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Superior Court of California
County of Los Angeles

MAY 01 2023

David W. Slayton, Executive Officer/Clerk of Court
By: N. Navarro, Deputy

**SUPERIOR COURT OF CALIFORNIA**

**COUNTY OF LOS ANGELES**

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| YAZMIN GONZALEZ, individually, and on behalf of all others similarly situated,<br><br>Plaintiff,<br><br>v.<br><br>BRANDED ONLINE, INC., a Delaware corporation; and DOES 1 through 100, inclusive,<br><br>Defendants. | Case No.: 20STCV29702<br><br>ORDER GRANTING MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT ON CONDITION |

## I. BACKGROUND

Plaintiff Yazmin Gonzalez sues her former employer, Defendant Branded Online, Inc., for alleged wage and hour violations. Defendant provides e-commerce services to third-party retailers and other vendors. Plaintiff seeks to represent a class of Defendant's current and former non-exempt employees.

The original complaint was filed August 5, 2020. On October 27, 2020, Plaintiff filed the operative First Amended Complaint alleging causes of action for: (1) failure to pay minimum wages (Labor Code §§ 1182.12, 1197); (2) failure to pay overtime wages (Labor Code §§ 510, 1198); (3) failure to provide required meal periods (Labor Code §§ 226.7, 512, 1198); (4) failure to provide required rest periods (Labor Code §§ 226.7, 1198); (5) failure to indemnify employees for necessary expenditures incurred in discharge of duties (Labor Code § 2802(a)); (6) failure to furnish accurate itemized wage statements (Labor Code §§ 226(a), 226(e)(2)(B)); (7) failure to timely pay all wages due to discharged and quitting employees (Labor Code §§ 201(a), 202, 203); (8) unfair and unlawful business practices (Bus. & Prof. Code §§ 17200 et seq.); and (9) civil penalties pursuant to the Private Attorneys General Act (Labor Code §§ 2698, et seq.) ("PAGA").

On November 5, 2021, the parties attended a full-day mediation presided over by mediator Kelly Knight, which did not result in settlement. On September 23, 2022, the parties participated in a second mediation presided over by Hon. Lisa Hart Cole (Ret.), which resulted in the parties' acceptance of a mediator's proposal. The parties subsequently finalized the terms of settlement in a long-form Class Action and PAGA Settlement Agreement (Settlement Agreement), a copy of which is attached to the Declaration of Taras Kick filed February 16, 2023 and formed the basis for Plaintiff's Motion for Preliminary Approval filed February 16, 2023 and noticed for hearing on April 20, 2023.

In advance of the hearing a "checklist" was issued. In response counsel filed on April 19, 2023 the Declarations of Michael Bui, Greg Taylor, and Tom T. Nagashima.

Following hearing the parties executed an Amended Settlement Agreement, attached as Exhibit A to the Declaration of Greg Taylor and filed April 24, 2023, at which time the matter stood submitted. All references below are to the Amended Settlement Agreement.

For the reasons set forth below, the Court preliminarily grants approval for the settlement on condition that, in connection with the Final Approval Hearing plaintiff and defendant file Declarations confirming that they have no financial interest in, or role in the governance of the proposed cy pres recipient, Public Citizen Foundation.

## II. THE TERMS OF THE SETTLEMENT

### A. SETTLEMENT CLASS AND RELATED DEFINITIONS

"Class" means all current and former non-exempt employees who worked for Defendant in the State of California at any time during the Class Period. (¶1.5)

"Class Period" means the period from August 5, 2016, through September 30, 2022. (¶1.12)

"Aggrieved Employee" means all Class Members who worked for Defendant during the PAGA Period. (¶1.4)

"PAGA Period" means the period from August 5, 2019, through September 30, 2022. (¶1.31)

"Participating Class Member" means a Class Member who does not submit a valid and timely Request for Exclusion from the Settlement. (¶1.35)

### B. THE MONETARY TERMS OF SETTLEMENT

The essential monetary terms are as follows:

