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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

KEVIN DION COCROFT and EFRAIM ALVARADO, individuals, on behalf of himself, and on behalf of all persons similarly situated, Plaintiffs, v. EQUIPMENTSHARE.COM INC., and DOES 1-50, Inclusive, Defendants.	Case No: 37-2024-00021084-CU-OE-CTL **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT** Date: June 6, 2025 Time: 10:30 a.m. Judge: Hon. Loren Freestone Dept.: C-64

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I. INTRODUCTION

Plaintiffs Kevin Dion Cocroft and Efraim Alvarado ("Plaintiffs") seek preliminary approval of the Stipulation of Settlement of Class and PAGA Action Claims and Release of Claims ("Agreement" or "Settlement Agreement")[1], which if approved, would provide valuable monetary relief for approximately 347 Class Members. The basic terms of the Agreement provide for the following:

1. The **"Class"** and **"Class Period"** means all persons who are or previously were employed by Defendant EquipmentShare.com Inc. ("Defendant") in California and classified as non-exempt employees at any time during the period beginning February 29, 2020, through December 16, 2024 ("Class Period"). Agreement at §§ I(E), I(I).

a. **"Settlement Class Member"** means a Class Member who does not submit a valid and timely request for exclusion from the Settlement. Agreement at § I(MM).

2. The "**Class Size**" is comprised of 347 individuals who collectively worked approximately 26,867 Workweeks during the Class Period as estimated by Defendant. Agreement at § III(A)(2).

3. **"Aggrieved Employees"** and **"PAGA Period"** means all current and former non-exempt employees who worked for Defendant in California at any time during the PAGA Period current and former non-exempt employees employed by Defendant in California who worked at any time during the period beginning on February 28, 2023, through December 16, 2024 ("PAGA Period"). Agreement at §§ I(D), I(Y). Aggrieved Employees do not have the ability to opt-out of the PAGA portion of the settlement. Agreement at § III(L)(7).

4. The "**Gross Settlement Amount**" is Five Hundred Fifty-Five Thousand Dollars and Zero Cents ($555,000.00). Agreement at § I(O). The Gross Settlement Amount is non-reversionary and includes the following:

a. A **"Service Award**" of $10,000 to each Plaintiff, or an amount that the Court authorizes, in recognition of their efforts and risks in assisting with the prosecution of the Action. Agreement at § I(II); III(M)(9).

/ / /

[1] The Agreement is attached as Ex "1" 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.

b. A **"Class Counsel Award"** in the amount of not more than $200,000.00, comprised of one-third of the Gross Settlement Amount for attorney's fees, currently estimated to be $185,000.00 ***and*** litigation expenses not to exceed $15,000.00, to be paid to Class Counsel. Agreement at § I(G);

c. A "**PAGA Payment**" of Ten Thousand Dollars and Zero Cents ($10,000.00) shall be allocated from the Gross Settlement Amount for settlement of claims for civil penalties under the Private Attorneys General Act of 2004 ("PAGA Payment"). The Settlement Administrator shall pay seventy-five percent (75%) of the PAGA Payment ($7,500.00) to the Labor and Workforce Development Agency ("LWDA Payment"). Twenty-five percent (25%) of the PAGA Penalties ($2,500.00) will be distributed to the Aggrieved Employees ("Aggrieved Employee Payments"). Agreement at § III(M)(11); and

d. "**Settlement Administration Costs**" not to exceed $7,990.00 payable to the Settlement Administrator, Apex Class Action LLC, for, *inter alia,* the administration of the Class Notice and costs associated with administration of the settlement. Agreement at §§ I(LL), III(M)(12).

4. The "**Net Settlement Amount**" of approximately $317,010.00 (Gross Settlement Amount less the requested Class Counsel Award, Service Award, PAGA Payment, and Settlement Administration Costs) which will be allocated to all Settlement Class Members on a pro-rata basis according to the number of Workweeks each Settlement Class Member worked during the Class Period. Agreement at §§ III(M)(1). The entire Net Settlement Amount will be paid to all Settlement Class Members who do not opt out of the Settlement resulting in an average Individual Settlement payment of ***$913.57.*** JCL Dec., ¶ 7.

