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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

GUSTAVO ADAME, an individual, on behalf
of himself, and on behalf of all persons similarly
situated,

Plaintiff,

vs.

HUSTEAD'S COLLISION CENTER, INC., a
California Corporation; and DOES 1 through
50, Inclusive.

Defendants.

Case No. 22CV018744

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

Date: July 11, 2024

Time: 10:00 am

Judge: Hon. Michael Markman
Dept.: 23

Reservation ID: 685821505020

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1 I. INTRODUCTION

2 Plaintiff GUSTAVO ADAME (hereinafter “Plaintiff”) seeks preliminary approval of the Class
3 Action and PAGA Settlement Agreement and Class Notice (“Agreement”)¹, which if approved, would
4 provide valuable monetary relief for approximately 172 members of the Class and 127 Aggrieved
5 Employees. The basic terms of the Agreement provide for the following:

6 1. The “**Class**,” and “**Class Period**” mean all non-exempt employees who are or previously
7 were employed by HUSTEAD’S COLLISION CENTER, INC. (“Defendant”) and performed work in
8 California during the Class Period. Agreement at § I(G). The Class Period means the period from
9 September 29, 2018 to March 4, 2024. Agreement at § I(J). The Class is comprised of approximately
10 172 individuals who collectively worked approximately 9,463 Workweeks during the Class Period.
11 Declaration of Jonathan Yi Confirming Class Members and Workweeks During Class Period at ¶ 2
12 (“Defendant’s Dec.”), filed concurrently herewith.

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

15 3. The “**Aggrieved Employees**” means all non-exempt employees who are or previously
16 were employed by Defendant and performed work in California during the PAGA Period. Agreement
17 at § I(C).

18 4. The “**PAGA Period**” means the period from September 29, 2021 through March 4, 2024.
19 Agreement at § I(Y). There are approximately 127 Aggrieved Employees during the PAGA Period who
20 worked an aggregate of 5,395 PAGA Workweeks and Pay Periods. Defendant’s Dec. at ¶ 3.

21 5. The “**Gross Settlement Amount**” is Three Hundred Thousand Dollars (\$300,000.00).
22 Agreement at § III(A)(1). The Gross Settlement Amount is non-reversionary and includes the following:

23 a. A “**Enhancement Award**” in the total amount of Five Thousand Dollars and
24 Zero Cents (\$5,000.00) to Plaintiff Adame. Agreement at § I(O).

25 b. An award of “**Attorneys’ Fees**” and “**Attorneys’ Expenses**” consisting of
26 attorneys’ fees in the amount of up to one-third of the Gross Settlement Amount currently estimated to

27
28 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.

be One Hundred Thousand Dollars and Zero Cents (\$100,000.00) (“Class Counsel Fees Payment”) **and** Class Counsel Litigation Expenses for reimbursement of actually incurred litigation costs by Class Counsel in an amount not to exceed Twenty Thousand Dollars and Zero Cents (\$20,000.00). Agreement at §§ I(E) and I(F).

c. A “**PAGA Penalties**” of Twenty Thousand Dollars and Zero Cents (\$20,000.00) to be allocated from the Gross Settlement Amount, with 25% of the payment going to the Aggrieved Employees (“Individual PAGA Payments”) and 75% of the payment going to the Labor and Workforce Development Agency (“LWDA PAGA Payment”). Agreement at § I(Z).

d. “**Administration Costs**” not to exceed \$7,500.00 payable to the Settlement Administrator, APEX Class Action LLC, for, *inter alia*, the administration of the Notice Packet and Individual Settlement Payments. Agreement at § I(B).

e. The “**Individual Settlement Payments**” are the amounts payable from the Net Settlement Amount to each Settlement Class Member and excludes any amounts distributed to Aggrieved Employees. Agreement at § I(R).

5. The “**Net Settlement Amount**” refers to the portion of the Gross Settlement Amount less the PAGA Penalties, Enhancement Award, Administration Costs, and Class Counsel’s Attorneys’ Fees and Attorneys’ Expenses. Agreement at § I(S). The Net Settlement Amount is approximately One Hundred Forty-Seven Thousand Five Hundred Dollars and Zero Cents (\$147,500.00) which will be allocated to all Settlement Class Members on a pro-rata basis according to the number of Workweeks each Participating Class Member worked during the Class Period. Assuming there are zero opt-outs, the entire Net Settlement Amount will be paid to all Participating Class Members resulting in an average Individual Settlement Payment of approximately **\$857.55**. SOZ Dec., ¶ 8.

