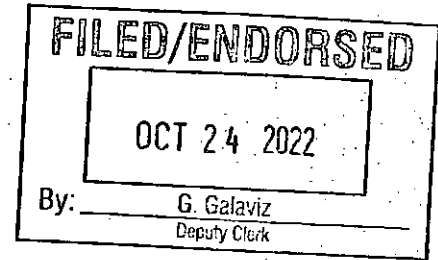


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SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO

11 **BLAKE MCMAHON**, individually, and on
12 behalf of all others similarly situated,

13 **Plaintiff,**

14 vs.

15 **AIRCO MECHANICAL, INC.**, a California
16 Corporation; and **DOES 1 to 100**, inclusive,

17 **Defendants.**

Case No. 34-2019-00259269

CLASS ACTION

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

Reservation No. 2675831

Date: November 18, 2022

BY FAX

Time: 9:00 a.m.

Dept.: 25

Judge: Hon. Jill H. Talley

Filed: June 25, 2019

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Trial Date: None Set

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. Introduction and Opening Summary of Argument1

II. Procedural and Litigation History.....2

III. Investigation and Discovery Conducted2

IV. Negotiation and Proposed Settlement.....3

 a. Plaintiff and Defendant Engaged in Extensive Arm’s Length Negotiations3

 b. The Terms of the Settlement.....3

 c. Allocation of Settlement Funds5

V. Argument6

 a. Class Action Settlements are Subject To Court Review and Approval Under the California Rules of Court.....6

 b. The Terms of The Settlement Are Fair and Within the Range of Reasonableness6

 i. The Settlement is a Result of Extensive, Non-Collusive Arm’s Length Negotiations Between the Parties7

 ii. The Extent of Investigation and Discovery Completed Provided Ample Information to Enter Into an Informed and Reasonable Settlement7

 iii. Plaintiff’s Counsel are Experienced in Similar Litigation8

 iv. The Settlement is Fair and Reasonable Based on the Strength of Plaintiff’s Case and the Risks and Costs of Further Litigation8

 v. The Proposed Settlement is a Reasonable Compromise of Claims9

 vi. The Enhancement Payment to the Named Plaintiff for Plaintiff’s Services to the Putative Class Is Reasonable and Routinely Awarded by Courts.....10

 vii. Awarding Attorneys’ Fees as a Percentage of the Common Fund Is Reasonable and Customarily Approved by Courts.....11

 c. Provisional Certification of the Class is Appropriate13

 i. The Proposed Settlement Class is Ascertainable and Sufficiently Numerous.....13

 ii. The Commonality, Predominance, and Typicality Requirements are Met...14

 iii. The Adequacy Requirement is Met15

VI. Conclusion15

TABLE OF AUTHORITIES

CALIFORNIA CASES

Bell v. Farmers Ins. Exchange, 115 Cal.App.4th 715(2004) 12

City of San Jose v. Superior Court, 12 Cal.3d 447 (1974) 14

Classen v. Weller, 145 Cal. App. 3d 27 (1983) 14

Dunk v. Ford Motor Co., 48 Cal.App.4th 1794 (1996) 7, 11, 13

Green v. Obledo, 29 Cal.3d 126 (1981)..... 6

Hebbard v. Calgrove, 28 Cal.App.3d 1017 (1972)..... 14

Kullar v. Foot Locker Retail, Inc., 168 Cal.App.4th 116 (2008) 6, 9

Laffitte v. Robert Half Internat., Inc., 1 Cal.5th 480 (2016) 11

Lee v. Dynamex, Inc., 166 Cal. App. 4th 1325 (2008)..... 13

McGhee v. Bank of America, 60 Cal.App.3d 442 (1976) 15

Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles, 186 Cal. App. 4th 399 (2010) 9

Neary v. Regents of Univ. of Cal., 3 Cal. 4th 273 (1992) 6

Noel v. Thrifty Payless, Inc., 7 Cal.5th 955 (2019)..... 13

North County Contr.'s Assn., Inc. v. Touchstone Ins. Svcs.,
 27 Cal. App. 4th 1085 (1994) 6

Rebney v. Wells Fargo Bank, 220 Cal.App.3d 1117 (1990) 8

Richmond v. Dart Ind., Inc., 29 Cal.3d 462 (1981) 14

Rose v. City of Hayward, 126 Cal.App.3d 926 (1981) 13

Sanders v. City of Los Angeles, 3 Cal.3d 252 (1970) 12

Serrano v. Priest, 20 Cal.3d 25 (1977) 11

Wershba v. Apple Computer, Inc., 91 Cal. App. 4th 224 (2001) 6, 8, 12

CALIFORNIA STATUTES AND OTHER AUTHORITIES

Cal. Labor Code section 2699(1)(2) 6

Cal. Labor Code section 2699.3(a), (c)..... 2

Cal. Rules of Court, Rule 3.769 6

//

FEDERAL CASES

1 **FEDERAL CASES**

2 *Amchem Products v. Windsor*, 521 U.S. 591 (1997) 14

3 *Avila v. Cold Spring Granite Co.*, 2017 U.S. Dist. LEXIS 130878 (E.D. Cal. 2017) 9

4 *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245 (N.D. Cal 2015) 9

5 *Benitez et al. v. Wilbur*, USDC Eastern District, Case No. 1:08-cv-01122 12

6 *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980) 11

7 *Boyd v. Bechtel Corp.*, 485 F.Supp. 610 (N.D. Cal. 1979) 8

8 *Bravo v. Gale Triangle, Inc.*, 2017 U.S. Dist. LEXIS 77714 (C.D. Cal. 2017) 9

9 *Chavez et al. v. Petrissans et al.*, USDC Eastern District, Case No. 1:08-cv-00122 12

10 *Dirienzo v. Dunbar Armored, Inc.*, USDC Southern District, Case No. 3:09-cv-02745 12

11 *Gardner v. GC Servs., LP*, 2012 U.S. Dist. LEXIS 47043, 18 (S.D. Cal. 2012)..... 13

