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13
14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **FOR THE COUNTY OF LOS ANGELES**

16 JENNIFER COMBEST, as an individual and
17 on behalf of all others similarly situated,

18 Plaintiff,

19 v.

20 NINETY FIVE SOUTH, INC., a Florida
21 corporation; and DOES 1-50, inclusive

22 Defendants.

Case No.: 21STCV02842

Assigned for All Purposes to:
Hon. David S. Cunningham
Dept. SSC-11

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

[Filed concurrently with Notice of Motion and
Motion; Declarations of Zachary M. Crosner,
Jennifer Combest, and Eric Springer; [Proposed]
Order]

Date: January 31, 2023
Time: 10:00 a.m.
Dept. SSC-11

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1 **I. INTRODUCTION**

2 Plaintiff Jennifer Combest respectfully requests that the Court preliminarily approve the
3 Class Action and PAGA Settlement Agreement (“Agreement”) entered into between Plaintiff and
4 Defendant Ninety Five South, Inc. (“NFS” or “Defendant”). The proposed settlement seeks to
5 resolve claims in the above captioned matter in exchange for a non-reversionary \$250,000 Gross
6 Settlement Amount. The settlement class is comprised of “all current and former non-exempt
7 employees employed by Defendant in California at any time from January 25, 2017 to August 22,
8 2022.”

9 The Agreement and notice distribution plan are the products of adversarial, arm’s-length
10 negotiations by informed counsel and parties, facilitated by an experienced mediator. The settlement
11 is fair, reasonable, and adequate to all. Plaintiff has analyzed the strengths and vulnerabilities of the
12 claims with Defendant’s potential exposure and determined the \$250,000 proposed settlement is
13 well within the range of reasonableness and is in the Class Members’ best interests. The length and
14 risks of trial and perils of litigation that affect the values of the claims were all carefully weighed.
15 In addition, the defenses asserted by Defendant, the uncertainty of class certification, the difficulties
16 of complex litigation, the lengthy process of establishing specific damages and various possible
17 delays and appeals, were also considered by Plaintiff and counsel in negotiating the proposed
18 settlement. Further, the proposed settlement satisfies the criteria for preliminary approval under
19 California Rules of Court, Rule 3.769.

20 Accordingly, Plaintiff seeks: (1) preliminary approval of the settlement; (2) provisional
21 certification of the Class; (3) appointment of Plaintiff as Class Representatives; (4) appointment of
22 Crosner Legal, PC as Class Counsel; (5) approval of the Parties’ proposed Notice of Class Action
23 Settlement (“Notice”) and method of notifying the Class Members; (6) a hearing date for Plaintiff’s
24 Motion for Final Approval of Class Action Settlement; and (7) entry of an Order Granting
25 Preliminary Approval of Class Action Settlement.

26 **II. BACKGROUND/LITIGATION HISTORY**

27 NFS offers facility management services to commercial locations, schools, transportation
28 facilities, and government facilities, including Veteran’s Administration buildings, throughout

1 California. Plaintiff Jennifer Combest (“Ms. Combest”) was employed by NFS as a non-exempt
2 porter from May 13, 2018 until her resignation on September 1, 2021. (Crosner Decl., ¶ 12.)

3 On January 25, 2021, Plaintiff filed a class action complaint against Defendant. The
4 operative Complaint alleges claims for failure to pay wages, including overtime wages, meal and
5 rest break violations, inaccurate wage statements, waiting time penalties, failure to provide sick
6 leave and keep accurate records, and unfair competition. (Crosner Decl., ¶ 13.) Plaintiff also
7 submitted the required notice letter to the LWDA under PAGA and timely exhausted her
8 administrative remedies with the LWDA. (Crosner Decl. ¶ 13; Exh. 4.) Plaintiff did not receive
9 notice from the LWDA that it intended to investigate the alleged violations outlined in her PAGA
10 letter. (Crosner Decl., ¶ 13.) Plaintiff consequently filed an amended complaint adding a claim for
11 PAGA consistent with her notice letter.¹ (Agreement, § 2.1.)

12 In May 2022, the Parties participated in mediation with Steve Rottman, Esq., a respected
13 wage and hour class action mediator. The mediation lasted a full day and with the mediator’s
14 assistance the Parties reached agreement on all major issues and executed a Memorandum of
15 Understanding. They then formally reduced the proposed settlement to the Agreement now before
16 the Court for approval. The Agreement meets the requirements in the LASC Checklist for
17 Preliminary Approval. The Agreement has also been uploaded to the LWDA. (Crosner Decl., ¶ 14;
18 Exh. 6.)

19 **III. INVESTIGATION**

20 Prior to the mediation, Defendant provided Plaintiff with extensive informal discovery,
21 including Plaintiff’s personnel, time, and payroll records, time and payroll records for a randomly
22 selected sampling of Class Members, wage statement exemplars, Defendant’s employee handbooks,
23 including Defendant’s policies and procedures regarding the payment of wages, the provision of
24 meal and rest breaks, timekeeping policies (including recording hours), issuance of wage statements,
25 and termination wages, as well as information regarding the number of putative Class Members who
26 are current and former employees, the number of PAGA Members, the number of workweeks
27 throughout the Class Period, and the number of pay periods throughout the PAGA Period. From this

28 _____
¹ Plaintiff uploaded the complaint to the LWDA. (Crosner Decl., ¶ 13; Exh. 5.)

