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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CINNAMON MILLS, individually, on
a representative basis, and on behalf of
all others similarly situated;

Plaintiff,

vs.

TARGET CORPORATION, a
Minnesota Corporation; and DOES 1
through 20, inclusive;

Defendants.

Case No.: 5:20-CV-01460-JGB-KK
[Assigned to Hon. Jesus G. Bernal]

FRCP RULE 23 CLASS ACTION

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

Hearing

Date: November 13, 2023

Time: 9:00 a.m.

Courtroom: 1

Complaint filed: June 10, 2020

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	BACKGROUND	3
III.	SUMMARY OF THE PROPOSED SETTLEMENT	5
	A. Settlement Consideration and Allocation.....	5
	B. Notice Procedures.....	6
	C. Settlement Allocation Formula for Settlement Shares.....	7
	D. Distribution of Unclaimed Settlement Shares and Uncashed Checks	7
	E. Exclusion and Objection Procedures	7
	F. Participating Class Members' Release of Claims	8
	G. PAGA Group Members' Release of Claims	9
	H. Timing of Settlement Disbursements.....	10
	I. Tax Treatment	10
IV.	TARGET AGREES NOT TO CONTEST THIS COURT'S CERTIFICATION OF THE CLASS FOR PURPOSES OF SETTLEMENT	10
	A. The Settlement Satisfies the Requirements of Rule 23(a)	11
	1. Numerosity.....	12
	2. Commonality.....	12
	3. Typicality	12
	4. Fair and Adequate Representation.....	13
	B. Certification of a Class Under Rule 23(b)(3).....	14
V.	PRELIMINARY APPROVAL OF THE SETTLEMENT	14
	A. The Settlement Falls Well Within the Range of Possible Approval.....	14
	B. Risk, Expense, Complexity, and Likely Duration of Further Litigation and/or of Obtaining Class Status.....	16
	C. The Settlement was the Product of Informed Negotiations	17
	D. The Attorneys' Fees and Cost Allocation Is Fair and Reasonable	17
	E. The Class Representative Service Award is Fair and Appropriate.....	20
VI.	THE COURT SHOULD APPOINT RUST CONSULTING AS ADMINISTRATOR	20
VII.	TIMELINE AND SCHEDULING A FINAL APPROVAL HEARING.....	21
VIII.	CONCLUSION.....	21

Table of Authorities

Cases

<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	11
<i>Armenta v. Osmose, Inc.</i> , 135 Cal.App.4th 314 (2005)	18
<i>Bond v. Ferguson Enterprises, Inc.</i> , 2011 WL 2648879 (E.D. Cal. 2011).....	20
<i>Chavez v. City of Los Angeles</i> , 47 Cal.4th 970 (2010)	18
<i>Class Plaintiffs v. Seattle</i> , 955 F.2d 1268 (9th Cir. 1992)	10, 14
<i>Cotter v. Lyft, Inc.</i> , 193 F.Supp.3d 1030, 1037 (N.D. Cal. 2016).....	15
<i>Doninger v. Pacific Northwest Bell, Inc.</i> , 563 F.2d 1304 (9th Cir. 1977)	11
<i>Ficalora v. Lockheed Cal. Co.</i> , 751 F.2d 995 (9th Cir. 1985)	14
<i>Fry v. Hayt</i> , 198 F.R.D. 461 (E.D. Pa. 2000).....	11
<i>General Tel. Co. of the Southwest v. Falcon</i> , 457 U.S. 147 (1982).....	12
<i>General Tel. Co. v. EEOC</i> , 446 U.S. 318 (1980).....	12
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9th Cir. 1998)	11, 12, 13
<i>Hanon v. Dataproducts Corp.</i> , 976 F.2d 497 (9th Cir. 1992)	12
<i>Hansberry v. Lee</i> , 311 U.S. 32 (1940).....	13
<i>Hensley v. Eckerhart</i> , 461 U.S. 424 (1983).....	19

1	<i>In re Mego Fin. Corp. Sec. Litig.</i> ,	
2	213 F.3d 454 (9th Cir. 2000)	13, 14
3	<i>In re Tableware Antitrust Litig.</i> ,	
4	484 F. Supp. 2d 1078 (N.D. Cal. 2007)	14
5	<i>Kayes v. Pac. Lumber Co.</i> ,	
6	51 F.3d 1449 (9th Cir. 1995)	12
7	<i>Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.</i> ,	
8	244 F.3d 1152 (9th Cir. 2001)	13
9	<i>Mills v. Target Corp.</i> ,	
10	2023 U.S. App. LEXIS 5273 (9th Cir. 2023)	1
11	<i>Muniz v. United Parcel Serv.</i> ,	
12	738 F.3d 214 (9th Cir. 2013)	19
13	<i>Narouz v. Charter Communs., LLC</i> ,	
14	591 F.3d 1261 (9th Cir. 2010)	11
15	<i>Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.</i> ,	
16	221 F.R.D. 523 (C.D. Cal. 2004)	16
17	<i>O’Neal v. City of Seattle</i> ,	
18	66 F.3d 1064 (9th Cir. 1995)	19
19	<i>Officers for Justice v. Civil Service Com.</i> ,	
20	688 F.2d 615 (9th Cir. 1982)	10, 15
21	<i>Staton v. Boeing Co.</i> ,	
22	327 F.3d 938, 952 (9th Cir. 2003)	11, 14
23	<i>Troester v. Starbucks Corp.</i> ,	
24	5 Cal. 5th 829 (2018)	18
25	<i>Van Bronkhorst v. Safeco Corp.</i> ,	
26	529 F.2d 943 (9th Cir. 1976)	10
27	<i>Vasquez v. Coast Valley Roofing, Inc.</i> ,	
28	266 F.R.D. 482 (E.D. Cal. 2010)	20
	<i>Wal-Mart Stores, Inc. v. Dukes</i> ,	
	564 U.S. 338 (2011)	11, 12
	<i>West v. Circle K Stores, Inc.</i> ,	
	2006 U.S. Dist. LEXIS 76558 (E.D. Cal. 2006)	20
	<i>Yamada v. Nobel Biocare Holding AG</i> ,	
	2016 WL 1579705 (9th Cir. 2016)	19

Statutes

28 U.S.C. § 1715	7
Cal. Labor Code § 203	1, 4
Cal. Labor Code § 227.3	1, 4, 15
Federal Rules of Civil Procedure, Rule 23(a).....	11, 12, 13
Federal Rules of Civil Procedure, Rule 23(b).....	11, 14
Federal Rules of Civil Procedure, Rule 23(e).....	14

1 **I. INTRODUCTION**

2 Plaintiff Cinnamon Mills seeks preliminary approval of a class action settlement
3 following years of hard-fought litigation before this Court and the Ninth Circuit Court of
4 Appeal (“Ninth Circuit”). This action presented an issue of first impression that
5 challenged the legality of Defendant Target Corporation’s (“Target”) statewide practice
6 of paying vested vacation owed to departing employees at their hourly *base rate* of pay.
7 Ultimately, this Court and the Ninth Circuit held that under Labor Code § 227.3 final
8 vested vacation wages must be paid at the employee’s “*final rate*” of pay (a rate that
9 includes shift differentials). (The difference between final vested vacation wages
10 including shift differentials and what Target paid is called “Unpaid Vested Vacation
11 Wages” in the settlement.)