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

As discussed below, the proposed Settlement satisfies all criteria for preliminary settlement approval and falls within the range of reasonableness. The average Individual Settlement Payment to the Settlement Class Members meets awards in similar wage and hour class actions. Moreover, the proposed Class is appropriate for provisional certification. Accordingly, Plaintiffs respectfully request the Court grant preliminary approval of the Settlement. JCL Dec., ¶ 8.

II. FACTS AND PROCEDURE

A. Overview of the Litigation

Defendant owns and operates a construction equipment rental company throughout the state of California, including in the county of San Diego, California where Plaintiffs worked. Plaintiff Cocroft was employed by Defendant from July of 2023 to August 2023 as a non-exempt employee. Plaintiff Alvarado was employed by Defendant from July 2022 to February 2024 as a non-exempt employee. Throughout their employment, Plaintiffs were subject to Defendant's policies and procedures. JCL Dec., ¶ 9.

Generally, Plaintiffs claims that Defendant failed to properly calculate the regular rate of pay for purposes of overtime, meal period premiums and redeemed sick pay, failed to pay all wages, failed to pay for all time worked, failed to provide compliant meal and rest periods, failed to reimburse necessary business expenses, failed to furnish accurate itemized wage statements, and failed to pay all wages upon separation. Defendant denies liability for each of Plaintiff's claims. Further, Defendant asserts that they fully complied with all applicable employment laws and raised several other significant defenses to Plaintiff's claims, including but not limited to timely payment of all wages due upon separation of employment. JCL Dec., ¶ 10.

On February 29, 2024, Plaintiff Cocroft filed a Class Action complaint in the San Diego Superior Court, Case No. 37-2024-00009472 ("Class Action"), alleging claims for: 1. Unfair Competition In Violation Of Cal. Bus. & Prof. Code §17200 et seq; 2. Failure To Pay Minimum Wages In Violation Of Cal. Lab. Code §§ 1194, 1197 & 1197.1; 3. Failure To Pay Overtime Wages In Violation Of Cal. Lab. Code §§ 510, et seq; 4. Failure To Provide Required Meal Periods In Violation Of Cal. Lab. Code §§ 226.7 & 512 and the Applicable IWC Wage Order; 5. Failure To Provide Required Rest Periods In Violation Of Cal. Lab. Code §§ 226.7 & 512 and the Applicable IWC Wage Order; 6. Failure To

Reimburse Employees For Required Expenses In Violation Of Cal. Lab. Code § 2802; 7. Failure To Provide Accurate Itemized Statements In Violation Of Cal. Lab. Code § 226; and 8. Failure To Provide Wages When Due In Violation Of Cal. Lab. Code §§ 201, 202 And 203. On the same day, Plaintiff Cocroft filed a Notice of Violations with the LWDA and served the same on Defendant. JCL Dec., ¶ 11.

On April 4, 2024, Defendant removed the Class Action from the San Diego Superior Court to the United Stated District Court, Southern District of California. On May 6, 2024, Plaintiff Cocroft filed a Representative Action Complaint in the San Diego Superior Court, Case No. 37-2024-00021084-CU-OE-CTL, for Violations of the Private Attorneys General Act (Labor Code sections 2698 et. seq.) On June 10, 2024, Plaintiff Alvarado filed a Notice of Violations with the LWDA and served the same on Defendant. In the removed class action, the district court set an Early Neutral Evaluation ("ENE"), to be attended by the Parties. As discussed *infra,* in preparation for the ENE, Plaintiffs' counsel retained the forensic consultants at Berger Consulting Group to analyze Defendant's time and payroll data. JCL Dec., ¶ 12.

On October 30, 2024, the Parties attended an Early Neutral Evaluation ("ENE") in the removed Class Action with the Honorable Judge Allison H. Goddard and reached a settlement of both the Class Action and the PAGA Action, which was subsequently 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., ¶ 13.

