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11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

12 **COUNTY OF MARIN**

13 **JUAN CAAMAL,**

14 **Plaintiff,**

15 **v.**

16 **TRG CA EMPLOYMENT, INC., a**
17 **corporation; TIBURON LODGE CA**
18 **HOTEL MANAGER, LLC, a limited**
19 **liability company; and DOES 1-100,**
20 **inclusive,**

21 **Defendants.**

22 **Case No.: CIV-2001374**

23 **MEMORANDUM OF POINTS AND**
24 **AUTHORITIES IN SUPPORT OF**
25 **PLAINTIFF'S UNOPPOSED MOTION FOR**
26 **PRELIMINARY APPROVAL OF CLASS AND**
27 **PAGA ACTION SETTLEMENT**

28 **Date:** _____
Time: _____
Dept.: _____

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I. INTRODUCTION

This is a wage-and-hour class action brought under the California Labor Code. The nucleus of the case is portions of mandatory service charges (related to banquets at the Lodge at Tiburon, in Tiburon, California) that were paid to Defendants' California employees; Caamal alleges that the value of these service charges were, in violation of the Labor Code, not incorporated into employee's "regular rate of pay" for purposes of overtime and paid sick leave, and into the (synonymous) "regular rate of compensation" for purposes of rest/meal period premiums. In the alternative—assuming that the service charges were in fact gratuities—Caamal alleges that Defendants violated the law by retaining a portion of these gratuities. Caamal further alleges that employees did not receive all rest and meal periods to which they were entitled, did not receive accurate wage statements, and were not paid all wages due upon cessation of employment. With regard to Tiburon Lodge only, Plaintiff also alleges a failure to reimburse employees for business expenses. Based on these claims, Plaintiff asserts violations of Labor Code sections 201-204, 226, 226.3, 226.7, 233, 246, 246.5, 248.5, 351, 510, 512, 558, 1194, and 2802, seeking to recover unpaid wages as well as statutory penalties, and California Business & Professions Code section 17200, et seq. Plaintiff also brings a claim under the Private Attorneys General Act, seeking to recover *civil* penalties for the Labor Code violations alleged. The Class Period, as stipulated, is June 16, 2016 to September 15, 2022.

This case was aggressively litigated from its inception. Prior to the settlement of this action, Class Counsel thoroughly investigated the facts relating to the claims alleged in the complaint, including reviewing and analyzing extensive wage-and-hour data and documents produced by Defendants. Plaintiff also engaged in a thorough study of the legal principles applicable to the claims asserted against Defendants. Defendants presented a vigorous defense, contesting a number of Plaintiff's central claims, and creating distinct risks with respect to the ultimate outcome, and certainly, the risk of protracted litigation. In the interest of avoiding unnecessary litigation costs, the Parties engaged in settlement discussions and, with the assistance of an experienced and highly effective mediator, were ultimately able to reach a settlement in the gross amount of \$185,000. While Plaintiff and Class Counsel are confident that they could prevail on class certification, as well as on the merits,

1 they recognize the inherent risks in drawn-out litigation and the specific risks that a class might not be
2 certified and/or that Plaintiff could fail to establish liability. Based on their own independent
3 investigation and evaluation, Class Counsel is of the opinion that the Proposed Settlement is fair,
4 reasonable, and adequate and is in the best interests of the Class.

5 **II. SUMMARY OF THE CASE**

6 **A. Factual and Procedural History.**

7 On June 9, 2020, Class Counsel sent written notice to Defendants and the California Labor and
8 Workforce Development Agency (“LWDA”), alleging that, during Plaintiff’s employment with
9 Defendant, he was not paid overtime at the correct rate of pay, had tips impermissibly taken by his
10 employer, was not paid sick leave at the correct rate, was not timely paid all wages, was not provided
11 with rest and meal periods or paid premiums, was not paid all wages due upon termination, and was not
12 furnished with accurate wage statements. (Briscoe Decl., Exhibit B.) The LWDA did not provide
13 written notice that it intended to investigate the alleged violations. (*Id.*, § 5.)

14 On June 16, 2020, Class Counsel filed this action in Marin County Superior Court as against
15 Defendants, on behalf of himself and all other California employees similarly situated. On September
16 23, 2020, Caamal filed a First Amended Class Action Complaint, adding a cause of action under the
17 Private Attorneys General Act (“PAGA”, Lab. Code, § 2698 et seq.)

18 In July 2021, the California Supreme Court issued its ruling in the matter of *Ferra v. Loews*
19 *Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, clarifying that “premium” payments for non-compliant
20 rest and meal periods must be paid at the “regular rate of compensation”, inclusive of commissions,
21 nondiscretionary bonuses, and other items of compensation. Accordingly, on September 1, 2021,
22 Plaintiff filed a Second Amended Complaint—this did not add any substantive claims but clarified that,
23 to the extent that rest/meal premiums were paid, they were not paid at the appropriate regular rate of
24 compensation (because they omitted the value of mandatory service charges).

25 Between September and October 2021, Defendants filed their respective Answers to the Second
26 Amended Complaint, in which it denied the claims, causes of action and substantive allegations of the
27 Second Amended Complaint, and asserted various affirmative defenses.

1 **B. Investigation, Discovery, and Negotiations.**

2 Prior to filing this action, counsel for Caamal conducted an extensive and exhaustive analysis of
3 the claims to be asserted in this action, including closely scrutinizing Caamal's wage-and-hour records.
4 In mid-2021, the Parties all agreed to attend private mediation with Lisa Klerman, Esq., a renowned
5 mediator of employment class and representative actions. Prior to mediation, Defendants produced a
6 sampling of wage-and-hour records and also extensive payroll spreadsheets and other documents; with
7 this data and documents, Class Counsel was able to evaluate the size and scope of the class and the
8 number of potential violations of multiple provisions of the Labor Code. Plaintiff's counsel estimated
9 that the *maximum* exposure for unpaid wages (inclusive of rest/meal period premiums) and statutory
10 penalties is in excess of \$415,000 (making this settlement amount a very substantial amount of that
11 which might be recovered following likely years of additional litigation and a complex trial). (Briscoe
12 Decl., §§ 7, 14-17.)