12 As detailed below, the settlement pays each Class Member the full amount of
13 Unpaid Vested Vacation Wages owed – with many Class Members receiving *more* than
14 they are owed because of a \$5 minimum payment guarantee.

15 Plaintiff’s action – coupled with the Ninth Circuit decision – will benefit
16 employees throughout California for years to come and provide clarity regarding what the
17 term “final rate” of pay means under Labor Code § 227.3. But arriving here was not
18 quick or uncontested. Target filed a Motion to Dismiss and the Parties engaged in formal
19 discovery and depositions. The Parties then brought cross-motions: Plaintiff with a
20 motion for class certification and Target with a motion for summary judgment, after
21 which this Court issued a ruling that: (1) certified the Class, (2) denied Target’s motion
22 for summary judgment on the Labor Code § 227.3 claim, and (3) granted Target’s motion
23 for summary judgment on Plaintiff’s claim for waiting time penalties under Labor Code §
24 203 (which was derivative of the § 227.3 claim). Target appealed to the Ninth Circuit,
25 and Plaintiff cross-appealed. Ultimately, the Ninth Circuit sided with Plaintiff that
26 employers must pay vested vacation wages at the employee’s final rate of pay, including
27
28

1 shift differentials and held that Target was not liable for waiting time penalties.¹

2 In the aftermath of the Ninth Circuit's decision, trial would have merely focused
3 on damages. But in lieu of a costly and time-consuming trial, the Parties engaged in
4 arm's length negotiations which ultimately resulted in this fair and reasonable settlement.
5 Under this Settlement:

6 1) Target will pay every Class Member the *full Unpaid Vested Vacation Wages*
7 *owed* (and, in many cases, more than owed due to a \$5 minimum payment).²

8 2) Target will pay a fair and reasonable PAGA amount of \$48,800 to settle
9 Plaintiff's PAGA claim, allocated 75% to the California Labor Workforce Development
10 Agency ("LWDA") and 25% to all PAGA Group Members in an equal share.

11 3) Target will pay Class Counsel's *actual* attorney's fees (*i.e.*, lodestar) through
12 final approval (based on hours worked x hourly rate of all attorneys). From this amount,
13 Class Counsel has agreed to reduce their lodestar-based fee request as needed to ensure
14 that each Class Member receives a minimum payment of least \$5.00.

15 4) Target will pay a Service Award to Plaintiff of \$10,000 and will pay
16 Settlement Administrator Expenses of \$47,000.

17 Plaintiff now seeks preliminary approval of this \$945,456 settlement on behalf of
18 the Class Members.³ The following payments will be made from the Maximum
19 Settlement Amount: (1) \$314,956 in Unpaid Vested Vacation Wages, representing 100%
20 of the amounts at issue, (2) an estimated sum of \$15,000 to guarantee a minimum \$5
21 payment to all Class Members (deducted from Class Counsel's fee request), (3) \$48,800

22
23 ¹ See *Mills v. Target Corp.*, 2023 U.S. App. LEXIS 5273 (9th Cir. 2023) (where the Ninth Circuit affirmed this Court's ruling
24 under § 227.3 and the grant of summary judgment to Defendant on the waiting time penalty claim under Labor Code § 203,
25 holding that "Target [] did not act 'willfully' under § 203").

26 ² Since this Court and the Ninth Circuit disallowed waiting time penalties, many Class Members were owed less
27 than \$1.00 in Unpaid Vested Vacation Wages, which is why Class Counsel funded the minimum payment from
28 their fees.

³ The certified Class includes: all former non-exempt employees employed by Target in the State of California
whose employment ended on or after June 10, 2016, through August 17, 2021, and who, at the time of termination
of employment, (a) received shift differential pay during the last workweek worked for Target, (b) had vested
vacation wages owed upon separation of employment, and (c) upon termination of employment were paid for
their vested vacation wages at a rate that did not include the shift differential pay, and excluding those individuals
who already have resolved the claims asserted in this Action, whether by settlement or adjudication.

1 to settle Plaintiff's claim for PAGA penalties, allocated 75% to the LWDA and 25% to
2 the PAGA Group Members, (4) an estimated \$488,750 in attorneys' fees to Class
3 Counsel, (\$503,750 lodestar minus the estimated \$15,000 to fund the \$5 minimum
4 payment guarantee), (5) actual litigation costs not to exceed \$20,950, (6) settlement
5 administrator costs not to exceed \$47,000, and (7) a service award of \$10,000 to
6 Plaintiff/Class Representative Cinnamon Mills. (Settlement Agreement ¶ III.A; Mankin
7 Decl. ¶¶ 8-10).

8 Target does not oppose this motion. Thus, this Settlement should be preliminarily
9 approved because the settlement is fair and reasonable and was negotiated at arm's length
10 by experienced counsel following extensive litigation (including a full determination on
11 the liability issues by this Court and the Ninth Circuit), as well as a sufficient exchange of
12 information and documents. Thus, Plaintiff respectfully requests that the Court enter an
13 order preliminarily approving the settlement, conditionally certifying the Class for
14 settlement purposes, approving the proposed Class Notice Packet, appointing Rust
15 Consulting as the Settlement Administrator, and scheduling a hearing for final approval.

16 **II. BACKGROUND**

17 On June 10, 2020, Plaintiff submitted a letter to the California Labor and
18 Workforce Development Agency ("LWDA") for civil penalties under PAGA. (Mankin
19 Decl. ¶ 13). That same day, Plaintiff filed a class action complaint against Target in
20 Superior Court, County of Riverside, alleging three claims: 1) failure to pay vested
21 vacation wages, 2) failure to timely pay final wages, and 3) unfair and unlawful
22 competition under Business and Professions Code § 17200 *et seq.* (Dkt. 1, Exh. 1).
23 Months later, the LWDA declined to assert jurisdiction over the PAGA claims, and
24 Plaintiff amended the complaint to include related PAGA claims. (Dkt. 25). (Mankin
25 Decl. ¶ 14).

