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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN JOAQUIN

JANET UGALE and JOBANY RODRIGUEZ,
individually, and on behalf of other members of the
general public similarly situated and on behalf of
aggrieved employees pursuant to the Private
Attorneys General Act ("PAGA");

Plaintiffs,

v.

ALLEN DISTRIBUTION, LP, a Pennsylvania
limited partnership; and DOES 1 through 100,
inclusive;

Defendants.

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County of San Joaquin
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Motion for Approval of Class Settlement
09/02/2021 09:00 AM in 10D

Case No.: STK-CV-UOE-2020-0005807

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

Date: _____, 2021

Time: 9:00 a.m.

Dept.: 10D

Judge: Hon. Barbara A. Kronlund

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1 **I. INTRODUCTION.**

2 Plaintiffs Janet Ugale and Jobany Rodriguez (collectively “Plaintiffs”), both former non-exempt
3 employees of Defendant Allen Distribution, L.P. (“Defendant” or “Allen”) within California,
4 negotiated a resolution of pending wage and hour claims asserted on behalf of themselves and other
5 similarly situated current and former employees of Defendant that provides \$658,980.00 to be shared
6 amongst approximately 325 individuals as compensation for alleged failures to 1) properly pay
7 minimum wage and overtime because of an unlawful rounding policy and/or because employees were
8 otherwise required to work off-the-clock, 2) calculate the “regular rate of pay” for sick pay wages
9 resulting in underpaid wages, 3) provide meal and rest periods and associated premiums, 4) pay all
10 wages due and owing on separation, 5) reimburse necessary business expenses, and 6) to furnish
11 accurate itemized wage statements—**a settlement expected to provide an average net recovery of**
12 **nearly \$920 (\$919.57) to each Class Member.**¹ Through this action, Plaintiffs seek to redress the harm
13 he alleges Allen inflicted on all current and former non-exempt employees employed directly by
14 Defendant within California at any time between June 16, 2016 and May 4, 2021 (the “Class”). In
15 order to facilitate dissemination of notice of the Parties’ Joint Stipulation of Class and Representative
16 Action Settlement and Release (the “Settlement” or “SA”)² and, ultimately, distribution of the
17 substantial monetary recovery it embodies, Plaintiffs seek preliminary approval of the negotiated
18 resolution from this Court. The Settlement confers cognizable monetary benefits on Class Members, in
19 addition to the fact this lawsuit motivated Allen to audit its policies, practices and procedures to ensure
20 compliance with California law. Since the Settlement is fair, adequate, and reasonable, and was
21 negotiated at arm’s length with the assistance of respected mediator Marc Feder, Esq., it should be
22 preliminarily approved so that Class Members have an opportunity to weigh in on its propriety.

23 ///

24 ///

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26 _____
27 ¹ Class Members who are also members of the Former Employee Sub-Class will receive an *additional* \$250.00 and
28 PAGA Aggrieved Employees will receive at least an additional almost \$50.00 on average. Declaration of Jenny D.
Baysinger (“JDB Dec.”) filed concurrently herewith, at ¶¶ 60, 72, 78.

² Capitalized terms herein shall have the same meaning as in the Class and Representative Action Settlement Agreement and
Release of Claims, a copy of which is attached as **Exhibit 1** to JDB Dec.

1 **II. SUMMARY OF THE CASE.**

2 **A. Plaintiffs' Claims.**

3 Plaintiffs claim Allen failed to pay them and its other non-exempt California employees for all
4 hours worked as a result of a systematically unfair rounding system and other “off-the-clock” work
5 employees were required to perform, failed to properly calculate and pay sick pay because of a
6 miscalculation of the “regular rate of pay”, failed to provide the opportunity for off-duty meal and rest
7 periods, and failed to reimburse all necessary business expenses. Because of these alleged violations,
8 Plaintiffs also alleges Allen failed to issue accurate itemized wage statements, failed to timely pay
9 wages owed on separation of employment, and engaged in unfair business practices (the “Class
10 Claims”). Plaintiffs also asserts a cause of action to assess and collect civil penalties based on the Class
11 Claims (the “PAGA Claim”).

