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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

JANELLE BASICH-MUSTAFA, as an
individual and on behalf of all others
similarly situated,

Plaintiff,

vs.

DESIGNER FRAGRANCES &
COSMETICS COMPANY, a California
corporation d/b/a NYX Professional
Makeup; and DOES 1 through 100,

Defendants.

CASE NO. 20STCV16314

*[Case assigned for all purposes to the Hon.
William F. Highberger, Dept. 10]*

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Date: June 2, 2022
Time: 10:00 a.m.
Dept.: 10

Action Filed: April 28, 2020
Trial Date: None Set

PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court, on June 2, 2022 at 10:00 a.m. in Department SSC10 of the above-entitled Court, located at 312 N Spring St, Los Angeles, California 90012, Plaintiff Janelle Basich-Mustafa ("Plaintiff"), individually and on behalf of a class of similarly situated individuals, will and hereby does move this Court for:

1. Preliminary approval of the proposed Settlement of this lawsuit;
2. Pursuant to Section 382 of the California Code of Civil Procedure, provisional certification of the following Settlement Class defined as follows:

Settlement Class – all employees of Defendant Designer Fragrances & Cosmetics Company ("Defendant") who were classified as non-exempt and worked within the State of California during the period of April 28, 2016 through the date of Preliminary Approval of the Settlement.

3. Preliminary appointment of Plaintiff Janelle Basich-Mustafa as Class Representative;
4. Preliminary appointment of Fletcher W. Schmidt, Paul K. Haines, and Alexandra R. McIntosh of Haines Law Group, APC and Joseph Tojarieh of Tojarieh Law Firm, PC as Class Counsel;
5. The scheduling of a hearing to consider whether the Settlement should be finally approved and to award amounts for the Class Representative service payment, Settlement Administrator costs, the PAGA payment to the Labor and Workforce Development Agency, as well as attorneys' fees and costs to Class Counsel;
6. Appointment of Phoenix Settlement Administrators as the third-party Settlement Administrator for mailing notices; and
7. Approval of the proposed Class Notice and entry of the proposed Order instructing the Class Notice to be disseminated to the proposed Settlement Class as provided in the Settlement.

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1 This Motion is based on this Notice of Motion, the attached Memorandum of Points and
2 Authorities, the declarations of Fletcher W. Schmidt, Paul K. Haines, Alexandra R. McIntosh,
3 Janelle Basich-Mustafa, Jodey Lawrence of Phoenix Settlement Administrators, and the exhibits
4 attached thereto, the pleadings and other papers filed in this action, and on any further oral or
5 documentary evidence or argument presented at the time of hearing.

6
7 Dated: May 11, 2022

Respectfully Submitted,
HAINES LAW GROUP, APC

8
9 By:



Fletcher W. Schmidt
Attorneys for Plaintiff

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Janelle Basich-Mustafa (“Plaintiff”) filed this putative class action (the
4 “Lawsuit”) on behalf of all current and former non-exempt employees who worked for Designer
5 Fragrances & Cosmetics Company (“Defendant”) in California from April 28, 2016 until the date
6 of preliminary approval (the “Class Period”) (hereinafter Plaintiff and Defendant will be referred
7 to collectively as the “Parties”). Plaintiff alleges the following causes of actions against
8 Defendant: (1) Failure to Pay Minimum Wages; (2) Failure to Pay Overtime; (3) Failure to
9 Provide Meal Periods; (4) Failure to Provide Rest Breaks; (5) Failure to Provide Accurate Wage
10 Statements; (6) Failure to Timely Pay Wages Upon Separation; (7) Unfair Competition (the
11 “Action”); and (8) For Civil Penalties Under the Private Attorneys General Act (Labor Code §
12 2698 *et seq.*) (“PAGA”).

13 Through this Motion, Plaintiff respectfully requests that this Court preliminarily approve
14 this non-reversionary class action settlement (“Settlement”),¹ on behalf of the following
15 Settlement Class:

16 **Settlement Class** – all employees of Defendant who were classified as non-
17 exempt and worked within the State of California during the period of April
18 28, 2016 through the date of Preliminary Approval of the Settlement (“Class
Period”).

19 Based upon the data received from Defendant, there are approximately 1,587 potential
20 Settlement Class members who worked approximately 82,594 combined workweeks from April
21 28, 2016 to November 11, 2021. The Settlement calls for Defendant to pay a Gross Settlement
22 Payment (“GSA”) of \$1,750,000.00. This represents a significant result for Settlement Class
23 members who will be agreeing to a release of only those claims that were actually asserted, or
24 which could have been asserted based on the same set of operative facts alleged in the Lawsuit.
25

26
27 ¹ The Stipulation of Settlement (“Settlement Agreement”) is attached to the Declaration of Fletcher W.
28 Schmidt as Exhibit 1 and the proposed Notice Packet (which is comprised of the Notice of Class Action
Settlement (“Class Notice”), Notice of Settlement Award (“Dispute Form”)), and Opt-Out Form are
attached as Exhibits A to the Settlement Agreement.

1 After deductions for Plaintiff's service award, settlement administrator costs, the LWDA
2 Payment, and attorneys' fees and costs to Class Counsel, the remaining amount (the "Net
3 Settlement Amount") of approximately \$1,068,166.67 will be distributed to the Settlement Class.
4 Significantly, Class Members do not need to file a claim form in order to receive a Settlement
5 Share, and all Class Members who do not opt-out will automatically receive average payments of
6 approximately \$673.07.

7 Prior to reaching this proposed Settlement, Defendant provided Plaintiff with timekeeping
8 and payroll data for a sample of the putative class, which Plaintiff's counsel and a retained expert
9 used to construct a comprehensive damages model. Defendant also produced relevant policies in
10 effect during the Class Period. After extensive legal research and analysis along with a
11 comprehensive review of the data performed by Plaintiff and her expert, the Parties participated
12 in a mediation session with Tripper Ortman, Esq., a respected wage and hour class action
13 mediator. Although the Parties did not reach a resolution at the mediation, the Parties continued
14 to engage in settlement discussions and were ultimately able to reach the Settlement, which is
15 now submitted to this Court for approval.