1 information, Plaintiff was able to analyze Defendant's liability for the claims asserted in this case
2 and, with the assistance of Plaintiff's experts at Berger Consulting Group, the potential exposure
3 and damages. (Crosner Decl., ¶ 15.)

4 Based on this informal discovery, Plaintiff contends the Class Members were not paid all
5 overtime wages, not provided with legally compliant meal and rest periods, did not receive
6 compliant wage statements, and did not receive all wages due on separation of employment. In
7 considering the reasonableness of the proposed settlement, Plaintiff considered each of Defendant's
8 counterarguments, which sharply contested Plaintiff's claims. Plaintiff's Counsel weighed the
9 strength of Defendant's arguments, including the risks of prevailing at class certification and on the
10 merits, and determined that the proposed settlement is in the best interests of the Class. Although
11 remaining confident in the strength of their claims, all these factors led Plaintiff to discount the
12 exposure analysis, discussed in detail below. (Crosner Decl., ¶ 16.)

13 **IV. TERMS OF THE PROPOSED SETTLEMENT**

14 **A. Deductions from the Settlement**

15 The Parties have agreed (subject to the Court's approval) that this action be settled and
16 compromised for the non-reversionary total sum of \$250,000.00 ("Gross Settlement Amount" or
17 "GSA") (Agreement, § 3.1.), which includes: (a) attorney's fees of up to \$83,333.33 (one-third of
18 the GSA)² to compensate Class Counsel for work already performed and all work remaining to be
19 performed (Agreement, § 3.2.2.); (b) actual litigation expenses as documented and not to exceed
20 \$20,000.00 ³ (Agreement, § 3.2.2.); (c) an Enhancement Award to Plaintiff in an amount not to
21 exceed \$10,000.00 (Agreement, § 3.2.1.); (d) Administration Costs to Simpuri, Inc. (the proposed
22 settlement administrator) in an amount not to exceed \$5,000.00 (Agreement, § 3.2.3.); and (e)
23 PAGA penalties to the LWDA of \$11,250.00 (which is 75% of the \$15,000.00 PAGA Payment,
24 with the remaining 25% or \$3,750.00 to PAGA Members) (Agreement, § 3.2.5.). Employer-side
25

26 ² The percentage method, with or without a lodestar cross-check, may be used in common fund cases like this one.
27 *Laffitte v. Robert Half Internat., Inc.* (2016) 1 Cal.5th 480, 503. In support of their fee request at Final Approval, Class
28 Counsel will provide the Court with lodestar information to permit the Court to do a lodestar cross-check in connection
with Class Counsel's request for attorney's fees.

³ At Final Approval, Class Counsel will provide documentation regarding actual expenses incurred to support Class
Counsel's request for reimbursement of actual expenses.

1 payroll taxes (including FICA, FUTA, and SDI) will be paid by Defendant separate and apart from
2 the GSA. (Agreement, § 3.1.)

3 **B. Calculation of the Individual Settlement Payments to Class and PAGA**
4 **Members**

5 After all Court-approved deductions from the GSA, it is estimated that \$116,667 (“Net
6 Settlement Amount” or “NSA”), less all applicable employee-side taxes, will be distributed to the
7 estimated 92 Class Members, with an average individual settlement amount of around \$1,268.⁴
8 Additionally, it is estimated that the 25% PAGA Payment (\$3,750.00) will be distributed to the
9 estimated 92 PAGA Members, resulting in an average payment of \$40.76⁵ per PAGA Member.
10 (Crosner Decl., ¶ 18.) Under no circumstances will any portion of the Settlement revert to
11 Defendant. (Agreement, § 3.1.)

12 Subject to the terms and conditions of the Settlement, Simpluris will calculate and issue
13 Individual Class Payments to Participating Class Members by “(a) dividing the Net Settlement
14 Amount by the total number of Workweeks worked by all Participating Class Members during the
15 Class Period and (b) multiplying the result by each Participating Class Member’s Workweeks.”
16 (Agreement, § 3.2.4.) Additionally, Simpluris will calculate and issue payments to PAGA Members
17 based (a) dividing the amount of the Aggrieved Employees’ 25% share of PAGA Penalties (\$3,750)
18 by the total number of PAGA Period Pay Periods worked by all Aggrieved Employees during the
19 PAGA Period and (b) multiplying the result by each Aggrieved Employee’s PAGA Period Pay
20 Periods.” (Agreement, § 3.2.5.1.)

21 Each Class Member’s will be apportioned as follows: twenty percent (20%) wages and
22 eighty percent penalties and interest. (Agreement, § 3.2.4.1.) Simpluris will be responsible for
23 issuing Form W-2s for amounts deemed “wages” and Form 1099s for the portions allocated to
24 penalties and interest. (Agreement, §§ 3.2.4.1. and 3.2.5.2.)

