Galen T. Shimoda (Cal. State Bar No. 226752)
Justin P. Rodriguez (Cal. State Bar No. 278275)
Renald Konini (Cal. State Bar No. 312080)
Shimoda & Rodriguez Law, PC
9401 East Stockton Boulevard, Suite 120
Elk Grove, CA 95624
Telephone: (916) 525-0716
Facsimile: (916) 760-3733

Attorneys for Plaintiffs CARLETON EDWARDS on behalf of himself and of similarly situated employees

[additional parties continued on next page]

SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

CARLETON EDWARDS, MICHAEL ADAMS, and PETER HALL, individually and on behalf of all other similarly situated employees,

Plaintiffs,

vs.

SUBURBAN PROPANE, L.P., a Delaware Limited Partnership; and DOES 1 to 100, inclusive,

Defendants.

Case No. 34-2022-00314949-CU-OE-GDS

Assigned for All Purposes to Hon. Jill Talley, Department 27

CLASS ACTION

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

Reservation No. 2720117

BY FAX

Date: June 30, 2023
Time: 9:00 a.m.
Dept.: 27
Judge: Hon. Jill Talley

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POTTER HANDY LLP
Mark D. Potter (SBN 166317)
mark@potterhandy.com
James M. Treglio (SBN 228077)
jimt@potterhandy.com
100 Pine St., Ste 1250
San Francisco, CA 94111
(858) 375-7385
Fax: (888) 422-5191

Attorneys for Plaintiff MICHAEL ADAMS and the Putative Class

BLUMENTHAL NORDREHAUG BHOWMIK DE BLOUW LLP
Norman B. Blumenthal (State Bar #068687)
Kyle R. Nordrehaug (State Bar #205975)
Aparajit Bhowmik (State Bar #248066)
Nicholas J. De Blouw (State Bar #280922)
2255 Calle Clara
La Jolla, CA 92037
Telephone: (858)551-1223
Facsimile: (858) 551-1232
Website: www.bamlawca.com

Attorneys for Plaintiff PETER HALL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CALIFORNIA CASES

CALIFORNIA STATUTES AND OTHER AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES AND OTHER AUTHORITIES

I. INTRODUCTION AND OPENING SUMMARY OF ARGUMENT

Plaintiffs Carleton Edwards, Michael Adams, and Peter Hall ("Plaintiffs") seek preliminary approval of a wage and hour class action and Private Attorneys General Act ("PAGA") settlement in the gross amount of $945,000. *See generally* Exhibit A (Joint Stipulation Regarding Class Action and PAGA Settlement and Release ["Agreement"]). The Agreement before the Court is the result of extensive litigation across four (4) different cases. The cases include the present action, *Edwards, et al. v. Suburban Propane, L.P.*, Sacramento County Superior Court, Case No. 34-2022-00314949 ("*Edwards* Action"), *Hall v. Suburban Propane, L.P., et al.*, Los Angeles County Superior Court, Case No. 22STCV00670 ("*Hall* Class Action"), *Hall v. Suburban Propane, L.P., et al.*, Los Angeles County Superior Court, Case No. 22AVCV00103 ("*Hall PAGA* Action"), and *Adams v. Suburban Propane, L.P., et al.*, Sacramento County Superior Court, Case No. 34-2022-00316279 ("*Adams* Action"). Through tremendous effort by all involved, the parties were able to come to a global resolution. Plaintiffs and the named defendants in each of these cases, Suburban Propane, L.P, and Suburban Sales & Service, Inc. ("Defendants") (Plaintiffs and Defendants sometimes collectively referred to as the "Parties"), agreed to consolidate the claims into one operative pleading in this case to ensure an efficient settlement review process that would minimize potential confusion by Class Members from multiple approval motions in different Courts, each with their own response deadlines and response procedures. *See generally* Exhibit B (Plaintiffs' Operative Complaint). There are approximately 634 Class Members.

Plaintiffs have alleged that Defendants 1) failed to pay overtime wages, 2) failed to pay minimum wages, 3) failed to provide meal periods, 4) failed to provide rest periods, 5) failed to provide accurate wage statements, 6) failed to timely pay all final wages, 7) failed to reimburse employees for incurred expenses, and 8) engaged in unfair competition. *See generally* Exhibit B; *see also* Declaration of Justin P. Rodriguez ("Decl. Rodriguez"), ¶¶ 3, 11. Plaintiffs have also alleged Defendants are liable for civil penalties under the PAGA based on these violations. *See id.*; Exhibit C (Plaintiffs' Ltrs. to the Labor and Workforce Development Agency ["LWDA"] Regarding PAGA Claims). Defendants have denied all of Plaintiffs' allegations in their entirety and any liability or wrongdoing of any kind. *See* Decl. Rodriguez, ¶ 6. Defendants have also denied that this case is appropriate for class certification

other than for purposes of settlement. *See id.* However, subject to Court approval, the Parties have been able to compromise and settle all asserted claims as a result of extensive investigations, document and data exchanges, and extended negotiations. *See* Exhibit A. Plaintiffs and Plaintiffs' counsel believe the proposed Agreement is fair, reasonable, and adequate based on the investigations, discovery, employee data exchanges, negotiations, and a detailed knowledge of the issues in this case. *See* Decl. Rodriguez, ¶¶ 3, 6-12; Declaration of James M. Treglio ("Decl. Treglio"), ¶¶ 13-14; Declaration of Kyle Nordrehaug ("Decl. Nordrehaug"), ¶¶ 3-6; Declaration of Carleton Edwards ("Decl. Edwards"), ¶¶ 6-7, 10; Declaration of Michael Adams ("Decl. Adams"), ¶ 3; Declaration of Peter Hall ("Decl. Hall"), ¶ 11.

