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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES – SPRING STREET COURTHOUSE

ROCHELLE ANTHONY, an individual, on
behalf of herself and others similarly situated,

PLAINTIFF,

v.

CITIZEN WATCH COMPANY OF
AMERICA, INC.; and DOES 1 thru 50,
inclusive,

DEFENDANTS.

CASE NO. 20STCV00171

[Case Assigned for All Purposes to Hon. Maren
E. Nelson in Dept. SSC-17]

**NOTICE OF MOTION AND MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

*[Filed concurrently with the Declaration of Ari
J. Stiller and Proposed Order]*

Date: March 3, 2021

Time: 9:00 a.m.

Dept.: 17

Complaint Filed: January 3, 2020

FAC Filed: March 9, 2020

Trial Date: None Set

1 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

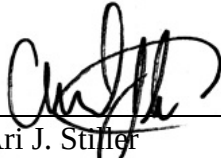
2 **PLEASE TAKE NOTICE** that on March 3, 2021, at 9:00a.m. in Department 17 of the
3 above-entitled court, Plaintiffs Rochelle Anthony and Travenia Morris will move the Court for an
4 Order of Preliminary Approval of the Settlement Agreement and Release of Claims ("Settlement
5 Agreement"), a copy of which is filed concurrently herewith.

6 This Motion will be made on the grounds that the proposed Settlement Agreement is fair,
7 adequate, reasonable, and in the best interest of the Proposed Class and Parties.

8 This Motion will be based on this Notice of Motion, the attached Memorandum of Points
9 and Authorities in Support of Preliminary Approval of Class Action Settlement, the Declaration
10 of Ari J. Stiller, the Settlement Agreement and Release, all other papers and records on file in this
11 action, and on such oral and documentary evidence as may be presented at the hearing on this
12 Motion.

13
14 DATED: February 5, 2021

KINGSLEY & KINGSLEY, APC

15
16 By: 

Ari J. Stiller

Zachary B. Greenberg

Attorneys for Plaintiffs and the Proposed Class
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Rochelle Anthony and Travenia Morris (“Plaintiffs”) submit this Memorandum
4 of Points and Authorities in support of Plaintiffs’ Motion for Preliminary Approval of Class Action
5 Settlement reached between Plaintiffs and Defendant Citizen Watch Company of America, Inc.
6 (“Defendant”). By this Motion, Plaintiffs respectfully request that the Court:

7 (1) Grant preliminary approval of the fully-executed Settlement Agreement and
8 Release of Claims, attached to the Declaration of Ari J. Stiller as Exhibit “A”;

9 (2) Approve the proposed Notice to Class Members – a copy of which is attached to
10 the Declaration of Ari J. Stiller as Exhibit “B” – and direct the Notice to be sent to Class Members
11 in the manner set forth in the Settlement Agreement;

12 (3) Schedule a hearing on final approval of the proposed Settlement and Plaintiffs’
13 Counsel’s application for an award of attorneys’ fees and litigation costs at which Class Members
14 have an opportunity be heard (“Final Approval Hearing”).

15 **II. FACTUAL BACKGROUND**

16 A. Litigation Overview and Procedural History

17 Plaintiffs allege that they worked as shipping clerks at Defendant’s warehouse in Torrance,
18 California, where their job duties included packing and processing orders for watches, toys, and
19 other items. (Stiller Decl. ¶ 3.) They claim that Defendant paid them and other clerks a shift
20 differential (typically an extra \$1.25 per hour) as an incentive for working undesirable shifts, but
21 that Defendant failed to blend the shift differential into their “regular rate of pay” when they
22 worked overtime or earned meal period premiums in the same pay periods as shift differential.
23 (Stiller Decl. ¶ 4.)

24 On or about January 3, 2020, Plaintiff Rochelle Anthony (“Plaintiff Anthony”) filed her
25 Class Action Complaint seeking unpaid wages and penalties. (Stiller Decl. ¶ 5.) She added a claim
26 under the Private Attorney’s General Act (“PAGA”), Labor Code § 2699 by way of a First
27 Amended Class and Representative Action Complaint filed on March 9, 2020. (Stiller Decl. ¶ 5.)

1 During the course of litigation, Plaintiff's counsel was retained by another former employee of
2 Defendant, Travenia Morris, and Plaintiff's counsel filed a Second Amended Class and
3 Representative Action Complaint on January 26, 2021, to add her as an additional class
4 representative. (Stiller Decl. ¶ 6.)

5 With the assistance of mediator David Phillips, Esq., the Parties reached an agreement in
6 principle to settle the matter after a full day's mediation on October 27, 2020. (Stiller Decl. ¶ 9.)
7 The Parties then signed a final long-form Settlement Agreement intended to resolve all claims.
8 (Stiller Decl. ¶ 10.)

9 B. The Discovery Process

10 After the Court lifted the discovery stay for mediation purposes on August 11, 2020, the
11 parties engaged in extensive informal discovery. Defendant produced documents and provided
12 other information necessary to evaluate settlement, including Plaintiff Anthony's personnel file
13 and time and pay records, relevant policy documents, a statement of the number of California
14 employees who received overtime or meal/rest premiums in the same pay period as shift
15 differential during the class and PAGA periods, and the complete payroll for the liability period
16 for pay periods where the class earned shift differential and overtime or other premium pay.
17 (Stiller Decl. ¶ 7.) Plaintiffs also produced dozens of paystubs and other employment documents
18 to Defendant, including those that they believe form the basis for their claims. (Stiller Decl. ¶ 8.)