12 **1. The Class and Subclasses.**

13 Plaintiff seeks to represent three distinct classes and sub-classes defined as follows:

14 The Class

15 All current and former non-exempt California employees employed directly by Defendant at
16 any time between June 16, 2016 and May 4, 2021;

17 The Former Employee Sub-Class

18 All members of the Class whose employment with Defendant ended at any time between June
19 16, 2017 and May 4, 2021.

20 SA at ¶¶ 16, 25.

21 **B. Procedural History.**

22 On June 11, 2020, Plaintiff Rodriguez provided written notice to the Labor and Workforce
23 Development Agency (“LWDA”) and Defendant regarding specific provisions of the Labor Code
24 alleged to have been violated as to Plaintiff Rodriguez and Allen’s other non-exempt California
25 employees, including the facts and theories to support those alleged violations. JDB Dec. ¶ 4. On
26 June 16, 2020, Plaintiff Rodriguez filed a Class and Collective Action Complaint in the United
27 States District Court, Eastern District of California Case number 2:20-cv-01202-KJM-CKD (the
28 “Rodriguez Class Action”). *Id.* ¶ 5. On July 8, 2020, Plaintiff Ugale filed a Class Action Complaint

1 for Damages in this Court (the “*Ugale* Class Action”). *Id.* ¶ 6. On August 21, 2020, Plaintiff
2 Rodriguez filed a First Amended Class and Collective Action Complaint in the *Rodriguez* Class
3 Action in order to add a claim to assess and collect civil penalties pursuant to the PAGA. On August
4 28, 2020, Allen removed the *Ugale* Class Action to the United States District Court, Eastern District
5 of California. On September 25, 2020, Plaintiff Ugale filed a motion to remand the *Ugale* Class
6 Action to this Court. *Id.* at ¶ 11.

7 In early September 2020, the Parties began discussing the prospect of an early joint
8 mediation of the *Rodriguez* Class Action and the *Ugale* Class Action. In the fall of 2020, the parties
9 in the *Rodriguez* Class Action and the *Ugale* Class Action agreed to a joint mediation with
10 experienced employment class action mediator Marc Feder. In January 2021, and in order to
11 facilitate the global mediation, Mayall Hurley, P.C. and the Justice Law Corporation (collectively
12 with Mayall Hurley, P.C., “Class Counsel”) entered into a co-counsel agreement to jointly represent
13 Plaintiffs Ugale and Rodriguez and the putative classes in each pending action.

14 C. **Identifying the Claims, Marshalling the Evidence, Creating a Damages Model**
15 **and Developing a Strategy for Mediation.**

16 Through independent inquiry, research, formal and informal discovery, Class Counsel
17 thoroughly and diligently investigated and pursued the claims asserted in both the *Rodriguez* Class
18 Action and the *Ugale* Class Action. JDB Dec. ¶ 17. This process included, but was not limited to,
19 (1) obtaining and reviewing both Plaintiff’s personnel files, payroll records, and time records; (2)
20 researching Defendant, its organization and operations within California; (3) researching the
21 existence of other pending actions; (4) identifying, researching, and pleading the appropriate claims,
22 including adding potential claims as additional information has been discovered; (5) exhausting
23 administrative remedies; (6) identifying, requesting, securing, and reviewing pertinent policies,
24 practices, and procedures; (7) identifying, requesting, and securing time and payroll records for a
25 random 20% sampling of putative class members; (8) propounding formal discovery to secure
26 relevant policy documents and numerical information regarding the size of the classes and the scope
27 of the claims, (9) retaining an expert to analyze the data provided by Defendant and personally
28 conducting spot checks to ensure the accuracy of the damages calculations; (10) creating a reliable

1 damages model; and (11) developing and implementing a strategy for mediation and settlement.
2 *Ibid.* Prior to the mediation, Defendant provided more than 100 pages of policy documents, along
3 with the time and wage records for an agreed upon 20% random sampling of the Class that Class
4 Counsel engaged an economist expert to evaluate. *Id.* ¶¶ 18-22.

5 **D. Settlement Negotiations, Remand to State Court, and Amended Pleadings.**

6 At all times, the Parties’ negotiations were adversarial, non-collusive, and at arms’ length. JDB
7 Dec. ¶ 32. On March 4, 2021, the Parties participated in an all-day mediation with Mr. Feder. At the
8 close of the mediation, Mr. Feder proposed a mediator’s number that was ultimately accepted by the
9 Parties. *Id.* ¶ 24. On March 21, 2021, the Parties executed a Memorandum of Understanding
10 memorializing the basic terms, which they converted to the more formal SA executed June 23, 2021
11 after months of additional negotiations. *Id.* ¶¶ 24, 28.