It is well within the discretion of this Court to grant preliminary approval of the Agreement as it satisfies all applicable criteria under California law. Accordingly, Plaintiffs request that the Court: (1) certify the proposed settlement class on a preliminary and conditional basis; (2) grant preliminary and conditional approval of the proposed Agreement (Exhibit A); (3) approve the form and content of the Notice of Settlement (Exhibit E) and the method for providing notice to Class Members as set forth in the Agreement; and (4) adopt the implementation schedule contained in the proposed order.

II. PROCEDURAL AND LITIGATION HISTORY

The Agreement represents a global compromise of all claims across four (4) different cases. The cases include the present action, *Edwards, et al. v. Suburban Propane, L.P.*, Sacramento County Superior Court, Case No. 34-2022-00314949 ("*Edwards* Action"), *Hall v. Suburban Propane, L.P., et al.*, Los Angeles County Superior Court, Case No. 22STCV00670 ("*Hall* Class Action"), *Hall v. Suburban Propane, L.P., et al.*, Los Angeles County Superior Court, Case No. 22AVCV00103 ("*Hall PAGA* Action"), and *Adams v. Suburban Propane, L.P., et al.*, Sacramento County Superior Court, Case No. 34-2022-00316279 ("*Adams* Action"). *See* Decl. Rodriguez, ¶ 2. The dates each of the lawsuits were filed are as follows: (1) *Hall* Class Action – January 7, 2022; (2) *Edwards* Action – February 2, 2022; (3) *Hall* PAGA Action – February 16, 2022; and (4) *Adams* Action – March 3, 2022. *See* Exhibit A, ¶ 2.2. Plaintiffs exhausted administrative remedies under the PAGA by providing notice of the claims and violations to the LWDA. *See* Exhibit C; Cal. Lab. Code § 2699.3(a), (c); Decl. Rodriguez, ¶ 4. As part of a global settlement, the Parties agreed to consolidate all claims into one

operative pleading in this case to streamline the approval process and avoid potential confusion by Class Members that might arise from multiple, separate approval processes in multiple jurisdictions. *See* Decl. Rodriguez, ¶ 2. Accordingly, Plaintiffs filed a second Amended Complaint in this case on March 10, 2023. *See id.* There is no date set for a motion for certification or trial in this matter. *See* Decl. Rodriguez, ¶ 5.

III. INVESTIGATION AND DISCOVERY CONDUCTED

Plaintiffs thoroughly investigated issues affecting certification, the merits of the class claims, and potential damages for such claims. *See id.* at ¶¶ 7-11; Decl. Treglio, ¶¶ 10-12; Decl. Nordrehaug, ¶ 4; Decl. Edwards, ¶¶ 3, 5-6; Decl. Adams ¶ 3; Decl. Hall, ¶¶ 5, 9-12. Plaintiffs worked during the time all of Defendants' policies and practices at issue in the Complaint were in effect and provided information regarding these policies and practices, enabling pre-filing investigations to take place. *See* Decl. Carleton, ¶ 2; Decl. Adams, ¶ 3; Decl. Hall, ¶¶ 2, 4. The Parties engaged in informal discovery and exchange of documents, including a representative sampling of employee data, such as timecards, paystubs, payroll data, and relevant policies for the entirety of the statute of limitations applicable to the asserted claims. The discovery covered all aspects of the asserted claims, including certification issues, merits issues, damages, the scope and configuration of Class Members, the content and implementation of the wage and hour policies at issue, issues relating to manageability concerns at trial, among other relevant areas. *See* Decl. Rodriguez, ¶¶ 7-9. The information allowed Plaintiffs to determine the extent and frequency of any violations in accordance with Plaintiffs' contentions and create an accurate damages model to assess the reasonableness of any settlement. *See id.*

IV. NEGOTIATION AND PROPOSED SETTLEMENT

a. Plaintiffs and Defendants Engaged in Extensive Arm's Length Negotiations

The final settlement occurred only after extended, arm's length negotiations. Over the course of approximately sixteen (16) months, Plaintiffs have been investigating the claims and discussing with Defendants' counsel the merits of the claims and issues present in this case. *See id.* at ¶¶ 7-10. The Parties exchanged substantial amounts of information and legal analysis in connection with these discussions. *See id.* It was only after these extended discussions, which included a full day mediation

with Louis Marlin, that the Parties were able resolve all claims and enter into the Agreement. *See id.* at ¶ 10.

