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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF VENTURA

ILDIKO O'CONNOR, an individual and on
behalf of all others similarly situated,
LAURA RAYA, an individual and on behalf
of all others similarly situated, and
DINA SHASHUA, an individual and on
behalf of all others similarly situated,

Plaintiff,

v.

FERGUSON SM, INC., a California
Corporation; SEAN CORREA, an
individual; THOMAS HUMPHREY, an
individual, MICHAEL REYES, an
individual, INFINITI HR WEST, LLC, an
Arizona Limited Liability Company, HR
SERVICE GROUP, LLC, a Maryland
Limited Liability Company, and DOES 3-
50, inclusive,

Defendants.

CASE NO.: 56-2020-00543357-CU-OE-VTA

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

Date: 1/16/2024

Time: 8:30 a.m.

Dept.: 40

Hon. Judge: Judge Mark S. Borrell

Complaint Filed: July 17, 2020

Second Amended Complaint Filed: Nov. 24, 2020

Trial Date: None set

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1 **I. INTRODUCTION**

2 Plaintiffs Ildiko O'Connor, Laura Raya, and Dina Shashua ("Plaintiffs"), individually and on
3 behalf of the "Settlement Class" (as defined below), submit this motion for preliminary approval of
4 a proposed settlement (the "Settlement") of this action (the "Litigation"), and of certification of the
5 proposed Settlement Class. Defendants do not oppose this motion. (Plaintiffs and Defendants are
6 collectively referred to as the "Parties"). The terms of the Settlement are set forth in the executed
7 Joint Stipulation of Class Action Settlement and Release (hereinafter the "Settlement Agreement").
8 (*See* Exhibit 1 to Kitchin Decl.; unless otherwise defined herein, capitalized terms used in this
9 memorandum shall have the same meaning ascribed to them in the Stipulation.)

10 The Settlement is the result of the hard work and good judgment of Plaintiffs and their
11 counsels. (*See* O'Connor Decl., ¶¶ 10-14, Shashua Decl., ¶¶ 11-14, and Raya Decl., ¶¶ 11-14.) The
12 Parties reached agreement on the terms of a global settlement with the assistance of the Hon. Jamie
13 Jacobs-May (Ret.) of JAMS on January 24, 2023. The compromise Settlement will create a
14 Settlement Fund to be established by Defendants in the amount of One Hundred Seventy-Five
15 Thousand Dollars and No/Cents (\$175,000.00). The Settlement Class consists of: "All licensed
16 cosmetologists who worked for the Ferguson Defendants or the Infiniti Defendants, at any time in
17 the state of California from May 1, 2018, through July 31, 2021", and will resolve a wide range of
18 contested wage and hour claims on their behalf. (Settlement Agreement ¶ 20, 26) The Settlement
19 provides for a financial benefit to each Settlement Class Member ("Class" or "Class Member").
20 To settle claims and remedies under Labor Code §s 2699, *et seq.*, subject to Court approval,
21 the Parties allocate \$7,500.00 to PAGA penalties, with 75% of this amount (\$5,625.00) to be paid
22 directly to the LWDA and 25% of this amount (\$1,875.00) to be paid to the PAGA Aggrieved
23 Employees. PAGA penalties will still be paid to Class Members who submit a timely request for
24 exclusion of the Class Settlement. (Settlement Agreement, ¶ 25)

25 While Plaintiffs are confident of favorable determinations on the merits, they have determined
26 that the Settlement provides significant benefits and is in the best interests of the Class. The
27 Settlement is appropriate because Plaintiffs recognize the expense and amount of time required to
28 continue to pursue the Litigation, as well as the uncertainty, risk, and difficulties of proof inherent in

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1 prosecuting such claims. Defendants assert that they have meritorious defenses to Plaintiffs' claims
2 but have determined that it is desirable to settle the Litigation on the terms set forth in the Settlement
3 Agreement. Finally, the primary employer of Plaintiffs and the Class, Ferguson SM, Inc., has been
4 out of business now for more than two years, rendering it judgment proof. Under the circumstances,
5 the \$175,000 settlement is reasonable.

6 The Settlement was achieved through the dedicated advocacy of the three class
7 representatives, O'Connor, Raya and Shashua, and their attorneys, Kitchin Legal, APC and Trial
8 Lawyers for Justice. In addition to their respective share of the Net Settlement Amount ("NSA"),
9 the Class Representatives each deserve additional compensation for their service to the Class. They
10 worked closely with their attorneys to identify violations of California's labor laws, and to identify
11 and coordinate communications with witnesses who provided invaluable evidence in support of the
12 claims. In total, the Class Representatives spent a total of approximately 150 hours working to
13 achieve a fair result for all class members. Each of them should be awarded service fees of \$5,000.

14 Plaintiffs' counsels, in turn, are entitled under California law to fair compensation for the
15 work they performed and the costs they incurred on a contingent basis on behalf of the Class. Class
16 Counsels worked diligently to protect and advance their interests.

17 Costs to provide notice to the ("Notice") and to the Settlement Class and to administer the
18 Settlement will be paid out of the Settlement Fund, as will, subject to Court approval, an award of
19 attorneys' fees. Class Counsel is requesting an award of not in excess one third of the Gross
20 Settlement Amount, equal to \$58,332.00, plus actual costs incurred of \$18,617.00.