6. The “**Released Class Claims**” means upon entry of an order granting final approval of this settlement and upon funding of the Gross Settlement Amount, Plaintiff and the participating Class Members agree to release the Released Parties from “all claims alleged in the Operative Complaint in the Action and all claims that reasonably could have been alleged based on the facts and/or theories pled in the Operative Complaint, including claims for: unfair competition predicated on claims for failure to pay minimum wages, failure to pay overtime wages, failure to provide meal and rest periods,

1 failure to reimburse business expenses, failure to pay all wages due upon discharge or resignation,
2 failure to provide accurate wage statements, and regular rate violations with respect to overtime, double
3 time, meal and rest period premiums, and sick pay; and labor code violations for failure to pay minimum
4 wages; failure to pay overtime wages; failure to provide meal and rest periods; failure to reimburse
5 business expenses; failure to pay all wages due upon discharge or resignation; failure to provide
6 accurate wage statements; and regular rate violations with respect to overtime, double time, meal and
7 rest period premiums, and sick pay that accrued during the Class Period. The released claims include,
8 but are not limited to, claims for wages, statutory penalties, civil penalties, damages, liquidated
9 damages, or any other relief brought under state or federal law, the California Labor Code, the Fair
10 Labor Standards Act, California Business and Professions Code sections 17200 *et seq*, and/or any
11 applicable Industrial Welfare Commission Wage Order, arising from the labor code violations released
12 herein; attorneys' fees and costs; and interest that accrued during the Class Period. The release
13 expressly excludes claims for vested benefits, wrongful termination, unemployment insurance,
14 disability, social security, workers' compensation, and class claims outside of the Class Period. The
15 release also expressly excludes PAGA claims, which are separately released by the Aggrieved
16 Employees hereinbelow." Agreement at § I(EE).

17 7. The **"Released PAGA Claims"** means upon entry of an order granting final approval of
18 this settlement and upon funding of the Gross Settlement Amount, the State of California and the
19 LWDA shall release claims for "all claims for civil penalties, attorneys' fees, interest, costs, or any
20 other relief under PAGA for alleged violations of Labor Code sections 201, 201.3, 202, 203, 204, 210,
21 218.5, 218.6, 221, 226, 226.2, 226.3, 226.7, 246, 510, 512, 558, 558.1, 1174(d), 1174.5, 1194, 1197,
22 1197.1, 1197.14, 1198, 198.5, 1199, 2802, 2804, 2699.5, and all applicable Industrial Welfare
23 Commission Wage Order(s) that arise out of or reasonably relate to the factual allegations in the
24 operative complaint and the relevant notice letter(s) to the LWDA." Agreement § I(FF).

25 An objective evaluation of the Settlement confirms that the relief negotiated on behalf of the
26 Class is fair, reasonable, and adequate. The Settlement was negotiated by the Parties at arm's length.
27 The Settlement confers substantial benefits to the Class. The relief offered by the Settlement is
28 particularly impressive when viewed against the difficulties encountered by plaintiffs pursuing wage

1 and hour cases (*see infra*). Indeed, by settling now rather than proceeding to trial, the Class will not
2 have to wait (possibly years) for relief, nor will they have to bear the risk of class certification being
3 denied or of Defendant prevailing at trial. SOZ Dec., ¶ 7.

4 As discussed below, the proposed Settlement satisfies all criteria for preliminary settlement
5 approval and falls within the range of reasonableness. The average Individual Settlement Payments to
6 the Settlement Class meets or exceeds awards in similar wage and hour class actions. Moreover, the
7 proposed Settlement Class is appropriate for provisional certification. Accordingly, Plaintiff
8 respectfully requests the Court grant preliminary approval of the Settlement. SOZ Dec., ¶ 10.

9 II. FACTS AND PROCEDURE

10 A. Overview of the Litigation

11 Defendant is a California corporation that owns and operates automobile collision repair shops
12 in the state of California, including in Alameda County, where plaintiff worked. Plaintiff Adame
13 worked for Defendant as a non-exempt employee from 2014 through May 15, 2020. Plaintiff alleges
14 that Defendant, among other things, failed to provide compliant meal and rest periods, furnished
15 inaccurate itemized wage statements, miscalculated the regular rate of pay for purposes of paying
16 overtime compensation, and failed to reimburse employees for mandatory business expenses.
17 Throughout his employment, Plaintiff was subject to Defendant's written policies and procedures
18 contained in, among other documents, the Hustead's Collision Center Meal and Rest Period Policy.
19 SOZ Dec., ¶ 11; Declaration of Gustavo Adame ("GA Dec.") at ¶¶ 1-7.

20 Defendant forcefully denies liability for each of Plaintiff's claims. Further, Defendant asserts
21 that it fully complied with all applicable employment laws and raised several other significant defenses
22 to Plaintiff's claims, including but not limited to, compliant compensation policies and plans, complaint
23 meal and rest practices, compliant wage statements, and timely payment of all wages due upon
24 separation of employment. SOZ Dec., ¶ 12.

