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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF BUTTE

BRANDON BROOKS individually, and
on behalf of all others similarly situated,

Plaintiff,

vs.

ARGONAUT CALIFORNIA
VENTURES, INC. d.b.a. KFC, and
DOES 1 through 100, inclusive,

Defendants.

Case No. 20CV00611

CLASS ACTION

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR PRELIMINARY APPROVAL
OF CLASS ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: September 23, 2020

Time: 9:00 a.m.

Dept.: 10

Judge: Hon. Robert A. Glusman

NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, NOTICE IS
HEREBY GIVEN that, at 9:00 a.m. on September 23, 2020, or as soon thereafter as the matter
may be heard in Department 10 of the above-entitled Court, located at 1775 Concord Avenue,
Chico, CA 95928, Representative Plaintiff Brandon Brooks, on behalf of the Plaintiff Class, will
and hereby does apply to this Court for an order: (1) granting preliminary approval of the parties'
class action settlement agreement, (2) granting conditional certification of the settlement class, (3)

FILED Superior Court of California
County of Butte
8/25/2020
By Kimberly Flener, Clerk Deputy
Electronically FILED

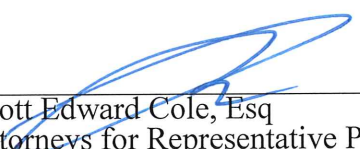
1 appointing class counsel, (4) appointing the class representative, (5) appointing a settlement claims
2 administrator, (6) approving the class notice, and (7) setting a hearing date for final settlement
3 approval.

4 This motion is based upon the accompanying memorandum of points and authorities, the
5 declaration of Scott Edward Cole, Esq. and exhibits thereto, and such other oral argument and
6 documentary evidence as may be presented to the Court at the hearing of this motion.

7
8 Dated: August 25, 2020

SCOTT COLE & ASSOCIATES, APC

9
10 By:



Scott Edward Cole, Esq.
Attorneys for Representative Plaintiff,
Aggrieved Employees and the Plaintiff Class

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	LITIGATION HISTORY	1
III.	THE SETTLEMENT.....	2
A.	THE CLASS	2
B.	SETTLEMENT TERMS.....	3
C.	THE RELEASE	7
D.	CLASS NOTICE.....	8
	1. Notice to Class Members	8
	2. Exclusions and Objections	9
IV.	JUDICIAL APPROVAL OF CLASS ACTION SETTLEMENTS.....	9
A.	THE SETTLEMENT FALLS WITHIN THE RANGE OF REASONABLENESS	10
B.	VALUATION OF PRIMARY CLAIMS ALLEGED.....	11
	1. Missed Meal Breaks	11
	2. Missed Rest Breaks	12
	3. Waiting Time Penalties.....	13
	4. Wage Statement Violations	14
	5. PAGA Penalties	14
	6. Summary.....	15
C.	THE RISK, EXPENSE AND LIKELY DURATION OF FURTHER LITIGATION SUPPORTS SETTLEMENT	17
V.	THE SETTLEMENT MEETS THE STANDARD FOR PROVISIONAL CLASS CERTIFICATION.....	18
A.	THE CLASS IS SUFFICIENTLY NUMEROUS	18
B.	THE CLASS HAS A WELL-DEFINED COMMUNITY OF INTEREST IN QUESTIONS OF LAW AND FACT.....	19
	1. The Class Satisfies the Commonality Element.....	19
	2. Plaintiff Satisfies the Typicality Element.....	21
	3. Plaintiff and His Counsel Satisfy the Adequacy Requirement	22
VI.	THE COURT SHOULD APPROVE THE PROPOSED CLASS NOTICE.....	22
VII.	A FINAL APPROVAL HEARING SHOULD BE SET	23
VIII.	CONCLUSION	23

TABLE OF AUTHORITIES

Cases

<i>Abzug v. Kerkorian</i> , CA-000981 (L.A. Super. Ct., November 1990)	4
<i>Amaral v. Cintas Corp. No. 2</i> , 163 Cal.App.4th 1157 (2008)	13,15
<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591, 117 S.Ct. 2231 (1997)	18,20
<i>Augustus v. ABM Security Services, Inc.</i> , 2 Cal.5th 257 (2016)	4
<i>Barbosa v. Cargill Meat Solutions Corp.</i> , 2013 U.S. Dist. LEXIS 93194 (E.D. Cal. July 1, 2013)	4
<i>BCI Overtime Cases</i> , J.C.C.P. No. 4280 (San Bernardino Super. Ct. 2007)	4
<i>Bell v. Farmers Ins. Exchange</i> , 115 Cal.App.4th 715 (2004)	4
<i>Benton v. Telecom Network Specialists, Inc.</i> , 220 Cal.App.4th 701 (2013)	21
<i>Bluford v. Safeway Stores, Inc.</i> , 216 Cal.App.4th 864 (2013)	21
<i>Blum v. Stenson</i> , 465 U.S. 886 (1984)	5
<i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472, 100 S.Ct. 745 (1980)	5
<i>Boyd v. Bank of Am. Corp.</i> , No. SACV 13-0561-DOC, 2014 WL 6473804 (C.D. Cal. Nov. 18, 2014)	4
<i>Bradley v. Networkers International, LLC</i> , 211 Cal.App.4th 1129 (2012)	21
<i>Brinker Restaurant Corp. v. Superior Court</i> , 53 Cal.4th 1004 (2012)	11,19,21
<i>Cellphone Termination Fee Cases</i> , 186 Cal.App.4th 1380 (2010)	4
<i>Central Railroad & Banking Co. of Georgia v. Pettus</i> , 113 U.S. 116, 5 S.Ct. 387 (1885)	5
<i>Chau v. Starbucks Corp.</i> , 174 Cal.App.4th 688 (2009)	18

1	<i>Churchill Vill., L.L.C. v. GE,</i>	
2	361 F.3d 566 (9th Cir. 2004)	22
3	<i>Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.,</i>	
4	127 Cal.App.4th 387 (2005)	6
5	<i>Cook v. Niedert,</i>	
6	142 F.3d 1004 (7th Cir. 1998)	4
7	<i>County of Suffolk v. Long Island Lighting Co.,</i>	
8	710 F. Supp. 1422 (E.D.N.Y. 1989)	18
9	<i>Daar v. Yellow Cab Co.,</i>	
10	67 Cal.2d 695 (1967)	18
11	<i>Davis v. The Money Store, Inc.,</i>	
12	Case No. 99AS01716 (Sacramento Super. Ct. 2000)	4
13	<i>Day v. NLO,</i>	
14	851 F. Supp. 869 (S.D. Ohio 1994)	21
15	<i>Dennis v. Kellogg Co.,</i>	
16	697 F.3d 858 (9th Cir. 2012)	3
17	<i>Dunk v. Ford Motor,</i>	
18	48 Cal.App.4th 1794 (1996)	9
19	<i>Eisen v. Carlisle & Jacquelin,</i>	
20	417 U.S. 156 (1974)	8,22
21	<i>Estrada v. FedEx Ground Package System, Inc.,</i>	
22	154 Cal.App.4th 1 (2007)	21
23	<i>Faulkinbury v. Boyd & Associates, Inc.,</i>	
24	216 Cal.App.4th 220 (2013)	21
25	<i>Ferguson v. Lieff, Cabraser, Heimann & Bernstein,</i>	
26	30 Cal.4th 1037 (2003)	9,17
27	<i>Finder v. Leprino Foods Co.,</i>	
28	No. 1:13-CV-2059 AWI-BAM, 2015 U.S. Dist. LEXIS 30652 (E.D. Cal. 2015)	14
	<i>Fleming v. Covidien Inc.,</i>	
	2011 WL 7563047 (C.D. Cal. Aug. 12, 2011)	15
	<i>Franklin v. Kayrpo Corp.,</i>	
	884 F.2d 1222 (9th Cir. 1989)	17
	<i>Gay v. Waiters' & Dairy Lunchmen's Union,</i>	
	489 F.Supp. 282 (N.D. Cal. 1980), aff'd 694 F.2d 531 (9th Cir. 1982)	18
	<i>Glass v. UBS Financial Services, Inc.,</i>	
	Not Reported in F. Supp. 2d, 2007 WL 221862 (N.D. Cal. 2007)	4