13 At the close of that mediation, it was agreed that the Parties would resolve all of the claims
14 theretofore alleged in this action, for the Gross Settlement Sum of \$180,000 (with Tiburon Lodge
15 contributing \$95,000 and TRG contributing \$85,000). After several months of clarifying the essential
16 terms, Plaintiff and TRG executed a memorandum of understanding regarding the latter's contributions
17 to the Gross Settlement Sum. Finalizing the Proposed Settlement with Tiburon Lodge, however, proved
18 more contentious and protracted. Tiburon Lodge eventually asked that this Settlement included a
19 waiver of claims for failure to reimburse for business expenses (see Lab. Code, § 2802), though such
20 claims were not at issue. It was agreed that Tiburon Lodge would disclose information so that Class
21 Counsel could evaluate such a claim. Class Counsel was provided with a declaration from Tiburon
22 Lodge's general manager; said declaration generally demonstrated that the value of a § 2802 claim
23 would be negligible. Thus, it was agreed that Tiburon Lodge would increase its payment to \$100,000,
24 and that this Settlement would include a waiver of claims under Labor Code section 2802. Negotiations
25 hit a further snag when Tiburon Lodge requested a waiver of claims for failure to pay minimum wage
26 also be included in the Proposed Settlement; this was on account of an errant reference in the First
27 Amended Complaint to Labor Code section 1197.1—a statute which provides for civil penalties for

1 failure to pay minimum wage. It was subsequently agreed that Plaintiff would file a Second Amended
2 Complaint, adding a claim for Failure to Reimburse for Business Expenses (as against Tiburon Lodge
3 only) and strike the reference to Labor Code section 1197.1. (Briscoe Decl., §§ 8-12.) *To clarify*: This
4 Settlement does not include a waiver of claims for failure to pay minimum wage, or any other claim
5 that is not set forth in the Third Amended Complaint.

6 Ultimately—and following over a year of contentious and intensive negotiating over the
7 particulars—the Parties have to resolve, on behalf of the putative Class, all claims alleged in the Third
8 Amended Complaint and derivative claims related thereto arising from the facts alleged in the Third
9 Amended Complaint, from June 16, 2016 to September 15, 2022, including claims for underpayment of
10 overtime, underpayment of paid sick leave hours, failure to provide meal or rest periods or pay
11 premiums at the correct rate, underpayment of meal or rest period premiums, wage statement
12 violations, unfair business practices, and waiting time penalties arising from or related to such claims.
13 Additionally, the Proposed Settlement resolves claims for failure to reimburse for business expenses,
14 but only as against Tiburon Lodge.

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

16 **A. The Terms of the Proposed Settlement.**

17 The Proposed Settlement resolves any and all claims based upon Plaintiff’s allegations
18 supporting claims set forth in the Third Amended Complaint and all derivative claims related thereto
19 arising from the facts alleged in the Third Amended complaint, including but not limited to, all claims
20 for alleged (a) failure to properly calculate and pay overtime, (b) failure to properly calculate and pay
21 sick leave, (c) failure to provide rest and meal periods or pay premiums for non-compliant rest or meal
22 periods at the correct rate, (d) failure to furnish accurate itemized wage statements, (e) impermissible
23 taking of tips, (f) unfair business practices, (g) failure to reimburse for business expenses (as against
24 Tiburon Lodge only); and (h) all waiting time penalties arising from the claims asserted in the Third
25 Amended Complaint, whether known or unknown, suspected or unsuspected, that existed or came into
26 existence between June 16, 2016 to September 15, 2022. These claims are referred to as the “Released
27 Claims.”

1 A summary of the terms of the Proposed Settlement is as follows:

2 **1. Settlement Payments.**

3 Defendants shall pay a maximum of \$185,000, the Maximum Settlement Amount (“MSA”), to
4 settle the Released Claims. TRG shall contribute \$85,000 and Tiburon Lodge \$100,000 to the MSA.
5 (Briscoe Decl., Exhibit A, § 13.) The MSA and other actions and forbearances taken by Defendants are
6 paid in full and final settlement of (a) the Released Claims, (b) the fees and costs of the Proposed
7 Settlement Administrator, (c) the Incentive Payment to Plaintiff, (d) the payment to the Labor and
8 Workforce Development Agency (“LWDA”), and (e) Class Counsel’s Fees and Costs. The Proposed
9 Settlement is being made on an opt-out basis with no reversion to Defendant. (Briscoe Decl., Exhibit A,
10 § 14.c.)

11 **2. Proposed Class and PAGA Group.**

12 The Proposed Class consists of the following: All current and former non-exempt California
13 employees within California who worked at least one shift between June 16, 2016 to September 15,
14 2022 (excluding any persons who previously settled any of the claims covered by this Settlement, or
15 any person who submits a timely and valid Request for Exclusion). (Briscoe Decl., Exhibit A, § 8.)
16 The Proposed Class is further divided into the following subclasses:

- 17 a. The “TRG Subclass”: All hourly-paid, nonexempt employees employed by TRG in
18 the State of California from June 16, 2016 to September 30, 2019.
19 b. The “Tiburon Lodge Subclass”: All other hourly-paid, nonexempt employees
20 employed by Tiburon Lodge in the State of California from August 20, 2019 through
21 September 15, 2022.

22 (*Id.*, Exhibit A, § 8.)