26 Meanwhile, Target retained counsel and began a vigorous defense, including
27 removing the action under the Class Action Fairness Act ("CAFA") (Dkt. 1), and filing a
28 motion to dismiss the action on the grounds that Target complied with the Labor Code

1 because an “employee is entitled to vacation paid at the rate specified by the contract or
2 employer policy.” (Dkt. 13). Plaintiff opposed, claiming that the action was supported by
3 the plain language of Labor Code § 227.3 requiring employers to calculate and pay
4 vested vacation using the departing employee’s “*final rate*” of pay which must include
5 shift differentials. (Dkt. 17). The Court denied Target’s Motion to Dismiss (Dkt. 20),
6 which set in motion a long battle over the meaning of Labor Code § 227.3 that included
7 extensive discovery, depositions, a class certification motion and, ultimately, an appeal.
8 (Mankin Decl. ¶ 15).

9 After considerable work by both Parties, on May 24, 2021, Target moved for
10 summary judgment in the Action, and Plaintiff moved for class certification in the
11 Action. On July 29, 2021, the Court issued a split decision ruling, denying Target’s
12 motion for summary judgment on Plaintiff’s claim for Unpaid Vested Vacation Wages
13 under Sections 227.3 and 17200, and granting Target’s motion for summary judgment on
14 Plaintiff’s claim for waiting-time penalties under Section 203. The Court also granted
15 Plaintiff’s motion for class certification. (S.A. § II.E; Mankin Decl. ¶ 16).

16 On October 22, 2021, Target petitioned the Ninth Circuit to hear its interlocutory
17 appeal. On November 15, 2021, Plaintiff answered Target’s petition and conditionally
18 cross-petitioned for interlocutory appeal. (S.A. § II.G).

19 On March 6, 2023, after extensive briefing and argument, the Ninth Circuit
20 rendered its decision, and effectively adopted this Court’s prior rulings, finding in favor
21 of Plaintiff on the vacation claim under Section 227.3, and ruling in favor of Target on
22 the waiting time penalties claims under Section 203. (S.A. § II.H).

23 The Ninth Circuit ruling resolved all disputes of liability, leaving damages to be
24 decided at trial. In regard to damages, there was no dispute that Target paid accrued
25 vacation wages to departing employees at the hourly base rate of pay. However, Target
26 did not include shift differentials in the final rate of pay during the Class Period and thus,
27 under the Ninth Circuit’s ruling, owed Unpaid Vested Vacation Wages to the Class
28 Members. To determine the potential damages for Unpaid Vested Vacation Wages,

1 Target undertook a comprehensive analysis of each former employee during the Class
2 Period to determine if the employee worked a shift differential during the final pay period
3 worked, and if so, the amount of the underpayment. To qualify as a Class Member and
4 be owed Unpaid Vested Vacation Wages, the individual must have had vested vacation
5 wages and worked a shift differential in the final pay period worked. Target provided a
6 detailed spreadsheet to Class Counsel identifying all Class Members who met these
7 criteria and the amounts owed per person. In total, Target calculated that the Class
8 Members are collectively owed \$314,956.00 in Unpaid Vested Vacation Wages (before
9 applying the \$5.00 minimum payment). (Mankin Decl. ¶ 18).

10 The Parties also engaged in arm's length negotiations as to the merits of the PAGA
11 claims and potential amount of PAGA Penalties (if any) this Court might have awarded
12 given the Ninth Circuit's split decision. The Parties also debated the merits of the
13 attorney fee claim, the minimum \$5 payment to the Class, the Service Award to Plaintiff,
14 and obtained several bids from Settlement Administrators. (Mankin Decl. ¶ 19).

15 Although the Parties continued to dispute various issues, including damages, they
16 ultimately agreed upon a fair and adequate settlement, and then memorialized the terms
17 of the settlement in a long-form Settlement Agreement – the “Class Action and PAGA
18 Settlement Agreement”- hereinafter referred to as the “Settlement Agreement” or “S.A.”
19 (Mankin Decl., Exhibit 1). The Parties now seek the Court's Preliminary Approval of the
20 Settlement. (Mankin Decl. ¶ 20).

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

22 The following is a summary of the principal terms of the Settlement Agreement:

23 **A. SETTLEMENT CONSIDERATION AND ALLOCATION**

24 The Maximum Settlement Amount (“Settlement Amount”) is \$945,456.00. The
25 Participating Class Members will each receive their actual Unpaid Vested Vacation
26 Wages, pursuant to the Ninth Circuit decision and as calculated by Target. In the event
27 that any Class Member would receive a share of less than \$5.00, Class Counsel will
28 reduce its attorneys' fees request to ensure that Participating Class Members receive: (1)

1 a \$5.00 minimum payment, and (2) no less than the full amount of Unpaid Vested
2 Vacation Wages that could have been awarded at trial. (S.A. § III.B). Under no
3 circumstance will any portion of the Settlement Amount revert to Target.

4 The Settlement Amount includes a \$10,000 Service Payment to the named
5 Plaintiff/Class Representative, Class Counsel actual attorneys' fees and litigation costs,
6 the payment to the LWDA and PAGA Group Members to resolve claims under the
7 PAGA, and Settlement Administration Costs. (S.A. § III.C-D). If the Court reduces the
8 fees, costs, service payment or administration costs, or if a Class Member opts-out, these
9 sums shall be placed into the Net Settlement Amount and distributed to the Class
10 Members. (S.A. § III.B-D.) Target will also separately pay its share of employer-side
11 payroll taxes as required by law. (S.A. § III.A.)

12 **B. NOTICE PROCEDURES**

13 The proposed Notice Packet that will be provided to the Class Members contains a
14 Class Notice and Information Sheet showing the estimated amount that each Class
15 Member will receive (S.A., Exhs. A, B.). Within 30 days after entry by the Court of its
16 Order of Preliminary Approval, Target shall provide the Settlement Administrator with
17 the Class Data, which includes a list of Class Members' names, last known addresses,
18 Social Security Numbers, Unpaid Vested Vacation Wages and whether the person
19 qualifies as a PAGA Group Member. (S.A. § III.F.2.a).