25 On September 29, 2022, Plaintiff Adame served Defendant and the Labor and Workforce
26 Development Agency ("LWDA") with a Notice of Violations ("PAGA Notice"). Plaintiff's PAGA
27 Notice set forth the facts and theories supporting Defendant's alleged violations of various provisions
28 of the California Labor Code and applicable Industrial Welfare Commissions ("IWC") Wage Order

1 and of his intent to pursue claims under California Labor Code Private Attorneys General Act, Cal.
2 Lab. Code Sections 2698 *et seq.* (“PAGA”). SOZ Dec., ¶ 13.

3 On September 29, 2022, Plaintiff Adame filed this class action complaint in the Alameda
4 Superior Court. The Action alleged twelve causes of action against Defendant for: (1) Retaliation in
5 violation of Cal. Lab. Code section 1102.5; (2) Wrongful termination in violation of public policy; (3)
6 Violation of Government Code section 12940 (Disability and Racial Discrimination); (4) Failure to
7 provide reasonable accommodation; (5) Unfair Competition in Violation of Bus. and Prof. Code
8 sections 17200 *et seq.*; (6) Failure to pay minimum wages in violation of California Labor Code sections
9 1194, 1197 & 1197.1; (7) Failure to pay overtime wages in violation of California Labor Code sections
10 510 *et seq.*; (8) Failure to provide required meal periods in violation of California Labor Code sections
11 226.7 and 512 and the applicable IWC wage order; (9) Failure to provide required rest periods in
12 violation of California Labor Code sections 226.7 and 512 and the applicable IWC wage order; (10)
13 Failure to reimburse employees for required business expenses in violation of California Labor Code
14 section 2802; (11) Failure to provide wages when due in violation of Cal. Lab. Code sections 201, 202
15 and 203; and (12) Failure to provide accurate itemized statements in violation of Cal. Lab. Code section
16 226. SOZ Dec., ¶ 14.

17 **B. Class Counsels’ Investigation**

18 To prepare for mediation, Class Counsel requested pertinent documents and data points to
19 evaluate Plaintiff’s claims and measure Defendant’s liability exposure to the Class. In response,
20 Defendant produced, among other things, time, and payroll records for 30% of the Class, aggregate
21 workweek and pay period data, and copies of applicable handbooks, policies, and procedures. In total,
22 Defendant produced over 2,000 pages of documents and more than 1 million unique cells of time and
23 payroll data. SOZ Dec., ¶ 17.

24 Class Counsel then retained the statisticians and economists at Creal & Creal, An Accountancy
25 Corporation, to evaluate the Class Members’ payroll and time data and to calculate Defendant’s liability
26 exposure to the Class. Creal & Creal provide data analysis and damage modeling consulting services,
27 specializing in wage and hour class actions. Creal & Creal analyzed Defendant’s time and payroll data
28 and developed various damage models that assisted Class Counsel at the time of mediation. SOZ Dec.,

¶ 18.

Overall, Class Counsel thoroughly investigated the claims at issue. Class Counsel (1) reviewed Plaintiffs' suitability as a putative class representatives through interviews, background investigations, and analysis of his employment files; (2) evaluated Plaintiff's potential claims; (3) researched similar wage and hour class actions; (4) analyzed time and payroll records for the Class; (5) analyzed Defendant's labor policies and practices; (6); developed comprehensive damage models which estimated Defendant's liability for purposes of settlement with the assistance of a third party damages consultant, Creal & Creal; (7) conducted telephonic interviews with many Class Members, (8) drafted the mediation brief; and (9) participated in the mediation. This investigation allowed Class Counsel to fully assess the nature and magnitude of the claims being settled, and to make an independent assessment of the reasonableness of the terms to which the Parties have agreed. Based on its investigation of the facts, applicable law, and marketplace for similar settlements, and considering the risk of significant delay and uncertainty associated with litigation, and the various defenses asserted by 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. SOZ Dec., ¶ 19.

C. The Parties Settled After Mediation

On October 24, 2023, the Parties participated in a full day mediation with Hon. Brian C. Walsh (Ret.), an experienced wage and hour mediator. The mediation concluded without settlement. However, the Parties continued settlement negotiations after the mediations, with the assistance of the mediator. This ultimately resulted in settlement after the Parties accepted a Mediator's proposal, which was memorialized in the form of a Memorandum of Understanding ("MOU") and then the Agreement. SOZ Dec., ¶ 20. Class Counsel submits that the Settlement constitutes a fair, adequate, and reasonable compromise of the claims at issue. SOZ Dec., ¶ 17.

