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24 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
25 **COUNTY OF SAN BERNARDINO**

26 **SARAH P. ESPINOZA,**

27 **Plaintiffs,**

28 **vs.**

LOVE'S COUNTRY STORES OF
CALIFORNIA;
and DOES 1-100, inclusive,

Defendants.

Case No.: CIVDS2016481

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

Date: November 16, 2021
Time: 9:00 a.m.
Dept.: S-26
Judge: Hon. David Cohn

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1 **I. INTRODUCTION**

2 After more than a year of litigation, analysis of well over 170,000 line items of data comprising
3 all of the time and payroll records of putative class members for the time period May 25, 2016 through
4 December 31, 2020, a full-day mediation with respected mediator Steven J. Rottman, Esq., an accepted
5 mediator's proposal, and months of mediator-facilitated further negotiations to finalize settlement terms,
6 Plaintiffs Sarah Espinoza ("Espinoza") and Estefania Renteria ("Renteria") (collectively, "Plaintiffs"),
7 former hourly paid, non-exempt cashiers for Defendant Love's Country Stores of California
8 ("Defendant" or "Love's"), have secured Loves' agreement to pay \$2,100,000 (the "Gross Settlement
9 Amount" or "GSA") in resolution of wage and hour claims of an expected +/- 1,440 individuals. To
10 facilitate dissemination of notice of the Stipulation of Settlement of Class Action and PAGA Action and
11 Release of Claims (the "Settlement" or "SA")¹ and, ultimately, distribution of an average of more than
12 \$870 to each Class Member, Plaintiffs seek preliminary approval of the negotiated resolution. Since the
13 Settlement is fair, adequate, and reasonable, and confers cognizable benefits on the Class, it should be
14 preliminarily approved so that Class Members have an opportunity to weigh in on its propriety.

15 **II. SUMMARY OF THE CASE**

16 **A. Plaintiffs' Claims**

17 Plaintiffs allege Defendant underpaid Class Members overtime and sick pay wages because it
18 did not properly calculate the regular rate of pay, failed to pay minimum wage and denied meal and
19 rest breaks because it required Class Members to carry communication devices (walkie-talkies, etc.)
20 and be "on-call" during breaks, including unpaid meal breaks, and failed to furnish accurate itemized
21 wage statements, and to pay wages due and owing at the end of employment. JDB Dec. ¶ 44;
22 Second Amended Class and Representative Action Complaint ("SAC") at ¶¶ 9-45.

23 **1. The Class**

24 Plaintiffs seek to represent all persons Defendant classified as non-exempt employees who are
25 or previously were employed by Defendant in California between May 15, 2019 and May 25, 2021.

26 _____
27 1 Capitalized terms herein shall have the same meaning as in the Stipulation of Settlement of Class Action and PAGA
28 Action and Release of Claims ("Settlement Agreement", "Settlement", or "SA"), a copy of which is attached as **Exhibit 1** to
the Declaration of Jenny D. Baysinger ("JDB Dec.") filed concurrently herewith.

SA ¶¶ I.G, I.H. Within the Class, and so that the settlement proceeds can be distributed in a fair and equitable fashion, the Parties have agreed to afford Class Members whose employment ended during the Class Period with an additional four (4) workweeks to provide additional compensation in light of the waiting time penalty claims those Class Members potentially have. There are approximately 1,440 individuals in the Class who worked an expected 50,296 total workweeks during the Class Period. SA ¶ III.A.2; JDB Dec. ¶¶ 37, 102.

B. Procedural History of the Instant Case

On July 29, 2020, Plaintiff Espinoza provided written notice to Defendant and the Labor and Workforce Development Agency (“LWDA”), as required by Labor Code section 2699.3, of alleged violations of the Labor Code committed by Defendant and the facts and theories supporting them. JDB Dec. ¶ 4. The next day, July 30, 2020, the instant class action was commenced in this Court. *Id.* ¶ 5. On May 27, 2020, Plaintiff Renteria provided written notice to the Labor and Workforce Development Agency (“LWDA”) as required by Labor Code section 2699.3. On May 28, 2020, Plaintiff Renteria filed a Class Action Complaint in the Superior Court of California, County of Kern case number BCV-20-101260 (the “Kern County Action”). On October 7, 2020, Plaintiff Espinoza filed an amended Class Action Complaint in the instant case in order to add/incorporate claims to assess and collect civil penalties pursuant to the PAGA. *Id.* ¶ 9. After a joint mediation of the instant case and the Kern County Action, a Second Amended Class and Representative Action Complaint (“SAC”) was submitted in the instant case to add Plaintiff Renteria as a class representative and incorporate the factual allegations of the Kern County Action into this case. JDB Dec. ¶¶ 31

C. Other Cases

Prior to the instant case and the Kern County Action being filed, a class action titled *McGough & Elick v. Love’s Travel Shops & Country Stores, Inc., et al.* was filed and settled in Kern County Superior Court case number BCV-16-102286 (the “*McGough* Class Action”). JDB Dec. ¶ 27. Through the *McGough* Class Action, claims on behalf of Defendant’s non-exempt employees between September 28, 2012 and May 14, 2019 were resolved. *Ibid.* The *McGough* Class Action covered (and resolved) all wage and hour claims asserted by the Class here through May 14, 2019, thus limiting the

1 scope of the Class and the temporal scope of the Class Period in the instant action. JDB Dec. ¶¶ 27-28.