12 As part of the Settlement, the *Ugale* Class Action was remanded back to this Court. On August
13 3, 2021, the operative First Amended Class Action Complaint for Damages was filed in the *Ugale*
14 Class Action, in order to add Plaintiff Rodriguez as a named Plaintiff and merge the claims from the
15 *Rodriguez* Class Action into the instant case. JDB Dec. ¶¶ 25-27. The SA is intended to resolve all
16 claims asserted withing the *Rodriguez* Class Action and the *Ugale* Class Action—it is anticipated the
17 *Rodriguez* Class Action will be dismissed after final approval of the SA is secured in this Court. *Ibid.*

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

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

20 Pursuant to the Settlement, Allen is to remit \$658,980.00 – the Maximum Settlement Amount
21 (“MSA”) – on an all-in, non-reversionary basis to resolve the claims to be released by Participating
22 Class Members. SA ¶¶ 28, 42-43. After deducting the Administrator’s costs (\$6,975.00), Plaintiffs’
23 Enhancement Payments (\$7,500 each; \$15,000 total), the fees (\$230,643) and costs (\$20,000) of Class
24 Counsel, and the payment to the LWDA relating to the PAGA Claims (\$30,000), a \$356,362 net
25 settlement amount (\$346,362 for Class Claims, expected to be divided \$47,500 to Former Employee
26 Sub-Class Members and \$298,862, with \$10,000 attributable to the PAGA Claim) is expected to
27 ultimately be distributed to participating Class Members. SA ¶ 52; JDB Dec. ¶¶ 60, 72. Participating
28 Class Members are expected to receive an average payout of nearly \$920.00 in resolution of Class

1 Claims, with Former Employee Sub-Class Members receiving an additional \$250, and Class Members
2 employed during the PAGA Settlement Period receiving another \$49.50. JDB Dec. ¶¶ 72, 78.

3 **B. Notice to Class.**

4 The Class Notice will be mailed to Class Members within 30 calendar days after preliminary
5 approval of the Settlement. SA ¶¶ 64-65; Exh. A.

6 **C. Participation in the Settlement.**

7 Class Members are not required to file claims in order to be eligible to participate in this
8 Settlement; all Class Members who do not opt-out will be Participating Class Members. SA ¶¶ 38, 67.
9 Class Members employed during the PAGA Settlement Period will receive a proportional share of the
10 portion of the Net PAGA Settlement Amount payable to aggrieved employees, regardless of whether
11 he/she opts out of the Class Settlement. SA ¶¶ 31, 68.

12 **D. Allocation Between the Classes and Settlement Shares.**

13 The Net Class Settlement Amount will consist of a Former Employee Set-Aside of \$250 per
14 participating Former Employee Sub-Class member and the remainder—an expected \$298,862—to be
15 proportionally divided amongst Participating Class Members. SA ¶ 68. Individual Settlement Shares
16 for Class Members will be based on the number of workweeks each individual worked during the Class
17 Period, divided by the total workweeks worked by all Class Members during the Class Period,
18 multiplied by the portion of the NCSA allocated to Class Members. *Ibid.*

19 The *average* payment to each Participating Class Member is expected to be nearly \$920.00,
20 with Participating Former Employee Sub-Class Member receiving an *additional* \$250. JDB Dec. ¶ 72.
21 For the purpose of taxes and withholdings, 100% of the amounts distributed to the Former Employee
22 Sub-Class will be considered penalties. SA ¶ 58. All amounts distributed to Class and the Regular
23 Rate Sub-Class will be allocated 25% wages and 75% penalties and interest. *Ibid.* Employer-side
24 Taxes shall be paid separately by Allen. SA ¶¶ 23, 51.

25 **E. Scope Of Release And Final Judgment.**

26 As of the Effective Date, Participating Class Members will forever and completely release and
27 discharge Allen and Released Parties from the Released Claims. SA ¶¶ 42, 44, 73. Additionally,
28 Plaintiffs will release Defendant from any and all claims and will execute a Civil Code section 1542

1 waiver. SA ¶ 75. The Released Claims were narrowly tailored to track the claims advanced on behalf
2 of the Class and do not include a Civil Code section 1542 waiver. JDB Dec. ¶ 74.

3 **F. Settlement Administration.**

4 Plaintiff solicited bids from several administrators. After negotiating to obtain the most reliable
5 and cost-effective service, Phoenix Class Action Administration Solutions (“Phoenix”) was selected.
6 Plaintiff seeks approval of up to \$6,975 for the Administrator’s fees and costs. SA ¶¶ 51(i); JDB Dec. ¶
7 85.

8 **G. Payment To The LWDA.**

9 The SA allocates \$40,000, just over 6% of the MSA and 2% of the maximum civil penalty
10 exposure facing Allen, to resolve PAGA claims. 75% (\$30,000) will be paid to the LWDA and the
11 remaining 25% (\$10,000) will comprise the Net PAGA Settlement Amount and will be distributed to
12 Class Members employed during the PAGA Settlement Period. SA ¶¶ 31, 35-36, 55, 68. The Parties
13 negotiated this amount in good faith, intending to serve the punitive and deterrent purposes of the
14 PAGA, and it exceeds the range approved by courts in other class actions with PAGA components.³
15 JDB Dec. ¶¶ 75-80. The LWDA has been notified of the Settlement. *Id.* ¶ 80, Exh. 5.

