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ELECTRONICALLY FILED
Merced Superior Court
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Clerk of the Superior Court
By: Tawn Saepanh, Deputy

14 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **IN AND FOR THE COUNTY OF MERCED**

16 SHANA WRIGHT individually, and on
17 behalf of all others similarly situated,
18
19 Plaintiff,
20
21 vs.
22
23 WINGANOMICS, INC. d.b.a.
24 WINGSTOP, *et al.*,
25
26 Defendants.

Case No. 20CV-00657

CLASS ACTION

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

Date: October 19, 2021
Time: 9:00 a.m.
Dept.: 8
Judge: Hon. Brian McCabe

27 **NOTICE OF MOTION**

28 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, NOTICE IS**
HEREBY GIVEN that, at 9:00 a.m. on October 19, 2021, or as soon thereafter as the matter may
be heard in Department 8 of the above-entitled Court, located at 627 West 21st Street, Merced,
CA 95340, Representative Plaintiff Shana Wright, 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) appointing

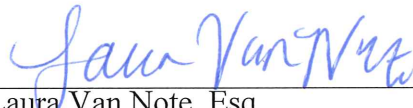
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1 class counsel, (4) appointing the class representative, (5) appointing a settlement claims
2 administrator, (6) approving the class notice, and (7) setting a hearing date for final settlement
3 approval.

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: October 1, 2021

COLE & VAN NOTE

9
10 By: 
11 Laura Van Note, Esq.
12 Attorneys for Representative Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This motion seeks preliminary court approval of a \$1,500,000 settlement fund obtained by plaintiff Shana Wright (hereinafter “Representative Plaintiff”) against Winganomics, Inc. d.b.a. Wingstop, Jason Khan, Right Swing, Inc. d.b.a. Wingstop, Wingman and Associates, Inc. d.b.a. Wingstop, Wing or Lose, Inc. d.b.a. Wingstop, All I Do Is Wing, Inc. d.b.a. Wingstop, Winging is Everything d.b.a. Wingstop, The Wingman Company d.b.a. Wingstop, King of the Wing, Inc. d.b.a. Wingstop, Spread Your Wings, Inc. d.b.a. Wingstop, Wing Life, Inc. d.b.a. Wingstop, Wingcraft, Inc. d.b.a. Wingstop, Winging Is A Habit, Inc. d.b.a. Wingstop, Wingology, Inc. d.b.a. Wingstop, Wing Me Over, Inc. d.b.a. Wingstop, Paul Conway, Aamir Khan, Johnzeb Khan, Nagina Khan, Nargis Khan, Michael James Ryan, and/or James Toal, and/or Does 1 through 100, inclusive (“Wingstop” or “Defendants”). 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 7, 2020, Representative Plaintiff Shana Wright filed a class action Complaint in Merced County Superior Court (*Wight I*).² In the *Wight I* action, plaintiff Wright 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, and (4) violation of the Unfair Competition Law (Bus. & Prof. Code § 17200).³ On May 5, Plaintiff filed her First Amended Complaint adding a cause of action under the Private Attorneys’ General Act.⁴ Through discovery and further investigation, Plaintiff identified additional entities which she

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.

² Cole Decl. ¶ 2.

³ Cole Decl. ¶ 2.

⁴ Cole Decl. ¶ 3.

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1 alleges are the employers and/or joint employers of Plaintiff and the putative class.⁵ On April 1,
2 2021, Plaintiff filed a new complaint in Merced County Superior Court *Wright v. Right Swing, et*
3 *al.*, Case No. 21CV-01074 (*Wright II*) alleging similar claims as pled in the *Wright I* action.⁶ On
4 or about September 1, 2021, Plaintiff filed a Consolidated Complaint to include both the *Wright I*
5 and *Wright II* actions.⁷

6 Plaintiff Wright worked for defendant Winganomics in various capacities, including as a
7 cashier and shift supervisor at Defendants' Wingstop-branded facilities in California.⁸ As
8 discovered during litigation, the putative class totaled roughly 1,682 workers.⁹

9 On her own behalf and on behalf of all Wingstop non-exempt restaurant workers, Plaintiff
10 Wright alleged that Defendants' policies, lack of proper staffing and other common circumstances
11 prevented her from, *inter alia*, enjoying, timely, full and uninterrupted meal and/or rest breaks.¹⁰
12 Indeed, the core of her complaint was that these conditions ran afoul of the relevant California
13 Wage Order provisions and Labor Code §§ 226.7 and 512.¹¹

14 Even prior to filing the action, Plaintiff's attorneys at Cole & Van Note ("CVN") were
15 armed with a detailed factual understanding of Defendants' operations, Plaintiff's job duties and,
16 by extension, the job duties of putative class members.¹² Notably, as a high-profile restaurant
17 chain, much of the sort of information needed for that due diligence investigation was available
18 through a variety of sources online and otherwise.¹³ Coupled with that, CVN has prosecuted
19 hundreds of wage and hour class actions, a large percentage of which have involved the food
20 service industry.¹⁴ Falling back on this experience, CVN concluded that Ms. Wright's allegations
21 against Defendants were likely shared by remaining members of the putative class.¹⁵
22

23 ⁵ Cole Decl. ¶ 3.
24 ⁶ Cole Decl. ¶ 3.
25 ⁷ Cole Decl. ¶ 3.
26 ⁸ Cole Decl. ¶ 4.
27 ⁹ Cole Decl. ¶ 4.
28 ¹⁰ Cole Decl. ¶ 5.
¹¹ Cole Decl. ¶ 5.
¹² Cole Decl. ¶ 6.
¹³ Cole Decl. ¶ 6.
¹⁴ Cole Decl. ¶ 6.
¹⁵ Cole Decl. ¶ 6.