21 The Settlement satisfies all the criteria for preliminary approval. Accordingly, Plaintiffs
22 move this Court for an order preliminarily approving the Settlement Agreement, directing
23 dissemination of Class Notice, and scheduling a Final Approval Hearing. This Motion requests the
24 Court grant preliminary approval of the Settlement, finding there is a prima facie showing it is fair,
25 adequate, and reasonable. (Exhibit 1 to Kitchin filed) The Motion requests the Court conditionally
26 certify the proposed Class for settlement ("Settlement Class"), approve Patrick R. Kitchin and Kelly
27 B. Hanker as Class Counsels, approve Plaintiffs O'Connor, Raya and Shashua as the Class
28 Representatives, approve Phoenix Class Action Administration Solutions as the third-party

Settlement Administrator (“Administrator”), approve the form and method of Class Notice, and approve the proposed mechanism for receiving and handling notices of election to opt out of the Settlement and objections.

II. SUMMARY OF THE CASE

A. The Parties

Ferguson SM, Inc. was formed in mid-2018 and provided salon and beauty services to retirement communities in California. Defendants established and operated salons in Ventura County, Los Angeles County, Napa County, Orange County, Riverside County, San Diego County, and Sonoma County. The company ceased operations in July 2020. The individual defendants, Sean Correa, Thomas Humphrey and Michael Reyes, were Ferguson officers.

HR Service Group LLC and Infiniti HR West are both Professional Employer Organizations (“PEO”). Ferguson outsourced its payroll and human resources obligations to the Infiniti Entities from November 2018 through the end of 2019 only.

Plaintiffs, California licensed cosmetologists, allege that when they and the Settlement Class were employed by Defendants, Defendants utilized wage systems that failed to comply with California law. The systems were based on a legally invalid piece rate scheme that failed to pay Plaintiffs and the Settlement Class all the compensation due to them.

B. Procedural History: Pleadings, Discovery and Mediation

On July 17, 2020, Plaintiff O’Connor filed a putative class action in the California Superior Court for the County of Ventura, asserting the several causes of action arising out of her employment. On July 30, 2020, this case was designated as a class action, and an exceptional action. On July 29, 2020, pursuant to the California Labor Code Private Attorneys General Act (“PAGA”), Plaintiff gave notice to the California Labor and Workforce Development Agency pursuant to Labor Code § 2698.3(a)(1)(A) of alleged violations of California employment law by Defendants.

On September 3, 2020, Plaintiffs O’Connor, Raya and Shashua filed a first amended complaint. On November 24, 2020, Plaintiffs filed a second amended complaint (the operative complaint) asserting causes of action for: (1) Failure to Pay Minimum Wages; (2) Failure to Pay Overtime Wages; (3) Failure to Pay for Nonproductive Time and Rest/Recovery Periods for Piece

Rate Workers; (4) Violations of Labor Code § 204.11; (5) Failure to Provide Meal Periods; (6) Failure to Provide Rest Periods; (7) Violations of Labor Code § 226; (8) Willful Failure to Pay All Wages Due Upon Termination; (9) Unfair Competition; (10) Declaratory Relief; and (11) Labor Code Private Attorneys General Act. Defendants generally denied all allegations.

Plaintiffs subsequently prepared and served written discovery on Ferguson, the Infiniti Defendants and the individual defendants to gather information about their employment practices and to obtain timekeeping and payroll records for Plaintiffs and the Class. Plaintiffs also took the deposition of Defendant Thomas Humphrey, the person deemed most qualified at Ferguson to address critical matters at issue in the Litigation. (Kitchin Dec., ¶ 8)

Following Humphreys' deposition, the Parties agreed to mediation. Prior to mediation, Defendants provided Plaintiffs with substantial additional information about the class, and sufficient data to develop an evidence-based damages and penalties models. (Kitchin Decl., ¶ 8) Plaintiffs' counsel retained a well-qualified wage economist, with substantial experience in wage and hour class litigation, including claims under the PAGA. (Kitchin Decl., ¶ 8) Plaintiffs' expert consultant developed a class wide mode based on data produced by Ferguson and the Infiniti Defendants, and grounded on the claims Plaintiffs asserted in the Litigation. (Kitchin Decl., ¶ 8)

On January 24, 2023, after substantial preparation, the parties mediated the claims with Judge Jamie Jacobs-May (Ret.). (Kitchin Decl., ¶ 9) Each of the Plaintiffs came well prepared and actively participated in mediation. (*Id.*) Plaintiffs' settlement posture throughout the day was grounded on their expert's careful analysis of timekeeping and payroll records. Plaintiffs had evaluated the strengths and weaknesses of their claims, and of Defendants' affirmative defenses, and had carefully weighed the fact that Ferguson was out of business and that the Litigation and Settlement was being funded primarily by one of the individual defendants, Thomas Humphreys. (*Id.*)

After a full-day mediation with Judge Jacob-Mays, the Parties agreed on the general terms of a proposed settlement. After additional negotiations, the Parties executed a memorandum of understanding upon which they based a long-form settlement agreement. (Kitchin Decl., Exhibit 1)

C. Summary of the Claims

This is a proposed class action and PAGA representative action asserting eleven causes of

1 action arising out of Defendants’ alleged violations of California law. Ferguson employed Class
2 Members between March 2018 and July 2020. The Infiniti Defendants jointly employed Plaintiffs and
3 Settlement Class Members between November 2018 and December 31, 2019.