16 **H. Enhancement Payments To Plaintiffs For Service To The Class.**

17 Each of the Plaintiffs will apply for an enhancement payment in the amount \$7,500, or 1.13% of
18 the MSA. Class Members will be apprised of Plaintiffs’ requests and ability to review the moving
19 papers on the Court’s website and to object to his request if they so desire. SA ¶ 56, Exh. 1.

20 **I. Class Counsel’s Attorneys’ Fees And Costs.**

21 Class Counsel will request attorneys’ fees of thirty-five percent (35%) of the MSA, or
22 \$230,643, as well as declared litigation costs up to \$20,000. SA ¶ 57. Class Members will be apprised
23 of Class Counsel’s request, their ability to review the moving papers on the Court’s website and to
24 object to the request if they so desire. SA Exh. 1.

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26 _____
27 ³ See, e.g., *Nordstrom Comm’n Cases* (2010) 186 Cal.App.4th 576, 589 (approving PAGA allocation of \$0 to the LWDA);
28 *Hopson v. Hanesbrands, Inc.* (N.D. Cal. 2008) 2008 WL 338542, at 1 (approving PAGA allocation of .03% or \$1,500); *In re M.L. Stern Overtime Litig.* (S.D. Cal. 2009) 2009 WL 995864, at 1 (approving PAGA allocation of 2% or \$20,000); *Munoz v. UPS Ground Freight, Inc.* (N.D. Cal. 2009) 2009 WL 1626376, at 1 (approving PAGA settlement of 2% or \$60,000).

1 **J. Final Approval Hearing.**

2 At a date set by the Court, the SA contemplates the Court will hold a Final Approval Hearing
3 and, if the Settlement is approved, enter an Order of Final Approval approving the SA in a manner
4 substantially consistent with its terms and intent, and enter Judgment accordingly. SA ¶ 76.

5 **K. Proposed Implementation Schedule.**

6 Allen to provide Class List to Administrator.	Within 15 calendar days of the Court's execution of the Order Granting Preliminary Approval.
7 Administrator to mail Class Notice.	Within 30 calendar days of the POA
8 Deadline for Class Members to object or opt out.	Within 45 calendar days after Notice mailed.
9 Plaintiff to file Motion for Attorneys' Fees, Cost and Service Payment.	Not less than 16 court days before the Final Approval hearing.
10 Deadline for Plaintiff to file Motion for Final Approval.	Not less than 16 court days before the Final Approval hearing.
11 Final Approval Hearing.	Not less than 90 days after the Order Granting Preliminary Approval.

12 **IV. PROVISIONAL CERTIFICATION OF EACH OF THE CLASSES IS APPROPRIATE**

13 Prior to obtaining class certification, the parties to a class action may appropriately negotiate a
14 proposed settlement, subject to court approval. See *Wershba v. Apple Computer, Inc.* (2001) 91
15 Cal.App.4th 224, 240. To facilitate the resolution, the parties may stipulate that defined classes be
16 conditionally certified for settlement purposes only. Cal. R. Court Rule 3.769(d); *Hernandez v.*
17 *Vitamin Shoppe Industries, Inc.* (2009) 174 Cal.App.4th 1441, 1456-1457. This Court must review the
18 propriety of certification and independently determine the standards for class-wide treatment exist.

19 California courts have broad discretion to certify a class for settlement purposes. *Dunk v. Ford*
20 *Motor Co.* (1996) 48 Cal.App.4th 1794, 1807 n. 19 (holding that class certification in settlement cases
21 is subject to a "lesser standard of scrutiny"). Provisional and conditional certification is appropriate
22 where there is an ascertainable class and a well-defined community of interest among the members;
23 when "the question is one of a common or general interest, of many persons, or when the parties are
24 numerous, and it is impracticable to bring them all before the court." Code Civ. Proc. § 382; *Richmond*
25 *v. Dart Industries* (1981) 29 Cal.3d 462, 470; see also *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695,
26 704. The practical purpose of provisional certification is to facilitate notice to class members of the
27 terms of the proposed settlement, rights thereunder, and the date and time of the final approval hearing.

28 ///

1 To be certified, a settlement class must meet the following criteria: (1) the individuals in the
2 class are so numerous that joinder would be impractical; (2) there is a commonality of interest between
3 the plaintiff and the members of the class; (3) plaintiff's claims are typical of the claims of the class
4 members; and (4) plaintiff and their counsel will fully and adequately represent the interests of the class
5 members. Code. Civ. Proc. § 382; *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319,
6 326-27; Fed. R. Civ. P. 23.⁴ All of the prerequisites to certification are met for each of the classes here.