19 Careful review and analysis of this discovery confirmed Plaintiffs' Counsel's belief that
20 the proposed settlement is adequate, fair, reasonable, and appropriate for Court approval. (Stiller
21 Decl. ¶ 11.) Defendant denies any liability or wrongdoing. However, based on their own
22 independent investigation and evaluation, Plaintiffs' Counsel believes the Settlement Agreement
23 is fair and reasonable in light of all known facts and circumstances, including the risk of significant
24 delay, defenses asserted by Defendant, uncertainties regarding a class and representative action
25 trial on the merits, and potential appellate issues. (Stiller Decl. ¶ 11.)

26 **III. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED FOR**
27 **SETTLEMENT PURPOSES**

1 Originally creatures of equity, class actions have been statutorily embraced by the
2 Legislature whenever “the question [in a case] is one of a common or general interest, of many
3 persons, or when the parties are numerous, and it is impracticable to bring them all before the
4 court...” (Code Civ. Proc. § 382; *see, e.g., Fireside Bank v. Sup. Court* (2007) 40 Cal.4th 1069,
5 1078.) They serve an important function by “establishing a technique whereby the claims of many
6 individuals can be resolved at the same time” thereby “eliminat[ing] the possibility of repetitious
7 litigation and provid[ing] small claimants with a method of obtaining redress.” (*Richmond v. Dart*
8 *Industries, Inc.* (1981) 29 Cal.3d 462, 469.) Public policy supports the use of class actions to
9 enforce wage and overtime laws for the benefit of workers. (*See Sav-on Drug Stores, Inc. v. Sup.*
10 *Court* (2004) 34 Cal.4th 319, 340.)

11 The certification question is “essentially a procedural one that does not ask whether an
12 action is legally or factually meritorious.” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439–
13 440.) A court ruling on a certification motion must determine “whether . . . the issues which may
14 be jointly tried, when compared with those requiring separate adjudication, are so numerous or
15 substantial that the maintenance of a class action would be advantageous to the judicial process
16 and to the litigants.” (*Collins v. Rocha* (1972) 7 Cal.3d 232, 238.) The California Supreme Court
17 has identified three certification requirements: (1) “the existence of an ascertainable and
18 sufficiently numerous class”; (2) “a well-defined community of interest”; and (3) “substantial
19 benefits from certification that render proceeding as a class superior to the alternatives.” (*Brinker*
20 *Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021.) The “community of interest”
21 requirement includes three additional requirements: (1) common questions of law or fact
22 predominant over individual questions; (2) the class representatives have claims or defenses
23 typical of the class; and (3) the class representatives can adequately represent the class. (*Ibid*, citing
24 *Fireside Bank, supra*, 40 Cal.4th at 1089.)

25 Class certification for settlement purposes is proper in this case as the proposed Settlement
26 Class satisfies each of the requirements under Code of Civil Procedure § 382. Accordingly, this
27 Court should certify the putative settlement class.

A. The Proposed Classes Are Ascertainable and Sufficiently Numerous

1. Ascertainability

Putative class members are deemed “ascertainable” when they may be “readily identified without unreasonable expense or time by reference to official records.” (*Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932.) In determining whether a class is ascertainable, a court scrutinizes the class definition, the size of the class and the means of identifying class members. (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.) Here, Plaintiffs maintain that the proposed Settlement Class is ascertainable because Defendant’s records demonstrate which employees were subject to an alleged violation, and Defendant has agreed to provide the settlement administrator with each Settlement Class Member’s full name, last known address, social security or other identifying number, and relevant pay periods . (Stiller Decl. ¶ 13; Ex. 1 at § III, ¶ B(2).)

2. Numerosity

There is no set number that is required as a matter of law to maintain a class action. (*See e.g., Rose, supra*, 126 Cal.App.3d at p. 934.) Here, the proposed Settlement Class contains approximately 64 hourly employees. (Ex. 1 at § III, ¶ I(2).) Therefore, the proposed Settlement Class is ascertainable and sufficiently numerous. (Stiller Decl. ¶ 14.)

B. There Is a Well-Defined Community of Interest

1. There Are Predominant Questions of Law and Fact

In deciding whether questions of common or general interest predominate, a court must determine 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.” (*Collins v. Rocha* (1972) 7 Cal.3d 232, 238; *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) As a general matter, if the defendant’s liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.” (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916, 107; *Knapp v. AT&T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 941.)

1 Here, Plaintiffs argue that there are questions of law and fact common to the proposed
2 Settlement Class that predominate over any questions affecting only individual Class Members.
3 (Stiller Decl. ¶ 15.) Plaintiffs allege that Settlement Class Members worked in the same capacity
4 for the same employer and were subject to the same relevant employment policies and practices,
5 namely the uniform failure to blend shift differential pay into the “regular rate of pay” when
6 calculating overtime and meal period premiums, and thus the failure to pay wages at the proper
7 rate. (Stiller Decl. ¶ 15.) For purposes of settlement, the evidence reviewed by Class Counsel
8 demonstrates that common wage policies applied to the proposed Settlement Class Members and
9 certification for settlement purposes is appropriate. (Stiller Decl. ¶ 15.)

