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on behalf of themselves and all others similarly situated

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA BARBARA**

CHERYL FOSTER, an individual;
TRAVONN HALEY, an individual, on behalf
of themselves and others similarly situated,

Plaintiffs,

vs.

DECKERS OUTDOOR CORPORATION, a
Delaware corporation; REAL TIME
STAFFING SERVICES, LLC, a limited
liability company; and DOES 1 through 50,
inclusive,

Defendants.

Case No.: 20CV03699

CLASS ACTION

Assigned for All Purposes to
The Honorable Donna D. Geck

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR AN ORDER
(1) PRELIMINARILY APPROVING THE
CLASS ACTION SETTLEMENT; (2)
APPROVING NOTICE OF CLASS
ACTION SETTLEMENT; AND (3)
SETTING HEARING FOR FINAL
APPROVAL**

*[Filed concurrently with Plaintiffs' Notice of
Motion and Motion; Declaration of David
Yeremian; and [Proposed] Order]*

Date: October 29, 2021
Time: 10:00 a.m.
Dept: 4

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Cheryl Foster and Travonn Haley (collectively “Plaintiffs” or “Class
4 Representatives”) filed a class action complaint in the Superior Court of the State of California,
5 Santa Barbara County, Case No 20CV03699 against Defendant Deckers Outdoor Corporation and
6 Staffing Services, LLC (collectively “Defendants”). Plaintiffs alleged the following causes of
7 action: (1) Failure to Pay Minimum Wages; (2) Failure to Pay Wages and Overtime Under Labor
8 Code § 510; (3) Meal Period Liability Under Labor Code § 226(a); (4) Rest-Break Liability
9 Under Labor Code § 226.7; (5) Violation of Labor Code § 226(a); (6) Failure to Keep Required
10 Payroll Records Under Labor Code §§ 1174 and 1174.5; (7) Violation of Labor Code §221; (8)
11 Violation of Labor Code §203; (9) Violation of Business & Professions Code § 17200 *et seq.*; and
12 (10) Penalties Pursuant to Labor Code § 2699 *et seq.*

13 Pursuant to the proposed Joint Stipulation of Class Action Settlement (“Settlement” or
14 “Settlement Agreement”), filed concurrently herewith, the class consists of “all hourly paid
15 workers directly employed by Deckers and/or employed by Real Time and placed on assignment
16 at any Deckers facility in California at any time from June 1, 2016 through November 21, 2021.”
17 After engaging in substantial investigation and extensive negotiations with the assistance of a
18 respected third-party neutral, Todd Smith, Esq., the parties have agreed to settle all claims alleged
19 in the lawsuit on a class-wide non-reversionary basis for One Million One Hundred Fifty
20 Thousand Dollars and Zero Cents (\$1,150,000), inclusive of all fees and costs. All 6,150 Class
21 Members shall receive a settlement share unless they opt out.

22 The proposed settlement reflected in the Settlement Agreement is fair, reasonable, and
23 adequate, and in the best interests of the Class. Consequently, Plaintiffs, with the consent of
24 Defendants, hereby move this Court for an order: (1) granting preliminary approval of the
25 proposed class action settlement, as embodied in the Joint Stipulation of Class Action Settlement
26 (“Settlement” or “Settlement Agreement”) filed concurrently herewith; (2) approving the Notice
27 of Class Action Settlement to be sent to Class Members, and the notification schedule as set forth
28 in the Settlement Agreement and the Proposed Order, also filed concurrently herewith; and (3)

1 setting a hearing for final approval of the class action settlement.

2 **II. STATUS OF THE LITIGATION**

3 **A. Procedural History**

4 On May 6, 2020, Plaintiffs submitted a Private Attorneys General Act (“PAGA”) notice
5 letter to the Labor Workforce Development Agency (“LWDA”) and served Defendants.
6 (Declaration of David Yeremian (“Yeremian Decl.”), filed concurrently herewith, ¶ 10) The
7 LWDA did not express an interest in investigating Plaintiffs’ claims within the 65 day period.
8 (*Id.*)

9 On June 1, 2020, Plaintiffs filed a class action complaint against Defendants alleging
10 eleven causes of action: (1) Failure to Pay Minimum Wages; (2) Failure to Pay Wages and
11 Overtime Under Labor Code § 510; (3) Meal Period Liability Under Labor Code § 226(a); (4)
12 Rest-Break Liability Under Labor Code § 226.7; (5) Violation of Labor Code § 226(a); (6)
13 Failure to Keep Required Payroll Records Under Labor Code §§ 1174 and 1174.5; (7) Violation
14 of Labor Code §221; (8) Violation of Labor Code §203; (9) Violation of Business & Professions
15 Code § 17200 *et seq.*; and (10) Penalties Pursuant to Labor Code § 2699 *et seq.* (Yeremian Decl.,
16 ¶ 11)

17 **B. Investigation**

18 Before filing the lawsuit, Class Counsel investigated and researched the facts and
19 circumstances underlying the pertinent issues and the law applicable thereto. (Yeremian Decl., ¶
20 12) This required thorough discussions and interviews between Class Counsel and Plaintiffs, as
21 well as preliminary research into the various legal issues involved in the case. (*Id.*) After
22 conducting their initial investigation, Class Counsel determined that Plaintiffs’ claims were well-
23 suited for class and representative action adjudication owing to what appeared to be a common
24 course of conduct affecting a similarly situated group of employees. (*Id.*)

25 After filing the lawsuit, Class Counsel conducted a thorough investigation of the facts and
26 claims giving rise to the action, including: (1) conducting informal and formal discovery, and
27 meeting and conferring with defense counsel about same; (2) reviewing and analyzing a 25%
28 sampling of time and pay records for the Class Members who were directly hired by Defendant

1 Deckers Outdoor Corporation and a 10% sampling of time and pay records for the Class
2 Members who were hired by Real Time Staffing Services, LLC as well as employment
3 handbooks, Plaintiffs' personnel files including arbitration agreements, relevant policies and other
4 documentation; (3) researching the applicable law and potential defenses; (4) constructing
5 damage models based on interpretations of California law; and (5) reviewing information
6 provided by Defendants at the mediation including the total number of Class Members during the
7 Class Period, total number of Class Members during the PAGA Period, total number of current
8 employees, total number of former employees in the relevant time period, average hourly rate of
9 pay, total number of workweeks worked during the Class Period, the total number of paychecks
10 issued during the relevant time period and the number of Class Members who had signed
11 arbitration agreements (nearly all staffing company employees and approximately 50% of direct
12 hires have signed pre-employment arbitration agreements with class action waivers with direct
13 hires making up approximately 350 out of 6,150 total Class Members. (Yeremian Decl., ¶ 13)
14 The Class enumerated in this action is ascertainable because the Class Members may be readily
15 identified by reference to Defendants' records. (*Id.*) Defendants have agreed to share the
16 information from these records with the Settlement Administrator in order to identify and contact
17 the Class Members. (*Id.*) There are approximately 6,150 total Class Members. (*Id.*)