7 **A. The Proposed Classes Are Ascertainable and Joinder Would be Impractical.**

8 The identity of each Class Member is ascertainable because all Class Members worked for
9 Allen as non-exempt employees within California during the specific periods of time relevant to each
10 Class and can be easily identified through employee and payroll records. *Rose v. City of Hayward*
11 (1981) 126 Cal.App.3d 926, 932. With approximately 325 individuals, joinder is impractical.

12 **B. The Commonality Requirement is Met for the Settlement Classes.**

13 The commonality requirement is met if questions of law and fact that are common to the class
14 predominate and the theory of recovery is "amenable to class treatment." *Sav-On Drug Stores*, 34
15 Cal.4th at p. 327; *Brinker Restaurant Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004, 1033. The claims of
16 Rodriguez and each of the Class Members flow from the same facts and legal claims, i.e., Allen's
17 uniform application of its rounding policy, uniform failure to include bonuses and shift differentials
18 when calculating "regular rate of pay" for purposes of sick leave, uniform application of meal and rest
19 period practices, and uniformly applied reimbursement policies. JDB Dec. ¶¶ 40-53, 62-71, Exhs. 2-4.
20 Common questions predominate.

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

22 The typicality requirement is met if the claims of named representatives are typical of those of
23 the class, though "they need not be substantially identical." *Hanlon v. Chrysler Corp.* (9th Cir. 1998)
24 150 F.3d 1011, 1020; *Sav-On Drug Stores, Inc.*, 34 Cal.4th at p. 326. Each of the Plaintiffs' claims are
25 typical of the claims of every Class Member because they arise from the same factual bases and
26 uniform application of policies and procedures and are based upon the same legal theories. *Wehner v.*

27
28 ⁴ The California Supreme Court has authorized California's trial courts to use Federal Rule of Civil Procedure 23 and cases applying it for guidance in considering class issues. See *Vasquez v. Sup. Ct.* (1971) 4 Cal.3d 800, 821; *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146. Where appropriate, federal case law will be cited in addition to California law.

1 *Syntex Corp.* (N.D. Cal. 1987) 117 F.R.D. 641, 644. Importantly, were Rodriguez and Ugale not
2 serving as Class Representatives, each would unquestionably be a member of the Class, and Former
3 Employee Sub-Class. JDB Dec. ¶ 86. Typicality is satisfied.

4 **D. The Adequacy Requirement is Met with Respect to All Classes and Sub-Classes.**

5 The adequacy requirement is met if the named representative and counsel have no interests
6 adverse to those of the Class Members and are committed to vigorously prosecuting the case on behalf
7 of the class. *Hanlon*, 150 F. 3d at 1020; *McGhee v. Bank of Am.* (1976) 60 Cal.App.3d 442, 450-51.
8 Plaintiffs’ interests in prosecuting this matter and obtaining the most beneficial recovery practicable
9 fully comports with the collective interests of each respective Class. There are no conflicts between
10 either Plaintiff and the other Class Members, and each is a member of *both* Classes. *Hanlon*, 150. F 3d
11 at 1021. Moreover, any Class Member who wishes to opt-out and/or object to the Settlement will have
12 the opportunity to protect his/her individual interest by doing so. *Hanlon*, *supra*, 150. F.3d 1021.

13 In addition, throughout this case Plaintiffs and Class Counsel have demonstrated their
14 commitment to vigorously prosecuting this lawsuit on behalf of the Class. This is demonstrated by
15 Class Counsel’s experience in wage and hour cases and by the substantial benefits they have and will
16 continue to confer upon Class Members, including securing the MSA *and* motivating Allen to audit its
17 policies and practices to ensure compliance with California law, which necessarily benefits of current-
18 employee Class Members. JDB Dec. ¶¶ 34-35, 39, 56, 61, 72-73, 91-94.

19 **V. PRELIMINARY APPROVAL OF THE SETTLEMENT IS WARRANTED.**

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

21 The purpose of the preliminary evaluation of a proposed class action settlement is to determine
22 whether it is within the range of possible approval, and thus whether notice to the class of the terms and
23 conditions are warranted. *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85
24 Cal.App.4th 1135, 1145; *Spann v. J.C. Penney Corp.* (C.D. Cal. 2016) 314 F.R.D. 312, 319; William B.
25 Rubenstein, 4 NEWBERG ON CLASS ACTION (4th Ed. 2002) § 11.25. In passing on its propriety, this
26 Court has broad discretion to determine whether a settlement is fair under the unique circumstances.
27 *Dunk*, 48 Cal.App.4th 1801. Indeed, the Court need only find the settlement falls within a “reasonable
28 range”, as courts recognize that approving class action settlements is “an amalgam of delicate

balancing, gross approximations and rough justice.” *Ibid.*; *Cordy v. USS-Posco Indus.* (N.D. Cal. 2013) 2013 WL 4028627 *4; 4 NEWBERG § 11:25.