1	<i>Ghazaryan v. Diva Limousine, Ltd.</i> ,	21
2	169 Cal.App.4th 1524 (2008)	
3	<i>Green v. Obledo</i> ,	10
4	29 Cal.3d 126 (1981)	
5	<i>Gutierrez v. Kovacevich "5" Farms</i> ,	20
6	2004 WL 3745224 (E.D. Cal. Dec. 2, 2004)	
7	<i>Haitz v. Meyer, et al.</i> ,	4
8	No. 572968-3 (Alameda Super. Ct., August 20, 1990)	
9	<i>Haley v. Medtronic, Inc.</i> ,	19
10	169 F.R.D. 643 (C.D. Cal. 1996)	
11	<i>Hanlon v. Chrysler Corp.</i> ,	5,10,19-22
12	150 F.3d 1011 (9th Cir. 1998)	
13	<i>Ibrahimi v. Walgreen</i> ,	4
14	Case No. MSC16-02120 (Contra Costa Super. Ct. 2019)	
15	<i>In re Autozone, Inc. Wage and Hour Litig.</i> ,	13
16	Case No. 3:10-md-021590CRB, 2016 WL 4208200 (N.D. Cal. 2016)	
17	<i>In re California Indirect Purchases</i> ,	4
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19	<i>In re Cipro Cases I and II</i> ,	17
20	121 Cal.App.4th 402 (2004)	
21	<i>In re Consumer Privacy Cases</i> ,	5
22	175 Cal.App.4th 545 (2009)	
23	<i>In re GNC Shareholder Litig.: All Actions</i> ,	7
24	668 F.Supp. 450 (W.D. Pa. 1987)	
25	<i>In re Mego Fin. Corp. Sec. Litig.</i> ,	22
26	213 F.3d 454 (9th Cir. 2000)	
27	<i>In Re Pac. Enter. Sec. Litig.</i> ,	4
28	47 F.3d 373 (9th Cir. 1995)	
	<i>In re United Energy Corp. Sec. Litig.</i> ,	7
	Not Rpt'd in F.Supp., 1989 WL 73211 (C.D. Cal. 1989)	
	<i>In re Warner Comm. Sec. Litig.</i> ,	7
	618 F.Supp. 735 (S.D.N.Y.1985)	
	<i>In re Wells Fargo Loan Processor Overtime Pay Litig.</i> ,	23
	2011 WL 3352460 (N.D. Cal. Aug. 2, 2011)	
	<i>Jones v. Bath & Body Works, Inc.</i> ,	4
	No. 2:13-cv-05206-FMO-AJW (C.D. Cal. July 11, 2016)	

1	<i>Kirby v. Imoos Fire Protection, Inc.</i> ,	
2	53 Cal. 4th 1244 (2012)	13
3	<i>Kullar v. Foot Locker Retail, Inc.</i> ,	
4	168 Cal.App.4th 116 (2008)	10,17
5	<i>Lealao v. Beneficial California</i> ,	
6	82 Cal.App.4th 19 (2000)	5
7	<i>Ling v. P.F. Chang's China Bistro, Inc.</i> ,	
8	245 Cal.App.4th 1242 (2016)	13
9	<i>Linney v. Cellular Alaska P'ship</i> ,	
10	151 F.3d 1234 (9th Cir. 1998)	2
11	<i>Magadia v. Wal-Mart Associates, Inc.</i> ,	
12	384 F.Supp. 1058 (N.D. Cal. 2019)	15
13	<i>Makabi v. Gedalia</i> ,	
14	No. BC468146, (L.A. Super. Ct. May 8, 2013)	15
15	<i>Maldonado v. Epsolon Plastics, Inc.</i> ,	
16	22 Cal.App.5th 1308 (2018)	14
17	<i>Mambuki, et al. v. Securitas Security Services USA, Inc.</i> ,	
18	Case No. 1-05-CV-047499, J.C.C.P. No. 4460	
19	(Santa Clara Super. Ct. 2009)	4
20	<i>Menchyk v. Beverages & More, Inc.</i> ,	
21	Case No. RG 05196918 (Alameda Super. Ct. 2006)	5
22	<i>Michaels Stores Song-Beverly Cases</i> ,	
23	JCCP No. 4684 (S.D. Super. Ct., August 6, 2014)	5
24	<i>Morris v. Lifescan, Inc.</i> ,	
25	54 Fed.Appx. 663 (9th Cir. 2003)	5
26	<i>Mullane v. Central Hanover Bank & Trust Co.</i> ,	
27	339 U.S. 306 (1950)	8
28	<i>Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles</i> ,	
	186 Cal.App.4th 399 (2010)	4
	<i>Naranjo v. Spectrum Security Services, Inc.</i> ,	
	(No. S258966) 40 Cal.App.5 th 444 (2020 Cal.App. LEXIS 167)) (review granted).....	13
	<i>Nordstrom, Inc. Song-Beverly Act Cases</i> ,	
	JCCP No 4651 (L.A. Super. Ct., July 26, 2012)	5
	<i>O'Hara, et al. v. Factory 2-U Stores, Inc.</i> ,	
	Case No. 834123-5 (Alameda Super. Ct. 2002)	5
	<i>Powers v. Eichen</i> ,	
	229 F.3d 1249 (9 th Cir. 2000)	5

1	<i>Prince v. CLS Transportation, Inc.,</i>	
2	118 Cal.App.4th 1320 (2004)	21
3	<i>Quintana v. Claire's Boutiques, Inc.,</i>	
4	No. 5:13-cv-00368-PSG (N.D. Cal. Dec. 1, 2015)	5
5	<i>Rainbow Bus. Solutions v. Merch. Servs.,</i>	
6	2013 U.S. Dist. LEXIS 179288 (N.D. Cal. 2013)	20
7	<i>Rodriguez v. West Publ'g Corp.,</i>	
8	563 F.3d 9483 (9th Cir. 2009)	23
9	<i>Savaglio v. Wal-Mart Stores, Inc.,</i>	
10	Case No. C-835687 (Alameda Super. Ct.).....	18
11	<i>Sav-On Drug Stores, Inc. v. Superior Court,</i>	
12	34 Cal.4th 319 (2004)	19,21
13	<i>Serrano v. Bay Bread LLC,</i>	
14	2016 Cal. Super. LEXIS 8043 (June 29, 2016)	13
15	<i>Serrano v. Priest,</i>	
16	20 Cal.3d 25 (1977)	5
17	<i>Singer v. Becton Dickinson and Co.,</i>	
18	Case No. 08-CV-821-IEG (BLM)	
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20	<i>Slaven v. BP Am., Inc.,</i>	
21	190 F.R.D. 649 (C.D. Cal. 2000)	19
22	<i>Sprague v. Ticonic Nat'l Bank,</i>	
23	307 U.S. 161, 59 S.Ct. 777 (1939)	5
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26	<i>Steiner v. Whittacker Corp.,</i>	
27	CA 000817 (L.A. Super. Ct., March 13, 1989)	5
28	<i>Smith v. Krispy Kreme Doughnut Corp.,</i>	
	Not Rpt'd in F.Supp.2d, 2007 WL 119157 (M.D.N.C. Jan. 10, 2007)	7
	<i>Thurman v. Bayshore Transit Mgmt.,</i>	
	203 Cal.App.4th 1112 (2012)	15
	<i>Tierno v. Rite Aid Corp.,</i>	
	2006 U.S. Dist. LEXIS 71794 (N.D. Cal. Aug. 31, 2006)	20
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4	<i>Willner v. Manpower Inc.</i> , 35 F.Supp.3d 1116 (N.D. Cal. 2014)	13
5	<i>White v. Starbucks Corp.</i> , 497 F.Supp.2d 1080 (N.D. Cal. 2007)	11
6	<i>Young v. Katz</i> , 447 F.2d 4313 (5th Cir. 1971)	17
7	<u>Statutes</u>	
8	Bus. & Prof. Code § 17200 (Unfair Competition Law)	1,20
9	Cal. Civ. Code § 1542.....	8
10	Cal. Civ. Code § 1781.....	9
11	Cal. Civ. Proc. Code § 382	18
12	Cal. Civ. Proc. Code § 384	3
13	Cal. Civ. Proc. Code § 904.1	17
14	Cal. Labor Code §§ 201-203.....	13
15	Cal. Labor Code § 203	7,13,14,20
16	Cal. Labor Code § 226	7,13-16,20
17	Cal. Labor Code § 226.7	1,12,14,20
18	Cal. Labor Code § 512	1,12,20
19	Cal. Labor Code § 2699	passim
20	<u>Rules</u>	
21	California Rules of Court Rule 3.766	8
22	California Rules of Court Rule 3.769(a)	9,10
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This motion seeks preliminary court approval of a \$550,000 settlement fund obtained by plaintiff Brandon Brooks (hereinafter “Representative Plaintiff”) against Argonaut California Ventures, Inc. (“Argonaut” or “Defendant”). Given the modest size of the defendant’s franchise, relatively low wage rate of putative class members, early-stage of litigation and challenges to class certification and liability, the settlement achieved here represents an impressive result which now merits preliminary court approval.¹

II. LITIGATION HISTORY

On February 27, 2020, Representative Plaintiff Brandon Brooks filed a class action Complaint in Butte County Superior Court. In the action, plaintiff Brooks sought individual and class-wide damages and penalties for (1) unlawful failure to pay wages, (2) failure to provide meal and rest periods, (3) failure to provide accurate itemized wage statements, (4) failure to pay wages upon termination, (5) failure to reimburse for business expenses, and (6) violation of the Unfair Competition Law (Bus. & Prof. Code § 17200). Plaintiff Brooks worked for defendant Argonaut as a food service management trainee at Defendant’s KFC-branded facilities in Chico and Oroville, California. As discovered during litigation, the actual class totaled roughly 1,159 workers.