20 Within 10 days after receiving the Class Data, the Settlement Administrator will
21 populate the Notice Packet for each Class Member and take steps to ensure that the
22 Notice Packet is received by all Class Members, including running all addresses through
23 the National Change of Address database. In the event that any Class Notice is returned
24 as undeliverable, the Settlement Administrator shall perform a skip trace search and seek
25 an address correction for such Class Member(s), and re-mail the Notice Packet to any
26 new or different address that is obtained. (S.A. § III.F.2.b-c).

27 Within 10 days after filing of this Motion, Target shall serve all necessary Attorney
28 Generals a notice of the proposed settlement, including the information and materials

1 listed in 28 U.S.C. § 1715(b)(1)-(8), as required by CAFA. (S.A. § III.F.1.b).

2 **C. SETTLEMENT ALLOCATION FORMULA FOR SETTLEMENT SHARES**

3 Out of the Net Settlement Amount, Target will pay to each Participating
4 Class Member (*i.e.*, those who do not submit a timely Exclusion from Settlement) a
5 Settlement Share that is equal to or greater than the Class Member's Unpaid Vested
6 Vacation Wages, calculated as follows: A Class Member's Settlement Share will equal
7 the product of (a) the Class Member's Unpaid Vested Vacation Wages divided by the
8 total Unpaid Vested Vacation Wages of all Class Members and (b) the Net Settlement
9 Amount, provided that no Settlement Share will be less than \$5.00. (S.A. § III.B; III.D.2).

10 An approximation of each Class Member's Settlement Share will be provided in
11 the Class Member Information Sheet included with the Notice Packet.

12 A Class Member may challenge his/her share of unpaid vested vacation wages if
13 he/she feels that Target's records are inaccurate by submitting documentation to the
14 Settlement Administrator by the Response Deadline. (S.A. § III.F.3.a).

15 Additionally, each PAGA Group Member will receive a share of the settlement of
16 Plaintiff's claim for PAGA penalties. Thus, the \$12,200 in the PAGA settlement
17 allocated to the PAGA Group Members (25% of the \$48,800 PAGA settlement) will be
18 divided and paid in an equal share. (S.A. ¶ III.C).

19 **D. DISTRIBUTION OF UNCLAIMED SETTLEMENT SHARES AND UNCASHED**
20 **CHECKS**

21 Participating Class Members and PAGA Group Members will have 180 days to
22 cash a settlement check. If a person fails to timely cash a check, then the Settlement
23 Administrator shall issue the unclaimed funds to the California State Controller's Office
24 in the name of the Class Member or PAGA Group Member, unless the Court directs the
25 Parties to issue the unpaid residue to some other fund. (S.A. § III.F.8).

26 **E. EXCLUSION AND OBJECTION PROCEDURES**

27 Class Members who do not submit a timely Exclusion from Settlement (*i.e.*, opt-
28 out) will be deemed to participate in the Settlement and shall become a Participating

1 Class Member without having to submit a claim form or take any other action. To opt-
2 out of the Settlement, the Class Member must submit a written request to the Settlement
3 Administrator no later than 30 days after the mailing (“Response Deadline”). Any
4 Request for Exclusion that is not postmarked by the Response Deadline will be invalid,
5 unless both Parties agree to accept the late Request for Exclusion. (S.A. § III.F.3.c).

6 The Class Notice shall inform the Class Members of their right to object to the
7 Settlement. Any Class Member who wishes to object to the Settlement must submit a
8 written objection to the Settlement Administrator no later than the 30-day Response
9 Deadline, stating the basis of the objection. (S.A. § III.F.3.b).

10 **F. PARTICIPATING CLASS MEMBERS’ RELEASE OF CLAIMS**

11 In exchange for these payments, the Settlement Agreement at § III.G.2 provides
12 that the Participating Class Members will narrowly release the Released Parties of the
13 claim for Unpaid Vested Vacation Wages based on the Ninth Circuit’s ruling, and will
14 bar any claim for waiting time penalties that is directly related to the Unpaid Vested
15 Vacation Wages claim (to prevent it from being litigated again in a different venue), as
16 follows:

17 All claims against the Target Released Parties that were raised or
18 that could have been raised in the Action based on the factual
19 allegations made in the Action or otherwise based on or related to
20 the allegations that Target failed to timely pay Unpaid Vested
21 Vacation Wages for the period from June 10, 2016, through
22 August 17, 2021; claims for Unpaid Vested Vacation Wages
23 under Sections 227.3 and 17200; claims for waiting-time
24 penalties under Section 203 based on Unpaid Vested Vacation
25 Wages; any other associated statutory or civil penalties, whether
26 recovery is founded on federal, state, or municipal law; and any
27 associated claim for interest, attorneys’ fees, or costs, based on
28 Unpaid Vested Vacation Wages (the “Class Members’ Released
Claims”). The Class Members’ Released Claims include all such
claims, whether known or unknown by the Class Members or any
of them. However, the Class Members’ Released Claims do not
include a claim that Target failed to pay vested vacation wages
upon termination other than Unpaid Vested Vacation Wages.

1 The Class Members' Released Claims is limited to the Class Period. Further, it is
2 understood and agreed that the Settlement Agreement will not release any person, party
3 or entity from claims, if any, by Class Members for any other claims, including claims for
4 vested benefits, wrongful termination, violation of the Fair Employment and Housing
5 Act, unemployment insurance, disability, social security, workers' compensation, or
6 claims based on facts occurring outside the Class Period.

7 **G. PAGA GROUP MEMBERS' RELEASE OF CLAIMS**

8 The Settlement Agreement at § III.G.3 also defines the "Released PAGA Claims"
9 as follows:

10 All PAGA Group Members are deemed to release the Target
11 Released Parties from all claims for civil penalties under PAGA
12 that Plaintiff alleged against the Target Released Parties, on behalf
13 of PAGA Group Members and State of California, based on the
14 factual allegations made in the Action or otherwise based on or
15 related to the allegations that Target failed to timely pay Unpaid
16 Vested Vacation Wages for the period from June 10, 2019, through
17 August 17, 2021 (the "Released PAGA Claims"), including civil
18 penalties based on (1) claims for Unpaid Vested Vacation Wages
19 under Sections 227.3 and 17200; (2) claims for waiting-time
20 penalties under Section 203 based on Unpaid Vested Vacation
21 Wages; (3) claims for any other associated penalties, whether
22 recovery is founded on federal, state, or municipal law, based on
23 Unpaid Vested Vacation Wages; and (4) any associated claim for
24 interest, attorneys' fees, or costs, based on Unpaid Vested
25 Vacation Wages. The Released PAGA Claims include all such
26 claims, whether known or unknown by PAGA Group Members.
27 By this release, the PAGA Group Members do not release any
28 claims for wages or statutory penalties.