- The Gross Settlement Amount ("GSA") is **$827,500** (¶3.1). This includes payment of a PAGA penalty of **$25,000** to be paid 75% to the LWDA ($18,750) and 25% to the Aggrieved Employees ($6,250) (¶3.2.5).
    - Escalator Clause: Based on its records, Defendant estimates that, as of the date of this Settlement Agreement, (1) there are 232 Class Members and 17,209 Total Workweeks during the Class period and (2) there were 159 Aggrieved Employees who worked 6,236 Pay Periods during the PAGA Period. If the calculated number of Class Members, Workweeks, or Pay Periods exceeds Defendant's estimate by more than 10%, then the Gross Settlement Amount shall be increased in proportion to the percentage increase in the number of Class Members, Workweeks, or Pay Periods in excess of 10%. (¶8)
- The Net Settlement Amount ("Net") (**$441,666.67**) is the GSA less:
    - Up to **$275,833.33** (33 1/3%) for attorney fees (¶3.2.2);
    - Up to **$65,000** for attorney costs (*Ibid.*);
    - Up to **$10,000** for a service award to the proposed class representative (¶3.2.1); and
    - Estimated **$10,000** for settlement administration costs (¶3.2.3).
- Employer-side payroll taxes will be paid by Defendant separately from the GSA (¶3.1).
- Assuming the Court approves all maximum requested deductions, approximately $441,666.67 will be available for automatic distribution to participating class members. Assuming full participation, the average settlement share will be approximately $1,903.73. ($441,666.67 Net ÷ 232 class members = $1,903.73). In addition, each Aggrieved Employee will receive a portion of the PAGA

penalty, estimated to be $39.30 per Aggrieved Employee. ($6,250 or 25% of $25,000 PAGA penalty ÷ 159 Aggrieved Employees = $39.30).

- There is no Claim Requirement (¶3.1).
- The settlement is not reversionary (¶3.1).
- Individual Settlement Share Calculation: Each Participating Class Member will receive an Individual Class Payment calculated by (a) dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating Class Members during the Class Period and (b) multiplying the result by each Participating Class Member's Workweeks. (¶3.2.4) Non-Participating Class Members will not receive any Individual Class Payments. The Administrator will retain amounts equal to their Individual Class Payments in the Net Settlement Amount for distribution to Participating Class Members on a pro rata basis. (¶3.2.4.2)
- PAGA Payments: The Administrator will calculate each Individual PAGA Payment by (a) dividing the amount of the Aggrieved Employees' 25% share of PAGA Penalties ($6,250) by the total number of PAGA Period Pay Periods worked by all Aggrieved Employees during the PAGA Period and (b) multiplying the result by each Aggrieved Employee's PAGA Period Pay Periods. (¶3.2.5.1)
- Tax Withholdings: Individual Class Payments will be allocated as 20% wages, 80% interest and penalties (¶3.2.4.1). The Administrator will report the Individual PAGA Payments on IRS 1099 Forms. (¶3.2.5.2)
- Funding of Settlement: Defendant shall fully fund the Gross Settlement Amount, and also fund the amounts necessary to fully pay Defendant's share of payroll taxes by transmitting the funds to the Administrator, as follows. Defendant shall

make a first transfer to the Settlement administrator of $206,875 plus agreed employer payroll taxes no later than 21 days after the Effective Date, provided the Effective Date is at least three quarters (270 days) after the signing of this Settlement Agreement. Defendant will transfer $124,125 plus agreed employer payroll taxes before the end of the next quarter (meaning within ninety days) after the first transfer. This is considered the second transfer. Defendant will make four additional transfers to the Administrator of $124,125 per quarter plus agreed employer payroll taxes each subsequent quarter (every ninety days) which will then cause the amount agreed to be paid under this Settlement Agreement to be transferred in full four quarters after the first quarterly transfer was made by Defendant to the Administrator. (¶4.3)

  - The Administrator will make a proportionate first distribution under this Settlement Agreement within 15 days of receiving the second transfer from Defendant, meaning $331,000 plus employer payroll taxes will have been transferred, meaning a proportionate distribution of 40%. A second distribution under this Settlement Agreement will be made by the Administrator within 15 days of receiving the last transfer from Defendant, which will be four quarters after the first transfer of $124,125 plus employer payroll taxes. (*Ibid.*)

- Distribution: The Administrator will make two distributions, as set forth in Paragraph 4.3. The first distribution will be within 15 days after Defendant funds the first 40% of the Gross Settlement Amount, and the second distribution will be with 15 days after the Defendant funds the remaining 60% of the Gross Settlement Fund, as per Paragraph 4.3. The Administrator will mail checks for all Individual Class Payments, all Individual PAGA Payments, the LWDA