To make this fairness determination, courts consider several relevant factors, including “the strength of the plaintiffs’ case; the risk, expense, complexity and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; [and] the experience and views of counsel” *Hanlon*, 150 F.3d at 1026 (citations omitted). Importantly, there is a presumption of fairness when the settlement is the result of arm’s-length negotiation, investigation and discovery that are sufficient to permit counsel and the court to act intelligently, and counsel are experienced in similar litigation, as is the case here. *Dunk*, 148 Cal.App.4th 1801; *Wren v. RGIS Inventory Specialties* (N.D. Cal. 2011) 2011 WL 1230826 *6. California courts put a great deal of stock into what is otherwise, a private, negotiated, consensual agreement. Accordingly, a court’s inquiry is limited “to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole is fair, reasonable and adequate to all concerned.” *Dunk*, 148 Cal.App.4th 1801. The Settlement here satisfies all of the legal standards for preliminary approval and provides a cognizable average monetary recovery to each Class Member, particularly in light of the challenges and risks to securing relief on a class-wide basis.

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

The Class Action and Settlement have and will result in substantial benefits to the Class. While the MSA represents 25.3% of the maximum damages recoverable, those maximum damages include tenuous off-the-clock claims and challenging meal and rest period claims that are difficult to substantively prevail on and secure and maintain class certification of. *Castro v. PPG Industries, Inc.* (C.D. Cal. 2021) 2021 WL 99724 *3; *Hubbs v. Big Lots Stores, Inc.* (C.D. Cal. 2018) 2018 WL 5624141 *4-5; *Kilbourne v. Coca-Cola Co.* (S.D. Cal. 2015) 2015 WL 5117080 *8-9; JDB Dec. ¶¶ 58, 64, 66. Once the exposure is adjusted for reasonableness, the MSA allocated to Class Claims

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1 represents 45.25% of the realistic Class recovery⁵—the Class will recover 57.37% of its realistic
2 damages, and the Former Employee Sub-Class will recover 12.78% of its realistic recovery. JDB Dec.
3 ¶¶ 58-60. Moreover, all of the monetary relief afforded is *in addition to non-monetary benefits*
4 *conferred as a result of Allen’s audit of its policies and practices. Id. ¶¶ 35-36.*

5 Allen asserted legal and factual grounds to defend against this Class Action including, but not
6 limited to that its rounding policy was neutral as applied, that any time rounded was actually not
7 compensable (i.e. not work time), that its policies precluded off-the-clock work and none was
8 performed, that its meal period policies were facially lawful and that it did not actually interfere with
9 rest periods despite its written prohibition on leaving the premises, that it properly calculated sick
10 leave, that is reimbursed all necessary expenses it was aware of, that any failures to pay wages on
11 separation were not willful, and that derivative wage statement errors are not compensable. JDB Dec.
12 ¶¶ 58-71. While Class Counsel is confident certification and success on the merits could have been
13 attained, continued litigation was guaranteed to be costly, time consuming, and uncertain in outcome.
14 *Id. ¶ 73.* By contrast, the proposed Settlement ensures timely relief, cognizable monetary and non-
15 monetary benefits, is thus well within the range of reasonableness, and is undeniably fair, reasonable
16 and adequate.

17 **1. Defendant’s Exposure to the Class.**

18 Under Class Counsel’s damages model, Allen faced up to a maximum of \$2,438,328.30 in total
19 damages and statutory penalty liability to the Class, nearly half of which (\$1,184,969.30) arose from
20 allegedly off-the-clock work and allegedly denied meal and rest periods which are particularly difficult
21 to certify and prove. JDB Dec. ¶¶ 42-43, 45-49, 58, 64, 66. Because of anticipated challenges to
22 certification, success on the merits at trial, and on appeal, and Allen’s expected motion for summary
23 judgment, Class Counsel adjusted the exposure for reasonableness to account for all of the risks. *Id. ¶¶*
24 *58-73.*

25 **2. Allen’s Defenses.**

26 Allen asserted numerous defenses and planned to employ a multipronged attack aimed at
27 circumscribing both the scope of the Class and the available damages. Specifically, Allen planned to
28 _____

⁵ Class Counsel calculated Defendant’s realistic total liability to the Class at \$1,367,882.80. JDB Dec. ¶ 59.

1 file motions for summary judgment and/or summary adjudication contending its rounding policy was
2 neutral and thus proper as a matter of law (*Silva v. See's Candy Shops, Inc.* (2016) 7 Cal.App.5th 235,
3 251-253), that it did not allow any off-the-clock work *Kilbourne*, 2015 WL 5117080 *8-9, and that it's
4 meal and rest period policies and practices were facially lawful. JDB Dec. ¶¶ 62-64, 66.