On his own behalf and on behalf of all Argonaut exempt and non-exempt restaurant workers, plaintiff Brooks alleged that the defendant’s policies, lack of proper staffing and other common circumstances prevented him from, *inter alia*, enjoying, timely, full and uninterrupted meal and/or rest breaks. Indeed, the core of his complaint was that these conditions ran afoul of the relevant California Wage Order provisions and Labor Code §§ 226.7 and 512.

Even prior to filing the action, plaintiff’s attorneys at Scott Cole & Associates (“SCA”) were armed with a detailed factual understanding of this defendant’s operations, Plaintiff’s job

¹ A copy of the fully executed Settlement Agreement and Release of Claims (“Agreement”) is attached to the accompanying Declaration of Scott Edward Cole, Esq. (“Cole Decl.”) as Exhibit “A.” Unless otherwise noted, all exhibits cited herein are attached to the Cole Decl.

1 duties and, by extension, the job duties of putative class members. Notably, as a high-profile
2 restaurant chain, much of the sort of information needed for that due diligence investigation was
3 available through a variety of sources online and otherwise. Coupled with that, SCA has
4 prosecuted hundreds of wage and hour class actions, a large percentage of which involving the
5 food service industry. Falling back on this experience, SCA concluded that Mr. Brooks'
6 allegations against Argonaut were likely shared by remaining members of the putative class.

7 After filing the action, the parties engaged in traditional and informal discovery efforts,
8 including the production of documents detailing Defendant's business operations, common
9 policies and procedures, wage rates and payroll information for numerous putative class members.²
10 To be sure, the information available to SCA prior to the ultimate mediation was sufficiently
11 comprehensive to place the parties' attorneys, each of whom are experienced class action litigators,
12 in a position to explore settlement.

13 On August 4, 2020, the parties mediated the matter before experienced neutral, Cynthia
14 Remmers, a mediator with substantial knowledge of California wage and hour law and class-action
15 procedure. At mediation, negotiations were intense and arm's length (lasting roughly 13 hours),
16 ultimately culminating in the settlement agreement accompanying this motion.

17 18 **III. THE SETTLEMENT**

19 **A. THE CLASS**

20 The proposed settlement encompasses a class defined as "all persons employed by
21 Defendants as exempt [and/or] non-exempt food service employees in California on or after
22 February 27, 2016 to the date the Court enters preliminary approval of the Settlement, excluding
23 any such individuals who opt out of this Settlement."
24
25

26 ² In many class actions, informally-exchanged discovery protects a defendant's proprietary and/or financial
27 information and allows a richer and faster exchange of data calculated to determine the settlement value—often putting
28 the parties in a far better settlement position, so long as plaintiff's counsel knows what to ask for. Indeed, although
formal discovery was conducted, it is "not a necessary ticket to the bargaining table." *Linney v. Cellular Alaska P'ship*,
151 F.3d 1234, 1239 (9th Cir. 1998).

B. SETTLEMENT TERMS

Under the proposed non-reversionary³ settlement, the claims of all class members shall be settled for \$550,000, which is inclusive of all individual settlement awards to class members who do not timely opt out (“Settlement Class Members”), the class representative service award, the PAGA allocation, SCA’s fees and costs, and reimbursement of the claims administrator costs. Agreement ¶¶ 10, 11, 29. The settlement amount shall be allocated as follows:

Individual Settlement Awards. The Net Settlement Fund shall be distributed in its entirety to Settlement Class Members. Each Settlement Class Member shall receive his/her respective share thereof, based on his/her number of compensable hours worked during the Settlement Period, divided by the total number of compensable hours worked by all Settlement Class Members during that period.⁴ Defendant shall tender payment of the Gross Settlement Fund to the claims administrator through a two-payment protocol (i.e., one-half payment immediately after the Effective Date and the second one half payment distributed within 90 days thereafter). Settlement checks will remain valid for 180 days after the date of issuance. If a Settlement Class Member does not cash his/her settlement check within 180 days, the uncashed funds shall be transmitted in accordance with CCP § 384(b) to Legal Aid at Work in San Francisco, CA.⁵

Class Representative’s Service Award. Subject to Court approval, plaintiff Brandon Brooks shall be paid a service award not to exceed \$5,000 for his time, risk and effort in bringing the lawsuit, representing the class, and releasing his claims. Agreement ¶ 32. This individual initiated the action and devoted considerable time thereto. This included frequent emails and telephone calls with counsel, production of documents and communications surrounding mediation and settlement. Moreover, this individual risked retaliation (now and in the future) and disruption of his daily work life because he challenged the status quo of these alleged unlawful

³ This amount is non-reversionary, such that no amount will revert back to the defendant, and the employer’s share of payroll taxes shall be funded independently by the company so it does not deplete the settlement proceeds.

⁴ Exhibit “A,” Agreement ¶ 35.

⁵ Exhibit “A,” Agreement ¶ 61. CCP § 384(b) requires that cy pres awards go to organizations that “will benefit the class or similarly situated persons or that promote the law consistent with the objectives and purposes of the underlying cause of action[.]” Between the claims here and Legal Aid at Work there is a “driving nexus,” given that this organization represents “low-wage workers who are victims of wage violations.” *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012); <https://legalaidatwork.org/cy-pres/>.

1 labor practices.⁶ Finally, the proposed service award is reasonable given the minimal impact this
2 amount will have on any Settlement Class Member's level of recovery.

3 Service awards to the lead plaintiffs in class action litigation are commonplace and are
4 "intended to compensate class representatives for work done on behalf of the class, to make up for
5 financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their
6 willingness to act as a private attorney general."⁷ Service awards "are intended to advance public
7 policy by encouraging individuals to come forward and perform their civic duty in protecting the
8 rights of the class and to compensate class representatives for their time, effort and inconvenience
9 ...Federal authority is in accord."⁸

10 Without Representative Plaintiff's courage, the action would never have commenced
11 and/or on such favorable terms. This initiative deserves to be rewarded.⁹ Finally, the proposed
12 service award is fair to other Settlement Class Members because, at less than 0.1% of the Gross
13 Settlement Fund, it will not significantly reduce the settlement funds available to them.

14 Class Counsel's Fees. The settlement provides for an attorneys' fee award of 35% of the
15 settlement amount, a typical percentage in the resolution of common fund cases.¹⁰ SCA has

16
17 ⁶ A declaration illustrating Plaintiff's entitlement to a service award will be submitted at the time of final approval.

18 ⁷ *Cellphone Termination Fee Cases*, 186 Cal.App.4th 1380, 1394 (2010) (approving an incentive award of \$10,000); *see also*, *Bell v. Farmers Ins. Exchange*, 115 Cal.App.4th 715, 725–26 (2004); *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal.App.4th 399, 412 (2010).

19 ⁸ *In re California Indirect Purchases*, 1998 WL 1031494, 11 (Alameda Super. Ct. 1998) (internal citations omitted).

20 ⁹ *See, e.g., Glass v. UBS Financial Services, Inc., Not Reported in F. Supp. 2d*, 2007 WL 221862 at *17 (N.D. Cal. 2007) (approving \$25,000 enhancement awards to four named plaintiffs who "provided a great deal of informal discovery to Class Counsel,"... "a great deal of insight into the policies and practices of UBS [and] ... additional relevant detail at the final fairness hearing") (internal citations omitted); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (approving \$25,000 incentive payment to representative plaintiff); *Van Vranken v. Atlantic Richfield Co.*, 901 F.Supp. 294, 300 (N.D. Cal. 1995) (approving \$50,000 incentive award); *Augustus v. ABM Security Services, Inc.*, 2 Cal.5th 257 (2016) (\$50,000 and \$25,000 service awards for the two primary plaintiffs).

21 ¹⁰ *See, e.g., Abzug v. Kerkorian*, CA-000981 (L.A. Super. Ct., 1990) (45% fee of \$35 million class action settlement); *Barbosa v. Cargill Meat Solutions Corp.*, 2013 U.S. Dist. LEXIS 93194 (E.D. Cal. 2013) (33% fee award of gross fund); *BCI Overtime Cases*, J.C.C.P. No. 4280 (San Bernardino Super. Ct. 2007) (33 1/3% fee award in wage and hour class action); *Boyd v. Bank of Am. Corp.*, No. SACV 13-0561-DOC, 2014 WL 6473804, at *9 (C.D. Cal. 2014) (33 1/3% fee award in wage and hour class action); *Davis v. The Money Store, Inc.*, Case No. 99AS01716 (Sacramento Super. Ct. 2000) (33 1/3 % fee award); *Haitz v. Meyer, et al.*, No. 572968-3 (Alameda Super. Ct., 1990) (45% fee award); *Ibrahimi v. Walgreen*, (Contra Costa Super. Ct. 2019) Case No. MSC16-02120) (35% fee award in wage and hour class action); *In Re Pac. Enter. Sec. Litig.*, 47 F.3d 373, 378-79 (9th Cir. 1995) (affirming attorneys' fee of 33% of the recovery); *Jones v. Bath & Body Works, Inc.*, No. 2:13-cv-05206-FMO-AJW (C.D. Cal. 2016) (33 1/3% fee award in wage and hour class action); *Mambuki, et al. v. Securitas Security Services USA, Inc.*, Case No. 1-05-CV-047499, J.C.C.P. No. 4460 (Santa Clara Super. Ct. 2009) (33 1/3% fee award in wage and hour class action);

devoted numerous hours to and faced significant risk¹¹ in the prosecution of this matter and, more importantly, made an extraordinary fund available given the challenges faced here and the modest claim values—to a large number of otherwise-underrepresented, low paid workers.