2 In addition to this case, the Kern County Action, and the *McGough* Class Action, an additional
3 class action titled *Diamond v. Love's Country Stores of Cal.*, San Bernardino County case number
4 CIVDS2012915 (the "*Diamond* Class Action") was filed and remains pending against Love's. The
5 *Diamond* Class Action is brought on behalf of individuals allegedly misclassified as exempt employees
6 and thus does not overlap the instant case or the Class implicated by the SA. JDB Dec. ¶ 10.

7 **D. Investigation, Mediation and Settlement Negotiations.**

8 Between October 2020 and May 2021, as part of informal discovery and the Parties' settlement
9 negotiations, Defendant produced more than 170,000 lines of data (each containing multiple individual
10 data points) constituting the time and payroll records for *all* Class Members for the time period May
11 25, 2016 through December 31, 2020, along with relevant numerical data points for the Class and some
12 policy documents. JDB Dec. ¶¶ 17, 23. The Parties spoke at length about the strengths and
13 weaknesses of each sides' claims and defenses, the certifiability of the claims, and the scope of
14 Defendant's alleged liability. Class Counsel retained an expert to analyze the data, and separately
15 completed its own evaluation, including spot-checking calculations to confirm the accuracy of the
16 expert's evaluation. *Id.* ¶¶ 24-26.

17 On May 25, 2021, the Parties mediated with experienced and respected employment class
18 action mediator Steven Rottman. After a full day of negotiations, the Parties were unable to reach a
19 resolution. Instead, Rottman made a mediator's proposal that was ultimately accepted on June 4, 2021.
20 The Parties executed a Memorandum of Understanding memorializing the basic terms and ultimately
21 finalized the SA on October 20, 2021. JDB Dec. ¶¶ 29-30, 34, Exh. 1. There was no fraud or
22 collusion at mediation or in the subsequent negotiations, all of which were conducted at arm's length
23 and generally facilitated by a neutral mediator. *Id.* ¶ 38.

24 **III. SUMMARY OF THE PROPOSED SETTLEMENT.**

25 **A. Monetary Relief Under the Settlement.**

26 Defendant is to remit \$2,100,000 to resolve the claims to be released by Settlement Class
27 Members. SA ¶¶ I.O, I.AA-I.BB, I.HH, III.A.1. After deduction of costs of administration, payments
28 associated with Released PAGA Claims, Service Awards to Plaintiffs, and the fees and costs of Class

Counsel, a \$1,253,236.40 Net Class Settlement Amount (“NCSA”) is expected to be available for distribution to the Class.² JDB Dec. ¶ 66. In accordance with the formulas set forth in the Settlement, an additional \$20,000 will be distributed to Aggrieved Employees in consideration for the Released PAGA Claims. SA ¶¶ I.B, I.BB, III.C, III.O.2, III.O.11.

B. Notice to Class.

The Class Notice will be mailed within a month of entry of the Order of Preliminary Approval. SA ¶¶ III.N.1; Exhibit A.

C. Participation in the Settlement, Calculation of Shares, and Taxation.

Class Members are not required to file claims in order to be eligible to participate in the Settlement. The amount of each participating Individual Settlement Payment shall be determined by the Settlement Administrator based upon Defendant’s records and will be based proportionally on the number of workweeks individuals worked during the Class Period. SA ¶ III.O.1. Settlement Class Members whose employment with Defendant ended during the Class Period will be assigned an additional four (4) workweeks to increase his/her Payment Ratio. SA ¶ I.II. The *average* payment to each Settlement Class Member is expected to be \$870.30. JDB Dec. ¶¶ 37, 76. Every Aggrieved Employee, whether or not he/she participates in the Settlement, will also receive an average payment of approximately \$13.61 in resolution of the Released PAGA claims. JDB Dec. ¶ 84. Defendant will separately pay employer-side taxes. SA ¶ III.A.4.

D. Scope of Release and Final Judgment.

As of the Funding Date, in exchange for the consideration provided in the SA, Settlement Class Members will release and discharge Defendant and Released Parties from the Released Class Claims. SA ¶ III.B.³ Additionally, Plaintiffs, on behalf of the LWDA, will release Defendant and Released Parties from the Released PAGA claims. SA ¶ III.C. The Releases were narrowly tailored to track the

² Pursuant to the agreed upon escalator clause, if either the number of Class Members or the number of workweeks increases by more than 10%, the GSA shall increase pro rata with a 10% grace margin. SA ¶ III.A.2.