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27 _____
28 ⁴ \$116,667 NSA/92 Class Members

⁵ \$3,750 (25% PAGA Payment) /92 PAGA Members

1 **C. Uncashed Funds to Unclaimed Property Fund**

2 Settlement checks must be cashed or deposited within 180 days after the checks are mailed
3 to them. (Agreement, § 4.4.1.) In the event a settlement check remains uncashed, such uncashed
4 funds shall be transmitted to the State Controller's Office Unclaimed Property Fund in the name of
5 the Participating Class Member and/or PAGA Member for later claim. (Agreement, § 4.4.3.)
6 Because this lawsuit benefits Class Members/PAGA Members who release claims by participating
7 in the lawsuit, the funds representing their settlement payments should remain their property. By
8 sending the uncashed funds to the Unclaimed Property Fund in the name of the Class
9 Member/PAGA Member, he or she can claim his or her property at a future date convenient to the
10 Class Member. Therefore, there will be no unpaid residue or unclaimed or abandoned Class Member
11 funds under California Code of Civil Procedure section 384(a).

12 **D. Notice and Extended Response Deadline for Re-Mailed Notices**

13 Within fifteen calendar days after entry of the Preliminary Approval Order, Defendant will
14 provide Simpluris with the Class Data, containing each Class Member's first and last name, last
15 known mailing address, Social Security number, total number of weeks worked during the Class
16 Period, and total number of pay periods worked during the PAGA Period. (Agreement, § 4.2.)
17 Simpluris will maintain the Class Data as private and confidential. (Agreement, § 4.2.)

18 Prior to mailing, Simpluris will perform a search for updated addresses in the National
19 Change of Address Database. (Agreement, § 7.4.2.) Simpluris will use the NCOA and skip traces
20 to attempt to find current addresses for any Notice returned as undeliverable. If Simpluris is unable
21 to obtain a better address for a Class Member, the Notice will be deemed undeliverable. (Agreement,
22 § 7.4.3.) Within fourteen days after receipt of the class data, Simpluris will mail via regular First-
23 Class mail the Notice to all Class Members. (Agreement, § 7.4.2..)

24 The contents of the Notice are consistent with the terms of the Agreement. The Notice
25 informs Class Members how and when to request exclusion from or object to the settlement and of
26 their estimated payment amount which they will automatically receive a settlement payment if they
27 do nothing. (Crosner Decl., ¶¶ 24-27; Exh. 3.)

28 /////

1 **E. Responses to the Settlement and Deadline Thereon**

2 Class Members will have sixty days from the initial mailing of the Notice to respond to the
3 settlement by submitting a challenge to the number of weeks or pay periods attributed to them,
4 submitting an objection, or requesting to be excluded from the settlement and the consequences of
5 each choice. (Agreement, §§ 7.5.1.) Class Members can object to the settlement in writing via mail
6 or fax by submitting a document with their name, the words “Notice of Objection” or “Formal
7 Objection” and a description of the arguments supporting their objection. Class Members are
8 informed that the Court will hear any objections from any Class Member who attends the Final
9 Approval Hearing. (Agreement, § 7.7.)

10 Class Members can also submit a written request for exclusion from the settlement by
11 mailing or faxing a written request, including his or her name, address, and phone number, and a
12 statement demonstrating his or her intent to opt out of the settlement. (Agreement, § 7.5.)

13 The Notice also informs the Class Member/PAGA Members that they can dispute the
14 number of weeks/pay periods allotted to them to calculate their settlement payments by contacting
15 Simpluris before the Response Deadline and include any documentation supporting the dispute.
16 Simpluris will investigate the dispute, request additional information from Defendant, and make a
17 final decision as to the number of eligible work weeks/pay periods. (Agreement, § 7.6.)

18 **F. Funding and Distribution of the Settlement**

19 Defendant shall fund the settlement within fourteen calendar days after the Effective Date.
20 (Agreement, § 4.3.). Simpluris shall disburse all payments required under this Settlement within
21 seven calendar days of receipt of the GSA. (Agreement, § 4.4.)

22 **G. Release of Claims**

23 Upon final approval, Participating Class Members shall forever release the Released Parties⁶
24 for the Released Claims for the Class Period (Agreement, § 5.), as follows:

25 All Participating Class Members, on behalf of themselves and their respective
26 former and present representatives, agents, attorneys, heirs, administrators,

27 ⁶ “Released Parties” means Defendant and any of their past, present, and future direct or indirect parents, subsidiaries,
28 predecessors, successors, and affiliates, as well as each of their past, present, and future officers, directors, employees,
partners, members, shareholders and agents, attorneys, insurers, reinsurers, and any individual or entity which could be
jointly liable with Defendants. (Agreement, § 1.41.)

1 successors, and assigns, release Released Parties from all claims that were alleged,
2 or reasonably could have been alleged, based on the Class Period facts stated in the
3 Operative Complaint and ascertained in the course of the Action including, e.g.,
4 any and all claims involving any alleged failure to pay minimum wage, failure to
5 pay all overtime wages, failure to authorize and permit rest periods, failure to
6 provide meal periods, failure to furnish accurate, itemized wage statements, failure
7 to timely pay all wages owed at termination, failure to provide paid sick time,
8 failure to maintain accurate records, unfair business practices, interest, and
9 attorney's fees. Except as set forth in Section 5.1.1 and 5.3 of this Agreement,
10 Participating Class Members do not release any other claims, including claims for
11 vested benefits, wrongful termination, violation of the Fair Employment and
12 Housing Act, unemployment insurance, disability, social security, workers'
13 compensation, or claims based on facts occurring outside the Class Period.

