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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE**

ANNMARIE ALBANEZ, individually,
and on behalf of other members of the
general public similarly situated;

Plaintiff,

v.

OCMBC, INC., a California corporation
d/b/a LOANSTREAM MORTGAGE; and
DOES 1 through 100, inclusive;

Defendants.

Case No. 30-2019-01078636-CU-OE-CXC

Honorable Kirk Nakamura
Department CX-103

CLASS ACTION

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT, CONDITIONAL
CERTIFICATION, APPROVAL OF CLASS
NOTICE, SETTING OF FINAL APPROVAL
HEARING DATE; MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT
THEREOF**

[Reservation ID: 73492021]

[Declaration of Proposed Class Counsel
(Douglas Han); and [Proposed] Order filed
concurrently herewith]

Hearing Date: April 22, 2021
Hearing Time: 2:00 p.m.
Department.: CX-103

Filed: June 24, 2019
FAC: November 16, 2020
Trial: None Set

1 **PLEASE TAKE NOTICE** that on April 22, 2021 and at 2:00 p.m., or as soon as the
2 matter may be heard before the Honorable Kirk Nakamura in Department CX103 of the Orange
3 County Superior Court, located at 751 West Santa Ana Boulevard, Santa Ana, California 92701,
4 Plaintiff Annmarie Albanez (“Plaintiff”) will and hereby move for an order:

- 5 • Granting Preliminary Approval of the proposed class action settlement described
6 herein and as set forth in the parties’ Stipulation of Resolution (“Settlement,”
7 “Agreement,” or “Settlement Agreement”), attached as **“EXHIBIT 1”** to the
8 Declaration of Douglas Han, including, and not limited to, the means of allocation
9 and distribution of funds, and the allocations for penalties under the California
10 Labor Code Private Attorneys General Act of 2004 (“PAGA”), attorneys’ fees,
11 actual litigation costs, Class Representative Service Fee, and the Claims
12 Administration Costs;
- 13 • Conditionally certifying the proposed Class for settlement purposes only;
- 14 • Appointing Plaintiff as the Class Representative;
- 15 • Appointing Justice Law Corporation as Class Counsel;
- 16 • Approving the proposed Notice of Proposed Class Action Settlement (“Class
17 Notice” or “Notice”) attached as “Exhibit 1” to the Settlement Agreement;
- 18 • Approving the proposed form, content, and procedure of the request for
19 exclusion from the Settlement by a Class Member (“Opt-Out Request”).
- 20 • Directing the mailing of the proposed Class Notice and Opt-Out Request with a
21 postage-paid return envelope (hereinafter collectively referred to as the “Notice
22 Packet”) to the proposed Class;
- 23 • Approving the proposed deadlines for the notice and Claims Administration
24 process;

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- Approving Simpluris, Inc. as the Claims Administrator; and
- Scheduling a hearing to consider whether to grant Final Approval of the Settlement, at which time the Court will also consider whether to grant Final Approval of the requests for attorneys' fees, actual litigation costs, Class Representative Service Fee, and approval of the allocation for PAGA penalties and the Claims Administration Costs.

This motion is based upon the following memorandum of points and authorities; the Declaration of proposed Class Counsel (Douglas Han); and the [Proposed] Order lodged together with this motion, as well as the pleadings and other records on file with the Court in this matter, and such documentary evidence and oral argument as may be presented at the hearing on this motion.

Dated: March 17, 2021

JUSTICE LAW CORPORATION

By:



Douglas Han
Attorneys for Plaintiff

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1 **I. INTRODUCTION**

2 This motion seeks preliminary approval of a non-reversionary \$600,000 proposed wage
3 and hour class action settlement by Plaintiff on behalf of herself and all non-exempt employees
4 within the State of California who are or were employed by Defendant OCMBC, Inc., d/b/a
5 Loanstream Mortgage (“Defendant”) in the State of California at any time from June 24, 2015, to
6 August 6, 2020, inclusively (“Class,” “Class Members,” and “Class Period”). During the Class
7 Period, Plaintiff estimates that there are approximately two hundred forty-three (243) individuals
8 that would be included in this Settlement.

9 It is requested this Court grant Preliminary Approval, as, when analyzing the strengths
10 and vulnerabilities of the class claims along-side Defendant’s potential liability exposure, this
11 proposed settlement of \$600,000 – **with an average settlement share amount estimated at**
12 **\$1,337.44¹** – is well within the “ballpark” of reasonableness.

13 As the following sections show, Class Counsel is convinced that the proposed Settlement
14 is in the best interests of the Class based on the negotiations and a detailed knowledge of the
15 issues present in this action. The length and risks of trial and perils of litigation that effect the
16 value of the claims were all carefully weighed. In addition, the defenses asserted by Defendant,
17 particularly, the uncertainty of class certification, the difficulties of complex litigation, the
18 lengthy process of establishing specific damages and various possible delays and appeals, were
19 also carefully considered by Class Counsel in arriving at the proposed Settlement.

20 **II. BACKGROUND**

21 Defendant is a full-service mortgage lender that specializes in residential financing
22 through mortgage brokers, bankers, and its networks, has been focused on the residential
23 mortgage lending market for over thirty (30) years, and offers a wide array of products and rates.
24 This case involves all non-exempt employees within the State of California who are or were
25 employed by Defendant in the State of California at any time from June 24, 2015, to August 6,
26 2020, inclusively. Plaintiff alleges that at all times during the Class Period, Defendant’s non-
27

28 ¹ \$325,000 (Net Settlement Fund) / 243 (Class Members) = \$1,337.44. Plaintiff will submit the actual high, average
and low estimated settlement shares once the notice process is complete.

1 exempt employees work and/or worked on an hourly basis. (Declaration of Douglas Han (“Han
2 Dec.”) ¶ 8).

3 Plaintiff is a former employee of Defendant who filed a wage and hour class action
4 lawsuit on behalf of the current and former non-exempt employees who worked for Defendant
5 within the State of California at any time during the Class Period. Plaintiff’s allegations are that,
6 since June 24, 2015, Defendant has violated the California Labor Code by failing to pay
7 minimum and overtime wages, provide meal and rest periods, provide timely wages during
8 employment, provide timely wages during termination, provide complete and accurate wage
9 statements, and reimburse necessary business expenses. (Han Dec. ¶ 9). There are no other
10 pending representative PAGA or class actions that are related or could potentially overlap with
11 this case. (Han Dec. ¶ 10).

12 The Parties agreed to attend a mediation of Plaintiff’s claims on August 6, 2020. At the
13 conclusion of mediation, the Parties were able to reach an agreement on a settlement of the class
14 action. (Han Dec. ¶ 11).

15 Defendant denies the allegations of the class action in their entirety, denies any liability
16 or wrongdoing of any kind associated with the claims alleged in this action, and further denies
17 that, for any purpose other than settling this action, this matter is appropriate for class treatment.
18 Defendant further contends that it has complied at all times with all applicable California laws,
19 the California Labor Code, the applicable California Wage Order(s), and the Unfair Competition
20 Law. Defendant finally contends that, if this matter were to be litigated further, it would have
21 strong defenses to class certification and on the merits. (Han Dec. ¶ 12).

22 **III. INVESTIGATION/ LITIGATION HISTORY**

23 **a. Discovery, Investigation, and the Parties’ Staunchly Conflicting Positions**

24 After filing Plaintiff’s complaint, both Parties engaged in discovery. Plaintiff propounded
25 one (1) set of requests for production, one (1) set of requests for admission, one (1) set of special
26 interrogatories, and one (1) set of form interrogatories. Defendant also requested formal
27 discovery from Plaintiff. After reviewing Defendant’s responses, Plaintiff further met and
28 conferred to obtain additional responses and obtained supplemental responses. Additionally,

1 Parties met and conferred regarding the scope and the extent of informal discovery and data
2 exchange. (Han Dec. ¶ 13).