10 2. The Plaintiffs Have Claims Typical of the Proposed Class

11 A putative class representative’s claim must be “typical,” but not necessarily identical, to
12 the claims of other class members. The test of typicality “is whether other members have the same
13 or similar injury, whether the action is based on conduct which is not unique to the Class
14 Representatives, and whether other class members have been injured by the same course of
15 conduct.” (*Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502.) Thus, it is sufficient
16 that the representative is similarly situated so that he or she will have the motive to litigate on
17 behalf of all class members. (*Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502.) Here,
18 Plaintiffs worked for Defendant as warehouse clerks, earning overtime pay and shift differentials,
19 but allegedly did not receive overtime pay at the proper blended rate. (Stiller Decl. ¶ 16.) Their
20 claims are thus typical of those of the Settlement Class. (Stiller Decl. ¶ 16.)

21 3. Plaintiffs Contend That They Have and Will Fairly Represent the Interests
22 of the Settlement Class Members

23 A putative class representative must show that he or she can adequately represent the class.
24 (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.App.4th 1096, 1104.) The representative,
25 through qualified counsel, must be capable of “vigorously and tenaciously” protecting the interests
26 of the class members. (*Simons v. Horowitz* (1984) 151 Cal.App.3d 834, 846.)

27 Plaintiffs believe that they are capable of fairly representing and adequately protecting the
28

1 interests of the proposed Settlement Class Members. (Stiller Decl. ¶ 17.) Plaintiffs’ interests in this
2 litigation are coextensive with the interests of the proposed Settlement Class Members. The
3 members of the proposed Settlement Class all worked for Defendant during the relevant time
4 period and incurred the same type of alleged damages with regard to Defendant’s alleged violations
5 of the law. (Stiller Decl. ¶ 17.) Moreover, Plaintiffs have agreed to serve as class representatives
6 and have retained qualified counsel who is experienced in prosecuting wage and hour class actions.
7 (Stiller Decl. ¶ 18.) This demonstrates their commitment to bringing about the best possible results
8 for the benefit of the proposed Settlement Class. (Stiller Decl. ¶ 18.) Plaintiffs have provided their
9 Counsel with all necessary and pertinent information. (Stiller Decl. ¶ 19.) They have actively
10 participated in the litigation and worked closely with Class Counsel to develop theories of liability.
11 (Stiller Decl. ¶ 19.) Plaintiff Anthony also attended the full-day mediation in this matter and
12 Plaintiff Morris actively participated by phone throughout the day. (Stiller Decl. ¶ 20.) Both
13 Plaintiffs were informed of and involved in all of the Settlement negotiations. (Stiller Decl. ¶ 21.)
14 Therefore, Plaintiffs believe that they have and will continue to adequately represent the proposed
15 Settlement Class Members. (Stiller Decl. ¶ 21.)

16 C. The Class Action Vehicle Is Superior to the Alternatives

17 “The ultimate question in every case of this type is whether...the issues which may be
18 jointly tried, when compared with those requiring separate adjudication, are so numerous or
19 substantial that the maintenance of a class action would be advantageous to the judicial process
20 and to the litigants.” (*Lockheed Martin, supra*, 29 Cal.App.4th at pp. 1104–1105.) The California
21 Supreme Court has directed the courts to utilize the class action device to fashion “an effective
22 and inclusive group remedy.” (*Richmond v. Dart Indus., Inc.* (1981) 29 Cal.3d 462, 469.)
23 Normally, if the causes of action may be adjudicated in a single proceeding, thereby saving time,
24 reducing waste, and limiting duplication of effort, class certification is superior to individual
25 litigation. (*See, e.g., Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 816.) Since the Parties seek
26 Court approval of a settlement, Plaintiffs submit that there is not as much need as in an ordinary
27 motion for class certification to determine that the case can be manageably tried.

1 All the same, Plaintiffs maintain that class treatment would be the superior method of
2 managing this case. A class action is superior to individual litigation “when numerous parties
3 suffer injury of insufficient size to warrant individual action and when denial of class relief would
4 result in unjust advantage to the wrongdoer.” (*Blue Chip Stamps v. Superior Court* (1976) 18
5 Cal.3d 381, 385.) In cases such as this, where individual damages may be small, the class action
6 device is the most feasible method of recovery. (*See, e.g. Lockheed Martin, supra*, 29 Cal.4th at p.
7 1131.) In this regard, the superiority of class treatment is evident here because individual pursuit
8 of class members’ claims may not be economically viable. (Stiller Decl. ¶ 23.) The only alternative
9 to certification would be to force over sixty-four employees to join this action, file individual,
10 uniform actions, or abandon their legal rights altogether. (Stiller Decl. ¶ 23.) Plaintiffs maintain
11 that this economic reality could result in a windfall for Defendant if this case were not certified.
12 (Stiller Decl. ¶ 23.)

13 **IV. THE PROPOSED SETTLEMENT**

14 A. The Settlement Class

15 For purposes of the Settlement Agreement, the Settlement Class is defined as: “any and all
16 nonexempt California employees of Defendant who received overtime pay or a meal or rest break
17 premium in the same pay period in which they received a shift differential during the Class Period.”
18 (Stiller Decl. ¶ 24; Settlement Agreement, Ex. 1 at § I, ¶¶ E, HH.) The Class Period runs from
19 January 3, 2016 through the earlier of December 27, 2020 or the date that the Court preliminarily
20 approves this Settlement Agreement. (Stiller Decl. ¶ 25; Ex. 1 at § I, ¶ E.) As of October 27, 2020
21 (the date of mediation) and based on documents and other information produced by Defendant,
22 there are approximately 64 Settlement Class Members. (Stiller Decl. ¶ 26; Ex. 1 at § III, ¶ I(2).)