18 Defendants, for their part, vigorously contested liability, the amount of claimed damages,
19 and the propriety of class certification. (Yeremian Decl., ¶ 14) After Class Counsel analyzed the
20 relevant documents and other gathered data, Class Counsel believed that this case was appropriate
21 for resolution via mediation. (*Id.*) Given the high level of risk present for both sides, the parties
22 elected to mediate Plaintiffs' claims and explore the possibility of settlement. (*Id.*)

23 **C. Settlement Efforts**

24 On May 27, 2021, the parties mediated this case with Todd Smith, Esq., a respected and
25 highly experienced mediator in wage and hour class actions. (Yeremian Decl., ¶ 15) During
26 mediation, Plaintiffs' and Defendants' counsel discussed all aspects of the case, including the
27 risks of litigation and the risks to both parties of proceeding with a motion for class certification
28 as well as the law relating to unpaid wages, meal periods, rest periods, wage statements, and final

1 pay. (*Id.*) As a result of the mediation, the parties agreed to settle the lawsuit according to the
2 terms set forth in the Settlement Agreement. (*Id.*; See Exhibit 1 attached to Yeremian Decl.,
3 “Settlement” or “Settlement Agreement”).)

4 From Class Counsel’s review of the facts, strengths, and weaknesses of the case, the risks
5 and delays posed by further litigation, and Class Counsel’s own prior litigation experience, Class
6 Counsel believes that the recovery for each Class Member is fair and reasonable taking into
7 consideration the amounts received in other wage and hour class actions, the risks inherent in
8 litigation of this genre, and the reasonable tailoring of each Class Member’s claim to the
9 settlement award he or she will receive. (*Id.*) Further, and based on the settlement negotiations,
10 which were extensive, and conducted in good faith and at arm’s length between attorneys with
11 substantial experience litigating class actions and wage and hour cases, the Settlement Agreement
12 was the product of a non-collusive settlement process in which the parties were forced to make
13 significant compromises in the interest of reaching a full and complete settlement of the lawsuit.
14 (*Id.*)

15 **III. SETTLEMENT AGREEMENT AND ACCOMPANYING DOCUMENTS**

16 Under the terms of the proposed Settlement Agreement, the Defendants have agreed to
17 pay One Million One Hundred Fifty Thousand Dollars and Zero Cents (\$1,150,000) (“Gross
18 Settlement Amount”) on a non-reversionary basis to settle and release all claims asserted by
19 Plaintiffs in the Class Action and PAGA Action on behalf of the proposed Class. (Yeremian
20 Decl., ¶ 16; Exh. 1, ¶ 1.21) The Settlement Agreement defines the “Class Members” as “all
21 hourly paid workers directly employed by Deckers and/or employed by Real Time and placed on
22 assignment at any Deckers facility in California at any time from June 1, 2016 through November
23 21, 2021.” (Yeremian Decl., ¶ 17; Exh. 1, ¶ 1.38) The “Net Settlement Amount,” available for
24 distribution to Class Members, shall be the Gross Settlement Amount, less the Attorneys’ Fees
25 and Costs, the Class Representatives Incentive Award, Settlement Administration Fees, and
26 seventy-five percent (75%) of the LWDA Payment. (Yeremian Decl., ¶ 18; Exh. 1, ¶ 1.27) These
27 amounts are detailed as follows:

- 28 • not more than Three Hundred Eighty Three Thousand Three Hundred Thirty Three

Dollars and Thirty Three Cents (\$383,333.333) to Class Counsel for Attorneys' Fees, and not more than Twenty Thousand Dollars and Zero Cents (\$20,000.00) in Attorneys' Costs; ((Yeremian Decl., ¶ 18; Exh. 1, ¶ 6.6);

- not more than Twenty Five Thousand Five Hundred Nineteen Dollars and Zero Cents (\$25,519.00) for the Settlement Administration Fees; ((Yeremian Decl., ¶ 18; Exh. 1, ¶ 6.6);
- not more than Ten Thousand Dollars and Zero Cents (\$10,000.00) to each of the two Plaintiffs for a Class Representative Incentive Award; and ((Yeremian Decl., ¶ 18; Exh. 1, ¶ 6.2);
- Fifty Thousand Dollars and Zero Cents (\$50,000.00) for civil penalties under the PAGA, where 75% (\$37,500.00) will be paid to the LWDA and 25% (\$12,500.00) will be included in the Net Settlement Amount and distributed to Settlement Class Members). ((Yeremian Decl., ¶ 18; Exh. 1, ¶ 1.29)

The "Individual Settlement Payment," which is each Class Member's share of the Net Settlement Amount, will be calculated and apportioned from the Net Settlement Amount based on the number of workweeks a Class Member worked during the Class Period as a non-exempt employee in California. (Yeremian Decl., ¶ 19; Exh. 1, ¶ 1.27)

Defendants shall pay its corporate payroll tax obligations on the payouts to Class Members in addition to the Gross Settlement Amount. (Yeremian Decl., ¶ 20; Exh. 1, ¶ 6.1)

The settlement amount was a compromise figure, factoring in the inherent risks related to certification, liability and damages. (Yeremian Decl., ¶ 21) However, taking into account all the circumstances of the action and the defenses raised by Defendants against certification, liability and damages, Class Counsel believes that the settlement is fair and reasonable. (*Id.*)

Attached to the Settlement Agreement as Exhibit 1 is the Notice of Proposed Class Action Settlement ("Notice Packet"). Class Members will have an opportunity to dispute the information provided in their Notice Packet and they may produce evidence to support the information is inaccurate. (Yeremian Decl., ¶ 23; Exh. 1, ¶ 8.3; *see also* Class Notice, **Exhibit 1** attached to the Settlement Agreement.) Defendants' records will be presumed determinative, absent evidence to

1 rebut Defendants' records, but the Settlement Administrator will evaluate the evidence submitted
2 by the Class Member and make the decision as to the validity of such evidence. (Yeremian Decl.,
3 ¶ 23; Exh. 1, ¶ 8.3) Class Members wishing to opt-out from the Settlement Agreement must sign
4 and submit written request to the Settlement Administrator requesting that he or she be excluded
5 from the settlement within the Response Deadline. (Yeremian Decl., ¶ 24; Exh. 1, ¶ 8.5) The
6 Response Deadline will be forty five (45) calendar days after the date the Notice Packet was
7 mailed. (*Id.*)

8 Class Members who do not opt out from the Settlement Agreement will also have the
9 opportunity to object to the Settlement Agreement, by sending a written objection to the
10 Settlement Administrator within the Response Deadline. (Yeremian Decl., ¶ 25; Exh. 1, ¶ 8.6) All
11 objections must be served within forty five (45) calendar days of first mailing of the Notice
12 Packet. (*Id.*)

13 The parties have also agreed that Simpluris shall handle the notice and settlement
14 administration (Exh. 1, ¶ 1.37), and the parties respectfully request this Court to appoint
15 Simpluris to handle those procedures. The procedures for mailing notice and processing
16 exclusions and objections as well as distribution of the Net Settlement fund is detailed in the
17 Stipulation. (Exh. 1, ¶ 8)

18 **IV. CERTIFICATION FOR SETTLEMENT PURPOSES ONLY IS APPROPRIATE**

19 Express judicial policy favors maintaining wage and hour actions as class actions. (*Prince*
20 *v. CLS Transp., Inc.* (2004) 118 Cal. App. 4th 1320, 1328; *Richmond v. Dart Industries, Inc.*
21 (1981) 29 Cal. 3d 462.) Any doubt as to the appropriateness of class treatment should be resolved
22 in favor of class certification, subject to later modification if necessary. (*Richmond*, 29 Cal. 3d at
23 473-75.) The decision to certify a class is a procedural one, and should be based on the allegations
24 in the operative complaint, and not in the perceived factual or legal merit of the class claims.
25 (*Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 439-41.)