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1 After filing the action, the parties engaged in traditional and informal discovery efforts,
2 including the production of documents detailing Defendants’ business operations, common
3 policies and procedures, wage rates and payroll information for numerous putative class
4 members.¹⁶ The parties attended mediation with Hon. Richard Kramer (Ret.) initially on August
5 26, 2020.¹⁷ At that time, the parties were unable to reach an agreement to resolve the case.¹⁸ After
6 the first mediation session, CVN conducted additional investigation including further interviews
7 of class members, dozens of public records requests, and further formal discovery.¹⁹ To be sure,
8 the information available to CVN prior to the ultimate (second) mediation was sufficiently
9 comprehensive to place the parties’ attorneys, each of whom are experienced class action litigators,
10 in a position to explore settlement.²⁰

11 On April 28, 2021, the parties mediated the matter again before Hon. Richard Kramer
12 (Ret.).²¹ At mediation, negotiations were intense and arm’s length (lasting roughly 13 hours),
13 ultimately culminating in the settlement agreement accompanying this motion.²²

14
15 **III. THE SETTLEMENT**

16 **A. THE CLASS**

17 The proposed settlement encompasses a class defined as “all current and former non-
18 exempt employees who worked at any time for Defendants’, or any of them, in California from
19 February 7, 2016 through the date of Preliminary Approval.”²³

20
21
22
23 ¹⁶ Cole Decl. ¶ 7. In many class actions, informally-exchanged discovery protects a defendant’s proprietary and/or
24 financial information and allows a richer and faster exchange of data calculated to determine the settlement value—
often putting 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).

25 ¹⁷ Cole Decl. ¶ 8.

26 ¹⁸ Cole Decl. ¶ 8.

27 ¹⁹ Cole Decl. ¶ 8.

28 ²⁰ Cole Decl. ¶ 8.

²¹ Cole Decl. ¶ 9.

²² Cole Decl. ¶ 9.

²³ Settlement Agreement ¶ 13.

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B. SETTLEMENT TERMS

Under the proposed non-reversionary²⁴ settlement, the claims of all class members shall be settled for \$1,500,000, which is the maximum amount and final all-in total amount that shall be paid by Defendants to resolve this action, 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, CVN’s fees and costs, and reimbursement of the claims administrator costs. 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 workweeks during the Settlement Period, divided by the total number of compensable weeks worked by all Settlement Class Members during that period.²⁵ Defendants shall tender payment of the Gross Settlement Fund to the claims administrator on or before the Effective Date.²⁶ 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 to the California State Controller Unclaimed Property fund.²⁷

Class Representative’s Service Award. Subject to Court approval, plaintiff Shana Wright shall be paid a service award not to exceed \$7,500 for her time, risk and effort in bringing the lawsuit, representing the class, and releasing her claims. Ms. Wright 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, Ms. Wright risked retaliation (now and in the future) and disruption of her daily work life because she challenged the status quo of these alleged unlawful labor practices.²⁸ Finally, the proposed

²⁴ This amount is non-reversionary, such that no amount will revert back to the defendants, and the employer’s share of payroll taxes shall be funded independently by the company, so it does not deplete the settlement proceeds.

²⁵ Settlement Agreement ¶ 5.

²⁶ Settlement Agreement ¶ 28.

²⁷ Settlement Agreement ¶ 65.

²⁸ A declaration illustrating Plaintiff’s entitlement to a service award will be submitted at the time of final approval.

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1 service award is reasonable given the minimal impact this amount will have on any Settlement
2 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."²⁹ 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."³⁰

10 Without Representative Plaintiff's courage, the action would never have commenced. This
11 initiative deserves to be rewarded.³¹ Finally, the proposed service award is fair to other Settlement
12 Class Members because it will not significantly reduce the settlement funds available to them.

13 Class Counsel's Fees. The settlement provides for an attorneys' fee award of 35% of the
14 settlement amount or Five Hundred Twenty-Five Thousand Dollars and no cents (\$525,000.00), a
15 typical percentage in the resolution of common fund cases.³² CVN has devoted numerous hours to

16 ²⁹ *Cellphone Termination Fee Cases*, 186 Cal.App.4th 1380, 1394 (2010) (approving an incentive award of
17 \$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).

18 ³⁰ *In re California Indirect Purchases*, 1998 WL 1031494, 11 (Alameda Super. Ct. 1998) (internal citations
omitted).

19 ³¹ *See, e.g., Glass v. UBS Financial Services, Inc., Not Reported in F. Supp. 2d*, 2007 WL 221862 at *17 (N.D. Cal.
20 2007) (approving \$25,000 enhancement awards to four named plaintiffs who "provided a great deal of informal
21 discovery to Class Counsel,"... "a great deal of insight into the policies and practices of UBS [and] ... additional
22 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).

23 ³² *See, e.g., Abzug v. Kerkorian*, CA-000981 (L.A. Super. Ct., 1990) (45% fee of \$35 million class action
24 settlement); *Barbosa v. Cargill Meat Solutions Corp.*, 2013 U.S. Dist. LEXIS 93194 (E.D. Cal. 2013) (33% fee award
25 of gross fund); *BCI Overtime Cases*, J.C.C.P. No. 4280 (San Bernardino Super. Ct. 2007) (33 1/3% fee award in wage
26 and hour class action); *Boyd v. Bank of Am. Corp.*, No. SACV 13-0561-DOC, 2014 WL 6473804, at *9 (C.D. Cal.
27 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
28 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);
Menchyk v. Beverages & More, Inc., Case No. RG 05196918 (Alameda Super. Ct. 2006) (33 1/3% fee award);

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and faced significant risk³³ 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”³⁴—California state courts,³⁵ the Ninth Circuit³⁶ and the United States Supreme Court³⁷ agree that awarding attorneys’ fees as a percentage of the common fund is the proper method.³⁸

As expressed by the Third Circuit’s Task Force on the Selection of Class Counsel,³⁹ in Conte and Newberg’s treatise on class actions (“*Newberg*”)⁴⁰ 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 from the fund or damage recovery (a.k.a. “fee spreading”). In contrast to the calculation of a

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).