PAGA Payment, the Administration Expenses Payment, the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment, and the Class Representative Service Payment in a proportionate percent amount each time. Disbursement of the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment and the Class Representative Service Payment shall not precede disbursement of Individual Class Payments and Individual PAGA Payments. (¶4.4)

- Uncashed Settlement Checks: The face of each check shall prominently state the date (not less than 180 days after the date of mailing) when the check will be voided. The Administrator will cancel all checks not cashed by the void date. (¶4.4.1) For any Class Member whose Individual Class Payment check or Individual PAGA Payment check is uncashed and cancelled after the void date, the Administrator shall transmit the funds represented by such checks to the proposed cy pres recipient, subject to Court approval, without further amendment to this Agreement, consistent with Code of Civil Procedure Section 384, subd. (b) ("Cy Pres Recipient"). The Parties propose that funds represented by any uncashed or undeliverable checks shall be distributed to Public Citizen Foundation, a section 501(c)(3) non-profit organization. The Parties, Class Counsel and Defense Counsel represent that they have no interest or relationship, financial or otherwise, with the intended Cy Pres Recipient. (¶4.4.3; Declaration of Taras Kick ¶25; Declaration of Tom Nagashima.) Plaintiff shall file a separate Declaration to this effect.

## C. TERMS OF RELEASES

- Releases of Claims: Effective on the date when Defendant fully funds the entire Gross Settlement Amount and fund all employer payroll taxes owed on the

Wage Portion of the Individual Class Payments, Plaintiff, Class Members, and Class Counsel will release claims against all Released Parties as follows: (¶5)

- Release by Participating Class Members Who Are Not Aggrieved Employees: All Participating Class Members, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, release Released Parties from (i) all claims that were alleged, or reasonably could have been alleged, based on the Class Period facts stated in the Operative Complaint, Plaintiff's PAGA Notice, or otherwise ascertained in the course of the Action. Except as set forth in Section 5.4 of this Agreement, Participating Class Members do not release any other claims, including claims for vested benefits, wrongful termination, violation of the Fair Employment and Housing Act, unemployment insurance, disability, social security, workers' compensation, or claims based on facts occurring outside the Class Period. (¶5.4)
- Release by Non-Participating Class Members Who Are Aggrieved Employees: All Non-Participating Class Members who are Aggrieved Employees are deemed to release, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, the Released Parties from all claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the PAGA Period facts stated in the Operative Complaint, the PAGA Notice, and ascertained in the course of the Action. (¶5.5)
- "Released Parties" means Defendant and each of its former and present directors, officers, shareholders, owners, management-level and exempt employees, attorneys, insurers, predecessors, successors, and assigns. (¶1.41)

- The named Plaintiff will also provide a general release and a waiver of the protections of Cal. Civ. Code §1542. (¶¶5.2-5.3)
- The releases are effective on the date when Defendant fully funds the entire Gross Settlement Amount, which would occur on the date of the final transfer of settlement funds pursuant to the payment plan in ¶4.3.

### D. SETTLEMENT ADMINISTRATION

- The proposed Settlement Administrator is Simpluris, Inc. (¶1.2), which has provided evidence that no counsel are affiliated with it and that it has adequate procedures in place to safeguard the data and funds to be entrusted to it. (See Declaration of Michael Bui.
- Settlement administration costs are estimated to be $10,000 (Kick Decl., Exhibit 4).
- Notice: The manner of giving notice is described below.
- Opt Out/Objection Dates: "Response Deadline" means 60 days after the Administrator mails Notice to Class Members and Aggrieved Employees, and shall be the last date on which Class Members may: (a) fax, email, or mail Requests for Exclusion from the Settlement, or (b) fax, email, or mail his or her Objection to the Settlement. Class Members to whom Notice Packets are resent after having been returned undeliverable to the Administrator shall have an additional 14 calendar days beyond the Response Deadline has expired. (¶1.43) The same deadline applies to the submission of workweek disputes. (¶7.6)
    - Because future PAGA claims are subject to claim preclusion upon entry of the Judgment, Non-Participating Class Members who are Aggrieved

Employees are deemed to release the claims identified in Paragraph 5.5 of this Agreement and are eligible for an Individual PAGA Payment. (¶7.5.4)

  - If the number of valid Requests for Exclusion identified in the Exclusion List exceeds 10% of the total of all Class Members, Defendant may, but is not obligated, elect to withdraw from the Settlement. (¶9)

- Notice of Final Judgment will be posted on the Settlement Administrator's website (¶7.8.1).