16 This proposed Settlement is well within the range of possible approval in light of the
17 significant legal and factual obstacles that Plaintiff faced, the risks and costs of further litigation,
18 and the substantial monetary benefits to the Settlement Class. For the reasons discussed herein,
19 Plaintiff respectfully requests that the Court grant preliminary approval of the Settlement.

20 **II. SUMMARY OF THE LITIGATION**

21 Defendant is a subsidiary of L'Oreal USA, Inc. and the parent company of five retail store
22 brands in California, including NYX Professional Makeup, Urban Decay Cosmetics, Atelier
23 Cologne, Kiehl's, and Luxury Beauty Store. Declaration of Fletcher W. Schmidt ("Schmidt
24 Decl."), ¶ 8. According to Defendant, in July 2020 Defendant permanently closed a number of its
25 California retail locations, including all California NYX, Atelier, and Urban Decay Cosmetics
26 retail locations. *Id.* In connection with its closing, Defendant offered a number of its employees
27 severance and release agreements. *Id.* Plaintiff was employed by Defendant as a non-exempt Sales
28 Associate/Key Holder from approximately February 2019 to August 1, 2019 at a NYX retail store

1 in Sherman Oaks, California. *Id.* Plaintiff's theories of liability, and Defendant's defenses to each
2 are discussed below.

3 **A. PLAINTIFF'S CLAIMS AND DEFENDANT'S DEFENSES**

4 Plaintiff alleges that Defendant failed to pay Plaintiff and other employees for all hours
5 worked as a result of its alleged policy and practice of requiring employees to undergo security
6 checks off-the-clock. Schmidt Decl., ¶ 13. Specifically, at the end of each shift and before
7 employees were allowed to leave the facility, including for meal and rest periods, Plaintiff alleges
8 that she and other employees were required to clock out and then have their bag checked by a
9 manager under a security camera. *Id.* In response, Defendant contends that it has always
10 maintained a compliant bag check policy whereby employees are required to undergo a bag check
11 *prior to* clocking out for their shift and that there was never a line or excessive wait time before
12 an employee could receive a bag check. *Id.* Defendant maintains that its bag check process was
13 quick and streamlined and typically lasted no more than 15-20 seconds. *Id.* Defendant further
14 contends that Plaintiff's bag check claim is not suited for class certification as individual inquiries
15 would be required to assess which employees underwent bag checks off-the-clock, how often,
16 and how long each bag check lasted. *Id.*

17 As a result of Defendant's bag check policy, Plaintiff further alleges that Defendant failed
18 to provide employees with full, uninterrupted 30-minute meal periods before the end of the fifth
19 hour of work as well as duty-free 10-minute rest periods for every four hours worked. Schmidt
20 Decl., ¶ 14. Specifically, Plaintiff alleges that Defendant's policy and practice of requiring its
21 employees to undergo bag checks off-the-clock prior to leaving the premises, including for meal
22 and rest periods, violates California law because it operates as a de facto on-premises meal and
23 rest period policy which forces employees to choose between an on-premises 30-minute meal
24 period/10-minute rest period or an off-premises meal period of less than 30-minutes and/or rest
25 period of less than 10-minutes as some of the break will necessarily be spent going through the
26 bag check. *Id.*

27 In response, Defendant contends that it has always provided employees with legally-
28 compliant meal and rest periods and that any meal or rest periods that did not meet that standard

1 were solely the result of employee choice (not Defendant’s policy/practice). Schmidt Decl., ¶ 15.
2 Defendant further argues that according to its written policy, bag checks were to be conducted
3 prior to the employee clocking out, including for meal periods. *Id.* Additionally, Defendant argues
4 that in practice, bag checks were only conducted at the end of the employee’s shift and were not
5 conducted prior to meal and rest periods where employees rarely left the store with a bag. *Id.*
6 Defendant further contends that it pays meal period premium wages to employees who are not
7 provided full, uninterrupted meal periods per Labor Code section 226.7. *Id.* Lastly, Defendant
8 contends that Plaintiff’s meal and rest period claims are not suited for class certification as
9 individual inquiries would be required to assess which employees received non-compliant meal
10 and/or rest periods, how many meal and/or rest periods were non-compliant, and the reasons why
11 a particular individual recorded a non-compliant meal period or missed a meal period on a
12 particular shift. *Id.*

13 As a result of these alleged substantive violations, Plaintiff contends that Defendant is
14 liable for derivate wage statement violations, waiting time penalties for its failure to pay
15 employees all final wages upon their separation of employment, and civil penalties under PAGA,
16 Labor Code section 2698 *et seq.* Schmidt Decl., ¶ 16. Defendant argues that the alleged wage
17 statement violations were not “knowing and intentional,” and that Plaintiff could not show she
18 “suffer[ed] injury,” as required by Labor Code section 226(e) for imposition of penalties. *See*
19 *Amaral v. Cintas Corp.* (2008) 163 Cal. App. 4th 1157, 1201; Schmidt Decl., ¶ 16. Defendant
20 further contends that it possesses strong, good faith defense to Plaintiff’s underlying claims, thus
21 precluding recovery of waiting time penalties (which are only available for the “willful” failure
22 to pay wages). *See* 8 Cal. Code Regs. § 13520 (“[A] good faith dispute that any wages are due
23 will preclude imposition of waiting time penalties under Section 203...A good-faith dispute that
24 any wages are due occurs when an employer presents a defense, based in law or fact which, if
25 successful, would preclude any recovery on the part of the employee.”); Schmidt Decl., ¶ 16.
26 Defendant also contends that Plaintiff’s meal and rest period claims cannot support a claim for
27 waiting time penalties. *See Ling v. P.F. Chang's China Bistro, Inc.* (2016) 245 Cal.App.4th 1242,
28 1261 (meal and rest period premium pay compensates for the non-provision of meal and rest

periods, not for the ‘nonpayment of wages’ as required by Labor Code § 203); Schmidt Decl., ¶ 16. Defendant also maintains that, given its good-faith defenses, this Court would exercise its discretion to substantially reduce any PAGA penalties if it were to find Defendant liable for any of Plaintiff’s underlying claims. *Id.*