b. The Terms of the Agreement

1. The following groups of individuals are covered by the Agreement: (a) Class Members, which include: a) Reimbursement Subclass: all employees who are class members in the Fernandez Action[1] and worked for Defendants in California during the Reimbursement Subclass Period; b) Wage Subclass: all employees who are class members in the Fernandez Action and who worked for Defendants in California between March 25, 2021 and February 12, 2023, and all other non-exempt employees (*i.e.* employees who were not part of the release of claims in the Fernandez Action) who worked for Defendants in California during the time period of Wage Subclass Period; and c) Aggrieved Employees: all non-exempt employees who worked for Defendants during the PAGA Claim Period. *See* Exhibit A, ¶¶ 1.2, 1.5, 1.31-1.32, 1.38-1.39. There are approximately 634 Class Members and 399 Aggrieved Employees. *See id.*

2. Defendants will pay the Gross Settlement Amount of $945,000, which is exclusive of the employer's share of payroll taxes. *See id.* at ¶ 5.1. No portion of the Gross Settlement Amount will revert to Defendants. *See id.* at ¶ 5.6. Aggrieved Employees will still be paid their share of the PAGA Payment regardless of whether they opt out of being Class Members. *See id.* at ¶¶ 7.5.1, 7.8.3.

3. Up to $10,000 will be paid to each of the Class Representatives as an Enhancement Payment. This amount will be in addition to any amount Plaintiffs may be entitled to under the terms of the Agreement. *See id.* at ¶ 5.4.

4. Subject to Court approval, the Parties have selected ILYM Group, Inc. to act as the Settlement Administrator, who has provided a maximum cost estimate of $14,900. *See* Exhibit D (ILYM Group, Inc. Quote); Exhibit A, ¶ 1.37; Decl. Rodriguez, ¶ 22.

5. The Parties agree that $20,000 of the Gross Settlement Amount shall be allocated to resolving claims under the PAGA. Seventy-Five percent (75%) of the PAGA Payment will be paid to

[1] **"Fernandez Action" means Michelle Fernandez, et al. v. Suburban Propane, LP, Fresno County Superior Court Case No. 16CECG00418, that previously settled a class of all employees of defendant employed as either: 1) a Customer Service Representative ("CSR") and Customer Relations Specialist ("CRS") employed by Suburban Propane, LP in California from February 10, 2012 through March 24, 2021; or 2) a Service Technician ("ST") employed by Suburban in California from** November 2, 2013 through March 24, 2021. *See* Exhibit A, ¶ 1.15; Decl. Rodriguez, ¶ 9.

the LWDA and Twenty-Five percent (25%) will be paid to Aggrieved Employees. *See* Exhibit A, ¶ 5.5. Given the risk to proving the claims on the merits, the derivative nature of the penalties, the efforts by Defendants to maintain compliant policies and take corrective action, the presence of what may likely be deemed good faith disputes, and the Court's discretion to reduce any penalty award, Plaintiffs believe the $20,000 PAGA Payment allocation represents a meaningful settlement aimed at deterring non-compliance given the facts of this case. *See* Decl. Rodriguez, ¶¶ 7-12; *see also Nordstrom Com. Cases*, 186 Cal.App.4th 576, 589 (2010) (approving $0 allocation to the resolution of PAGA claims based on their being disputed and being part of a class settlement which was evaluated based on the terms of the agreement overall); *Junkersfeld v. Med. Staffing Sols., Inc.*, 2022 WL 2318173, at *8 n.2 (E.D. Cal. 2022) (collecting cases with PAGA settlement values ranging from .037%-1%); *Jennings v. Open Door Marketing, LLC*, 2018 WL 4773057, *9 (N.D. Cal. 2018) (approving settlement of PAGA claims at 0.6% of total estimated value due to risk of no recovery); *Ruch v. AM Retail Grp., Inc.*, 2016 WL 5462451, *7 (N.D. Cal. 2016) (approving $10,00 PAGA settlement allocation where total PAGA penalty exposure was approximately $5.2 million, or 0.2% of total estimated value); *Davis v. Cox Commc'ns California, LLC*, 2017 U.S. Dist. LEXIS 63514, *1 (S.D. Cal. 2017) (preliminarily approving $4,000 PAGA allocation in $275,000 settlement); *Moore v. Fitness Int'l, LLC*, 2014 U.S. Dist. LEXIS 8358, *5 (S.D. Cal. 2014) (approving $2,500 PAGA allocation when attorneys' fees award alone amounted to $200,000); *Jack v. Hartford Fire Ins. Co.*, 2011 U.S. Dist. LEXIS 118764, *6 (S.D. Cal. 2011) (approving $3,000 PAGA allocation in $1,200,000 settlement); *Singer v. Becton Dickinson & Co.*, 2010 U.S. Dist. LEXIS 53416, *2 (S.D. Cal. 2010) (approving $3,000 PAGA allocation in $1,000,000 settlement); *Hopson v. Hanesbrands Inc.*, 2009 U.S. Dist. LEXIS 33900, *9 (N.D. Cal. 2009) (approving $1,500 PAGA allocation in $1,026,000 settlement); *Syed v. M-I, L.L.C.*, 2017 U.S. Dist. LEXIS 24880, *34-35 (E.D. Cal. 2017) (approving $100,000 PAGA allocation in a $3,950,000 settlement even though PAGA exposure was calculated at $53,600,000, or 0.2% of total estimated value); *Garcia v. Gordon Trucking, Inc.*, 2012 U.S. Dist. LEXIS 160052, at *7 (E.D. Cal. 2012) (approving $10,000 PAGA allocation in a $3,700,000 settlement); *Franco v. Ruiz Food Prod., Inc.*, 2012 WL 5941801, at *14 (E.D. Cal. 2012) ($10,000 in PAGA payment from $2,500,000 settlement fund); *Chu v. Wells Fargo Investments, LLC*, 2011 WL 672645, at *1 (N.D. Cal. 2011) (approving