³³ CVN 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.

³⁴ *Vasquez*, 266 F.R.D. 482 at *491 (E.D. Cal. 2010).

³⁵ See, fn. 10; *Lealao v. Beneficial California*, 82 Cal.App.4th 19 (2000); *Serrano v. Priest*, 20 Cal.3d 25 (1977).

³⁶ *Staten v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003); *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000).

³⁷ 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).

³⁸ 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).

³⁹ 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).

⁴⁰ *Newberg on Class Actions* (5th ed. 2017).

1 statutory fee, payable by the defendant depending on the extent of success achieved, a common
2 fund is itself the measure of success and represents the benchmark from which a fee will be
3 awarded. 5 *Newberg* § 15.53 at 183. Consequently, the analysis in a common fund case focuses
4 not on the plaintiffs' position as "prevailing parties," but on a showing that the fund conferring a
5 benefit on the class which resulted from their efforts. *Id.*, § 2.06 at 40.⁴¹

6 Here, CVN harnessed evidence from all available resources, conducted formal and
7 informal significant discovery and, thereupon, used its skills and experience to negotiate an
8 outstanding result for numerous class members. A common fund doctrine award of fees for that
9 work,⁴² risks assumed, and results is, thus, appropriate.

10 PAGA Allocation. The settlement also provides for a payment of \$20,000 for a release of
11 PAGA claims, 75% of which will be remitted to the LWDA and 25% of which will remain in the
12 Net Settlement Fund.⁴³ The \$20,000 allocation for PAGA penalties is reasonable under the
13 circumstances and consistent with PAGA allocations in similar actions.

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

21
22 ⁴¹ 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.").

⁴² 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.

⁴³ Cal. Labor Code § 2699(i).

1 served to benefit the class, the Court should approve this capped amount in the Notice.⁴⁴ As noted
2 below, the parties have also agreed upon the amount of attorneys' fees Plaintiff's counsel is
3 seeking.

4 Settlement Administration Costs. The settlement administration costs of CPT Group are
5 capped at \$15,000—a very reasonable amount given the size of the class and the work required to
6 send the Notice, process settlement checks, establish a website, and communicate with class
7 members and counsel. The settlement administration costs shall be paid from the Gross Settlement
8 Fund.⁴⁵

9 Employer's Share of Payroll Taxes. Defendants' share of payroll taxes, including, but not
10 limited to FICA and FUTA (i.e., the employers' share of the payroll taxes), shall be paid separately
11 from the Gross Settlement Fund.⁴⁶ While many similar settlements allow the employer taxes to be
12 paid from the Gross Settlement Fund, CVN specifically negotiated against that option.

13 Tax Treatment of Individual Settlement Shares. Settlement Class Members' settlement
14 shares will be allocated as 15% wages and 85% interest and statutory damages for tax purposes.⁴⁷
15

16 C. THE RELEASE

17 Upon the Effective Date, Settlement Class Members shall release and discharge
18 Defendants from "any and all debts, liabilities, costs, demands, obligations, claims, causes of
19 action, or complaints arising during the Settlement Period that were pled, or which could have
20 been pled based on the same facts as pled [in the Complaint]."

24 ⁴⁴ *In re United Energy Corp. Sec. Litig., Not Rpt'd in F.Supp.*, 1989 WL 73211, * 6 (C.D. Cal. 1989) ("[a]n attorney
25 who creates or preserves a common fund by judgment or settlement for the benefit of a class is entitled to receive
26 reimbursement of reasonable fees and expenses involved"); 1 Alba Conte, *Attorney Fee Awards* § 2:08 at 50-51 ("The
27 prevailing view is that expenses are awarded in addition to the fee percentage."); *Smith v. Krispy Kreme Doughnut*
28 *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).

⁴⁵ Settlement Agreement ¶¶ 10, 34.

⁴⁶ Settlement Agreement ¶ 40.

⁴⁷ Settlement Agreement ¶ 40.

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1 **D. CLASS NOTICE**

2 Notice is necessary in order to inform class members of the settlement and their options

3 with regard thereto. Within ten (10) calendar days of the granting of preliminary approval,

4 Defendants will provide the claims administrator with class members’ names, social security

5 numbers, dates of employment,⁴⁸ and last known addresses, which the claims administrator will

6 verify and update using the National Change of Address (“NCOA”) Database. Within seven (7)

7 calendar⁴⁹ days of receipt of this class member information from Defendants, the claims

8 administrator will disseminate the Notice by first class mail and will establish a website. To avoid

9 unnecessary confusion, maximize their recoveries, and reduce administrative costs, Settlement

10 Class Members will not be required to file a claim form to receive their portion of the settlement.

11 **1. Notice to Class Members**

12 The proposed Notice meets the requirements of CRC Rule 3.766(b). The Notice costs will

13 be included in the settlement administration expenses to be paid from the Gross Settlement Fund.