23 B. Settlement Proceeds

24 As detailed fully in the Settlement Agreement, the Settlement provides for Defendant to
25 pay Settlement Proceeds of \$130,000.00, which includes the Settlement Payments to Participating
26 Class Members, Plaintiffs’ service awards, Class Counsel fees’ and litigation costs, the PAGA
27 Payment, and the Settlement Administration Costs. (Stiller Decl. ¶ 27; Ex. 1 at § III, ¶ A(1).)

The Net Settlement Amount is the Settlement Proceeds less Class Counsel's Award, Plaintiffs' Incentive Award, PAGA Payment to the LWDA, and Settlement Administration Costs. (Stiller Decl. ¶ 28; Ex. 1 at § I, ¶ P.) The Parties estimate the amount of the Net Settlement as follows:

Settlement Proceeds:	\$	130,000.00
Plaintiffs' Incentive Awards:	\$	10,000.00 (\$5,000 for each Plaintiff)
Class Counsel's Fees:	\$	43,333.33
Class Counsel's Costs:	\$	9,250.00
PAGA Payment:	\$	7,500.00
		(\$5,625.00 to the LWDA and \$1,875.00 to remain in the Net Settlement Amount)
<u>Settlement Administrator Costs:</u>	<u>\$</u>	<u>5,234.00</u>
Net Settlement Amount	\$	56,557.67

(Stiller Decl. ¶ 28; Ex. 1 at § III, ¶ A.)

C. Individual Settlement Payments

The Settlement Payment amount of each Participating Class Member is an individualized amount based on the number of Pay Periods worked by the Participating Class Member during the Class Period where the class member worked overtime and earned shift differential. (Stiller Decl. ¶ 29; Ex. 1 at § III, ¶ C; *see also* Ex. 1 to the Settlement Agreement [Class Notice].) Specifically, Settlement Payments will be paid from the Net Settlement Amount as follows: (1) First, Defendant will use its payroll records to calculate the total number of Pay Periods worked by each Participating Class Member during the Class Period; (2) Second, the total of these Pay Periods for each Participating Class Member will then be divided by the total of these Pay Periods by all Participating Class Members to create a "Final Percentage" for each Participating Class Member; (3) Third, that Final Percentage for each Participating Class Member will then be multiplied by the Net Settlement Amount to determine the Participating Class Member's pro rata recovery under this Settlement. (Stiller Decl. ¶ 30; Ex. 1 at § III, ¶ C(2)-(4); *see also* Ex. 1 to the Settlement Agreement.) The Settlement Agreement provides for a dispute process regarding Settlement Payments. (Stiller Decl. ¶ 31; *See* Ex. 1 at § III, ¶ F.)

For purposes of this Settlement, the Parties have allocated \$7,500.00 to PAGA in

1 recognition that potential PAGA penalties are relatively small compared to the class damages.
2 They agree that \$5,625.00 (75% of the total) represents the amount to be paid to the Labor and
3 Workforce Development Agency (“LWDA”). (Stiller Decl. ¶ 32; Ex. 1 at § III, ¶ C(5).)

4 D. Process for Administering Settlement after Preliminary Approval

5 The detailed Notice procedure established by the Settlement Agreement will efficiently
6 and accurately ensure that Notice is provided to the Settlement Class Members. (Ex. 1 at § III, ¶
7 E.) The Parties have agreed to use a reputable third-party claims administrator, ILYM Group, Inc.,
8 to administer the Settlement Agreement. (Ex. 1 at § I, ¶ EE.)

9 E. Process for Settlement Class Members to Respond to Class Notice

10 Settlement Class Members will have an opportunity to request exclusion from the
11 Settlement Class (*i.e.* “opt out”) or to object to the Settlement either in writing or in person at the
12 Final Approval Hearing. (Ex. 1 at § III, ¶ G(1).) Any written objection must be filed no later than
13 forty-five (45) calendar days after the mailing of the Notice Packet. (Ex. 1 at § III, ¶ G(2).)
14 Likewise, Settlement Class Members may submit a Request for Exclusion to the Settlement
15 Administrator no later than forty-five (45) calendar days after the mailing of the Notice Packet.
16 (Ex. 1 at § III, ¶ G(1)(a).)

17 F. The Release

18 The Released Claims are defined as: “any and all claims, demands, rights, liabilities, and/or
19 causes of action of any nature and description whatsoever, known or unknown, in law or in equity,
20 whether concealed or hidden, which arose at any time during the Class Period based on the facts or
21 claims asserted by Plaintiffs Rochelle Anthony or Travenia Morris in any pleading in the Action on
22 their own behalf or on behalf of a putative class member, or based on any facts, transactions, events,
23 occurrences, acts, disclosures, statements, omissions, or failures that arise out of, in any way, the claims
24 made and facts alleged in the Action, including without limitation violations of any state or federal
25 statutes, rules, or regulations (including the Fair Labor Standards Act), based on an assertion that
26 Released Parties (1) failed to pay wages and/or overtime under Labor Code §§ 510, 1194; and 1199;
27 (2) failed to provide Meal Breaks or correctly pay meal break premiums Pursuant to Labor Code §§
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226.7 and 512; (3) failed to provide accurate wage statements; (4) failed to pay all wages due at termination; (5) violated the California Private Attorneys General Act; and/or (6) engaged in any unfair and unlawful business practices.” (Ex. 1 at § I, ¶ Y.)