PAGA settlement payment of $7,500 to the LWDA out of $6.9 million common-fund settlement).

6. The Parties agree that up to one-third (1/3) of the Gross Settlement Amount ($315,000) will be paid for Plaintiffs' attorneys' fees incurred in the litigation of this case. Defendants will not oppose any application for attorneys' fees so long as it is within this threshold. *See id.* at ¶ 5.2. Additionally, the Parties agree that Plaintiffs will also be entitled to the actual litigation costs as approved by the Court in an amount not to exceed $25,000. *See id.* The proposed notice to be sent to Class Members will state this information. *See* Exhibit E.

7. Any allocated amounts under the Agreement for Settlement Administrator Costs, Class Representative Enhancement Payments, and attorney's fees and costs that are not ultimately awarded by the Court will remain part of the Net Settlement Amount and be paid out to Participating Class Members on a pro rata basis as set forth in the Agreement. *See* Exhibit A, ¶¶ 5.1-5.5, 5.8-5.8.4. These amounts will be paid out from the Gross Settlement Amount, not in addition to the Gross Settlement Amount. *See* Exhibit A, ¶¶ 5.1-5.5.

8. Class Members who fail to timely opt-out of this settlement will waive all Released Class Claims as set forth in the Agreement. *See* Exhibit A, ¶¶ 1.5-1.6, 1.14, 1.27, 1.31-1.33, 1.35, 1.38-1.39, 6.1. Aggrieved Employees will waive all Released PAGA Claims as set forth in the Agreement regardless of whether they opt out of being a Class Member. *See id.* at ¶¶ 1.2, 1.14, 1.34-1.35, 6.2, 7.5.1.

9. For any portion of the Net Settlement Amount or PAGA Payment allocated to Participating Class Members and/or Aggrieved Employees that is not claimed by them by cashing their respective settlement checks within 180 calendar days of issuance, that remaining amount shall be donated equally, *i.e.*, 50/50 to Capital Pro Bono, Inc., and the Center for Workers' Rights under the doctrine of *cy pres*. *See* Exhibit A, at ¶ 5.6. Because the Agreement provides for all funds such that there is no residue, the provisions of California Civil Procedure Code section 384 are inapplicable. *See In re Microsoft I-V Cases*, 135 Cal.App.4th 706, 718, 720 (2006). The designated beneficiaries clearly promote the law consistent with the objectives and purposes underlying the lawsuit as they are non-profits aimed at assisting employees with wage and hour claims who cannot afford legal representation, including providing representation for employees in wage claims before the California Labor

Commissioner. *See id.* at 722-724; *see also* Decl. Rodriguez, ¶¶ 25-34; Decl. Treglio, ¶ 15; Decl. Nordrehaug, ¶ 7.

c. Allocation of Settlement Funds

Payment to Participating Class Members and Aggrieved Employees will not require the submission of a claim form. A Net Settlement Amount will be determined by subtracting from the Gross Settlement Amount any attorneys' fees and costs, Enhancement Payment to the Class Representatives, Settlement Administrator Costs, PAGA Payment that are approved and/or awarded by the Court. Because Reimbursement Subclass members have had their non-reimbursement claims waived in a prior class action settlement (the Fernandez Action), subclasses have been created to allocate the Net Settlement Amount in a way that fairly accounts for the difference in claim value between those who have already waived and been compensated for their non-reimbursement claims (Reimbursement Subclass) and those who are not subject to any waivers and have not been compensated (Wage Subclass). *See* Decl. Rodriguez, ¶ 9. Ninety-five percent (95%) of the Net Settlement Amount will be allocated to the Wage Subclass and five percent (5%) of the Net Settlement Amount will be allocated to the Reimbursement Subclass, which approximates the difference in value between the reimbursement claims and all other claims combined. *See id.* at ¶¶ 9, 11; Exhibit A, ¶ 5.8 Each Class Member's share will be determined by dividing their total weeks worked by the total weeks of all Class Members within the same subclass. That fraction will then be multiplied by the Net Settlement Amount allocated to the subclass to arrive at the Class Member's individual share of the Net Settlement Amount. Each Aggrieved Employee's share of the 25% portion of the PAGA Payment will be determined by dividing their total weeks worked within the PAGA Claim Period by the total weeks worked by all Aggrieved Employees within the PAGA Claim Period. That fraction will then be multiplied by the 25% portion of the PAGA Payment to arrive at the Aggrieved Employee's individual share. *See* Exhibit A, at ¶¶ 5.5, 5.8-5.8.4.