³ The Released Class claims are defined as:

All class claims alleged in the operative complaint in the Renteria Action and/or Espinoza Action, which occurred during the Class Period (May 15, 2019 through May 25, 2021), and expressly excluding all other claims, including claims for vested benefits, wrongful termination, unemployment insurance, disability, social security, workers’ compensation, and class claims outside the Class Period, and excluding claims arising from allegations of misclassification of employees as exempt. SA ¶ I.AA.

1 factual allegations in this case and the Kern County Action and do not include a 1542 waiver by the
2 Class. JDB Dec. ¶ 78.

3 **E. Settlement Administration.**

4 Plaintiffs solicited bids from several national settlement administrators. After negotiating to
5 obtain the most reliable and cost-effective service possible, the Parties selected ILYM Group, Inc.
6 (“Administrator”). SA ¶ I.GG; JDB Dec. ¶ 90. The Administrator will, among other things, distribute
7 the Class Notice, calculate Individual Settlement Payments, prepare and mail settlement checks,
8 respond to Class Member inquiries/disputes, prepare appropriate tax forms, and perform all normal and
9 customary duties associated with the administration of such settlements. Plaintiff seeks preliminary
10 approval of the Administrator’s bid of \$16,763.60. JDB Dec. ¶ 91.

11 **F. Payment to the LWDA.**

12 The Settlement contemplates a PAGA Settlement of \$80,000, or 3.8% of the GSA. SA ¶ I.V.
13 Pursuant to the PAGA, 75% (\$60,000) of this amount will be paid to the LWDA and the remaining
14 25% (\$20,000) will be distributed to the Aggrieved Employees. SA ¶ III.O.2, III.O.11. The Parties
15 negotiated this amount in good faith, intending to ensure the deterrent and punitive purposes of the
16 PAGA are served. JDB Dec. ¶¶ 82-85. Further, the proposed allocation is fair and reasonable and
17 above the range of 0% and 2% commonly approved in other class actions with PAGA components.⁴
18 The LWDA has been notified of the settlement as required by law. JDB Dec. ¶ 86.

19 **G. Service Awards to Plaintiffs for Their Service to the Class.**

20 Plaintiffs will each apply for a service award of \$10,000, or .47% of the GSA in consideration
21 for their respective service as Class Representatives. SA ¶¶ I.I, III.O.9.

22 **H. Class Counsel Award**

23 Class Counsel will request attorneys’ fees in the amount of one-third of the GSA, expected to
24 equate to \$700,000, as well as declared litigation costs of up to \$30,000. SA ¶¶ I.E, III.O.10.

25
26 ⁴ See, e.g., *Nordstrom Comm’n Cases* (2010) 186 Cal.App.4th 576, 589 (approving 0% PAGA allocation); *Berry v.*
27 *Urban Outfitters* (N.D.Cal. Lead Case No. 13-cv-02628-JSW) (approving 1% PAGA allocation in \$5M settlement); *Jack*
28 *v. Hartford Fire Ins. Co.* (S.D. Cal. 2011) 2011 WL 4899942 * 6 (approving \$3,000 PAGA allocation in \$1.2M
settlement); *Singer v. Becton Dickinson & Co.* (S.D. Cal. 2010) 2010 WL 2196104 *2 (approving \$3,000 PAGA
allocation in \$1M settlement); and *Hopson v. Hanesbrands, Inc* (N.D. Cal. 2009) 2009 WL 928133 * 9 (approving
\$1,500 PAGA allocation in \$1.026M settlement).

1 **IV. PROVISIONAL AND CONDITIONAL CERTIFICATION OF THE CLASS IS**
2 **APPROPRIATE.**

3 Prior to obtaining class certification, the parties to a class action may appropriately negotiate
4 a proposed settlement of all claims. See *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th
5 224, 240. When the class has not been certified by the court prior to settlement, as here, the parties
6 may stipulate that a defined class be conditionally (or “provisionally”) certified for settlement
7 purposes only. Cal. R. Court Rule 3.769(d); *Hernandez v. Vitamin Shoppe Industries, Inc.* (2009)
8 174 Cal.App.4th 1441, 1456-1457. The Court must review the propriety of certification and
9 independently determine that the standards for class-wide treatment have been met.