26 To certify a settlement class, the Court must find the two primary requirements for
27 maintaining a class action: (1) there must be an ascertainable class, and (2) there must be a well-
28 defined community of interest in the questions of law and fact involving the parties to be

1 represented. (*See Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 805-09; *Daar v. Yellow Cab*
2 *Company* (1967) 67 Cal. 2d 695, 704.) These criteria are met here for the reasons set forth below.

3 **A. There Is A Numerous and Ascertainable Class**

4 Whether a class is ascertainable is determined by examining the class definition, the size
5 of the class and the means available for identifying class members. (*See Vasquez, supra*, 4 Cal. 3d
6 at 821-22; *Reyes v. Board of Supervisors of San Diego County* (1987) 196 Cal. App. 3d 1263,
7 1271.) Class members are “ascertainable” where they may be readily identified without
8 unreasonable expense or time.

9 Plaintiffs contends, and Defendants do not dispute for settlement purposes only, this
10 requirement and the requirement of numerosity is met. Class Members are “all hourly paid
11 workers directly employed by Deckers and/or employed by Real Time and placed on assignment
12 at any Deckers facility in California at any time from June 1, 2016 through November 21, 2021”
13 (Yeremian Decl., ¶ 71(a)) Documents and information exchanged between the parties reflect a
14 class of approximately 6,150 Class Members. (Yeremian Decl., ¶ 71(a)) The Class Members have
15 already been identified by reference to Defendants’ payroll and personnel records. (Yeremian
16 Decl., ¶ 71(b))

17 Therefore, and notwithstanding the foregoing, there is a numerous and ascertainable class.

18 **B. There Is A Well-Defined Community of Interest**

19 A community of interest is established by the predominance of common issues of law and
20 fact. *See Vasquez*, 4 Cal. 3d at 811. The requirement of a community of interest:

21 [D]oes not depend upon an identical recovery, and the fact that each
22 member of the class must prove his separate claim to a portion of
23 any recovery by the class is only one factor to be considered ... The
24 mere fact that separate transactions are involved does not of itself
25 preclude a finding of the requisite community of interest so long as
26 every member of the alleged class would not be required to litigate
27 numerous and substantial questions to determine his individual right
28 to recover subsequent to the rendering of any class judgment which
determined in plaintiffs’ favor whatever questions were common to
the class.

Id. at 809.

Plaintiffs contends, and Defendants do not dispute for settlement purposes only, that

1 common issues of fact and law predominate as to each of the claims alleged by Plaintiffs, and the
2 Class is united in its proof. (Yeremian Decl., ¶ 71(e)) Because Plaintiffs has alleged a single
3 scheme, “the relevant proof [does] not vary among class members” and “clearly presents a
4 common question fundamental to all class members.” (*See In Re NASDAQ Market-Makers*
5 *Antitrust Litigation* (SDNY 1997) 172 F.R.D. 119, 123 (citing *In Re NASDAQ Market-Makers*
6 *Antitrust Litigation*, (SDNY 1997) 169 F.R.D. 493, 518).) California courts show “no hesitancy”
7 in inferring class-wide causation, class-wide injury, and class-wide damages when a common
8 course of action has been shown. (*B.W.I. Custom Kitchen*, 191 Cal. App. 3d at 1350.) This
9 inference ““eliminates the need for each class member to prove individually the consequences of
10 the defendants’ actions to him or her.”” (*Id.* at 1351 (quoting *Rosack v. Volvo of America Corp*
11 (1982) 131 Cal. App. 3d 741, 753 [emphasis added])).)

12 This action involves, *inter alia*, a determination about Defendants’ alleged failure to
13 provide meal period and rest periods, failure to pay wages and overtime due to allegedly common
14 and unlawful policies, failure to pay final wages when required, failure to provide accurate
15 paystubs, and largely derivative claims under the Business & Professions Code and PAGA.
16 Plaintiffs contends these practices affected Class Members in the same way. Plaintiffs contends
17 these practices resulted in a failure to compensate employees at termination, and incomplete
18 wages displayed on wage statements. The outcome of litigation on this matter depends upon
19 questions that are common to Class Members. (Yeremian Decl., ¶ 71(f)) While Defendants
20 maintained otherwise, these issues will not be decided on the basis of facts peculiar to each Class
21 Member, but rather on the basis of facts common to them all. It is also true that these issues of
22 liability can be determined on a class-wide basis. (*Id.*)

23 C. The Named Plaintiffs’ Claims Are Typical

24 A class representative’s claims are typical when they arise from the same event, practice,
25 or course of conduct that gives rise to the claims of other putative class members, and if their
26 claims rest on the same legal theories. The class representative’s claims must be “typical” but not
27 necessarily identical to the claims of other class members. It is sufficient that the representative is
28 similarly situated so that he or she will have the motive to litigate on behalf of all class members.

1 (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 47; *B.W.I. Custom Kitchens v. Owens-Illinois, Inc.*
2 (1987) 191 Cal.App.3d 1341, 1347 (“[I]t has never been the law in California that the class
3 representative must have identical interests with the class members.”) Thus it is not necessary that
4 the class representative should have personally incurred all of the damages suffered by each of the
5 other class members. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 228.)

6 Plaintiffs contends, and Defendants do not dispute for settlement purposes only, that
7 Plaintiffs’ claims are typical of Class Members’ claims because they arose from the same factual
8 basis and are based on the same legal theories. (Yeremian Decl., ¶ 71(c)) Plaintiffs were
9 employed by Defendants during the Class Period, and were subject to the allegedly unlawful meal
10 and rest policies and pay practices at issue in this litigation. (*Id.*) Accordingly, Plaintiffs are
11 members of the Class. (*Id.*) The central issues of this litigation (whether Defendants failed to pay
12 all wages, whether Defendants failed to provide meal and rest periods, etc.), which would arise if
13 this was an individual action, applies to the other Class Members as well. The answer to these
14 questions would determine Defendants’ liability to the putative class. (*Id.*) Thus, the claims of
15 Plaintiffs are typical of the claims of the putative class. (*Id.*) Accordingly, the typicality
16 requirement is satisfied.