12 *Gay v. Waiters' & Dairy Lunchmen's Union*, 489 F.Supp. 282 (N.D. Cal. 1980),

13 *aff'd* 694 F.2d 531 (9th Cir. 1982)..... 14

14 *Green, et al. v. Penske Logistics, L.L.C., et al.*, USDC Southern District,

15 Case No. 3:09-cv-00069 12

16 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998) 6, 14, 15

17 *Ingram v. The Coca Cola Co.*, 200 F.R.D. 685 (N.D. Ga. 2001) 10

18 *In re Activision Sec. Litigation*, 723 F.Supp. 1373 (N.D. Cal. 1989) 12

19 *In re Heritage Bond Litig.*, 2005 WL 1594403 (C.D. Cal. June 10, 2005) 7, 12

20 *In re Ikon Office Solutions, Inc. Secur. Litig.*, 194 F.R.D. 166 (E.D. Pa. 2000) 12

21 *In re Omnivision Technologies, Inc.*, 559 F.Supp.2d 1036 (2007) 8, 10

22 *Jamison v. Butcher & Sherrerd*, 68 F.R.D. 479, 481 (E.D. Pa. 1975)..... 6

23 *Martin v. Ameripride Servs.*, 2011 U.S. Dist. LEXIS 61796 (S.D. Cal. 2011) 12

24 *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970) 11

25 *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615 (9th Cir. 1982) 8

26 *Paul, Johnson, Alston & Hunt v. Grauly*, 886 F.2d 268 (9th Cir. 1989) 11

27 *Reed v. 1-800 Contacts, Inc.*, 2014 U.S. Dist. LEXIS 255 (S.D. Cal. 2014) 10

28 *Romero v. Producers Dairy Foods, Inc.*, 2007 U.S. Dist. LEXIS 86270 (2007) 12

1	<i>Schiller v. David's Bridal, Inc.</i> , 2012 U.S. Dist. LEXIS 80776 (E.D. Cal. 2012).....	13
2	<i>Singer v. Becton Dickenson and Co.</i> , 2010 U.S. Dist. LEXIS 53416, 2010 WL 2196104	
3	(S.D. Ca. June 1, 2010)	12
4	<i>Staton v. Boeing Co.</i> , 327 F.3d 938 (9th Cir. 2003)	12
5	<i>Van Vranken v. Atlantic Richfield Co.</i> , 901 F. Supp. 294 (N.D. Cal. 1995)	10
6	<i>Vasquez v. Coast Valley Roofing, Inc.</i> , 266 F.R.D. 482 (E.D. Ca. 2010)	12
7	<i>Vincent v. Hughes Air West, Inc.</i> , 557 F.2d 759 (9th Cir. 1977)	11
8	<i>Waters v. Intern. Precious Metals Corp.</i> , 190 F.3d 1291 (11th Cir. 1999)	11
9	<i>Watson v. Raytheon Company</i> , USDC Southern District, Case No. 3:10-cv-00634	12
10	<i>Williams v. MGM-Pathe Communications Co.</i> , 129 F.3d 1026 (9th Cir. 1977)	11
11	<i>Willis et al. v. Cal-Western Transport</i> , USDC Eastern District, Case No. 1:00-cv-05695	12
12	FEDERAL STATUTES AND OTHER AUTHORITIES	
13	Newberg on Class Actions, (3rd Ed.), 1992, §14.03	12
14	Fed. R. Civ. Proc., Rule 23(e).....	6

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1 **I. INTRODUCTION AND OPENING SUMMARY OF ARGUMENT**

2 This Motion is brought seeking preliminary approval of a wage and hour class action settlement
3 in the gross amount of \$445,000. *See generally* Exhibit A (Joint Stipulation Regarding Class Action and
4 PAGA Settlement and Release). Plaintiff Blake McMahon (“Plaintiff”) brought this class action
5 individually and on behalf of other similarly situated employees employed by Airco Mechanical, Inc.
6 (“Defendant”). Plaintiff worked for Defendant during the Class Period as a non-exempt employee and
7 was subject to all the same policies and practices that are alleged to be unlawful in this litigation. *See*
8 *generally* Exhibit B (Plaintiff’s Operative Complaint); Declaration of Blake McMahon (“Decl.
9 McMahon”) ¶ 2.

10 Plaintiff has alleged that Defendant failed to pay minimum wages, failed to pay overtime wages,
11 failed to provide meal periods, failed to provide rest periods, failed to provide accurate wage
12 statements, failed to timely pay final wages, and engaged in unfair competition. *See generally* Exhibit
13 B. Plaintiff has also alleged Defendant is liable for a civil penalties under the Private Attorneys
14 General Act (“PAGA”) based on these violations. *See id.*; Exhibit C (Plaintiff’s Ltr. to the Labor and
15 Workforce Development Agency [“LWDA”] Regarding PAGA Claims). These violations primarily
16 stem from Plaintiff’s allegations that Defendant violated California law by 1) failing to pay all hours
17 worked, including overtime wages and minimum wages due to alleged work off-the-clock and rounding
18 of hours worked; 2) failing to provide wage statements accurately itemizing all of the information
19 required by Labor Code section 226(a); 3) failing to timely pay all final wages owed; 4) failing to
20 provide all meal periods; 5) failing to provide all rest periods; and 6) failing to maintain record of all
21 start and end times for shifts worked and meal periods. *See* Exhibit B. Plaintiff has contended that this
22 is a meritorious class action lawsuit and that this case is appropriate for class certification for settlement
23 purposes as the requisites for class certification in this case can be satisfied. *See* Exhibit B.