3 As the result of investigation and formal and informal discovery conducted by Plaintiff,
4 Defendant produced a large volume of documents including employee handbooks, meal and rest
5 period policies, Plaintiff's personnel files, payroll records, and time records. (Han Dec. ¶ 14).

6 Plaintiff also was in constant communication with a dozen current and former non-
7 exempt employees of Defendant. These employees apprised Plaintiff of their experiences
8 working for Defendant and provided Plaintiff with relevant documents, including the contact
9 information for other putative class members. (Han Dec. ¶ 15).

10 Based upon Defendant's information and document production, as well as interviews
11 Plaintiff had with Class Members, Plaintiff contends – and Defendant denies – that Defendant
12 did not provide compliant meal and rest periods. With respect to meal periods, Plaintiff asserts
13 that Defendant's policies lacked any provision stating that employees were required to start their
14 meal period before the end of the fifth hour of their shift, and Defendant's handbooks did not
15 make any reference to a second meal break. Additionally, Plaintiff contends that Defendant
16 failed to provide proper meal and rest breaks as a matter of practice. Specifically, due to the high
17 volume of work and the fact that the funding deadline was set in the afternoon, it was difficult
18 for employees to take timely, full, and complete meal periods. Employees were also constantly
19 overwhelmed with urgent deadlines to meet; production numbers to maintain, queues to work
20 through; and a high volume of calls, emails and texts to make and follow up on. The functional
21 result of Defendant's policy was for employees to clock out for meal periods and continue
22 working through them. For similar reasons, employees were frequently required to forego their
23 rest breaks as well. Finally, Plaintiff asserts that Defendant did not have policy or practice to pay
24 premium wages for failing to provide employees with legally mandated meal and rest breaks.
25 (Han Dec. ¶ 16).

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1 Additionally, Plaintiff contends – and Defendant denies – that Defendant did not
2 compensate employees for all hours worked. Plaintiff asserts that Defendant had a rounding
3 policy which favored Defendant in 2016 and 2017 which deprived Class Members of wages.
4 (Han Dec. ¶ 17).

5 Moreover, Plaintiff contends – and Defendant denies – that Defendant failed to factor
6 non-discretionary bonuses and incentives into employees’ regular rate of pay. Specifically,
7 Plaintiff asserts that while Defendant offers non-discretionary bonus payments, it fails to factor
8 these payments into employees’ regular rate for purposes of overtime compensation. (Han Dec.
9 ¶ 18).

10 Further, Plaintiff contends – and Defendant denies – that Defendant failed to calculate
11 and pay employees sick leave using the regular rate of pay. Plaintiff asserts that during the entire
12 Class Period, Defendant’s practice is to pay sick leave at employee’s hourly rate of pay, which
13 does not comport with any of the methods set forth in the Labor Code. (Han Dec. ¶ 19).

14 Finally, Plaintiff contends – and Defendant denies – that Defendant failed to reimburse
15 employees for necessary business expenses. Plaintiff asserts that Defendant requires employees
16 to use their personal cell phones for work related purposes. Plaintiff contends that employees
17 would get calls from other coworkers and clients would text or call regarding work related
18 matters. (Han Dec. ¶ 20).

19 Defendant denies Plaintiff’s contentions in their entirety. Defendant denies Plaintiff’s rest
20 and meal break contentions, on the grounds that it provided rest and meal periods within
21 compliant times and that non-exempt employees were given discretion as to when to take their
22 rest and meal periods. Defendant contends that its rest and meal period policies complied with
23 California law and that non-exempt employees could use their rest period and meal period time
24 for their own purposes. Finally, Defendant contends that whether non-exempt employees took
25 meal and rest periods during compliant time frames and were relieved of all duties are questions
26 that could only be resolved by resorting to individualized inquiries to each non-exempt employee
27 and therefore class certification would not be appropriate. With respect to off-the-clock work,
28 Defendant contends that employees were prohibited from working off-the-clock and that

overtime was authorized and paid as evidenced by the numerous overtime hours that were paid. Defendant also contends that as office employees there were provided with phone to use and that there was no reason to use their personal phone for business purposes other than their own preference. (Han Dec. ¶ 21).

Per the above, the Parties took staunchly conflicting positions with respect to Defendant's policies and procedures and their effect on non-exempt employees.

b. The Parties Attended Mediation Which Resulted in the Joint Stipulation

The Parties agreed to go to mediation with experienced wage and hour mediator, Marc Feder. The mediation took place on August 6, 2020, and ultimately the parties were able to reach an agreement on settlement, the terms of which were memorialized in a Settlement Agreement that the Parties seek preliminary approval of in the instant motion. (Han Dec. ¶ 22; Ex. 1).

c. Terms of the Proposed Settlement

i. Deductions from the Settlement

The Parties have agreed (subject to and contingent upon the Court's approval) that this action be settled and compromised for the non-reversionary total sum of \$600,000 ("Gross Settlement Fund" or "GSF") which includes, subject to Court approval: (a) attorneys' fees of up to \$210,000 (thirty-five percent (35%) of the GSF) to compensate Class Counsel for work already performed and all work remaining to be performed in documenting the settlement, administering the settlement and securing Court approval; (b) reimbursement for actual litigation costs to Class Counsel in a sum not to exceed \$20,000²; (c) Class Representative Service Fee to the Class Representative in a sum not to exceed \$10,000 in consideration for a general release of all claims against Defendant arising from the pleaded allegations and her employment, for initiating and prosecuting the class action complaint, serving as Class

² The amount of the actual litigation costs will be provided to the Court in conjunction with Plaintiff's motion for final approval. At that time, Plaintiff will ask the Court to approve the amount of these actual litigation costs. If Plaintiff's actual litigation costs exceed \$20,000 Plaintiff will only seek reimbursement in the amount of \$20,000. If Plaintiff's actual litigation costs are lower than \$20,000, Plaintiff will seek reimbursement of her costs. With the exception of remaining funds due to non-cashed checks, any difference between the amounts allocated under the Settlement and those approved by the Court, including reimbursement for actual litigation costs, shall be distributed to Eligible Class Members in proportion to the number of weeks of their tenure during the Class Period and the total number of work weeks among Eligible Class Members. (Han Dec. ¶ 24).

Representative, for her work performed, and for the risks undertaken for the payment of attorneys' fees and costs in the event they had been unsuccessful in their matters; (d) Claims Administration Costs to Simpluris, Inc. ("Simpluris"), not to exceed \$15,000; (e) penalties paid pursuant to PAGA to the Labor and Workforce Development Agency ("LWDA") in the amount of \$15,000 (which is seventy-five percent (75%) of \$20,000 allocated to Plaintiff's claims under PAGA); (f) employees' share of taxes, deductions, and withholdings; and (g) the total possible aggregate of the PAGA Payment to be paid to all non-exempt employees who worked for Defendant within the State of California between August 19, 2019 through August 6, 2020 ("Eligible Aggrieved Employees" and "PAGA Timeframe"). (Han Dec. ¶ 23). Defendant is responsible for its share of the payroll taxes, which will not be deducted from the Gross Settlement Fund. (*Id.*)

ii. Calculation of the Settlement Payments to Class Members

After all Court-approved deductions from the GSF, it is estimated that \$325,000 ("Net Settlement Fund" or "NSF"), less all applicable employee taxes, will be distributed to Class Members – **with an average settlement share estimated at \$1,337.44**. Subject to the terms and conditions of the Settlement, the Claims Administrator shall make payments to Class Members who have not opted out ("Eligible Class Members") only after Defendant has made payment of the entire Settlement Fund pursuant to the Settlement. The Claims Administrator will calculate and issue settlement checks to Eligible Class Members based on the following formula:

After subtracting the attorneys' fees, costs, incentive, and Claims Administrator's costs, and penalties paid pursuant to PAGA penalties, the Claims Administrator shall take the balance (Net Settlement Fund) and divide that amount into the total eligible work weeks in the Class Period to determine the value of each class-member workweek. The award for each Class Member shall be determined by multiplying the value of each class workweek by the number of workweeks worked by the Class Member in the Class Period. That is, each Class Member's share will be determined by dividing the Net Settlement Fund by the total number of weeks worked by the Class Members during the Class Period, multiplied by the total number of weeks individually worked by the claiming Class Member during the Class Period.