10 Class certification is authorized when “the question is one of a common or general interest, of
11 many persons, or when the parties are numerous, and it is impracticable to bring them all before the
12 court.” Code Civ. Proc. § 382. Certification is appropriate where there is an ascertainable class and
13 a well-defined community of interest among the class members. *Richmond v. Dart Industries* (1981)
14 29 Cal.3d 462, 470; see also *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 704. Courts have broad
15 discretion to certify a class for purposes of a class action settlement. *Dunk v. Ford Motor Co.* (1996)
16 48 Cal.App.4th 1794, 1807 n. 19 (holding that class certification in settlement cases is subject to a
17 “lesser standard of scrutiny”). The practical purpose of provisional and conditional certification is to
18 facilitate distribution to all settlement class members of notice of the terms of the proposed
19 settlement, their rights thereunder, and the date and time of the final approval hearing.

20 To be certified, a settlement class must meet the following criteria: (1) the individuals are so
21 numerous that joinder would be impractical; (2) there is a commonality of interest between plaintiff
22 and the members of the class; (3) plaintiff’s claims are typical of the claims of the class members;
23 and (4) plaintiff and counsel will fully and adequately represent the interests of class members. Cal
24 R. Ct. 3.769; Code Civ. Proc. § 382; *Sav-on Drug Stores, Inc. v. Sup. Ct.* (2004) 34 Cal.4th 319,
25 326-27; Fed. R. Civ. P. 23. All of these factors are met here.

26 **A. The Numerosity Requirement is Met.**

27 The identity of the Class Members is ascertainable because all worked for Defendant as non-
28 exempt employees within California during the Class Period of time and can be easily ascertained

1 through Loves' employee and payroll records. *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932.
2 With an estimated 1,440 individuals, joinder would be impractical and numerosity is satisfied. *Rannis v.*
3 *Recchia* (9th Cir. 2010) 380 Fed.Appx. 646, 651 (in general, numerosity satisfied if more than 40).

4 **B. The Commonality Requirement is Met.**

5 The commonality requirement is met if questions of law and fact that are common to the class
6 predominate and the theory of recovery is "amenable to class treatment." *Sav-On Drug Stores*, 34
7 Cal.4th 327; *Brinker Restaurant Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004, 1033. The claims of
8 Plaintiffs and each Class Member flow from the same facts and legal theories, i.e., Loves' uniform
9 failure to properly calculate and pay overtime and sick pay because certain non-discretionary
10 remuneration was not included, failure to pay for all hours worked because meal periods were on-call
11 and thus not provided (or compensated) and implementation of policies requiring employees to carry
12 walkie-talkies and remain on-call during meal/rest periods thereby defeating their off-duty nature,
13 provision of wage statements with a uniform format that, among other things, do not accurately
14 identify wage rates and the number of hours worked at each, and derivative failures to pay all wages
15 on separation. JDB Dec. ¶¶ 42, 44, 46-47, 102.b, Exhs. 2-3. Moreover, Loves' primary defenses,
16 that (1) its policies/practices include necessary "other remuneration" in calculating the "regular rate
17 of pay" and any items not included were wholly discretionary and properly disregarded, (2) its
18 written policies require and result in all hours worked being recorded and paid, (3) its policies and
19 practices provided the opportunity for meal/rest periods, and (4) its wage statements were compliant
20 and/or that no injury resulted from any technical omissions on wage statements, are also common to
21 all members of the Class. JDB Dec. ¶¶ 66, 68-74. Common questions predominate.

22 **C. The Typicality Requirement is Met.**

23 The typicality requirement is met if the named representative's claims are typical of those of
24 the class, though "they need not be substantially identical." *Hanlon v. Chrysler Corp.* (9th Cir. 1998)
25 150 F.3d 1011, 1020. Plaintiffs contend their claims are typical of the claims of the Class because they
26 arise from the same factual bases and are based upon the same legal theories as those applicable to
27 Class Members. JDB Dec. ¶ 102.c; see also *Wehner v. Syntex Corp.* (N.D. Cal. 1987) 117 F.R.D. 641,

28 ///

644. Plaintiffs and the other Class Members worked as non-exempt employees during the Class Period, and all were subjected to the same written policies and uniform practices.⁵

D. The Adequacy Requirement is Met.

The adequacy requirement is met if the named representatives and counsel have no interests adverse to those of Class Members and are committed to vigorously prosecuting the case on behalf of the class. *Hanlon*, 150 F.3d 1020. Plaintiffs' interests in obtaining the most beneficial recovery possible coincides with the interests of the Class and Plaintiffs have no claims separate from those of the Class that might create a conflict. *Id.* 1021. Plaintiffs and Class Counsel have demonstrated their commitment to vigorously prosecuting this matter through their actions in securing a substantial monetary settlement and Class Counsel's experience. JDB Dec. ¶¶ 92-96, 102.d. Furthermore, any Class Member who wishes to opt-out and/or object to the settlement will have opportunity to do so. SA ¶ 68-69.