4 Plaintiffs allege that Defendants denied Plaintiffs and the Settlement Class employment rights
5 mandated by the California Labor Code and applicable IWC Wage Order 5-2001. Plaintiffs allege
6 they were required to work off of clock without wages, work overtime hours without correct overtime
7 wages, and that they were denied meal and rest periods. They allege Defendants failed to provide
8 them compliant wage records, including paystubs, willfully failed to pay all wages due upon
9 termination and engaged in unfair business practices subject to California Business & Professions
10 Code §§ 17200, et seq. (*See* Second Amended Complaint.)

11 Wages: Defendants paid the Class wages they described as commissions for providing hair
12 and nail services to Defendants’ customers. In fact, Defendants paid Plaintiffs and the Class on the
13 basis of a defective piece rate that failed to compensate them for nonproductive time and that failed
14 to pay them separately for rest and recovery periods. “A plan which simply relies upon a ‘percentage’
15 of some sum such as the cost of the goods sold, or the services rendered by an establishment does not
16 constitute a ‘commission wage’; the worker receiving the commission must be principally involved
17 in selling the goods or the services upon which the commission is measured. Many of the plans which
18 simply equate ‘commission’ with ‘percentage’ are, if carefully reviewed, revealed to be nothing more
19 than piece rate plans.” DLSE Manual § 34.1.2, emphasis added.

20 Damages: Plaintiffs seek damages for unpaid regular and overtime wages, including
21 liquidated damages for unpaid minimum wages, statutory penalties for meal and rest period
22 violations, statutory penalties for wage keeping violations, waiting time penalties and for civil
23 penalties under the PAGA.

24 **III. THE SETTLEMENT**

25 **A. The Settlement Class**

26 The Settlement Class consists of: “All licensed cosmetologists who worked for the Ferguson
27 Defendants or the Infiniti Defendants, at any time in the state of California from May 1, 2018, through
28 July 31, 2021.” (Settlement Agreement ¶ 20) The Settlement Class, including the PAGA Aggrieved

Employees, includes 193 former Employees of Defendants. (Settlement Agreement, ¶ 22)

i. Defendants' Commission Wage Scheme Was a Legally Noncompliant Piece Rate System that Denied Employees all Earned Wages

Defendants' commission program was in practice a defective piece rate wage scheme. Plaintiffs were paid a percentage of the cost of salon services they provided. Piece-rate employees are entitled to separate hourly compensation at their regular rates of pay for non-productive time, including time spent waiting, or performing other work for an employer. Defendants paid "commissions" to all Settlement Class Members. They were paid only when they were directly engaged in cutting, styling or coloring customers' hair. Consequently, Plaintiffs and the Settlement Class worked a substantial amount of time each workday without being paid any wages. Plaintiffs and the Class typically worked an hour or more each day completely without compensation. (O'Connor Decl., ¶¶ 5-6, Shashua Decl., ¶¶ 4-5, and Raya Decl., ¶¶ 5-6)

ii. Meal and Rest Period Violations

Defendants failed to maintain a record of meal periods taken by Plaintiffs and the Settlement Class, and failed to provide them with all meal and rest periods, or provided meal periods late. Yet they never paid employees an extra hour of compensation when they were not provided breaks. (O'Connor Decl., ¶¶ 7-8, Shashua Decl., ¶¶ 6-9, and Raya Decl., ¶¶ 6-8)

iii. Minimum Wages for All Work Time

Plaintiffs and the Settlement Class were paid a percentage of the services fees for services they performed, without any compensation for nonproductive time and rest or recovery periods. Thus, Plaintiffs and the Settlement Class failed to receive minimum wages for all time worked. (O'Connor Decl., ¶¶ 4-6, Shashua Decl., ¶¶ 6-9, and Raya Decl., ¶¶ 6-8)

iv. Wage Statement Violations and Record Keeping Penalties

In violation of Labor Code § 226, Defendants failed to maintain and provide employees with accurate payroll records, including paystubs showing: (1) gross wages earned, (2) total hours worked, (3) the number of piece-rate units earned and applicable piece rates, (4) net wages earned, and (5) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee. (O'Connor Decl., ¶ 10, Shashua Decl., ¶ 10, and Raya Decl., ¶10)

1 v. Waiting Time Penalties (Labor Code § 203)

2 Plaintiffs and the Settlement Class were not paid all wages upon termination, including
3 compensation for all hours worked and for penalty wages for meal and rest periods not provided.

4 vi. Private Attorneys General Act Claims

5 Plaintiffs' PAGA claims include: failure to provide meal periods under Labor Code § 226.7;
6 failure to provide rest periods under § 226.7; failure to pay overtime under Labor Code § 510;
7 underpaid employees under § 558; failure to pay wages when due under §§ 201-204; failure to pay
8 wages at place of discharge under § 208; and § 1199.

9 vii. Attorneys' Fees and Costs of Suit

10 Plaintiffs are entitled to recover their reasonable attorneys' fees and costs pursuant to Labor
11 Code §§ 218.5, 226, 1194, 2699(g)(1) and California Code of Civil Procedure § 1021.5.