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1 The \$5,000 (twenty-five percent (25%) of the PAGA payment in the amount of
2 \$20,000) shall be paid to the Eligible Aggrieved Employees in proportion to the
3 number of workweeks that he or she worked during the PAGA Timeframe.

4 The precise number of work weeks per Class Member will not be known until Defendant has
5 tabulated them, following preliminary approval. The settlement payout to the Class will be
6 computed as eighty percent (80%) as penalties, reimbursement, and interest and twenty percent
7 (20%) as wages. The Claims Administrator will pay from the Net Settlement Fund the
8 employees' portion for statutory withholding amounts. The payment of taxes and withholdings
9 shall be calculated based upon Defendant's payroll records for each Class Member, including W-
10 4 forms. The Claims Administrator shall provide, as appropriate, an IRS Form 1099 to each
11 Class Member, named Plaintiff, and Class Counsel. PAGA Payments shall be designated as
12 100% penalties, for which an IRS Form 1099 will issue. Under no circumstances will any
13 portion of the \$600,000 settlement revert to Defendant. (Han Dec. ¶ 25).

14 The Class Members are responsible for their share of the payroll taxes, which shall be
15 deducted from their settlement checks. Defendant is responsible for its share of the payroll taxes,
16 and these taxes will not be deducted from the Gross Settlement Fund. Defendant will separately
17 pay its share of the employer payroll taxes which are due with respect to the portion of the
18 Settlement designated as wages. (Han Dec. ¶ 26).

19 **iii. The Allocation of Twenty Percent (20%) Wages and Eighty Percent**
20 **(80%) Penalties, Reimbursement, and Interest are Justified Under the**
21 **Claims of this Case**

22 The realistic estimate of total exposure is \$887,831.73 at the low end and \$895,445.47 at
23 the high end. (Han Dec. ¶ 57). The realistic exposure at the low end based on meal and rest
24 premiums/penalties and overtime/minimum wage claims equals \$321,731.73. The
25 overtime/minimum wage are classified as wages meal and rest premiums can be classified as
26 either wages or penalties. One-half of the meal and rest premiums exposure (\$153,252.13) plus
27 the overtime/minimum wage and off-the-clock exposure (\$22,841) claim equals \$176,093.34,
28 which consists of approximately twenty percent (19.8%) of the low end of the realistic exposure.
Thus, the wages are were allocated at twenty percent (20%), while the allocation of eighty

1 percent (80%) of the settlement payout to each penalties, reimbursements, and interests that have
2 no adverse consequence to Class Members, they will not be subject to tax withholding whether
3 the remainder is characterized as a penalty, interest, or reimbursement.

4 **iv. Notice to the Class**

5 Within twenty (20) days of the Court's signing of the order of Preliminary
6 Approval, Defendant shall cause to be delivered by email or otherwise to the Claims
7 Administrator a list of the Class Members that includes their names, last known addresses, social
8 security numbers, and number of workweeks during the Class Period, all of which information
9 shall be based upon Defendant's employment records ("Class List"). Within ten (10) days after
10 delivery of the Class List, the Claims Administrator will mail the Notice Packet to each Class
11 Member in accordance with the Court's order of Preliminary Approval, with written verification
12 to be provided to all counsel of record and to the Court at least twenty (20) days prior to the date
13 of the Fairness Hearing. The Notice Packet advises the Class of the Settlement terms, their rights
14 to participate in the settlement, and how to and when to object or request exclusion from the
15 settlement. Class Members are not required to submit a claim form to receive payment. The
16 Notice Packet will only be provided in English as this labor force is in the mortgage industry that
17 deals with high level English literacy and fluency. (Han Dec. ¶ 27). The proposed Class Notice
18 is attached as Exhibit 1 to the Settlement Agreement, which is Exhibit 1 to the Declaration of
19 Douglas Han.

20 **v. Distribution of Funds**

21 The Claims Administrator shall advise Defendant of the amounts required to fund the
22 Qualified Settlement Fund as set forth herein. The Gross Settlement Fund shall be funded by
23 Defendant in two installments. If no objection to the settlement is made, the first one-half of the
24 Gross Settlement Fund (\$300,000) shall be tendered to the Claims Administrator in an interest-
25 bearing trust account within fifteen (15) days after the final approval order. If an objection to the
26 settlement is made but no appeal is filed, the first one-half of the Gross Settlement shall be
27 tendered to the Claims Administrator within fifteen (15) days of the end of the period in which
28 an appeal could be filed. If an appeal is filed, the first one-half of the Gross Settlement shall be

1 tendered to the Claims Administrator within fifteen (15) days of the date the judgment is final
2 and no longer subject to appeal. The second one-half of the Gross Settlement Fund (\$300,000)
3 shall be tendered to the Claims Administrator on February 14, 2022, which is five hundred forty-
4 nine (549) days after the date the Parties executed the Memorandum of Understanding, which is
5 assuming the judgment is final and no longer subject to appeal. At no time prior to final approval
6 of the Settlement shall Defendant be required to escrow any portion of the Settlement Amount.
7 (Han Dec. ¶ 28).

8 Within eighteen (18) calendar days following the date on which the settlement is fully
9 funded. (Han Dec. ¶ 29).

10 The expiration date of the settlement checks will be one hundred eighty (180) days from
11 the date the settlement checks are mailed. The amount of any settlement checks that are not
12 cashed by Eligible Class Members within one hundred eighty (180) calendar days of the date of
13 mailing of the settlement checks, shall be sent to the California State Controller to be deposited
14 in the Unclaimed Property Fund for the benefit of the Class Member whose check was not
15 cashed. (Han Dec. ¶ 30).