17 **D. Adequacy of Class Counsel and Class Representatives**

18 Class Counsel are experienced in class actions, have represented their clients zealously
19 and have no conflicts of interest. (Yeremian Decl., ¶¶ 3-9, 71(d)) The Class Representatives’
20 interests are aligned with those of the Class Members, they have suffered the same injuries as the
21 Class Members, and have no conflicts of interest. (*Id.*) Therefore Class Counsel and the Class
22 Representatives are adequate.

23 **E. Predominance and Superiority**

24 Individual issues do not predominate over those common to the class. (Yeremian Decl.,
25 ¶71(f)) The class action mechanism is superior to individualized actions because Class Members
26 have little incentive to bring claims that are small. (*Id.*)

27 **V. THE TWO-STEP APPROVAL PROCESS**

28 Any settlement of class action litigation must be reviewed and approved by the Court.

1 This is accomplished in two steps: (1) An early (preliminary) review by the trial court, and (2) a
2 detailed review after the notice has been distributed to the class members for their comments or
3 objections. In this regard, the Manual for Complex Litigation (Second) explains:

4 A two-step process is followed when considering class
5 settlements... If the proposed settlement appears to be the product
6 of serious, informed, non-collusive negotiations, has no obvious
7 deficiencies, does not improperly grant preferential treatment to
8 class representative or segments of the class, and falls within the
range of possible approval, then the court should direct that notice
be given to the class members of a formal fairness hearing, at which
evidence may be presented in support of and in opposition to the
settlement.

9 (*Manual for Complex Litigation (Second)* (1985) at § 30.44.) The preliminary approval of the
10 class action settlement by the trial court is simply a conditional finding that the settlement appears
11 to be within the range of acceptable settlements. (*See, e.g., Newberg*, § 11.25; *North County*
12 *Contractor's Assn., Inc. v. Touchstone Ins. Services* (1994) 27 Cal. App. 4th 1085, 1094-95.)
13 Thus, the preliminary approval of the class action settlement by the trial court is simply a
14 conditional finding that the settlement appears to be within the range of acceptable settlements.

15 Settlements to resolve PAGA claims also require court approval. (Labor Code §
16 2699(1)(2).) There is no articulated standard for approving PAGA settlements. PAGA settlements
17 for as little as \$0 have been approved. (*See Nordstrom Com'n Cases* (2010) 186 Cal.App.4th 576,
18 589 (approving PAGA settlement and release that allocated \$0 to PAGA claim).) Courts have
19 also approved settlements for \$20,000 or less. (*See, e.g., Hicks v. Toys 'R' Us—Delaware, Inc.*,
20 (C.D. Cal. Sept. 2, 2014) 2014 WL 4703915, at *1 (approving \$5,000 PAGA payment in \$4
21 million settlement); *Chu v. Wells Fargo Invest. LLC* (N.D. Cal. Feb. 16, 2011) 2011 WL 672645,
22 at *1 (approving PAGA payment of \$7,500 in \$6.9 million settlement); *Williams v. Brinderson*
23 *Constructors* (C.D. Cal. Feb. 6, 2017) 2017 WL 490901, at *5 (\$10,000 PAGA settlement in
24 \$300,000 settlement).)

25 A review of the preliminary approval criteria demonstrates a substantial basis for granting
26 the instant Motion and proceeding to a full settlement hearing.
27
28

1 **VI. THE SETTLEMENT IS FAIR AND ADEQUATE**

2 As a matter of public policy, courts both encourage the use of the class action device and
3 favor settlement over continued litigation. (*See, e.g., Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th
4 429, 434 (“Courts have long acknowledged the importance of class actions as a means to prevent
5 a failure of justice in our judicial system.”); *Class Plaintiffs v. City of Seattle* (1992) 955 F.2d
6 1268, 1276 (“[S]trong judicial policy . . . favors settlements, particularly where complex class
7 action litigation is concerned.”).)

8 Moreover, courts presume the absence of fraud or collusion in the negotiation of a
9 settlement unless evidence to the contrary is offered. In short, there is a presumption that the
10 negotiations were conducted in good faith. (*Newberg*, §11.51; *Rodriguez v. West Publ. Corp.*
11 (C.D. Cal. August 10, 2007) 2007 U.S. Dist. LEXIS 74767, 24-25 ; *Priddy v. Edelman* (6th Cir.
12 1989) 883 F.2d 438, 447.) Courts do not substitute their judgment for that of the proponents,
13 particularly when settlement has been reached by experienced counsel familiar with the litigation.
14 (*Rodriguez*, 2007 U.S. Dist. LEXIS 74767 at 24; *Hammon v. Barry* (D.D.C. 1990) 752 F. Supp.
15 1087.)

16 In *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 128 (2008), the court laid out
17 several factors that should be analyzed in determining if a class action settlement should be
18 approved. These factors include: (1) the strength of plaintiffs’ case; (2) the risk, expense,
19 complexity and likely duration of further litigation; (3) the risk of maintaining class action status
20 through trial; (4) the amount offered in settlement; (5) the extent of discovery completed and
21 stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a
22 governmental participant; and (8) the reaction of the Class Members to the proposed settlement.

23 The Settlement here satisfies each of these factors. Class Counsel conducted extensive
24 informal discovery before entering into meaningful settlement negotiations in this matter,
25 including a detailed analysis of Defendants’ policies and a considerable sample of Defendants’
26 time and pay records. (Yeremian Decl., ¶¶ 11-12.) This discovery permitted Class Counsel to
27 fairly evaluate the strengths of the case and the risks associated with ongoing litigation. Class
28 Counsel is very experienced in the handling of wage and hour class actions and supports this

1 Settlement. (Yeremian Decl., ¶¶ 3-9.)

2 **A. The Strength of Plaintiffs' Case.**

3 Plaintiffs alleges that Defendants failed to pay minimum wages and overtime, failed to
4 provide proper meal breaks or provide premium pay in lieu thereof, failed to provide proper rest
5 breaks or provide premium pay in lieu thereof, failed to provide accurate wage statements, failed
6 to timely pay all wages including upon termination, and failed to maintain accurate records all in
7 violation of California law. (Yeremian Decl., ¶ 27)

8 Class Counsel felt confident that the claims in this case would be certified given that
9 Defendants' policies were applicable to all Class Members and unlawful on their face. (Yeremian
10 Decl., ¶¶ 28-60) Defendants contended, however, that that the policies complied with California
11 law.

12 **B. The Risks Associated with the Merits.**

13 As with all litigation, there are risks that a party will not prevail on the merits. In this case,
14 Plaintiffs contends that they and other Class Members were not properly provided meal periods.
15 (Yeremian Decl., ¶¶ 34-37) Defendants contended that Class Members were given a reasonable
16 opportunity to take their meal periods, and in fact received their meal periods most of the time
17 (*Id.*) If Defendants' contentions are proven true and prevail in trial, the likely outcome of this
18 claim would be no recovery for the Class Members. Plaintiffs also contended that Defendants did
19 not provide Class Members with paid 10-minute rest breaks for every four hours or major fraction
20 thereof. (Yeremian Decl., ¶¶ 38-40) Class Members consistently worked in excess of consecutive
21 four-hour shifts and were entitled to paid rest breaks of not less than ten minutes for each
22 consecutive four hour shift which they were denied. Class Members were required to work
23 through their rest breaks, and through their entire shifts. Defendants maintained that they did
24 provide the reasonable opportunity for Class Members to take duty-free rest breaks. (Yeremian
25 Decl., ¶ 39) Defendants also pointed out that, unlike meal periods, rest breaks need not be
26 recorded and Defendants dispute all allegations that breaks were not received. As these
27 considerations would likely depress the damages *vel non* ultimately awarded, Class Counsel
28 applied significant and appropriate discounts to the rest-break claim.