5 In sum, the Settlement, which was negotiated at arms' length, by experienced, well-informed
6 counsel after significant investigation and information exchange, consummated after a full-day
7 mediation with experienced employment class action mediator Marc Feder, Esq. and required months
8 of further negotiations on the fine points, is fair, reasonable and adequate in light of the strengths and
9 weaknesses of the Class Claims and Defendant's defenses. "Great weight' is accorded to the
10 recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation.
11 This is because '[p]arties represented by competent counsel are better positioned than courts to produce
12 a settlement that fairly reflects each party's expected outcome in the litigation.' Thus, 'the trial judge,
13 absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of
14 counsel.'" *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 528.
15 Class Counsel, having demonstrated a high degree of competence in the litigation of this case, as well
16 as numerous other wage and hour class actions, strongly believe that the proposed Settlement is a fair,
17 adequate, and reasonable resolution of the Class Action and is preferable to continued litigation. JDB
18 Dec. ¶¶ 39, 56, 72.⁶ The Settlement should be preliminarily approved such that the Class Members
19 have an opportunity to evaluate and voice their opinions on the Settlement.

20 C. **The Court Should Order Dissemination of the Proposed Notice.**

21 In order to protect the rights of absent class members, courts must ensure each receives the best
22 notice practicable. *Phillips Petroleum Co. v. Shutts* (1985) 72 U.S. 797, 811-12. Procedural due
23 process requires affected parties have the right to be heard at a meaningful time and in a meaningful
24 manner. It does not guarantee any particular procedure but rather only requires notice reasonably
25 calculated "to apprise interested parties of the pendency of the action and afford them an opportunity to
26 present their objections." *Ryan v. Cal. Interscholastic Fed'n – San Diego Section* (2001) 94

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28 ⁶ See also, *In re Wachovia Corp. "Pick-A-Payment" Mortgage Mktg. & Sales Practices Litig.* (N.D. Cal. 2011) 2011 WL 1877630, at *3 (approving settlement based upon, among other factors, the belief of "Plaintiffs' counsel, who are experienced attorneys . . . that the settlement is extremely favorable to the class").

1 Cal.App.4th 1048, 1072. The law typically requires that notice of a proposed settlement inform class
2 members of: (1) the nature of the pending litigation; (2) the general terms of the proposed settlement;
3 (3) that complete information is available from the court files; and (4) that any class member may
4 appear and be heard at the fairness hearing. See Cal. Rules of Court, Rules 3.766(d)-(f) and 3.769(f);
5 William B. Rubenstein, 3 NEWBERG ON CLASS ACTIONS (4th Ed.) § 8:32.

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

7 California law vests the court with broad discretion to fashion an appropriate notice program.
8 Cal. Civ. Code §1781; Fed. R. Civ. Proc. Rule 23(e)(1); Rule 23(c)(2)(B); *Cartt v. Superior Court*
9 (1975) 50 Cal.App.3d 960, 973-74. Because all Class Members are current and former employees for
10 whom Allen has current or last known addresses as well as SSNs, notice is simpler and more reliable
11 that in other types of class actions. The Class Notice and plan here are consistent with notices
12 approved by state and federal courts and, under the circumstances, affords the best notice practicable.

13 The Class Notice will be sent to all Class Members, informs them of the terms of the
14 Settlement, and is neutrally worded to avoid prejudice. The Class Notice meets all of the requirements
15 of procedural due process and California Rules of Court, Rules 3.766(d)-(f) and 3.769(f) by identifying
16 Plaintiffs and Allen, describing the claims and the Action in a straightforward manner; succinctly
17 describing the essential terms of the Settlement, including identifying the scope of the release and all
18 parties against whom claims are being released; describing Plaintiffs' proposed Enhancement Payments
19 as well as the amount of Class Counsel's attorney's fees and costs; providing information on how to
20 participate in, opt-out of, or object to the Settlement; providing all applicable deadlines; and informing
21 Class Members of the consequences of not opting out. SA, Exh. A. In short, the Class Notice provides
22 Class Members with all of the necessary information to make an informed decision.

23 **D. The Settlement Administrator's Fees are Reasonable.**

24 The Parties have selected Phoenix Class Action Administration Solutions ("Phoenix") to serve
25 as Administrator. Phoenix has substantial experience in administration, having handled thousands of
26 class action settlements. The Administrator's fees and costs will be paid out of the MSA/QSF. The
27 Administrator will, among other things, distribute the Court-approved Class Notice, calculate
28 Participating Class Members' shares, prepare and mail settlement checks, respond to inquiries/disputes

1 as appropriate, prepare requisite tax forms, and generally perform all normal and customary duties
2 associated with the administration of such settlements. Plaintiff seeks preliminary approval of \$6,975
3 for the Administrator's fees and costs. JDB Dec. ¶ 85.