16 **vi. Release of Claims**

17 Upon the final approval of the settlement, the Class (other than those who submit a valid
18 request for exclusion) and each member of the Class, will fully release and discharge Defendant,
19 and each of its past or present subsidiaries, parents, affiliates, successors, predecessors,
20 managing agents, owners, employees, servants, consultants, agents, directors, officers,
21 independent contractors, representatives, insurance carriers, reinsurers, and attorneys (and the
22 servants, agents, owners, employees, directors, officers, independent contractors, representatives,
23 consultants, insurance carriers, reinsurers, and attorneys of any such subsidiaries, parents,
24 predecessors or affiliates), and all persons acting by, through, under or in concert with any of
25 them, and each of their respective heirs, successors, and assigns, and any individual or entity
26 which could be jointly liable with Defendant (“Released Parties”) of the following: claims that
27 are released and discharged against the Released Parties during the Class Period as to any and all
28 past, present or future claims, complaints, demands, liabilities, debts, obligations, liens,

1 promises, losses or damages arising from or relating to any and all causes of action alleged in the
2 Complaint or that could have been asserted based on the facts and claims alleged in the
3 Complaint whether under common law, statute, or regulation, as well as damages alleged in the
4 Complaint, including damages for restitution, conversion, liquidated damages, equitable relief,
5 damages, unpaid wages (including minimum, regular, overtime and double time wages based on
6 theories that include, but are not limited to, “rounding” of hours worked, off-the-clock work, the
7 automatic deduction of meal periods from hours worked, and/or not including incentive pay,
8 including but not limited to bonuses and commissions, in the “regular rate of pay”), meal period
9 premiums, rest period premiums, wage statement violations, waiting time penalties,
10 unreimbursed business expenses, penalties including PAGA Penalties (*Labor Code* Section 2698
11 et seq.), penalties of any other related claims and/or penalties of any nature whatsoever, interest,
12 costs and attorneys’ fees related to these claims (“Released Claims”) at any time during the Class
13 Period. The Released Claims do not include a *Civil Code* § 1542 waiver and general release on
14 behalf of the Class Members. Plaintiff, the Class, and each and every Class Member
15 acknowledges and agrees that his/her claims for unpaid wages, premiums, penalties, and
16 untimely payment of wages in the Action are disputed, and that the payments set forth herein
17 constitute payment of all sums allegedly due to them. Plaintiff, the Class, and each and every
18 Class Member acknowledge and agree that California *Labor Code* Section 206.5 is not
19 applicable to the Parties hereto. (Han Dec. ¶ 31). Thus, the release is limited to the claims and
20 factual allegations in the Complaint.

21 In consideration for her service fee, Plaintiff releases any and all unknown claims against
22 Defendant arising from or related to the Complaint through Preliminary Approval with a *Civil*
23 *Code* § 1542 waiver. The Released Claims will be effective until Defendant has satisfied its
24 payment obligations. (Han Dec. ¶ 31). Upon Defendant’s fulfillment of its payment obligations,
25 this settlement forever bars Plaintiff, the LWDA, and any other representative, proxy, or agent
26 thereof, including, but not limited to, any and all Eligible Aggrieved Employees, during the
27 PAGA Timeframe, from pursuing any action for civil penalties alleged in the LWDA letter
28 submitted on August 19, 2020 against the Released Parties. (*Id.*)

1 **IV. ARGUMENT**

2 **a. Class Action Settlements Are Subject to Court Review**

3 Rule 3.769 requires court approval for class action settlements.³ “Before final approval,
4 the court must conduct an inquiry into the fairness of the proposed settlement.” (California Rules
5 of Court, Rule 3.769(g). Rule 3.769 further requires a noticed motion for preliminary approval of
6 class settlements:

7 (a) A settlement or compromise of an entire class action, or a cause of action
8 in a class action, or as to a party, requires the approval of the court after
9 hearing.

10 . . .

11 (c) Any party to a settlement agreement may serve and file a written notice of
12 motion for preliminary approval of the settlement. The settlement
13 agreement and proposed notice to class members must be filed with the
14 motion, and the proposed order must be lodged with the motion.

15 Courts act within their discretion in approving settlements that are fair, not collusive, and
16 take into account “all the normal perils of litigation as well as the additional uncertainties
17 inherent in complex class actions.” *In re Beef Industry Antitrust Litigation* (5th Cir. 1979) 607 F.
18 2d 167, 179, cert. den. sub nom. *Iowa Beef Processors, Inc. v. Meat Price Investigators Ass’n*
19 (1981) 452 U.S. 905.

20 **b. Conditional Certification of the Class is Appropriate.**

21 For settlement purposes only, the requisites for establishing conditional class certification
22 are met. Code of Civil Procedure Section 382 “authorizes class actions ‘when the question is one
23 of a common or general interest, of many persons, or when the parties are numerous, and it is
24 impracticable to bring them all before the court.’” *Sav-On Drug Stores, Inc. v. Superior Court*
25 (2004) 34 Cal. 4th 319, 326. California courts certify class actions where the plaintiff identifies
26 “both [1] an ascertainable class and [2] a well-defined community of interest among class
27 members.” *Id.*

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³The California Supreme Court also has authorized California’s trial courts to use Federal Rule 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, therefore, the Parties cite Federal Rule 23 and federal case law in addition to California law.

1 Here, the proposed Class is ascertainable and numerous as to make it impracticable to
2 join all class members, and there are common questions of law and fact that predominate over
3 any questions affecting any individual Class Member. Plaintiff's claims are typical of the claims
4 of the Class Members, and Class Counsel will fairly and adequately protect the interests of the
5 Class. Further, prosecution of separate actions by individual Class Members would create the
6 risk of inconsistent or varying adjudications, and a class action is superior to other available
7 means for the fair and efficient adjudication of the case. (Han Dec. ¶ 32). As discussed below,
8 this case is amenable to class certification.

9 **i. The Proposed Class Is Ascertainable and Sufficiently Numerous**

10 "Ascertainability is required in order to give notice to putative class members as to whom
11 the judgment in the action will be res judicata." *Hicks v. Kaufman & Broad Home Corp.* (2001)
12 89 Cal. App. 4th 908, 914. "A class is ascertainable if it identifies a group of unnamed plaintiffs
13 by describing a set of common characteristics sufficient to allow a member of that group to
14 identify himself or herself as having a right to recover based on the description." *Bartold v.*
15 *Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 828. The proposed class must also be
16 sufficiently numerous. *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.

17 This action involves approximately two hundred forty-three (243) Class Members. This
18 Class is sufficiently numerous. *See Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal. App. 4th
19 1524, 1531 n.5 (finding that a proposed class of "as many as 190 current and former employees"
20 is sufficiently numerous). Further, all Class Members can and will be identified by Defendant to
21 the Settlement Administrator through a review of Defendant's employment records concerning
22 non-exempt or hourly employees who worked for Defendant in the State of California during the
23 Class Period. (Han Dec. ¶ 33).

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1 **ii. The Class Members Share a Well-Defined Community of Interest**

2 The community of interest requirement “embodies three factors: (1) predominant
3 common questions of law or fact; (2) class representatives with claims or defenses typical of the
4 class; and (3) class representatives who can adequately represent the class.” *Sav-On, supra*, 34
5 Cal.4th at p. 326. “[T]he community of interest requirement for certification *does not mandate*
6 *that class members have uniform or identical claims.*” *Capitol People First v. Department of*
7 *Developmental Services* (2007) 155 Cal.App.4th 676, 692 (emphasis in original). Rather, courts
8 focus on the Defendant’s internal policies and “pattern and practice . . . in order to assess
9 whether that common behavior toward similarly situated plaintiffs renders class certification
10 appropriate.” *Id.* (citing *Sav-On, supra*, 34 Cal.4th at 333).

11 The “common issues” requirement “involves analysis of whether the proponent’s ‘theory
12 of recovery’ is likely to prove compatible with class treatment.” *Capitol People, supra*, 155
13 Cal.App.4th at p. 690 (emphasis added) (citing *Sav-On, supra*, 34 Cal.4th at p. 327).
14 Furthermore, the commonality inquiry centers on the “reasonableness” of the Defendants’ labor
15 policies as applied to the potential class. *Ghazaryan, supra*, 169 Cal.App.4th at p. 1534.