14 A notice sent by mail to class members’ last known addresses, accompanied by reasonable

15 attempts to locate class members where those notices are returned as undeliverable, is sufficient to

16 ensure due process. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950);

17 *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-76 (1974). Finally, the contents of the Notice

18 soundly comply with CRC Rule 3.766(d) insofar as it provides information on the meaning and

19 nature of the settlement, its key provisions, how payments will be calculated, the amounts of

20 CVN’s attorneys’ fees and costs, the service award, the date, time, and place of the final fairness

21 hearing, and the procedures and deadlines for requesting exclusion from and/or objecting to the

22 settlement.

23 **2. Exclusions and Objections**

24 Class members will have 45 calendar days to opt out or object.⁵⁰ Those Class Members

25 who receive a re-mailed Class Notice will have the latter of (i) an additional fifteen (15) days or

26

27 ⁴⁸ Settlement Agreement ¶ 51.

28 ⁴⁹ Settlement Agreement ¶ 50.

⁵⁰ Settlement Agreement ¶ 55-57.

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1 (ii) the Response Deadline to opt out of the Settlement.⁵¹ With the exception of claims for PAGA
2 penalties as there is no ability to opt out of a PAGA suit, Class members who wish to exclude
3 themselves or “*opt out*” of the settlement must submit a signed, written request therefor to the
4 claims administrator by the response deadline. A class member wishing to *object* must submit a
5 written objection thereto describing why the objector believes the settlement is unfair and whether
6 the objector intends to appear at the final approval hearing. Class members who submit a timely
7 objection will have a right to appear at the final approval hearing to have their objections heard by
8 the Court.
9

10 **IV. JUDICIAL APPROVAL OF CLASS ACTION SETTLEMENTS**

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

19 The Court has discretion to approve a proposed settlement. *Wershba v. Apple Computer,*
20 *Inc.*, 91 Cal.App.4th 224 (2001). Its decision will only be reversed upon a showing there was “a
21 clear abuse of discretion.” *Id.*; *Dunk v. Ford Motor*, 48 Cal.App.4th 1794, 1802 (1996). The policy
22 under California law, however, favors and encourages settlement of class actions. *Ferguson v.*
23 *Lieff, Cabraser, Heimann & Bernstein*, 30 Cal.4th 1037, 1054 (2003) (acknowledging the
24 “overriding public policy favoring settlement of class actions”). The purpose of the Court’s
25 preliminary evaluation of the proposed settlement is to (1) determine whether it is within the “range
26 of possible approval” (4 *Newberg* § 13.13 at 311) and to (2) provisionally certify the proposed
27

28 ⁵¹ Settlement Agreement ¶ 55.

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1 settlement class (4 *Newberg* § 13:12 at 305) in order to facilitate dissemination of the Notice–
2 which outlines the key settlement terms–to the class members and apprises them of the date and
3 time of the final approval hearing. *Manual for Complex Litigation* (4th ed. 2004) (“*MCL*”) § 21.63;
4 CRC Rule 3.769(e). Representative Plaintiff requests the Court take the first step and grant
5 preliminary approval of the settlement.

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

9 At the preliminary approval stage, a proposed settlement is *presumed* to be fair when (1) it
10 is reached through arm’s-length negotiations, (2) the putative class is represented by experienced
11 counsel, and (3) the parties have conducted sufficient investigation or discovery. *Wal-Mart Stores,*
12 *Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005).⁵² As previously discussed, this settlement
13 is the result of an arm’s-length transaction, reached through mediation (after two sessions) before
14 an experienced neutral. Moreover, CVN has vast experience in similar litigation--having litigated
15 hundreds of wage and hour class actions.⁵³ Finally, as detailed above, the presence of significant
16 formal and informal discovery produced by Defendants is more than “sufficient investigation” to
17 warrant preliminary approval of this settlement.

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

26 ⁵² 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).

⁵³ Cole Decl. ¶ 19-23; Exhibit “C” CVN’s Professional Resume.

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1 discounted the theoretical maximum recovery to account for inherent risks such as the denial of
2 class certification and the possible success of Defendants’ defenses at the liability phase.

3

4 **B. VALUATION OF PRIMARY CLAIMS ALLEGED**

5 **1. Missed Meal Breaks**

6 The allegation that Defendants deprived class members of meal and rest periods was the
7 driving force of this litigation.⁵⁴ However, as the company’s policies exhibited, Winganomics, Inc.
8 had taken a variety of steps to adopt and enforce compliant meal and rest break policies by the
9 time this case was filed.⁵⁵ Indeed, CVN all but conceded this fact, and yet, maintained that
10 the violations stemmed more from scheduling practices (versus a *per se* noncompliant policy)
11 whereby many workers were required to remain “on-duty” during their breaks, an inadequate labor
12 budget to consistently permit employee coverage during breaks and/or that workers were
13 uninformed as to what constituted a valid break to begin with.⁵⁶

14 Despite Representative Plaintiff’s allegations, however, the arguable lack of a *per se*
15 violative policy presented significant challenges to class certification, as did Defendants’ argument
16 that this class of workers served at various locations, under (at least, potentially) varying degrees
17 and styles of management oversight.⁵⁷ And, even if the Court certified the class (or a subclass
18 thereof), Defendants would undoubtedly argue it need only make breaks *available* and that it had
19 no obligation to *ensure* that breaks were actually taken. *Brinker Restaurant Corp. v. Superior*
20 *Court*, 53 Cal.4th 1004 (2012); *White v. Starbucks Corp.*, 497 F.Supp.2d 1080 (N.D. Cal. 2007).

21 Nevertheless, based on CVN’s analysis of the available payroll records, it was determined
22 that the number of pay periods in which meal periods could be missed was as high as 21,593.⁵⁸

23

24 ⁵⁴ Cole Decl. ¶ 15.a.