B. Class Counsel Thoroughly Investigated the Factual and Legal Issues

Months before filing the Action, Class Counsel began its pre-filing investigation into the Plaintiffs' complaints. Class Counsel's investigation started with several lengthy interviews with Plaintiffs. As part of the interview process, Plaintiffs produced documents related to their employment, including wage statements. At the conclusion of the interviews, Class Counsel determined that Plaintiffs' complaints justified further inquiry. JCL Dec., ¶ 14.

Class Counsel subsequently requested Plaintiffs' employee files from Defendant. In response, Defendant produced additional documents including timesheets, policies, and complete payroll records. Class Counsel reviewed and analyzed the documents and determined the documents appeared to substantiate Plaintiffs' claims that Defendant failed to, among other things, Plaintiffs' claim for failure to calculate the correct regular rate of pay. JCL Dec., ¶ 15.

To prepare for the ENE, Defendant produced time and payroll records for the Class Members, aggregate workweek and pay period data for the Class Members, average hourly rate for the Class Members, and copies of applicable handbooks, policies, and agreements. JCL Dec., ¶ 16.

Class Counsel then retained the statisticians and economists at Berger Consulting Group ("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., ¶ 17.

BCG analyzed Defendant's time and payroll data to assist in the development of various damage models. Among other things, BCG determined the approximate amount of unpaid wages, amount of unpaid overtime wages, number of workweeks, pay periods, average length of shifts and average number of hours worked per week. BCG also estimated the number of missed, late, or truncated meal and rest periods, the amount of unpaid wages, the amount of unpaid and underpaid overtime, and the amount of missed meal and rest period premiums paid during the Class Period. JCL Dec., ¶ 18.

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

Class Counsel only agreed to enter the Settlement following this thorough investigation and evaluation of Plaintiffs' claims. 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 Defendant, 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., ¶ 20.

C. The Parties Settled at an ENE

On October 30, 2024, the Parties participated in an Early Neutral Evaluation ("ENE"), in connection with Plaintiffs' federal class action case. The ENE was presided over by Magistrate Judge Allison H. Goddard. The Parties made substantial progress with Judge Goddard's assistance. Namely, the Parties exchanged information regarding their respective claims and defenses, including their respective evaluation of the damages. The ENE concluded with a global settlement of Plaintiffs' class and PAGA claims, which was subsequently memorialized in the form of a Memorandum of Understanding. 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., ¶ 21.

D. The Proposed Settlement Fully Resolves Plaintiffs' Claims

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

The proposed Class consists of all persons who are or previously were employed by Defendant in California and classified as non-exempt, at any time during the Class Period of February 29, 2020 through December 16, 2024. Agreement at § I(E); I(I). The Settlement Class excludes any person who submits a timely and valid request for exclusion. Agreement at § I(MM). Defendant estimates that the Class is comprised of 347 individuals who collectively worked approximately 26,867 Workweeks during the Class Period. Agreement at § III(A)(2).

2. <u>The Settlement Consideration</u>

The Parties agreed to settle the underlying class claims in exchange for the Gross Settlement Amount of $555,000.00. The Gross Settlement Amount includes: (1) Individual Settlement Payments to the Settlement Class Members; (2) Service Award of not more than $10,000.00 to each of the two Plaintiffs for their services on behalf of the Class; (3) a PAGA Payment in the amount of $10,000.00;

(4) Settlement Administration Costs not to exceed $7,990.00; (5) a Class Counsel Award of up to $200,000, comprised of attorneys' fees equal to one-third of the Gross Settlement Amount estimated to be $185,000 and an estimated $15,000.00 for actually incurred litigation expenses. See generally Agreement at § III(M).

Subject to the Court approving the Service Award, Class Counsel Award, PAGA Payment, and the Settlement Administration Costs, the Net Settlement Amount will be distributed to each Settlement Class Member. Agreement at §§ I(S). There is no reversion to Defendant and Defendant must separately pay for their share of the employer payroll taxes. Agreement at § I(O).

3. <u>The Funding Date and Installment Plan</u>

Assuming there are no objectors, and no appeal is filed, Defendant will fund the Gross Settlement Amount within sixty (60) days of notice of entry of the Court's order granting final approval. Agreement at § I(N).