23 Additionally—and without seeking class certification of the following groups—the Proposed
24 Settlement provides for settlement of claims for civil penalties under the PAGA, with the covered
25 employees defined as follows:

- 26 a. The “TRG PAGA Members”: All hourly-paid, nonexempt employees employed by TRG
27 in the State of California from July 20, 2019 to August 20, 2019.

b. The “Tiburon Lodge PAGA Members”: All hourly-paid, nonexempt employees employed by Tiburon Lodge in the State of California from August 20, 2019 through September 15, 2022.

(Briscoe Decl., Exhibit A, § 9.)

3. Scope of Release and Final Judgment.

The Proposed Settlement provides that Class Members (i.e., those who do not opt out) will release Defendants and the other Released Parties from any and all claims based upon the allegations in the Third Amended Complaint (with the notable detail that only members of the Tiburon Lodge Subclass release claims for violations of Labor Code section 2802. (Briscoe Decl., Exhibit A, pp. 21:25-24:18.) Regardless of opting-out of the Class, TRG PAGA Members and Tiburon Lodge PAGA Members also release claims under the PAGA premised on those legal violations alleged in the Third Amended Complaint. (*Id.*) Only Caamal (in exchange for his request for an enhancement) will release all claims generally and waive the protections of Civil Code section 1542. (*Id.*, § 25.)

4. Claims Procedure and Participating Member Shares.

Each Class Member shall be entitled to a share of the Net Settlement Amount. Class Members will *not* be required to complete a claim form. As set forth below, Class Members shall receive a Notice of Class Action Settlement informing them of the terms of the Proposed Settlement, their right to opt out and/or object, and providing them with an estimate of their share of the Net Settlement Amount (and an opportunity to contest the calculation of that share). (Briscoe Decl., Exhibit A, § 18, internal Exhibit 1.). Unless a Class Member elects to opt-out, a check representing his or her share will be mailed to them pursuant to the terms of this Settlement. (*Id.*, Exhibit A, § 21.)

The individual settlement payments of Class Members will be calculated as follows:

Step 1: The Maximum Settlement Amount shall be deposited into the Qualified Settlement Fund (“QSF”).

Step 2: From the Maximum Settlement Amount, the following shall be deducted:

- i. The Court-approved fees and costs of the Settlement Administrator;
- ii. The Court-approved Incentive Payment to Plaintiff for his services as Class Representative;

- iii. The Court-approved payment to the LWDA; and
- iv. The Court-approved fees and costs of Class Counsel.

The remaining amount after all such deductions shall be referred to as the Net Settlement Amount.
(Briscoe Decl., Exhibit A, § 14.c.)

Step 3: Settlement Awards to members of the TRG Subclass and the Tiburon Lodge Subclass, respectively, will be based on the number of weeks worked by each such member, during the respective Subclass Period, based on the information provided by the respective Defendant. (*Id.*, § 14.c.i.)

It is presently estimated that the average payment to each Class Member will be approximately \$829.69 (Briscoe Decl., § 14.) This is an estimate only and could go up or down depending on what the Court decides at the final approval hearing and the number of valid requests for exclusion that are received by the Settlement Administrator. (*Id.*) The payments to Class Members shall be allocated as five percent wages and 95 percent statutory penalties. Class Members who receive payment in accordance with the Proposed Settlement shall be responsible for any taxes associated therewith.
(Briscoe Decl., Exhibit A, § 44.)

5. Claims Administration.

The Parties have selected Simpluris to serve as Settlement Administrator. The Settlement Administrator's declared fees and costs (not to exceed \$9,000) will be paid out of the Maximum Settlement Amount. (Briscoe Decl., Exhibit A, § 14.c.vii.) Class Counsel has extensive experience using Simpluris and has found their services excellent and rates competitive. (*Id.*, § 21.)

6. Notice to Class Members.

Within fifteen calendar days following preliminary approval, Defendants shall provide Class Members' and PAGA Group Members' names, contact information, social security numbers, workweek and pay period data, and employment status to the Settlement Administrator. (Briscoe Decl., Exhibit A, § 18.a.) The Class Notice will be mailed to each Class Member within fifteen days after receiving this information from Defendants. (*Id.*)

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1 **7. Service Payment to Plaintiff as Class Representative.**

2 Plaintiff will apply for a Service Payment in the amount of \$5,000, or 2.7 percent of the
3 Maximum Settlement Amount, in consideration for his service as Class Representative. (Briscoe Decl.,
4 Exhibit A, § 39.) The sought Incentive Payment is (a) in line with other Incentive Payments awarded in
5 similar wage and hour class actions, (b) only 2.7 percent of the Maximum Settlement Amount, and (c)
6 fair, reasonable and appropriate under the unique circumstances of this case (which are detailed below).
7 Class Members will be apprised of Plaintiff's request as well as their ability to review their moving
8 papers through the Court's website, and to object to the request if they so desire. (*Id.*, Exhibit B.)

9 **8. Class Counsel's Attorneys' Fees and Costs.**

10 Class Counsel will request attorneys' fees in the amount of one-third of the Maximum
11 Settlement Amount, or \$61,667, as well as declared litigation costs of up to \$9,000 in connection with
12 the prosecution of this Class Action. (Briscoe Decl., Exhibit A, § 16.) Class Members will be apprised
13 of Class Counsel's request as well as their ability to review their moving papers on the Court's website
14 and to object to the request if they so desire. (Briscoe Decl., Exhibit B.)

15 **9. Final Approval Hearing.**

16 The Proposed Settlement contemplates that the Court will hold a Final Approval Hearing and, if
17 the Proposed Settlement is approved, enter an Order of Final Approval approving the Proposed
18 Settlement in a manner substantially consistent with the terms and intent of the Proposed Settlement
19 and dismissing the Class and PAGA Action with prejudice. (Briscoe Decl., Exhibit A, § 27.)