12 **B. Settlement Payments**

13 The gross settlement amount of \$175,000 will be distributed in two payments.

14 Infiniti Defendants' entire Settlement Amount of Ninety Thousand Dollars and No/Cents
15 (\$90,000.00) will be paid to the Claims Administrator fifteen (15) calendar days after the Effective
16 Date. One-half of Ferguson Defendants' Settlement Amount, equal to Forty-Two Thousand and Five
17 Hundred Dollars and No/Cents (\$42,500.00), shall be paid to the Claims Administrator fifteen (15)
18 calendar days after the Effective Date. This first portion of the Gross Settlement Amount
19 (\$132,500.00) will include 100% of the approved enhancement payments to Plaintiffs (\$15,000.00),
20 100% of the approved costs to Class Counsels (\$18,617.00), \$23,837.00 out of the total approved
21 attorneys' fees, and \$5,625.00 to the LWDA, with the remainder to be paid to the Settlement Class
22 as the complete Class payment (\$69,421.00), which includes \$1,875.00 to the PAGA Aggrieved
23 Employees. No later than six months after the Effective Date, Ferguson Defendants will pay the
24 second and remaining settlement payment of Forty-Two Thousand and Five Hundred Dollars and
25 No/Cents (\$42,500.00) to the Claims Administrator. In accordance with this Agreement, This portion
26 of the Gross Settlement Amount shall be distributed as follows: approved attorneys' fees (\$34,500),
27 and 100% of the approved Claims Administrator fees (\$8,000.00). (Kitchin Decl., ¶ 16, FN 1)

28 ///

1 **IV. DISCOVERY, INFORMATION EXCHANGE, MEDIATION AND SETTLEMENT**

2 Plaintiffs obtained significant class wide information and data from Defendants pursuant to
3 written discovery, deposition, and an arms-length agreement to share evidence under the mediation
4 privilege. Evidence Code §§ 1115, *et seq.* The parties traded e-mails advocating their positions and
5 had several telephone and zoom conferences. Finally, after several months of negotiations, the
6 parties agreed to an appropriate evidence exchange and to mediation.

7 Under the agreement, Defendants produced additional written employment policies, plus
8 payroll records and human resource materials for all Class Members. Plaintiffs' counsels identified
9 and interviewed several Class Members who provided copies of Defendants' written employment
10 policies, handbooks, relevant emails and payroll records. Plaintiffs' counsel interviewed twelve
11 additional Class Members and witnesses, working closely with the Class Members and witnesses,
12 from before Plaintiffs filed their complaint to the day of mediation. (Hanker Decl., ¶ 6)

13 During interviews that often lasted two or more hours, Class Members estimated the hours
14 they spent waiting for customers or other nonproductive time, how often they were denied meal and
15 rest periods, and the amount of time engaged in productive activities at the Ferguson salons. Using
16 estimates from Plaintiffs O'Connor, Raya and Shashua, others, and the payroll data Defendants
17 produced before mediation, Plaintiffs generated class wide damage and penalty models.

18 The parties hired Hon. Jacobs-May (Ret.) as mediator. Following a full day of arms-length
19 negotiations on January 24, 2023, the Parties agreed on the material terms of the settlement.

20 **V. TERMS OF THE PROPOSED SETTLEMENT**

21 The Settlement Agreement contains all of the terms necessary to effectuate a fair distribution
22 of the Settlement Funds and protect the interests of absent Settlement Class Members. (*See* Exhibit
23 1 to Kitchin Decl.)

24 a. "Class Members" or "Class" comprise "all licensed cosmetologists who worked for the
25 Ferguson Defendants or the Infiniti Defendants, at any time in the state of California from May 1,
26 2018, through July 31, 2021."

27 b. "PAGA Aggrieved Employees" means "all licensed cosmetologists who worked for the
28 Ferguson Defendants or the Infiniti Defendants, at any time in the state of California from June 28,

2019, through July 31, 2021.” (PAGA claim number LWDA-CM-800523-20 filed July 29, 2020, and amended September 25, 2020)

c. Defendants will pay \$175,000.00 (the “Gross Settlement Amount”) in full settlement of all claims alleged, or that could have been alleged under the facts set out in Plaintiffs’ SAC. Defendants will also pay the employer’s share of taxes on the wage portion of the settlement.

d. The Gross Class Amount will pay: (i) eight thousand dollars (\$8,000.00) to Phoenix Class Action Administration Solutions, the proposed Settlement Administrator; and (ii) no more than \$58,332.00 in attorneys’ fees, plus litigation costs of \$16,250.94.

e. PAGA penalties paid to the California Labor Workforce Development Agency for \$7,500.00, with 75% of this amount (\$5,625.00) to be paid directly to the LWDA and 25% of this amount (\$1,875.00) to be paid to the PAGA Aggrieved Employees.

f. Class Representative Service Payments to Class Representatives O’Connor, Raya and Shashua for up to \$5,000.00 each (total \$15,000.00). Defendants agree not to oppose a request for Class Counsel’s attorneys’ fees of one-third (1/3) of the Gross Settlement Amount (\$58,332.00), (“Class Counsel Fee Award”), plus a request for Class Counsel’s actual costs incurred, which are estimated to be approximately \$16,250.94 (“Class Counsel Cost Award”).

The remaining amount will constitute the Net Settlement Amount (“NSA”), estimated to be \$69,421.00, including PAGA payments. The Claims Administrator will determine the amounts of Individual Settlement Payments to be awarded to the Participating Class Members as follows: Class Members’ gross share of the Net Settlement Amount (before deduction for the standard employee’s share of payroll taxes) will be calculated by dividing the Net Settlement Amount by the total number of weeks worked by all Class Members during the Class Period and multiplying that amount by the number of workweeks worked by each Class Member during the Class Period.

The Administrator will manage all aspects of the notice process under the direction of the parties’ counsels in compliance with the express terms of the Settlement and the Court’s orders. (*See* Declaration of Jodey Lawrence, Phoenix Class Action Administration Solutions.) The Settlement is non-reversionary. Funds from uncashed settlement payments will be deposited with the California Department of Relations Unpaid Wage Fund. Defendants have the right to revoke the Settlement if

1 15% or more of the Class submits timely opt outs.