1 Plaintiffs alleged that Defendants failed to pay Plaintiffs and Class Members minimum
2 wages for all hours worked. (Yeremian Decl., ¶ 31) Plaintiffs contended Defendants failed to pay
3 for pre-shift and post-shift hours worked. (*Id.*) Plaintiffs claimed Class Members had to go
4 through a badge swipe procedure in order to gain access to the building and then wait in another
5 line to go through a security screening process. (*Id.*) Plaintiffs contended that after Class
6 Members got through both the badge swipe process and the security bag check, they then had to
7 wait in line to use Defendants time clocks. (*Id.*) In addition, in March of 2020 Defendant
8 instituted a COVID-19 temperature check as part of the security screening process. (*Id.*) Plaintiffs
9 claimed Class Members were also subject to post-shift off the clock work during which they had
10 to first clock out and then be subjected to the security check line prior to leaving the facility. (*Id.*)

11 Defendants contended that they paid for all reported hours worked, that Class Members
12 were trained to record all hours worked, and that they paid proper minimum wages. (*Id.* at 32)
13 Defendants contended that they had multiple time clocks and that they also conducted a time and
14 motion study which revealed that there were minimal wait times. Defendants also maintained that
15 the allegations regarding failure to pay wages for hours worked in excess of eight hours in a day
16 did not constitute a basis for violation of Labor Code § 510. Defendants argued that given their
17 written policies and practices, any unrecorded hours were likely subject to individualized inquiry
18 and unlikely to be certified. Taking into account the difficulties of proof, the Defendants'
19 defenses, including the fact that maintaining a class action would be extremely difficult in light of
20 the fact that approximately 6,000 out of 6,150 Class Members signed arbitration agreements and
21 that this claim would otherwise be subject to individualized proof, and other attendant risks, Class
22 Counsel estimate that the total amount of damages that the class could reasonably expect to be
23 awarded at trial is significantly less than the maximum exposure even assuming a class is
24 certified.

25 **C. The Risks Associated with Paystub Violations and Waiting Time Penalties.**

26 In order to establish liability for these penalties, Plaintiffs would first have to establish
27 liability for the underlying claims. Moreover, Defendants argued that meal violations, even if
28 established, could not be the predicate for a Labor Code § 226 wage statement or § 203 waiting

1 time claim. (Yeremian Decl., ¶¶ 41, 44) For example, the California Supreme Court has recently
2 held that claims for meal period penalties do not constitute “action[s] brought for the nonpayment
3 of wages” for the purpose of determining statutory fees. (*Kirby v. Immoos Fire Prot., Inc.* (2012)
4 53 Cal.4th 1244, 1259.) In *Ling v. P.F. Chang’s China Bistro* (2016) 245 Cal.App.4th 1242, the
5 Court of Appeal noted an action for unlawful meal periods “cannot support a section 203 penalty
6 because section 203, subdivision (b) tethers the waiting time penalty to a separate action for
7 wages.” Authority is divided on this point. Moreover, although authority is divided, many district
8 court rulings support the conclusion that any unpaid meal period premium pay cannot give rise to
9 derivative wage statement liability. (See, e.g., *Culley v. Lincare Inc.* (E.D. Cal. 2017) 236
10 F.Supp.3d 1184, 1195-96; *Soto v. Motel 6 Operating, L.P.* (2016) 4 Cal.App.5th 385, 392-393
11 (noting a wage statement need only document compensation *actually received* and the hours used
12 to calculate that compensation).) Thus, it is unclear if the Court would have permitted untimely
13 wage penalties or wage statement violations for Defendants’ alleged failure to provide meal
14 period penalties.

15 In addition, Plaintiffs would have to establish that Defendants’ conduct was willful to
16 recover waiting time penalties. (Labor Code § 203.) With these penalties, there is always the risk
17 that the trier of fact would not have held that Defendants’ actions were done “willfully.” A good
18 faith belief in a legal defense can preclude a finding of willfulness. (*Gonzalez v. Downtown LA*
19 *Motors* (2013) 215 Cal.App.4th 36, 54; 8 C.C.R. § 13520.) As discussed above, Plaintiffs alleges
20 that Defendants failed to pay for all hours worked and premiums for non-compliant meal and rest
21 breaks. Plaintiffs contended the Class Members are entitled to these wages and premiums, which
22 they allege was not paid at the time of their termination or resignation. If Plaintiffs are successful
23 on their claims, the penalties pursuant to Labor Code § 203 shall attach. Defendants, however,
24 contended they provided employees with the reasonable opportunity to take meal and rest breaks,
25 asked Class Members to confirm the accuracy of their time records, and therefore had good-faith
26 defenses under *Brinker* and its progeny. As such, there was some risk associated with waiting
27 time penalties that Class Counsel had to consider. (Yeremian Decl., ¶¶ 44-47)

28 Additionally, Defendants argued the claims for paystub violations and waiting time

1 penalties had little or no value. *See e.g., Naranjo v. Spectrum Security Services, Inc.*, 40 Cal.
2 App. 5th 444 (2019), *rev. granted Naranjo v. Spectrum Security Services, Inc.*, No. S258966,
3 2020 Cal. LEXIS 167 (Jan. 2, 2020) ((noting, for example, that the remedy for a meal period/rest
4 break violation is an extra hour of pay, but that does not transform the remedy into a wage for
5 triggering section 203 waiting time penalties; similar analysis applied in rejecting a derivative
6 claim for paystub penalties); *see also Maldonado v. Epsilon Plastics, Inc.*, 22 Cal. App. 5th 1308,
7 1336-1337 (2018) (wage statements that accurately report wages paid to employees do not violate
8 Labor Code § 226, even if it is later determined that employer did not properly pay all wages
9 due).

