that worked the same shift. Plaintiff alleges that Class Members stayed while this counting and allocation process took place, as their cash tip allocation could not be safely secured if they did not take it home that day. Defendants admit that some Class Members did in fact stay after the end of shifts to wait for their allocated tips, but argued that Class Members were not required to participate in tip pooling, and further, that Class Members' allocated cash tips would have been left in a secured location if they opted to pick them up during their next shift, thus there was no requirement or need to stay. Rather, Defendants argued that the single Class Member charged with counting and allocating the tips was the only employee required to stay. Taking into account Defendants' defenses, Plaintiff estimated Defendants' exposure for this claim at $135,341.00. JCL Dec., ¶ 27.

(4) Defendants' Estimated Exposure for Unreimbursed Business Expenses

Plaintiff alleged Defendants failed to reimburse Class Members for all necessary business expenses. Specifically, Plaintiff asserts that Defendants' written policy required Class Members to press their uniforms, however Defendants failed to reimburse Class Members for this cost, in violation of Labor Code Section 2802. Defendants argued that liability here could only occur if the Class Members had actually ironed their uniform and requested such reimbursement, and even under those circumstances, which Plaintiff did not present evidence of, the damages would be minimal. Taking into account Defendants' defenses, Plaintiff estimated Defendants' exposure for this claim at $279,507.00. JCL Dec., ¶ 28.

(5) Defendants' Exposure for Miscalculating the Regular Rate of Pay

Plaintiff also alleged that Defendants miscalculated the regular rate of pay for purposes of overtime, redeemed sick pay, and meal period premiums. Specifically, Plaintiff alleges that Class Members received non-discretionary incentive compensation labeled on wage statements as "BONUS" and "Auto Grat/Serv Chrg" but failed to consider these non-discretionary bonuses when it calculated the overtime rate, redeemed sick pay or meal period premiums for Class Members. Defendants denied that they paid any non-discretionary bonuses or issued any other payments that had to be included in the regular rate. Plaintiff's expert estimated that Defendant's exposure for this claim is approximately $951.00. JCL Dec., ¶ 29.

(6) <u>Defendants' Exposure for Wage Statement Violations and Waiting Time Penalties</u>

Plaintiff contended that Defendants' alleged violations resulted in derivative violations of Labor Code section 203 and 226. Although these penalties collectively represented Defendants' largest dollar amount of exposure, Class Counsel considered these penalties and weighed the potential recoveries against probable defenses. Specifically, Defendants contend that Plaintiff could not prove the "willful" prong needed to obtain waiting time penalties under Labor Code Section 203. Additionally, Defendants contend that Plaintiff cannot show that Class Members suffered an "injury" because of wage statement violations, as required by Labor Code section 226. Plaintiff would have to overcome 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); *Alonzo v. Maximus, Inc.*, 832 F. Supp.2d 1122, 1134-1137 (C.D. Cal. 2011) (finding insufficient evidence of bad faith or actual injury). These claims represented Plaintiff's most legally precarious and uncertain claims, thus Plaintiff applied a 50% discount to these claims and estimated Defendants' total exposure for these claims to be approximately $1,507,365.50. JCL Dec., ¶ 30.

(7) <u>Defendants' PAGA Exposure</u>

Class Counsel's damage models also estimated Defendants' exposure for PAGA penalties. At the time of mediation, Plaintiffs estimated Defendants' PAGA exposure at $1,257,465.00. JCL Dec., ¶ 31. The proposed PAGA Payment of the Gross Settlement Amount is fair, just and reasonable. *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 77. Where settlements "negotiate a good faith amount" for PAGA penalties and "there is no indication that this amount was the result of self-interest at the expense of class members," such amounts are generally considered reasonable. *Hopson v. Hanesbrands Inc.*, No. CV-08-0844 EDL, 2009 WL 928133, at *9 (N.D. Cal. Apr. 3, 2009). Courts routinely approve of amounts for PAGA penalties in the range of zero to two percent of the settlement. *See id.* at *1, 9 (approving a PAGA payment of 0.3%); *Jack v. Hartford Fire Ins. Co.*, No. 09cv1683 MMA (JMA), 2011 WL 4899942, at *6 (S.D. Cal. Oct. 13, 2011) (approving a PAGA payment of 0.25%); *McKenzie v. Fed. Express Corp.*, No. CV 10-02420 GAF (PLAx), 2012 WL 12882124, at *5 (C.D. Cal. Jan. 23, 2012) (acknowledging that courts approve PAGA claim settlements in the range of zero to two percent of the total settlement).