20 **10. The Proposed Implementation Schedule.**

21

22 Class Data provided to Settlement Administrator.	Within 15 calendar days after the Court issues the Order of Preliminary Approval.
23 Notice of Class Action Settlement mailed to Class Members.	Within 15 calendar days after the Settlement Administrator receives the Class Data.
24 Deadline for Class Members to exclude themselves from and/or object to the terms of the Proposed Settlement.	45 calendar days after the mailing of the Notice of Pendency of Class and Representative Action and Proposed Settlement.
25 Date for filing of Motion for Final Approval.	16 business days before the Final Approval Hearing.

26

27

Final Approval Hearing Date.

Approximately 130 days after the Order of Preliminary Approval.

IV. PROVISIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE

Class certification is authorized when “the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court.” (Code Civ. Proc., § 382; Fed. R. Civ. P. 23(a).) Certification is appropriate where there is an ascertainable class and a well-defined community of interest among the class members. (*Richmond v. Dart Indus.* (1981) 29 Cal. 3d 462, 470.) Courts have broad discretion to certify a class for purposes of a class action settlement. (*Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1807 n.19 (holding that class certification in settlement cases is subject to a “lesser standard of scrutiny”).) Provisional and conditional certification is appropriate where, as here, the proposed settlement class has not previously been certified by the Court and the requirements for certification are met. The practical purpose of provisional and conditional certification is to facilitate distribution to all Class Members of notice of the terms of the Proposed Settlement, their rights thereunder, and the date and time of the final approval hearing. The additional rulings sought on this motion – e.g., approving the form, content and distribution of the Notice of Class Action Settlement, scheduling of deadlines and setting of a formal fairness hearing – facilitate the settlement approval process and are also typically made at the preliminary approval stage. (Cal. Rules of Court, rule 3.769; 4 Herbert B. Newberg, *Newberg on Class Actions* § 11.26 (4th ed. 2002 and Supp. 2004) (“Newberg”).)

To be certified, a settlement class must meet the following criteria for certification: (1) numerosity, (2) typicality of the class representative’s claims, (3) adequacy of representation, (4) predominance of common issues, and (5) superiority. (Code Civ. Proc., § 382; Fed. Rules Civ. Proc., rule 23(a); *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326-27; Fed. Rules Civ.

Proc., rule 23; *see also Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1019.¹) Here, as set forth below, all of these factors are met and provisional certification is appropriate.

A. The Proposed Class is Ascertainable and Joinder Would be Impractical.

Plaintiff contends, and Defendants do not dispute for settlement purposes, that the proposed Class is ascertainable because all Class Members have worked for Defendants and can be identified through its employee and payroll records. (See *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932.) Plaintiff further contends, and Defendants does not dispute for settlement purposes, that joinder of the 82 Class Members would be impractical. (Briscoe Decl., Exhibit A, § 10.a.)

B. The Commonality Requirement is Met.

The commonality requirement is met if there are questions of law and fact that are common to the class. (*Hanlon, supra*, 150 F.3d at 1019.) Plaintiff contends, and Defendants do not dispute for settlement purposes, that commonality is satisfied. (Briscoe Decl., Exhibit A, § 10.b.) The claims of Plaintiff and the Class Members all flow from the same facts and legal claims: i.e., Defendants' alleged keeping of gratuities, failure to provide rest and meal periods (or pay premiums at the appropriate rate), to pay overtime and paid sick days at the appropriate rate, to furnish accurate wage statements, and to pay all wages upon cessation of employment.

C. The Typicality Requirement is Met.

The typicality requirement is met if the named representative's claims are typical of those of the class, though "they need not be substantially identical." (*Hanlon, supra*, 150 F. 3d at 1020; *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47.) Plaintiff contends, and Defendants do not dispute for settlement purposes, that his claims are typical of the claims of the Class because they arise from the same factual basis and are based upon the same legal theories as those applicable to the Class Members. (See *Wehner v. Syntex Corp.* (N.D. Cal. 1987) 117 F.R.D. 641, 644.) Plaintiff worked for Defendants as a California employee during the Class Period, was subjected to the same uniform policies and, even

¹ 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. Superior Court* (1971) 4 Cal.3d 800, 821); *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146. Where appropriate, Rule 23 and federal case law will be cited in addition to California law.

1 if he was not serving as Class Representative, would be a member of the Class. His claims are typical
2 of the Class and satisfy this requirement.

3 **D. The Adequacy Requirement is Met.**

4 The adequacy requirement is met if the named representative and his or her counsel have no
5 interests adverse to those of the Class Members and are committed to vigorously prosecuting the case
6 on behalf of the class. (*Hanlon, supra*, 150 F. 3d at 1020; *McGhee v. Bank of Am.* (1976) 60
7 Cal.App.3d 442, 450-51.) Plaintiff contends, and Defendants do not dispute for settlement purposes,
8 that those requirements are met. Plaintiff's interests in prosecuting this Class Action and obtaining the
9 most beneficial recovery possible fully comport with the interests of the Class Members. There are no
10 conflicts between Plaintiff as Class Representative and the Class Members, and he is a Class Member.
11 (See *Hanlon* at p. 1021.) Moreover, any Class Member who wishes to opt-out and/or object to the
12 Proposed Settlement will have the opportunity to do so. In addition, throughout this case, Plaintiff and
13 Class Counsel have demonstrated their commitment to vigorously prosecuting this Class Action on
14 behalf of the Class Members. This is demonstrated not only by Class Counsel's experience in litigating
15 wage and hour class actions and representative actions, but by the substantial monetary benefits they
16 will confer upon the Class Members through their representation.