The “common fund” method, or “percentage-of-the-benefit” analysis, calculates attorneys’ fees based on a percentage of the common benefit to the class. *In re Consumer Privacy Cases*, 175 Cal.App.4th 545 (2009); *Serrano v. Priest*, 20 Cal.3d 25 (1977). In cases where a common fund has been created—i.e., where each class member will “receive a mathematically ascertainable payment”¹²—California state courts,¹³ the Ninth Circuit¹⁴ and the United States Supreme Court¹⁵ agree that awarding attorneys’ fees as a percentage of the common fund is the proper method.¹⁶

As expressed by the Third Circuit’s Task Force on the Selection of Class Counsel,¹⁷ in Conte and Newberg’s treatise on class actions (“*Newberg*”)¹⁸ and, *inter alia*, in *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984), the rationale for this is commonsensical: in common fund cases, fees are not assessed against the unsuccessful litigant (a.k.a. “fee shifting”), but rather, are taken

Menchyk v. Beverages & More, Inc., Case No. RG 05196918 (Alameda Super. Ct. 2006) (33 1/3% fee award); *Michaels Stores Song-Beverly Cases*, JCCP No. 4684 (S.D. Super. Ct., 2014) (33 1/3% fee award); *Morris v. Lifescan, Inc.* 54 Fed.Appx. 663 (9th Cir. 2003) (affirming 33% fee award); *Nordstrom, Inc. Song-Beverly Act Cases*, JCCP No 4651 (L.A. Super. Ct., 2012) (33% fee award); *O’Hara, et al. v. Factory 2-U Stores, Inc.*, Case No. 834123-5 (Alameda Super. Ct. 2002) (33 1/3% fee award in wage and hour class action); *Quintana v. Claire’s Boutiques, Inc.*, No. 5:13-cv-00368-PSG (N.D. Cal. 2015), Dkt. No. 88 (awarding attorneys’ fees of 33% of fund); *Singer v. Becton Dickinson and Co.*, Case No. 08-CV-821 - IEG (BLM) 2010 U.S. Dist. LEXIS 53416, at *23 (S.D. Cal. 2010) (33 1/3% fee award); *Steiner v. Whittacker Corp.*, CA 000817 (L.A. Super. Ct. 1989) (35% fee award in \$17.75 million class action); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482 (E.D. Cal. 2010) (33 1/3% award in wage and hour class action).

¹¹ SCA undertook this matter solely on a contingent basis, with no guarantee regarding the potential duration of the litigation or even the ultimate reimbursement of fees or costs.

¹² *Vasquez*, 266 F.R.D. 482 at *491 (E.D. Cal. 2010).

¹³ See, fn. 10; *Lealao v. Beneficial California*, 82 Cal.App.4th 19 (2000); *Serrano v. Priest*, 20 Cal.3d 25 (1977).

¹⁴ *Staten v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003); *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000).

¹⁵ The United States Supreme Court has always computed common fund fee awards on a percentage of the fund basis. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 100 S.Ct. 745 (1980); *Central Railroad & Banking Co. of Georgia v. Pettus*, 113 U.S. 116, 5 S.Ct. 387 (1885); *Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161, 59 S.Ct. 777 (1939).

¹⁶ A lodestar approach (enhanced by a multiplier) can be used as an alternative to the common fund theory when “there is no way to gauge the net value of the settlement or any percentage thereof.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998).

¹⁷ See, *Third Circuit Task Force on the Selection of Class Counsel* (Final Report, January 2002), available at <https://www.ca3.uscourts.gov/sites/ca3/files/final%20report%20of%20third%20circuit%20task%20force.pdf>

(recommending that all fee awards in common fund cases be awarded as a percentage of the fund, but that a lodestar analysis continue to be the applicable method for determining statutory fee shifting awards); *Report of the Third Circuit Task Force*, 108 F.R.D. 237, 255 (hardcopy not exhibited here due to length of document).

¹⁸ *Newberg on Class Actions* (5th ed. 2017).

1 from the fund or damage recovery (a.k.a. “fee spreading”). In contrast to the calculation of a
2 statutory fee, payable by the defendant depending on the extent of success achieved, a common
3 fund is itself the measure of success and represents the benchmark from which a fee will be
4 awarded. 5 *Newberg* § 15.53 at 183. Consequently, the analysis in a common fund case focuses
5 not on the plaintiffs’ position as “prevailing parties,” but on a showing that the fund conferring a
6 benefit on the class which resulted from their efforts. *Id.*, § 2.06 at 40.¹⁹

7 Here, SCA harnessed evidence from all available resources, conducted formal and informal
8 discovery and, thereupon, used its skills and experience to negotiate an outstanding result for
9 numerous class members. A common fund doctrine award of fees for that work,²⁰ risks assumed
10 and results is, thus, appropriate.

11 PAGA Allocation. The settlement also provides for a payment of \$7,500 for a release of
12 PAGA claims, 75% of which will be remitted to the LWDA and 25% of which will remain in the
13 Net Settlement Fund.²¹ The \$7,500 allocation for PAGA penalties is reasonable under the
14 circumstances and consistent with PAGA allocations in similar actions.

15 Litigation Expenses. Over the course of this litigation, SCA incurred ordinary litigation
16 costs and (just as with regard to the post-settlement efforts ordinarily attendant to class action
17 work), SCA anticipates incurring additional expenses in overseeing the settlement process, making
18 future appearances, ensuring claims administration compliance with this Court’s orders,
19 responding to Settlement Class Members, CPAs, etc. Although SCA will submit a detailed cost
20 report with its motion for final approval of the settlement, the Agreement caps such costs at
21

22 ¹⁹ The common fund doctrine is “based on the commonsense notion that the ‘one who expends attorneys’ fees in
23 winning a suit which creates a fund from which others derive benefits, may require those passive beneficiaries to bear
24 a fair share of the litigation costs.” *Consumer Cause, Inc. v. Mrs. Gooch’s Natural Food Markets, Inc.*, 127
25 Cal.App.4th 387, 397 (2005) (internal citation omitted); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (“a
26 lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable
27 attorney’s fee from the fund as a whole,” and class members who benefit from a lawsuit “without contributing to its
28 cost are unjustly enriched at the successful litigant’s expense.”).

²⁰ Attorney fee awards in common funds cases are intended to compensate class counsel for work performed both
before and after the date of judgment. In nearly every class action, the efforts during litigation and in pursuing approval
of the settlement are only part of the overall work picture. Post-judgment, class counsel is required to stay in close
contact with the claims administrator to ensure payment of the settlement proceeds, to communicate with class
members, their CPAs, even other attorneys regarding the tax treatment of settlement proceeds, and report compliance
with the terms of the Court’s final approval order thereto.

²¹ Cal. Labor Code § 2699(i).

1 \$15,000. Since the level of such costs are reasonable and served to benefit the class, the Court
2 should approve this capped amount in the Notice.²²

3 Settlement Administration Costs. The settlement administration costs of CPT Group are
4 capped at \$15,000—a very reasonable amount given the size of the class and the work required to
5 send the Notice, process settlement checks, establish a website, and communicate with class
6 members and counsel. The settlement administration costs shall be paid from the Gross Settlement
7 Fund. Agreement ¶¶ 10, 34.

8 Employer's Share of Payroll Taxes. Defendant's share of payroll taxes, including, but not
9 limited to FICA and FUTA, shall be paid separately from the Gross Settlement Fund. Agreement
10 ¶ 40. While many similar settlements allow the employer taxes to be paid from the Gross
11 Settlement Fund, SCA specifically negotiated against that option.

12 Tax Treatment of Individual Settlement Shares. Settlement Class Members' settlement
13 shares will be allocated as 25% wages and 75% interest and statutory penalties for tax purposes.²³
14 This allocation is reasonable given that the majority of the class claims are, arguably, for penalties
15 (See, e.g., Labor Code §§ 203 and 226), not underlying wages. Obviously, this particular tax
16 treatment provides additional monies to these already low-paid workers.