IV. PRELIMINARY APPROVAL OF THE SETTLEMENT IS WARRANTED.

A. Legal Standards for Preliminary Approval of Class Action Settlements.

A class action may not be dismissed, compromised or settled without approval of the Court. Civ. Code § 1781(f); Cal. Rules of Court, Rule 3.769; Fed. R. Civ. P. 23(e). Approval of a class action settlement requires three steps: (1) preliminary approval of the resolution; (2) dissemination of notice to all class members; and (3) a final settlement approval hearing, at which class members may be heard regarding settlement. Manual for Complex Litigation (4th Ed. 2004) § 21.61.

The purpose of the preliminary evaluation of a proposed class action settlement is to determine whether the settlement is within the range of possible approval, and thus whether notice to the class of the terms and conditions and the scheduling of a formal fairness hearing are warranted. *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1145; *Spann v. J.C. Penney Corp.* (C.D. Cal. 2016) 314 F.R.D. 312, 319; William B. Rubenstein, 4 NEWBERG ON CLASS ACTIONS (4th Ed. 2002) § 11.25. In passing on its propriety, this Court has broad powers to

⁵ Underscoring typicality and commonality, the fact both Plaintiffs were subjected to a walkie-talkie requirement although they worked at completely separate locations (Renteria in Lost Hills, CA and Espinoza in Barstow) reflects a common practice that is not isolated at any particular store or likely explained by individual "management" practices at the store level.

determine whether a settlement is fair under the circumstances. *Dunk*, 48 Cal.App.4th 1801; *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128. Indeed, the Court need only find that the settlement falls within a “reasonable range”, as courts recognize that approving class action settlements is merely “an amalgam of delicate balancing, gross approximations and rough justice.” *Ibid.*; *Cordy v. USS-Posco Indus.* (N.D. Cal. 2013) 2013 WL 4028627 *4. To make this fairness determination, courts consider several relevant factors, including “the strength of the plaintiffs’ case; the risk, expense, complexity and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; [and] the experience and views of counsel” *Hanlon*, 150 F.3d 1026 (citations omitted). Importantly, there is a presumption of fairness when the settlement is the result of arm’s-length negotiation, investigation and discovery that are sufficient to permit counsel and the court to act intelligently, and counsel are experienced in similar litigation. *Dunk*, 48 Cal.App.4th 1801; *Wren v. RGIS Inventory Specialties* (N.D. Cal. 2011) 2011 WL 1230826 *6. California courts put a great deal of stock into what is, otherwise, a private, negotiated, consensual agreement. Accordingly, a court’s inquiry is limited “to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole is fair, reasonable and adequate to all concerned.” *Ibid.* The Settlement here satisfies all legal standards for preliminary approval.

B. The Settlement Terms are Fair, Reasonable, and Adequate.

The Settlement will result in substantial benefits to all Class Members. The GSCA represents cognizable gross recovery of nearly 35% (34.11%) of the Class’ *maximum* recoverable damages (including interest) and statutory penalties, a substantial 48% of the Class’ realistic recovery, and a net recovery of nearly 30% (29.78%) of that same realistic recovery. JDB Dec. ¶¶ 60, 64. Overall, and considering the risks, including changes in California precedent that have occurred in the wake of the Settlement and jeopardize some of Plaintiffs’ claims, the Settlement is undeniably fair, adequate, and reasonable.

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1 **1. Defendant’s Maximum and Realistic Exposure to the Class.**

2 Under Class Counsel’s damages model, based on retained expert analysis of the substantial
3 time and payroll records provided, it was determined Defendant faced up to a maximum of \$48,546 in
4 underpaid overtime, sick pay, and associated interest, \$1,490,306 in unpaid meal period premiums and
5 interest, \$764,447.04 in unpaid minimum wage (due to Class Members being “on-duty” but unpaid
6 during meal periods due to walkie-talkie requirements), \$1,588,530 for missed rest breaks, \$1,045,892
7 in waiting time penalties under Labor Code section 203, and \$983,766 in statutory penalties under
8 Labor Code section 226(e), for a total of \$5,921,487.04 in maximum potential damages, interest, and
9 statutory penalties to the Class (exclusive of PAGA civil penalties). JDB Dec. ¶¶ 45, 50, 52, 55, 57-58,
10 60. The Settlement amount allocated to Class Claims, \$2,020,000, represents an impressive 34.11% of
11 these *maximum* damages. JDB Dec.¶ 60.