B. DISCOVERY AND MEDIATION

In connection with mediation, Defendant provided Plaintiff with timekeeping and payroll data for 10% of the putative class. Schmidt Decl., ¶ 10. Defendant also provided relevant policies and procedures in effect during the Class Period as well as a class list with employee start dates and end dates, if applicable. *Id.* Plaintiff, with the help of her expert, conducted an analysis of this data and created a comprehensive damages model to calculate the likely exposure that Defendant faced on each claim. *Id.*

On August 16, 2021, the Parties participated in a mediation with Tripper Ortman, Esq., a highly respected wage and hour class action mediator. Schmidt Decl., ¶ 11. During mediation, the Parties exchanged divergent views on Defendant’s liability and exposure valuations, their legal positions, and the likelihood of certification of Plaintiff’s claims. *Id.* Although the Parties did not settle at mediation, they continued their settlement discussions for several months, eventually arriving at a settlement in principle which was ultimately formalized in the Settlement. *Id.*

III. THE PROPOSED SETTLEMENT

A. ESSENTIAL TERMS OF THE SETTLEMENT

If the Court preliminarily approves this settlement, Defendant will pay a GSA of \$1,750,000.00. Settlement §§ I.R., III.A. This Settlement is non-reversionary and Settlement Class members will automatically receive their Settlement Share unless they affirmatively opt-out of the Settlement. *Id.*

Defendant will fund the GSA within 14 days of the Effective Date – which means the date by which all of the following have occurred: (1) This agreement and the contemplated settlement receive final approval from the Court; and (2) The Judgement becomes “Final”, meaning the last of the following dates, as applicable: (1) the first business day following the last date on which a notice of appeal from the Judgment may be filed and none is filed; and (2) if Judgment is affirmed

and is no longer subject to appeal. Settlement §§ 9, I.N, I.P.

The monetary terms of the Settlement are as follows:

• Gross Settlement Amount (“GSA”):	\$1,750,000.00
• Minus Court-approved attorneys’ fees (one-third):	\$583,333.33
• Minus Court-approved verified costs (up to):	\$35,000.00
• Minus Court-approved service payment:	\$7,500.00
• Minus Amount set aside as LWDA Payment:	\$37,500.00
• <u>Minus estimated settlement administration costs:</u>	<u>\$18,500.00</u>
Net Settlement Amount (“NSA”):	\$1,068,166.67

1. The Settlement Provides for Reasonable Monetary Payments

After deducting amounts for court-approved attorneys’ fees and costs, class representative service payment, costs of settlement administration, and the LWDA Payment, the Settlement requires Defendant to pay a Net Settlement Amount of approximately \$1,068,166.67 to the Class Members. *See* Settlement §§ I.U, III.B.

Defendant’s records indicate that there are approximately 1,587 Class Members who worked a combined 82,594 workweeks during the time period of April 28, 2016 through November 11, 2021. Schmidt Decl., ¶ 17; Settlement § III.C.5. Based on the allocations of the Net Settlement Amount, participating employees will receive, on average, a payment of approximately \$673.07. Schmidt Decl., ¶ 17. Settlement Class members will have 60 calendar days from the mailing of the Class Notice to opt-out or object to the Settlement, thereby providing ample time to review the Class Notice without unduly delaying the Settlement. *See* Settlement § III.E.3. Those Settlement Class members who do not opt-out of the Settlement will be bound by its terms and will release any and all claims that were alleged in the Complaint or could have been asserted based on the factual allegations asserted in the Action. Specifically, without limitation, Settlement Class members will release claims under Cal. Lab. Code §§ 201, 202, 203, 204, 223, 226, 226.7, 510, 512, 516, 558, 1182.12, 1194, 1194.2, 1197, 1198, and the IWC Wage Orders, and the federal Fair Labor Standards Act (“Released Class Claims”), as well as claims by or on behalf of the State of California or any of its divisions, including the LWDA, under the Private Attorney General Act, Cal. Lab. Code § 2698, *et seq.* and for unlawful and/or unfair business practices under Cal. Bus. & Prof Code § 17200 *et seq.*, to the extent such claims are predicated on the Released Class Claims; and any claim for attorneys’ fees and costs related to the above-

1 referenced Released Class Claims. *Id.*, § III.F.1.

2 **2. Attorneys' Fees, Costs, and Class Representative Service Payment**

3 As part of the Settlement, Plaintiff will apply for a service payment at the time of seeking
4 final approval of the Settlement in the total amount of \$7,500.00 for her service to the Settlement
5 Class and her general release of all claims (known or unknown) against Defendant. *See* Settlement
6 § III.B.1; Schmidt Decl., ¶ 18. “[I]ncentive awards are fairly typical in class action cases . . . and
7 are intended to compensate class representatives for work done on behalf of the class [and] to
8 make up for financial or reputational risk undertaken in bringing the action.” *In re Cellphone Fee*
9 *Termination Cases* (2010) 186 Cal.App.4th 1380, 1393-94. Plaintiff’s requested service payment
10 is intended to recognize the significant benefits conferred upon the Settlement Class due to the
11 time and effort that Plaintiff expended on behalf of the Settlement Class, including providing
12 factual information and documents to her attorneys, identifying potential witnesses, and
13 participating in multiple meetings with her attorneys to discuss the claims and theories at issue in
14 the litigation, as well as the significant risks Plaintiff undertook by agreeing to serve as the named
15 plaintiff in this case, as well as the fact that Plaintiff agreed to a general release of all claims
16 subject to a waiver of California Civil Code section 1542. Settlement § III.B.1; Schmidt Decl., ¶
17 18; Declaration of Janelle Basich-Mustafa (“Mustafa Decl.”), ¶¶ 3-4.