24 Defendant has denied all of Plaintiff’s allegations in their entirety and any liability or
25 wrongdoing of any kind. *See* Declaration of Justin P. Rodriguez (“Decl. Rodriguez”), ¶ 5. Defendant
26 has denied that this case is appropriate for class certification other than for purposes of settlement and
27 that Plaintiff would have difficulty proving class certification is proper here. *See id.* However, subject
28 to approval by the Court, the parties have been able to compromise and settle all asserted claims for

1 monetary compensation as a result of extensive investigations, informal document and data exchanges,
2 and extended negotiations relating to all aspects of the asserted claims. *See* Exhibit A. Plaintiff's
3 counsel is convinced that the proposed settlement is in the best interest of the putative class based on
4 the discovery, investigations, negotiations, and a detailed knowledge of the issues in this case. *See*
5 Decl. Rodriguez, ¶¶ 3, 6-10. The prospect of potential class certification issues and the uncertainty of
6 class certification, difficulties of complex litigation, the lengthy process of establishing specific
7 damages and various possible delays and appeals were carefully considered by Plaintiff and Plaintiff's
8 counsel in agreeing to the proposed settlement. *See id.*

9 It is well within the discretion of this Court to grant preliminary and conditional approval of the
10 Agreement, which satisfies all of the criteria for preliminary settlement approval under California law.
11 Accordingly, Plaintiff request that the Court: (1) provisionally and conditionally certify the proposed
12 settlement class; (2) grant preliminary and conditional approval of the proposed Agreement (Exhibit
13 A); (3) set dates for and direct distribution to the class of the Notice of Settlement (Exhibit F), which
14 provides Class Members information regarding the settlement, including information regarding the
15 opportunity to opt-out of, or object to, the settlement and notifies each class member of their expected
16 pro rata share of the settlement; and (4) adopt the implementation schedule contained in the proposed
17 order and schedule a final approval hearing.

18 II. PROCEDURAL AND LITIGATION HISTORY

19 Plaintiff filed a class action complaint on approximately June 25, 2019, in Sacramento County
20 Superior Court against Defendant. Plaintiff exhausted administrative remedies under the PAGA by
21 providing notice of the claims and violations to the LWDA. *See* Exhibit C; Cal. Lab. Code § 2699.3(a),
22 (c); Decl. Rodriguez, ¶ 3. Then, Plaintiff filed a First Amended Class Action Complaint on to include a
23 PAGA claim and filed a Second Amended Complaint and Third Amended Complaint to clarify the
24 scope of the class. *See id.*; Exhibit B. There is no date set for a motion for certification or trial in this
25 matter. *See* Decl. Rodriguez, ¶ 4.

26 III. INVESTIGATION AND DISCOVERY CONDUCTED

27 Plaintiff thoroughly investigated issues affecting certification, the merits of the class claims, and
28 potential damages for such claims. *See id.* Plaintiff experienced Defendant's policies and practices at

1 issue in the Complaint and provided information regarding these policies and practices, enabling pre-
2 filing investigations to take place. *See* Decl. McMahon, ¶ 2. The parties engaged in formal and
3 informal discovery and exchange of documents, including a representative sampling of employee data,
4 such as time records, payroll data and relevant policies for the entirety of the statute of limitations
5 applicable to the alleged claims. The discovery covered all aspects of the asserted claims, including
6 certification issues, merits issues, damages, the scope and configuration of Class Members, the content
7 and implementation of the wage and hour policies at issue, issues relating to manageability concerns at
8 trial, among other relevant areas. *See* Decl. Rodriguez, ¶ 7. The information allowed Plaintiff to
9 determine the extent and frequency of any violations in accordance with Plaintiff's contentions and
10 create an accurate damages model to assess the reasonableness of any settlement. *See id.*

11 **IV. NEGOTIATION AND PROPOSED SETTLEMENT**

12 **a. Plaintiff and Defendant Engaged in Extensive Arm's Length Negotiations**

13 The final settlement occurred only after extended, and sometimes contentious, arm's length
14 negotiations. Over the course of over three years, Plaintiff has been investigating the claims and
15 discussing with Defendant's counsel the merits of the claims and certification issues present in this
16 case. *See id.* at ¶¶ 6-10. The parties exchanged substantial amounts of information and legal analysis
17 regarding the asserted claims. *See id.* Then, only after over three years of litigation and negotiation,
18 which included a full day mediation with Lisa Klerman, Esq., the parties able to reach a mutually
19 agreeable settlement. *See id.* at ¶ 8. In light of the claims and defenses at issue, the parties agreed to a
20 Gross Settlement Amount of \$445,000. *See* Exhibit A.

21 **b. The Terms of the Settlement**

22 Under the Agreement, Defendant has agreed to the following:

23 1. The following groups of individuals are covered by the Settlement (*See* Exhibit A, ¶¶
24 1.2, 1.8):

25 All individuals who have, or continue to, perform work for Defendant in
26 California as a non-exempt, hourly employee from June 25, 2015, up to
27 either (i) the Preliminary Approval Date; or (ii) December 13, 2022,
whichever is earlier.

28 All individuals who have, or continue to, perform work for Defendant in
California as a non-exempt, hourly employee from July 1, 2018, up to

1 either (i) the Preliminary Approval Date; or (ii) December 13, 2022,
2 whichever is earlier.

3 2. Pay Gross Settlement Amount of \$445,000.00, exclusive of the employer's share of
4 payroll taxes, to resolve and release the claims alleged in the Complaint. *See id.* at ¶¶ 5.1, 5.2. No
5 portion of the Gross Settlement Amount will revert to Defendant. *See id.* at ¶ 5.6. Aggrieved
6 Employees will still be paid their share of the PAGA Payment regardless of whether they opt out of
7 being Class Members. *See id.* at 7.5.1.

8 3. The parties agree that up to \$15,000 for Plaintiff Blake McMahon will be paid as a Class
9 Representative Enhancement Payment. This amount will be in addition to any amount Plaintiff may be
10 entitled to under the Agreement. *See id.* at ¶ 5.4.