12 Because 100% success in litigation is unrealistic, Class Counsel determined a much more
13 realistic estimate for the potential recovery of the Classes. Under this more measured approach, Class
14 Counsel (1) applied no discount to the regular rate claim because the written policies plainly render the
15 “other remuneration” provided non-discretionary, leaving \$48,546, (2) applied a 25% discount to the
16 meal period claims because of the lack of a uniform written policy, general challenges to certification
17 that often plague meal period claims, leaving \$1,117,729.50, (3) applied a 25% discount to the
18 minimum wage claim to account for Defendant’s anticipated argument that and expected testimony
19 from Class Members that there were multiple occasions when they were able to take off-duty meal
20 periods and were not interrupted and thus that time was not properly within the scope of “hours
21 worked”, leaving \$573,335.28, (4) applied a 25% discount to the rest period claims because Plaintiffs
22 both advised they were frequently able to take some uninterrupted rest periods, leaving \$1,191,397.50,
23 (5) applied a 50% reduction the wage statement exposure to reflect the Ninth Circuit’s opinion
24 (reached almost simultaneously with the settlement negotiations) holding that reconciled/retroaction
25 overtime adjustments made *do not* have to specify the associated hourly rate of pay or number of hours
26 worked (*Magadia v. Wal-Mart Associates, Inc.* (2021) 999 F.3d 668), which potentially threatens the
27 stand-alone wage statement theories, and case law suggesting there is no liability for derivative errors
28 on wage statements (*Maldonado v. Epsilon Plastics, Inc.* (2018) 22 Cal.App.5th 1308), leaving

1 \$491,883 and (6) applied a 25% discount to the claim for waiting time penalties in order to take into
2 account the substantive challenges available to the unpaid wage claims that would necessarily threaten
3 a derivative 203 claim and Defendant’s arguments against willfulness, leaving \$784,419. JDB Dec. ¶
4 62. Under this more measured approach, Class Counsel determined the damages the Class could
5 reasonably or realistically expect to recover to be \$4,207,310.28. *Id.* ¶ 63. The portion of the GCSA
6 represents gross recovery of 48% of these realistic damages—the expected net recovery for the Class
7 is nearly 30% of the realistic damages. *Id.* ¶ 64. Such substantial guaranteed recovery, without the
8 risks attendant to ongoing litigation, is undeniably, fair, adequate, and reasonable.

9 **2. Loves’ Defenses and Litigation Concerns.**

10 Defendant raised numerous defenses and planned to employ a multipronged attack aimed at
11 circumscribing the scope of available damages. Specifically, Defendant asserts many of the items of
12 “other remuneration” provided were properly excluded from “regular rate” and that it *actually did*
13 include all necessary items as evidenced by retroactive payments made to Class Members throughout the
14 Class Period. JDB Dec. ¶¶ 66-67. Defendant contends it maintained a sophisticated time keeping
15 system designed to capture all time recorded, expressly required its employees to record all time
16 worked, and paid them for all time they reported and/or Love’s was aware otherwise aware of being
17 performed. JDB Dec. ¶ 69. Defendant also asserts its employees were, at all times relevant, authorized
18 and permitted to take meal and rest breaks. See *Brinker Rest. Corp.*, 53 Cal. 4th 1037. Defendant
19 directly denies that it had any walkie talkie requirement and, perhaps more importantly, contends
20 employees were authorized to travel out-of-range of walkie talkie transmission for required breaks and
21 thus could not have been “required” to remain “tethered” to the employer during breaks. *Augustus v.*
22 *ABM Security Svcs. Inc.* (2016) 2 Cal.5th 257, 269-270; JDB Dec. ¶¶ 68. While Plaintiffs contend
23 Defendant’s written policies *did not* properly advise employees of entitlements to meal/rest periods, both
24 Plaintiffs advised they did sometimes travel offsite and out-of-range for breaks and *were* occasionally
25 actually able to take uninterrupted breaks. JDB Dec. ¶¶ 47, 68.

26 In connection with the waiting time penalty claims, Defendant argued 1) it acted in good faith
27 and that its conduct was not willful and 2) that the failure to pay premiums for allegedly non-compliant
28

1 meal and rest breaks does not give rise to liability under Labor Code section 203.⁶ Defendant also
2 argued Class Members could not establish the “injury” or “knowing and intentional” elements of their
3 Labor Code section 226(a)(1), (2), (5), and (9) claim where (i) the alleged inaccuracies did not
4 themselves cause any distinct injury and are frowned upon by some courts⁷, (ii) Defendant accurately
5 listed the amounts actually paid to its non-exempt California employees, and (iii) case law suggests
6 such does not create derivative wage statement violations⁸. JDB Dec. ¶¶ 70-72.