24 Even if a PAGA Group Member requests exclusion from the Class settlement (i.e.,
25 the Class Members' Released Claims), that individual will still be subject to the Released
26 PAGA Claims to the fullest extent permitted by law and will receive a pro-rata share of
27 PAGA Penalties. (S.A. § III.C).

28 ///

1 **H. TIMING OF SETTLEMENT DISBURSEMENTS**

2 Within 10 days after the Judgment becoming Final (which is the first business day
3 following the deadline to file an appeal or the resolution of any filed appeal), Target shall
4 deposit the Settlement Amount into a Qualified Settlement Fund to be established by the
5 Settlement Administrator, plus Target's share of payroll taxes and withholdings. The
6 Settlement Amount will be used to fund: (i) Settlement Shares of the Participating Class
7 Members and PAGA Group Members; (ii) amounts awarded to Class Counsel for
8 attorneys' fees and litigation costs, (iii) the service award to the Plaintiff, (iv) the
9 payment to the LWDA for the settlement of Plaintiff's claim for PAGA Penalties, and (v)
10 Settlement Administration Costs. The Settlement Administrator will issue the court-
11 approved payments within 10 days of receipt. (S.A. § III.A-E; III.F.7).

12 **I. TAX TREATMENT**

13 The Settlement Agreement provides that the portion of each Settlement Share
14 representing the Class Member's Unpaid Vested Vacation Wages will be considered
15 taxable wages (with IRS W-2 reporting), and any additional payment on top of the Class
16 Member's Unpaid Vested Vacation Wages (such as bringing the payment up to the \$5.00
17 minimum payment) will be considered interest with 1099 reporting. (S.A. § III.B.2).
18 Target's share of employer payroll taxes will be paid separately by Target. The
19 Settlement Administrator will be responsible for issuing all tax forms, and paying all
20 deductions and withholdings from the Settlement Amount.

21 **IV. TARGET AGREES NOT TO CONTEST THIS COURT'S**
22 **CERTIFICATION OF THE CLASS FOR PURPOSES OF SETTLEMENT**

23 The law favors settlement, particularly in class actions where substantial resources
24 can be conserved by avoiding the time, cost, and rigors of formal litigation. *Class*
25 *Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Van Bronkhorst v. Safeco*
26 *Corp.*, 529 F.2d 943, 950 (9th Cir. 1976). "Voluntary conciliation and settlement are the
27 preferred means of dispute resolution. This is especially true in complex class action
28 litigation." *Officers for Justice v. Civil Service Com.*, 688 F.2d 615, 625 (9th Cir. 1982).

1 When parties reach a settlement agreement prior to class certification, the Court
2 has an obligation to “peruse the proposed compromise to ratify both the propriety of the
3 certification and the fairness of the settlement.” *Staton v. Boeing Co.*, 327 F.3d 938, (9th
4 Cir. 2003). Preliminary approval of a class settlement is generally a two-step process.
5 First, the Court must assess whether a class exists. *Id.* (citing *Amchem Prods., Inc. v.*
6 *Windsor*, 521 U.S. 591, 620 (1997)). Second, the Court must “determine whether the
7 proposed settlement is fundamentally fair, adequate, and reasonable.” *Id.* (citing *Hanlon*
8 *v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)). The decision to approve or
9 reject a settlement is within the Court's discretion. *Hanlon*, 150 F.3d at 1026.

10 Class certification is governed by the Federal Rules of Civil Procedure, which
11 provide that “[o]ne or more members of a class may sue or be sued as representative
12 parties on behalf of all.” Fed. R. Civ. P. 23(a). Plaintiff seeks conditional approval of the
13 class for settlement via Rule 23(c)(1), under which a court may “make a conditional
14 determination of whether an action should be maintained as a class action, subject to final
15 approval at a later date.” *Fry v. Hayt*, 198 F.R.D. 461, 466 (E.D. Pa. 2000).

16 Here, the Court previously certified the Class, and Target agrees, for settlement
17 purposes only, not to seek decertification of the certified Class. In the event this
18 Settlement is either not granted preliminary or final approval, or is reversed on appeal,
19 Target reserves the right to oppose class certification.

20 **A. THE SETTLEMENT SATISFIES THE REQUIREMENTS OF RULE 23(A)**

21 Parties seeking class certification bear the burden of demonstrating the elements of
22 Rule 23(a) are satisfied, and “must affirmatively demonstrate ... compliance with the
23 Rule.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Doninger v. Pacific*
24 *Northwest Bell, Inc.*, 563 F.2d 1304, 1308 (9th Cir. 1977). If an action meets the
25 prerequisites of Rule 23(a), the court must consider whether the class is maintainable
26 under one or more of the three alternatives set forth in Rule 23(b). *Narouz v. Charter*
27 *Communs., LLC*, 591 F.3d 1261, 1266 (9th Cir. 2010).

1 The prerequisites of Rule 23(a) “effectively limit the class claims to those fairly
2 encompassed by the named plaintiff’s claims.” *General Tel. Co. of the Southwest v.*
3 *Falcon*, 457 U.S. 147, 155-56 (1982) (citing *General Tel. Co. v. EEOC*, 446 U.S. 318,
4 330 (1980)). The Rule 23(a) prerequisites are commonly referred to as numerosity,
5 commonality, typicality, and adequacy of representation. *Falcon*, 457 U.S. at 156.

6 **1. Numerosity**

7 With approximately 13,529 Class Members, the numerosity requirement is met.

8 **2. Commonality**

9 Rule 23(a) requires “questions of law or fact common to the class.” Fed. R. Civ. P.
10 23(a)(2). Commonality “does not mean merely that [class members] have all suffered a
11 violation of the same provision of law,” but that their “claims must depend upon a
12 common contention.” *Dukes*, 564 U.S. at 350. In this case, the Class Members all
13 presented the same claims, namely whether they were owed Unpaid Vested Vacation
14 Wages and waiting time penalties. The questions of law and fact are common to all Class
15 Members, which satisfies Rule 23(a)(2)’s commonality requirement.