V. THE PROPOSED PROCEDURES TO NOTIFY CLASS MEMBERS SATISFY DUE PROCESS AS THEY PROVIDE THE BEST NOTICE PRACTICABLE UNDER THE CIRCUMSTANCES

It is not required that Class Members be given actual notice of a class settlement; instead, the best practicable notice under the circumstances is all that is required. *See Silber v. Mabon*, 18 F.3d

1449, 1453 (9th Cir. 1994); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1129 (9th Cir. 2017); *Walsh v. CorePower Yoga LLC*, 2017 U.S. Dist. LEXIS 163991, at *12-14 (N.D. Cal. 2017); *Wright v. Linkus Enters.*, 259 F.R.D. 468, 474-75 (E.D. Cal. 2009). In *Silber v. Mabon*, 18 F.3d 1449 (9th Cir. 1994), the Court rejected a class member's argument that he had not received due process because he did not receive notice until after the opt out period, finding that, so long as the notice process utilized is the best practicable under the circumstances, due process is satisfied even if there is no actual receipt of the notice. *See Silber*, 18 F.3d at 1453-1454. A similar finding was made in *Briseno v. Conagra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017). With regard to any potential for undeliverable notice mailings, the Court in *Rannis v. Recchia*, 380 F. App'x 646 (9th Cir. 2010) found that class members who did not receive actual notice due to their mailings being deemed undeliverable were still properly held to be part of the class settlement because they received the best notice practicable under the circumstances. *See Rannis v. Recchia*, 380 F. App'x at 650-651. In *Noel v. Thrifty Payless, Inc.*, 7 Cal.5th 955, 980-984 (2019), the California Supreme Court noted that California has adopted a similar approach regarding providing notice to class members.

Under the proposed notice procedures, Class Members will have sixty (60) days from the date of mailing to review and respond to the Notice of Settlement, which will also be available online. *See* Exhibit A, ¶¶ 1.22, 7.2. The Notice of Settlement contains all information necessary for a Class Member to assess the litigation, the settlement, and whether they want to participate, object, or opt-out. *See id.* at ¶¶ 7.2, 7.5.1-7.5.3; Exhibit E. National change of address database searches, skip-traces, and surveying of current employees will be utilized as set out in the Agreement to provide the best practical means of ensuring Class Members receive the notice mailing. *See* Exhibit A, ¶¶ 7.3-7.4. Any individual whose initial mailing was deemed undeliverable will have additional time to respond. *See id.* at ¶ 7.4. Additional time to respond will also be provided to cure any deficiencies in opt-outs, objections, or disputes. *See id.* ¶ 7.5.4. This notice method is regularly utilized in wage and hour class actions and similar to the one approved in *Rannis*. Thus, the proposed procedures for notifying Class Members satisfy due process and should be approved in this case.

VI. THE AGREEMENT WARRANTS PRELIMINARY APPROVAL AS IT IS FAIR, REASONABLE, AND ADEQUATE AS TO ALL CLASS MEMBERS BASED ON THE FACTS OF THIS CASE

A class action may not be dismissed, compromised, or settled without Court approval and the decision to approve or reject a settlement is committed to the Court's sound discretion. *See* Cal. Rules of Court, Rule 3.769; Fed. R. Civ. Proc., Rule 23(e)[2]; *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 234-35 (2001); *see also* Cal. Lab. Code §§ 2699(l)(2). However, "[d]ue regard should be given to what is otherwise a private consensual agreement between the parties. 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.'" *See Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996); *see also Cellphone Termination Fee Cases*, 180 Cal. App. 4th 1110, 1118 (2009); *In re Microsoft I-V Cases*, 135 Cal. App. 4th 706, 723 (2006); *Nordstrom Com. Cases*, 186 Cal. App. 4th 576, 581 (2010). The law favors settlement of lawsuits, particularly class actions and other complex cases where substantial resources can be conserved by avoiding the time, expense, and rigors of formal litigation. *See Cellphone Termination Fee Cases*, 180 Cal. App. 4th 1110, 1117-1118 (2009); *In re Microsoft I-V Cases*, 135 Cal. App. 4th 706, 723 n.14 (2006); *Nordstrom Com. Cases*, 186 Cal. App. 4th 576, 581 (2010); *see also Neary v. Regents of Univ. of Cal.*, 3 Cal. 4th 273, 277-81 (1992).

a. The Terms of The Settlement Are Fair and Within the Range of Reasonableness

The purpose of the Court's preliminary evaluation of a proposed class action settlement is to determine only whether it is within the range of possible approval such that notice to the class of its terms and conditions and the scheduling of a formal fairness hearing is warranted. *See Wershba*, 91 Cal. App. 4th at 234-35. If the Court finds a proposed settlement falls within "the range of reasonableness," it should grant preliminary approval of the class action settlement. *See, e.g., North County Contr.'s Assn., Inc. v. Touchstone Ins. Svcs.*, 27 Cal. App. 4th 1085, 1089-90 (1994); *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 133 (2008). Factors to consider in determining whether the settlement is fair, reasonable, and adequate include the strength of the Plaintiff's case, the risk, expense,

[2]The 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).

complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement. *See Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996). However, this Court should begin its analysis with a presumption that the proposed settlement is fair. "A presumption of fairness exists where: (1) the settlement is reached through arm's length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." *Id.* at 1802.