17 18 **C. THE RELEASE**

19 Upon the Effective Date, Settlement Class Members shall release and discharge Defendant
20 from "any and all debts, liabilities, costs, demands, obligations, claims, causes of action, or
21 complaints arising during the Settlement Period that were pled, or which could have been pled
22
23
24

25 ²² *In re United Energy Corp. Sec. Litig.*, Not Rpt'd in F.Supp., 1989 WL 73211, * 6 (C.D. Cal. 1989) ("[a]n attorney
26 who creates or preserves a common fund by judgment or settlement for the benefit of a class is entitled to receive
27 reimbursement of reasonable fees and expenses involved"); 1 Alba Conte, *Attorney Fee Awards* § 2:08 at 50-51 ("The
28 prevailing view is that expenses are awarded in addition to the fee percentage."); *Smith v. Krispy Kreme Doughnut Corp.*, Not Rpt'd in F.Supp.2d, 2007 WL 119157, *3 (M.D.N.C. Jan. 10, 2007); *In re Warner Comm. Sec. Litig.*, 618 F.Supp. 735 (S.D.N.Y.1985); *In re GNC Shareholder Litig.: All Actions*, 668 F.Supp. 450, 452 (W.D. Pa. 1987).

²³ Exhibit "A," Agreement ¶ 41.

1 based on the same facts as pled [in the Complaint].” For unnamed class members,²⁴ a Civil Code
2 § 1542 release applies, but only to those claims. Agreement ¶ 62.

3
4 **D. CLASS NOTICE**

5 Notice is necessary in order to inform class members of the settlement and their options
6 with regard thereto. Within five calendar days of the granting of preliminary approval, Defendant
7 will provide the claims administrator with class members’ names, social security numbers, dates
8 of employment, email addresses, and last known addresses, which the claims administrator will
9 verify and update using the National Change of Address (“NCOA”) Database. Within five business
10 days of receipt of this class member information from Defendant, the claims administrator will
11 disseminate the Notice by first class mail,²⁵ and will establish a website. To avoid unnecessary
12 confusion, maximize their recoveries, and reduce administrative costs, Settlement Class Members
13 will not be required to file a claim form to receive their portion of the settlement.

14 **1. Notice to Class Members**

15 The proposed Notice meets the requirements of CRC Rule 3.766(b).²⁶ The Notice costs
16 will be included in the settlement administration expenses to be paid from the Gross Settlement
17 Fund.²⁷ A notice sent by mail to class members’ last known addresses, accompanied by reasonable
18 attempts to locate class members where those notices are returned as undeliverable, is sufficient to
19 ensure due process. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950);
20 *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-76 (1974). Finally, the contents of the Notice
21 soundly comply with CRC Rule 3.766(d) insofar as it provides information on the meaning and
22 nature of the settlement, its key provisions, how payments will be calculated, the amounts of SCA’s
23 attorneys’ fees and costs, the service award, the date, time, and place of the final fairness hearing,
24 and the procedures and deadlines for requesting exclusion from and/or objecting to the settlement.

25
26 ²⁴ In exchange for his option of receiving a service award, the Representative Plaintiff agreed to a § 1542 release of
27 all potential claims (whether pled or not). Exhibit “A,” Agreement ¶ 63.

28 ²⁵ Exhibit “A,” Agreement ¶ 47.

²⁶ Exhibit “B,” Notice of Settlement of Class Action Lawsuit.

²⁷ Exhibit “A,” Agreement ¶¶ 10, 34.

2. Exclusions and Objections

Class members will have 45 calendar days (or 10 calendar days after the date the Notices are re-mailed after having been returned as undeliverable) to opt out or object. Class members who wish to exclude themselves or “*opt out*” of the settlement must submit a signed, written request therefor to the claims administrator by the response deadline. Agreement ¶¶ 51, 53, 59. A class member wishing to *object* must submit a written objection thereto describing why the objector believes the settlement is unfair and whether the objector intends to appear at the final approval hearing. Agreement ¶ 54. Class members who submit a timely objection will have a right to appear at the final approval hearing to have their objections heard by the Court.

IV. JUDICIAL APPROVAL OF CLASS ACTION SETTLEMENTS

A class action may not be dismissed, compromised, or settled without the approval of the Court. Cal. Civ. Code § 1781(f); California Rules of Court (“CRC”) Rule 3.769(a); Fed. R. Civ. P. 23(e). The commonly accepted procedure calls for: (1) preliminary approval of the proposed settlement at an informal hearing, (2) notice to class members of the proposed settlement and of their rights with respect thereto, and (3) a formal hearing on the fairness of the proposed settlement, at which members of the class may be heard concerning their support for or objection to the settlement, also known as a final approval hearing or “final fairness” hearing. *Manual for Complex Litigation* § 21.63 at 447-50 (4th ed. 2004).

The Court has discretion to approve a proposed settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224 (2001). Its decision will only be reversed upon a showing there was “a clear abuse of discretion.” *Id.*; *Dunk v. Ford Motor*, 48 Cal.App.4th 1794, 1802 (1996). The policy under California law, however, favors and encourages settlement of class actions. *Ferguson v. Lieff, Cabraser, Heimann & Bernstein*, 30 Cal.4th 1037, 1054 (2003) (acknowledging the “overriding public policy favoring settlement of class actions”). The purpose of the Court’s preliminary evaluation of the proposed settlement is to (1) determine whether it is within the “range of possible approval” (4 *Newberg* § 13.13 at 311) and to (2) provisionally certify the proposed settlement class (4 *Newberg* § 13.12 at 305) in order to facilitate dissemination of the Notice—

1 which outlines the key settlement terms—to the class members and apprises them of the date and
2 time of the final approval hearing. *Manual for Complex Litigation* (4th ed. 2004) (“MCL”) § 21.63;
3 CRC Rule 3.769(e). Representative Plaintiff requests the Court take the first step and grant
4 preliminary approval of the settlement.

5
6 **A. THE SETTLEMENT FALLS WITHIN THE RANGE OF**
7 **REASONABLENESS**

8 At the preliminary approval stage, a proposed settlement is *presumed* to be fair when (1) it
9 is reached through arm’s-length negotiations, (2) the putative class is represented by experienced
10 counsel, and (3) the parties have conducted sufficient investigation or discovery. *Wal-Mart Stores,*
11 *Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005).²⁸ As previously discussed, this settlement
12 is the result of an arm’s-length transaction, reached through mediation before an experienced
13 neutral. Moreover, SCA has vast experience in similar litigation--having litigated hundreds of
14 wage and hour class actions.²⁹ Finally, as detailed above, the presence of significant formal and
15 informal discovery produced by Defendant is more than “sufficient investigation” to warrant
16 preliminary approval of this settlement.

17 Second, in determining whether the settlement is *actually* within the range of fairness,
18 courts consider additional factors such as the strength of the plaintiff’s case, the risk, expense,
19 complexity and likely duration of further litigation, the risk of maintaining class action status
20 throughout trial, the amount offered in settlement, and the experience and views of counsel.
21 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (1998); *Kullar v. Foot Locker Retail, Inc.*, 168
22 Cal.App.4th 116 (2008). Each of these factors illustrates the reasonableness of the settlement here.
23 SCA calculated Defendant’s potential exposure if all of the class claims were proven at trial but
24 discounted the theoretical maximum recovery to account for inherent risks such as the denial of
25 class certification and the possible success of Defendant’s defenses at the liability phase.

26 ²⁸ This Motion occasionally cites federal case law and commentaries thereon which construe authority for
27 conditional class certification and settlement approval in California courts. The California Supreme Court has
28 authorized and urged California’s trial courts to use federal resources for guidance in considering class issues. *Vasquez*
v. Superior Court, 4 Cal.3d 800, 821 (1971); *Green v. Obledo*, 29 Cal.3d 126, 145-46 (1981).

²⁹ Cole Decl. ¶ 19-23; Exhibit “C,” SCA’s Professional Resume.

B. VALUATION OF PRIMARY CLAIMS ALLEGED

1. Missed Meal Breaks

The allegation that Defendant deprived class members of meal and rest periods was the driving force of this litigation. However, as the company's policies exhibited, Argonaut had taken a variety of steps to adopt and enforce compliant meal and rest break policies by the time this case was filed. Indeed, SCA all but conceded this fact, and yet, maintained that the violations stemmed more from scheduling practices (versus a *per se* noncompliant policy) whereby many workers were required to remain "on-duty" during their breaks, an inadequate labor budget to consistently permit employee coverage during breaks and/or that workers were uninformed as to what constituted a valid break to begin with.

Despite Representative Plaintiff's allegations, however, the arguable lack of a *per se* violative policy presented significant challenges to class certification, as did Defendant's argument that this class of workers served at various locations, under (at least, potentially) varying degrees and styles of management oversight.³⁰ And, even if the Court certified the class (or a subclass thereof), Defendant would undoubtedly argue it need only make breaks *available* and that it had no obligation to *ensure* that breaks were actually taken. *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012); *White v. Starbucks Corp.*, 497 F.Supp.2d 1080 (N.D. Cal. 2007).