11 4. The parties agree that the cost of administering this class action settlement shall be paid
12 from the settlement proceeds. Subject to Court approval, the parties have selected ILYM Group, LLC
13 to act as the Claims Administrator, who has provided a maximum cost estimate of \$11,500 to
14 administer the class settlement. *See Exhibit D (ILYM Group, LLC Quote).* The difference between
15 any actual administration costs and the \$15,000 allocated under the Agreement, if any, will be added to
16 the Net Settlement Amount and paid to Class Members on a pro rata basis. *See Decl. Rodriguez, ¶ 20.*

17 5. The parties agree that \$10,000 of the Gross Settlement Amount shall be allocated to
18 resolving claims under the PAGA. Seventy-Five percent (75%) of the PAGA Payment will be paid to
19 the LWDA and Twenty-Five percent (25%) will be paid to Aggrieved Employees. *See Exhibit A, ¶*
20 *5.5.*

21 6. The parties agree that up to thirty-five percent (35%) of the Gross Settlement Amount
22 will be paid for Plaintiff's attorneys' fees incurred in the litigation of this case. Defendant will not
23 oppose any application for attorneys' fees so long as it is within this threshold. *See id.* at ¶ 5.2.
24 Additionally, the parties agree that Plaintiff will also be entitled to the actual litigation costs as
25 approved by the Court in an amount not to exceed \$17,500.00. *See id.* The difference between any
26 actual costs and the \$17,500.00 will be redistributed to Class Members on a pro rata basis. *See Exhibit*
27 *A, ¶ 5.2.* The proposed notice to be sent to Class Members will state this information. *See Exhibit F.*

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1 7. Any Claims Administrator Costs, any amounts paid for attorneys' fees and costs, the
2 Class Representative Enhancement Payments, and PAGA Payment will be paid out from the Gross
3 Settlement Amount, not in addition to the Gross Settlement Amount. See Exhibit A, ¶¶ 5.1-5.5.

4 8. In consideration for the value received in the Agreement, Class Members who fail to
5 timely opt-out of this settlement will waive all Qualified Claimant's Released Claims as set forth in the
6 Agreement. See Exhibit A, ¶¶ 1.30-1.31. Aggrieved Employees will waive all Released PAGA Claims
7 as set forth in the Agreement regardless of whether they opt out of being a Class Member. See *id.* at
8 1.33, 7.5.1.

9 9. For any portion of the Net Settlement Amount or PAGA Payment allocated to Qualified
10 Claimants and/or Aggrieved Employees that is not claimed by them by cashing their respective
11 settlement checks within 120 days, the remaining amount shall be paid 50/50 to Capital Pro Bono, Inc.,
12 and the Center for Workers' Rights under the doctrine of *cy pres*. See Exhibit A, ¶ 5.6.

13 **c. Allocation of Settlement Funds**

14 Payment to Qualified Claimants and Aggrieved Employees of their Claim Amount will not
15 require the submission of a claim form. A Net Settlement Amount will be determined by subtracting
16 from the Gross Settlement Amount any amounts for approved attorneys' fees and costs, any
17 Enhancement Payment to the Class Representatives, the Claims Administrator Costs, and the PAGA
18 Payment. Each Class Member's share will be determined by dividing their total weeks worked within
19 the Class Period by the total weeks worked by all Class Members within the Class Period. That
20 fraction will then be multiplied by the Net Settlement Amount to arrive at the Class Member's
21 individual share of the Net Settlement Amount. Each Aggrieved Employee's share of the 25% portion
22 of the PAGA Payment will be determined by dividing their total weeks worked within the PAGA
23 Claim Period by the total weeks worked by all Aggrieved Employees within the PAGA Claim Period.
24 That fraction will then be multiplied by the 25% portion of the PAGA Payment to arrive at the
25 Aggrieved Employee's individual share. See Exhibit A, at ¶ 5.8.

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28 //

1 **V. ARGUMENT**

2 **a. Class Action Settlements are Subject to Court Review and Approval Under the**
3 **California Rules of Court**

4 A class action may not be dismissed, compromised, or settled without Court approval and the
5 decision to approve or reject a settlement is committed to the Court's sound discretion. *See* Cal. Rules
6 of Court, Rule 3.769; Fed. R. Civ. Proc., Rule 23(e)¹; *Wershba v. Apple Computer, Inc.*, 91 Cal. App.
7 4th 224, 234-35 (2001); *see also* Cal. Lab. Code §§ 2699(1)(2) (requiring Court review of PAGA
8 settlements). However, courts should give "proper deference to the private consensual decision of the
9 parties," since "the court's intrusion upon what is otherwise a private consensual agreement negotiated
10 between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment
11 that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating
12 parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned."
13 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). Where a settlement is reached on terms
14 agreeable to all parties, a court should disapprove of the settlement "only with considerable
15 circumspection." *Jamison v. Butcher & Sherrerd*, 68 F.R.D. 479, 481 (E.D. Pa. 1975). The law favors
16 settlement of lawsuits, particularly class actions and other complex cases where substantial resources
17 can be conserved by avoiding the time, expense, and rigors of formal litigation. *See Neary v. Regents of*
18 *Univ. of Cal.*, 3 Cal. 4th 273, 277-81 (1992).

19 **b. The Terms of The Settlement Are Fair and Within the Range of Reasonableness**

20 The purpose of the Court's preliminary evaluation of a proposed class action settlement is to
21 determine only whether the proposed settlement is within the range of possible approval and whether
22 notice to the class of its terms and conditions and the scheduling of a formal fairness hearing is
23 warranted. *See Wershba*, 91 Cal. App. 4th at 234-35. If the Court finds a proposed settlement falls
24 within "the range of reasonableness," it should grant preliminary approval of the class action settlement.
25 *See, e.g., North County Contr. 's Assn., Inc. v. Touchstone Ins. Svcs.*, 27 Cal. App. 4th 1085, 1089-90
26 (1994); *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 133 (2008). To make the fairness
27

28 ¹The California Supreme Court has authorized California's trial courts to rely on these federal resources to decide class certification issues. *See Green v. Obledo*, 29 Cal.3d 126, 145-46 (1981).