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

Settlement of this case was reached only after substantial litigation and extensive arm's length litigation and negotiations lasting approximately sixteen (16) months, which included a full day mediation. *See* Decl. Rodriguez, ¶ 10. At all times, the negotiations were adversarial, although still professional in nature. *See id.*

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

The Parties were in possession of all necessary information during the negotiations. The Parties engaged in substantial informal discovery, which included all necessary components for evaluating the class claims and creating an accurate damages model. *See id.* at ¶¶ 7-12. Plaintiffs were in possession of this information prior to calculating any damages in this case. *See id.* As a result, Plaintiffs were able to make a reasonable estimation of Defendants' potential liability. *See id.* For these reasons, the settlement now before the Court was reached at a stage where "the parties certainly have a clear view of the strengths and weaknesses of their cases" sufficient to support the settlement. *See Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 617 (N.D. Cal. 1979).

iii. Plaintiffs' Counsel are Experienced in Similar Litigation

Plaintiffs' counsel have considerable experience in complex litigation such as class and PAGA actions. *See* Decl. Rodriguez, ¶¶ 14-20; Decl. Treglio, ¶¶ 2-8; Exh. A to Decl. Treglio; Decl.

Nordrehaug, ¶¶ 2-3; Exh. 1 to Decl. Nordrehaug. Thus, Plaintiffs' counsel are qualified to evaluate the class claims, the value of settlement versus moving forward with litigation, and viability of possible affirmative defenses. Plaintiffs' counsel believe that the Agreement is fair, reasonable, and adequate in light of the risks associated with the claims, the uncertainties of complex litigation, and the secured benefit to Class Members. *See* Decl. Rodriguez, ¶ 12; Decl. Treglio, ¶¶ 10-13; Decl. Nordrehaug, ¶ 6.

iv. The Settlement is Fair, Reasonable, and Adequate Based on the Strength of Plaintiffs' Case and the Risks and Costs of Further Litigation

Plaintiffs' claims and the ability to obtain and maintain certification all the way through trial were heavily disputed by Defendants. *See* Decl. Rodriguez, ¶¶ 6-11. Based on the records and facts of this case, Plaintiffs have secured a gross recovery of approximately 5.8% of the maximum value of the claims in this matter ($16,206,392.78) and between 14.3% and 37.2% of the more realistic range of recovery ($2,542,312.82 to $6,608,994.30). *See* Decl. Rodriguez, ¶¶ 11-12. The net recovery represents approximately 3.3% of the maximum value of the claims in this matter and between 8.1% and 21.1% of the more realistic range of recovery. The average net award is approximately $847.79. *See id.*

This settlement is a reasonable compromise of the class and PAGA claims, and is within the percentile ranges of the total available damages that have been approved in other class settlements. *See Wershba*, 91 Cal.App.4th at 246, 250; *Rebney v. Wells Fargo Bank*, 220 Cal.App.3d 1117, 1139 (1990); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 628 (9th Cir. 1982); *see also In re Omnivision Technologies, Inc.*, 559 F.Supp.2d 1036, 1042 (2007) (noting that certainty of recovery in settlement of 6% of maximum potential recovery after reduction for attorney's fees was higher than median percentage for recoveries in shareholder class action settlements, averaging 2.2%-3% from 2000 through 2002); *Bravo v. Gale Triangle, Inc.*, 2017 U.S. Dist. LEXIS 77714 (C.D. Cal. 2017) (approving a settlement where the net recovery to class members was approximately 7.5% of the projected maximum recovery amount); *Avila v. Cold Spring Granite Co.*, 2017 U.S. Dist. LEXIS 130878 (E.D. Cal. 2017) (approving a settlement with a gross recovery of 11% of the projected maximum damages available and a net recovery of approximately 6.7% of the projected maximum recovery); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245 (N.D. Cal. 2015) (approving a

settlement where the gross recovery was approximately 8.5% of the projected maximum recovery); *Schiller v. David's Bridal, Inc.*, 2012 U.S. Dist. LEXIS 80776 at *48 (E.D. Cal. 2012) ("Class Members will receive an average of approximately $198.70, with the highest payment to a Class Member being $695.78 . . . Overall, the Court finds that the results achieved are good, which is highlighted by the fact that there was no objection to the settlement amount or the attorneys' fees requested."); *Gardner v. GC Servs., LP,* 2012 U.S. Dist. LEXIS 47043, 18 (S.D. Cal. 2012) ("the results achieved in this case were very favorable. Class members are provided with immediate monetary relief, with an average award of around several hundred dollars and a minimum award of $50").

v. The Proposed Settlement is a Reasonable Compromise of Claims

In *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116 (2008), the Court required additional information be presented in class action settlements "to ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing the litigation . . . ." *Id.* at 129. *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal.App.4th 399 (2010), clarified that *Kullar* does not require an illusory prediction of the outer reaches of exposure without taking into account the actual risks of litigation such as dispositive motions and trial. *Kullar* also does not require an explicit statement of the maximum amount to be recovered if a plaintiff prevailed on all the claims, provided there is a record that allows "an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation." *Id.* at 409.