2 The claims released by Settlement Class Members are limited to those that were or could
3 have been made based on the factual allegations in the SAC. The named Plaintiffs, in turn, will
4 provide Defendants with general waivers. (*See* ¶ 73 of the Settlement, Exhibit A to Kitchin Decl.)

5 **VI. CLASS CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE**

6 Whether to grant class certification does not turn on the merits of the claims presented for
7 adjudication, but turns, instead, on the appropriateness of adjudication of disputed claims on behalf
8 of a class of individuals whose claims are based on common issues of fact and law. *Sav-On Drug*
9 *Stores, Inc. v. Superior Court* 34 Cal. 4th 319 (2004). The ultimate goal of the class process is to
10 avoid “a multiplicity of trials conducted at great expense to both the judicial system and the
11 litigants.” *Id.* at 319. To accomplish the goal of adjudicating common claims on behalf of a group
12 of claimants in a single action, California law and public policy favor the fullest and most flexible
13 use of the class action device. *Richmond v Dart Indus., Inc.*, (1981) 29 Cal.3d 462, 470, (1981).
14 “Courts long have acknowledged the importance of class actions to prevent a failure of justice in our
15 judicial system.” *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 434, 445.

16 The proposed Settlement Class is particularly well suited for class certification. All claims
17 relate to Defendants’ employment practices that Plaintiffs allege violated the legal rights of all Class
18 Members. The Class is easily ascertainable, and all Class Members have suffered damages. The
19 Class satisfies the prerequisites for certification under California Code of Civil Procedure § 382,
20 which provides: “[W]hen the question is one of a common or general interest, of many persons, or
21 when the parties are numerous, and it is impracticable to bring them all before the court, one or more
22 may sue or defend for the benefit of all.”

23 To support class certification, two requirements of § 382 must be met: “(1) there must be an
24 ascertainable class; and (2) there must be a well-defined community of interest in the questions of
25 law and fact involved affecting the parties to be represented.” *Daar v. Yellow Cab Co.* (1967) 67
26 Cal.2d 695, 704 (citations omitted) “The community-of-interest requirement embodies three factors:
27 “(1) predominant common questions of law or fact; (2) class representatives with claims or defenses
28 typical of the class; and (3) class representatives who can adequately represent the class.” *Sav-On*

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1 *Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319.

2 **A. An Ascertainable Class Exists That Is So Numerous That Joinder of All**
3 **Members Is Impracticable**

4 The proposed Class is ascertainable and includes 193 former employees of the Defendants.

5 **1. The Class Can Be Ascertained By Objective Criteria**

6 All Class Members have been identified from Defendants' payroll and personnel records.

7 Thus, the Class clearly satisfies the ascertainability requirement.

8 **2. The Numerosity Requirement Is Satisfied**

9 The proposed Settlement Class consists of 193 former employees. The proposed Class is
10 considerably larger than the 42-member class certified in *Rose v. City of Hayward*, (1981) 28
11 Cal.App.3d 926. Joinder of all 193 Class Members would be impracticable and unmanageable.

12 **3. There Is a Well-Defined Community of Interest in Questions of Law**
13 **and Fact**

14 The Court should grant class certification when questions of law and fact common to all
15 Class Members predominate over questions affecting only individual Class Members. The
16 predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant
17 adjudication on a representative basis. *Sav-On Drug Stores, Inc. v. Sup.Ct.*, (2004) 34 Cal.4th 319

18 The proposed Settlement embodies all three factors of the "community of interest" test: (1)
19 common questions of law and fact predominate; (2) Plaintiffs' claims are typical; (3) Plaintiffs and
20 their counsel will fairly and adequately protect the interests of the Class.

21 1. Predominant common questions: The claims asserted by Plaintiffs on behalf of the
22 193 Class Members concern predominant common issues of law and fact, including: (1) the legality
23 of Defendants' piece rate system guised as a "commission" program; (2) whether Defendants failed
24 to compensate Class Members for rest and recovery periods and other non-productive time; (3)
25 whether Class Members were afforded the opportunity to take rest and meal breaks; (4) whether
26 Defendants failed to pay minimum wages for all Class Members' work time; (5) whether
27 Defendants' wage statements and record keeping were proper; and (6) whether Defendants willfully
28 failed to pay all wages due upon termination to Class Members.

29 2. Plaintiffs' claims are typical: Typicality does not focus on individual characteristics
30 of the representatives compared to those of the remainder of the Class, but rather upon the typicality

of the proposed representatives' claims as they relate to the defendants' conduct and activities. *See Classen v. Weller* (1983) 145 Cal.App.3d 27, 47: "[t]he only requirements are that common questions of law and fact predominate and that the class representative be similarly situated". The representative plaintiffs' claims are typical if they arise from the same event, practice or course of conduct that gives rise to the claims of other class members, and rest on the same legal theories. *Id.*

In this case, the claims of the proposed Class representatives are typical of the Settlement Class. All three Plaintiffs worked as licensed cosmetologists for the Ferguson Defendants or the Infiniti Defendants. All three worked under the same employment policies applicable to the Class, and together worked in salons in California retirement centers, all of which were managed by the Defendants. All three Plaintiffs waited for clients or engaged in other nonproductive time without compensation, and all were deprived of meal and rest periods. Current and former employees confirm Plaintiffs' experiences were substantially similar to the experiences of other members of the Class. (O'Connor Decl., ¶¶ 11-12, Shashua Decl., ¶¶ 11-12, and Raya Decl., ¶¶ 11-12)

3. The named Plaintiffs and their counsel will fairly and adequately protect the interests of the Settlement Class: The adequacy of representation requirements is met by fulfilling two conditions: (1) a named plaintiff must be represented by counsel qualified to conduct the pending litigation; and (2) a named plaintiff's interests cannot be antagonistic to those of the class. *McGhee v. Crocker-Citizens Nat. Bank* (1976) 60 Cal.App.3d 442, 451.