14 (Agreement, § 5.2.). With respect to PAGA claims, they will be released as follows:

15 All Participating Class Members who are Aggrieved Employees and Non-
16 Participating Class Members who are Aggrieved Employees are deemed to release,
17 on behalf of themselves and their respective former and present representatives,
18 agents, attorneys, heirs, administrators, successors, and assigns, the Released
19 Parties from all claims for PAGA penalties that were alleged, or reasonably could
20 have been alleged, based on the PAGA Period facts stated in the Operative
21 Complaint and the PAGA Notice and ascertained in the course of the Action
22 including, e.g., any and all claims involving any alleged failure to pay minimum
23 wage, failure to pay all overtime wages, failure to authorize and permit rest periods,
24 failure to provide meal periods, failure to furnish accurate, itemized wage
25 statements, failure to timely pay all wages owed at termination, failure to provide
26 paid sick time, failure to maintain accurate records, and failure to reimburse for
27 business expenses.

28 (Agreement, § 5.3.)

As discussed below, Plaintiff's Counsel is convinced that the proposed settlement is in the
Class Members' best interests based on the negotiations and a detailed knowledge of the issues
present in this action. The length and risks of trial and perils of litigation that affect the value of the
claims were all carefully weighed. In addition, the affirmative defenses asserted by Defendant, the
uncertainty of class certification, the difficulties of complex litigation, the lengthy process of
establishing specific damages and various possible delays and appeals were also carefully
considered by Plaintiff's Counsel in arriving at the proposed settlement. (Crosner Decl., ¶ 31.)

**H. The Class Representative Service Award Is Justified Given the Risks and
Should be Preliminarily Approved**

The Agreement provides for a service payment not to exceed \$10,000.00 to Plaintiff.
(Agreement, § 3.2.1.) Courts routinely approve service payments, or incentive awards, to
compensate named plaintiffs for the services they provide and the risks they incur during class

1 litigation. *In re Cellphone Fee Termination Cases* (2010) 186 Cal. App. 4th 1380, 1393 (“These
2 awards are discretionary...and are intended to compensate class representatives for work done on
3 behalf of the class, to make up for financial or reputational risk undertaken in bringing the action,
4 and, sometimes, to recognize their willingness to act as a private attorney general.”); *Bell v. Farmers*
5 *Ins. Exch.* (2004) 115 Cal. App. 4th 715, 725-26 (upholding service payments to class
6 representatives); Manual § 21.62 n.971 (noting that service payments are warranted).

7 The requested service award is reasonable in light of the benefits Plaintiff conferred upon
8 the entire Class, resulting in a benefit to all Class Members and the State of California, the time
9 spent assisting counsel with the investigation and prosecution of these claims, commitment to
10 responding to discovery, and consenting to the proposed Agreement. Furthermore, by attaching his
11 name to this lawsuit, Plaintiff also took on the reputational risk that future employers would learn
12 of her participation in this case and would unfairly associate them with costly litigation, costing
13 them future employment opportunities. Any future employer could easily perform a simple Google
14 search – an unauthorized simple background check unknown to Plaintiff that can still provide a
15 plethora of information – and conclude that Plaintiff is not worth the risk of hiring given her prior
16 involvement in a lawsuit against a former employer. This is the kind of reputational risk, borne only
17 by Plaintiff and no other Class Member, that the incentive award is meant to compensate.
18 Furthermore, in pursuing this action on behalf of the Class, Plaintiff risked a judgment against her
19 for attorney’s fees and costs in the event this matter had been lost. For these reasons, at final
20 approval, Plaintiff will request the Court award him an enhancement payment in an amount that
21 does not exceed \$10,000. (Crosner Decl., ¶¶ 32-33; Declaration of Jennifer Combest, ¶¶ 2-9.)

22 **V. ARGUMENT**

23 In deciding whether to approve a proposed class action settlement under Code of Civil
24 Procedure section 382, the Court must find that a proposed settlement is “fair, adequate and
25 reasonable.” *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801 [quoting *Officers for*
26 *Justice v. Civil Serv. Comm’n* (9th Cir. 1982) 688 F.2d 615, 625, cert. den. (1983) 459 U.S. 1217].
27 A proposed class action settlement is **presumed** fair under the following circumstances: (1) the
28 parties reached settlement after arms-length negotiations; (2) investigation and discovery were

1 sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar
2 litigation; and (4) the percentage of objectors is small. *Id.* at 1802. As the following shows, all of
3 these elements are present here and the Court should grant of preliminary approval.

4 **A. The Settlement was Reached as a Result of Arm’s Length Negotiations**

5 The proposed settlement was reached as a result of arm’s-length negotiations. Though
6 cordial and professional, the settlement negotiations have been, at all times, adversarial and non-
7 collusive in nature. Following mediation, Counsel for the Parties conducted extensive arm’s length
8 settlement negotiations regarding the settlement termes memorialized in the Agreement. (Crosner
9 Decl., ¶ 34.)

10 While Plaintiff believes in the merits of her case, she also recognizes the inherent risks of
11 litigation and understand the benefit of Class Members receiving significant settlement funds
12 immediately as opposed to risking continued litigation in achieving class certification, the merits of
13 the case before and after trial, the damages awarded and/or an appeal that can take several more
14 years to litigate. (Crosner Decl., ¶ 35.)