III. ARGUMENT

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

The proposed Settlement, including a Gross Settlement Amount of Three Hundred Thousand Dollars and Zero Cents (\$300,000.00), meets the standards for preliminary approval. Pre-trial settlement of complex class actions is a judicially favored remedy. (*Officers for Justice v. Civil Serv.*

1 *Comm’n* (9th Cir. 1982) 688 F.2d 615, 625 (“Voluntary conciliation and settlement are the preferred
2 means of dispute resolution.”).) Class action settlement approval requires an early “preliminary”
3 review by the trial court and a subsequent “final” review after notice of the settlement has been
4 distributed to class members for their comments and objections. (C.R.C. 3.769(c)-(g); *Cellphone*
5 *Termination Fee Cases*, 180 Cal.App.4th 1110, 1118 (2010) (the court first “preliminarily approves the
6 settlement” and later “conducts a final approval hearing to inquire into the fairness of the proposed
7 settlement”).)

8 Although Rule of Court Rule 3.769 does not provide detail as to the scope of review of the
9 proposed settlement, preliminary approval is warranted if the settlement falls within a “reasonable
10 range.” (See *North County Contractor’s Assn., Inc. v. Touchstone Ins. Services* (1994) 27 Cal.App.4th
11 1085, 1089-90; Conte & Newberg, *Newberg on Class Actions*, §§ 11.26 (4th ed. 2002).)
12 Reasonableness and fairness are presumed where: (1) the settlement is reached through “arms-length
13 bargaining;” (2) investigation and discovery are “sufficient to allow counsel and the court to act
14 intelligently;” and (3) counsel is “experienced in similar litigation. . . .” (*Dunk v. Ford Motor Co.*
15 (1996) 48 Cal.App.4th 1794, 1802.) The presumption of fairness is consistent with California’s public
16 policy goal of favoring settlements. (*Stambaugh v. Super. Ct* (1976) 62 Cal.App.3d 231, 236 (“the law
17 wisely favors settlements”); *Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1118
18 (“public policy generally favors the compromise of complex class action litigation”); *7-Eleven Owners*
19 *for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1151 (“voluntary conciliation
20 and settlement are the preferred means of dispute resolution ... [t]his is especially true in complex class
21 action litigation”).)

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

28 ///

1 1. The Parties Reached the Settlement Through Arm's-Length Bargaining Led by
2 Experienced Counsel.

3 “[W]hat transpires in settlement negotiations is highly relevant to the assessment of a proposed
4 settlement’s fairness.” (*State v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 482.) Courts presume the
5 absence of fraud or collusion in the negotiation of a settlement, unless evidence to the contrary is
6 offered; thus, there is a presumption that settlement negotiations are conducted in good faith. (Newberg,
7 § 11.51.)

8 The Parties participated in mediation with highly respected Judge Brian C. Walsh (Ret.). Judge
9 Walsh managed the Parties’ expectations and provided a useful, neutral analysis of the issues and risks
10 to both sides. (*In re Apple Computer, Inc. Derivative Litig.* No. C 06-4128 JF (HRL), 2008 U.S. Dist.
11 LEXIS 108195 (N.D. Cal. Nov. 5, 2008) (mediator’s participation weighs considerably against any
12 inference of a collusive settlement); *D’Amato v. Deutsche Bank* (2d. Cir. 2001) 236 F.3d 78, 85 (a
13 “mediator’s involvement in pre-certification settlement negotiations helps to ensure that the
14 proceedings were free of collusion and undue pressure.”).) The Parties only reached a settlement after
15 a lengthy mediation session, further post-mediation communications involving the mediator, and after
16 both sides agreed to a Mediator’s proposal, which was subsequently memorialized in a Memorandum
17 of Understanding (“MOU”). At all times, the Parties’ negotiations were at an arm’s length, adversarial,
18 and non-collusive. After reaching an agreement in the principle, the Parties drafted and negotiated a
19 long-form settlement which is the subject of the instant motion. Objectively, the Settlement terms are
20 fair, adequate and represent a reasonable compromise of the claims at issue. SOZ Dec., ¶ 22.

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

23 As set forth in greater detail above, Class Counsel conducted a very thorough investigation into
24 the factual and legal issues in dispute. The investigation allowed Class Counsel to fully assess the
25 nature and magnitude of the claims being settled, as well as the impediments to recovery, such as to
26 make an independent assessment of the reasonableness of the terms to which the Parties have agreed.
27 Based on this investigation of the facts, applicable law, and marketplace for similar settlements, and
28 considering the risk of significant delay, uncertainty associated with litigation, and the various defenses

1 asserted by Defendant, Class Counsel firmly believes this Agreement to be in the best interests of the
2 Class Members. Because the Settlement's terms are fair, reasonable, and adequate, the Court should
3 preliminarily approve the Settlement. SOZ Dec., ¶ 23.