First, Class Counsels are "qualified, experienced and generally able to conduct the proposed litigation." *Miller v. Woods* (1983) 148 Cal.App.3d 862, 875. Plaintiffs' legal team comprises attorneys from two law firms, who, together, have extensive expertise in handling all aspects of wage and hour and class action litigation. (Kitchin Decl., ¶¶ 6, 7; Hanker Decl., ¶ 6)

Second, Defendants have injured the representative Plaintiffs and every Settlement Class Member in the same manner; therefore, the named Plaintiffs' interests are co-extensive with those of the Class. Plaintiffs have demonstrated their commitment to achieving the best results possible for their fellow Class Members. *McGhee*, 60 Cal.App.3d at 451. Each assisted in the investigation and litigation efforts undertaken by their attorneys. In addition to gathering their own employment records and helping counsel understand the employment practices at issue, each Plaintiff has

undertaken substantial efforts to contact and encourage other Class Members to provide evidence to their attorneys. All Plaintiffs participated in the day-long mediation. (*See* Plaintiffs’ declarations.) As a direct result of their efforts, sufficient documentary and testimonial evidence was gathered to engage in meaningful class-wide that resulted in the proposed \$175,000.00 class settlement.

B. A Class Action is Superior to a Multiplicity of Litigation

Finally, the Court must determine that a class action would be superior to alternative means for the fair and efficient adjudication of the claims. By consolidating 193 potential individual actions into a single class-wide proceeding, the Court can manage this litigation in a manner that serves the economics of time, effort, and expense for the litigants and the judicial system. Absent class treatment, similarly situated employees with relatively small but meritorious claims for damages would, as a practical matter, have no means of redress because of the time, effort, and expense required to prosecute individual actions. *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 713.

VII. THE SETTLEMENT IS WELL WITHIN THE RANGE OF POSSIBLE APPROVAL

Approval of the Settlement is warranted under the standards applicable to both preliminary and final approval of class action settlements. As a threshold matter, “a voluntary conciliation and settlement are the preferred means of dispute resolution.” *7-11 Owners For Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1151 (citation omitted)

Court approval of a class action settlement under California law involves a two-step process. *See* Cal.R.Ct. 3.769 (c), (g). First, the trial court must determine if a settlement proposal is “within the range of possible approval. If it finds the proposed settlement to be within this range, it then proceeds to the second step in the review process, the fairness hearing.” *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794. At the final approval stage, the court determines if a settlement is “fair, adequate and reasonable” and “not the product of fraud or overreaching by, or collusion between, the negotiating parties.” *See Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 244-45; *7-Eleven Owners for Fair Franchising v. The Southland Corp.* (2000) 85 Cal.App.4th 1135, 1146.

The trial court possesses broad discretion to determine the fairness of a class settlement. Both the federal circuit courts and the California Courts of Appeal have adopted a mix of considerations, including “[1] the strength of plaintiff’s case, [2] the risk, expense, complexity and

likely duration of further litigation, [3] the risk of maintaining class action status through trial [4] the amount offered in settlement, [5] the extent of discovery completed and the stage of the proceedings, [6] the experience and views of counsel, . . . and [7] the reaction of the class members to the proposed settlement.” See *Dunk*, at 1801; see also *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128. This Settlement satisfies these factors. While the Court need not, and should not, at this stage determine whether the proposed Settlement is fair and adequate for final approval, the Settlement falls well “within the range” of fairness and adequacy for preliminary approval.

A. Analyzing the Proposed Settlement According to These 7 Factors Warrants the Court’s Preliminary Approval

1. The Strength of Plaintiffs’ Case

Piece-rate violations: Settlement Class Members were not engaged in selling a product or service; they cut and colored hair, or performed manicuring services. Their wages, therefore, were not commissions on sales. *Keyes Motors, Inc. v. DLSE* (1988) 197 Cal.App.3d 557. Though they called the wages “commissions,” Defendants’ wage scheme was based on a piece-rate system that failed to pay employees for rest and recovery periods and for non-productive time.

Meal and rest periods: Plaintiffs allege, and Class Members have confirmed, that employees did not take regular meal or rest breaks. Whether Class Members were afforded the opportunity to take rest and meal breaks in accordance to Defendants’ written meal and rest break policies will be contested. Defendants argue that differences in labor practices at the salons over time render class treatment inappropriate.

Labor Code § 203: If Plaintiffs prevail on their various unpaid wage claims, then they will be in a strong position to obtain waiting time penalties under Labor Code § 203. If Plaintiffs establish Settlement Class Members are entitled to additional wages, the burden will shift to Defendants to prove the wages were not willfully withheld.

PAGA civil penalty claims: The PAGA claims are based on the same evidence Plaintiffs would use to prove their damage and statutory penalty claims.