25 ⁵⁵ Cole Decl. ¶ 15.a.

26 ⁵⁶ Cole Decl. ¶ 15.a.

27 ⁵⁷ While Representative Plaintiff’s position that liability and premium wages due for missed meal and rest periods
28 could be determined using representative sampling, Defendants 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.

⁵⁸ Cole Decl. ¶ 15.a.

1 Using this information and data provided by Defendants, an average (weighted) hourly wage of
2 \$13.00, and assuming a violation every time a worker worked a full time shift five days per week,
3 every week, the liability exposure possible for this claim could exceed \$2.5 million over the period
4 since February 2016.⁵⁹ This recovery number is, of course, based on a variety of assumptions, none
5 of which Defendants have agreed to, on schedules for this largely part time workforce that would
6 be unrealistic (i.e., that every worker worked every day for eight full hours), and on the assumption
7 that all elements of this claim could be proven (as well as its frequency) at trial.⁶⁰

8 Indeed, perhaps the most questionable assumption is that roughly 10 potential meal periods
9 per pay cycle (i.e., a violation every single working day) were actually “missed,” not to mention
10 represent a “violation” of Labor Code §512.⁶¹ Given that class members would rarely have made
11 or kept independent records of whether they took complaint breaks, it is likely that many, if not
12 the vast majority, of any breaks missed would be, in fact, punch-in/punch-out errors or class
13 member neglect in punching in/out at all.⁶² That, and given the generally unsophisticated approach
14 by entry-level workers to diligent timekeeping, it is very likely that many workers simply took
15 their breaks without punching out properly or notifying management when they left for a break.⁶³
16 And, in other situations, it is likely that many class members were afforded the chance for a break
17 but simply elected not to take one for any one of myriad reasons.⁶⁴ These challenges—and the
18 paucity of records to demonstrate the violations—reveals that a substantial discount off CVN’s
19 original damages estimate was appropriate.⁶⁵

20 **2. Missed Rest Breaks**

21 As discussed above, the risk of losing class certification, proof of compliant policies and
22 aggressive enforcement measures means CVN was also compelled to deeply discount its rest break
23 damages analysis. Using the same data points enumerated above and based upon its investigation,
24

25 ⁵⁹ Cole Decl. ¶ 15.a.

26 ⁶⁰ Cole Decl. ¶ 15.a.

27 ⁶¹ Cole Decl. ¶ 15.a.

28 ⁶² Cole Decl. ¶ 15.a.

⁶³ Cole Decl. ¶ 15.a.

⁶⁴ Cole Decl. ¶ 15.a.

⁶⁵ Cole Decl. ¶ 15.a.

1 the liability exposure possible for missed rest periods could also exceed \$2.5 million. Again,
2 however, none of the assumptions supporting this estimate were conceded by Defendants and, for
3 all the reasons set forth above (e.g., whether these were actually “missed” breaks, a lack of
4 independent record-keeping), it is suspect if even a substantial percentage of these occurrences
5 could constitute violations of § 226.7. Add to these uncertainties the fact that employers may
6 require workers to stay on-premises during rest periods, and it becomes even more evident why
7 many workers may simply have chosen not to take off-duty rest breaks. Given all this, the
8 resolution achieved represents an excellent result for the class.⁶⁶

9 3. Waiting Time Penalties

10 The strongest claims in this case were the meal and rest break claims, neither of which
11 *conclusively* generates a “wage” to which a Labor Code § 203 claim could be tethered. The
12 California Court of Appeal stated, *arguably in dicta*, that a meal break violation under Labor Code
13 § 226.7 cannot support a “waiting time penalty” under Labor Code § 203. *Ling v. P.F. Chang’s*
14 *China Bistro, Inc.*, 245 Cal.App.4th 1242, 1261 (2016); *Serrano v. Bay Bread LLC*, 2016 Cal.
15 Super. LEXIS 8043 at *22 (June 29, 2016) (no published California case holds contrary to *Ling*);
16 *Kirby v. Imoos Fire Protection, Inc.*, 53 Cal. 4th 1244 (2012) (failure to pay meal and rest period
17 premiums cannot trigger waiting time penalties); *but see, In re Autozone, Inc. Wage and Hour*
18 *Litig.*, Case No. 3:10-md-021590CRB, 2016 WL 4208200 at **6-7 (N.D. Cal. Aug. 10, 2016)
19 (meal period payments constitute “wages,” thus, supporting Labor Code §§ 201-203 claims).

20 More recently, the California Supreme Court has granted review⁶⁷ in *Naranjo v. Spectrum*
21 *Security Services, Inc.* (No. S258966) 40 Cal.App.5th 444 (2020 Cal.App. LEXIS 167), to tackle
22 the question of whether a rest break violation supports an additional penalty under Labor Code §
23 203 and/or 226 or if this would constitute “penalties on penalties.” Finally, Defendants would
24 contend that Representative Plaintiff could not show the requisite “willful[ness]” under § 203.
25 *Willner v. Manpower Inc.*, 35 F.Supp.3d 1116, 1131 (N.D. Cal. 2014); *Amaral v. Cintas Corp. No.*
26

27 ⁶⁶ Cole Decl. ¶ 15.b.

28 ⁶⁷ Should the trial court stay the instant litigation, pending the Supreme Court’s review of *Naranjo*, payments to
class members would be further delayed.

1 2, 163 Cal.App.4th 1157, 1203-04 (2008) (holding the employer did not willfully fail to pay wages
2 under Labor Code § 203 even though the class prevailed on the merits on the underlying claim).