4. <u>Formula for Calculating Individual Settlement Payments</u>

Each Settlement Class Member will receive an Individual Settlement_Payment. The Individual Settlement Payment will be proportional to the number of Workweeks each Class Member worked for Defendant in California during the Class Period. Agreement at § III(M)(1). The Class Data provided by Defendant to the Settlement Administrator will include Class Members' start and end dates of employment. Agreement at § I(H). The Settlement Administrator will calculate each Class Member's final Individual Settlement Payment by dividing the particular Class Member's total number of Workweeks by the total number of Workweeks for all Class Members, resulting in a Class Payment Ratio for each Class Member. Agreement at § III(M)(1). Each Class Member's Class Payment Ratio will then be multiplied by the Net Settlement Amount to calculate each Class Member's estimated Individual Settlement Payment. Each Individual Settlement Payment will be reduced by any legally mandated employee tax withholdings (e.g., employee payroll taxes, etc.). *Id.*

Given that there are approximately 347 Class Members, <u>***the average gross recovery is approximately $913.57***</u> (Net Settlement Amount divided by Class Members). JCL Dec., ¶ 7.

5. <u>Release by Settlement Class Members</u>

Generally, upon entry of final judgment and funding of the Gross Settlement Amount, the

Settlement Class Members will release the Released Parties from the Released Class Claims for the Class Period. Agreement at § III(B).

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

Generally, upon entry of final judgment and funding of the Gross Settlement Amount, Plaintiffs and the State of California will release the Released Parties from the Released PAGA Claims that accrued during the PAGA Period. Agreement at III (C).

III. ARGUMENT

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

The proposed Settlement, including a Gross Settlement Amount of $555,000.00 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 an ENE with the Honorable Allison H. Goddard on October 30, 2024. The ENE concluded with a settlement, which was subsequently memorialized in the form of a Memorandum of Understanding. JCL Dec., ¶ 22.

The Parties then engaged in negotiations regarding the written terms of the global settlement. The Agreement is the final product of the mediated negotiations. Objectively, the Settlement terms are fair, adequate and represent a reasonable compromise of the claims at issue. JCL Dec., ¶ 23.

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

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 Plaintiffs' claims and intelligently engage defense counsel in settlement discussions that culminated in the proposed settlement now before the Court. JCL Dec., ¶ 24.

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

The Gross Settlement Amount of $555,000.00 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 of $555,000.00 is fair and reasonable considering the nature and

[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* (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.* (9^{th} 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").

magnitude of the claims being settled and the various potential impediments to recovery. Prior to the ENE, Class Counsel retained Berger Consulting Group to develop economic damage models measuring Defendant's liability exposure while accounting for the uncertainties of continued litigation. The various models were informed by Class Counsel's investigation, including the analysis of a significant sample of time and payroll data. Class Counsel projected Defendant's liability exposure for *class claims* (excluding PAGA Penalties) ranged between $1,071,282.30 ("Realistic Damages") and $2,918,091.00 ("Maximum Damages") if successful at trial. This range reflects the uncertainty regarding several of the claims. Thus, the Gross Settlement Amount represents a recovery of between 51% ("Realistic Damages") and 19% ("Maximum Damages") of Defendant's class-wide exposure – well within the recognized range of reasonableness. The following summarizes Defendant's liability exposure. JCL Dec., ¶ 25.

(1) Estimated Exposure for Regular Rate Violations

Plaintiffs alleged that Defendant failed to include certain non-discretionary payments when calculating the regular rate of pay for purposes of overtime wages, redeemed sick pay, and meal period premiums. The regular rate of pay, which can change from pay period to pay period, includes adjustments to the straight time rate, reflecting, among other things, non-discretionary bonuses and awards, shift differentials and the per-hour value of any non-hourly compensation the employee has earned. *Alvarado v. Dart Container Corp. of California* (2018) 4 Cal.5th 542, 552-554. For overtime work, "an employee must receive a 50 percent premium on top of his or her regular rate of pay[.]" *Id.* at 553. Plaintiffs estimate Defendant's exposure for this claim to be approximately $176,570. JCL Dec., ¶ 26.