7 Had Defendant been successful on any of these endeavors, it would have substantially reduced
8 the Class’ potential recovery; success on all fronts would have eviscerated the Class’ claims. Adding an
9 additional risk, almost simultaneous with the mediation in this case, California’s Ninth Circuit issued its
10 decision in *Magadia v. Wal-Mart Associates, Inc.* (9th Cir. 2021) 999 F.3d 668 holding that the
11 provision of retroactive overtime payments *without* identifying the rates or number of hours associated
12 with those payments, does not offend 226. *Id.* 682. This precedent potentially eviscerates the primary
13 stand-alone wage statement violation theory asserted on behalf of the Class. JDB Dec. ¶¶ 73-74. While
14 Class Counsel is confident that certification and success on the merits could be attained, continued
15 litigation was guaranteed to be costly, time consuming, and uncertain. JDB Dec. ¶¶ 76-77. By contrast,
16 the Settlement guarantees substantial monetary relief and is supported by Class Counsel. *Ibid.* ¶ 41.
17 The Settlement reflects a reasoned compromise which not only takes into consideration the inherent
18 risks in wage and hour class litigation, but the various issues unique to this case which had the potential
19 to substantially reduce recovery by the Class, if not wipe it out entirely.

20 For these reasons, Class Counsel believes the proposed settlement is fair, reasonable and
21 adequate, preferable to continued litigation and in the best interest of the class—it is also proportionally
22 more beneficial than the Settlement reached (and approved) in the *McGough* Class Action. *Id.* ¶ 77, fn
23 9. It represents cognizable and substantial recovery on disputed claims and should be approved.

24
25 ⁶ See e.g., *Harris v. Vector Marketing Corp.* (N.D. Cal. 2009) 656 F.Supp.2d 1128, 1145-46; *Nordstrom Com’n Cases*
26 (2010) 186 Cal.App.4th 576, 584 (holding that the trial court did not abuse its discretion in discounting the penalties on a §
203 claim because the defendant could avoid the penalties by showing that a ‘good faith dispute’ existed regarding the
claimed wages). See also *Stewart v. San Luis Ambulance, Inc.* (2017) 878 F.3d 833.

27 ⁷ *Hurst v. Buczek Enters. LLC* (N.D. Cal. 2012) 2012 WL 1564733 *17 (granting summary judgment to defendant on the
plaintiff’s Labor Code § 226 claim on the basis of the good faith dispute defense).

28 ⁸ See e.g., *Maldonado*, 22 Cal.App.5th 1308 and *Naranjo*, 40 Cal.App.5th 544, on review in California Supreme Court
Case No. S258966.

1 **C. The Court Should Order Dissemination of the Notice.**

2 In order to protect the rights of class members, courts must ensure that settlement class members
3 receive the best notice practicable. *Phillips Petroleum Co. v. Shutts* (1985) 72 U.S. 797, 811-12.
4 Procedural due process requires affected parties have the right to be heard at a meaningful time and in a
5 meaningful manner. It does not guarantee any particular procedure, but rather only requires notice
6 reasonably calculated “to apprise interested parties of the pendency of the action and afford them an
7 opportunity to present their objections.” *Ryan v. Cal. Interscholastic Fed’n – San Diego Section* (2001)
8 94 Cal.App.4th 1048, 1072. The law typically requires notice of a proposed settlement inform class
9 members of: (1) the nature of the pending litigation; (2) the general settlement terms; (3) that complete
10 information is available from the court files; and (4) that any class member may appear and be heard at
11 the final fairness hearing. See Cal. Rules of Court, Rules 3.766(d)-(f) and 3.769(f); 3 NEWBERG ON
12 CLASS ACTIONS § 8:32 (4th ed.). The proposed Notice here satisfies those requirements.

13 **1. The Class Notice is Accurate, Informative, and Satisfies Due Process.**

14 California law vests the court with broad discretion to fashion an appropriate notice program.
15 Civ. Code §1781; Fed. R. Civ. P. 23(e)(1), (c)(2)(B); *Cartt v. Sup. Ct.* (1975) 50 Cal.App.3d 960,
16 973-74. Because all Class Members are current and former employees for whom Love’s has current
17 or last known addresses as well as SSNs, notice is simpler and more reliable here than in other types
18 of class actions. The Class Notice and notice plan here are consistent with notices approved by state
19 and federal courts and, under the circumstances, represent the best notice practicable.

20 The Class Notice will be sent to all Class Members, will inform them of the terms of the
21 Settlement and is neutrally worded so as to avoid prejudice. The Class Notice meets all of the
22 requirements of procedural due process and the California Rules of Court 3.766(d)-(f) and 3.769(f)
23 by identifying the Plaintiffs and Love’s and describing the claims asserted in a straightforward
24 manner; succinctly describing the essential terms of the Settlement, including identifying the scope
25 of the release and all parties against whom claims are being released, describing Plaintiffs’ proposed
26 Service Award as well as the amount of Class Counsel’s attorney’s fees and costs; providing
27 information on how to participate in, opt-out of, or object to the Settlement; providing all applicable
28 deadlines for such action; and informing Class Members that if they do not exclude themselves, and

the Settlement is approved, they will be bound by the resulting judgment. SA, Exh. A. In short, the Class Notice provides all of the necessary information to make an informed decision.