4 **E. The Enhancement Payments to Plaintiffs Are Reasonable.**

5 Named plaintiffs in class action litigation are eligible for reasonable service payments. *Staton v.*
6 *Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 977. "Courts routinely approve incentive awards to
7 compensate plaintiffs for the services they provided and the risks they incurred during the course of the
8 class action litigation." *Ingram v. Coca-Cola Co.* (N.D. Ga. 2001) 200 F.R.D. 685, 694 (approving
9 \$300,000 payment to each class representative in employment action settling before certification).⁷
10 Factors used by courts in determining the amount of the service payments include (1) a comparison
11 between service awards and the range of monetary recovery available to the class (*see Ingram*, 200
12 F.R.D. at 694; (2) time and effort put into the litigation (*see Van Vranken*, 901 F. Supp. at 299); (3)
13 whether the litigation will further the public policy underlying the statutory scheme (*see Roberts*, 979
14 F. Supp. at 201 n.23); and (4) risks of retaliation (*see Roberts*, 979 F. Supp. at 202). All factors support
15 the enhancement payments requested here. Plaintiffs will each request \$7,500, or 1.13% of the MSA.
16 The sought payments are fair, reasonable and appropriate under the circumstances of this case,
17 including Plaintiffs' provision of general releases and Civil Code section 1542 waivers. Plaintiffs, who
18 has worked diligently with Class Counsel throughout this entire litigation, including participating in
19 discovery and the Parties' informal information exchange, taking numerous calls with Class Counsel,
20 and actively participating during the remote mediation, should be rewarded for taking the initiative to
21 pursue these claims on behalf of their coworkers, and for their role in reaching a substantial settlement
22 providing valuable relief to the Class. JDB Dec. ¶¶ 86-90.

23 **F. Class Counsel's Attorneys' Fees and Costs are Reasonable, Fair, and Appropriate.**

24 Plaintiffs, in the settlement of this wage and hour class action, are entitled to payment of
25 attorneys' fees and costs. Cal. Lab. Code §§ 218.5, 226(e) (1), 1194, and 2699(g); *Early v. Superior*
26 *Court* (2000) 79 Cal.App.4th 1420, 1427. In conjunction with final approval, Plaintiffs will seek an

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28 ⁷ *Roberts v. Texaco, Inc.* (S/D.N.Y. 1997) 979 F. Supp. 185 (approving incentive payments up to \$85,000 for named
plaintiffs in employment action settling before certification); *Van Vranken v. Atl. Richfield Co.* (N.D. Cal. 1995) 901 F.
Supp. 294, 300 (\$50,000 service payment for named plaintiff in class action).

award of Class Counsel's fees under the common fund doctrine, which is customarily used in awarding fees and costs in settlement of Labor Code class actions and an approved method under California law.⁸ The traditional method for calculating a common fund fee is to award a percentage of the total fund. *Blum v. Stenson* (1984) 465 U.S. 886, 900 n. 16; *Mex. Workers v. Ariz. Citrus Growers* (9th Cir. 2002) 904 F.2d 1301, 1311. Courts customarily approve payments of attorney's fees between one-third to forty percent of the common fund in comparable wage and hour class actions.⁹ Here, Plaintiffs will seek attorneys' fees of 35% of the MSA, or \$230,643, and declared litigation costs of up to \$20,000. Because these fees and costs are reasonable, within the range commonly awarded by state and federal courts in wage and hour class actions, and because Class Counsel have conferred and will confer significant monetary and non-monetary benefits upon the Class, the Court should preliminarily approve the requested awards as fair and reasonable.

VI. A FINAL APPROVAL HEARING SHOULD BE SET.

Plaintiffs request the Court set a date for hearing on a motion for final approval as well as a motion for fees, costs, and enhancement payments, deadlines for Class Members to opt-out, object, and for the submission of associated moving papers. In order for sufficient time to mail the Class Notice and for Class Members to decide how they wish to proceed, Plaintiffs request that the date for the final approval hearing be set not less than 120 days after preliminary approval.

VII. CONCLUSION.

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

DATED: August 3, 2021

MAYALL HURLEY P.C.

By _____

JENNY D. BAYSINGER

Attorneys for Plaintiff and the Putative Class

⁸ *Wershba*, 91 Cal.App.4th at 254; *Lealao v. Beneficial Cal.* (2000) 82 Cal.App.4th 19, 26-30; *Serrano v. Priest* (1977) 20 Cal.3d 25, 34 ("[w]hen a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorney's fees out of the fund."); see also *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478 ("[A] lawyer who recovers for a common fund . . . is entitled to a reasonable attorney's fee from the fund as a whole."); *Hanlon*, 150 F.3d at 1029.

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