(2) Estimated Exposure for Unpaid Wages

Plaintiffs also alleged that Defendant failed to pay its employees for all hours worked. Specifically, Plaintiffs alleged that Defendant required themselves and the Class to review various documents and videos at home, while off-the-clock. These include training videos and onboarding paperwork. Defendant contends that the tasks could have been completed while on the clock and to the extent they were not, the time spent on these tasks would have been under one hour per Class Member, for the duration of the Class Period. Plaintiffs estimate Defendant's exposure for this claim to be between $10,930.50 and $21,861.00. JCL Dec., ¶ 27.

(3) Estimated Exposure for Meal and Rest Period Violations.

Plaintiffs alleged that Defendant failed to provide compliant meal periods. Specifically, Plaintiffs alleged they were frequently unable to take compliant meal and rest periods due to the press of business and the nature of the work being performed. Class Members were also required to maintain a cell phone and keep it on at all times during their meal and rest periods, so that they could be reached by Defendant. In fact, Plaintiffs would receive phone calls from upper management during their meal and rest breaks with various work directives. Defendant contends that its meal and rest period policies are fully compliant with California law and that Plaintiffs' meal and rest break claims would have mainly relied on the testimony of Class Members, making it a riskier claim. Establishing liability likely would have entailed competing testimony as to whether breaks offered but not taken, and whether it was requirement to keep a cell phone on during breaks. *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 defendant 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, plaintiffs' own evidence confirms that the written policy does not generate uniform practices."). Plaintiffs estimate Defendant's exposure for these claims to be between $521,638 and $1,043,276. JCL Dec., ¶ 28.

(4) Estimated Exposure for Unreimbursed Business Expenses

Plaintiffs alleged that Defendant required Plaintiffs and the Class Members were required to use their personal cell phones to perform work-related tasks. Plaintiffs alleged that although Defendant provided work phones, they often did not work or have reception, thus Class Members were forced to use their own personal devises. JCL Dec., ¶ 29.

(5) Estimated Exposure for Wage Statement and Waiting Time Penalties

Plaintiffs alleged that Defendant's alleged violations resulted in derivative violations of Labor Code section 203 and 226. Class Counsel considered these penalties and weighed the potential recoveries against probable defenses. Specifically, Defendant contends that Plaintiffs could not prove the "willful" prong needed to obtain waiting time penalties under Labor Code Section 203.

Additionally, Defendant contends that Plaintiffs cannot show that Class Members suffered an "injury" because of wage statement violations, as required by Labor Code section 226. Plaintiffs would have to overcome precedent to prove the Class were entitled to these 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 Plaintiffs' most legally precarious and uncertain claims. Taking this into account, Plaintiffs estimated Defendant's exposure for waiting time penalties to be between $157,019.80 and $785,099, and its exposure for wage statement statutory penalties to be between $151,390 and $756,950. JCL Dec., ¶ 30.

(6) Defendant's PAGA Exposure

In all, Class Counsel projected Defendant's liability exposure for PAGA claims ranged between $773,600 ("Conservative Model") and $851,350 ("Aggressive Model") if successful at trial. JCL Dec., ¶ 31. The proposed PAGA allocation 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 Penalties 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 Penalties 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 $10,000.00 which is 1.8% of the Gross Settlement Amount. This amount falls well within the range of approved PAGA payments. Seventy-Five percent (75%) of the PAGA Payment ($7,500.00) will be paid to the LWDA ("LWDA Payment") with the remaining twenty-five percent (25%) of the PAGA Payment ($2,500.00) will be distributed to the Aggrieved Employees ("Aggrieved Employee Payments"), which is within the range of PAGA payments 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 the plaintiff actually prevailed at trial, and even then, the PAGA penalties were reduced by 90%.