3 Based on a typical eight-hour workday, on records showing that over 1,254 class members
4 were “severed” employees, and that their average (weighted) hourly wage was \$13.00,
5 Defendants’ liability could reach as high as \$3.9 million for waiting time penalties. Given the state
6 of the law, and that an unrealistic full eight-hour workday was used to calculate this penalty for all
7 severed workers, the value of this claim was discounted *significantly*.⁶⁸

8 4. Wage Statement Violations

9 Although some federal court decisions have held break premiums under Labor Code §
10 226.7 can support a wage statement penalty under Labor Code § 226(e), there are no published
11 California state court decisions issuing a similar holding. *Maldonado v. Epsilon Plastics, Inc.*, 22
12 Cal.App.5th 1308, 1337 (2018) (meal and rest claims cannot support a class-wide claim for
13 inaccurate wage statements); *Finder v. Leprino Foods Co.*, No. 1:13-CV-2059 AWI-BAM, 2015
14 U.S. Dist. LEXIS 30652, at *1 (E.D. Cal. March 12, 2015). In light of the California authority
15 explaining that a violation of Labor Code § 226.7 cannot support a § 203 waiting time penalty, the
16 same logic may apply to § 226 wage statement penalties, making those entirely unrecoverable in
17 this litigation. Had this matter not settled, Defendants would have certainly argued this, as well as
18 contended Representative Plaintiff cannot establish an “injury” resulting from Defendants’
19 “knowing and intentional failure” to furnish wage statements (i.e., that included premium pay for
20 missed breaks). Cal. Lab. Code § 226(e)(1).

21 Under § 226, class members may recover \$50.00 for the initial violation and \$100.00 for
22 each subsequent violation. Based on data provided by Defendants and subsequent analysis thereof
23 by CVN, class members stood to potentially recover \$1.3 million if they fully prevailed on these
24 claims at trial. Given the numerous elements Representative Plaintiff would be required to
25 demonstrate, and anticipating Defendants’ “penalties on penalties” argument, CVN’s “reality
26 check” and, thus, significant discount to the potential value of this claim, was appropriate. What’s
27

28 ⁶⁸ Cole Decl. ¶ 15.c.

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1 more, this analysis assumes the penalties for all class members would never have reached the §
2 226 cap of \$4,000—although numerous workers stayed with the company beyond the tipping point
3 where their aggregated per-pay-period penalties would have reached that cap.⁶⁹

4 **5. PAGA Penalties**

5 Representative Plaintiff also alleged that Defendants’ conduct created liability under the
6 Labor Code Private Attorneys’ General Act (“PAGA”). PAGA claims are extraordinarily difficult
7 to evaluate because there are several obstacles to the actual award of the civil penalty. First, it is
8 arguably unclear whether penalties continue to accrue until the court finds a violation to exist.
9 Second, Labor Code § 2699(e)(1) and (2) give trial courts immense discretion to access or lower
10 the penalty amount.⁷⁰ Indeed, several courts have exercised their broad discretion and have
11 dramatically limited PAGA awards.⁷¹ Third, Defendants routinely argue that, when other statutory
12 penalties have been imposed, additional penalties under PAGA are unjust (e.g., in cases where
13 damages are already “in play” based on underlying wage violation claims, as we have here).

14 Thus, while the PAGA calculation herein for approximately 14,416 pay periods could
15 reach \$1.3 million, the likelihood of that sum ever being awarded, or anything even close to it, is
16 extremely slim. Despite this potential recovery, given that PAGA penalties would likely be deemed
17 duplicative of other penalties awardable here, given the extreme “haircuts” many courts are giving
18 to PAGA penalties, and given the presence here of class action allegations (the absence of which
19 often being the reason so-called “Plan B” PAGA penalties are sought to begin with), PAGA
20 penalties were significantly discounted.⁷²

21
22 ⁶⁹ Cole Decl. ¶ 15.d.

23 ⁷⁰ Cal. Labor Code § 2699(e)(2) (courts have discretion to deny or significantly reduce PAGA penalties, particularly
when the prescribed award would be “unjust, arbitrary and oppressive, or confiscatory.”)

24 ⁷¹ See e.g., *Fleming v. Covidien Inc.*, 2011 WL 7563047, at *3-4 (C.D. Cal. Aug. 12, 2011) (invoking § (e)(2) and
25 reducing PAGA penalty award from \$2.8 million to \$500,000); *Makabi v. Gedalia*, No. BC468146, (L.A. Super. Ct.
26 May 8, 2013) (trial court invoked § (e)(2) and declined to apply any PAGA penalties, despite finding that defendants
violated PAGA); *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157 (2008) (approving reduction of penalty amount
27 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
28 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).

⁷² Cole Decl. ¶ 15.e.

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6. Summary

In sum, assuming (liability and class certification) success on each of the claims, at the 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
~\$2.5M	~\$2.5M	~\$3.9	~\$1.3M	~\$1.3M	~\$11.5M

However, based on CVN’s conversations with the named plaintiff, knowledge of workflows and typical conditions within the fast food restaurant industry (with which CVN has vast experience), and analysis of Defendants’ meal and rest break policies, a number of deductions would be appropriate from those totals, due to:

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

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

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

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

Thus, *before even considering the likelihood of recovering these damages/penalties*, the analysis would look more like this.⁷³

REALISTIC “STARTING PLACE” VALUATIONS

⁷³ Cole Decl. ¶ 16-18.