2. The Risk, Expense, Complexity and Likely Duration of Further Litigation

Defendants raised several factual and legal defenses that, if successful, would defeat or

1 substantially impair the value of some of Plaintiffs' claims. For example, Defendants indicate that
2 they would challenge the adequacy of Plaintiffs as class representatives and present evidence that
3 employment practices varied over time, and from salon to salon. Further, the value of Plaintiffs'
4 central wage claims (unpaid wages, unpaid rest and recovery periods and unpaid non-productive
5 time) will turn on Plaintiffs' ability to manage the evaluation of damages of employees who worked
6 in 80-90 salons over more than two years' time. Manageability will be ardently contested.

7 Although Plaintiff seeks penalties for PAGA violations, courts have discretion to reduce
8 penalties deemed "unjust, arbitrary and oppressive or confiscatory." *See* Labor Code § 2699(e)(2).
9 Given the paucity of precedential interpretations of the scope of this discretion, Plaintiffs recognize
10 the risk that the trial court could significantly limit the recovery of civil penalties.

11 Litigating all of Plaintiffs' claims would involve additional extensive and expensive
12 discovery that would not likely increase the value of any claim. To gather representative data in
13 support of their claims, Plaintiffs would likely be required to survey the Class. Defendants, in turn,
14 could take Class Member depositions. Although the attorneys' fees and costs would increase
15 substantially with the litigation, the damages recovered for the class would not substantially increase.

16 All of these concerns aside, however, the fact that Ferguson has been out of business since
17 July 2021 is the most significant factor affecting settlement value of this Litigation. Plaintiffs believe
18 that Ferguson and its former owners and officers would seek bankruptcy protection in the absence
19 of settlement. Several times Ferguson's counsel has informed Plaintiffs that his clients were unable
20 to pay his attorneys' fees and were considering filing for bankruptcy. (Kitchin Decl., ¶ 12) Ferguson
21 and its attorney provided Plaintiffs with sufficient information to determine that further litigation
22 would not be in the best interest of Plaintiffs or the putative class. The benefits of settlement clearly
23 outweigh the risks of further litigation.

24 **3. The Risk of Maintaining Class Action Status Through Trial**

25 Defendants will challenge class certification based on a purported lack of commonality.
26 They will argue different salons had different practices over time. They will argue that Class
27 members controlled important aspects of the work environment and, therefore, many of the claims
28 at issue are too heterogeneous to support class treatment. Plaintiffs are confident that the evidence

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1 would support an order granting class certification but are equally confident that Defendants would
2 seek to decertify the class before trial. Furthermore, after Plaintiffs filed this action, Ferguson went
3 out of business, and the Infiniti Defendants' maximum liability exposure is for 14 months only.

4 **4. The Amount Offered in Settlement**

5 The total monetary value of the Settlement is \$175,000. Plaintiffs' counsel developed
6 damage models accounting for the strengths and weaknesses of the different claims, predicting
7 different outcomes based on the input of various assumptions, including: (1) frequency of meal and
8 rest periods missed; (2) amount of non-productive time worked by Class Members; and (3) penalties
9 likely to apply to Class Members. Assumed recovery at full value for damage and penalty claims
10 on behalf the Class, maximum recovery was calculated to be \$2,953,117. (Kitchin Decl., ¶¶ 13-17)

11 Under the Settlement, each Settlement Class Member will receive a pro-rata share of the
12 NSA. The exact amount paid to each Settlement Class Member will depend on the employee's
13 length of employment. One-third of the NSA will be paid as wages, subject to withholding, one-
14 third as penalties and one-third as interest. (Kitchin Decl., ¶ 18)

15 **5. Extent of Discovery Completed and The Stage of The Proceedings**

16 Plaintiffs gathered sufficient evidence through formal discovery and informal exchanges
17 before mediation to generate reasonable estimates of damages and to negotiate settlement in good
18 faith. Plaintiffs' counsel interviewed 12 former employees who worked in Defendants' salons.
19 (Kelly Decl., ¶ 6) They described similar experiences with meal and rest periods. Although their
20 estimated off-the-clock time and missed meal and rest periods varied, each of them spent some time
21 working without pay and each regularly missed meal and rest periods. (Kelly Decl., ¶ 12)

22 Defendants produced written policies and payroll data showing wages earned by pay period
23 for the entire Class. Before and during mediation, the parties made further exchanges relating to
24 Defendants' policies, workforce, financial viability, and likely litigation strategy. The records
25 produced provide a sufficient "understanding of the amount that is in controversy and the realistic
26 range of outcomes of the litigation." *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010)
27 186 Cal.App.4th 399, 409; *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128.

28 Plaintiffs used the data to build damage and penalty models for mediation. Estimates of the

1 maximum total value of the class claims was \$1,339,617 and the maximum value of the PAGA
2 penalty claims (including multiple penalties for multiple violations each pay period) was \$1,613,500.

3 With sufficient data in hand to evaluate Defendants' maximum exposures, Plaintiffs and their
4 counsels evaluated the chances of success on a claim-by-claim basis, and whether additional
5 discovery and litigation would increase or decrease the likelihood of prevailing on the claims. The
6 Gross Settlement Amount is substantially higher than the lowest judgment that could be entered **and**
7 **collected**, and substantially lower than the highest. Plaintiffs had sufficient information to negotiate
8 this Settlement in good faith. The Settlement is grounded on information sufficient to evaluate the
9 merits of the class-wide claims, the strengths of Defendants' defenses, the economic viability of the
10 Ferguson Defendants and the sufficiency of settlement value.