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

5 The Gross Settlement Amount of \$300,000.00 is well within the range of reasonableness. To
6 determine whether a settlement is fair and reasonable, the court should "consider enough information
7 about the nature and magnitude of the claims being settled, as well as the impediments to recovery, to
8 make an independent assessment of the reasonableness of the terms to which the parties have agreed."
9 (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133.) In making this determination,
10 the court is "not to try the case" but rather "satisfy itself that the class action settlement is within the
11 'ballpark of reasonableness.'" (*Id.* (emphasis added).) For this analysis, courts do "not require any such
12 explicit statement of value; [they] require[] a record which allows an understanding of the amount that
13 is in controversy and the realistic range of outcomes of the litigation." (*Munoz v. BCI Coca-Cola*
14 *Bottling Co.* (2010) 186 Cal.App.4th 399, 409 (internal citation omitted).) The reasonableness of a
15 settlement is not dependent upon its actual value approaching the potential recovery plaintiffs might
16 have received if they had succeeded at trial.² Indeed, "[t]he determination whether a settlement is
17 reasonable does not involve the use of a 'mathematical equation yielding a particularized sum.'" (*Frank*
18 *v. Eastman Kodak Co.* (W.D.N.Y. 2005) 228 FRD. 174, 186 (quoting *In re Michael Milken and Assoc.*
19 *Sec. Litig.* (S.D.N.Y. 1993) 150 F.R.D. 57, 66).)

20 The Gross Settlement Amount of \$300,000.00 is fair and reasonable considering the nature and
21 magnitude of the claims being settled and the various potential impediments to recovery. Prior to
22 mediation, Class Counsel retained Creal & Creal to develop economic damage models measuring

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

1 Defendant's liability exposure while accounting for the uncertainties of continued litigation. The
2 various models were informed by Class Counsel's investigation, including the analysis of a significant
3 sample of time and payroll data. Class Counsel projected Defendant's liability exposure for class
4 damages (excluding all penalties) at \$939,261.00 and Defendant's liability exposure for class claims
5 (excluding only PAGA Penalties) at \$1,998,247 dollars. Thus, the Gross Settlement Amount of
6 \$300,000.00 represents approximately 32% of Defendant's liability exposure for damages, and 15% of
7 Defendant's *class-wide* liability exposure. The following summarizes Defendant's estimated exposure.
8 SOZ Dec., ¶ 18.

9 **(a) Estimated Damages for Unpaid Wages due to Miscalculation of the Regular**
10 **Rate of Pay**

11 Plaintiffs' primary claim was that Defendant failed to calculate certain non-discretionary
12 compensation into the regular rate of pay for purposes of paying overtime, meal premiums, and
13 redeemed sick pay. Based on the review of the Class Members' time and payroll data, Creal & Creal
14 estimated Defendant underpaid the Class Members approximately \$13,453.00. Defendant vigorously
15 denied liability and asserted that all incentive compensation was either properly calculated into the
16 regular rate of pay, or was properly excluded as purely discretionary compensation. SOZ Dec., ¶ 25.
17 The parties vigorously debated this at mediation and post-mediation, even exchanging research and
18 further briefing with the mediator.

19 **(b) Estimated Damages for Meal and Rest Period Violations**

20 Plaintiff also alleged that because of their rigorous work schedule, Plaintiff, Class Members,
21 and Aggrieved Employees were not able to take timely and duty-free meal and rest periods. However,
22 Plaintiff's analysis showed that Defendant's time and payroll data evidenced approximately **34%**
23 violation rate for meal periods. Defendant's dispute this analysis and suggested the violation rate was
24 significantly lower. Plaintiff utilized the same violation rate for purposes of quantifying damages for
25 rest period violations. In total, Class Counsel estimated Defendant's exposure for the meal and rest
26 claims at \$863,768.00. SOZ Dec., ¶ 26.

27 Defendant argued, *inter alia*, that it provided the Class Members and Aggrieved Employees
28 with compliant meal and rest periods as evidenced by the modest violation rate. Defendant also argued

1 that they maintained facially complaint meal and rest period policies, and that any purportedly omitted
2 breaks were of an employee's own volition, particularly given the extreme flexibility afforded
3 employees in taking same. Thus, Defendant argued, any missed meal and rest periods were done so
4 voluntarily and not eligible for premium payments. In sum, Defendant argued that there was no
5 potential liability for Plaintiff's alleged meal and rest period violations and any claimed violations
6 required a highly individualized inquiry not suitable to class treatment. SOZ Dec., ¶ 27.