Nevertheless, based on SCA's analysis of the available payroll records, it was determined that the number of pay period in which meal periods could be missed was as high as 24,400. Using this information and data provided by Defendant, an average (weighted) hourly wage of \$11.63, and assuming a violation every worker worked a full time shift five days per week, every week, the liability exposure possible for this claim could exceed \$3 million over the period since February 2016. This recovery number is, of course, based on a variety of assumptions, none of which

³⁰ While Representative Plaintiff's position that liability and premium wages due for missed meal and rest periods could be determined using representative sampling, Defendant would certainly attack any proposed methodology and argue the class issues to be unmanageable. What's more, turning to damages, few, if any, records were available which demonstrated meal or rest period violations, making damages calculations difficult. This quantification, however, would be Representative Plaintiff's burden.

1 Defendant has agreed to, on schedules for this largely part time workforce that would be unrealistic
2 (i.e., that every worker worked every day for eight full hours), and on the assumption that all
3 elements of this claim could be proven (as well as its frequency) at trial.

4 Indeed, perhaps the most questionable assumption is that roughly 10-11 potential meal
5 periods per pay cycle (i.e., a violation every single working day) were actually “missed,” not to
6 mention represent a “violation” of Labor Code §512. Given that class members would rarely have
7 made or kept independent records of whether they took complaint breaks, it is likely that many, if
8 not the vast majority, of any breaks missed would be, in fact, punch-in/punch-out errors or class
9 member neglect in punching in/out at all. That, and given the generally unsophisticated approach
10 by entry-level workers to diligent timekeeping, it is very likely that many workers simply took
11 their breaks without punching out properly or notifying management when they left for a break.
12 And, in other situations, it is likely that many class members were afforded the chance for a break
13 but simply elected not to take one for any one of myriad reasons. These challenges—and the
14 paucity of records to demonstrate the violations—reveals that a substantial discount off SCA’s
15 original damages estimate was appropriate.

16 **2. Missed Rest Breaks**

17 As discussed above, the risk of losing class certification, proof of compliant policies and
18 aggressive enforcement measures means SCA was also compelled to deeply discount its rest break
19 damages analysis. Using the same data points enumerated above and based upon its investigation,
20 the liability exposure possible for missed rest periods could also exceed \$3 million. Again,
21 however, none of the assumptions supporting this estimate were conceded by Defendant and, for
22 all the reasons set forth above (e.g., whether these were actually “missed” breaks, a lack of
23 independent record-keeping), it is suspect if even a substantial percentage of these occurrences
24 could constitute violations of § 226.7. Add to these uncertainties the fact that employers may
25 require workers to stay on-premises during rest periods, and it becomes even more evident why
26 many workers may simply have chosen not to take off-duty rest breaks. Given all this, the
27 resolution achieved represents an excellent result for the class.
28

3. Waiting Time Penalties

The strongest claims in this case were the meal and rest break claims, neither of which *conclusively* generates a “wage” to which a Labor Code § 203 claim could be tethered. The California Court of Appeal stated, *arguably in dicta*, that a meal break violation under Labor Code § 226.7 cannot support a “waiting time penalty” under Labor Code § 203. *Ling v. P.F. Chang’s China Bistro, Inc.*, 245 Cal.App.4th 1242, 1261 (2016); *Serrano v. Bay Bread LLC*, 2016 Cal. Super. LEXIS 8043 at *22 (June 29, 2016) (no published California case holds contrary to *Ling*); *Kirby v. Imoos Fire Protection, Inc.*, 53 Cal. 4th 1244 (2012) (failure to pay meal and rest period premiums cannot trigger waiting time penalties); *but see, In re Autozone, Inc. Wage and Hour Litig.*, Case No. 3:10-md-021590CRB, 2016 WL 4208200 at **6-7 (N.D. Cal. Aug. 10, 2016) (meal period payments constitute “wages,” thus, supporting Labor Code §§ 201-203 claims).

More recently, the California Supreme Court has granted review³¹ in *Naranjo v. Spectrum Security Services, Inc.* (No. S258966) 40 Cal.App.5th 444 (2020 Cal.App. LEXIS 167), to tackle the question of whether a rest break violation supports an additional penalty under Labor Code § 203 and/or 226 or if this would constitute “penalties on penalties.” Finally, Defendant would contend that Representative Plaintiff could not show the requisite “willful[ness]” under § 203. *Willner v. Manpower Inc.*, 35 F.Supp.3d 1116, 1131 (N.D. Cal. 2014); *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1203-04 (2008) (holding the employer did not willfully fail to pay wages under Labor Code § 203 even though the class prevailed on the merits on the underlying claim).

Based on a typical eight-hour workday, on records showing that over 900 class members were “severed” employees, and that their average (weighted) hourly wage was \$11.63, Defendant’s liability could reach as high as \$2.5 million for waiting time penalties. Given the state of the law, and that an unrealistic full eight-hour workday was used to calculate this penalty for all severed workers, the value of this claim was discounted *significantly*.

³¹ Should the trial court stay the instant litigation, pending the Supreme Court’s review of *Naranjo*, payments to class members would be further delayed.

4. Wage Statement Violations

Although some federal court decisions have held break premiums under Labor Code § 226.7 can support a wage statement penalty under Labor Code § 226(e), there are no published California state court decisions issuing a similar holding. *Maldonado v. Epsiolon Plastics, Inc.*, 22 Cal.App.5th 1308, 1337 (2018) (meal and rest claims cannot support a class-wide claim for inaccurate wage statements); *Finder v. Leprino Foods Co.*, No. 1:13-CV-2059 AWI-BAM, 2015 U.S. Dist. LEXIS 30652, at *1 (E.D. Cal. March 12, 2015). In light of the California authority explaining that a violation of Labor Code § 226.7 cannot support a § 203 waiting time penalty, the same logic may apply to § 226 wage statement penalties, making those entirely unrecoverable in this litigation. Had this matter not settled, Argonaut would have certainly argued this, as well as contended Representative Plaintiff cannot establish an “injury” resulting from Argonaut’s “knowing and intentional failure” to furnish wage statements (i.e., that included premium pay for missed breaks). Cal. Lab. Code § 226(e)(1).

Under § 226, class members may recover \$50.00 for the initial violation and \$100.00 for each subsequent violation. Based on data provided by Defendant and subsequent analysis thereof by SCA, class members stood to potentially recover \$2.4 million if they fully prevailed on these claims at trial. Given the numerous elements Representative Plaintiff would be required to demonstrate, and anticipating Argonaut’s “penalties on penalties” argument, SCA’s “reality check” and, thus, significant discount to the potential value of this claim, was appropriate. What’s more, this analysis assumes the penalties for all class members would never have reached the § 226 cap of \$4,000—although numerous workers stayed with the company beyond the tipping point where their aggregated per-pay-period penalties would have reached that cap.

5. PAGA Penalties

Representative Plaintiff also alleged that Defendant’s conduct created liability under the Labor Code Private Attorneys’ General Act (“PAGA”). PAGA claims are extraordinarily difficult to evaluate because there are several obstacles to the actual award of the civil penalty. First, it is arguably unclear whether penalties continue to accrue until the court finds a violation to exist. Second, Labor Code § 2699(e)(1) and (2) give trial courts immense discretion to access or lower

1 the penalty amount.³² Indeed, several courts have exercised their broad discretion and have
2 dramatically limited PAGA awards.³³ Third, defendants routinely argue that, when other statutory
3 penalties have been imposed, additional penalties under PAGA are unjust (e.g., in cases where
4 damages are already “in play” based on underlying wage violation claims, as we have here).

5 Thus, while the PAGA calculation herein for approximately 24,400 pay periods could
6 reach \$2.4 million (i.e., a calculation identical here to the one for § 226 penalties), the likelihood
7 of that sum ever being awarded, or anything even close to it, is extremely slim. Despite this
8 potential recovery, given that PAGA penalties would likely be deemed duplicative of other
9 penalties awardable here, given the extreme “haircuts” many courts are giving to PAGA penalties,
10 and given the presence here of class action allegations (the absence of which often being the reason
11 so-called “Plan B” PAGA penalties are sought to begin with), PAGA penalties were significantly
12 discounted.

13 6. Summary

14 In sum, assuming (liability and class certification) success on each of the claims, at the
15 level hoped for by Representative Plaintiff, the claims could be as high as:

HIGHEST “STARTING PLACE” VALUATIONS					
Meal Breaks	Rest Breaks	Waiting Time	Wage Statements	PAGA	TOTAL
~\$3M	~\$3M	~\$2.5	~\$2.4M	~\$2.4M	~\$12.8M

16
17
18
19
20 However, based on SCA’s conversations with the named plaintiff, knowledge of
21 workflows and typical conditions within the fast food restaurant industry (with which SCA has
22

23 ³² Cal. Labor Code § 2699(e)(2) (courts have discretion to deny or significantly reduce PAGA penalties, particularly
24 when the prescribed award would be “unjust, arbitrary and oppressive, or confiscatory.”)