V. ARGUMENT

A. Plaintiffs Request Approval of This Class Action Settlement

The case of *Kullar v. Foot Locker Retail, Inc* (2008) 168 Cal.App.4th 116, 128, set forth several factors that the Court should analyze in determining whether to approve a class action settlement. These factors include: (1) the strength of Plaintiffs’ case; (2) the risk, expense, complexity and likely duration of further litigation; (3) the risk of maintaining class action status through trial; (4) the amount offered in settlement; (5) the extent of discovery completed and stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement. In *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal. App. 4th 399, 409, the court clarified that a *Kullar* showing does not require the parties to submit the outer reaches of maximum possible recovery without taking into account the risks of certification, decertification, dispositive motions, and trial, so long as there is a record which allows “an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.” *Munoz*, 186 Cal. App. 4th at 409.

The proposed settlement satisfies each of these factors. Class Counsel conducted extensive informal discovery before entering into meaningful settlement negotiations in this matter. (Stiller Decl. ¶ 36.) This discovery permitted Class Counsel to fairly evaluate the strength of the case and the risks associated with ongoing litigation. (Stiller Decl. ¶ 36.) Class Counsel is experienced in handling wage and hour class actions and, after weighing all of the following factors, supports this Settlement Agreement. (Stiller Decl. ¶ 37.)

1. The Strength of Plaintiffs’ Case

a) The Risks Associated with Minimum Wage/Overtime Claim

“Under state and federal law, overtime compensation is based on an employee’s ‘regular rate’ of pay.” (*Huntington Memorial Hosp. v. Superior Court* (2005) 131 Cal.App.4th 893, 902.)

1 “California Labor Code section 510, subdivision (a) provides, as relevant here, [that] an employee
2 is entitled to overtime pay at one and one-half times the ‘regular rate’ for work in excess of eight
3 hours in one day and twice the ‘regular rate’ for work in excess of 12 hours in one day.” (*Ibid.*)
4 For hourly employees, the regular rate is generally the employee’s straight-time hourly rate.
5 (*Huntington, supra*, 131 Cal.App.4th at 905.) However, in any pay period where an hourly
6 employee earns other compensation in addition to hourly wages — such as a non-discretionary
7 bonus, commission, or shift differential — the “regular rate” is computed by dividing the
8 employee’s total compensation by the total hours worked in that period. (*Marin v. Costco*
9 *Wholesale Corp.* (2008) 169 Cal.App.4th 804, 807.)

10 “Regular rate of pay, which can change from pay period to pay period, includes
11 adjustments to the straight time rate, reflecting, among other things, shift differentials and the per-
12 hour value of any non-hourly compensation the employee has earned.” (*Alvarado v. Dart*
13 *Container Corp. of California* (2018) 4 Cal.5th 542, 554.) “The case law is unequivocal that shift-
14 differential pay must be included” in an employee’s regular rate of pay. (*O’Brien v. Town of*
15 *Agawam* (1st Cir. 2003) 350 F.3d 279, 295 [applying federal law analogous to California law].)
16 Even if the shift differential is paid only on certain shifts, it “should also be averaged across the
17 entire pay period.” (*Alvarado, supra*, at p. 570.)

18 Plaintiffs believe that their “regular rate” claim is certifiable and that they have a relatively
19 high likelihood of success on the merits. However, in determining a fair settlement value, they had
20 to consider Defendant’s argument that it, in fact, incorporated the higher shift differential rate to
21 calculate overtime in some circumstances, and any alleged failure to use the higher regular rate
22 was due to inadvertence or mistake. (Stiller Decl. ¶ 38.) Plaintiffs also considered the fact that,
23 even if they succeed on the merits, the amount owed in direct wages amounts to approximately
24 \$7,383.49. (Stiller Decl. ¶ 39.)

25 b) The Risks Associated with the Meal Break Claim

26 Employers must pay one (1) hour at the employee’s “regular rate of compensation” as a
27 penalty when they fail to provide a thirty-minute uninterrupted meal period as required by Labor
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1 Code Section 512. (Lab. Code § 226.7(b).) Here, for the same reasons that Defendant’s failure to
2 blend shift differentials into the regular rate caused an overtime violation, it also resulted in
3 underpaid meal and rest period premiums when such premiums were owed.

4 In evaluating the settlement as to this claim, Plaintiffs considered Defendant’s argument
5 that differentials do not need to be blended for purposes of meal break premiums under *Ferra v.*
6 *Loews Hollywood Hotel, LLC* (2019) 40 Cal.App.5th 1239, 1252, which found a difference
7 between “regular rate of pay” for overtime under Labor Code Section 510 and “regular rate of
8 compensation” for meal period premiums under Labor Code Section 226.7. (Cf. *Eason v. Roman*
9 *Catholic Bishop of San Diego* (S.D. Cal. 2019) 414 F.Supp.3d 1276, 1284 [“The recovery provided
10 by section 226.7 compensates employees for time the employee worked and was not paid, just like
11 overtime pay.”].) *Ferra* is currently under review by the California Supreme Court. There is risk
12 in how that Court will decide the case, but since the meal premium damages only amount to a few
13 dollars, this claim was not the driving force behind the settlement. (Stiller Decl. ¶ 40.)