7 **(c) Exposure for Expense Reimbursement Claim**

8 Plaintiff further alleged that Defendant required the Class to use personal cell phones to receive
9 and respond to work-related communications. California employers who require employees to use their
10 personal cellular device for work purposes must reimburse the employee for the cost incurred in
11 furnishing the device, including voice and data service. (See *Cal. Labor Code* § 2802(a), providing that
12 "An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by
13 the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to
14 the directions of the employer...") Plaintiff estimated Defendant's exposure for this claim at \$62,040
15 or \$15 per month for each member of the Class during the Class Period. SOZ Dec., at ¶ 28. Defendant
16 disputed this claim and contends that Plaintiff chose to use his personal cell phone under unique
17 circumstances specific to Plaintiff, which did not constitute a necessary expenditure or apply on a Class-
18 wide basis.

19 **(d) Exposure for Wage Statement Violations and Waiting Time Penalties**

20 Plaintiff alleges that Defendant's alleged violations resulted in derivative violations of Labor
21 Code sections 203 and 226(a). Class Counsel considered the arguable presence of various penalties
22 and weighed the potential recoveries against probable defenses. Specifically, Defendant could, and did,
23 argue that Plaintiffs could not prove the "willful" prong needed to obtain waiting time penalties under
24 Labor Code section 203. Additionally, Defendant could, and did, argue that Plaintiff could not show
25 that Class Members suffered an "injury" because of wage statement violations, as required by Labor
26 Code section 226. Plaintiff estimated Defendant's exposure for these claims to be approximately
27 \$1,058,986.00 (\$760,636.00 for Labor Code section 203 waiting time penalties and \$298,350.00 for
28 Labor Code section 226 penalties). SOZ Dec., ¶ 29.

1 **(e) Defendant's PAGA Exposure**

2 Class Counsel's damage models also estimated Defendant's exposure for PAGA penalties. At
3 the time of mediation, Plaintiff estimated Defendant's PAGA exposure to be approximately \$675,600.
4 SOZ Dec., ¶ 30. Under PAGA, Courts have considerable discretion to reduce the penalty award. In
5 *Fleming v. Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011), a federal court reduced PAGA
6 penalties from \$2,800,000 to \$500,000, a reduction of 82.2%, because the court found maximum
7 penalties "unjust" because the employees had suffered no injuries. Some trial courts have awarded no
8 civil penalties, even when Labor Code violations are established. See *In re Nordstrom Com. Cases*, 186
9 Cal.App.4th 576, 589 (2010) (affirming an award of \$0 in PAGA penalties in a wage and hour class
10 action); *In re Taco Bell Wage & Hour Actions*, 2016 U.S. Dist. LEXIS 48557, *40-43 (E.D. Cal. Apr.
11 6, 2016) (PAGA penalties denied after trial).

12 To recover any PAGA penalties, Plaintiff would be required at trial to prove each of the
13 underlying Labor Code violations. See *Cardenas v. McLane Foodservice, Inc.*, 2011 U.S. Dist. LEXIS
14 13126, *10 (C.D. Cal. 2011) ("Given the statutory language [of PAGA], a plaintiff cannot recover on
15 behalf of individuals whom the plaintiff has not proven suffered a violation of the Labor Code by the
16 defendant."). Here, Plaintiff would need to prove that each Aggrieved Employee suffered a violation for
17 each pay period the employee worked. Again, Defendant raised several defenses that presented serious
18 threats to the claims of the Plaintiff and the Aggrieved Employees. In addition to those arguments
19 discussed *supra*, Defendant also argued that the Court of Appeals' decision in *Cacho v. Eurostar, Inc.*
20 (2019) 43 Cal.App.5th 885, weakened Plaintiffs' claims, on liability, value, and manageability as to the
21 rest period claims. SOZ Dec., ¶ 31. Further, Defendant paid its employees on a weekly basis rather than
22 a bi-weekly. Defendant claimed that this was for the benefit of employees. Thus, for the purpose of
23 calculating penalties, Defendant advocated reducing the number of pay periods by on a bi-weekly basis
24 rather than a weekly basis, from 52 annual pay periods, to 26 (or half), under the Court's discretionary
25 reduction power. SOZ Dec., ¶ 32.

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

1 the law. *Id.* at 517. Upon review, the Court of Appeal found such reduction to be proper. *Id.* at 539.
2 Again, the *Carrington* decision was after the plaintiff there prevailed at trial, and even then, the PAGA
3 penalties were reduced by 90%.