15 **B. The Settlement is the Result of Thorough Investigation and Discovery**

16 The Parties thoroughly investigated and evaluated the factual strengths and weaknesses of
17 their arguments before reaching the proposed settlement, and engaged in sufficient investigation,
18 research and discovery, referenced above, to support the settlement. The proposed settlement was
19 only possible following significant analysis and evaluation of Defendant’s relevant policies and
20 procedures, as well as the data it produced for the putative Class, which permitted Plaintiff’s Counsel
21 and expert to engage in a comprehensive analysis of liability and potential damages to prepare for
22 mediation. (Crosner Decl., ¶¶ 15, 36-37.) This litigation has reached the stage where “the Parties
23 certainly have a clear view of the strengths and weaknesses of their cases” sufficient to support the
24 Settlement. *Boyd v. Bechtel Corp.* (N.D. Cal. 1979) 485 F. Supp. 610, 617.

25 **C. Counsel for the Parties are Experienced in Similar Litigation**

26 Counsel for the Parties are particularly experienced in wage and hour employment law, class
27 actions and PAGA actions. Plaintiff’s Counsel has prosecuted numerous cases on behalf of
28 employees for wage and hour violations and thus are experienced and qualified to evaluate the class

1 and PAGA claims, evaluate settlement versus trial on a fully informed basis, and to evaluate the
2 viability of the defenses. This experience informed Plaintiff's Counsel on the risks and uncertainties
3 of further litigation and guided their determination to endorse the proposed settlement.⁷ (Crosner
4 Decl. ¶¶ 6-11.)

5 **D. The Proposed Settlement is a Reasonable Compromise of Claims**

6 An understanding of the amount in controversy is an important factor into whether the
7 settlement "of the class members' claims is reasonable in light of the strengths and weaknesses of
8 the claims and the risks of the particular litigation." *Kullar v. Foot Locker Retail, Inc.* (2008) 168
9 Cal.App.4th 116, 129; *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th
10 399, 409. The most important factor in this regard is "the strength of the case for plaintiffs on the
11 merits, balanced against the amount offered in settlement." *Kullar*, 168 Cal.App.4th at 129.

12 In weighing the strength of Plaintiff's case, *Kullar* instructs that the court is not to "decide
13 the merits of the case or to substitute its evaluation of the most appropriate settlement for that of the
14 attorneys." 168 Cal.App.4th at 133. Further, this analysis does not require an explicit statement of
15 the maximum amount the plaintiff class could recover if it prevailed on all its claims, provided there
16 is a record which allows "an understanding of the amount that is in controversy and the realistic
17 range of outcomes of the litigation." *Munoz*, 186 Cal. App. 4th at 409. Put differently, "as the court
18 does when it approves a settlement as in good faith under Code of Civil Procedure section 877.6,
19 the court must at least satisfy itself that the class settlement is within the 'ballpark' of
20 reasonableness." *Kullar*, 168 Cal. App. 4th at 133 citing *Tech-Bilt v. Woodward-Clyde & Associates*
21 (1985) 38 Cal. 3d 488, 499-500. As shown below, the Parties' investigation and discovery revealed
22 several reasons to discount claims and agree to this settlement.

23 **E The Settlement is Fair and Reasonable Based on the Strengths of Plaintiff's**
24 **Case and the Risks and Costs of Further Litigation**

25 The proposed settlement was only possible following significant analysis and evaluation of
26 Defendant's relevant policies and procedures, as well as the data that Defendant produced for the

27 ⁷ The final factor mentioned in *Dunk* - the number of objectors - is not determinable until the Notice of Class Action
28 Settlement has been provided to the Class and they have had an opportunity to respond. This information will be
provided to the Court in conjunction with the Motion for Final Approval of Class Action Settlement.

1 Class. This permitted Plaintiff's Counsel to engage in a comprehensive analysis of liability and
2 potential damages. The discovery conducted resulted in Plaintiff's central theories of liability, which
3 are based on Plaintiff's claims that Defendant failed to provide compliant meal and rest periods,
4 failed to pay all minimum and overtime wages, failed to provide accurate, itemized wage statements
5 and failed to pay all wages due on separation of employment. As explained above, Defendant
6 maintains that the discovery produced demonstrates that it would succeed at both class certification
7 and on the merits. (Crosner Decl., ¶¶ 15, 36-37.)

8 Plaintiff believes this case is suitable for certification on the claimed basis that there are
9 company-wide policies that Plaintiff contends violate California law and uniformly affect the Class
10 Members. However, Defendant's counterarguments raise uncertainties with respect to both class
11 certification and success on the merits. As the California Supreme Court emphasized in *Sav-On v.*
12 *Superior Court* (2004) 34 Cal.4th 319 (2004), class certification is always a matter of the trial court's
13 sound discretion, and decisions following *Sav-On* have reached different conclusions with respect to
14 certification of wage and hour claims.⁸ While remaining confident in the strengths of his claims, all
15 of these factors led Plaintiff to discount the following maximum potential damage claims. (Crosner
16 Decl., ¶ 38.)

17 **1. The Settlement Amount is Reasonable**

18 Defendant provided Plaintiff with class-wide data from which Plaintiff's Counsel could
19 extrapolate a damage analysis in preparation of mediation. Prior to mediation, there were a total of
20 92 Class Members who worked approximately 5,000 work weeks in the limitations period, and 92
21 aggrieved employees and 3,622 pay periods within the PAGA Period. (Crosner Decl., ¶ 39.)