Here, the Parties negotiated a good faith PAGA Payment in the amount of $30,000.00, which is 4.1% of the Gross Settlement Amount. This amount falls well within the range of approved PAGA Payments. Sixty-Five percent (65%) of the PAGA Payment ($19,500.00) will be paid to the LWDA ("LWDA Payment") with the remaining thirty-five percent (35%) to be distributed to the Aggrieved Employees, which is within the range of PAGA penalties approved by courts and should be approved. JCL Dec., ¶ 32.

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

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

For the aforementioned reasons, the PAGA Payment of the Gross Settlement Amount is fair, just and reasonable.

b. Inherent Risks of Continued Litigation Support Preliminary Approval.

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

With respect to the most immediate challenge, i.e., class certification, the risks attendant to the certification of similar wage and hour claims are demonstrated by *Magadia v. Wal-Mart Associates, Inc.* (9th Cir. 2021) 999 F.3d 668. There, the Ninth Circuit vacated, reversed, and remanded a $110 million judgement against an employer for, *inter alia*, inaccurately paying overtime, and directed the trial court to enter judgment in favor of the employer. *See also O'Conner v. Uber Technologies, Inc.* (9th Cir. 2018) 904 F.3d 1087 (decertification of wage and hour misclassification action); *see also Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, 31 (reversing a trial verdict in favor plaintiffs in a wage and hour class action)); *Tien v. Tenet Healthcare Corp.* (2012) 209 Cal.App.4th 1077, 1088 ("[T]he reason, if any, that employees might not take their breaks were predominantly individualized questions of fact not susceptible to class treatment."); *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, L.P.*, (C.D. Cal. 2013) 2013 WL 5302217 at *11-13 (following *Brinker* and denying certification of proposed off-the-clock and rest and meal break classes due to lack of uniform policy); *Brown v. Fed Express Corp.* (C.D. Cal. 2008) 249 F.R.D. 580, 587-88 (denying certification of driver meal and rest period claims based on the predominance of individual issues). Collectively, the examples cited above illustrate the uncertain nature of class litigation. Consequently, the uncertainty of obtaining certification through a contested motion is a significant risk factor favoring settlement. JCL Dec., ¶ 33.

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

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

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

Finally, continuing to litigate this action would require continued and extensive resources coupled with significant Court time to proceed through trial and post-trial motions, which can often take years. Furthermore, wage and hour litigation is complex and expensive, as it often necessitates extensive expert testimony, particularly with regard to damages. But even if Plaintiff is successful at trial, Plaintiff is acutely aware that a judgment does not end the litigation. Plaintiff fully expects that Defendants would appeal any favorable judgment. As demonstrated by *Magadia, supra,* 999 F.3d 668, the risk of an appeal and subsequent reversal is real. JCL Dec., ¶ 34. "Avoiding such a trial and the subsequent appeals in this complex case strongly militates in favor of settlement rather than further protracted and uncertain litigation." (*Nat'l Rural Telecomms. Coop v. DirecTV* (C.D. Cal. 2004) 221 F.R.D. 523, 527.) Thus, "unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." (*Id*. at 526.)

In this matter, Class Counsel negotiated a Gross Settlement Amount of $725,000.00 that is roughly a recovery of 20.7% of Defendants' class-wide exposure. Given the amount of the settlement here, as compared to potential value of the claims, offset by the various inherent risks to continued litigation, the settlement is fair and reasonable. JCL Dec., ¶ 35.

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

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

The Parties jointly drafted the Class Notice, which fairly and neutrally informs the Class Members of their rights and remedies. The Settlement Administrator will first verify addresses, then mail the proposed Class Notice to all Class Members. The Class Notice will include information regarding the nature of the lawsuit, a summary of the substance of the Settlement's terms, the class definition, the procedure, and time period within which to request exclusion from or object to the Settlement, the date for the final approval hearing, the formula used to calculate settlement payments, and the terms and scope of the Released Claims. Agreement at III(L)(2)(a); Ex. 1 to the Agreement. This method was negotiated by the Parties to ensure delivering the most reasonable method of notice to the Class Members while ensuring cost effective administration of the Settlement. JCL Dec., ¶ 36.