10 **D. The Risks Associated with the PAGA Penalties.**

11 Labor Code § 2699.3 gives aggrieved employees the right to recover civil penalties for
12 specific Labor Code violations by way of a civil action. The PAGA provides a penalty amount of
13 one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation
14 and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent
15 violation. Labor Code § 2699(e)(2). However, if a civil penalty is provided in a specified amount
16 by the Labor Code section relating to the underlying alleged Labor Code violation, that amount
17 shall apply. (*Id.*) The PAGA also gives the Court discretion to award any lesser amount than the
18 maximum civil penalty. (*Id.* [“...a court may award a lesser amount than the maximum civil
19 penalty amount specified by this part if, based on the facts and circumstances of the particular
20 case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or
21 confiscatory.”]); *See, e.g., Lopez v. Friant & Assocs., LLC*, 15 Cal. App. 5th 773, 788 (2017), *rev.*
22 *denied* (2018), (recognizing court’s ability to reduce PAGA penalties). Courts have held that
23 situations similar to the current one (e.g. injuryless violations, technical errors, and substantial
24 compliance) should lead to reductions in penalties. *See Thurman v. Bayshore Transit*
25 *Management, Inc.*, 203 Cal. App. 4th 1112, 1134-1135 (2012) (holding that reduction was
26 justified when employer “attempted to comply with the law”); *Fleming v. Covdien, Inc.*, No. ED
27 CV10-01487 RGK (OPx), 2011 U.S. Dist. LEXIS 154590 at *8-9 (C.D. Cal. August 12, 2011)
28 (reducing PAGA penalties more than 80% – from \$2.8 million to \$500,000 – when “employees

1 suffered no injury” employers were “not aware” of the violation and “took prompt steps to correct
2 all violations once notified”).

3 Plaintiffs discounted potential penalties under this claim given this authority, and for other
4 reasons. The PAGA claims are premised on the same underlying unpaid wages, meal and rest
5 break, wage statement, and waiting time claims, and thus subject to the same disputes and
6 defenses. There is also a dispute as to whether violations in later pay periods trigger the \$200
7 penalty under PAGA as a “subsequent violation.” (*Amaral v. Cintas Corp. No. 2*, 163 Cal. App.
8 4th 1157, 1203 (2008).) As such, there is a fair amount of risk associated with PAGA claims.
9 (Yeremian Decl., ¶¶ 48-51) The parties also considered that the purpose of PAGA is to “achieve
10 maximum compliance with state labor laws,” and that through the proposed settlement,
11 Defendants have agreed to ensure policies comply with California law. (*Iskanian v. CLS Transp.*
12 *Los Angeles, LLC* (2014) 59 Cal. 4th 348, 379.) This makes the settlement’s contemplated PAGA
13 payment of \$50,000 appropriate.

14 Based on this analysis, Class Counsel believes that this settlement is fair and reasonable
15 and in the best interest of the Class. (Yeremian Decl., *passim*.)

16 **E. The Risk, Expense, Complexity and Likely Duration of Any Litigation.**

17 Given the risks outlined above, the issues in this case were complex and the risk for
18 Plaintiffs and the Class Members associated with this litigation was high. (Yeremian Decl., ¶¶ 50-
19 53) A class trial would have required the retention of expensive expert witnesses, the accrual of
20 extensive litigation costs, and the parties would have had to spend a substantial amount of time.
21 (Yeremian Decl., ¶¶ 12, 56)

22 Finally, given the complexity and unsettled nature of the issues, it is likely that any
23 outcome at trial would have resulted in a lengthy and costly appeal. An appeal would result in
24 further delay for the Class Members who have already waited years for resolution in this matter.

25 **F. The Risk of Maintaining Class Action Status Through Trial.**

26 In class actions, decertification is always a possibility. There is always a risk that a trial of
27 this magnitude can become unmanageable. (*Id.*) Given cases like *Duran v. U.S. Bank Nat. Assn.*,
28 59 Cal. 4th 1, 34 (2014) that deal with the complexity of using statistical samples in class actions,

1 decertification is a real risk that Class Counsel must take into account.

2 **G. The Amount Offered in Settlement.**

3 There can be no doubt that this Settlement is the result of vigorous, adversarial, non-
4 collusive, and arms-length negotiations between the parties with an experienced mediator. In
5 order to determine the approximate potential damages which would be owed to each of the Class
6 Members, Class Counsel analyzed the time records for Plaintiffs and Defendants provided Class
7 Counsel with records for a sampling of the class members. By analyzing this information, Class
8 Counsel was able to estimate the full value of the case if Plaintiffs was to prevail at trial.

9 Once Class Counsel was able to determine the maximum potential damages, it was able to
10 determine a fair and reasonable settlement for the Class. (*Id.* at ¶¶ 55-58) Class Counsel analyzed
11 the likelihood of success on the merits. (*Id.*) It believes that the Class had a reasonable likelihood
12 of success on the core claims. (*Id.*) However, Defendants dispute this contention, denies all
13 wrongdoing in this matter and are confident they have strong legal and factual defenses to
14 Plaintiffs' claims. Moreover, Class Counsel determined that the likelihood of success on the
15 claims for unpaid wages and waiting time penalties were not as strong, because various defenses
16 including issues not suitable for class treatment, no detriment to the class members over time, and
17 *de minimis* defenses. Defendants may have had the opportunity to establish that they had a good
18 faith belief that they were complying with law. (*Id.*) After taking into account the likelihood of
19 success on each claim and the challenges faced with certifying these claims, Class Counsel
20 determined that the settlement amount of \$1,150,000.00 was fair and reasonable.

21 Under the Settlement, each of the approximately 6,105 Class Members will receive on
22 average, assuming they worked throughout the class period, \$108 after expenses. (*Id.* at ¶ 54)
23 Plaintiffs feels that this Settlement is fair, reasonable, and advantageous to the class. (*Id.*)

24 To summarize, the Settlement here is fair because it provides a substantial payment to
25 each Class Member for releasing his or her claims; extinguishes the risk of litigation; and
26 provides a fair and adequate distribution of the settlement proceeds whereby the funds are
27 allocated to Class Members proportionally based on their Payout Ratio.

28 As detailed at length in the accompanying Declaration of David Yeremian, the settlement

1 is the result of extensive settlement negotiations between the parties, conducted at arm's length,
2 and informed by substantial factual and legal investigations. (Yeremian Decl., *passim*.)

3 Throughout this case, Class Members have been represented by experienced counsel with many
4 years of experience in employment class action litigation. (Yeremian Decl., ¶¶ 3-9)

5 Class Counsel has devoted a considerable amount of time to the prosecution of this case,
6 including but not limited to, interviewing Plaintiffs on repeated occasions; drafting pleadings;
7 conducting considerable discovery, and meeting and conferring with defense counsel about same;
8 reviewing and analyzing time records and various handbooks and policies, Plaintiffs' personnel
9 file, and other documentation; researching California law; interviewing numerous class members
10 regarding their experiences; preparing for and attending mediation; and negotiating and finalizing
11 the Settlement Agreement and related documents. (Yeremian Decl., ¶¶ 11-14)

12 Among those matters considered during the course of settlement negotiations were the
13 strength of Plaintiffs' case versus the amounts offered in settlement; the risks, expenses, and
14 length of further litigation, including class certification and the appeals process; the present state
15 of the law as it applies to wage and hour class actions, particularly in light of *Brinker*; the present
16 value of a settlement versus the long wait necessitated by any potential judgment in class
17 members' favor; the burdens of proof necessary to establish liability against Defendants; and
18 Defendants' defenses to the action. (Yeremian Decl., *passim*.)