22 Plaintiff contends Defendant failed to provide legally compliant meal and rest breaks.
23 Specifically, as to meal breaks, Plaintiff contends his analysis of the time and payroll records
24 produced by NFS reveals 53% of all shifts contained a unique meal period violation (i.e., late, short,
25

26 ⁸ *E.g., Harris v. Superior Court*, 154 Cal.App.4th 164 (2007) (reversing decertification of class claiming
27 misclassification and ordering summary adjudication in favor of employees), *review granted*, 171 P.3d 545 (2007) (not
28 cited as precedent, but rather for illustrative purposes only); *Walsh v. IKON Solutions, Inc.*, 148 Cal.App.4th 1440
(2007) (affirming decertification of class claiming misclassification); *Aguilar v. Cintas Corp. No. 2*, 144 Cal.App.4th
121 (2006) (reversing denial of certification); *Dunbar v. Albertson's Inc.*, 141 Cal.App.4th 1422 (2006) (affirming
denial of certification).

1 or missed). Plaintiff claims this violates Labor Code sections 512, 226.7, and the applicable IWC
2 Wage Orders, as well as *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 and
3 *Augustus v. ABM Security Serv., Inc.* (2016) 2 Cal.5th 257 for failure to provide all required meal
4 periods and within the required time frames. Plaintiff also contends NFS fails to provide duty-free
5 rest periods to Class Members by failing to relinquish control over how Class Members utilize their
6 rest period time by prohibiting Class Members from leaving the premises during rest periods and
7 further that NFS supervisors instructed Plaintiff and Class Members to remain at their worksites and
8 respond to any incoming calls, and they further were prohibited by company policy from using
9 social media while on work time and otherwise subject to policies imposing employer control on
10 the Class Members during their break time. (Crosner Decl., ¶ 40.)

11 Defendant denies Plaintiff's contentions, claiming they made meal and rest breaks available
12 to Class Members in compliance with California law. Defendant contends its meal and rest break
13 policies are lawful and that Class Members were frequently reminded they were required to take all
14 meal and rest breaks. Defendant also contends that time records demonstrate that Class Members
15 took duty-free, timely meal and rest breaks. Defendant also contends its meal and rest break policies
16 and practices comported with the flexibility the *Brinker* court held was integral to California's meal
17 and rest period requirements. Finally, Defendant argues that Plaintiff's meal and rest break claims
18 are not susceptible to common proof, as the claims would require individualized inquiry, including
19 whether there was an unlawful companywide policy, whether employees had the opportunity to take
20 meal and rest periods, whether they voluntarily chose to forego their meal and rest periods, and
21 whether Defendant ever prevented them from taking meal and rest periods. Accordingly, Defendant
22 contends these claims are vulnerable to a ruling that class treatment is not appropriate. (Crosner
23 Decl., ¶ 41.) Without taking into consideration any of Defendant's defenses to certification or on
24 the merits, Plaintiff estimates NFS faces NFS faces no less than **\$191,976** in damages for meal
25 period violations and **\$324,326** in damages under on the rest period claims. (Crosner Decl., ¶ 42.)

26 Plaintiff further contends Defendant failed to pay all overtime wages. Instead, NFS has a
27 policy and practice of paying a straight hourly rate for all hours worked in excess of eight hours in
28 a workday and forty in a workweek: As a result, NFS failed to pay Ms. Combest and the Class

1 Members overtime for all hours they worked in violation of Labor Code § 510. (Crosner Decl., ¶
2 43.)

3 Defendant contends it paid class members all wages due, including overtime
4 wages, as required under applicable law. Without taking into consideration any of Defendant's
5 defenses to certification or on the merits, Plaintiff's expert calculated Defendant's maximum
6 exposure for this claim **\$189,385** in damages for unpaid overtime. (Crosner Decl., ¶ 44.)

7 On the inaccurate wage statement claims under Labor Code section 226, Plaintiff contends
8 NFS's wage statements violate Section 226 on their face by failing to correctly state the total hours
9 worked during each pay period. NFS's wage statements list two separate hourly rates of pay: "CA
10 Regular" and "CA Benefit" and then state Class Members' total hours worked for the pay period
11 were listed twice under both "CA Regular" and "CA Benefit," and thereby double count employee
12 hours worked. (Crosner Decl., ¶ 45.) As a result of the above alleged violations, Plaintiff also
13 alleges NFS failed to timely pay all wages that were due and owing upon separation of employment.
14 Should the primary claims fail, Plaintiff's claim for waiting time penalties would also fail.
15 Defendant also contend they would not be liable for waiting time penalties because a "good faith
16 dispute" exists over the payment of past wages. Cal. Code Regs. Tit. 8 § 13520; *Amaral v. Cintas*
17 *Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1201. Further, Defendant contends Plaintiff would have
18 to prove that Defendant "willfully" failed to pay Class Members appropriate wages due upon
19 separation of employment. (Crosner Decl., ¶ 46.) Defendant contends that any failure to pay wages
20 upon separation was not willful. Without taking into consideration any of Defendant's defenses to
21 certification or on the merits, Plaintiff calculated Defendant's maximum exposure for wage
22 statement penalties **\$137,750** and waiting time penalties at **\$173,676**. (Crosner Decl., ¶ 47.)