4 The proposed Settlement allocates \$20,000 to satisfy the PAGA claims. This amount represents
5 approximately 6.67% of the Gross Settlement Amount. This achieves a fair, reasonable, and adequate
6 resolution of Plaintiffs' PAGA claim. See *Moniz v. Adecco* (2021) 72 Cal.App.5th 56. Further, the
7 amount allocated to the satisfaction of Plaintiffs' PAGA claim, is well within the range of
8 reasonableness. See, e.g., *Nordstrom Comm'n Cases* (2010) 186 Cal.App.4th 576, 589 (approving 0%
9 PAGA allocation); *Berry v. Urban Outfitters* (N.D. Cal. Lead Case No. 13-cv-02628-JSW) (approving
10 1% PAGA allocation in \$5M settlement); *Jack v. Hartford Fire Ins. Co.* (S.D. Cal. 2011) 2011 WL
11 4899942 * 6 (approving \$3,000 PAGA allocation in \$1.2M settlement); *Singer v. Becton Dickinson &*
12 *Co.* (S.D. Cal. 2010) 2010 WL 2196104 *2 (approving \$3,000 PAGA allocation in \$1M settlement);
13 and *Hopson v. Hanesbrands, Inc* (N.D. Cal. 2009) 2009 WL 928133 * 9 (approving \$1,500 PAGA
14 allocation in \$1.026M settlement.) SOZ Dec., ¶ 33.

15 4. Inherent Risks of Continued Litigation Support Preliminary Approval.

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

21 With respect to the most immediate challenge, i.e., class certification, the risks attendant to the
22 certification of similar wage and hour claims are demonstrated by *Magadia v. Wal-Mart Associates,*
23 *Inc.* (9th Cir. 2021) 999 F.3d 668. There, the Ninth Circuit, vacated reversed and remanded a \$110
24 million judgement against an employer for, *inter alia*, inaccurately paying overtime, and directed the
25 trial court to enter judgement in favor of the employer. See also *O'Conner v. Uber Technologies, Inc.*
26 (9th Cir. 2018) 904 F.3d 1087 (decertification of wage and hour misclassification action); see also
27 *Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, 31 (reversing a trial verdict in favor
28 plaintiffs in a wage and hour class action)); *Tien v. Tenet Healthcare Corp.* (2012) 209 Cal.App.4th

1 1077, 1088 (“[T]he reason, if any, that employees might not take their breaks were predominantly
2 individualized questions of fact not susceptible to class treatment.”); *Ali v. U.S.A. Cab Ltd.* (2009) 176
3 Cal.App.4th 1333, 1341 (affirming denial of certification because employees’ declarations attesting to
4 having taken meal and rest breaks demonstrated that individualized inquiries were required to show
5 harm); *Campbell v. Best Buy Stores, L.P.*, (C.D. Cal. 2013) 2013 WL 5302217 at *11-13 (following
6 *Brinker* and denying certification of proposed off-the-clock and rest and meal break classes due to lack
7 of uniform policy); *Brown v. Fed Express Corp.* (C.D. Cal. 2008) 249 F.R.D. 580, 587-88 (denying
8 certification of driver meal and rest period claims based on the predominance of individual issues).
9 Collectively, the examples cited above illustrate the uncertain nature of class litigation. Consequently,
10 the uncertainty of obtaining certification through a contested motion is a significant risk factor favoring
11 settlement. SOZ Dec., ¶ 34.

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

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

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

22 Finally, continuing to litigate this action would require continued and extensive resources
23 coupled with significant Court time to proceed through trial and post-trial motions, which can often
24 take years. Furthermore, wage and hour litigation is complex and expensive, as it often necessitates
25 extensive expert testimony, particularly with regards to damages. But even if Plaintiff is successful at
26 trial, Plaintiff is acutely aware that a judgment does not end the litigation. Plaintiff fully expects that
27 Defendant would appeal any favorable judgment. As demonstrated by *Magadia, supra*, 999 F.3d 668,
28 the risk of an appeal and subsequent reversal is real. SOZ Dec., ¶ 35. “Avoiding such a trial and the

subsequent appeal 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.)

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. SOZ Dec., ¶ 36.

B. The Proposed Notice Packet 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 of their rights and remedies. The Settlement Administrator will first verify addresses, then mail the proposed Class Notice to the entire Class. The Class Notice includes information regarding the nature of the lawsuit, a summary of the substance of the Settlement’s terms, the procedure, and time within which to requests for exclusions or objections 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 Class Claims. The Parties negotiated this method to ensure delivering the most reasonable method of notice to the Class while ensuring cost effective administration of the Settlement. SOZ Dec., ¶ 37.

Accordingly, both the method of disseminating the Notice Packet and content of the Notice

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.

1 Packet satisfy due process. (See C.R.C. 3.776(e)-(f); *State of Cal. v. Levi Strauss* (1986) 41 Cal.3d
2 460,485 (the class notice must “fairly apprise the class members of the terms of the proposed
3 compromise and of the options open to dissenting class members.”).)