25 ³³ See e.g., *Fleming v. Covidien Inc.*, 2011 WL 7563047, at *3-4 (C.D. Cal. Aug. 12, 2011) (invoking § (e)(2) and
26 reducing PAGA penalty award from \$2.8 million to \$500,000); *Makabi v. Gedalia*, No. BC468146, (L.A. Super. Ct.
27 May 8, 2013) (trial court invoked § (e)(2) and declined to apply any PAGA penalties, despite finding that defendants
28 violated PAGA); *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157 (2008) (approving reduction of penalty amount
to one-third of the damages award even though there was “no evidence that Cintas [did] not entertain a good faith
belief that the LWO did not apply to workers in Plaintiffs’ position”); *Thurman v. Bayshore Transit Mgmt.*, 203
Cal.App.4th 1112, 1135-36 (2012) (reducing penalty amount by 30% where “defendants took their obligations under
Wage Order No. 9 seriously and attempted to comply with the law); *Magadia v. Wal-Mart Associates, Inc.*, 384
F.Supp. 1058 (N.D. Cal. 2019).

1 vast experience), and analysis of Defendant's meal and rest break policies, a number of deductions
2 would be appropriate from those totals, due to:

3 Meal/Rest Periods: Many workers worked below the threshold number of hours for meal
4 or rest period entitlements, worked less than five days per week, and only missed breaks (when
5 they did) out of choice or mis-punches. More likely, one to two violations per pay period is more
6 realistic.

7 Waiting Time Penalties: If not all workers had meal/rest period violations to begin with,
8 worked less than 8 hours per day, the starting place for this penalty analysis needs to be discounted.

9 Wage Statement Penalties: For the same reasons as those supporting a Waiting Time
10 Penalty reduction, the top end/potential §226 penalty level should be reduced, even before a
11 liability analysis for them begins.

12 PAGA: The penalties only apply if a predicate violation applies, which it oftentimes likely
13 would not. Given that, the starting place for a PAGA analysis should be reduced.

14 Thus, *before even considering the likelihood of recovering these damages/penalties*, the
15 analysis would look more like this:

REALISTIC "STARTING PLACE" VALUATIONS					
Meal Breaks	Rest Breaks	Waiting Time	Wage Statements	PAGA	TOTAL
~\$500K	~\$500K	~\$750K	~\$750K	~\$500K	~\$3M

16
17
18
19
20
21 Indeed, while, on its face, the total damages and penalties available to class members under
22 either scenario are certainly higher than the settlement amount, so were the risks and delays
23 inherent in protracted litigation. And further litigation wouldn't necessarily have tipped the scales
24 in favor of either party since (a) significant discovery was already available to them and, as in all
25 litigation, (2) both good and bad facts would inevitably have come to light for each side. What is
26 certain, however, is that Argonaut would have fought the action very aggressively, thereby
27 delaying the benefits now available through settlement to class members for quite some time.³⁴ As

28 ³⁴ Note that *Augustus* was filed in 2005 and not resolved until 2017—*12 years after its inception*.

1 a result, the extraordinary result of a *non-reversionary* \$550,000.00 fund is more than reasonable
2 when balanced against the risks of continued litigation.

3
4 **C. THE RISK, EXPENSE AND LIKELY DURATION OF FURTHER
LITIGATION SUPPORTS SETTLEMENT**

5 In evaluating for fairness, the Court should weigh the benefits of settlement against the
6 expense and delay involved in achieving an equivalent or even more favorable result at trial. *Young*
7 *v. Katz*, 447 F.2d 431, 433 (5th Cir. 1971); *Kullar*, 168 Cal.App.4th 116 (2008). As California
8 jurists have recognized, there exists “an overriding public policy favoring settlement of class
9 actions.” *Ferguson v. Lieff, Cabraser, Heimann & Bernstein*, 30 Cal.4th 1037, 1054 (2003) (citing
10 *Franklin v. Kayrpo Corp.*, 884 F.2d 1222, 1229 (9th Cir. 1989) (“public policy favor[s] the
11 compromise and settlement of disputes”)). The alternative to a class action, namely, numerous
12 individual actions, could tax private and judicial resources for years. Given the relatively modest,
13 though not inconsequential, amount of damages Settlement Class Members allegedly incurred, it
14 would be uneconomical even for those with the resources to secure individual legal representation.
15 Here, however, the settlement provides *all* Settlement Class Members, regardless of their means,
16 the opportunity of monetary recovery in a prompt and efficient manner, without the risk of the
17 Court denying class certification and these workers potentially recovering nothing at all.

18 SCA considered that, even if Representative Plaintiff prevailed on both class certification
19 and liability, the process could be lengthy and costly, potentially including appeals. As with most
20 complex litigation, wage and hour class action certification rarely ends with a certification ruling.
21 Class action defendants may seek a writ of mandate from an order granting class certification. *See*,
22 Cal. Code Civ. Proc. § 904.1; *In re Cipro Cases I and II*, 121 Cal.App.4th 402, 409 (2004), and
23 subsequent decertification is often sought. Moreover, the losing party often takes an appeal after
24 disposition of liability and/or damages. Even a successful judicial resolution at the trial court level
25 can be just the beginning of a lengthy, expensive process, stalling payments to class members for
26 years.³⁵ This judicial purgatory is compounded by the risk of an adverse appellate ruling, which

27
28 ³⁵ Consider, for example, the plight of the employee-class members in *Savaglio v. Wal-Mart Stores, Inc.*, Case No. C-835687 (Alameda Super. Ct.). Following four years of litigation and a four-month jury trial, in 2005, a \$172 million

1 would remand the action to the trial court for further litigation, possibly with negative precedent.³⁶
2 As such, the complexity, expense, and delay of continued litigation supports approval of this
3 settlement.

4
5 **V. THE SETTLEMENT MEETS THE STANDARD FOR PROVISIONAL CLASS**
6 **CERTIFICATION**

7 Prior to obtaining class certification, the parties to a class action suit may appropriately
8 negotiate a proposed settlement. *Wershba*, 91 Cal.App.4th at 240. When the class has not been
9 certified prior to settlement—as here—the parties may stipulate that a defined class be conditionally
10 certified for settlement purposes only. *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp.
11 1422, 1425 (E.D.N.Y. 1989). However, the traditional prerequisites for certification are used to
12 determine whether conditional certification of the proposed class should be granted. *Amchem*
13 *Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997).³⁷ This case satisfies these elements for
14 purposes of conditional certification.

15
16 **A. THE CLASS IS SUFFICIENTLY NUMEROUS**

17 For class certification, CCP § 382 requires the parties be “numerous [and it be]
18 impracticable to bring them all before the court....” *Daar v. Yellow Cab Co.*, 67 Cal.2d 695, 704
19 (1967); *Gay v. Waiters’ & Dairy Lunchmen’s Union*, 489 F.Supp. 282 (N.D. Cal. 1980), *aff’d* 694
20 F.2d 531 (9th Cir. 1982). Here, the class consists of approximately 1,159 employees, which is
21 sufficiently numerous. With this workforce size, joinder of all class members would be
22 impracticable and the relatively small value of each individual claim makes it unlikely individual
23

24
25 verdict was entered against Wal-Mart on behalf of over 116,000 class members. Those aggrieved employees, however,
26 did not receive any remuneration until 2011, more than five years later.

26 ³⁶ See, e.g., *Chau v. Starbucks Corp.*, 174 Cal.App.4th 688 (2009) (appellate court reversed an \$86 million
27 restitution award to a certified class of hourly employees).

27 ³⁷ A pre-certification settlement may stipulate that a defined class be conditionally certified for settlement purposes.
28 This enables the defendant to get the benefit of a final judgment binding on all class members without conceding
certification should the court disapprove the settlement. Weil & Brown., Cal. Prac. Guide: Civ. Pro. Before Trial (The
Rutter Group 2015) ¶ 14:139, *et seq.*

workers would pursue relief absent class certification, diminishing the prospect that joinder is a feasible alternative. Class members can easily be identified through Defendant's records.

B. THE CLASS HAS A WELL-DEFINED COMMUNITY OF INTEREST IN QUESTIONS OF LAW AND FACT

The "community of interest" requirement requires: (1) predominant common questions of law or fact, (2) class representatives whose claims or defenses are typical of the class, and (3) class representatives who adequately represent the class. *Brinker*, 53 Cal.4th at 1021.

1. The Class Satisfies the Commonality Element

The first prong of the test (i.e., predominant common questions of law or fact) is met so long as common questions are likely to arise in the action and the theory of recovery is "amenable to class treatment." *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319, 327 (2004).³⁸ The class members' claims in this action stem from Defendant's alleged uniform practice of short-staffing, failing to provide "rovers" to cover for class members during their meal and rest periods, and Defendant's commitment of full-time staffing to its clients. Representative Plaintiff contended these alleged practices undermined Argonaut's otherwise compliant break policies.