14 c) The Risks Associated with Plaintiffs’ Waiting Time Penalty Claim

15 The waiting time penalty claim was the largest in terms of potential damages, but it came
16 with certain risks not present for the direct wage claims. Under Labor Code section 203, if an
17 employer fails to provide wages at the time of an employee’s termination or within seventy-two
18 (72) hours of resignation, then the employee’s wages shall continue as a penalty for up to thirty
19 (30) days. Section 203 reflects a public policy that favors the full and prompt payment of earned
20 wages. (See, e.g., *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7; *Mamika v.*
21 *Barca*, (1998) 68 Cal.App.4th 487, 492.)

22 Here, Plaintiffs and all members of the Proposed Class are no longer employed by
23 Defendant. Plaintiffs argue that they are entitled to waiting time penalties because Defendant’s
24 failure to pay overtime at the legal rate resulted in unpaid wages owed upon termination and/or
25 resignation. (See *Diaz v. Grill Concepts Services, Inc.* (2018) 23 Cal.App.5th 859.)

26 In evaluating settlement, Plaintiffs considered Defendant’s argument that a good-faith
27 belief exception applies because its actions were not willful and its payment calculations allegedly
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1 resulted in occasions of overpayment. While Plaintiffs dispute that not knowing the law is a
2 sufficient defense, Plaintiffs still had to acknowledge that this argument posed some risk. (Stiller
3 Decl. ¶ 42.) Moreover, the parties dispute how the Court would interpret Defendant's inclusion of
4 shift differentials in some pay periods. (Stiller Decl. ¶ 43.) Plaintiffs believe this shows that
5 Defendant knew it was obligated to pay the higher rate but failed to do so, while Defendants argue
6 that this shows inadvertence as to the pay periods where Plaintiffs alleged a violation. (Stiller Decl.
7 ¶ 43.) Finally, Plaintiffs expected Defendant to argue that the Court has discretion to lower the
8 waiting time penalty amount where it is significantly higher than the wages owed, so imposing
9 waiting time penalties of \$244,288.52 is not justified on an approximately \$7,383.49 wage award.
10 Plaintiffs disagree, but nonetheless had to consider this argument when determining an appropriate
11 settlement. (Stiller Decl. ¶ 44.)

12 d) The Risks Associated with the PAGA Claim

13 Plaintiffs are cognizant of risks associated with their PAGA claim and have therefore
14 agreed to discount this claim for multiple reasons. First, the aggrieved employees' PAGA claims
15 arise from the same violations as the foregoing class claims and bear the same risks on the merits.
16 Second, the Court has discretion to award less than the maximum penalty, which Defendant argued
17 would be appropriate considering the low amount of direct wage damages. (See Labor Code §
18 2699(e)(2) ["a court may award a lesser amount than the maximum civil penalty amount specified
19 by this part if, based on the facts and circumstances of the particular case, to do otherwise would
20 result in an award that is unjust, arbitrary and oppressive, or confiscatory"]; *Carrington v.*
21 *Starbucks Corporation* (2018) 30 Cal.App.5th 504, 529 [affirming award of 10% of maximum
22 PAGA penalty].) Finally, the Settlement Class is compensated for these violations in the proposed
23 Settlement Agreement, and thus any PAGA recovery for these same violations would be
24 duplicative. Plaintiff also considered the fact that PAGA assesses penalties on a per-employee per-
25 pay-period basis, and there were only 208 pay periods with violations. (Stiller Decl. ¶ 46.) Thus,
26 PAGA did not make up a significant percentage of the overall potential liability compared to other
27 claims. (Stiller Decl. ¶ 46.) As such, the Settlement Agreement's contemplated PAGA payment of
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1 \$7,500.00 is appropriate. (Stiller Decl. ¶ 47.)

2 2. The Risk, Expense, Complexity, and Likely Duration of Further Litigation

3 There is significant expense associated with the class certification process, which the
4 Parties can avoid by entering into the contemplated Settlement Agreement. (Stiller Decl. ¶ 48.) If
5 the Court did eventually certify a class, trial of a case involving approximately sixty-four
6 Settlement Class Members would require the retention of expensive expert witnesses, the accrual
7 of litigation costs, and a significant time investment by the parties. (Stiller Decl. ¶ 48.) Moreover,
8 given the complexity and unsettled nature of the issues in this case it is likely that any outcome at
9 trial would have resulted in a lengthy and costly appeal. (Stiller Decl. ¶ 49.) An appeal would result
10 in further delay for the Settlement Class Members who are waiting for a resolution in this matter.
11 (Stiller Decl. ¶ 49.)

12 3. The Risk of Maintaining Class Action Status through Trial

13 This case has not been certified as a class action. (Stiller Decl. ¶ 50.) While Plaintiffs
14 believe there is strong evidence to support certification of several possible classes, certification is
15 always hard fought and subject to judicial discretion. Moreover, in class actions, decertification is
16 always a possibility. (Stiller Decl. ¶ 50.) In attempting to certify a class, the Parties would need to
17 conduct multiple depositions, including of Plaintiffs and of several person(s) most knowledgeable.
18 (Stiller Decl. ¶ 51.) There is a risk for both sides as to what these depositions will reveal and
19 whether they will support class certification to the extent expected. (Stiller Decl. ¶ 51.)

20 4. The Amount Offered in Settlement

21 It was very difficult for the Parties to reach this Settlement of \$130,000.00. (Stiller Decl.
22 ¶ 52.) This Settlement is the result of adversarial, non-collusive, and arms-length negotiations.
23 (Stiller Decl. ¶ 52.) The Parties arrived at it after extensive investigation and discovery, careful
24 evaluation of the law, risks, and all information substantiating the amount of penalties reasonably
25 likely to be awarded to the class were the trier of fact to find Defendant liable, and the assistance
26 of an experienced mediator, David Phillips, Esq. (Stiller Decl. ¶ 53.)