1 determination, the Court must consider several factors, including:

2 the strength of the Plaintiff's case, the risk, expense, complexity and likely
3 duration of further litigation, the risk of maintaining class action status
4 through trial, the amount offered in settlement, the extent of discovery
5 completed and the stage of the proceedings, the experience and views of
6 counsel, the presence of a governmental participant, and the reaction of the
7 class members to the proposed settlement.

8 *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996). However, this Court should
9 begin its analysis with a presumption that the proposed settlement is fair. "A presumption of fairness
10 exists where: (1) the settlement is reached through arm's length bargaining; (2) investigation and
11 discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in
12 similar litigation; and (4) the percentage of objectors is small." *Id.* at 1802; *see also In re Heritage*
13 *Bond Litig.*, 2005 WL 1594403, at *10 (C.D. Cal. June 10, 2005) ("It is established that the absence of
14 a large number of objectors to a proposed class action settlement raises a strong presumption that the
15 terms of a proposed class settlement action are favorable to the class members").

16 **i. The Settlement is a Result of Extensive, Non-Collusive Arm's Length
17 Negotiations Between the Parties**

18 Settlement in this case was reached only after litigation and extensive arm's length negotiations
19 lasting over three years, which included a full day mediation with Lisa Klerman, Esq. *See Decl.*
20 Rodriguez, ¶¶ 6-10. At all times, the negotiations were adversarial and contentious, although still
21 professional in nature. *See id.* Further, while Plaintiff contends he would ultimately prevail on the
22 claims and the issue of certification, this is not a certainty and there is substantial risk in proceeding to
23 further litigation. *See id.* at ¶¶ 6-10. The ability to secure a guaranteed settlement now and ensure Class
24 Members receive some compensation, rather than proceed to further litigation and potentially recover
25 nothing, was a motivating factor in reaching this settlement. *See id.*

26 **ii. The Extent of Investigation and Discovery Completed Provided Ample
27 Information to Enter Into an Informed and Reasonable Settlement**

28 The parties were in possession of all necessary information during the negotiations. The parties
engaged in substantial informal discovery and exchange of documents, including a representative
sampling of employee data, such as time records, payroll data and relevant policies for the entirety of

1 the statute of limitations applicable to the alleged claims, which covered all aspects of the class claims
2 and helped thoroughly vet the extent of Plaintiff's claims against Defendant and create an accurate
3 damages model. *See id.* at ¶ 6-10. Plaintiff was in possession of this information prior to calculating
4 the potential damages in this case. *See id.* As a result, Plaintiff was able to make a reasonable
5 estimation of Defendant's potential liability. *See id.* For these reasons, the settlement now before the
6 Court was reached at a stage where "the parties certainly have a clear view of the strengths and
7 weaknesses of their cases" sufficient to support the settlement. *Boyd v. Bechtel Corp.*, 485 F.Supp.
8 610, 617 (N.D. Cal. 1979).

9 **iii. Plaintiff's Counsel are Experienced in Similar Litigation**

10 Plaintiff's counsel has considerable experience in class and PAGA actions and wage and hour
11 litigation. Plaintiff's counsel has brought and are currently bringing several wage and hour class and/or
12 PAGA actions. Thus, Plaintiff's counsel are qualified to evaluate the class claims, value of settlement
13 versus moving for certification and going to trial, and the viability of possible affirmative defenses. *See*
14 Decl. Rodriguez, ¶¶ 11-18. Plaintiff's counsel believes that the settlement is fair and reasonable in light
15 of the complexities of the case, the uncertainties of class certification and litigation, and the secured
16 benefit to the class. *See id.* at ¶ 6.

17 **iv. The Settlement is Fair and Reasonable Based on the Strength of Plaintiff's Case**
18 **and the Risks and Costs of Further Litigation**

19 A review of the Agreement's terms does not give rise to any doubts about its fairness. Based on
20 the records and facts of this case, Plaintiff have secured a gross recovery of approximately 4.4% and a
21 net recovery of approximately 2.4% of the claims' maximum likely value. *See id.* at ¶¶ 9-10.
22 Additionally, the average net award per class member is approximately \$392.34. *See id.* This
23 settlement is a reasonable compromise of the class and PAGA claims, and is within the percentile
24 ranges of the total available damages that have been approved in other class settlements. *See Wershba,*
25 *91 Cal. App. 4th at 246, 250; Rebney v. Wells Fargo Bank*, 220 Cal.App.3d 1117, 1139 (1990); *Officers*
26 *for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 628 (9th Cir. 1982); *see also In re Omnivision*
27 *Technologies, Inc.*, 559 F.Supp.2d 1036, 1042 (2007) (noting that certainty of recovery in settlement of
28 6% of maximum potential recovery after reduction for attorney's fees was higher than median

1 percentage for recoveries in shareholder class action settlements, averaging 2.2%-3% from 2000
2 through 2002); *Bravo v. Gale Triangle, Inc.*, 2017 U.S. Dist. LEXIS 77714 (C.D. Cal. 2017) (approving
3 a settlement where the net recovery to class members was approximately 7.5% of the projected
4 maximum recovery amount); *Avila v. Cold Spring Granite Co.*, 2017 U.S. Dist. LEXIS 130878 (E.D.
5 Cal. 2017): (approving a settlement with a gross recovery of 11% of the projected maximum damages
6 available and a net recovery of approximately 6.7% of the projected maximum recovery);
7 *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245 (N.D. Cal 2015) (approving a settlement where
8 the gross recovery was approximately 8.5% of the projected maximum recovery).