Plaintiffs have thoroughly set forth the realistic range of outcomes in this litigation as well as the data points relied upon in reaching these ranges. *See* Decl. Rodriguez ¶¶ 11-12. The record demonstrates that the compromises made by Plaintiffs were reasonable and have resulted in a settlement with recovery percentage well within the range of what has been found to be sufficient in several other cases. *See, supra,* Section VI.a.iv; *see also Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) ("The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved"); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974) ("In

fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery").

b. Provisional Certification of the Class is Appropriate

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

i. The Proposed Settlement Class is Ascertainable and Sufficiently Numerous

The proposed settlement class is ascertainable because all putative Class Members can be readily identified through employee personnel and payroll files. *See Noel v. Thrifty Payless, Inc.*, 7 Cal.5th 955, 980 (2019); *Rose v. City of Hayward*, 126 Cal.App.3d 926, 932 (1981); *Lee v. Dynamex, Inc.*, 166 Cal. App. 4th 1325, 1334 (2008). The numerosity requirement is met because there are 634 individuals who fall within the definition of Class Member, which makes joinder of all members impracticable. *See Gay v. Waiters' & Dairy Lunchmen's Union*, 489 F.Supp. 282 (N.D. Cal. 1980), *aff'd* 694 F.2d 531 (9th Cir. 1982); *Hebbard v. Calgrove*, 28 Cal. App. 3d 1017, 1030 (1972) (noting no set minimum to meet the numerosity prerequisite, but a class as few as twenty-eight (28) members is acceptable). Thus, these requirements are satisfied.

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

The commonality requirement is met when there are questions of law or fact regarding the class as a whole. *See Hanlon*, 150 F.3d at 1019. Commonality requires only that some common legal or factual questions exist; Plaintiffs need not show that all issues in the litigation are identical. *See Richmond v. Dart Ind., Inc.*, 29 Cal.3d 462, 473 (1981); *City of San Jose v. Superior Court*, 12 Cal.3d 447, 460 (1974). Common questions of law or fact must also predominate over individual questions and class-wide treatment of a dispute must be superior to individual litigation.[3] *See Richmond*, 29

[3]When 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).

Cal.3d at 469. Predominance requires a putative class be sufficiently cohesive to warrant adjudication by representation. *See Hanlon*, 150 F.3d at 1022. The typicality requirement is met when claims of the named representative are typical of those of the class, though "they need not be substantially identical." *Id.* at 1020; *Classen v. Weller*, 145 Cal. App. 3d 27, 46-47 (1983).

The common questions of law and fact in this case stem from Plaintiffs' contention that Defendants violated California law by by 1) failing to pay for all hours worked, including minimum and overtime wages for time spent completing paperwork, temperature checks and COVID-19 screenings, time clocked out during on-duty meal periods, and donning/doffing personal protective equipment, 2) failing to properly calculate the regular rate of pay for premium wage payments such as overtime, meal and rest period premiums, and sick leave wages, 3) failing to provide meal and rest periods due to on-duty break requirements and the prohibition on leaving work premises, 4) engaging in unlawful rounding of hours worked, 5) failing to reimburse employees for the use of their personal cell phones to communicate with supervisory employees and record their hours worked, 6) failing to pay all wages owed in a timely manner, including final wages, and 7) failing to issue accurate itemized wage statements. *See* Exhibit B. The unfair competition and PAGA claims are derivative of these violations. *See id.* Plaintiffs and the Class Members seek the same remedies under state law. Under these specific circumstances, the commonality and predominance requirements are satisfied. Regarding the typicality requirement, Plaintiffs contends they suffered from the same unlawful policies, treatment, and circumstances as Class Members did, will request the same remedies, and will rely on the same methods of proof to establish liability and damages. *See id.* Thus, the typicality requirement is also satisfied for settlement purposes.

iii. The Adequacy Requirement is Met

The adequacy of representation requirement is met if the named representative and counsel have no interests adverse to those of the putative class members and are committed to vigorously prosecuting the case on behalf of the class. *See Hanlon*, 150 F.3d at 1020; *McGhee v. Bank of America*, 60 Cal.App.3d 442, 450-51 (1976). Those standards are met here. Under the proposed Agreement, Plaintiffs and the putative Class Members will receive a pro rata share of the settlement based on the number of workweeks they worked for Defendants. *See* Exhibit A. Additionally, any Class Member

who wishes to opt-out of the settlement may do so, and he or she may also dispute the number of workweeks stated in the Notice of Settlement (Exhibit E).