17 **E. Common Issues Predominate, Rendering Classwide Settlement Superior to Other**
18 **Available Methods of Resolution.**

19 Class certification is authorized where common questions of law and fact predominate over
20 individual questions and where classwide treatment of a dispute is superior to individual litigation.
21 (*Richmond, supra*, 29 Cal.3d at p. 469; Fed. Rules Civ. Proc., rule 23(a), (b)(3).) The reviewing court
22 may consider that the class will be certified for settlement purposes only and that the manageability of
23 trial is therefore irrelevant. (*Amchem Prods., Inc. v. Windsor* (1997) 521 U.S. 591, 620.) Plaintiff
24 contends, and Defendants do not dispute for settlement purposes, that the proposed Class Members
25 share a "common nucleus of facts and potential legal remedies." (See also *Hanlon, supra*, 150 F. 3d at
26 p. 1022.) Common questions about Defendants' policies and practices predominate over individual
27 questions, and the Class Members' potential legal remedies are identical – i.e., 1) all Class Members
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1 were subject to Defendants' policies and procedures, and 2) all Class Members could seek the same
2 remedies which have been secured by this Settlement. Plaintiff further contends, and Defendants do
3 not dispute for settlement purposes, that class resolution, particularly in the settlement context, is
4 superior to other available methods for the fair and efficient adjudication of the controversy. (See
5 *Hanlon* at p. 1023.)

6 **F. Class Counsel Adequately Represents the Interests of Class Members.**

7 From the inception of this case, Class Counsel has zealously represented the interests of the
8 Class Members. As explained in his declaration, Class Counsel have substantial experience litigating
9 wage and hour class actions and have been approved as class counsel on numerous occasions. (Briscoe
10 Decl., §§ 22-27.)

11 **V. PRELIMINARY APPROVAL OF THE PROPOSED SETTLEMENT IS WARRANTED**

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

13 A class action may not be dismissed, compromised or settled without approval of the trial court.
14 (Civil Code, § 1781, subd. (f); Cal. Rules of Court, rule 3.769; Fed. Rules Civ. Proc., rule 23(e).)
15 Proper review and approval of a class action settlement requires three steps: (1) preliminary approval
16 of the proposed settlement after submission of a written motion; (2) dissemination of mailed and/or
17 published notice of the settlement to all class members; and (3) a formal fairness hearing, or final
18 settlement approval hearing, at which class members may be heard regarding settlement, and at which
19 evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement is
20 presented. (Manual for Complex Litigation (4th Ed. 2004) § 21.61.) This procedure safeguards class
21 members' procedural due process rights and enables the court to fulfill its role as guardian of class
22 interests. (See 4 Newberg §§ 11:22, *et seq.*)

23 The decision to approve or reject a proposed settlement is committed to the sound discretion of
24 the court. (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128; *Wershba v. Apple*
25 *Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-35; *Hanlon, supra*, 150 F.3d at pp. 1026-27.) The
26 purpose of the preliminary evaluation of a proposed class action settlement is to determine whether the
27 settlement is within the range of possible approval, and thus whether notice to the class of the terms and
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1 conditions and the scheduling of a formal fairness hearing are warranted. (*Wershba* at pp. 234-35;
2 *Spann v. J.C. Penney Corp.* (C.D. Cal. 2016) 314 F.R.D. 312, 319; 4 Newberg § 11.25.) In passing on
3 class action settlements, this Court has broad powers to determine whether a settlement is fair under the
4 circumstances of the case. (*Spann* at p. 319.) Indeed, a court need only find that the settlement falls
5 within the range of possible final approval, also described as the “reasonable range.” (*N. Cnty.*
6 *Contractors’ Ass’n v. Touchstone Ins. Svcs.* (1994) 27 Cal.App.4th 1085, 1089-90; 4 Newberg on Class
7 *Actions* § 11:25.)

8 To make this fairness determination, courts consider several relevant factors, including “the
9 strength of the Plaintiffs’ case; the risk, expense, complexity and likely duration of further litigation;
10 the risk of maintaining class action status throughout the trial; the amount offered in settlement; the
11 extent of discovery completed and the stage of the proceedings; [and] the experience and views of
12 counsel . . .” (*Dunk, supra*, 48 Cal.App.4th at p. 1801.) “[I]f the proposed settlement appears to be the
13 product of serious, informed, noncollusive negotiations, has no obvious deficiencies, does not
14 improperly grant preferential treatment to class representatives or segments of the class, and falls within
15 the range of possible approval, then the court should direct that notice be given to the class members of
16 a formal fairness hearing.” (*Chun-Hoon v. McKee Foods Corp.* (N.D. Cal. 2009) 2009 WL 3349549, at
17 *2.) The Ninth Circuit has repeatedly ruled that the courts “put a good deal of stock in [class
18 settlements that are] the product of arms-length, non-collusive, negotiated resolution.” (*Rodriguez v.*
19 *West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 965; *Hanlon, supra*, 150 F.3d at 1027.)
20 Importantly, there is a presumption of fairness “if the settlement is recommended by class counsel after
21 arm’s-length bargaining.” (*Wren v. RGIS Inventory Specialties* (N.D. Cal. 2011) 2011 U.S. Dist. Lexis
22 38667, *19.) Further, the fact that “the settlement could have been better . . . does not mean the
23 settlement presented was not fair, reasonable or adequate.” (*Hanlon* at p. 1027.) The district courts
24 have “wide discretion in assessing the weight and applicability of each factor.” (*Nat’l Rural*
25 *Telecomms. Coop. v. DIRECTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 526.) The factors are non-
26 exclusive, not all need be shown, and the court is free to engage in a balancing and weighing of factors
27 depending on the circumstances of each case. (*Churchill Village, LLC v. General Electric Co.* (9th Cir.