9 **v. The Proposed Settlement is a Reasonable Compromise of Claims**

10 The case of *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116 (2008) requires additional
11 information be presented to the Court, acting as a fiduciary for the absent class members “to ensure that
12 the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims
13 being released, discounted by the risks and expenses of attempting to establish and collect on those
14 claims by pursuing the litigation” *Id.* at 129. *Munoz v. BCI Coca-Cola Bottling Co. of Los*
15 *Angeles*, 186 Cal. App. 4th 399 (2010), clarified that a *Kullar* showing does not require the parties to
16 submit an illusory prediction of the outer reaches of exposure without taking into account the actual
17 risks of certification, decertification, dispositive motions, and trial. *Kullar* also does not require an
18 explicit statement of the maximum amount the plaintiff class could recover if it prevailed on all its
19 claims provided there is a record that allows “an understanding of the amount that is in controversy and
20 the realistic range of outcomes of the litigation.” *Id.* at 409. The *Munoz* Court found that the record
21 before the trial court was sufficient, having included the number of class members, payroll data,
22 declarations describing hours and overtime worked, as well as variances in duties and rest and meal
23 period experience, and a companion action alleging less than \$5,000,000 in damages. This information
24 constituted “an adequate basis from which to garner a reasonably adequate understanding of the amount
25 that is in controversy within the meaning of *Kullar*.” *Id.*

26 Plaintiff similarly relied upon payroll data and Class Members’ data to determine the realistic
27 potential damages suffered by the class as a whole. *See Decl. Rodriguez*, ¶¶ 6-10. This analysis
28 allowed Plaintiff to determine the extent and frequency of potential violations on all claims as to all

1 Class Members. *See id.* Ultimately, Plaintiff secured a percentage of the total demand for the putative
2 class that is within the range of what has been found to be sufficient in several other cases. *See, supra,*
3 Section V.c.iv; *see also, e.g., In re Omnivision Technologies, Inc.*, 559 F.Supp.2d at 1042; *Reed v. 1-*
4 *800 Contacts, Inc.*, 2014 U.S. Dist. LEXIS 255 (S.D. Cal. 2014) (approving a settlement of \$11.7
5 million where the maximum range of damages was \$5,000 for each of the alleged 300,000 instances of
6 unlawful recording violations (\$1.5 billion), equaling approximately .78% of the total demand and
7 approximately \$800 per class member). This settlement represents a reasonable compromise given the
8 percentage of the total demand that was secured, the average recovery per class member, the Court's
9 ability and discretion to cut PAGA penalties, and the uncertainty of class certification. *See Decl.*
10 Rodriguez, ¶¶ 9-10.

11 **vi. The Enhancement Payment to the Named Plaintiff for Plaintiff's Services to the**
12 **Putative Class Is Reasonable and Routinely Awarded by Courts**

13 The Enhancement Payment to the named Plaintiff is intended to recognize the time and effort
14 expended on behalf of the class. Indeed, Courts routinely approve enhancement payments to
15 compensate named Plaintiff for the services they provide and the risks they incurred during the course
16 of the class action litigation. *See Ingram v. The Coca Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001).
17 In *Ingram*, the Court approved enhancement payments of \$300,000.00 to each named plaintiff in
18 recognition of the services they provided to the class by responding to discovery, participating in the
19 mediation process, and taking the risk of stepping forward on behalf of the class. *See Id.* at 694; *see*
20 *also Van Vranken v. Atlantic Richfield Co.*, 901 F.Supp. 294 (N.D. Cal. 1995) (approving a \$50,000.00
21 enhancement payment).

22 In this case, Plaintiff provided and explained documents, being available at all times to discuss
23 the case with Plaintiff's counsel. *See Decl. Rodriguez*, ¶ 7; *Decl. McMahon*, ¶ 5. Plaintiff spent a
24 significant amount of time pursuing this litigation for the benefit of all Class Members. *See id.*
25 Plaintiff brought this action knowing there would be a delay in any payment as the litigation
26 progressed, rather than proceeding on individual claims in front of the California Labor Commissioner.
27 *See id.* Payment of \$15,000 to Plaintiff is appropriate given the risk, assistance, time required in
28 bringing this case and resolution of this case.

1 **vii. Awarding Attorneys' Fees as a Percentage of the Common Fund Is Reasonable**
2 **and Customarily Approved by Courts**

3 California state and federal courts have recognized that when a litigant's efforts create or
4 preserve a fund from which others derive benefits, the Court may spread litigation costs proportionally
5 among all the beneficiaries to compensate those who created the fund. *See Boeing Co. v. Van Gemert*,
6 444 U.S. 472, 477-478 (1980) ("A lawyer who recovers a common fund for the benefit of persons other
7 than . . . her client is entitled to a reasonable attorney's fee from the fund as a whole."); *Vincent v.*
8 *Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375
9 (1970); *Waters v. Intern. Precious Metals Corp.*, 190 F.3d 1291 (11th Cir. 1999); *see also Serrano v.*
10 *Priest*, 20 Cal.3d 25, 34-35 (1977); *Laffitte v. Robert Half Internat., Inc.*, 1 Cal.5th 480, 506 (2016).
11 The purpose of this equitable doctrine is to avoid unjust enrichment of counsel and to "spread litigation
12 costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
13 burden alone." *Vincent*, 557 F.2d at 769; *Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026,
14 1027 (9th Cir. 1977). California state courts have approved use of a percentage of the fund to calculate
15 reasonable attorney fee awards where the amount of the settlement is certain or is an easily calculable
16 sum of money. *See Dunk*, 48 Cal. App. 4th at 1808.