16 Here, Plaintiff asserts that common issues of fact and law predominate as to each of the
17 claims alleged by Plaintiff. All non-exempt hourly employees who worked for Defendant during
18 the Class Period were subject to the same or similar employment practices, policies, and
19 procedures. (Han Dec. ¶¶ 16-21). All of their claims surround Defendant’s common practice
20 and scheme of failing to properly account for all time worked by non-exempt hourly employees
21 and failing to pay them, *inter alia*, for overtime work, non-compliant meal and rest periods,
22 associated waiting time penalties, and reimbursement of business expenses (*Id.*). Plaintiff
23 contends, and Defendant denies that Defendant’s meal and rest period policy while legal was
24 non-compliant in practice. (*Id.*). As a result, all of the Class Members, including Plaintiff, were
25 uniformly not paid for all of the hours they worked for Defendant during the Class Period.

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1 **iii. The Proposed Class Representative Has Claims or Defenses Typical of**
2 **the Class and Can Adequately Represent The Class.**

3 The typicality requirement is satisfied where class representatives have claims that are
4 typical of those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191
5 Cal.App.3d 1341, 1347 (finding typicality satisfied where named Plaintiff purchased the same
6 goods as the putative class in a consumer class action). As mentioned above, Plaintiff's claims
7 are typical of those held by the proposed Class. First, Plaintiff was employed by Defendant
8 during the Class Period as non-exempt employees and were subject to Defendant's wage and
9 hour policies at issue in this case. (Han Dec. ¶¶ 16-21). Second, Plaintiff was allegedly injured
10 by the same challenged policies that allegedly injured the Class as a whole. For example,
11 Plaintiffs assert that they were not paid for all minimum and overtime hours worked, were
12 subject to a non-compliant meal and rest period policy that did not authorize or permit the
13 requisite number of meal and rest periods, received inaccurate itemized wage statements, similar
14 to those received by the Class Members, were not reimbursed for all necessary business
15 expenditures, and were not paid all of her wages owed upon their separation of employment.
16 Given that Defendant's policies and practices applied to all non-exempt employees, Class
17 Members possess a similar interest and have suffered similar alleged injuries as Plaintiff.
18 Accordingly, because Plaintiff's claims and those of the Settlement Class all arise from the same
19 conduct, typicality is satisfied.

20 The adequacy requirement examines conflicts of interest between named parties and the
21 class(es) they seek to represent. *Capital People First v. Department of Developmental Services*
22 (2007) 155 Cal.App.4th 676, 697.

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1 Here, there are no apparent conflicts of interest between Plaintiff and the Class she seeks
2 to represent. Indeed, Plaintiff's interests are aligned with those of the Class Members, as they all
3 seek monetary relief under the same facts and legal theories. Additionally, Class Counsel do not
4 have any conflict of interest with the Class. *See McGhee v. Bank of America* (1976) 60
5 Cal.App.3d 442, 450-51 (adequacy satisfied where there was no indication that Class Counsel
6 were not qualified, and the named plaintiff had no interests antagonistic to those of the proposed
7 class).

8 Based on these facts, Plaintiff concludes that the proposed Class is readily certifiable in
9 this case. Accordingly, the Court should provisionally certify the Class for settlement purposes
10 only.

11 **c. The Settlement Is Fair, Reasonable, and Adequate**

12 In deciding whether to approve a proposed class action settlement under Code of Civil
13 Procedure § 382, the Court must find that a proposed settlement is "fair, adequate and
14 reasonable." *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. A proposed class
15 action settlement is presumed fair under the following circumstances: (1) the parties reached
16 settlement after arms-length negotiations; (2) investigation and discovery were sufficient to
17 allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation;
18 and (4) the percentage of objectors is small. *Dunk v. Ford Motor Co., supra*, at 1802. As the
19 following shows, all of these elements are present here and the Court's grant of preliminary
20 approval is therefore requested.

21 **d. The Settlement Was Reached as a Result of Arm's-Length Negotiations**

22 The Settlement was reached as a result of arm's-length negotiations. Though cordial and
23 professional, the settlement negotiations have been, at all times, adversarial and non-collusive in
24 nature. At the mediation, Counsel for the Parties conducted extensive arm's length settlement
25 negotiations until an agreement was ultimately reached by all Parties. The terms of the
26 Settlement are memorialized in the Settlement Agreement. (Han Dec. ¶ 34, Ex. 1).

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1 Plaintiff believes in the merits of her case, but also recognizes the inherent risks of
2 litigation and understands the benefit of the Class receiving settlement funds immediately as
3 opposed to risking continued litigation, the merits of the case before and after trial, damages
4 awarded, and an appeal that can take years to litigate. (Han Dec. ¶ 35).

5 **e. The Settlement Is the Result of Thorough Investigation and Discovery**

6 The Parties thoroughly investigated and evaluated the factual strengths and weaknesses
7 before reaching the proposed settlement, and engaged in enough investigation, research and
8 discovery to support the settlement. The settlement was only possible following discovery and
9 evaluation of Defendant’s policies and procedures, as well as the data produced for the putative
10 class, which permitted Class Counsel to engage in a comprehensive analysis of liability and
11 potential damages. This litigation has reached the stage where “the Parties certainly have a clear
12 view of the strengths and weaknesses of their cases” sufficient to support the Settlement. *Boyd v.*
13 *Bechtel Corp.* (N.D. Cal. 1979) 485 F. Supp. 610, 617.

14 **f. Counsel for Both Parties Are Experienced in Similar Litigation**

15 Both Plaintiff’s counsel and Defendant’s counsel are particularly experienced in wage
16 and hour employment law and class actions. Plaintiff’s counsel has significant experience in
17 litigating unpaid wages, unprovided meal period, and unprovided rest period class actions. (Han
18 Dec. ¶¶ 4-7).

19 Plaintiff’s counsel has prosecuted numerous cases on behalf of employees for California
20 Labor Code violations and thus are experienced and qualified to evaluate the class claims and to
21 evaluate settlement versus trial on a fully informed basis, and to evaluate the viability of the
22 defenses. This experience instructed Plaintiff’s counsel on the risks and uncertainties of further
23 litigation and guided their determination to endorse the proposed settlement.⁴ (Han Dec. ¶ 4-7).

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28 ⁴ The final factor mentioned in *Dunk* – the number of objectors – is not determinable until the Notice of Class
Action Settlement has been provided to the Class and they have had an opportunity to respond. This information will
be provided to the Court in conjunction with the Motion for Final Approval of Class Action Settlement.

1 **g. The Proposed Settlement is a Reasonable Compromise of Claims**

2 An understanding of the amount in controversy is an important factor into whether the
3 settlement “of the class members’ claims is reasonable in light of the strengths and weaknesses
4 of the claims and the risks of the particular litigation.” *Kullar v. Foot Locker Retail, Inc.* (2008)
5 168 Cal.App.4th 116, 129; see also *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010)
6 186 Cal.App.4th 399, 409. The most important factor in this regard is “the strength of the case
7 for plaintiffs on the merits, balanced against the amount offered in settlement.” *Id.*

8 In weighing the strength of the plaintiff’s case, *Kullar* instructs that the court is not to
9 “decide the merits of the case or to substitute its evaluation of the most appropriate settlement for
10 that of the attorneys.” *Kullar, supra*, 168 Cal.App.4th at 133. Finally, *Kullar* does not require an
11 explicit statement of the maximum amount the plaintiff class could recover if it prevailed on all
12 its claims, provided there is a record which allows “an understanding of the amount that is in
13 controversy and the realistic range of outcomes of the litigation.” *Munoz*, 186 Cal.App.4th at
14 409. Put differently, “as the court does when it approves a settlement as in good faith under *Code*
15 *of Civil Procedure* § 877.6, the court must at least satisfy itself that the class settlement is within
16 the ‘ballpark’ of reasonableness.” *Kullar, supra*, 168 Cal.App.4th at 133, citing *Tech-Bilt v.*
17 *Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 499-500.