16 **3. Typicality**

17 The typicality requirement demands that the “claims or defenses of the
18 representative parties are typical of the claims or defenses of the class.” Fed. R. Civ. P.
19 23(a)(3). The standards under this rule are permissive, and a claim or defense is not
20 required to be identical, but rather “reasonably coextensive” with those of the absent class
21 members. *Hanlon*, 150 F.3d at 1020. “The test of typicality is whether other members
22 have the same or similar injury, whether the action is based on conduct which is not
23 unique to the named plaintiffs, and whether other class members have been injured by the
24 same course of conduct.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir.
25 1992); *see also Kayes v. Pac. Lumber Co.*, 51 F.3d 1449, 1463 (9th Cir. 1995) (typicality
26 is satisfied when named plaintiffs have the same claims as other members of the class and
27 are not subject to unique defenses).

1 Here, Plaintiff was employed by Target and received shift differential pay in her
2 final pay period worked, but only received accrued vested vacation wages at the hourly
3 base rate of pay without inclusion of the shift differentials. This is the same issue to
4 which Plaintiff alleges all Class Members were also subjected. Therefore, the typicality
5 requirement is satisfied.

6 **4. Fair and Adequate Representation**

7 Absentee class members must be adequately represented for judgment to be
8 binding upon them. *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940). Accordingly, this
9 prerequisite is satisfied if the “representative parties will fairly and adequately protect the
10 interests of the class.” Fed. R. Civ. P. 23(a)(4). “[R]esolution of this issue requires that
11 two questions be addressed: (a) do the named plaintiffs and their counsel have any
12 conflicts of interest with other class members, and (b) will the named plaintiffs and their
13 counsel prosecute the action vigorously on behalf of the class?” *In re Mego Fin. Corp.*
14 *Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000) (citing *Hanlon*, 150 F.3d at 1020).

15 Specifically, Plaintiff is adequate to represent the class because she was formerly
16 employed by Target during the Class Period, alleges that she experienced the same wage
17 and hour violation as the rest of the Class, understood her duties as Class Representative,
18 submitted to a deposition and discovery, has been willing to undergo the risk of litigation,
19 and has no conflict of interest.

20 Adequacy of counsel may be established by the fact that counsel are experienced
21 practitioners. *See Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas*
22 *Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001). Here, Class Counsel are highly
23 experienced in Class/PAGA litigation; Brian Mankin has been named by the LA Times
24 as one “Southern California Leading Lawyers” in the May 2023 issue of Consumer
25 Attorneys of Southern California, being named as a “Super Lawyer” in employment
26 litigation (a distinction awarded to only 5% of litigators), having achieved large
27 settlements and verdicts, including one of the largest PAGA awards in California’s
28 history, collecting over \$250 million for its clients, having tried class and PAGA cases

1 against Fortune 100 companies, among other things. (Mankin Decl. ¶¶ 2-6). Likewise,
2 Gupta Wessler PLLC are experts in the appellate arena and demonstrated as much before
3 this Court and the Ninth Circuit. (Gupta Decl. ¶ 3-5).

4 **B. CERTIFICATION OF A CLASS UNDER RULE 23(B)(3)**

5 The Court has already certified the Class, showing that the Class is maintainable
6 under Rule 23(b)(3).

7 **V. PRELIMINARY APPROVAL OF THE SETTLEMENT**

8 Settlement of a class action requires approval of the Court, which may be granted
9 “only after a hearing and on finding that [the settlement] is fair, reasonable, and
10 adequate.” Fed. R. Civ. P. 23(e)(2). Approval is required to ensure the settlement is
11 consistent with Plaintiff’s fiduciary obligations to the class. *See Ficalora v. Lockheed*
12 *Cal. Co.*, 751 F.2d 995, 996 (9th Cir. 1985). The Ninth Circuit has set forth a number of
13 factors to determine whether a settlement agreement meets these standards, including: the
14 strength of plaintiff’s case; the risk, expense, complexity, and likely duration of further
15 litigation; the risk of maintaining class action status throughout the trial; the amount
16 offered in settlement; the extent of discovery completed, and the stage of the proceedings;
17 the experience and views of counsel; the presence of a governmental participant; and the
18 reaction of the class members to the proposed settlement. *Staton*, 327 F.3d at 959.

19 Further, a court may consider whether settlement is “the product of collusion
20 among the negotiating parties.” *In re Mego.*, 213 F.3d at 458 (citing *Class Plaintiffs*, 955
21 F.2d at 1290). But “[t]he court need not reach any ultimate conclusions on the contested
22 issues of fact and law which underlie the merits of the dispute.” *Id.* at 1291.

23 **A. THE SETTLEMENT FALLS WELL WITHIN THE RANGE OF POSSIBLE**
24 **APPROVAL**

25 To determine whether a settlement “falls within the range of possible approval,” a
26 court focuses on “substantive fairness and adequacy,” and “consider plaintiffs’ expected
27 recovery balanced against the value of the settlement offer.” *In re Tableware Antitrust*
28 *Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007). “Of course, the very essence of a

1 settlement is compromise, ‘a yielding of absolutes and an abandoning of highest hopes.’
2 *Officers for Justice*, 688 F.2d at 624.

3 Here, there can be no question as to the fairness and adequacy of this Settlement.
4 Based on information and data received from Target, there are 13,529 Class Members
5 subjected to the underpayment of vested vacation, and the total amount of Unpaid Vested
6 Vacation Wages is approximately \$314,956. And, given the rulings from this Court and
7 the Ninth Circuit upholding Plaintiff’s legal theory, the Parties agreed to a settlement that
8 pays every Class Member the full amount owed under Plaintiff’s Labor Code § 227.3
9 claim. And, in many cases, the Class Members will receive *more* than they are owed due
10 to the \$5 minimum payment guarantee. Thus, the “fairness and adequacy” analysis is
11 simple since there was no compromise on the value of the Class claims – Plaintiff’s
12 counsel negotiated for and obtained every cent owed to the Class and more. (Mankin
13 Decl. ¶ 23).

14 Plaintiff also sought PAGA penalties for each violation of Labor Code § 227.3,
15 which occurred each time a PAGA Group Member was terminated with Unpaid Vested
16 Vacation Wages owed. From data provided by Target, Plaintiff’s counsel calculated that
17 there were approximately 9,759 PAGA Group Members that separated from employment
18 since June 10, 2019 (the start of the PAGA Period), so there were 9,759 violations for
19 which PAGA penalties could be assessed at trial. Thus, assuming that a PAGA penalty is
20 available in the default amount of \$100 per pay period and is not reduced, the maximum
21 potential PAGA penalty would be \$975,900. (Cal. Lab. Code. § 2699(f)(2); Mankin
22 Decl. ¶ 24).