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Meal Breaks	Rest Breaks	Waiting Time	Wage Statements	PAGA	TOTAL
~\$250K	~\$500K	~\$250K	~\$500K	~\$500K	~\$2M

Indeed, while, on its face, the total damages and penalties available to class members under either scenario are certainly higher than the settlement amount, so were the risks and delays inherent in protracted litigation. And further litigation wouldn’t necessarily have tipped the scales in favor of either party since (a) significant discovery was already available to them and, as in all litigation, (2) both good and bad facts would inevitably have come to light for each side. What is certain, however, is that Defendants would have fought the action very aggressively, thereby delaying the benefits now available through settlement to class members for quite some time.⁷⁴ As a result, the extraordinary result of a *non-reversionary* \$1,500,000.00 fund is more than reasonable when balanced against the risks of continued litigation.

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

In evaluating for fairness, the Court should weigh the benefits of settlement against the expense and delay involved in achieving an equivalent or even more favorable result at trial. *Young v. Katz*, 447 F.2d 431, 433 (5th Cir. 1971); *Kullar*, 168 Cal.App.4th 116 (2008). As California jurists have recognized, there exists “an overriding public policy favoring settlement of class actions.” *Ferguson v. Lieff, Cabraser, Heimann & Bernstein*, 30 Cal.4th 1037, 1054 (2003) (citing *Franklin v. Kayrpo Corp.*, 884 F.2d 1222, 1229 (9th Cir. 1989) (“public policy favor[s] the compromise and settlement of disputes”)). The alternative to a class action, namely, numerous individual actions, could tax private and judicial resources for years. Given the relatively modest, though not inconsequential, amount of damages Settlement Class Members allegedly incurred, it would be uneconomical even for those with the resources to secure individual legal representation. Here, however, the settlement provides *all* Settlement Class Members, regardless of their means,

⁷⁴ Note that *Augustus* was filed in 2005 and not resolved until 2017—*12 years after its inception*.

1 the opportunity of monetary recovery in a prompt and efficient manner, without the risk of the
2 Court denying class certification and these workers potentially recovering nothing at all.

3 CVN considered that, even if Representative Plaintiff prevailed on both class certification
4 and liability, the process could be lengthy and costly, potentially including appeals. As with most
5 complex litigation, wage and hour class action certification rarely ends with a certification ruling.
6 Class action defendants may seek a writ of mandate from an order granting class certification. *See*,
7 Cal. Code Civ. Proc. § 904.1; *In re Cipro Cases I and II*, 121 Cal.App.4th 402, 409 (2004), and
8 subsequent decertification is often sought. Moreover, the losing party often takes an appeal after
9 disposition of liability and/or damages. Even a successful judicial resolution at the trial court level
10 can be just the beginning of a lengthy, expensive process, stalling payments to class members for
11 years.⁷⁵ This judicial purgatory is compounded by the risk of an adverse appellate ruling, which
12 would remand the action to the trial court for further litigation, possibly with negative precedent.⁷⁶
13 As such, the complexity, expense, and delay of continued litigation supports approval of this
14 settlement.

15 16 **V. THE SETTLEMENT MEETS THE STANDARD FOR PROVISIONAL CLASS** 17 **CERTIFICATION**

18 Prior to obtaining class certification, the parties to a class action suit may appropriately
19 negotiate a proposed settlement. *Wershba*, 91 Cal.App.4th at 240. When the class has not been
20 certified prior to settlement—as here—the parties may stipulate that a defined class be conditionally
21 certified for settlement purposes only. *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp.
22 1422, 1425 (E.D.N.Y. 1989). However, the traditional prerequisites for certification are used to
23 determine whether conditional certification of the proposed class should be granted. *Amchem*

24
25
26 ⁷⁵ Consider, for example, the plight of the employee-class members in *Savaglio v. Wal-Mart Stores, Inc.*, Case No.
27 C-835687 (Alameda Super. Ct.). Following four years of litigation and a four-month jury trial, in 2005, a \$172 million
28 verdict was entered against Wal-Mart on behalf of over 116,000 class members. Those aggrieved employees, however,
did not receive any remuneration until 2011, more than five years later.

⁷⁶ *See, e.g., Chau v. Starbucks Corp.*, 174 Cal.App.4th 688 (2009) (appellate court reversed an \$86 million
restitution award to a certified class of hourly employees).

Products, Inc. v. Windsor, 521 U.S. 591, 620 (1997).⁷⁷ This case satisfies these elements for purposes of conditional certification.

A. THE CLASS IS SUFFICIENTLY NUMEROUS

For class certification, CCP § 382 requires the parties be “numerous [and it be] impracticable to bring them all before the court....” *Daar v. Yellow Cab Co.*, 67 Cal.2d 695, 704 (1967); *Gay v. Waiters’ & Dairy Lunchmen’s Union*, 489 F.Supp. 282 (N.D. Cal. 1980), *aff’d* 694 F.2d 531 (9th Cir. 1982). Here, the class consists of approximately 1,682 employees, which is sufficiently numerous. With this workforce size, joinder of all class members would be impracticable and the relatively small value of each individual claim makes it unlikely individual workers would pursue relief absent class certification, diminishing the prospect that joinder is a feasible alternative. Class members can easily be identified through Defendants’ 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).⁷⁸ The class members’ claims in this action stem from Defendants’ alleged uniform practice of short-

⁷⁷ A pre-certification settlement may stipulate that a defined class be conditionally certified for settlement purposes. 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.*

⁷⁸ 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).

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1 staffing, failing to provide “rovers” to cover for class members during their meal and rest periods,
2 and Defendants’ failure to train employees on what constitutes a compliant break, and what breaks
3 employees were entitled to. Representative Plaintiff contended these alleged practices undermined
4 Defendants’ otherwise compliant break policies.