## III. SETTLEMENT STANDARDS AND PROCEDURE

California Rules of Court, rule 3.769(a) provides: "A settlement or compromise of an entire class action, or of a cause of action in a class action, or as to a party, requires the approval of the court after hearing." "Any party to a settlement agreement may serve and file a written notice of motion for preliminary approval of the settlement. The settlement agreement and proposed notice to class members must be filed with the motion, and the proposed order must be lodged with the motion." See Cal. Rules of Court, rule 3.769(c).

"In a class action lawsuit, the court undertakes the responsibility to assess fairness in order to prevent fraud, collusion or unfairness to the class, the settlement or dismissal of a class action. The purpose of the requirement [of court review] is the protection of those class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties." *Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal. App.4th 46, 60 [internal quotation marks omitted]; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 245, disapproved on another ground in *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal. 5th 260 ("*Wershba*"), [Court needs to "scrutinize the proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned."] [internal quotation marks omitted].

"The burden is on the proponent of the settlement to show that it is fair and reasonable. However, "a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small.'" *Wershba,* 91 Cal. App. 4th at 245 [citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802 ].

Notwithstanding an initial presumption of fairness, "the court should not give rubber-stamp approval." *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130 ("*Kullar*"). "[W]hen class certification is deferred to the settlement stage, a more careful scrutiny of the fairness of the settlement is required." *Carter v. City of Los Angeles* (2014) 224 Cal.App.4th 808, 819. "To protect the interests of absent class members, the court must independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished." *Kullar*, 168 Cal. App. 4th at 130. In that determination, the court should consider factors such as "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement." *Id.* at 128. "Th[is] list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case." *Wershba,* 91 Cal. App. $4^{th}$ at 245.

At the same time, "[a] settlement need not obtain 100 percent of the damages sought in order to be fair and reasonable. Compromise is inherent and necessary in the settlement process. Thus, even if 'the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated,' this is no bar to a class settlement because 'the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation.'" *Id.* at 250.

## IV. ANALYSIS OF SETTLEMENT AGREEMENT

### A. THERE IS A PRESUMPTION OF FAIRNESS

The settlement is entitled to a presumption of fairness for the following reasons:

#### 1. The settlement was reached through arm's-length bargaining

On November 5, 2021, the parties attended a full-day mediation presided over by mediator Kelly Knight, which did not result in settlement. (Kick Decl. ¶11.) On September 23, 2022, the parties participated in a second mediation presided over by Hon. Lisa Hart Cole (Ret.), which resulted in the parties' acceptance of a mediator's proposal. The parties subsequently finalized the terms of settlement in the long-form agreement. (*Id.* at ¶13.)

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**2. The investigation and discovery were sufficient**

Class Counsel represents that the parties engaged in formal discovery, and that Plaintiff prepared and propounded interrogatories, production demands, and multiple sets of requests for admissions on Defendant. (*Id.* at ¶10.) After the first mediation did not result in settlement, Plaintiff resumed formal discovery efforts, and the parties continued to meet and confer regarding Defendant's discovery responses. Defendant also propounded interrogatories and production demands on Plaintiff. Plaintiff took the deposition of Defendant's Person Most Knowledgeable ("PMK"), propounded additional written discovery, and obtained declarations from putative class members after a Belaire-West mailing. (*Id.* at ¶11.)

Class Counsel represents that in addition to Defendant's responses and supplemental responses to discovery requests, Defendant also informally produced documents and information for the purposes of mediation on the entry of a stipulated protective order, including additional time and pay records from the 2017 to 2018 time period. (*Id.* at ¶12.) Class Counsel retained labor violation statistician Dr. Richard Drogin, who tabulated meal breaks in the timekeeping data provided by Defendant and analyzed the data for systemic meal and rest break violations.

In addition, Class Counsel retained economic expert Berger Consulting Group, who analyzed the data and created a damages model based on it. (*Ibid.*) Plaintiff's counsel represents that Berger Consulting's November 2021 analysis was based on information provided by the defense about the class, which contained data for 94.8% of class members (218/230) and 61.4% of class workweeks at that time (7,904/12,876). The margin of error for the employee counts would be about 1.5%, and by workweek would be about 0.7%. Taylor Dec. ¶3.