There is no conflict of interest between Plaintiffs and Class Members. Plaintiffs and Plaintiffs' counsel have pursued the claims made in the operative Complaint vigorously on behalf of the class. Plaintiffs' counsel, with Plaintiffs' assistance, thoroughly investigated the claims made in this case by speaking with Plaintiffs and reviewing substantial amounts of documents. Plaintiffs' counsel thereafter engaged Defendants' counsel in litigation and settlement discussions over the course of approximately sixteen (16) months. Moreover, Plaintiffs' counsel has experience defending and bringing wage and hour claims. Because Plaintiffs' counsel has vigorously pursued Plaintiffs' and the Class Members' claims, the adequacy requirement is met. *See generally* Decl. Rodriguez.

VII. ATTORNEYS FEES AND COSTS, ENHANCEMENT PAYMENTS TO THE CLASS REPRESENTATIVES, AND SETTLEMENT ADMINISTRATOR COSTS TO BE REQUESTED IN CONNECTION WITH FINAL APPOVAL

Plaintiffs are not requesting any determination with respect to attorney's fees and costs, Enhancement Payments, or Settlement Administrator Costs at this time. Rather, should the Court grant preliminary approval, Plaintiffs will make the request for these amounts as set out in the Agreement as part of their final approval briefing. Specifically, Plaintiffs will request the Court award attorney's fees in the amount of $315,000 (1/3 of the Gross Settlement Amount), costs in an amount not to exceed $25,000, Settlement Administrator Costs in an amount not to exceed $14,900, and an Enhancement Payment for the Class Representatives in the amount of $10,000 each.

Plaintiffs believe an award of attorney's fees under the common fund doctrine is appropriate in this case as there is a sufficiently identifiable class of beneficiaries (*e.g.* the settlement class), the benefits received can be accurately traced to the settlement Plaintiffs and Class Counsel were able to negotiate on behalf of Class Members, and the fee can be shifted with exactitude to those benefiting as the fee request is a specific, lump-sum percentage of the fund. *See Laffitte v. Robert Half Internat., Inc.*, 1 Cal.5th 480, 506 (2016); *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 271 (9th Cir. 1989); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 477-478 (1980) ("A lawyer who recovers a common fund for the benefit of persons other than . . . her client is entitled to a reasonable attorney's fee from the fund as a whole."); *see also Martin v. Ameripride Servs.*, 2011 U.S. Dist. LEXIS 61796, *22-23

(S.D. Cal. 2011) (collecting cases); *Birch v. Office Depot, Inc.,* USDC Southern District, Case No. 06cv1690 DMS (WMC) (awarding 40% fee on a $16 million wage and hour class action settlement); *Rippee v. Boston Mkt. Corp.*, USDC Southern District, Case No. 05cv1359 BTM (JMA) (awarding a 40% fee on a $3.75 million wage and hour class action settlement); *West v. Circle K Stores, Inc.*, 2006 U.S. Dist. LEXIS 76558, at *7-*8, *12, *27 (E.D. Cal. 2006) (awarding a $15,000 representative enhancement where 10,000 class members were to receive a ***gross*** award of approximately $500 each from the $5,000,000 settlement); *Dent v. ITC Serv. Croup*, 2013 U.S. Dist. LEXIS 139359, at *9-*10, *15-*16 (D. Nev. Aug. 6, 2013) (awarding a $15,000 representative enhancement out of a $150,000 settlement for approximately 530 class members); *Patel v. Nike Retail Services, Inc.*, 2019 WL 2029061 at *2 (N.D. Cal. 2019) ($5,261 for settlement administrator's fees was not excessive where PAGA group consisted of 40 employees).

Plaintiffs' final approval briefing will include information and analysis regarding the appropriateness of the fee percentage sought, a lodestar cross check of the requested fee, a detailed declaration from Plaintiffs regarding their time spent on the case as well as any risks and burdens incurred as the Class Representatives, an itemized costs spreadsheet, and a declaration from the Settlement Administrator detailing the work performed and Settlement Administrator Costs incurred. *See* Decl. Rodriguez, ¶ 21. The Notice of Settlement will state the amounts to be requested to provide Class Members the ability to comment thereon, providing evidence of whether the requested amounts are reasonable. *See* Exhibit E at pg. 2, § II.A; *see also In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555, 71 (C.D. Cal. 2005) ("the absence of objections or disapproval by class members to class counsel's fee request further supports finding the fee request reasonable"). Any allocated amounts not ultimately awarded by the Court will be distributed to Class Members pro rata. *See* Exhibit A, ¶¶ 5.2-5.4, 5.8.

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VIII. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that this Court preliminarily and conditionally certify the class for settlement purposes; grant preliminary and conditional approval of the proposed settlement; approve the proposed notification procedures, including the Notice of Settlement and proposed deadlines relating thereto; and schedule the final approval hearing. A copy of Plaintiffs' proposed order is being filed concurrently herewith.

Shimoda & Rodriguez Law, PC

Dated: June 5, 2023

By: _____

Galen T. Shimoda
Justin P. Rodriguez
Renald Konini
Attorneys for Plaintiffs