18 Class Counsel will also apply for an attorneys’ fee award of \$583,333.33 (one-third of the
19 GSA), and up to \$35,000.00 in verified costs. *See* Settlement, § III.B.2.; Schmidt Decl., ¶ 19.
20 Plaintiff submits that the requested fee is fair compensation for undertaking complex, risky,
21 expensive, and time-consuming litigation on a purely contingent fee basis. Class Counsel incurred
22 substantial attorneys’ fees conducting pre-filing investigation, analyzing Plaintiff’s claims,
23 conducting legal research and analysis, reviewing documents and data produced by Defendant,
24 propounding discovery, building a comprehensive damages model, preparing for and attending
25 mediation, negotiating and preparing the long-form Settlement Agreement, preparing this motion
26 for preliminary approval, and otherwise litigating the case. Schmidt Decl., ¶ 19. Class Counsel
27 will also expend future attorney time in attending the hearing on this Motion, overseeing the
28 Notice process, drafting the Final Approval Motion and supporting documents, and attending the

1 Final Approval hearing, among other tasks. *Id.*

2 Both California and federal courts have recognized that an appropriate method for
3 awarding attorneys' fees in class actions is to award a percentage of the "common fund" created
4 as a result of the settlement. *See Laffitte v. Robert Half Int'l Inc.* (2016) 1 Cal.5th 480, 506 ("the
5 percentage of fund method survives in California class action cases..."); *Wershba v. Apple*
6 *Computer, Inc.* (2001) 91 Cal.App.4th 224, 254 (recognizing both the "percentage of recovery"
7 and "lodestar/multiplier" methods). Historically, courts have awarded percentage fees in the range
8 of 20% to 50%, depending on the circumstances of the case. *See 4 Newberg on Class Actions* §
9 14.6 (4th Ed. 2013) ("No general rule can be articulated on what is a reasonable percentage of a
10 common fund. Usually 50% of the fund is the upper limit on a reasonable fee award from a
11 common fund in order to assure that the fees do not consume a disproportionate part of the
12 recovery obtained for the class, although somewhat larger percentages are not unprecedented.").

13 Class Counsel submits that the request for attorneys' fees is reasonable when viewed as
14 an overall percentage of the settlement (one-third) in light of the substantial risks, including the
15 possibility that the Lawsuit could not move forward as a class action, as well as the significant
16 work undertaken, the extremely positive results obtained for the class, and the efficiency with
17 which the Parties conducted the litigation. Should the Court grant preliminary approval, Class
18 Counsel will seek an award of attorneys' fees and verified litigation costs at the time of seeking
19 final approval of the Settlement.

20 **IV. ARGUMENT**

21 **A. PRELIMINARY APPROVAL IS WARRANTED**

22 California Rule of Court 3.769 conditions the settlement of a class action on court
23 approval, which is generally evaluated under the federal standards applicable under Rule 23 of
24 the Federal Rules of Civil Procedure. *See Reed v. United Teachers Los Angeles* (2012) 208
25 Cal.App.4th 322, 337 (stating that Rule 3.769 requires the trial court to determine "that the
26 settlement is fair, reasonable and adequate to all concerned"); *Hanlon v. Chrysler Corp.* (9th Cir.
27 1998) 150 F.3d 1011, 1026 (stating that Rule 23(e) requires the trial court to determine "whether
28 a proposed settlement is fundamentally fair, adequate, and reasonable"). Settlement is the

1 preferred means of dispute resolution, particularly in complex class action litigation. *See In re*
2 *Syncor ERISA Litigation* (9th Cir. 2008) 516 F.3d 1095, 1101. The Court’s role in evaluating a
3 proposed settlement is limited to ensuring that the agreement taken as a whole is fair and is not
4 the product of fraud or collusion between the negotiating parties. *See e.g., Hanlon, supra*, 150
5 F.3d at 1027. There is an initial presumption of fairness when the settlement agreement was
6 negotiated at arm’s length by class counsel. *See Kullar v. Foot Locker Retail, Inc.* (2008) 168
7 Cal.App.4th 116, 130.

8 **1. Standard for Preliminary Approval**

9 To make a fairness determination, the Court should consider several factors, including
10 “the strength of plaintiffs’ case, the risk, expense, complexity and likely duration of further
11 litigation, the risk of maintaining class action status through trial, the amount offered in
12 settlement, the extent of discovery completed and the stage of the proceedings, [and] the
13 experience and views of counsel.” *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.
14 “The list of factors is not exclusive and the court is free to engage in a balancing and weighing of
15 factors depending on the circumstances of each case.” *Wershba, supra*, 91 Cal.App.4th at 245.
16 As discussed below, the proposed Settlement is fair, adequate, and reasonable in light of the
17 overall balance of factors in this case.

18 **a. The Strength of Plaintiff’s Case**

19 Class Counsel carefully vetted the claims at issue, reviewed timekeeping and payroll
20 records as well as relevant policy documents, and conducted a detailed analysis of that data to
21 create a comprehensive damages model for Defendant’s liability. *See Schmidt Decl.*, ¶¶ 10, 20-
22 26. Although Plaintiff steadfastly maintains that her claims are meritorious, Plaintiff
23 acknowledges that there were substantial risks and uncertainty in proceeding with class
24 certification and trial. As explained in detail in section II.B., *supra*, Defendant presented
25 numerous defenses to Plaintiff’s claims, both on the merits and with respect to class certification.
26 Although Plaintiff was prepared to litigate these claims through class certification and, ultimately,
27 through trial, given the amount offered in settlement, Plaintiff predicted that it was unlikely that
28 further litigation would result in a substantially more beneficial result for the Settlement Class.