Moreover, arguably, class members' duties did not vary significantly, nor did their actual experiences. During this class period, Defendant's policies and procedures changed little, and Argonaut required all class members to adhere to them. Not only do class members thus share common policies on paper, SCA's investigation revealed they were treated as a homogenous group. Given the uniform nature of class members' job duties, Defendant's policies and procedures, and the fact that working conditions were common, this case is suitable for class treatment. Allowing adjudication of these claims on a class basis would be superior³⁹ to letting

³⁸ Borrowing from federal authority, FRCP Rule 23 applies a permissive standard to demonstrate common questions of law or fact. *Hanlon*, 150 F.3d at 1011 (9th Cir. 1998) (emphasizing the "minimal" requirements and "permissive" interpretation of Rule 23(a)(2)). The presence of merely one common issue of law or fact is sufficient. *Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 648 (C.D. Cal. 1996); *Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 655 (C.D. Cal. 2000).

³⁹ Even manageability issues will not foreclose certification for settlement purposes. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231 (1997) ("Confronted with a request for settlement-only class certification, [the] court need not inquire whether the case, if tried, would present intractable manageable problems [citations omitted], for the proposal is that there be no trial.").

individual claims from transient, low-income workers, which would be less efficient and lead to a waste of resources and potentially inconsistent results. Indeed, the following common questions of law and fact, among others, flow logically from the practices detailed above:

- Whether Defendant violated each of the elements of Labor Code §§ 203, 226, 226.7 and 512 (the primary claims);
- Whether failing to pay and record meal and rest period premiums on employees' pay stubs was a violation of Labor Code § 226;
- Whether a violation of §§ 226.7 and/or 512 supports penalties under §§ 203 and/or 226;
- To what degree class members' job duties were common;
- How Defendant communicated its meal and rest break policies to class members;
- How Defendant scheduled workers, including use of common timekeeping and/or advanced schedules;
- What duties (including remaining "on call") workers were expected to perform while, ostensibly, on breaks;
- Whether Defendant violated Business and Professions Code § 17200, *et seq.* by engaging in unfair, unlawful and/or fraudulent business practices;
- Whether Defendant's labor budgets led class members to, essentially, remain "on duty" at all times during their respective shifts; and
- Whether the class is entitled to PAGA penalties, and, if so, in what amount.

Given the host of common questions of law and fact, the commonality requirement is satisfied. *Hanlon*, at 1019-20; *Gutierrez v. Kovacevich "5" Farms*, 2004 WL 3745224, at *5 (E.D. Cal. Dec. 2, 2004) (finding commonality satisfied where plaintiffs presented common questions of whether defendants failed to pay plaintiffs for all time worked); *Rainbow Bus. Solutions v. Merch. Servs.*, 2013 U.S. Dist. LEXIS 179288, *15 (N.D. Cal. 2013) (shared legal issues with divergent factual predicates sufficient for class certification); *Tierno v. Rite Aid Corp.*, 2006 U.S. Dist. LEXIS 71794 (N.D. Cal. Aug. 31, 2006) (certifying a wage and hour class of retail store managers based on a common evaluation process).

Following the California Supreme Court’s seminal decision in *Brinker*, courts are routinely certifying these types of claims.⁴⁰ Starting with *Brinker*, California courts have repeatedly affirmed that “a uniform policy, and that policy, measured against wage order requirements, allegedly violated the law—*is by its nature* a common question eminently suited for class treatment.” *Brinker*, 53 Cal.4th at 1033 (emphasis added). And, post-*Brinker*, courts are routinely reversing denials of certification when a common policy is the central issue. *Bradley v. Networkers International, LLC*, 211 Cal.App.4th 1129 (2012); *Faulkinbury v. Boyd & Associates, Inc.*, 216 Cal.App.4th 220 (2013); *Benton v. Telecom Network Specialists, Inc.*, 220 Cal.App.4th 701 (2013); *Bluford v. Safeway Stores, Inc.*, 216 Cal.App.4th 864 (2013). The evidence here shows sufficient commonality to justify class treatment for settlement purposes.⁴¹

2. Plaintiff Satisfies the Typicality Element

The second prong (i.e., typicality) is met when the class representative has claims or defenses typical of the class. *Sav-On*, 34 Cal.4th at 326. Here, typicality is met because the Representative Plaintiff’s claims arise from the same facts and are based on the same legal theories as those applicable to the class as a whole, yet those claims “need not be substantially identical.” *Sav-On*, 34 Cal.4th at 326; *Hanlon*, 150 F.3d at 1020. In deciding whether individual variations preclude typicality, the focus should be on the behavior of the defendants. *Day v. NLO*, 851 F. Supp. 869, 884 (S.D. Ohio 1994). The Representative Plaintiff alleges the denial of meal and rest periods, seek to champion precisely those claims for the remaining class members, and worked in the same or similar positions, under the same policies and procedures.

3. Plaintiff and His Counsel Satisfy the Adequacy Requirement

Under the third prong, class members are adequately represented if the named plaintiff and its counsel (1) do not have conflicts of interest with class members and (2) will prosecute the case

⁴⁰ *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal.App.4th 1524, 1538 (2008) (wage and hour claims “routinely proceed as class actions”); *Prince v. CLS Transportation, Inc.*, 118 Cal.App.4th 1320, 1329 (2004); *Estrada v. FedEx Ground Package System, Inc.*, 154 Cal.App.4th 1, 14 (2007).

⁴¹ Particularly in the settlement context, class resolution is superior to other available methods for the fair and efficient adjudication of the controversy. Indeed, the alternative methods of resolution are individual suits for relatively small amounts or individual arbitration. These claims “would prove uneconomic for potential plaintiffs” because “litigation costs would dwarf potential recovery.” *Hanlon*, 150 F.3d at 1023.

1 vigorously for the class. *Hanlon*, 150 F.3d at 1020.⁴² Here, there is no conflict of interest between
2 Representative Plaintiff (or his attorneys) and the remaining class members. Even if there were
3 such a conflict in a certain instance, any class member may “opt-out” of the class. Finally, SCA
4 has significant experience in wage and hour class action litigation and is routinely appointed class
5 counsel in cases alleging precisely these issues.⁴³ Thus, SCA and its client clearly have the
6 motivation and ability to litigate this class action had a fair settlement not been obtained.

7 8 VI. THE COURT SHOULD APPROVE THE PROPOSED CLASS NOTICE

9 Adequate notice is critical to court approval of a class settlement. *Hanlon*, 150 F.3d at
10 1025. The threshold requirement concerning the sufficiency of class notice is whether the means
11 employed to distribute the notice is reasonably calculated to apprise the class of the pendency of
12 the action, of the proposed settlement, and of class members’ rights to opt out or object. *Eisen*, 417
13 U.S. at 173-74 (1974). Notice is satisfactory if it “generally describes the terms of the settlement
14 in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and
15 be heard.” *Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 575 (9th Cir. 2004).

16 As detailed above the Notice is written in simple, straightforward language that, among
17 other things, includes: (1) basic information about the action, (2) a description of the benefits
18 provided by settlement, (3) an explanation of how class members can obtain benefits under the
19 settlement, (4) an explanation of how class members can exercise their right to object to the
20 settlement, (5) an explanation that any claims against Defendants that could have been litigated in
21 this action will be released if the class member does not request exclusion from the settlement, (6)
22 the names of Class Counsel and information regarding the requested attorneys’ fees and expenses
23 and Representative Plaintiff’s service award, (7) the Final Approval Hearing date, (8) an
24 explanation of eligibility for appearing at the Final Approval Hearing, and (9) contact information
25 to obtain additional information. Ex. B. Since the Notice provides class members with sufficient
26

27 ⁴² Notably, mere divergence of opinion between the class and its representatives is not sufficient to constitute a
28 conflict. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000).

⁴³ Cole Decl. ¶¶ 19-23; Exhibit “C,” SCA’s Professional Resume.

1 information to make an informed and intelligent decision about the settlement, it satisfies all due
2 process requirements. *In re Wells Fargo Loan Processor Overtime Pay Litig.*, 2011 WL 3352460,
3 at *4 (N.D. Cal. Aug. 2, 2011); *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 963 (9th Cir. 2009)
4 (where class notice communicated the essentials of the proposed settlement in a sufficiently
5 balanced, accurate, and informative way, it satisfied due process concerns).

6
7 **VII. A FINAL APPROVAL HEARING SHOULD BE SET**

8 The final step in the settlement approval process is a final fairness hearing at which the
9 Court may hear all evidence and arguments necessary to make its evaluation regarding the
10 settlement. *MCL* § 21.63 at 318. Representative Plaintiff requests the Court set a final approval
11 hearing at a time convenient for the Court, roughly 85 calendar days after preliminary approval.

12
13 **VIII. CONCLUSION**

14 For the reasons set forth above, Representative Plaintiff respectfully requests that the Court
15 (1) grant preliminary settlement approval, (2) approve the content and plan for distribution of the
16 Notice, (3) appoint class counsel, representative plaintiff and a claims administrator, (4)
17 conditionally certifying the class, and (5) schedule a Final Approval Hearing.

18
19 Dated: August 25, 2020

SCOTT COLE & ASSOCIATES, APC

20
21 By:

22 Scott Edward Cole, Esq
23 Attorneys for Representative Plaintiff,
24 Aggrieved Employees and the Plaintiff Class
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