23 As far as potential PAGA liability, the theoretical civil penalties likely exceed \$700,000
24 should Plaintiff prevail on all claims and establish violations of the multiple Labor Code sections at
25 issue. (Crosner Decl., ¶ 48.) As with the class claims, Plaintiff discounted the potential PAGA
26 penalties based on Defendant's various defenses on the merits and also accounted for the Court's
27 wide discretion to reduce such penalties, or to decline to award penalties at all. Labor Code §
28 2699(e)(2); *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504 (trial court awarded penalties

1 of \$5 per pay period after a bench trial, which decision was upheld on appeal); *In re Taco Bell Wage*
2 *and Hour Actions* (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. LEXIS 48557 (PAGA penalties denied
3 after trial). Accordingly, the Parties allocated \$15,000 to PAGA penalties. (Agreement, § 3.2.5.)

4 Plaintiff submits this amount is reasonable under the circumstances and in line with
5 comparable settlements in other wage and hour class actions in California. *E.g.*, *Van Kempen v.*
6 *Matheson Tri-Gas, Inc.* (N.D. Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182 (granting final
7 approval of \$5,000 PAGA penalty from \$370,000 settlement, or 1.4 percent of total settlement);
8 *Slavkov v. First Water Heater Partners I* (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS 116303
9 (finding a \$7,500 PAGA payment reasonable when measured against the overall settlement of
10 \$345,000 and the possible weaknesses in plaintiffs' case, or 2.2 percent of total settlement).
11 Additionally, the LWDA has been informed of the terms of the PAGA portion of the settlement,
12 and will be able to weigh in as necessary. *Jennings v. Open Door Mktg. Inc.* (N.D. Cal. Oct. 3, 2018)
13 2018 U.S. Dist. LEXIS 171356, at *27 (approving settlement with PAGA penalties of 0.6% where
14 "[p]laintiffs [have] submitted the settlement agreement to the LWDA, and the LWDA has not
15 objected to the settlement.

16 Thus, Plaintiff and her counsel discounted the value of the class claims consistent with the
17 risks discussed above, and carefully weighed the likelihood of the class receiving substantially
18 greater benefit if the litigation continued. Plaintiff and counsel concluded – in light of these very
19 real and substantial risks – settlement on the proposed terms and without prolonged and costly
20 litigation was in the best interests of the class. The overall \$250,000 recovery represents a
21 significant percentage of Defendant's potential exposure, and is roughly 24% of the theoretical
22 maximum value of the class claims (\$250,000/\$1,067,100). Given Defendant's multi-layered
23 defenses and all other potential risks of continued litigation, a total recovery for the class of
24 \$250,000, which will result in average award of some \$1,268 per class member, plus additional
25 sums under PAGA, is a significant result well within the range of reasonableness considering all
26 potential outcomes, and it will provide direct monetary awards to all Class Members without further
27 delay. [Crosner Decl., ¶ 49.]
28

1 Importantly, the mere fact that a settlement does not provide the same recovery as might be
2 achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and adequate.
3 Wershba, 91 Cal.App.4th at 246, 250 (“Compromise is inherent and necessary in the settlement
4 process...even if the relief afforded by the proposed settlement is substantially narrower than it
5 would be if the suits were to be successfully litigated, this is no bar to a class settlement because the
6 public interest may indeed be served by a voluntary settlement in which each side gives ground in
7 the interest of avoiding litigation”); 7-Eleven Owners for Fair Franchising v. Southland Corp. (2000)
8 85 Cal.App.4th 1135, 1150 (“The fact that a proposed settlement may amount to only a fraction of
9 the potential recovery does not, in and of itself, mean that the proposed settlement is grossly
10 inadequate and should be disapproved”); White v. Experian Information Solutions, Inc. (C.D. Cal.
11 2011) 803 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable even
12 though it represented 99% discount off the maximum value of the claims); Lane v. Facebook, Inc.
13 (9th Cir. 2012) 696 F.3d 811, 819 (“[T]he question whether a settlement is fundamentally fair . . . is
14 different from the question whether the settlement is perfect in the estimation of the reviewing
15 court”). Importantly as well, the proposed settlement is non-reversionary and will provide
16 immediate benefits to the Class Members without a claims process. White, 803 F.Supp.2d at 1098;
17 c.f., Federal Judicial Center, Managing Class Action Litigation: A Pocket Guide for Judges (3d ed.
18 2010) at 20, available at <http://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf>, (reversionary
19 provisions and/or cumbersome claims process may indicate lack of fairness). Plaintiff and her
20 counsel submit the settlement is within the “range of reasonableness,” and is fair and adequate for
21 the Class.

22 **F. Provisional Class Certification Should be Granted**

23 A class action is appropriate when the class is ascertainable and there is “a well-defined
24 community of interest in the questions of law and fact involved affecting the parties to be
25 represented.” Code Civ. Proc. § 382. Class certification requirements under Section 382 follow Rule
26 23 of the Federal Rules of Civil Procedure, and require: numerosity, typicality of the class
27 representatives’ claims, adequacy of representation, predominance of common issues, and
28 superiority. Fed.R.Civ.Pro. 23(b)(3); Hanlon v. Chrysler Corp. (9th Cir. 1998) 150 F.3d 1011, 1019.

1 While a court must certify a class for settlement purposes if a class has not already been certified,
2 “it is well established that trial courts should use different standards to determine the propriety of a
3 settlement class, as opposed to a litigation class certification. Specifically, a lesser standard of
4 scrutiny is used for settlement cases.” *Glob. Minerals & Metals Corp. v. Superior Court* (2013) 113
5 Cal.App.4th 836, 859 citing *Dunk*, Cal.App.4th 1794, 1807, n.19; *Wershba v. Apple Computer*
6 (2001) 91 Cal.App.4th 224, 237-38.