18 As the following subsections show, the Parties’ investigation and discovery revealed
19 plenty of reasons to discount claims and agree to this settlement.

20 **i. The Settlement Is Fair and Reasonable**

21 The proposed settlement was only possible following significant formal and informal
22 discovery and evaluation of Defendant’s relevant policies and procedures, as well as the data
23 they produced for the putative Class Members, which permitted Class Counsel to engage in a
24 comprehensive analysis of liability and potential damages. (Han Dec. ¶ 36).

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1 This informal discovery resulted in Plaintiff's central theories of liability, which are
2 predicated on Plaintiff's claims that Defendant employed uniform policies of not providing to
3 authorize and permit employees to take legally mandated meal and rest breaks, failing to
4 compensate meal and rest premium wages, not compensating employees for all hours worked,
5 failing to factor non-discretionary bonuses in employees' regular rate of pay for purposes of
6 overtime compensation, not reimbursing employees for necessary business expenses, failing to
7 provide employees with timely wages within seventy-two (72) hours of their resignation or
8 immediately after their termination, and not issuing complete and accurate wage statements.
9 (Han Dec. ¶ 37).

10 Defendant vehemently deny Plaintiff's theories of liability and contends, as stated above,
11 that all meal and rest periods were provided in compliance with California law, that all wages
12 were properly paid to Class Members, that all necessary business expenses were reimbursed, and
13 that it provided wage statements in compliance with Labor Code § 226. Defendant argues that if
14 litigation were to continue, it feels confident that it would prevail. (Han Dec. ¶ 38).

15 Although Plaintiff believes the case is suitable for certification on the claimed basis that
16 there are company-wide policies that Plaintiff contends violate California law and uniformly
17 affect the putative Class Members; uncertainties with respect to certification are always present.
18 As the California Supreme Court ruled in *Sav-On v. Superior Court* (2004) 34 Cal.4th 319, class
19 certification is always a matter of the trial court's sound discretion. Decisions following *Sav-On*
20 have reached different conclusions, with respect to certification of wage and hour claims.⁵ (Han
21 Dec. ¶ 39).

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26 ⁵ (See, e.g., *Harris v. Superior Court* (2007) 154 Cal. App. 4th 164 (reversing decertification of class claiming
27 misclassification and ordering summary adjudication in favor of employees), *review granted*, 171 P.3d 545 (2007)
28 (not cited as precedent, but rather for illustrative purposes only); *Walsh v. IKON Solutions, Inc.*, 148 Cal. App. 4th
1440 (affirming decertification of class claiming misclassification); *Aguilar v. Cintas Corp. No. 2* (2006) 144 Cal.
App. 4th 121 (reversing denial of certification); *Dunbar v. Albertson's Inc.* (2006) 141 Cal. App. 4th 1422
(affirming denial of certification).

1 Although remaining confident in the strengths of her claims, all of these factors led
2 Plaintiff to discount the following calculations of potential damage claims.

3 **ii. The Settlement Amount of \$600,000 is Reasonable**

4 In addition to being able to discover the strengths and vulnerabilities associated with
5 Plaintiff's claims, in preparing for mediation, Defendant provided Plaintiff with a sampling of
6 time and pay records for two hundred forty-three (243) Class Members and information
7 regarding the dates of employment for all putative class members and the hourly rate for class
8 members. Based on this information, Plaintiff calculated that there were approximately 16,874
9 workweeks worked by Class Members. Plaintiff was also able to determine that the average
10 hourly rate for class members was \$32.51. (Han Dec. ¶ 40).

11 Plaintiff contends – and Defendant denies – that Defendant did not provide compliant
12 meal and rest periods. Plaintiff's contention is based on the theories articulated above. (Han Dec.
13 ¶ 16). With respect to meal periods, Plaintiff's expert analyzed the punch records and
14 determined that 23.7% of the shifts included a unique violation including missed, short or late
15 meal breaks. Accordingly, Plaintiff calculated the meal break exposure at \$677,443.38 (76,331
16 meal break eligible shifts x .273 violation rate = 20,838 shifts x \$32.51). (Han Dec. ¶ 41). With
17 respect to rest periods, Plaintiff's investigation revealed that a reasonable estimate of violation
18 rate was approximately two rest periods per week. Rest period exposure is \$1,097,147.40
19 (16,874 workweeks x \$32.51/average hourly rate x 2 rest break violations per week). (Han Dec.
20 ¶ 42).

21 Additionally, Plaintiff contends – and Defendant denies – that Defendant did not
22 compensate employees for all hours worked due to the rounding practice. (Han Dec. ¶ 17).
23 Plaintiff's expert analysis the time and pay records identified at 832.7 hours were underpaid due
24 to the rounding practice. This results \$27,071.07 for minimum wage exposure (832.7 hours x
25 \$32.51) or if using the overtime rate, as certain shifts exceeded eight (8) hour per day or forty
26 (40) hours per week, would be \$40,606.61 (using a rate of \$48.77). (Han Dec. ¶ 43).

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1 With respect to the underpayment of overtime due to the regular rate calculation, further
2 investigation and expert analysis of the compensation data revealed that Defendant used the
3 proper formula to calculate the regular rate and attributed no exposure to this claim. (Han Dec. ¶
4 44).

5 Further, Plaintiff claims – and Defendant denies – that Defendant failed to accurately
6 record hours worked by putative Class Members This makes it likely that Defendant issued wage
7 statements in violation of California Labor Code section 226(a), meaning the wage statements
8 would also fail to state the accurate number of hours worked. Plaintiff calculates Defendant's
9 maximum potential exposure as to this claim to be approximately \$347,100 (\$1,950 penalty per
10 employee x 178 employees (based in 20 average pay periods). (Han Dec. ¶ 45).

11 If Plaintiff is able to prove Defendant's failure to pay all wages owed, Plaintiff is then
12 entitled to waiting time penalties in the amount of 30 days' worth of wages. Plaintiff calculates
13 Defendant's maximum potential exposure as to this claim to be approximately \$1,131,348 (8
14 hours x \$32.51/average hourly rate x approximately 145 former non-exempt employees x 30
15 days). (Han Dec. ¶ 46).

16 Finally, Plaintiff contends – and Defendant denies – that Defendant failed to reimburse
17 employees for necessary business expenses. Plaintiff asserts that Defendant requires employees
18 to use their personal cell phones. Class Members would get calls from other coworkers regarding
19 work or from client regarding the status of their loans and documents. Based upon investigation
20 with Class Members, Plaintiff estimate that each employee attributed approximately ten percent
21 or \$8.00 per month on average on their cell phone plans for this data.⁶ Plaintiff calculates
22 Defendant's potential exposure as to this claim to be approximately \$31,152 (3,894 months x \$8
23 per month). (Han Dec. ¶ 47).

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28 ⁶ Cell phone charges were based on the assumption of \$80 per month of cellular phone bill with 10% allocated to business purposes including calls and text messaging.

1 The provisions of the Labor Code potentially triggering PAGA penalties in this case
2 include but are not limited to Labor Code sections 201, 202, 226(a), 226.7, 510, 512(a), 1194,
3 1197, 1197.1, 1198, 2800, and 2802. Defendant asserted that, regardless of the results of the
4 underlying causes of action, PAGA penalties are not mandatory but permissive and
5 discretionary. Defendant maintained that, in addition to its strong arguments against the
6 underlying claims, it had a strong argument that it would be unjust to award maximum PAGA
7 penalties given the current unsettled state of law. (Han Dec. ¶ 48.)