19 These factors each indicated that the interests of Class Members are best served by a
20 settlement of this action in the manner and upon the terms set forth in the Settlement Agreement.
21 The Settlement Agreement confers a substantial benefit on the class of up to \$1,150,000.00.
22 Moreover, the settlement awards for each Class Member will be tailored to their workweeks
23 during the class period. (*Id.* at ¶ 19) In addition Class Counsel secured prospective relief for the
24 class in that Defendants will ensure their policies comply with California law.

25 Class Counsel believes that the settlement is fair and reasonable and serves the best
26 interests of the Class Members. Although the recommendations of counsel proposing the class
27 settlement are not conclusive, the Court can properly take the recommendations into account,
28 particularly if counsel has been involved in litigation for some period of time, appear to be

competent, and have experience with this type of litigation, and significant discovery has been completed. See *Newberg*, §11.47.

VII. THE CLASS REPRESENTATIVES INCENTIVE AWARDS ARE FAIR AND REASONABLE

It is appropriate to provide a relatively modest additional incentive payment to the class representative. See *Newberg*, § 12.1; *Van Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F.Supp. 294.

Plaintiffs are entitled to reasonable service payments for their efforts and initiative in bringing and helping to prosecute this class action. Plaintiffs spent significant time better apprising themselves of their rights, deciding whether remedial action should be taken, how it should be taken, searching for attorneys, and contacting Class Counsel, who spent many hours with Plaintiffs discussing their case and the law. (Yeremian Decl., ¶¶ 66-70) In the end, Plaintiffs decided to vindicate not only their own rights but also those of their co-workers by filing a class action lawsuit.

The courage it took to do this should not be underestimated. By suing Defendants, Plaintiffs contend they increased their risk of retaliation by prospective employers. (*Id.*) Plaintiffs' lawsuit has now cost Defendants considerable resources, and Plaintiffs contend such conduct will not be lost on a prospective employer who have to choose between an applicant who has never sued a prior employer and one who has. (*Id.*) Plaintiffs contend this risk is particularly real in the information age, where employers can, more easily than ever, perform background checks of prospective employees, sometimes with the stroke of a key. (*Id.*)

But Plaintiffs did not allow their fear of the potential repercussions of being a class representative deter them from acting for the benefit of Class Members. (*Id.*) To the contrary, Plaintiffs have been intimately involved in this case since its inception. (*Id.*) They has devoted a substantial amount of time to helping Class Counsel effectively develop and prosecute this action at every stage of the litigation. (*Id.*) Both before and after the filing of this lawsuit, Plaintiffs conferred with Class Counsel to discuss every aspect of this case; Plaintiffs have provided Class Counsel with information about Defendants and about the industry generally, reviewed

1 documents, identified witnesses, consulted Class Counsel throughout the litigation, participated in
2 the mediation process, monitored the progress of the litigation with Class Counsel, and reviewed
3 and signed the settlement agreement. (*Id.*)

4 Plaintiffs have spent a significant amount of time with Class Counsel detailing their
5 knowledge of Defendants' practices. (*Id.*) They have diligently, adequately, and fairly represented
6 Class Members, and have not placed their interests above any member of the putative class. (*Id.*)
7 This sort of payment to a class representative has been a common feature of settlements
8 negotiated by Class Counsel and has been routinely approved by trial courts. (*Id.*)

9 In light of the foregoing, Class Counsel believes that the incentive award in the amount of
10 \$10,000.00 to each of the two Class Representatives is fair and reasonable. (*Id.*)

11 **VIII. THE PROPOSED CLASS NOTICE PROVIDES ADEQUATE NOTICE TO THE**
12 **CLASS MEMBERS.**

13 Constitutional due process requires that class members be provided with notice sufficient
14 to give them an opportunity to be heard in the proceedings. *Mullane v. Central Hanover Bank &*
15 *Trust Co.* (1950) 339 U.S. 306. Proper notice must provide the class members with sufficient
16 information to make an informed decision as to whether to accept or object to the settlement. (*Id.*
17 at 314.) The notice must apprise the class members of the pendency of the action; reasonably
18 convey information regarding the settlement and the class members' rights, entitlements, and
19 obligations; and afford class members the opportunity to present their objections. (*Id.*)

20 The Notice Packet meets constitutional standards because it provides all the information a
21 reasonable person would need to make a fully informed decision about the settlement. It will
22 notify all class members of the terms of the settlement, of its effect on their rights, of their options
23 as class members (i.e., participate, object, opt out, do nothing), and of the consequences of
24 exercising those options. (Yeremian Decl., ¶¶ 59-61) Moreover, the Notice Packet will
25 specifically direct any class members who have questions or concerns to contact the Settlement
26 Administrator, Simpluris, or Class Counsel. (*Id.*)

27 The standard for determining the adequacy of notice is whether the notice has "a
28 reasonable chance of reaching a substantial percentage of the class members." (*Cartt v. Superior*

1 Court (1975) 50 Cal.App.3d 960, 974.) The Judicial Council of California's Deskbook on the
2 Management of Complex Civil Litigation (Matthew Bender 2003), § 3.74 notes that individual
3 notice by mail is preferred when possible and dissemination of combined certification/settlement
4 notice is a common and accepted practice. (*In re Vitamin Cases* (2003) 107 Cal.App.4th 820,
5 828.)

6 Here, the Notice Packet will be sent via first-class mail to each class member. (Yeremian
7 Decl., ¶ 39) If the Notice Packet is returned as non-deliverable on or before the Response
8 Deadline and a new address is obtained by way of a returned Notice Packet, then the Settlement
9 Administrator will promptly forward the original Notice Packet to the updated address via first-
10 class regular U.S. mail. (*Id.*) Thus, most, if not all, class members will likely receive the Notice
11 Packet.

12 Pursuant to controlling authority, the proposed Notice Packet and method of distribution
13 fully comport with due process requirements. Therefore, the Court should approve the Notice
14 Packet and direct that it be distributed as proposed herein.

15 **IX. STANDING TO OBJECT TO PROPOSED SETTLEMENT**

16 Non-settling parties and third parties periodically may attempt to object to proposed class
17 action settlements, but the right of non-settling parties to object at the final settlement approval
18 hearing, let alone the preliminary approval hearing, is quite limited. As a general rule, only class
19 members have standing to object to a proposed settlement. "Beginning from the unassailable
20 premise that settlements are to be encouraged, it follows that to routinely allow non-class
21 members to inject their concerns via objection at the settlement stage would tend to frustrate this
22 goal." (*Gould v. Alleco, Inc.* (4th Cir. 1998) 883 F.2d 281, 284.) Since an application is being
23 filed to obtain a good faith determination, no persons other than class members have standing to
24 object to the proposed settlement. (*In re School Asbestos Litigation* (3rd Cir. 1990) 921 F.2d
25 1330.)