17 The Ninth Circuit has also held that the common fund doctrine applies when: (1) the class of
18 beneficiaries is sufficiently identifiable; (2) the benefits can be accurately traced; and (3) the fee can be
19 shifted with some exactitude to those benefitting. *See Paul, Johnson, Alston & Hunt v. Grawly*, 886
20 F.2d 268, 271 (9th Cir. 1989). These criteria are "easily met" when "each member of a certified class
21 has an undisputed and mathematically ascertainable claim to part of a lump-sum settlement recovered
22 on her behalf." *Id.* at 271 (citations omitted). Under the three (3) factors set forth in *Paul, Johnson,*
23 *Alston & Hunt*, the common fund doctrine applies in this case because there is a sufficiently identifiable
24 class of beneficiaries (*e.g.* the settlement class), the benefits can be accurately traced to the settlement
25 Plaintiff and Plaintiff's counsel were able to negotiate on behalf of the class, and the fee can be shifted
26 with exactitude to those benefitting as the fee request is a specific, lump-sum percentage of the common
27 fund. As set forth in the fee award examples provided below for the Court's reference, it is an accepted
28 practice in wage and hour class action settlements to award attorneys' fees based on a percentage of the

1 common fund. See, e.g., *Staton v. Boeing Co.*, 327 F.3d 938, 967-972 (9th Cir. 2003); *Sanders v. City*
2 *of Los Angeles*, 3 Cal.3d 252, 261, 263 (1970); *Wershba*, 91 Cal. App. 4th at 254; *Bell v. Farmers Ins.*
3 *Exchange*, 115 Cal. App. 4th 715, 726, 765 (2004).

4 Historically, attorneys' fee awards in common fund cases in general range from 20% to 50% of
5 the fund, depending on the circumstances of the case. See *Newberg on Class Actions*, (3rd Ed.), 1992,
6 §14.03 (finding 50% to be the upper limit). Awards ranging between 30% and 40% of the fund are
7 generally approved as reasonable in wage and hour settlements below \$10 million:

8 More particularly, courts may award attorneys fees in the 30-40% range in wage and hour
9 class actions that result in recovery of a common fund under \$10 million. See *Vasquez v.*
10 *Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491-492 (E.D. Ca. 2010) (citing to five
11 recent wage and hour class actions where federal district courts approved attorney fee
12 awards ranging from 30 to 33%); *Singer v. Becton Dickenson and Co.*, 2010 U.S. Dist.
13 LEXIS 53416, 2010 WL 2196104, *8 (S.D. Ca. June 1, 2010) (approving attorney fee
award of 33.33% of the common fund and holding that award was similar to awards in
three other wage and hour class action cases where fees ranged from 33% to 40%);
Romero v. Producers Dairy Foods, Inc., 2007 U.S. Dist. LEXIS 86270, 2007 WL
3492841 (E.D. Ca. Nov. 14, 2007).

14 See *Martin v. Ameripride Servs.*, 2011 U.S. Dist. LEXIS 61796 at *22-23 (S.D. Cal. 2011). Plaintiff's
15 request of thirty-five percent (35%) of the settlement sum for attorneys' fees is within established rates
16 for fee awards in class settlements pursuant to the common fund doctrine, especially in light of the
17 excellent results achieved in this case. See *In re Activision Sec. Litigation*, 723 F.Supp. 1373, 1379
18 (N.D. Cal. 1989); *Watson v. Raytheon Company*, USDC Southern District, Case No. 3:10-cv-00634;
19 *Dirienzo v. Dunbar Armored, Inc.*, USDC Southern District, Case No. 3:09-cv-02745; *Green, et al. v.*
20 *Penske Logistics, L.L.C., et al.*, USDC Southern District, Case No. 3:09-cv-00069; *Benitez et al. v.*
21 *Wilbur*, USDC Eastern District, Case No. 1:08-cv-01122; *Chavez et al. v. Petrissans et al.*, USDC
22 Eastern District, Case No. 1:08-cv-00122; *Willis et al. v. Cal-Western Transport*, USDC Eastern
23 District, Case No. 1:00-cv-05695. To determine whether a percentage is reasonable, a court should
24 consider: (1) the percentage that would likely be negotiated between parties in a similar case; (2) the
25 percentage applied in other class actions; (3) the quality of class counsel; (4) the size of the award; and
26 (5) whether there are any objections by class members. See *In re Ikon Office Solutions, Inc. Secur.*
27 *Litig.*, 194 F.R.D. 166, 193 (E.D. Pa. 2000); *In re Heritage Bond Litig.*, 2005 WL 1594403, at *21
28 (C.D. Cal. June 10, 2005) ("the absence of objections or disapproval by class members to class

1 counsel's fee request further supports finding the fee request reasonable").

2 These factors support Plaintiff's request for reasonable attorneys' fees. The typical percentage
3 negotiated between parties ranges from thirty-five to forty percent (35% to 40%) in individual litigation
4 depending on the complexity of the case. In class action litigation, the typical percentage negotiated
5 between parties ranges from thirty to forty percent (30% to 40%) based on the same factors. Plaintiff's
6 request of 35% falls within these typical fee arrangements. *See* Decl. Rodriguez, ¶ 19. The quality of
7 counsel and the average size of settlement payments to Class Members and Aggrieved Employees also
8 support the fee request when compared to other settlements courts have considered as good results. *See*
9 *Schiller v. David's Bridal, Inc.*, 2012 U.S. Dist. LEXIS 80776 at *48 (E.D. Cal. 2012) ("Class
10 Members will receive an average of approximately \$198.70, with the highest payment to a Class
11 Member being \$695.78 . . . Overall, the Court finds that the results achieved are good, which is
12 highlighted by the fact that there was no objection to the settlement amount or the attorneys' fees
13 requested."); *Gardner v. GC Servs., LP*, 2012 U.S. Dist. LEXIS 47043, 18 (S.D. Cal. 2012) ("the
14 results achieved in this case were very favorable. Class members are provided with immediate
15 monetary relief, with an average award of around several hundred dollars and a minimum award of
16 \$50").

17 **c. Provisional Certification of the Class is Appropriate**

18 Class certification is appropriate when (1) the class is ascertainable and (2) there is "a well-
19 defined community of interest in the questions of law and fact involved affecting the parties to be
20 represented." *Dunk*, 48 Cal. App. 4th at 1806. The "community of interest" element "embodies three
21 factors: (1) common questions of law or fact predominate; (2) class representatives with claims or
22 defenses typical of the class; and (3) class representatives who can adequately represent the class." *Id.*
23 Here, the parties agree that, for the purposes of settlement, these prerequisites are met. *See* Exhibit A.