Thus, this factor supports preliminary approval of the Settlement.

b. Risk, Expense, Complexity, and Duration of Further Litigation

Although the Parties had not yet commenced formal discovery, the Settlement was reached after a significant informal exchange of timekeeping and payroll records and other relevant information for mediation purposes. Schmidt Decl., ¶ 20. Absent settlement, the Parties would need to spend substantial time and resources to complete formal written and deposition discovery and prepare the case for class certification, summary judgment or adjudication, and trial. *Id.* This Settlement avoids the considerable attorneys' fees and costs associated with conducting formal discovery, moving for class certification and summary judgment or adjudication, and ultimately, trial, as well as the risks and the accompanying burden of continued litigation on the Court.

c. Risk of Maintaining Class Action Status

Prior to reaching the Settlement, Plaintiff had not yet filed her motion for class certification. Considering Defendant's arguments and defenses against certification, there was a legitimate risk that the Court may deny certification of one or more of Plaintiff's claims, preventing the matter from continuing on a classwide basis. Thus, this factor supports preliminary approval of the Settlement.

d. Amount Offered in Settlement Given Realistic Value of Claims

This proposed Settlement provides a fair and reasonable monetary recovery for the Settlement Class in the face of disputed claims. After analyzing the data provided by Defendant prior to mediation, Plaintiff prepared a class-wide exposure analysis and forecasted the Settlement Class' expected recovery for each claim as follows:

Unpaid Wages Violations: \$138,758

Plaintiff alleges that Defendant failed to pay putative class members for all hours worked as a result of its practice of requiring putative class members to undergo bag checks off-the-clock. *See* Schmidt Decl., ¶ 21. Based on Plaintiff's testimony and a conservative estimate that employees were underpaid 4-minutes per shift due to Defendant's bag check policy, Plaintiff estimated Defendant's potential exposure for unpaid wages at \$578,158 (calculated as follows:

1 412,970 * 4 min/60 min * \$21.00 avg reg. rate). *Id.* However, as stated above, Defendant
2 maintains that it pays its employees for all hours recorded and that its written policies inform
3 employees that any bag checks are to be conducted on the clock. *Id.* Defendant further argues that
4 in any event, the bag check process is streamlined and that it only takes mere seconds for
5 employees to undergo a bag check. *Id.* Defendant further contends that Plaintiff's bag check claim
6 is not suited for class certification as individual inquiries would be required to assess which
7 employees underwent bag checks off-the-clock, how often, and how long each bag check lasted.
8 *Id.* Given these potential defenses, Plaintiff discounted Defendant's maximum exposure by 40%
9 for the risk of non-certification and 60% for the risk of being unsuccessful on the merits or
10 obtaining reduced damages, to arrive at an estimated exposure of \$138,758. *Id.*, ¶ 21.

11 **Meal Period Violations: \$365,450**

12 Plaintiff alleges that as a result of Defendant's policy and practice of requiring its non-
13 exempt employees to undergo a bag check off-the-clock prior to leaving the store's premises,
14 including during employee meal periods, Defendant failed to provide its employees with off-duty
15 30-minute meal periods. *See* Schmidt Decl., ¶ 22. Based on Plaintiff's expert's analysis of
16 Defendant's records, Plaintiff estimated Defendant's potential exposure for meal periods at
17 \$2,436,336 (calculated as follows: (127,212 non-compliant meal periods – 11,196 meal period
18 premiums paid) x \$21.00 average premium). *Id.* However, Defendant maintains that it provided
19 all legally compliant meal periods to employees and that any missed or non-compliant meal
20 periods were the result of employee choice, not Defendant's policy. *See Brinker, supra*, 53 Cal.4th
21 at 1040 (holding that where employees were "provided" the opportunity to take compliant breaks,
22 whether they took a break or not was immaterial); Schmidt Decl., ¶ 22. Defendant also argues
23 that according to its written policy bag checks were to be conducted prior to the employee
24 clocking out, including prior to meal periods, and that in practice, bag checks were only conducted
25 at the end of the employee's shift and were not conducted prior to meal and rest periods where
26 employees rarely left the store with a bag. *Id.* Lastly, Defendant maintains Plaintiff's meal period
27 claim is not suited for class certification, since individual inquiries would be required to assess
28 whether a bag check was conducted, whether the bag check was conducted on-the-clock, as well

as any other potential reasons why a particular employee recorded a non-compliant meal period or missed a meal period on a particular shift. *Id.* Given these potential defenses, Plaintiff discounted Defendant's maximum exposure by 50% for the risk of non-certification and 70% for the risk of being unsuccessful on the merits or obtaining reduced damages, to arrive at an estimated exposure of \$365,450. *Id.*, ¶ 22.

Rest Period Violations: \$671,648

Similar to meal periods, Plaintiff alleges that Defendant failed to authorize and permit all duty-free 10-minute rest periods for every four hours worked due to its policy and practice of requiring employees to undergo bag checks off-the-clock. *See* Schmidt Decl., ¶ 23. Based on Plaintiff's expert's analysis of Defendant's records, Plaintiff estimated Defendant's potential exposure for rest periods at \$8,395,611 (calculated as follows: (399,791 3.5+ shifts x \$21.00 average premium). *Id.* However, Defendant contends it authorized employees to take all required rest periods and argues that its bag check policy did not discourage or impede employees from taking rest periods off-premises as bag checks were rarely conducted in connection with employee rest periods. *Id.*, ¶ 23. Defendant further argues that Plaintiff's rest period claim is inherently unsuited for class treatment as it would require individualized inquiries to determine whether a certain rest period was denied on a given shift, whether a missed rest period was the result of individual employee choice, and/or whether a bag check was even conducted during a rest period, which would devolve into an unmanageable series of mini-trials. *Id.* Based on these defenses, Plaintiff discounted Defendant's maximum exposure by 60% for risk of non-certification and 80% for risk of being unsuccessful on the merits, to arrive at an estimated exposure of \$671,648. *Id.*, ¶ 23.