Class Counsel also represents, based on their review of publicly available information, that Defendant is operating with a negative cashflow and debt in excess of its cash assets since 2021. (*Id.* at ¶28.)

This is sufficient to value the case for settlement purposes.

### 3. Counsel is experienced in similar litigation

Class Counsel represent that they are experienced in class action litigation, including wage and hour class actions. (*Id.* at ¶2.)

### 4. Percentage of the class objecting

This cannot be determined until the final fairness hearing. Weil & Brown et al., Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2019) ¶ 14:139.18 ["Should the court receive objections to the proposed settlement, it will consider and either sustain or overrule them at the fairness hearing."].

## B. THE SETTLEMENT MAY PRELIMINARILY BE CONSIDERED FAIR, ADEQUATE, AND REASONABLE

Notwithstanding a presumption of fairness, the settlement must be evaluated in its entirety. The evaluation of any settlement requires factoring unknowns. "As the court does when it approves a settlement as in good faith under Code of Civil Procedure section 877.6, the court must at least satisfy itself that the class settlement is within the 'ballpark' of reasonableness. See *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 499–500. While the court is not to try the case, it is 'called upon to consider and weigh the nature of the claim, the possible defenses, the situation of the parties, and *the exercise of business judgment* in determining whether the proposed settlement is reasonable.' (*City of Detroit v. Grinnell Corporation, supra,* 495 F.2d at p. 462, italics added.)" *Kullar,* 168 Cal.App.4th at 133 (emphasis in original).

### 1. Amount Offered in Settlement

The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." (*Id.* at 130.)

Class Counsel estimated Defendant's maximum exposure at $4,149,414.09, based on the following analysis:

| **Violation** | **Maximum Exposure** |
|---|---:|
| Meal Break Violations | $62,595.39 |
| Rest Break Violations | $942,342.94 |
| Unpaid Minimum Wages | $94,218.22 |
| Liquidated Damages | $94,218.22 |
| Overtime Wages (1.5x) | $187,396.96 |
| Overtime Wages (2x) | $1,283.88 |
| Business Expenses | $32,190.00 |
| Waiting Time Penalties | $451,778.88 |
| Wage Statement Penalties | $428,387.00 |
| PAGA Penalties | $1,855,002.60 |
| **Total** | **$4,149,414.09** |

(MPA at pp. 3-7; Kick Decl. ¶¶17-18.)

Class Counsel obtained a gross settlement valued at $827,500. This is approximately 19.9% of Defendant's maximum exposure and approximately 64% of the maximum exposure before penalties and liquidated damages.

**2. The Risks of Future Litigation**

The case is likely to be expensive and lengthy to try. Procedural hurdles (e.g., motion practice and appeals) are also likely to prolong the litigation as well as any recovery by the class members. Even if a class is certified, there is always a risk of decertification. *Weinstat v. Dentsply Intern., Inc.* (2010) 180 Cal.App.4th 1213, 1226 ["Our Supreme Court has recognized that trial courts should retain some flexibility in conducting class actions, which means, under suitable circumstances, entertaining successive motions on certification if the court subsequently discovers that the propriety of a class action is not appropriate."].) Further, the settlement was negotiated and endorsed by Class Counsel who, as indicated above, are experienced in class action litigation. Based upon their investigation and analysis, the attorneys representing Plaintiff and the class are of the opinion that this settlement is fair, reasonable, and adequate. (Kick Decl. ¶18.)

The Court also notes that Plaintiff brings a PAGA claim on behalf of the LWDA, which was sent a copy of the Settlement Agreement on February 16, 2023 and has not yet objected. (Kick Decl., Exhibit 10.) Any objection by it will be considered at the final fairness hearing.

**3. The Releases Are Limited**

The Court has reviewed the Releases to be given by the absent class members and the named plaintiff. The releases, described above, are tailored to the pleadings and release only those claims in the pleadings. There is no general release by the absent class. The named plaintiff's general release is appropriate given that he was represented by counsel in its negotiation.

**4. Conclusion**

Class Counsel estimated Defendant's maximum exposure at $4,149,414.09. Class Counsel obtained a gross settlement valued at $827,500. Given the uncertain outcomes, including the potential that the class might not be certified, that liability is a contested issue, and that the full amount of penalties would not necessarily be assessed even if the class is certified and liability found, the settlement is within the "ballpark of reasonableness."