24 **i. The Proposed Settlement Class is Ascertainable and Sufficiently Numerous**

25 The proposed settlement class is ascertainable because all putative class members can be readily
26 identified through employee personnel and payroll files. *See Noel v. Thrifty Payless, Inc.*, 7 Cal.5th
27 955, 980 (2019); *Rose v. City of Hayward*, 126 Cal.App.3d 926, 932 (1981); *Lee v. Dynamex, Inc.*, 166
28 Cal. App. 4th 1325, 1334 (2008). The numerosity requirement is met because there are no less than

1 606 individuals who fall within the definition of Class Member, which makes joinder of all members
2 impracticable. *See Gay v. Waiters' & Dairy Lunchmen's Union*, 489 F.Supp. 282 (N.D. Cal. 1980),
3 *aff'd* 694 F.2d 531 (9th Cir. 1982); *Hebbard v. Calgrove*, 28 Cal. App. 3d 1017, 1030 (1972) (noting no
4 set minimum to meet the numerosity prerequisite, but a class as few as twenty-eight (28) members is
5 acceptable). Thus, these requirements are satisfied.

6 **ii. The Commonality, Predominance, and Typicality Requirements are Met**

7 The commonality requirement is met when there are questions of law or fact regarding the class
8 as a whole. *See Hanlon*, 150 F.3d at 1019. Commonality requires only that some common legal or
9 factual questions exist; Plaintiff need not show that all issues in the litigation are identical. *See*
10 *Richmond v. Dart Ind., Inc.*, 29 Cal.3d 462, 473 (1981); *City of San Jose v. Superior Court*, 12 Cal.3d
11 447, 460 (1974). Common questions of law or fact must also predominate over individual questions
12 and class-wide treatment of a dispute must be superior to individual litigation.² *See Richmond*, 29
13 Cal.3d at 469. Predominance requires a putative class be sufficiently cohesive to warrant adjudication
14 by representation. *See Hanlon*, 150 F.3d at 1022. The typicality requirement is met when claims of the
15 named representative are typical of those of the class, though "they need not be substantially identical."
16 *Id.* at 1020; *Classen v. Weller*, 145 Cal. App. 3d 27, 46-47 (1983).

17 The common questions of law and fact in this case stem from Plaintiff's contention that
18 Defendant violated California law by 1) failing to pay all hours worked, including overtime wages and
19 minimum wages due to alleged work off-the-clock and rounding of hours worked; 2) failing to provide
20 wage statements accurately itemizing all of the information required by Labor Code section 226(a); 3)
21 failing to timely pay all final wages owed; 4) failing to provide all meal periods; 5) failing to provide
22 all rest periods; and 6) failing to maintain record of all start and end times for shifts worked and meal
23 periods.. *See Exhibit B*. The waiting time penalties, unfair competition, and PAGA claims are
24 derivative of these violations. *See id.* Plaintiff and the Class Members seek the same remedies under
25 state law. Under these specific circumstances, the commonality and predominance requirements are
26 satisfied. Regarding the typicality requirement, Plaintiff contends he suffered from the same unlawful

27
28 ²When assessing predominance and superiority, a court may consider that the class will be certified for settlement purposes only and that manageability of trial is therefore irrelevant. *See Amchem Products v. Windsor*, 521 U.S. 591 (1997).

1 policies, treatment, and circumstances as Class Members did, will request the same remedies, and will
2 rely on the same methods of proof to establish liability and damages. *See id.* Thus, the typicality
3 requirement is also satisfied for settlement purposes.

4 **iii. The Adequacy Requirement is Met**

5 The adequacy of representation requirement is met if the named representative and counsel have
6 no interests adverse to those of the putative class members and are committed to vigorously prosecuting
7 the case on behalf of the class. *See Hanlon*, 150 F.3d at 1020; *McGhee v. Bank of America*, 60
8 Cal.App.3d 442, 450-51 (1976). Those standards are met here. Under the proposed settlement,
9 Plaintiff and the putative Class Members will receive a pro rata share of the settlement based on the
10 number of workweeks they worked for Defendants. *See Exhibit A.* Finally, any settlement class
11 member who wishes to opt-out of the settlement may do so, and he or she may also dispute the number
12 of workweeks stated in the Notice of Settlement (Exhibit F).

13 There is no conflict of interest between Plaintiff and Class Members. Plaintiff and Plaintiff's
14 counsel have pursued the claims made in the operative Complaint vigorously on behalf of the class.
15 Plaintiff's counsel, with Plaintiff's assistance, thoroughly investigated the claims made in this case by
16 speaking with Plaintiff and reviewing substantial amounts of documents. Plaintiff's counsel thereafter
17 engaged Defendant's counsel in settlement discussions over the course of more than three years.
18 Moreover, Plaintiff's counsel has experience defending and bringing wage and hour claims. Because
19 Plaintiff's counsel has vigorously pursued Plaintiff's and the Class Members' claims, the adequacy
20 requirement is met. *See generally* Decl. Rodriguez.

21 **VI. CONCLUSION**

22 For all of the foregoing reasons, Plaintiff respectfully request that this Court preliminarily and
23 conditionally certify the class for settlement purposes; grant preliminary and conditional approval to the
24 proposed settlement, including the Plaintiff's Class Representative Enhancement Payment, the payment
25 to the LWDA under PAGA, and Class Counsel's application for reasonable attorneys' fees and costs;
26 approve the Notice of Settlement, including the proposed deadlines for opting-out of and objecting to
27 the settlement; and schedule the final settlement approval hearing. A copy of Plaintiff's proposed order
28 is being filed concurrently herewith.

1
2 Dated: October 24, 2022

Shimoda & Rodriguez Law, PC

3
4 By: 

5 Galen T. Shimoda
6 Justin P. Rodriguez
7 Brittany V. Berzin
8 Attorneys for Plaintiff
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