11 **6. The Experience and Views of Counsel**

12 Plaintiffs' counsels frequently advise employers and employees regarding wage and hour
13 laws, and have conducted seminars and presentations to county and state bar associations regarding
14 wage and hour laws and litigation. Plaintiffs' counsels have become leaders in this area of
15 employment litigation in California. Plaintiffs and their counsel developed a well-conceived
16 litigation strategy to prosecute and resolve these claims.

17 Plaintiffs' counsels understand the burden they will face to obtain class certification and
18 prosecute these class action claims. They are familiar with the difficulties associated with pursuing
19 claims on a class basis, and the likelihood of prevailing on the claims asserted. They also understand
20 the problems small employers encounter when faced with significant judgements or awards.
21 Plaintiffs' counsels believe the proposed Settlement is a very good result for the Class. (*See* Hanker
22 Decl., ¶ 17; Kitchin Decl., ¶ 19.)

23 **7. The Reaction of The Class Members to The Proposed Settlement**

24 The Settlement permits Defendants to void the proposed Settlement if over 15% of the Class
25 opts out. Under factor 7 of the *7-Eleven* criteria, this provision will measure the Class Members'
26 reaction to the proposed Settlement. *See 7-Eleven Owners for Fair Franchising v. The Southland*
27 *Corp* 85 Cal.App.4th at 1146. Objecting Class Members can be heard at the fairness hearing.

28 ///

B. Absence of Fraud or Collusion

Finally, this Settlement results from Plaintiffs’ advocacy on behalf of the Class and is based on serious and sustained negotiations between the parties. It is a settlement reached through arm’s length negotiations under the direction of a very qualified mediator, and its value to the Class is a powerful indication of the propriety of the negotiation process.

VIII. THE PROPOSED NATURE AND METHOD OF CLASS NOTICE ARE CONSTITUTIONALLY SOUND AND APPROPRIATE

A. The Proposed Class Notice Plan Satisfies Due Process

California law vests courts with broad discretion in fashioning an appropriate class notice programs. *Cartt v. Super. Ct.* (1975) 50 Cal.App.3d 960, 973-74. “The notice given should have a reasonable chance of reaching a substantial percentage of the Class Members . . .” *Id.* at 974. Here, Defendants have the last known contact information for past employees. Notice by U.S. mail and by email is most appropriate.

After the Administrator conducts a NCOA address update search on all Class Members, Notice of the Proposed Class Action Settlement (“Class Notice”) will be mailed to Class Members’ current addresses and emailed to those addresses known by Defendants. The Administrator will conduct skip-trace research on Settlement Class Members whose notices are returned as undeliverable and will send out timely follow-up notices. Mailed and emailed notices will be effective and constitutes the best notice practicable. *See* Cal.R.Ct. 3.766(e).

B. The Proposed Class Notice Is Accurate and Informative

The content of the proposed Class Notice satisfies Cal.R.Ct. 3.766(d) by providing Class Members straight-forward information about the litigation, the nature of the proposed Settlement, the terms of the proposed Settlement, relief the Settlement will provide, the application of Class Counsel for payment of their attorneys’ fees and reimbursement of their costs, the date, time and place of the final approval hearing, and the procedure and deadlines for opting out of the proposed Settlement or for submitting comments and objections. (*See* Exhibit A to Kitchen Decl.)

The Class Notice also fulfills the requirement of neutrality in class notices, by summarizing the proceedings and terms of the proposed Settlement and the settlement process in an informative

1 and coherent manner. *Class Action Manual*, Rule 9.27(6)(e) The Notice states that the Settlement
2 constitutes no admission of liability by the Defendants, and that the Court has not ruled on the merits
3 of the claims. It also states that the final settlement approval decision has yet to be made. The Class
4 Notice complies with the standards of fairness, completeness, and neutrality required of a combined
5 settlement-certification class notice disseminated under authority of the Court.

6 The Class Notice will identify the number of work weeks worked by each Class member
7 within the Class Period, and the estimated value of their individual portions of the settlement. Class
8 Members can contact the Administrator through a toll-free number if the information is inaccurate
9 or they have questions. The Class Notice will provide an estimate of the wages, penalties and interest
10 to be paid. Class Members need not submit additional forms or information., Unless a Class Member
11 opts out of the Class Settlement, Class Members do not need to submit anything to receive payment.

12 **IX. SCHEDULING A FINAL APPROVAL HEARING IS APPROPRIATE**

13 The last step in the settlement approval process is the formal hearing, at which the Court may
14 hear all evidence and argument to evaluate conclusively the proposed Settlement. At that hearing,
15 proponents of the proposed Settlement may explain and describe its terms, and offer argument to
16 support its final approval, and Settlement Class Members (or their counsel) may be heard to support
17 or oppose the Settlement.

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1 **X. CONCLUSION**

2 Plaintiffs respectfully request that the Court conditionally certify the proposed Class for
3 settlement, approve Patrick R. Kitchen and Kelly B. Hanker as Class Counsels, approve Plaintiffs
4 O'Connor, Raya and Shashua as the Class Representatives, approve Phoenix Class Action
5 Administration Solutions as the third-party Settlement Administrator, approve the form and method
6 of class notice, and approve the proposed mechanism for receiving and handling notices of election
7 to opt out of the Settlement and objections.

8
9 **PLAINTIFFS' COUNSELS**

10 DATED: December 14, 2023

KITCHIN LEGAL, APC

11
12 By: Patrick R. Kitchen
13 PATRICK R. KITCHIN
14 Attorneys for Plaintiffs ILDIKO O'CONNOR,
 LAURA RAYA AND DINA SHASHUA

15 DATED: December 14, 2023

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