## C. CONDITIONAL CLASS CERTIFICATION MAY BE GRANTED

A detailed analysis of the elements required for class certification is not required, but it is advisable to review each element when a class is being conditionally certified. *Amchem Products, Inc. v. Winsor* (1997) 521 U.S. 591, 620, 622-627. The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives." *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021.

**1. The Proposed Class is Numerous**

There are approximately 232 putative Class Members. (Kick Decl. ¶5.) Numerosity is established. *Franchise Tax Bd. Limited Liability Corp. Tax Refund Cases* (2018) 25 Cal.App.5th 369, 393: stating that the *"requirement that there be many parties to a class action is liberally construed,"* and citing examples wherein classes of as little as 10, *Bowles v. Superior Court* (1955) 44 Cal.2d 574, and 28, *Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, were upheld).

**2. The Proposed Class Is Ascertainable**

"A class is ascertainable, as would support certification under statute governing class actions generally, when it is defined in terms of objective characteristics and common transactional facts that make the ultimate identification of class members possible when that identification becomes necessary." *Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 961 (*Noel*).

The class is defined above. Class Members are ascertainable through Defendant's records. (Kick Decl. ¶5.)

**3. There Is A Community of Interest**

"The community of interest requirement involves three factors: '(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.'" *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.

As to predominant questions of law or fact, Plaintiff contends that all Class Members were subject to common policies and practices. (MPA at 15:9-12.)

As to typicality, Plaintiff asserts that she is a member of the proposed class, and was subject to the same employment policies and practices as all other Class Members. (MPA at 15:14-17.)

As to adequacy, Plaintiff represents that she is aware of the duties and risks of serving as class representative, and has participated in the litigation. (Declaration of Yazmin Gonzalez ¶¶6-8.) As previously stated, Class Counsel have experience in class action litigation.

**4. Substantial Benefits Exist**

Given the relatively small size of the individual claims, a class action is superior to separate actions by the class members.

## D. THE PROPOSED NOTICE PLAN MEETS THE REQUIREMENTS OF DUE PROCESS

The purpose of notice is to provide due process to absent class members. A practical approach is required, in which the circumstances of the case determine what forms of notice will adequately address due process concerns. *Noel,* 7 Cal.5th at 982. California Rules of Court, rule 3.766 (e) provides that in determining the manner of the notice, the court must consider: (1) the interests of the class; (2) the type of relief requested; (3) the stake of the individual class members; (4) the cost of notifying class members; (5) the resources of the parties; (6) the possible prejudice to class members who do not receive notice; and (7) the res judicata effect on class members.

**1. Method of class notice**

Not later than 10 days after the Court grants Preliminary Approval of the Settlement, Defendant will deliver the Class Data to the Administrator, in the form of a Microsoft Excel spreadsheet. (¶4.2) Using best efforts to perform as soon as possible, and in no event later than 14 days after receiving the Class Data, the Administrator will send to all Class Members identified in the Class Data, via first-class United States Postal Service ("USPS") mail, the Class Notice, in English with Spanish translation. (¶7.4.2)

Not later than 3 business days after the Administrator's receipt of any Class Notice returned by the USPS as undelivered, the Administrator shall re-mail the Class Notice using any forwarding address provided by the USPS. If the USPS does not provide a forwarding address, the Administrator shall conduct a Class Member Address Search, and re-mail the Class Notice to the most current address obtained. The Administrator has no obligation to make further attempts to locate or send Class Notice to Class Members whose Class Notice is returned by the USPS a second time. (¶7.4.3) The deadlines for Class Members' written objections, Challenges to Workweeks and/or Pay Periods, and Requests for Exclusion will be extended an additional 14 days beyond the 60 days otherwise provided in the Class Notice for all Class Members whose notice is re-mailed. (¶7.4.4)

**2. Content of class notice.**

A copy of the proposed class notice is attached to the Settlement Agreement. The notice includes information such as: a summary of the litigation; the nature of the settlement; the terms of the settlement agreement; the maximum deductions to be made from the gross settlement amount (i.e., attorney fees and costs, the enhancement award, and claims administration costs); the procedures and deadlines for participating in, opting out of, or objecting to, the settlement; the consequences of participating in, opting out of, or objecting to, the settlement; and the date, time, and place of the final approval hearing. See Cal Rules of Court, rule 3.766(d). It is to be given in both English and Spanish (¶1.11).