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

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

16 The Settlement provides for an Enhancement Award of \$5,000 to Plaintiff Adame. The Service
17 Payment is fair and reasonable compensation for the Plaintiff’s efforts bringing the action, assisting
18 Class Counsel with the litigation and settlement, regularly conferring with Class Counsel on the status
19 of his case and the strategies for prosecuting the claims, reviewing the proposed Settlement to ensure
20 that its terms are fair and provide adequate relief for the Settlement Class. SOZ Dec., ¶ 38. Plaintiff has
21 separately entered into an individual settlement agreement resolving unrelated FEHA claims, a copy of
22 which is submitted to the Court concurrently with this motion for in-camera review.

23 Class Counsel on behalf of Plaintiff will file a formal motion for the negotiated Class
24 Representative Service Award once preliminary approval of the Settlement is granted. Plaintiff
25 respectfully submits that the above showing is sufficient for preliminary approval of the negotiated
26 Class Representative Service Award. SOZ Dec., ¶ 39.

27 ///

28 ///

1 **D. The Court Should Preliminarily Approve the Class Counsel Fees Payment and Litigation**
2 **Expenses Payment**

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

13 Class Counsel took this matter on a contingency fee basis and invested significant time and
14 expense successfully prosecuting Plaintiff’s claims. As discussed *supra*, the estimated average
15 Individual Settlement Payments illustrates the demonstrably positive outcome for the Class.
16 Considering the positive outcome, and considering the supporting authority, the proposed Class
17 Counsel Fees Payment and Class Counsel Litigation Expenses Payment are fair and reasonable. SOZ
18 Dec., ¶ 40.

19 Plaintiff will file a formal motion for the Class Counsel Fees Payment and Class Counsel
20 Litigation Expenses Payment once preliminary approval of the Settlement is granted. Plaintiff
21 respectfully submits that the above showing is sufficient for preliminary approval of the negotiated
22 attorneys’ fees. SOZ Dec., ¶ 41.

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

24 For Settlement, Plaintiff contends, and Defendant does not dispute for purposes of settlement,
25 that provisional certification of the Class is appropriate. SOZ Dec., ¶ 42.

26 1. The Standard for Class Certification

27 Class actions are statutorily authorized “when the question is one of common or general interest,
28 of many persons, or when the parties are numerous, and it is impracticable to bring them all before the

1 court” (*Cal.Civ.Proc.* Code § 382; *Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325, 1332.) Class
2 certification is appropriate when there is an “ascertainable class and a well-defined community of
3 interest among class members.” (*Sav-On Drug Stores, Inc.* (2014) 34 Cal.4th 319, 326.) Class treatment
4 is appropriate even if class members at some point may be required to make an individual showing as
5 to eligibility for recovery. (*Bufile v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1207;
6 *Sav-On*, 34 Cal.4th at 333.)

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

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

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

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

22 Because all members of the Class are Defendant’s current and former non-exempt employees,
23 the class is readily ascertainable from Defendant’s regular business records, i.e., payroll records. SOZ
24 Dec., ¶ 43.

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

1 claims of the Settlement Class. SOZ Dec., ¶ 44.

2 Plaintiffs' wage and hour claims are typical of the proposed Settlement Class because they arise
3 from the same factual basis and are based on the same legal theories applicable to the other Class
4 Members. Likewise, Plaintiff's interests are entirely coextensive with the interests of the Settlement
5 Class. Plaintiffs allege that he was injured by the same company-wide practices to which the proposed
6 Class Members were subject to and seeks the same relief. Plaintiff has already demonstrated his ability
7 to advocate for the interests of the Class Member by initiating this litigation, undertaking extensive
8 informal class discovery, and evaluating the proposed settlement to assure that it is fair. SOZ Dec., ¶
9 45.

10 Additionally, Plaintiff is represented by competent Class Counsel who have extensive experience
11 in litigating wage and hour class action cases. Class Counsel successfully briefed, argued, certified, and
12 gained state court settlement approval of the same class-wide causes of action that are at issue in this
13 case. Class Counsel's wage and hour class action experience establishes that they are well qualified to
14 represent the interests of this Class. SOZ Dec., ¶¶ 6, 48; Declaration of Jean-Claude Lapuyade, ¶¶ 3-
15 11.

16 A class action is superior to a multitude of individual lawsuits. Given the size and amount of
17 each individual claim, the Class Members likely have little incentive to litigate their claims on an
18 individual basis because the out-of-pocket expense and personal commitment necessary to litigate each
19 claim outweighs any potential recovery. In sum, class treatment is superior to individual, case-by-case
20 adjudication. SOZ Dec., ¶ 47.

21 IV. CONCLUSION

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

25 Dated: June 14, 2024

ZAKAY LAW GROUP, APLC

27 By: 

28 Shani O. Zakay, Esq.