5 Moreover, arguably, class members’ duties did not vary significantly, nor did their actual
6 experiences. During this class period, Defendants’ policies and procedures changed little, and
7 Defendants’ required all class members to adhere to them. Not only do class members thus share
8 common policies on paper, CVN’s investigation revealed they were treated as a homogenous
9 group. Given the uniform nature of class members’ job duties, Defendants’ policies and
10 procedures, and the fact that working conditions were common, this case is suitable for class
11 treatment. Allowing adjudication of these claims on a class basis would be superior⁷⁹ to letting
12 individual claims from transient, low-income workers, which would be less efficient and lead to a
13 waste of resources and potentially inconsistent results. Indeed, the following common questions
14 of law and fact, among others, flow logically from the practices detailed above:

- 15 • Whether Defendants violated each of the elements of Labor Code §§ 203, 226, 226.7
16 and 512 (the primary claims);
- 17 • Whether failing to pay and record meal and rest period premiums on employees’ pay
18 stubs was a violation of Labor Code § 226;
- 19 • Whether a violation of §§ 226.7 and/or 512 supports penalties under §§ 203 and/or 226;
- 20 • To what degree class members’ job duties were common;
- 21 • How Defendants communicated their meal and rest break policies to class members;
- 22 • How Defendants scheduled workers, including use of common timekeeping and/or
23 advanced schedules;
- 24 • What duties (including remaining “on call”) workers were expected to perform while,
25 ostensibly, on breaks;
- 26 • Whether Defendants violated Business and Professions Code § 17200, *et seq.* by
27 engaging in unfair, unlawful and/or fraudulent business practices;

28 ⁷⁹ 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.”).

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- Whether Defendants’ 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.⁸⁰ 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.⁸¹

⁸⁰ *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).

⁸¹ 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.

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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 Her 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 vigorously for the class. *Hanlon*, 150 F.3d at 1020.⁸² Here, there is no conflict of interest between Representative Plaintiff (or her attorneys) and the remaining class members. Even if there were such a conflict in a certain instance, any class member may "opt-out" of the class. Finally, CVN has significant experience in wage and hour class action litigation and is routinely appointed class counsel in cases alleging precisely these issues.⁸³ Thus, CVN and its client clearly have the motivation and ability to litigate this class action had a fair settlement not been obtained.

VI. THE COURT SHOULD APPROVE THE PROPOSED CLASS NOTICE

Adequate notice is critical to court approval of a class settlement. *Hanlon*, 150 F.3d at 1025. The threshold requirement concerning the sufficiency of class notice is whether the means employed to distribute the notice is reasonably calculated to apprise the class of the pendency of the action, of the proposed settlement, and of class members' rights to opt out or object. *Eisen*, 417

⁸² Notably, mere divergence of opinion between the class and its representatives is not sufficient to constitute a conflict. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000).

⁸³ Cole Decl. ¶¶ 19-23; Exhibit "C," CVN's Professional Resume.

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1 U.S. at 173-74 (1974). Notice is satisfactory if it “generally describes the terms of the settlement
2 in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and
3 be heard.” *Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 575 (9th Cir. 2004).

4 As detailed above the Notice is written in simple, straightforward language that, among
5 other things, includes: (1) basic information about the action, (2) a description of the benefits
6 provided by settlement, (3) an explanation of how class members can obtain benefits under the
7 settlement, (4) an explanation of how class members can exercise their right to object to the
8 settlement, (5) an explanation that any claims against Defendants that could have been litigated in
9 this action will be released if the class member does not request exclusion from the settlement, (6)
10 the names of Class Counsel and information regarding the requested attorneys’ fees and expenses
11 and Representative Plaintiff’s service award, (7) the Final Approval Hearing date, (8) an
12 explanation of eligibility for appearing at the Final Approval Hearing, and (9) contact information
13 to obtain additional information. Ex. B. Since the Notice provides class members with sufficient
14 information to make an informed and intelligent decision about the settlement, it satisfies all due
15 process requirements. *In re Wells Fargo Loan Processor Overtime Pay Litig.*, 2011 WL 3352460,
16 at *4 (N.D. Cal. Aug. 2, 2011); *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 963 (9th Cir. 2009)
17 (where class notice communicated the essentials of the proposed settlement in a sufficiently
18 balanced, accurate, and informative way, it satisfied due process concerns).

19
20 **VII. A FINAL APPROVAL HEARING SHOULD BE SET**

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

25
26 **VIII. CONCLUSION**
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28

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

Dated: October 1, 2021

COLE & VAN NOTE

By: 
Laura Van Note, Esq
Attorneys for Representative Plaintiff

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PROOF OF SERVICE

I am over 18 years of age, not a party to the above-captioned action, and am employed by the law firm of Cole & Van Note, 555 12th St., Suite 1725, Oakland, California 94607.

On this date, I served a copy of:

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

DECLARATION OF SCOTT EDWARD COLE, ESQ. IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

[PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

	By depositing the document(s) with the U.S. Postal Service, with postage fully prepaid, addressed as indicated below, in the ordinary course of business.
	By facsimile transmission to the fax number(s) below, before 5:00 p.m. PST.
	By placing the document(s) in a sealed Federal Express envelope, affixing a pre-paid air bill and delivering it to a Federal Express agent.
	By personal delivery.
X	By e-mail transmission to the e-mail address(es) below.
	By electronic filing using the CM/ECF System which will send a Notice of Electronic Filing to the email address(es) listed in the Electronic Mail Notice List.
	By uploading the document(s) to the third-party document management/service company, court-approved for purposes of this litigation.
	By electronic submission to the Labor and Workforce Development Agency.

on the following person(s):

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I declare under penalty of perjury under the laws of the United States and the State of California the foregoing is true and correct. Executed in Oakland, California on October 1, 2021.



Nicole Randle