27 a) Plaintiffs' Assessment of Defendant's Maximum Exposure

1 Plaintiffs assessed full value of the overtime/double overtime claim, without any discount, at
2 approximately \$7,383.49. (Stiller Decl. ¶ 54.) This was based on Defendant's payroll records for
3 the entire class. (Stiller Decl. ¶ 54.) The full value of the meal premium claim, without any
4 discount, was approximately \$3.04. (Stiller Decl. ¶ 55.) The reason is that meal period premiums
5 were paid infrequently, and the claim requires both a meal premium and shift differential in the
6 same pay period. (Stiller Decl. ¶ 55.) Plaintiffs also calculated interest on the aforementioned wage
7 damages in the amount of \$446.04. (Stiller Decl. ¶ 56.) Plaintiffs valued the Waiting Time Claim,
8 tied to the overtime claim, at \$244,288.52. (Stiller Decl. ¶ 57.) Considering the derivate nature of
9 Labor Code section 203 and the dispute over willfulness, Plaintiffs determined that accepting a
10 discount on this claim was appropriate. (Stiller Decl. ¶ 57.)

11 Finally, Plaintiffs calculated the value of the PAGA claim at \$20,800.00 for Settlement
12 Class Members using one hundred (\$100) dollars per pay period. (Stiller Decl. ¶ 58.) The main
13 risk taken into account with PAGA is the discretionary nature of the penalty award. (Stiller Decl.
14 ¶ 58.) A judge can award the statutory maximum of one hundred (\$100) dollars for the initial
15 violation and two hundred (\$200) dollars thereafter or – in theory – one cent per wage statement.
16 (Stiller Decl. ¶ 58.) While there is a dearth of available authority, in Plaintiffs' view, were they to
17 succeed on any of the underlying Labor Code violations, it is not likely that the Court would also
18 award a large amount of PAGA penalties on top of damages. (Stiller Decl. ¶ 58.)

19 Per Plaintiffs' assessment, the maximum potential value of all of Plaintiffs' and the
20 Settlement Class Members' claims was approximately \$272,921.09. (Stiller Decl. ¶ 59.) However,
21 as a result of the forgoing risks on the merits, Class Counsel believes the Settlement Proceeds of
22 \$130,000 is fair and reasonable. (Stiller Decl. ¶ 59.)

23 5. The Experience and Views of Counsel

24 Finally, Class Counsel's experience and success in similar class actions also weigh in favor
25 of preliminary approval. (See *Wershba, supra*, 91 Cal.App.4th at p. 245.) Kingsley & Kingsley,
26 APC is very experienced in prosecuting complex employment litigation, and the firm has focused
27 its practice since the year 2000 on complex wage, hour, and working condition violations. (Stiller
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Decl. ¶¶ 60-61.) The firm is well versed in class action litigation and has diligently and aggressively pursued this action. (Stiller Decl. ¶ 60.) Kingsley & Kingsley, APC currently serves as Class Counsel for dozens of pending class action lawsuits in Northern, Central, and Southern California. (Stiller Decl. ¶ 60.) A list of representative cases that Kingsley & Kingsley, APC has handled is included in the accompanying declaration of Ari J. Stiller. (Stiller Decl. ¶ 60(a)-(p).) After factoring in the risks explained above, Class Counsel believes that the proposed settlement is fair and reasonable. (Stiller Decl. ¶ 63.)

6. The Proposed Plan of Allocation Is Fair and Reasonable

Plans of allocation are subject to the same standard of review as class action settlements; they must be “fair, adequate and reasonable.” (*See, e.g., Officers for Justice v. Civil Service Comm’n* (9th Cir. 1982) 688 F.2d 615, 624–625, 629–630.) Here, the proposed plan of allocation compensates Participating Class Members pro rata based on the number of Pay Periods worked during the Class Period in which they received premium pay and a shift differential. (Ex. 1 at § I, ¶ W, § III, ¶¶ C(2)-(4).) This allocation distributes settlement funds proportionally to each class member’s damages for unpaid wages, and should therefore be approved as fair, adequate, and reasonable. (Ex. 1 at § III, ¶ C(2)-(4).)

7. The Proposed Notice Fairly Apprises the Settlement Class Members of the Terms of the Settlement and of the Class Members’ Rights

Plaintiffs request that the Court approve the proposed plan and form of Class Notice. The standard for determining the adequacy of notice is whether the notice has “a reasonable chance of reaching a substantial percentage of the class members.” (*Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974.) Pursuant to the Settlement Agreement, the Notice will be sent to the last known address of all Settlement Class Members, or to an updated address if one is located in the National Change of Address Database. (Ex. 1 at § III, ¶ E(1).) Any returned envelopes from this mailing with forwarding addresses will be utilized by the Settlement Administrator to locate the Settlement Class Members through reasonable and customary efforts, including checking the National Change of Address database and performing a skip trace. If no forwarding address is

provided, the Settlement Administrator shall promptly attempt to determine a correct address by use of skip-tracing, or other search[es] using the name, address and/or social security number of the Settlement Class Member whose notice was undeliverable, and shall then re-mail all returned, undelivered mail within ten (10) days of learning that a notice was undeliverable. Settlement Class Members who receive a remailed Notice of Class Action Settlement shall have their Response Deadline extended twenty (20) days from the original Response Deadline. (Ex. 1 at § III, ¶ E(4)). As such, the Notice is likely to reach most, if not all, Settlement Class Members.