1 2004) 361 F.3d 566, 576 n.7; *Wershba, supra*, 91 Cal. App. 4th at p. 245.) Indeed, “one factor alone
2 may prove determinative in finding sufficient grounds for court approval.” (*Nat’l Rural Telecomms.*
3 *Coop., supra*, 221 F.R.D. at p. 525; *Torrisi v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370,
4 1376 (upholding settlement where one factor predominated).) The court’s inquiry “into what is
5 otherwise a private consensual agreement negotiated between parties to a lawsuit must be limited to the
6 extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or
7 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole,
8 is fair, reasonable and adequate to all concerned.” (*Hanlon* at p. 1027.) Ultimately, a court’s
9 “determination is nothing more than an ‘amalgam of delicate balancing, gross approximations, and
10 rough justice.’” (*Nat’l Rural Telecomm. Coop.* at p. 526 (citations omitted).) Accordingly, a court’s
11 decision to approve a class action settlement may be reversed only upon a strong showing of clear
12 abuse of discretion. (*Hanlon* at p. 1027; *Class Plaintiff v. City of Seattle* (9th Cir. 1992) 955 F.2d 1268,
13 1276 (in context of class action settlement, appellate court cannot “substitute [its] notions of fairness
14 for those of the [trial] judge and the parties to the agreement,” and will reverse only upon strong
15 showing of abuse of discretion) (citation omitted).)

16 A settlement is presumed fair where: (1) the settlement is reached through arm’s length
17 bargaining; (2) investigation and discovery are sufficient to allow counsel and the Court to act
18 intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is
19 small. (*Dunk, supra*, 48 Cal.App.4th at p. 1802; *Spann, supra*, 314 F.R.D. at p. 323.) The law and
20 public policy strongly favor settlement prior to trial, particularly in class actions and other complex
21 cases where substantial resources can be conserved by avoiding the time, expense and rigors of
22 litigation. (*Neary v. Regents of Univ. of California* (1992) 3 Cal. 4th 273, 277-281; *Lealao v.*
23 *Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 52.) In light of the foregoing, and as set forth
24 below, the Proposed Settlement satisfies the standards for preliminary approval.

1 **B. The Proposed Settlement Terms are Fair, Reasonable, and Adequate and Well Within the**
2 **Range of Reasonableness.**

3 The Proposed Settlement in this class action is well within the range of reasonableness and is
4 fair and adequate. The Proposed Settlement will result in substantial benefits to all Class Members.
5 The Proposed Settlement would result in a substantial monetary benefit to Class Members—
6 **approximately \$85,548**, even after deducting the fees and costs of the Settlement Administrator, the
7 fees and costs of Class Counsel, the payment of 75 percent of recovered civil penalties to the Labor and
8 Workforce Development Agency, and the Incentive Payment to the Class Representative. (Briscoe
9 Decl., § 14.)

10 The Proposed Settlement is approximately 23 percent of the *maximum* calculated exposure
11 for unpaid wages and statutory penalties under the Labor Code—an eminently reasonable result.
12 (Briscoe Decl., § 7.) Prior to mediation, Class Counsel requested and analyzed extensive wage-
13 and-hour spreadsheets and other documents, relating not only to Defendants’ wage-and-hour
14 practices but also the size and composition of the Class. (Briscoe Decl., § 7.) Though there are an
15 estimated total of 82 Class Members, only 64 of them both received service charges and worked
16 overtime/doubletime (an average of 3.64 hours) in one or more pay periods. Under Class Counsel’s
17 damages model, it was determined that Defendants faced maximum exposure for unpaid wages and
18 statutory penalties of approximately \$415,000. (Briscoe Decl., § 7.) The Proposed Settlement
19 amount allocated to the class claims represents nearly 45 percent of these maximum damages. (*Id.*)

20 Were settlement not obtained at mediation, Defendants intended to both challenge certification
21 and assert numerous defenses on the merits. Among other things, Defendants contend they maintained
22 a timekeeping system designed to capture all time recorded, required its employees to record all time
23 worked, and paid them for all time they reported and/or Defendants was otherwise aware of being
24 performed. (Briscoe Decl., § 11.) Defendants also intended to argue that its employees were, at all
25 times relevant, authorized and permitted to take rest and meal periods. (*Id.*; see also *Brinker*
26 *Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1037.) In connection with the waiting time
27 penalty claims, Defendants maintained and would continue to maintain that it acted in good faith

1 (relying on guidance from the Division of Labor Standards Enforcement) and that its failure to
2 incorporate service charges into overtime and premiums was not willful,² and also that the failure to
3 pay premiums for allegedly noncompliant rest and meal periods does not give rise to penalties under
4 Labor Code section 203. Defendants also argued Class Members could not establish the “injury” or
5 “knowing and intentional” elements of their Labor Code section 226(a)(1), (2), (5), and (9) claim
6 where (i) the alleged inaccuracies did not themselves cause any distinct injury and are frowned upon
7 by some courts³, (ii) Defendants accurately listed the amounts actually paid to its non-exempt
8 California employees, and (iii) case law suggests such does not create derivative wage statement
9 violations⁴. (Briscoe Decl. § 16.)

10 Furthermore, each Class Member (easily identified from Defendant’s personnel records) will
11 receive their appropriate and proportional share of the Net Settlement Amount based upon the number
12 of wage statements they received during the Class Period.