Waiting Time Penalties: \$469,728

According to the data produced by Defendant, approximately 1,165 putative class members separated their employment with Defendant during the relevant time period. Schmidt Decl., ¶ 24. Plaintiff therefore calculated Defendant's maximum waiting time penalty exposure at \$5,871,600 (1,165 former employees x \$21.00 average hourly rate x 8 hours per day x 30 days). *Id.* However, Defendant maintains that waiting time penalties are not appropriate in this matter

1 as meal and rest period claims cannot support such penalties. *See Ling, supra*, 245 Cal.App.4th
2 at 1261 (holding that meal and rest period premium pay compensates for the non-provision of
3 meal and rest periods, not for the ‘nonpayment of wages’ as required by Labor Code section 203);
4 Schmidt Decl., ¶ 24. Defendant also argues it attempted to pay its employees all final wages owed
5 in good faith upon their separation, therefore precluding a finding of wilfulness which is necessary
6 to obtain waiting time penalties under 8 Cal. Code Regs. section 13520. Schmidt Decl., ¶ 24.
7 Lastly, Defendant argues that at least 160 employees signed release agreements when Defendant
8 closed a number of retail locations in June 2020. Given these defenses, Plaintiff discounted the
9 value of this claim by 60% for the risk of non-certification of the underlying claims, and 80% for
10 a risk of being unsuccessful on the merits (including a failure to establish wilfulness), for an
11 estimated recovery on this claim of \$469,728. *Id.*, ¶ 24.

12 **Wage Statement Violations: \$104,360**

13 According to Defendant’s data at mediation, 710 putative class members received 21,227
14 wage statements during the 1-year time period associated with wage statement penalties. Schmidt
15 Decl., ¶ 25. Plaintiff calculated Defendant’s maximum wage statement exposure at \$2,087,200
16 (calculated as follows: ((710 “initial” violations x \$50) + (1,840 “subsequent” violations x \$100)).
17 *Id.* Defendant argues that meal and rest period violations (Plaintiff’s primary claims) cannot
18 support derivative wage statement penalties. *Naranjo v. Spectrum Security Services, Inc.*, (2019)
19 40 Cal.App.5th 444, 474. Defendant argues that employees could not show they “suffer[ed]
20 injury” as a result of these violations, as required by Labor Code § 226(e). Schmidt Decl., ¶ 25.
21 Defendant further argues that a number of former employees have signed releases and therefore,
22 Plaintiff’s damage calculation is overstated. *Id.* In light of all of these arguments, as well as the
23 potential failure to prove that the violations were “knowing and intentional” as required by Labor
24 Code § 226(e), Plaintiff discounted the value of this claim by 75% for the risk of non-certification
25 of the underlying claims and discounted 80% for a risk of being unsuccessful on the merits, for
26 an estimated exposure of \$104,360. *Id.*, ¶ 25.

27 **PAGA Penalties: \$265,338**

28 The success of Plaintiff’s PAGA claim is wholly dependent upon the success of her

underlying claims occurring within the one-year statute of limitations applicable to the PAGA. Schmidt Decl., ¶ 26. Assuming that Plaintiff could prove at least one underlying Labor Code violation in each pay period within the PAGA period, Plaintiff estimates Defendant’s maximum PAGA exposure at \$2,122,700 (calculated from 21,227 pay periods at \$100 per violation). *Id.*; see also *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1207 (2008) (finding “initial” violation rate applies until employer is notified that it is violating a Labor Code provision). However, these penalties derived from the underlying wage and hour violations discussed above, which Defendant disputes. See e.g., *Green v. Lawrence Service Co.* (C.D. Cal. 2013) 2013 WL 3907506, *5, n.5 (explaining that a PAGA claim’s success was determined by the merits of its underlying claims). Plaintiff also recognizes that the Court has discretion to reduce any award of PAGA penalties where it views them as duplicative. Schmidt Decl., ¶ 26; see also *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 529 (affirming reduction of PAGA penalties to \$5 per initial violation); *Fleming v. Covidien, Inc.* (C.D. Cal. Aug. 12, 2011) Case No. ED CV 10-01487 RGK (OPx), 2011 WL 7563047 at *4 (reducing PAGA penalties from \$2.8 million to \$500,000). Plaintiff therefore discounted the maximum figure by 50% for the risk of being unable to proceed on a representative basis and an additional 75% to account for the likelihood of this Court reducing penalties, to arrive at an estimated exposure of \$265,338. Schmidt Decl., ¶ 26.

Using these estimated figures for each of the claims described above, Plaintiff predicts that a possible recovery for the Settlement Class would be approximately \$2,015,283. Schmidt Decl., ¶ 27. The proposed recovery to the Settlement Class of \$1,750,000 represents approximately 87% of Plaintiff’s projected potential recovery, while avoiding the further expense and serious risk of proceeding towards class certification and trial. *Id.* Taking into account the risk of non-certification, failure to prevail on the merits, and the Court’s power to reduce the civil penalties, the proposed Settlement falls well within the realm of being fair, reasonable, and adequate. See e.g., *Altamirano v. Shaw Industries, Inc.* (N.D. Cal. 2015) No. 13-cv-00939-HSG, 2015 WL 4512372, at *9 (preliminarily approving wage and hour class action settlement, stating, “[a]lthough 15% represents a modest fraction of the hypothetical maximum recovery estimated by Plaintiff, that figure is sufficient for the Court to grant preliminary approval given the merits

of Plaintiff's claims."). Preliminary approval is appropriate since the Settlement will provide significant monetary relief to Settlement Class members without the uncertainty, delay, and additional expense of further litigation.