Accordingly, both the method of disseminating the Class Notice and content of the Class Notice satisfy due process. (*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 Service Payment

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."

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

(*Rodriguez,* 563 F.3d at 958-59.) "[T]he rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class." (*Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785.)

The Settlement provides for a Service Payment of $10,000 for Plaintiff. The service payment is fair and reasonable compensation for the Plaintiff's efforts bringing the action, assisting Class Counsel with the litigation and settlement, regularly conferring with Class Counsel on the status of the case and the strategies for prosecuting the claims, reviewing the proposed Settlement to ensure that its terms are fair and provide adequate relief for the Settlement Class, and agreeing to provide Defendants a general release of all claims arising out of his employment. JCL Dec., ¶ 37.

Class Counsel on behalf of Plaintiff will file a formal motion for the negotiated Service Payment once preliminary approval of the Settlement is granted. Plaintiff respectfully submits that the above showing is sufficient for preliminary approval of the negotiated Service Payment. JCL Dec., ¶ 38.

D. The Court Should Preliminarily Approve the Attorneys' Fees and Costs

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

Class Counsel took this matter on a contingency fee basis and invested significant time and expense successfully prosecuting Plaintiff's claims. As discussed *supra*, the estimated average Settlement Payment illustrates the demonstrably positive outcome for the Settlement Class Members. Considering the positive outcome for the Class Members, and in light of the supporting authority, the proposed Class Counsel award is fair and reasonable. JCL Dec., ¶ 39.

Attorneys for Plaintiff have entered a Fee Sharing Agreement, which is attached to the Declarations of Class Counsel in compliance with Cal Rules of Court 3.769(b). Plaintiff will file a formal motion for the negotiated Attorneys' Fees and Costs once preliminary approval of the Settlement is granted. Plaintiff respectfully submits that the above showing is sufficient for preliminary approval of the negotiated attorneys' fees. JCL Dec., ¶ 40.

E. Provisional Certification for Settlement Purposes is Appropriate

For Settlement, Plaintiff contends, and Defendants do not dispute, that provisional certification of the Class is appropriate. JCL Dec., ¶ 41.

1. <u>The Standard for Class Certification</u>

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

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

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

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

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

Because all Class Members are Defendants' current and former employees, the class is readily ascertainable from Defendants' regular business records, i.e., payroll records. JCL Dec., ¶ 42.

The statutes relating to each of Plaintiff's claims apply with equal force and effect to the entire Settlement Class. Factually, Defendants' policies and practices apply class-wide and Defendants' liability can be determined by facts common to all members of the class. The wage and hour issues are both numerous and substantial, and a class action is the most advantageous method of dealing with the claims of the Settlement Class. JCL Dec., ¶ 43.

Plaintiff's wage and hour claims are typical of the proposed Settlement Class because they arise from the same factual basis and are based on the same legal theories applicable to the other Class Members. Likewise, Plaintiff's interests are entirely coextensive with the interests of the Settlement Class. Plaintiff alleges that they were injured by the same company-wide practices to which the proposed Class Members were subject and seek the same relief. Plaintiff has already demonstrated his ability to advocate for the interests of the Class by initiating this litigation, undertaking extensive class discovery, and evaluating the proposed settlement to assure that it is fair. JCL Dec., ¶ 44.

Additionally, Plaintiff is represented by competent Class Counsel who have extensive experience in litigating wage and hour class action cases. Class Counsel have successfully briefed, argued, certified, and gained state court settlement approval of the same class-wide causes of action that are at issue in this case. Class Counsel's wage and hour class action experience establishes that they are well qualified to represent the interests of this Class. JCL Dec., ¶¶ 46-53, Declaration of Shani Zakay, ¶¶ 1-3.

A class action is superior to a multitude of individual lawsuits. Given the size and amount of each individual claim, the Class Members likely have little incentive to litigate their claims on an individual basis because the out-of-pocket expense and personal commitment necessary to litigate each claim outweighs any potential recovery. In sum, class treatment is superior to individual, case-by-case adjudication. JCL Dec., ¶ 45.

IV. CONCLUSION

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

Dated: September 24, 2024

JCL LAW FIRM, APC

By: ______________________

Jean-Claude Lapuyade, Esq.