13 The benefits of the Proposed Settlement are, in Class Counsel’s view, certainly preferred to
14 continued, lengthy, and costly litigation. Although Class Members could *conceivably* receive a larger
15 payment after years of costly litigation and a lengthy trial, recovery is far from guaranteed and could
16 only occur after years of costly litigation that is rife with risk. Lengthy and in-depth discovery
17 (including depositions of percipient witnesses and persons most qualified from both Defendants) would
18 incur costs which would ultimately be deducted from a later settlement or verdict. Defendants would
19 doubtless continue to assert numerous legal defenses and would almost certainly oppose class
20 certification. Absent settlement, Class Counsel anticipates a vigorous and lengthy challenge to both
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22
23 ² The California Supreme Court’s decision in *Ferra v. Loews Hollywood Hotel LLC* (2021) 11 Cal.5th 858, which held
24 that rest and meal period premiums must incorporate the value of commissions, nondiscretionary bonuses, and other
items of compensation, was issued more than a year after the banquets—the events which entailed the payment of
service charges—stopped due to the Covid-19 pandemic.

25 ³ See e.g., *Elliott v. Spherion Pacific Workforce, LLC* (C.D. Cal. 2008) 572 F.Supp.2d 1169, 1179 (shortening the term
26 “Workforce” to “Work” while otherwise stating the full name of the employer); *York v. Starbucks Corp.* (C.D. Cal.
2009) 2009 WL 8617536 *7-8 (showing the registered dba “Starbucks Coffee Company” instead of “Starbucks
Corporation”); and *Hurst v. Buczek Enters. LLC* (N.D. Cal. 2012) 2012 WL 1564733 *17 (granting summary judgment
to defendant on the plaintiff’s Labor Code § 226 claim on the basis of the good faith dispute defense).

27 ⁴ See e.g., *Maldonado v. Epsilon Plastics, Inc.* (2018) 22 Cal.App.5th 1308 and *Naranjo v. Spectrum Sec. Svcs., Inc.*
28 (2019) 40 Cal.App.5th 444, on review in California Supreme Court Case No. S258966.

1 class certification and the merits of the Class Action. While Class Counsel remain confident
2 certification and ultimate victory could potentially be attained, continued litigation is guaranteed to be
3 costly, time consuming and uncertain. Appellate proceedings would only further delay and jeopardize
4 recovery by Class Members. By contrast, the Proposed Settlement ensures timely, meaningful and
5 substantial relief to the Class. (Briscoe Decl., § 16.)

6 The Notice of Class Action Settlement will apprise each Class Member of the nature of the
7 Class Action, the substance of the Proposed Settlement, how the Net Settlement Amount and payments
8 to Class Members (and their particular payments) will be calculated, the process for opting out of or
9 objecting to the Proposed Settlement, and the date of the Final Approval Hearing. Class Members who
10 do not opt out of the Proposed Settlement will become Class Members and each will receive a share of
11 the Net Settlement Amount based upon the number of wage statements issued to him or her during the
12 class period. Importantly, Class Members will be asked to release only those claims advanced in the
13 Class Action. (See Briscoe Decl., Exhibit 2.)

14 The Proposed Settlement is the result of protracted arms-length negotiations by experienced
15 counsel, following meticulous analysis of extensive payroll records and a mediation before a most
16 experienced and qualified mediator of employment class actions. Thereafter, the Parties spent
17 considerable time meeting and conferring and finally agreeing to the terms of the long form settlement,
18 with substantial back and forth on the details of the ultimate Proposed Settlement. (Briscoe Decl., §§ 8-
19 13.) “‘Great weight’ is accorded to the recommendation of counsel, who are most closely acquainted
20 with the facts of the underlying litigation. This is because ‘[p]arties represented by competent counsel
21 are better positioned than courts to produce a settlement that fairly reflects each party’s expected
22 outcome in the litigation.’ Thus, ‘the trial judge, absent fraud, collusion, or the like, should be hesitant
23 to substitute its own judgment for that of counsel.’” (*Nat’l Rural Telecomms. Coop.*, *supra*, 221 F.R.D.
24 at p. 528.) Class Counsel, having demonstrated a high degree of competence in the litigation of this
25 case, and numerous other wage and hour class actions and PAGA representative actions, strongly
26 believe that the Proposed Settlement is a fair, adequate, and reasonable resolution of the Class Action
27 and is preferable to continued litigation. (Briscoe Decl., §§ 14-17; *see also In re Wachovia Corp.*

1 “Pick-A-Payment” Mortgage Mktg. & Sales Practices Litig., No. 5:09-MD-02015-JF, 2011 WL
2 1877630, at *3 (N.D. Cal. May 17, 2011) (approving settlement based upon, among other factors, the
3 belief of “Plaintiff” counsel, who are experienced attorneys . . . that the settlement is extremely
4 favorable to the class”).) Accordingly, Plaintiff and Class Counsel respectfully request that the
5 Proposed Settlement be preliminarily approved.

6 **C. The Court Should Order Dissemination of the Proposed Notices.**

7 In order to protect the rights of class members, courts must ensure that settlement class
8 members receive the best notice practicable. (*Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797,
9 811-12; *Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156, 174-75.) Procedural due process requires
10 that affected parties have the right to be heard at a meaningful time and in a meaningful manner. It
11 does not guarantee any particular procedure but rather only requires notice reasonably calculated “to
12 apprise interested parties of the pendency of the action and afford them an opportunity to present their
13 objections.” (*Ryan v. Cal. Interscholastic Fed’n – San Diego Section* (2001) 94 Cal.App.4th 1048,
14 1072; *see also Silber v. Mabon* (9th Cir. 1994) 18 F.3d 1449, 1454.) The law requires that notice of a
15 proposed settlement inform class members of the following: (1) the nature of the pending litigation; (2)
16 the general terms of the proposed settlement; (3) that complete information is available from the court
17 files; and (4) that any class member may appear and be heard at the fairness hearing. (See Cal. Rules of
18 Court, rules 3.766(d)-(f) and 3.769(f); 3 *Newberg on Class Actions* (4th ed.) § 8:32.)