e. The Experience and Views of Counsel

"Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Pacific Enterprises Securities Litigation* (9th Cir. 1995) 47 F.3d 373, 378. Here, Plaintiff is represented by competent and experienced counsel who possess extensive experience litigating wage and hour class actions from both the plaintiff and defense side and have been appointed as class counsel in numerous cases alleging similar claims. *See* Schmidt Decl., ¶¶ 2-7. Class Counsel, with the help of their expert, conducted an extensive review of Defendant's records produced for mediation as well as relevant policies in effect during the Class Period and drew on their extensive experience in similar cases to assess the strengths and weaknesses of Plaintiff's case. *See* Schmidt Decl., ¶ 10. The Settlement was also reached with the input and assistance of Tripper Ortman, Esq., an experienced and highly respected neutral wage and hour class action mediator. *Id.*, ¶ 11. This factor strongly supports preliminary approval of the Settlement. *See Kullar, supra*, 168 Cal.App.4th at 130.

2. The Preliminary Approval Standard is Met

At this stage, the Court can grant preliminary approval of the Settlement and direct that the Class Notice be given if the proposed Settlement: (1) falls within the range of possible approval; (2) appears to be the product of serious, informed, and non-collusive negotiations; and (3) has no obvious deficiencies. *See* Manual for Complex Litigation § 30.41(3rd Ed. 1995); 4 *Newberg on Class Actions* § 11:24-25 (4th Ed. 2013).

a. The Settlement is Within the Range of Possible Approval

The proposed Settlement reflects an excellent recovery for the Settlement Class members in light of the significant risks of litigation. The proposed Settlement will provide substantial compensation for contested claims and derivative penalties, and the overall average payment of

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1 \$679.67 exceeds the average payment achieved in other wage and hour class action settlements.²
2 Thus, Plaintiff submits that the proposed Settlement is within the range of possible approval, such
3 that notice should be provided to the Settlement Class members so they can consider the
4 Settlement. The Court will have the opportunity to again assess the reasonableness of the
5 Settlement after the Settlement Class members have had the opportunity to opt-out or object.

6 **b. The Settlement Resulted from Serious, Informed, and Non-Collusive**
7 **Negotiations**

8 This proposed Settlement is entitled to an initial presumption of fairness (*see Kullar,*
9 *supra*, 168 Cal.App.4th at 130) as it is the result of the exchange of substantial information,
10 including timekeeping and payroll data which was analyzed by Plaintiff's counsel and an expert
11 with a Ph.D. in economics, arm's length negotiations by counsel; mediation before an experienced
12 wage and hour class action mediator; and additional months of negotiating and finalizing the
13 terms of the long-form Settlement Agreement. *See Schmidt Decl.*, ¶¶ 10-11. Thus, the proposed
14 settlement is entitled to an initial presumption of fairness. *See Kullar, supra*, 168 Cal.App.4th at
15 130.

16 **c. The Settlement is Devoid of Obvious Deficiencies**

17 The Settlement will provide substantial tangible monetary relief to Settlement Class
18 members. Moreover, the amounts proposed for Plaintiff's service payment, settlement
19 administration costs, attorneys' fees and costs to Class Counsel, and the PAGA payment to the
20 LWDA are all reasonable and appropriate. Because the Settlement is devoid of obvious
21 deficiencies, this final factor supports preliminary approval.

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25 ² *See e.g., Bercea v. AE Retail West*, Case No. 34-2012-00123947 (Sacramento County Super. Ct. May 9,
26 2012) (average net recovery of approximately \$105); *Ressler v. Federated Department Stores, Inc.*, Case
27 No. BC335018 (L.A. County Super. Ct. Jan. 2, 2009) (average net recovery of approximately \$90); and
28 *Schiller v. David's Bridal, Inc.*, Case No. 1:10-cv-00616-AWI-SKO, 2012 WL 2117001, at *17 (E.D. Cal.
June 11, 2012) ("Class Members will receive an average of approximately 198.70 . . . [T]his is a substantial
recovery where Defendants asserted compelling defenses to liability; Plaintiff also notes several similar
actions where the gross recoveries per class member were less than \$90 . . . [T]he Court finds that the
results achieved are good").

1 **B. THE COURT SHOULD CERTIFY THE PROPOSED SETTLEMENT**
2 **CLASS**

3 The proposed Settlement Class satisfies the criteria for certification of a settlement class
4 under California law because: (1) the individuals in the Settlement Class are so numerous that
5 joinder would be impractical; (2) common questions of law and fact predominate over individual
6 questions such that class certification is the most efficient and desirable way to maintain this
7 litigation; (3) Plaintiff's claims are typical of the claims of the absent Settlement Class members;
8 and (4) Plaintiff and her counsel will fairly and adequately represent the interests of the absent
9 Settlement Class members. *See* Cal. Code Civ. Proc. § 382.

10 **1. The Proposed Class is Ascertainable and Numerous**

11 A class is "ascertainable" where the members "may be readily identified without
12 unreasonable expense or time by reference to official [or business] records." *See Sevidal v. Target*
13 *Corp.* (2010) 189 Cal.App.4th 905, 919 (alterations in original). Here, the proposed Settlement
14 Class is defined as all employees of Defendant who were classified as non-exempt and worked
15 within the State of California during the Class Period. According to Defendant's records, the
16 Settlement Class consists of approximately 1,587 individuals, rendering it impracticable to gather
17 all the Settlement Class members and bring them before the Court. *See* Schmidt Decl., ¶ 17. Thus,
18 the proposed Settlement Class satisfies the numerosity requirement.