VI. THE SERVICE AWARDS TO PLAINTIFFS ARE REASONABLE.

Named plaintiffs in class action litigation are eligible for reasonable service awards. *Stanton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 977. Such awards are intended to “compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the class action, and, sometimes, to recognize their willingness to act as a private attorney general.” *Rodriguez v. West Publ’g Corp.* (9th Cir. 2009) 563 F.3d 948, 958-959. Service awards are particularly appropriate in wage-and-hour class actions where plaintiffs undertake a reputational risk by suing former employers. *Ibid.* The requested \$10,000 service award per Plaintiff is (a) in line with those commonly awarded by courts in similar wage and hour class actions;⁹ (b) just .476% of the GSA (0.95% collectively), and (d) fair, reasonable and appropriate under the circumstances. Plaintiffs worked diligently with Class Counsel throughout this litigation and should be rewarded for taking the initiative to pursue claims on behalf of their coworkers, and for their role in reaching a settlement providing for valuable relief to the Class. JDB Dec. ¶¶ 92-96, 102.d. Further, Class Members will be apprised of this request, may review the moving papers on the Court’s website, and may object if they so desire.

VII. CLASS COUNSEL’S FEES AND COSTS ARE REASONABLE AND APPROPRIATE.

Plaintiffs, in the settlement of this wage and hour class action, are entitled to payment of attorneys’ fees and costs. 29 U.S.C. § 2016(b); Lab. Code §§ 218.5, 226(e)(1), 1194, and 2699(g); *Early v. Sup. Ct.* (2000) 79 Cal. App.4th 1420, 1427. At the Final Approval Hearing, Plaintiffs will seek an award of Class Counsel’s fees under the common fund doctrine, which is customarily used in awarding fees and costs in settlement of wage and hour class in California.¹⁰ Plaintiffs will seek

⁹ See e.g. *Bond v. Ferguson Enterprises, Inc.* (E.D. Cal. 2011) 2011 WL 2648879 (approving service awards of \$11,250 each to two class representatives in a trucker meal break class action); *Vasquez v. Coast Valley Roofing, Inc.* (E.D. Cal. 2010) 266 F.R.D. 482, 493 (approving service awards of \$10,000 each from a \$300,000 settlement in a wage and hour class action); and *Castellanos v. Pepsi Bottling Group, Inc.*, No. RG07332684 (Alameda Cnty. Super. Ct., March 11, 2010) (approving service award of \$12,500 in a wage and hour class action).

¹⁰ *Wershba*, 91 Cal.App.4th at 254; *Lealao*, 82 Cal.App.4th at 26-30; *Serrano v. Priest* (1977) 20 Cal.3d 25, 34 (“[w]hen a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the

1 attorneys' fees of one-third of the GSA, expected to be \$700,000¹¹, and declared litigation costs of up
2 to \$30,000. These fees will be shared amongst Class Counsel, with 30% provided to the JCL Law
3 Firm, 30% provided to the Zakay Law Firm, and 40% provided to Mayall Hurley, P.C. JDB Dec. ¶ 15.
4 Courts customarily approve payments of attorney's fees of one-third to forty percent of the common
5 fund in similar class actions.¹² Because these fees and costs are reasonable, within the range
6 commonly awarded by state and federal courts in similar cases, and because Plaintiffs and Class
7 Counsel have and will convey significant benefits upon the Class, the Court should preliminarily
8 approve Plaintiffs' requested fee and cost award as fair and reasonable. Class Members will be
9 apprised of Plaintiffs' fee request as well as their ability to review the moving papers on the Court's
10 website, and to object if they so desire.

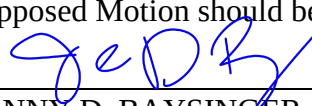
11 **VIII. A FINAL APPROVAL HEARING AND DEADLINES SHOULD BE SET.**

12 Plaintiffs respectfully request that the Court set a date for the Final Approval Hearing,
13 deadlines for Class Members to opt-out or object, and for the submission of motions associated with
14 final approval. To allow sufficient time for the foregoing, Plaintiffs request the Final Approval
15 Hearing be set not less than 75 days after the mailing of the Class Notice (approximately 100 days after
16 preliminary approval)..

17 **XV. CONCLUSION.**

18 For all the reasons stated above, Plaintiffs' unopposed Motion should be granted.

19 **DATED:** October 22, 2021

By 

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Attorneys for Plaintiffs and the Putative Class

25
26 benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorney's
fees out of the fund.").

27 ¹¹ This amount could potentially increase in the event the escalator clause within the Settlement is triggered.

28 ¹² 4 NEWBERG § 14:6 (Studies show that "Fee awards in class actions average around one-third of the recovery");
Williams v. MGM-Pathe Commc 'ns Co. (9th Cir. 1997) 129 F.3d 1026, 1027 (33% fee award); *Wren*, 2011 WL 1230826,
at *29 (42% fee award in common fund wage and hour class action).