8 Class Counsel calculated penalties under this cause of action by multiplying the number
9 of active Class Members (because of the shortened statutory period for this claim), by the civil
10 penalties that each could be awarded for the Labor Code sections enumerated under Labor Code
11 section 2699.5 that were applicable in this case. Class Counsel then applied discounts in light of
12 the countervailing arguments with regard to the other causes of action, as well as the Court's
13 power to award "a lesser amount than the maximum civil liability." (*Id.* (citing Lab. Code §
14 2699(e)(2).) (Han Dec. ¶ 49.)

15 Given the state of the law and the range of PAGA penalties requested and actually
16 awarded in California courts, it is difficult to determine a reasonable value and actual exposure
17 for PAGA penalties. However, if PAGA penalties are granted on any one of the violations
18 alleged in Plaintiff's operative complaint, the total penalties exposure for the eligible pay periods
19 could be approximately \$694,200 ([1 x \$100] + [19 x \$200] x 178 employees). Plaintiff
20 calculated Defendant's PAGA exposure using one hundred percent (100%) violation rate based
21 on the average number of pay periods (20) during the one-year statutory period. Multiplying the
22 PAGA exposure by the number of alleged violations under the PAGA theories of recovery (6)
23 gives potential civil penalties of \$4,165,200. (Han Dec. at ¶ 50.)

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1 Although Plaintiff argued he could obtain over \$4,000,000 for PAGA penalties, it seemed
2 highly unlikely that the Court would award such a large amount. PAGA’s plain language
3 indicates that an employer will be assessed a lower, “initial” penalty for each initial pay period in
4 which a violation occurs, and a higher, “subsequent” penalty for each subsequent pay period in
5 which a violation occurs. (Lab. Code, § 2699, subd. (f)(2).) In *Amaral v. Cintas Corp.* (2008)
6 163 Cal.App.4th 1157; however, the court held, “Until the employer has been notified that it is
7 violating a Labor Code provision (whether or not the commissioner or court chooses to impose
8 penalties), the employer cannot be presumed to be aware that its continuing underpayment of
9 employees is a ‘violation’ subject to penalties [and will be assessed only the ‘initial’ violation
10 rate].” (*Amaral, supra*, 163 Cal.App.4th at 1209.) This language could be interpreted as
11 indicating that until the Labor Commissioner or a court informs an employer that it has violated
12 the Labor Code, the employer can only be assessed the “initial” violation rate. Under this
13 interpretation, the maximum individual civil penalty for one statutory violation is \$17,800 (178 x
14 100 (initial violation), and for all possible Labor Code violations is \$106,800. (Han Dec. ¶ 51.)

15 Furthermore, PAGA’s statutory language is unclear as to whether PAGA penalties may
16 be “stacked” – that is, whether multiple civil penalties can be recovered in the same pay period
17 for different Labor Code violations. On the one hand, Labor Code section 2699, subdivision (f)
18 establishes “a civil penalty for a violation” (emphasis added), implying a separate civil penalty
19 for each violation. On the other hand, employers cite Labor Code section 2699, subdivision
20 (g)(1), which states that “an aggrieved employee may recover the civil penalty described in
21 subdivision (f)...on behalf of himself or herself and other current or former employees against
22 whom one or more of the alleged violations was committed” (emphasis added). However,
23 Defendants contended that the Ninth Circuit’s opinions in *Ubrino v. Orkin Svcs. of Calif., Inc.*
24 (9th Cir. 2013) 726 F.3d 118 and *Yocupicio v. PAE Grp., LLC* (9th Cir. 2015) 795 F.3d 1057,
25 which, preclude the aggregation of PAGA penalties for purposes of removal, prevents “stacking”
26 of PAGA penalties. Without stacking and limited to the initial violation, the PAGA penalties
27 would be limited to \$17,800 on the low end and \$106,800 on the high end based on six major
28 theories of recovery. (Han Dec. ¶ 52.)

1 To the extent Defendant's exposure remains in the millions of dollars, the civil penalties
2 would certainly be "unjust, arbitrary and oppressive, or confiscatory." In fact, many courts have
3 taken liberties to dramatically reduce the civil penalties. (See e.g. *Viceral v. Mistras Grp., Inc.*
4 (N.D. Cal. Oct. 11, 2016, 2016 WL 5907869 at 9* [preliminarily approving class action
5 settlement that included a PAGA set-aside of just 0.15 percent of the PAGA claims' full
6 potential value, where "Plaintiffs face[d] a substantial risk of recovering nothing on either class
7 or PAGA claims"]; *Costter v. Lyft, Inc.* (N.D. Cal. 2016) 193 F.Supp.3d 1030, 1037
8 [preliminarily approving class action settlement allocating a PAGA set-aside worth a fraction of
9 the PAGA claims' potential value, where the defendant's obligations were "genuinely unclear"
10 and there was no evidence the defendant acted deliberately or negligently failed to learn about its
11 obligations].). (Han Dec. ¶ 53.)

12 Under a more conservative approach, Plaintiff's counsel considered the possibility that
13 the Court could assess only the initial violation rate, bringing the basic PAGA penalty to
14 \$106,800 [178 employees x \$100 x 6 theories of recovery]. (Han Dec. at ¶ 54.)

15 Plaintiff also recognized the risk that any PAGA award could be significantly reduced.
16 Many of the causes of action brought were duplicative of the statutory claims such as violations
17 of California Labor Code §§ 226.7, 510, 512(a), 1194, 1198 and 2802. Thus, the maximum
18 penalties for each pay period are not justified. It was indeed arguable whether the Court would
19 award the maximum penalties under the law. Thus, allocating \$20,000 to PAGA civil penalties
20 was reasonable based on a rate of \$2.86 per pay period [$\$10,000 \div 3,494$ Pay Periods in PAGA
21 Date Range = \$2.86], given the fact that Defendant is also paying an additional \$580,000 in the
22 Class settlement. (Han Dec. at ¶ 54. (citing see *Carrington v. Starbucks Corp.* (2018) 30
23 Cal.App.5th 504, 529 (affirming a rate of \$5 per violation and a total PAGA penalty of \$150,000
24 while the plaintiff requested a rate of \$25 to \$75 per violation and a total PAGA penalty of
25 \$70,000,000).)) Where PAGA penalties are negotiated in good faith and "there is no indication
26 that [the] amount was the result of self-interest at the expense of other Class Members," such
27 amounts are generally considered reasonable. (*Id.* (citing *Hopson v. Hanesbrands Inc.* (N.D.
28 Cal. Apr. 3, 2009) Case No. 08-00844, 2009 U.S. Dist. LEXIS 33900, at *24; see, e.g.,

1 *Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 579 (“[T]rial court did not abuse its
2 discretion in approving a settlement which does not allocate any damages to the PAGA
3 claims.”).) (Han Dec. at ¶ 55.)

4 Defendant argues that if litigation continues it will show that non-exempt employees
5 were provided with compliant meal and rest periods. Defendant argues that meal periods were
6 provided in lawful timeframes and that employees were specifically instructed that they were
7 prohibited from performing any work during meal periods. Defendant further asserts that in order
8 to determine when meal periods were taken each shift and whether work was being conducted
9 during meal periods, an individual inquiry of each employee regarding how long their shift was
10 and when they took a meal period would be required, which would show that individualized
11 issues predominate. Likewise, Defendant argues that its rest period policies conform to
12 California law and that Class Members are provided with rest periods in compliant time frames.
13 As no records of rest periods exist, Plaintiff would have to ask each Class Member when they
14 took a rest period during any given shift, and individual issues would also predominate as to this
15 claim. Defendant contends that under *Brinker*, it is not required to police its employees to ensure
16 they take meal and rest breaks. If these breaks were not taken, Defendant asserts this was due to
17 the employee’s decision not to take it. (Han Dec. ¶ 56).