For the aforementioned reasons, the PAGA allocation 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, (*See Officers for Justice v. Civil Service Com.,* 688 F.2d 615, 625 (9th Cir.1982)), 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 judgement 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."); *a.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 regards to damages. But even if Plaintiffs are successful at trial, Plaintiffs are acutely aware that a judgment does not end the litigation. Plaintiffs fully expect that Defendant 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 $555,000.00 that is roughly between approximately 19% - 51% of Defendant's *class-wide* liability exposure for damages. 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 Members are 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 Notice Packet which fairly and neutrally informs the Class Members of their rights and remedies. The Settlement Administrator will first verify addresses, then

[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.

mail the proposed Notice Packet to all Class Members. The 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 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 Claims. Agreement at § III(L). The Parties negotiated this method 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 Notice Packet and content of the Notice Packet 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.").) JCL Dec., ¶ 37.

C. The Court Should Preliminarily Approve the Service Award

Service awards "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).) Service awards "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." (*Rodriguez,* 563 F.3d at 958-59.) "[T]he rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class." (*Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785.)

The Settlement provides for a Service Award of $10,000 to each Plaintiff. The Service Award is fair and reasonable compensation for Plaintiffs' efforts bringing the action, assisting Class Counsel with the litigation and settlement, regularly conferring with Class Counsel on the status of their case and the strategies for prosecuting the claims, reviewing the proposed Settlement to ensure that its terms are fair and provide adequate relief for the Settlement Class Members, and agreeing to provide

Defendant a general release of all claims arising out of their employment. JCL Dec., ¶ 38.

Class Counsel on behalf of Plaintiffs will file a formal motion for the negotiated Service Award once preliminary approval of the Settlement is granted. Plaintiffs respectfully submit that the above showing is sufficient for preliminary approval of the negotiated Service Award. JCL Dec., ¶ 39.

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

The purpose of a payment of a Class Counsel Award 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 Plaintiffs' claims. As discussed *supra*, the estimated average Individual 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., ¶ 40.

Plaintiffs will file a formal motion for the negotiated Class Counsel Award once preliminary approval of the Settlement is granted. Plaintiffs respectfully submit that the above showing is sufficient for preliminary approval of the negotiated attorneys' fees and expenses. JCL Dec., ¶ 41.

E. Plaintiff Alvarado's Settlement of His Individual Claims

Separate from the Class and PAGA Action Settlement, Plaintiff Alvarado entered into an individual settlement with Defendant in which he granted Defendant a broad release of all claims, including claims he had that were unrelated to the wage and hour claims that were the subject of the class and PAGA Action. Plaintiff will file this settlement agreement under seal for the Court to review in camera, at the Court's request. JCL Dec., ¶ 42.

F. Provisional Certification for Settlement Purposes Is Appropriate

For Settlement purposes only, Plaintiffs contend, and Defendant does not dispute, that provisional certification of the Class is appropriate. JCL Dec., ¶ 43.

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 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 Defendant's current and former employees, the class is readily ascertainable from Defendant's regular business records, i.e., payroll records. JCL Dec., ¶ 44.

The statutes relating to each of Plaintiffs' claims apply with equal force and effect to the entire Class. Factually, Defendant's policies and practices apply class-wide and Defendant's liability can be determined by facts common to all members of the class. The wage and hour issues are both numerous and substantial, and a class action is the most advantageous method of dealing with the claims of the Settlement Class Members. JCL Dec., ¶ 45.

Plaintiffs' wage and hour claims are typical of the proposed Class because they arise from the same factual basis and are based on the same legal theories applicable to the other Class Members. Likewise, Plaintiffs' interests are entirely coextensive with the interests of the Class. Plaintiffs allege they were injured by the same company-wide practices to which the proposed Class Members were subject to and seek the same relief. Plaintiffs have already demonstrated their ability to advocate for the interests of the Class Members by initiating this litigation, undertaking extensive class discovery, and evaluating the proposed settlement to assure that it is fair. JCL Dec., ¶ 46.

Additionally, Plaintiffs are represented by competent Class Counsel who have extensive experience in litigating wage and hour class action cases. Class Counsel 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. ¶¶ 47-54, Declaration of Shani O. 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., ¶ 56.

/ / /

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: May 14, 2025

ZAKAY LAW GROUP, APLC

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