26 **X. THE STIPULATED AWARD OF ATTORNEYS' FEES AND COSTS IS** 27 **REASONABLE AND SHOULD BE APPROVED.**

28 Under the Settlement Agreement, subject to approval by this Court, Class Counsel will

1 seek an award of fees of no more than Three Hundred Eighty Three Thousand Three Hundred
2 Thirty Three Dollars and Thirty Three Cents (\$383,333.33), approximately thirty-three percent of
3 the Gross Settlement Amount, and not more than Twenty Thousand Dollars and Zero Cents
4 (\$20,000.00) in costs. The requested fees are fair compensation for a law firm involved in
5 undertaking complex, risky, expensive, and time-consuming litigation solely on a contingent
6 basis. (Yeremian Decl. ¶¶ 63-65) Defendants will not oppose Class Counsel's fees and cost
7 request.

8 California courts routinely look to the federal courts on class action approvals. The Ninth
9 Circuit has recognized that an appropriate method for awarding attorneys' fees in class actions is
10 to award a percentage of the "common fund" created as a result of the settlement. (*Vincent v.*
11 *Hughes Air West, Inc.* (9th Cir. 1977) 557 F.2d 759, 769.) The purpose of the common
12 fund/percentage approach is to "spread litigation costs proportionally among all the beneficiaries
13 so that the active beneficiary does not bear the entire burden alone." (*Id.*) Accordingly, courts
14 have discretion to choose either the percentage-of-the-fund method or the lodestar method. (*In re*
15 *Wash. Pub.Power Supply Sys. Sec. Litigation* (9th Cir. 1994) 19 F.3d 1291, 1295-96.)

16 Several courts have, however, expressed frustration with the "lodestar" approach for
17 deciding fee awards, which usually involves wading through voluminous time records. Thus, the
18 percentage approach can be preferable to the lodestar in certain situations because: (1) it aligns
19 the interests of class counsel and absent class members; (2) it encourages efficient resolution of
20 the litigation by providing an incentive for early, yet reasonable, settlement; and (3) it reduces the
21 demands on judicial resources. (*In re Activision Securities Litigation*, (N.D. Cal. 1989) 723
22 F.Supp. 1373, 1378-79.) The Ninth Circuit has used the percentage of the common fund approach
23 to determine the award of attorneys' fees. (*In re Pacific Enterprises Securities Litigation* (9th Cir.
24 1994) 47 F.3d 373, 378-79 (approving attorneys' fee of 33 1/3% of settlement fund).)

25 Class Counsel's application for attorneys' fees in light of the facts and circumstances
26 surrounding this case is well within the range of reasonableness. Historically, courts have
27 awarded percentage fees in the range of 20% to 50% of the common fund, depending on the
28 circumstances of the case. (*Newberg*, at §14.03; see also *In re Activision Securities Litigation*,

1 723 F. Supp. at 1378.) *Newberg* further notes: “[A]chievement of a substantial recovery with
2 modest hours expended should not be penalized but should be rewarded for considerations of
3 time saved by superior services performed.” (*Id.* at §§ 14-10:14-11.)

4 The attorneys’ fees request provided for in the Settlement Agreement is commensurate
5 with judicial precedent. Both state and federal courts regularly approve fee awards equal to or
6 greater than the percentage requested in this case. (*See, e.g., In re Pacific Enterprises Securities*
7 *Litigation* (9th Cir. 1995) 47 F.3d 373, 379 (affirming an award equal to 33% of the common
8 fund); *In re Activision Securities Litigation* (N.D. Cal. 1989) 723 F.Supp. 1373, 1375 (awarding
9 plaintiffs’ counsel 32.8% of the common fund created to settle the litigation); *In re Ampicillin*
10 *Antitrust Litigation* (D. D.C. 1981) 526 F.Supp. 494 (awarding 45% of \$7.3 million settlement
11 fund); *Parker v. City of Los Angeles* (1974) 44 Cal.App.3d 556, 557-568 (affirming fee award to
12 counsel of one-third (1/3) of recovery achieved).)

13 In wage and hour class actions in particular, California trial courts have customarily
14 approved attorney’s fees consistent with or greater than the percentage of the common fund
15 requested in this case. (*See Evans v. Coca-Cola*, Los Angeles County Super. Ct. Case No. BC
16 220525 (Hon. Richard C. Hubbell) (Dec. 2001) (approving an award of attorneys’ fees of at least
17 33-1/3% of the settlement); *see also Estrada v. Dr. Pepper/Seven-Up*, Los Angeles County Super.
18 Ct. Case No. BC 262247 (May 2005) (Hon. Anthony J. Mohr); *Moreno v. Miller Brewing*, Los
19 Angeles County Super.Ct. Case No.BC 278170 (April 2004) (Hon. David M. Minning); *Josiah*
20 *Eaton v. Adolph Coors Company* (2003) Orange County Super. Ct. Case No. 01CC00140 (Hon.
21 Stephen J. Sundvold); *Kimbell v. Abercrombie & Fitch Stores, Inc.*, Los Angeles County
22 Super.Ct. Case No.BC 277359 (Sept. 2006) (Hon. Kenneth R. Freeman); *Daum v. Claim Jumper*
23 *Restaurants*, Orange County Super.Ct. Case No.02CC10201 (2006) (Hon. Ronald L. Bauer).)

24 Here, Class Counsel has borne the entire risk and costs of litigation and will not receive
25 any compensation until recovery is obtained. (*See Yeremian Decl.*, ¶¶ 65-67) The Court should
26 also consider the benefit obtained by Class Counsel on behalf of class members. Thus, the
27 requested award for Class Counsel is reasonable.

1 **XI. ACTION REQUESTED AS A PART OF THE MOTION FOR PRELIMINARY**
2 **APPROVAL**

3 The parties respectfully request this Court, as part of the preliminary approval process, to
4 grant the following relief and make the following orders:

- 5 1. Review and approve the Settlement Agreement;
- 6 2. Review and approve the Notice Packet, attached to the Settlement Agreement as
7 Exhibit A;
- 8 3. Consider and determine that the proposed class action settlement as set forth in the
9 Settlement Agreement preliminarily appears fair, reasonable, and adequate;
- 10 4. Enter an order conditionally certifying the action as a class action for settlement
11 purposes only and preliminarily approving the proposed class action settlement and the
12 Settlement Agreement;
- 13 5. Approve and appoint David Yeremian of David Yeremian & Associates, Inc. to serve
14 as Class Counsel for settlement purposes;
- 15 6. Approve and appoint Simpluris as the Settlement Administrator to handle the notice
16 and claims procedures as set forth in the Settlement Agreement;
- 17 7. Approve the proposed settlement's allocation of funds to claims made under PAGA;
- 18 8. Order Defendants to disclose to Simpluris the names, last-known addresses, telephone
19 numbers, dates of employment, and social security numbers of class members as set forth in the
20 Settlement Agreement;
- 21 9. Order that Simpluris mail the Notice Packet to class members; and
- 22 10. Set a date for the Final Approval Hearing.

23 Dated: September 17, 2021

Respectfully submitted,

24 DAVID YEREMIAN & ASSOCIATES, INC.

25 By



26 David Yeremian
27 Natalie Haritonian
28 Attorneys for Plaintiffs, CHERYL FOSTER and
TRAVONN HALEY, on behalf of themselves
and others similarly situated