With respect to the contents of the Notice, the “notice given to the class must fairly apprise the class members of the terms of the proposed compromise and of the options open to dissenting class members.” (*Trotsky v. L.A. Fed. Sav. & Loan Ass’n* (1975) 48 Cal.App.3d 134, 151–52.) The purpose of a class 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. (*Id.*)

Here, the Notice clearly explains terms of the proposed Settlement Agreement, each Class Member’s respective pay periods, their estimated share of the Net Settlement Amount, and the options to opt out or object at the Final Approval Hearing. (Ex. 1 at § III, ¶ G; Ex. 1 at § I, ¶ Q; *see also* Ex. 1 to the Settlement Agreement [Class Notice].) In short, the Court should approve the proposed Class Notice because it describes the proposed settlement with enough specificity to allow Settlement Class Members to make an informed choice regarding whether to participate.

VI. THE SERVICE AWARD TO THE NAMED PLAINTIFFS

The Class Representatives are entitled to an enhancement for their valiant effort and time expended in this matter. (Stiller Decl. ¶ 66.) The time spent by Rochelle Anthony and Travenia Morris is significant and includes the following: researching and retaining competent counsel; providing information to Class Counsel regarding the nature of the work for Defendant; compiling relevant documents, including paystubs and other information relevant to the claims; working closely with Class Counsel to develop the theories of liability; regularly discussing the status of the case with Class Counsel; discussing the case via telephone with other Settlement Class Members to assist with counsel’s investigation; Plaintiff Anthony attending a full-day of mediation

1 and Plaintiff Morris participating by telephone; and responding promptly to Class Counsel's
2 communications regarding settlement. (Stiller Decl. ¶ 67.) Thus, in addition to the sums paid to
3 Settlement Class Members, Plaintiffs requests a proposed litigation enhancement in the amount of
4 \$5,000 for each Plaintiff, to be paid from the Settlement Proceeds. (Ex. 1 at § III, ¶ A.) As set forth
5 in the Settlement Agreement, Plaintiffs will also be entering into a general release of liability
6 pursuant to Civil Code Section 1542. (Stiller Decl. ¶ 68; Ex. 1 at § V, ¶ (A)-(C).)

7 Class Counsel considers this to be a fair and reasonable enhancement. (Stiller Decl. ¶ 70.)
8 The enhancement takes into consideration the time, effort, and expense incurred by Plaintiffs in
9 coming forward to litigate this matter on behalf of all Settlement Class Members. (Stiller Decl. ¶
10 70.) Plaintiffs will provide a detailed declaration with the Final Approval Motion detailing their
11 participation and further justification for the enhancement. (Stiller Decl. ¶ 70.)

12 **VII. SUBMISSION TO THE LABOR AND WORKFORCE DEVELOPMENT AGENCY**

13 As indicated on the Proof of Service, Plaintiffs' Motion for Approval of Class Action
14 Settlement will be concurrently uploaded to the LWDA website on the date this Motion is filed as
15 required by statute. Proof of submission of Plaintiffs' Motion, all related documents, and copy of
16 the email from the LWDA confirming receipt is attached to the Declaration of Ari J. Stiller as
17 Exhibit "C". (Stiller Decl. ¶ 71.)

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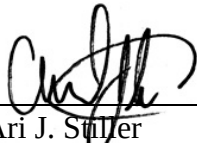
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1 **VIII. CONCLUSION**

2 Plaintiffs respectfully submit that the proposed Settlement Agreement is fair, adequate,
3 reasonable, and in the best interest of the Settlement Class Members. Therefore, the Parties
4 respectfully request that the Court (1) grant preliminary approval of the Settlement Agreement and
5 Release of Claims, and all of its terms; (2) approve the proposed form of notice, and direct that the
6 Notice be sent to Settlement Class Members in the manner set forth in the Settlement Agreement
7 and Release of Claims; and (3) schedule a hearing on final approval of the Settlement Agreement
8 and Class Counsel's application for an award of attorney's fees and litigation costs.

9
10 DATED: February 5, 2021

KINGSLEY & KINGSLEY, APC

11
12 By: 

Ari J. Stiller

Zachary D. Greenberg

Attorneys for Plaintiffs and the Proposed Class

(PROOF OF SERVICE)
[CCP 1013(a)(3)]

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 16133 Ventura Boulevard, Suite 1200, Encino, California 91436.

On February 5, 2021, I served all interested parties in this action the following documents described as: **NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Ashley Farrell Pickett
Ryan C. Bykerk
Bryan W. Patton
Matthew J. Weber
farrellpickett@gtlaw.com
bykerkr@gtlaw.com
pattonbw@gtlaw.com
webermat@gtlaw.com

GREENBERG TRAURIG, LLP
1840 Century Park East, Suite 1900
Los Angeles, CA 90067

[] (BY MAIL) I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage fully prepaid at Encino, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[XX] BY ELECTRONIC MAIL THROUGH CASE ANYWHERE: On interested parties set forth on the attached service list.

[XX] BY ELECTRONIC MAIL TRANSMISSION: I caused the document to be send to the persons at the e-mail address(es) listed on the attached service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. A pdf copy of which was sent via email to the below email address(es).

[XX] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on February 5, 2021, at Woodland Hills, California.



Michelle A. Tanzer