23 However, this maximum figure fails to account for several factors that impact
24 valuation of PAGA claims. For instance, the maximum figure fails to acknowledge that
25 courts have wide latitude to reduce the amount of civil penalties “based on the facts and
26 circumstances of a particular case” and if “to do otherwise would result in an award that
27 is unjust, arbitrary and oppressive, or confiscatory.” Labor Code § 2699(h); *Cotter v.*
28 *Lyft, Inc.*, 193 F.Supp.3d 1030, 1037 (N.D. Cal. 2016) (noting in the context of approving

1 settlement that a reduction in PAGA penalties would be “appropriate” based on the
2 “unjust, arbitrary and oppressive, or confiscatory” factors because (i) the employer did
3 not “deliberately evad[e] a clear obligation to provide legally required pay and benefits to
4 employees,” (ii) the employer did not “negligently fail to learn about its obligations under
5 the wage and hour laws,” and (iii) the employer’s obligations were “genuinely unclear”
6 because “there is no straight answer to the question.”). This reasoning is directly
7 applicable here, as Target would argue at trial that imposing *any* PAGA penalties would
8 be unjust given the uncertainty and contradictory case law regarding the proper rate at
9 which to pay vested vacation. For this reason, the Parties negotiated the value of the
10 PAGA claims and agreed on a PAGA settlement of \$48,880, which is equal to 5% of the
11 maximum amount. (Mankin Decl. ¶ 25).

12 Given the realistic value of Plaintiff’s claims, the \$945,456 settlement is an
13 excellent result for the Class, considering that the settlement amount pays 100% of the
14 wages owed to the Class. (Mankin Decl. ¶ 26).

15 **B. RISK, EXPENSE, COMPLEXITY, AND LIKELY DURATION OF FURTHER**
16 **LITIGATION AND/OR OF OBTAINING CLASS STATUS**

17 Approval of settlement is “preferable to lengthy and expensive litigation with
18 uncertain results.” *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529
19 (C.D. Cal. 2004). If the settlement were to be rejected, the parties would be forced to
20 conduct a trial to determine the amount of Unpaid Vested Vacation Wages and PAGA
21 Penalties, which would involve depositions and testimony from costly experts and
22 statisticians, and if Plaintiff prevailed at trial, then the Parties would engage in further law
23 and motion practice regarding potential discounts to PAGA Penalties, attorneys’ fees and
24 costs, administration of the judgment and so on, which could have resulted in additional
25 appellate issues. The time and expense of continued litigation and trial, including the
26 potential for further appeals, would be extremely hard to justify in light of the fact that
27 Class Members are receiving full value on their Unpaid Vested Vacation Wages, and
28 many will receive more with Settlement than at trial when factoring in the minimum

1 payment that Class Counsel will fund, and the potential that opt-outs will increase the Net
2 Settlement Amount. On the other hand, the proposed settlement provides for immediate
3 recovery for the Class, which weighs in favor of approval.

4 **C. THE SETTLEMENT WAS THE PRODUCT OF INFORMED NEGOTIATIONS**

5 The Settlement was reached after informed, arm's length negotiations between the
6 parties. Both parties conducted extensive investigation and discovery allowing them to
7 assess the strengths and weaknesses of the case and the amount of damages following the
8 Ninth Circuit's ruling. Target also presented Class Counsel with a spreadsheet showing
9 the amount of Unpaid Vested Vacation Wages owed to each Class Member. (Mankin
10 Decl. ¶ 23). Because Class Counsel achieved full recovery of the Class Members'
11 Unpaid Vested Vacation Wages (and, in many cases, more than owed given the \$5
12 minimum), as well as a fair and reasonable allocation for settlement of Plaintiff's claim
13 for PAGA Penalties, despite that Target may have convinced the Court to reduce the
14 PAGA Penalties award to zero under the same arguments that it used to defeat the claim
15 for waiting time penalties. Plus, the parties agreed that Class Counsel will merely receive
16 its lodestar, reduced by the \$5.00 minimum payment, and therein will not receive a
17 multiplier on its fee request, all of which show that the Settlement is the product of non-
18 collusive negotiations.

19 **D. THE ATTORNEYS' FEES AND COST ALLOCATION IS FAIR AND REASONABLE**

20 The Settlement Agreement authorizes Class Counsel to seek payment of its *actual*
21 attorneys' fees (lodestar) through the completion of the case, which Class Counsel have
22 calculated to be \$503,750 for both firms and all attorneys that have worked on the case.
23 From that amount, Class Counsel will reduce its fee request by whatever amount is
24 calculated by the Settlement Administrator and determined to be necessary to fund the
25 \$5.00 minimum payment (which is estimated to be approximately \$15,000). Thus, the
26 actual projected fee request at final approval will likely be less than \$503,750 (and
27 approximately \$488,750 if the minimum payment requires a funding of \$15,000).
28

1 While many class actions cases seek a percentage of the common fund, that would
2 not be appropriate here. In a typical common fund settlement, the Parties negotiate based
3 on the estimated value of the class claims, and if a settlement is reached, several
4 deductions are made from the class settlement, including fees, costs, admin costs, service
5 awards, PAGA Penalties, etc. In this case, Class Counsel felt that it would be
6 inappropriate to seek deductions from the Class recovery and instead negotiated to have
7 Target separately pay all deductions in addition to the class recovery. Thus, the class will
8 receive full payment of the wages owed, and in addition, Target will separately fund
9 Class Counsel’s attorneys’ fees, costs, administration costs, service award and PAGA
10 Penalties. Indeed, having Target separately pay for all deductions in addition to paying
11 the full unpaid vacation wages is an excellent result. It is likely better than the best case
12 result that could have been achieved for the Class at trial (and of course, it saves all
13 parties and the court an enormous amount of time, expense and inconvenience).

14 Equally important, Class Counsel took on a case of first appellate impression that
15 will not only benefit the Class Members and Target’s future employees, but will benefit
16 countless employees throughout California for decades to come. (Mankin Decl. ¶¶ 12).

17 While the value of the individual payments to each Class Member is not substantial
18 (because it merely includes the additional shift differential pay that was not included in
19 the vacation payout), the payment of these amounts is essential because California
20 zealously protects wages, even small amounts, since the California Labor Code is “indeed
21 concerned with ‘small things.’” *Troester v. Starbucks Corp.*, 5 Cal. 5th 829, 844 (2018);
22 *see also Armenta v. Osmose, Inc.*, 135 Cal.App.4th 314, 324 (2005) (California has a
23 “strong public policy in favor of full payment of wages for all hours worked”).