**3. Settlement Administration Costs**

Settlement administration costs are estimated at **$10,000**, including the cost of notice (¶3.2.3). Prior to the time of the final fairness hearing, the settlement administrator must submit a declaration attesting to the total costs incurred and anticipated to be incurred to finalize the settlement for approval by the Court.

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### E. ATTORNEY FEES AND COSTS

California Rule of Court, rule 3.769(b) states: "Any agreement, express or implied, that has been entered into with respect to the payment of attorney fees or the submission of an application for the approval of attorney fees must be set forth in full in any application for approval of the dismissal or settlement of an action that has been certified as a class action."

Ultimately, the award of attorney fees is made by the court at the fairness hearing, using the lodestar method with a multiplier, if appropriate. *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095-1096; *Ramos v. Countrywide Home Loans, Inc.* (2000) 82 Cal.App.4th 615, 625-626; *Ketchum III v. Moses* (2000) 24 Cal.4th 1122, 1132-1136. In common fund cases, the court may use the percentage method. If sufficient information is provided a cross-check against the lodestar may be conducted. *Laffitte v. Robert Half International, Inc.* (2016) 1 Cal.5th 480, 503. Despite any agreement by the parties to the contrary, "the court ha[s] an independent right and responsibility to review the attorney fee provision of the settlement agreement and award only so much as it determined reasonable." *Garabedian v. Los Angeles Cellular Telephone Company* (2004) 118 Cal.App.4th 123, 128.

The question of class counsel's entitlement to **$275,833.33** (33 1/3%) in attorney fees will be addressed at the final fairness hearing when class counsel brings a noticed motion for attorney fees. If a lodestar analysis is requested class counsel must provide the court with current market tested hourly rate information and billing information so that it can properly apply the lodestar method and must indicate what multiplier (if applicable) is being sought.

Class counsel should also be prepared to justify the costs sought (capped at **$65,000**) by detailing how they were incurred.

### F. SERVICE AWARD

The Settlement Agreement provides for a service award of up to **$10,000** for the class representative. Trial courts should not sanction enhancement awards of thousands of dollars with "nothing more than *pro forma* claims as to 'countless' hours expended, 'potential stigma' and 'potential risk.' Significantly more specificity, in the form of quantification of time and effort expended on the litigation, and in the form of reasoned explanation of financial or other risks incurred by the named plaintiffs, is required in order for the trial court to conclude that an enhancement was 'necessary to induce [the named plaintiff] to participate in the suit . . . .'" *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 806-807, italics and ellipsis in original.

The Court will decide the issue of the enhancement award at the time of final approval.

## V. <u>CONCLUSION AND ORDER</u>

Contingent upon the named plaintiff and Defendant confirming by Declaration filed with the Final Approval motion that they have no financial interest in, or involvement in the governance of, the proposed cy pres recipient, the Court hereby:

(1) Grants preliminary approval of the settlement as fair, adequate, and reasonable;

(2) Grants conditional class certification;

(3) Appoints Yazmin Gonzalez as Class Representative;

(4) Appoints The Kick Law Firm, APC as Class Counsel;

(5) Appoints Simpluris, Inc. as Settlement Administrator;

(6) Approves the proposed notice plan; and

(7) Approves the proposed schedule of settlement proceedings as follows:

- Deadline for Defendant to provide class list to settlement administrator: May 11, 2023 (within 10 calendar days from preliminary approval)
- Deadline for settlement administrator to mail notices: May 25, 2023 (within 14 calendar days from receipt of the class list)
- Deadline for class members to opt out: July 24, 2023 (60 calendar days from the initial mailing of the Notice Packets)
- Deadline for class members to object: July 24, 2023 (60 calendar days from the initial mailing of the Notice Packets)
- Deadline for class counsel to file motion for final approval: August 9, 2023 (16 court days prior to final fairness hearing)
- Final fairness hearing: August 31, 2023 at 9:00 a.m.

Any failure to fully and timely comply with the contingency may result in the modification of the terms of settlement respecting the cy pres recipient.

Dated: 4/28/23

Maren E. Nelson

MAREN E. NELSON
Judge of the Superior Court