18 Accordingly, taking into consideration Defendant’s defenses, its supporting evidence, and
19 its position that the action is not suitable for class treatment, the settlement amount of \$600,000 –
20 **with an average settlement share amount estimated at \$1,337.44** – is a reasonable and fair
21 settlement.

22 **h. Discount Analysis Justifies the Settlement**

23 Excluding the civil penalties, for the reasons stated, the total estimated potential
24 exposure, assuming certification and prevailing at trial, would be approximately \$3,311,261.85
25 on the low end to \$3,324,797.39 on the high end. (Han Dec. ¶ 57).

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Category	Potential Exposure	Certification Risk	Merits Risk	Realistic Exposure
Meal Penalties	\$677,443.38	50%	50%	\$169,360.84
Rest Penalties	\$1,097,147.40	75%	50%	\$137,143.42
Overtime/Minimum Wage: Rounding	\$27,071.07 to \$40,606.61	25%	25%	\$15,227.47 to \$22,841.21
Waiting Time Penalty	\$1,131,348	25%	50%	\$424,255.50
Paystub Penalty	\$347,100	25%	50%	\$130,162.50
Reimbursement	\$31,152	25%	50%	\$11,682.00
MAXIMUM TOTAL EXPOSURE	\$3,311,261.85 to \$3,324,797.39			\$887,831.73 to \$895,445.47

Plaintiff applies a 50% certification risk and 50% merits risk discounts for meal break premiums. The punch records establish a 23.7% unique meal break violation rate and Plaintiff can argue that this is evidence of a classwide violation. However, to fully establish a uniform and common practice, Plaintiff would need to secure and obtain declarations. This process while difficult is possible. However, even on a best day the risk is 50%. The merits could also be difficult if testimony and evidence reveals that short and late meal breaks were product of an employees' choice rather than an unofficial policy to pressure late or short meal breaks. (Han Dec. ¶ 58).

Plaintiff applies a 75% risk discount for the certification risk for the rest break violations. There are several important factors that make the certification of the rest breaks claim a challenge, including but not limited to no records of rest periods, office job environment with multiple job titles that may be more difficult to establish a uniform practice, and the lack of recent cases certifying rest break cases. Also, on the merits, an additional 50% discount is justified because Defendant may establish with their own witnesses that the rest breaks were provided and taken by class members. (Han Dec. ¶ 59).

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1 With respect to overtime and rounding claim the risk is lower for certification as these
2 types of cases are usually certified. However, no class certification is without risk thus a
3 reasonable discount of 25% is justified. Once certified, the merits are riskier. Defendant may
4 argue and convince this Court that the claims should be summarily adjudicated as the rounding
5 policy was neutral on its face. Thus, Class Counsel believes that a 50% chance that the Class
6 may not be able to prove up the full extent of damages claimed. (Han Dec. ¶ 60).

7 Plaintiff's § 203 claim for waiting time penalties is based on Plaintiff's claims for unpaid
8 overtime, rounding, and missed meal and rest breaks. If Plaintiff prevails on these underlying
9 claims, waiting time penalties would result. However, Defendant may argue that any failure to
10 pay wages due and owing to employees in a timely manner was not "willful" under Labor Code
11 § 203 and was instead a mistake made in good faith. For these reasons and the reasons explained
12 in the previous sections, Class Counsel believes a twenty-five percent (25%) certification risk
13 and fifty percent (50%) risk on the merits are justified. (Han Dec. ¶ 61).

14 Plaintiff's § 226(a) claim for wage statement penalties is based on Defendant's failure to
15 maintain accurate records. Defendant failed to accurately record hours worked by putative Class
16 Members and subsequently issued wage statements that failed to accurately state the numbers of
17 hours worked in violation of the California Labor Code. However, Defendant's error most likely
18 did not affect all employees. In addition, Defendant may argue that its failure to provide
19 accurate wage statements was not "knowing and intentional" under Labor Code § 226(a).
20 Consequently, Class Counsel believes a twenty-five percent (25%) certification risk and fifty
21 percent (50%) risk on the merits are justified. (Han Dec. ¶ 62).

22 For Plaintiff's section 2802 claim for unreimbursed business expenses, Class Counsel
23 believes a twenty-five percent (25%) certification risk and fifty percent (50%) merits risk
24 discount are justified. Plaintiff asserts that Defendant requires employees to use their personal
25 cell phones. Class certification on this claim seems fairly certain as the issue is whether
26 Defendant required or was aware class members were using their personal cell phones for
27 business purposes. However, the merits are more difficult. This workforce is in an office setting
28 and Defendant may argue that there was no reason for class members to use their own cell

phones when they had phone they could have used. Also, the experience here may be different for certain class members and may not establish the full extent of the damages alleged, justifying 50% discount on the merits. (Han Dec. ¶ 63).

Based on this analysis, the realistic recovery for this case is \$887,831.73 on the low end to \$895,445.47 on the high end. The Gross Settlement Fund of \$600,000 is approximately nine percent (18%) of the high end of the maximum potential exposure and approximately thirty-nine percent (67%) of the high end of the realistic exposure at trial, which an excellent settlement. (Han Dec. ¶ 64). The only question at preliminary approval is whether the settlement is within the range of possible approval. *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007). “The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.” *City of Detroit v. Grinnell Corporation* (2d Cir. 1974) 495 F. 2d 448, 455, *see also Linney v. Ceullar Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234,1242 (“[I]t is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators.”).

i. Notice to Class Members Complies with California Rule of Court 3.769(f)

California Rule of Court, No. 3.769(f), provides:

If the court has certified the action as a class action, notice of the final approval hearing must be given to class members in the manner specified by the court. The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement.

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1 The proposed Class Notice meets all of these requirements. The proposed Class Notice
2 advises the Class of their rights to participate in the Settlement, how to and when to object to or
3 request exclusion from the Settlement, and the date, time, and location of the final approval
4 hearing. *See* Settlement Agreement Ex. 1.

5 **V. CONCLUSION**

6 Plaintiff respectfully submits that the proposed settlement is in the best interests of the
7 class, as it is fair, adequate, and reasonable, and one that should ultimately be granted final
8 approval. Under the applicable class action criteria and guidelines, the proposed settlement
9 should be preliminarily approved by the Court, the class should be conditionally certified for
10 purposes of settlement only, and the Notice Packet should be approved.

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12 Dated: March 17, 2021

JUSTICE LAW CORPORATION



Douglas Han
Attorneys for Plaintiff

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PROOF OF SERVICE
1013A(3) CCP

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 751 N. Fair Oaks Avenue, Suite 101, Pasadena, CA 91103 and my electronic service address is arivera@justicelawcorp.com

On March 17, 2021, I served the foregoing document described as

**PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION SETTLEMENT, CONDITIONAL CERTIFICATION,
APPROVAL OF CLASS NOTICE, SETTING OF FINAL APPROVAL HEARING
DATE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

for the following case: **Albanez v. OCMBC, Inc.**
LWDA/Court Case No.: **LWDA Case No.: CM-803181-20**
Court Case No.: 30-2019-01078636-CU-OE-CXC
Orange County Superior Court

on interested parties in this action by electronically submitting as follows:

State of California
Labor & Workforce Development Agency
800 Capitol Mall, MIC-55
Sacramento, California 95814

[X] BY ELECTRONIC SUBMISSION

Pursuant to California Senate Bill No. 836, I caused the documents described above to be electronically submitted by and through the procedure stated on the website of the State of California Labor and Workforce Development Agency.

[X] STATE

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

Executed on March 17, 2021, at Pasadena, California.



Allana Rivera