7 **1. The Proposed Class is Sufficiently Numerous and Ascertainable**

8 First, the class is both sufficiently numerous, consisting of approximately 92 individuals,
9 and ascertainable by reference to Defendant’s personnel and payroll records. (Crosner Decl., ¶ 50.)
10 “There is no set number required to maintain a class action, and the statutory test is whether a class
11 is so numerous that ‘it is impracticable to bring them all before the court.’” *Hebbard v. Colgrove*
12 (1972) 28 Cal. App. 3d 1017, 1030 (noting that there is no set minimum to meet the numerosity
13 prerequisite, but that a class of as few as 28 is acceptable); *Bowles v. Superior Court* (1995) 44 Cal.
14 2d 574 (upholding a class of ten members); *Rose v. City of Hayward* (1981) 126 Cal. App. 3d 926,
15 932 (finding that “Class Members are ‘ascertainable’ where they may be readily identified without
16 unreasonable expense or time by reference to official records.”). Thus, the ascertainability
17 requirement is met.

18 **2. The Typicality and Adequacy Requirements Are Met**

19 The typicality requirement is met if the claims of the named representative are typical of
20 those of the Class, though, “they need not be substantially identical.” *Classen v. Weller* (1983) 145
21 Cal.App.3d 27, 46-47. Here, Plaintiff contends her claims are typical of the Class Members’ claims
22 because they arise from the same factual basis and are based on the same legal theories applicable
23 to the Class Members. Plaintiff further contends Defendant’s policies applied to all Class Members
24 and each Class Member is challenging the same policies and practices. As such, the typicality
25 requirement is satisfied for purposes of settlement. (Combest Decl., ¶¶ 2-3; Crosner Decl. ¶ 51.)

26 Adequacy requires that the Plaintiff have no interests adverse to the interests of the proposed
27 Class Members and be committed to vigorously prosecuting the case on behalf of the Class. *McGhee*
28 *v. Bank of America* (1976) 70 Cal.App.3d 442, 450-51. Plaintiff has been and will continue to be

1 committed to vigorously prosecuting this case, and she has no conflicts of interest with the Class.
2 (Combest Decl., ¶¶ 3-7; Crosner Decl., ¶ 52.)

3 **3. The Commonality Requirement is Met**

4 Next, common questions of law and fact predominate – particularly for purposes of a
5 settlement class – as the Class Members all were subject to the same meal and rest break policies
6 and alleged “de facto” policies resulting in meal period violations, and similarly subject to the same
7 improper time rounding policy. Since the focus of the claims against Defendant concerns the
8 legality of common policies applied uniformly to the entire class, common issues predominate over
9 individualized inquiries concerning liability. For instance, Defendant’s meal and rest break policy
10 is company-wide policy applied equally and consistently to all class members, and this policy is
11 either compliant with California law or it is not. Regardless of that determination, it will decide
12 liability for all class members one way or another. Similarly, whether the wage statements
13 improperly tabulated employee hours worked is another question common to all class members.
14 [Crosner Decl., ¶ 53.]

15 By now it is well-settled a theory of recovery asserting the existence of a uniform policy
16 violating California law is sufficient to satisfy the requirements for class certification. Jones v.
17 Farmers Ins. Exch. (2013) 221 Cal.App.4th 986, 996 (“Claims alleging that a uniform policy
18 consistently applied to a group of employees is in violation of the wage and hour laws are of the
19 sort routinely, and properly, found suitable for class treatment”); Williams v. Superior Court (2013)
20 221 Cal.App.4th 1353 (“A company-wide practice can sustain a common question of fact or law
21 that supports commonality for class certification”). Lastly, a class action is superior to other means
22 for the fair and efficient adjudication of this controversy. [Crosner Decl., ¶ 54.]

23 **G. Simpluris Should be Appointed as the Settlement Administrator**

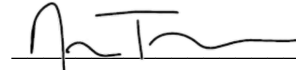
24 The Parties agreed to use Simpluris, Inc. as the Settlement Administrator in this matter.
25 (Agreement, § 7.1.) Simpluris is highly qualified and experienced as a settlement administrator,
26 committed to the security of data (having experienced no data breaches at all), carries insurance for
27 the theft of money or data, and has no relationship with Counsel. (Declaration of Eric Springer, ¶¶
28 2-13; Exhs. A-C; Crosner Decl., ¶ 55.)

1 **VI. CONCLUSION**

2 Plaintiff respectfully submits that the proposed settlement is in the best interests of the Class
3 Members, as it is fair, adequate, and reasonable. Plaintiff accordingly requests the Court certify the
4 class for settlement purposes, appoint Plaintiff as Class Representatives, appoint Plaintiff's Counsel
5 as Class Counsel, appoint Simpluris, Inc. as Settlement Administrator, approve the method of notice
6 and the Notice to be sent to the Class, preliminarily approve the Settlement Agreement, enter the
7 proposed order filed herewith, and set a Final Approval hearing date.

8
9 Dated: October 18, 2022

CROSNER LEGAL, P.C.

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12 Michael Crosner

13 Zachary Crosner

14 Nikki Trenner

15 Attorneys for Plaintiff JENNIFER COMBEST
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