19 **1. The Notice of Class Action Settlement is Accurate and Informative.**

20 The Notice of Class Action Settlement will be sent to all Class Members, will inform them of
21 the terms of the Proposed Settlement and will be neutrally worded so as to avoid prejudice. The Notice
22 of Class Action Settlement meets all of the requirements of procedural due process and California
23 Rules of Court, Rules 3.766 and 3.769 by identifying the Plaintiff and Defendants and describing the
24 claims and the Class Action in a straightforward manner; succinctly describing the essential terms of
25 the Proposed Settlement, including identifying the claims that are being released and all parties against
26 whom those claims are being released; describing Plaintiff’s proposed Incentive Payment as well as the
27 amount of Class Counsel’s attorney’s fees and costs; providing a mechanism for disputing the number
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1 of Pay Periods used to calculate their individual payment from the Net Settlement Amount; providing
2 information on how to participate in, opt out of, or object to the Proposed Settlement; clearly providing
3 all applicable deadlines for such action; and informing Class Members that if they do not exclude
4 themselves, and the Proposed Settlement is approved, they will be bound by the resulting judgment. In
5 short, the Notice of Class Action Settlement will provide Class Members with all of the necessary
6 information to make an informed decision regarding the Proposed Settlement.

7 **2. The Notice of Class Action Settlement Satisfies Due Process.**

8 Courts are vested with broad discretion to fashion an appropriate notice program which
9 provides the best notice practicable under the circumstances. (Civ. Code, § 1781; *Cartt v. Superior*
10 *Court* (1975) 50 Cal.App.3d 960, 973-74; see also Fed. Rules Civ. Proc., rules 23(e)(1), 23(c)(2)(B).)
11 The Proposed Settlement provides for direct mail notice of the Proposed Settlement to each Class
12 Member based upon Defendants' records, performing additional skip traces as necessary. (Briscoe
13 Decl., Exhibit A, § 18.) Because all Class Members are current or former employees of Defendants, for
14 whom Defendants have current or last known addresses as well as social security numbers, notice here
15 is simpler and more reliable than in other types of class actions that require published notice to reach
16 unidentifiable Class Members. Class Members will also be able view the Order of Preliminary
17 Approval, Motion for Final Approval, and Motion for Attorneys' Fees, Costs, and Incentive Payment,
18 as well as any updates regarding the scheduling of the Final Approval Hearing. (Briscoe Decl., Exhibit
19 B.) The Notice of Pendency of Class and Representative Action and Proposed Settlement is consistent
20 with similar notices approved by state and federal courts, and under the circumstances here, is the best
21 notice practicable. (*Cartt, supra*, 50 Cal.App.3d at pp. 973-974.)

22 **VI. A FINAL APPROVAL HEARING AND DEADLINES SHOULD BE SET**

23 Plaintiff requests that the Court set a date for the Final Approval Hearing, deadlines for any
24 motions to be submitted to the Court, including a Motion for Final Approval of the Proposed
25 Settlement and a Motion for Attorneys' Fees and Costs and Incentive Payment, as well as deadlines for
26 Class Members to opt out and/or object to the terms of the Proposed Settlement. In order to enable
27 sufficient time for the Parties and the Settlement Administrator to mail the Notice of Class Action
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1 Settlement, for Class Members to submit claims, and for the Parties to respond to any objections,
2 Plaintiff requests that the date for the Final Approval Hearing be set approximately 130 days from the
3 date of the Court's preliminary approval of the Proposed Settlement and preliminary class certification.

4 **VII. CONCLUSION**

5 For all of the reasons stated above, Plaintiff respectfully requests that the Court enter an Order
6 which 1) preliminarily and conditionally certifies the Class, 2) preliminarily approves of Plaintiff as
7 Class Representative, 3) preliminarily approves of Mayall Hurley P.C. as Class Counsel, 4)
8 preliminarily approves the Proposed Settlement as fair, reasonable and adequate, 5) approves the
9 proposed Notice of Pendency of Class and Representative Action and Proposed Settlement, 6) approves
10 the method of notice, 7) authorizes dissemination of the Notice of Class Action Settlement, 8) appoints
11 and approves Simpluris as Settlement Administrator, 9) preliminarily approves the requested fees and
12 costs of Class Counsel; 10) sets a schedule for the implementation of the terms of the Proposed
13 Settlement, and 11) sets the date of the Final Approval Hearing.

14 ///

15 **DATED:** June 20, 2023

MAYALL HURLEY P.C.

16 By



17 ROBERT WASSERMANN

18 JOHN P. BRISCOE

19 Attorneys for Plaintiff and the Putative Class
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PROOF OF SERVICE

I, the undersigned, certify and declare as follows:

I am over the age of eighteen years and not a party to this action. My business address is 112 S. Church Street, Lodi, California 95240 that is located in the county where the mailing and/or delivery below took place.

On June 20, 2023, I served the following document:

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY
APPROVAL OF CLASS AND PAGA ACTION SETTLEMENT**

addressed to:

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Andrea Chavez
Alex Pinto
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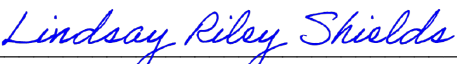
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☐ **BUSINESS PRACTICE TO ENTRUST DEPOSIT TO OTHERS:** I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business. On the date specified below, at my place of business at Stockton, California a copy of the document described above was placed for deposit in the United States Postal Service in a sealed envelope, with postage fully prepaid addressed to the individuals and/or entities mentioned above; and that envelope was placed for collection and mailing on that date following ordinary business practice.

☒ **BY EMAIL:** In accordance with Code of Civil Procedure, Section 1010.6, on the date specified below, I caused a copy of the document(s) described above to be sent to the person(s) at the e-mail address(es) listed above. My business e-mail address is lriley@mayallaw.com. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 20, 2023, at Lodi, California.


LINDSAY RILEY SHIELDS