19 **2. Common Issues of Law and Fact Predominate**

20 The focus in a certification dispute is not on the merits of the case, but rather on what
21 types of questions, "common or individual," are likely to arise in the action. *See Sav-On Drug*
22 *Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327. Here, Plaintiff's claims are predicated
23 on uniform company policies, principally revolving around Defendant's bag check policies and
24 practices as well as meal and rest period policies and practices. These claims include a failure to
25 pay all wages owed, provide all meal periods, authorize and permit all rest periods, as well as
26 derivative wage statement, waiting time, and PAGA claims. These types of claims are commonly
27 held to be proper for class certification. *See, e.g., Brinker, supra*, 53 Cal.4th at 1032-34 ("The
28 theory of liability—that Brinker has a uniform policy, and that that policy...allegedly violates the
law—is by its nature a common question eminently suited for class treatment."); *Bradley v.*

1 *Networkers Int'l, LLC* (2012) 211 Cal.App.4th 1129, 1150 (certifying meal and rest period
2 claims); *Bluford, supra*, 216 Cal.App.4th at 871 (reversing denial for certification of rest period
3 claim).

4 **3. The Claims of the Named Plaintiff Are Typical**

5 The typicality requirement is satisfied where class representatives have claims that are
6 typical of those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191
7 Cal.App.3d 1341, 1347. Here, Plaintiff's claims are typical of those held by the members of the
8 proposed Settlement Class. Like other Settlement Class members, Plaintiff was employed by
9 Defendant in California during the Class Period. *See* Schmidt Decl., ¶ 8; Basich-Mustafa Decl., ¶
10 2. Plaintiff was required to undergo bag checks off-the-clock and was not provided full 30-minute
11 meal periods or full 10-minute rest periods. Basich-Mustafa Decl., ¶ 2. Plaintiff was therefore
12 impacted by the same challenged policies that allegedly injured the Settlement Class as a whole
13 and were subject to the same defenses forwarded by Defendant as to the Settlement Class and is
14 therefore typical.

15 **4. Plaintiff and Class Counsel Will Fairly and Adequately Represent the**
16 **Class**

17 The adequacy of representation requirement examines conflicts of interest between named
18 parties and the class(es) they seek to represent. *See Capitol People First v. Department of*
19 *Developmental Services* (2007)155 Cal.App.4th 676, 697. Here, Plaintiff and Class Counsel will
20 adequately represent the Settlement Class, as there are no conflicts between Plaintiff and the
21 Settlement Class she seeks to represent, and Plaintiff possesses claims that are in line with those
22 of the Class. *See McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450 (finding adequacy
23 satisfied where there was no indication that the plaintiff's counsel were not qualified and the
24 named plaintiff had no interests antagonistic to those of the proposed class). Class Counsel also
25 has extensive experience in wage and hour class action litigation. *See* Schmidt Decl., ¶¶ 2-7;
Haines Decl., ¶¶ 2-8; McIntosh Decl., ¶¶ 2-5.

26 **C. THE COURT SHOULD ORDER DISTRIBUTION OF THE PROPOSED**
27 **CLASS NOTICE**

28 This Court should order distribution of the proposed Class Notice to the Settlement Class
by first class mail, postage prepaid, using the last known mailing address information provided

1 by Defendant This manner of giving notice is the “best notice practicable” under the
2 circumstances because it provides “individual notice to all members who can be identified through
3 reasonable effort.” *See Eisen v. Carlisle and Jacquelin* (1974) 417 U.S. 156, 173. Here, Plaintiff
4 proposes that the settlement be administered by Phoenix Settlement Administrators, an
5 experienced class action settlement administrator. *See* Declaration of Jodey Lawrence and
6 attached exhibits. Settlement Class members’ addresses will be ascertainable through Defendant’s
7 personnel and payroll records, which Defendant will provide to PSA within twenty (20) calendar
8 days after preliminary approval of the Settlement. *See* Settlement § III.E.2. Prior to mailing the
9 Class Notice packets, PSA will update the Class Data using the National Change of Address
10 database (“NCOA”). *Id.* To the extent that any notices are returned, PSA will search for a more
11 current address for the Class Member and re-mail the Class Notice Packet to the Class Member.
12 *Id.* The content of the proposed Class Notice satisfies California Rule of Court 3.766(d) because
13 it advises putative Settlement Class members of the nature of the claims, basic contentions and
14 denials of the parties, the key terms of the Settlement, the uniform 60-day deadline to opt-out or
15 object to the Settlement and the procedure by which to do so, explains the recovery formula and
16 expected recovery amount for each Settlement Class Member, and advises them that they will be
17 bound by the terms of the Settlement if they do not opt-out. *See* Schmidt Decl., Ex. 1, Ex. A.
18 (Class Notice). The proposed Class Notice will also notify Settlement Class members of the final
19 approval hearing date and provide the Settlement Class contact information for Class Counsel and
20 advise Settlement Class members that they may enter an appearance through counsel if they wish
21 to. *Id.* This manner of giving notice satisfies California Rule of Court 3.766(e) as the most reliable
22 and cost-effective method of reaching Settlement Class members.

23 **D. THE COURT SHOULD SET A FINAL APPROVAL HEARING**

24 Finally, this Court should set a hearing for final approval of the Settlement on a date
25 appropriately scheduled to follow the deadline by which Settlement Class members must file
26 objections to the Settlement or opt-out. *See* California Rule of Court 3.769.

27 **V. CONCLUSION**

28 For the foregoing reasons, Plaintiff respectfully requests that the Court preliminarily

1 approve the proposed Settlement, provisionally certify the Settlement Class, and enter the
2 proposed order submitted concurrently herewith.

3
4 Dated: May 11, 2022

Respectfully submitted,
HAINES LAW GROUP, APC

5
6 By:



Fletcher W. Schmidt
Attorneys for Plaintiff