24 Additionally, Class Counsel has successfully litigated this case to the verge of trial.
25 And, despite that Plaintiff’s derivative Labor Code § 203 claim did not succeed, that
26 cannot justify a reduction in attorneys’ fees given that Plaintiff succeeded on her primary
27 claim (§ 227.3). *See Chavez v. City of Los Angeles*, 47 Cal.4th 970, 989 (2010) (“fees are
28 not reduced when a plaintiff prevails on only one of several factually related and closely

intertwined claims”). As held by the Ninth Circuit: “before hours may be deducted specifically for unsuccessful claims, the claims must be suitable for entirely separate lawsuits.” *Muniz v. United Parcel Serv.*, 738 F.3d 214, 224 (9th Cir. 2013) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434-35 (1983)). To reduce fees, the fee opponent must show that the “plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims.” *Yamada v. Nobel Biocare Holding AG*, 2016 WL 1579705, at *7 (9th Cir. 2016) (quoting *Hensley*, 461 U.S. at 440). And work on claims where no “classwide relief” was obtained is compensable when those claims are related to the successful claim (such as here). See *O’Neal v. City of Seattle*, 66 F.3d 1064, 1069 (9th Cir. 1995) (authorizing fees for failed class claims).

Class Counsel could have elected to proceed to trial to recover full value for the Class Members, and then file its post-trial motion for attorneys’ fees and costs. However, the Parties agreed that it made far more sense to conserve the Parties and Court’s valuable resources to negotiate a settlement that will fully fund the Class Members for their Unpaid Vested Vacation Wages, and simultaneously fund Class Counsel for their actual attorneys’ fees worked on this case.

Thus, a fee award based on the actual attorneys’ fees incurred is appropriate for the following reasons: (1) Class Counsel obtained a valuable recovery for the Class and all employees throughout California after diligently and aggressively litigating the claims, (2) Class Counsel displayed considerable skill (commensurate with their extensive class action wage-and-hour experience) in reaching a favorable settlement given the complex and nuanced issues in the litigation, (3) Class Counsel faced substantial risk in this matter because of the myriad defenses raised by Target, (4) the risk and financial burden borne by Class Counsel in litigating this contingency-fee action, and (5) the fact that Class Counsel is seeking its actual attorneys’ fees (to be paid by Target separately, without reducing the value of Class Members’ Unpaid Vested Vacation Wages) without requesting any multiplier, and this request is based on reasonable rates that are directly in line with the prevailing community for similar work and identical to the rates awarded to

1 Class Counsel in similar cases.

2 Of course, Plaintiff's counsel will submit a comprehensive motion for attorneys'
3 fees and costs within the Notice Periods and the deadlines set by the Court that further
4 discuss all of these factors.

5 The Settlement Agreement caps Plaintiff's counsel's costs at \$20,950, which are its
6 actual estimated costs through final approval. Of course, any unused costs will return to
7 the Net Settlement Amount for payment to the Class Members. (Mankin Decl. at ¶ 38).

8 **E. THE CLASS REPRESENTATIVE SERVICE AWARD IS FAIR AND APPROPRIATE**

9 The Settlement Agreement authorizes a service award of up to \$10,000.00 to the
10 Plaintiff/Class Representative. The Class Representative assumed significant risk in
11 bringing this litigation, namely that had she lost, she could have been ordered to pay
12 Target's costs. Plaintiff also provided invaluable assistance to Class Counsel and the
13 Class in this case, including submitting to discovery and having her deposition taken;
14 providing documents about Target's compensation plan; participating in meetings to
15 discuss litigation and settlement strategy; and reviewing the settlement documents.
16 Plaintiff agreed to participate in this case with no guarantee of personal benefit.

17 The incentive award also falls within the range of incentive payments typically
18 awarded to Class Representatives in similar class actions. *See e.g. Bond v. Ferguson*
19 *Enterprises, Inc.*, 2011 WL 2648879 (E.D. Cal. 2011) (approving \$11,250.00 service
20 award to each of the two class representatives in a trucker meal break class action);
21 *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 493 (E.D. Cal. 2010) (approving
22 service awards in the amount of \$10,000.00 each); *West v. Circle K Stores, Inc.*, 2006
23 U.S. Dist. LEXIS 76558, at *28 (E.D. Cal. 2006) ("the court finds plaintiffs'
24 enhancement payments of \$15,000 each to be reasonable.")

25 **VI. THE COURT SHOULD APPOINT RUST CONSULTING AS**
26 **ADMINISTRATOR**

27 The Parties sought bids from at least 5 Administrators, and Rust Consulting
28 provided the lowest bid. Thus, subject to the Court's approval, the parties stipulated to

Rust Consulting serving as the Settlement Administrator. Rust is experienced in administering class action settlements and has agreed to administer this settlement for \$47,000.00. (Mankin Decl. ¶ 39). Any discount from this amount will be placed in the Net Settlement Amount and paid to the Participating Class Members.

VII. TIMELINE AND SCHEDULING A FINAL APPROVAL HEARING

The Parties propose that the Court schedule a final approval hearing approximately 130 days after preliminary approval, in accordance with the following schedule:

November 13, 2023	Preliminary approval (PA) hearing.
December 26, 2023 (40 days after PA)	Deadline for Settlement Administrator to complete first mailing of the Class Notice to all Class Members.
January 25, 2024 (30 days after mailing Class Notice Packet)	Deadline for Class Members to submit Requests for Exclusion and Objections to the settlement.
To be determined by the Court	Deadline for Plaintiff to file and serve Motion for Fees/Costs and Motion for Final Approval of Settlement.
TBD (Approximately March 25, 2024 – 130 days after PA is granted)	Final Approval Hearing.
10 days after Effective Date and Judgment becomes Final	Target to deliver court approved funds to Settlement Administrator
20 days after Payment	Settlement Administrator to issue checks.

VIII. CONCLUSION

Based upon all of the foregoing, Class Counsel respectfully requests that the Court preliminarily approve the Settlement Agreement, and enter the [proposed] Order Granting Preliminary Approval of Class Action Settlement.

Dated: October 13, 2023

LAUBY MANKIN LAUBY LLP

BY: /s/ Brian J. Mankin

Brian J. Mankin, Esq.

Attorneys for Plaintiff and the Class