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SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO

MICHAEL GREBE, individually, and on
behalf of other members of the general public
similarly situated,

Plaintiff,

v.

MARY ANN'S BAKING CO., INC., a
California corporation, and DOES 1 through
100, inclusive,

Defendants.

Case No. 34-2020-00285254-CU-OE-GDS

CLASS ACTION

*Assigned to the Honorable Jill H. Talley for all
purposes*

**MEMORANDUM OF POINTS &
AUTHORITIES IN SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY APPROVAL
OF CLASS, COLLECTIVE, AND
REPRESENTATIVE ACTION SETTLEMENT**

Reservation No. 2662349

Date: October 28, 2022

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Trial Date: None Set

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1 **I. INTRODUCTION AND OPENING SUMMARY OF ARGUMENT**

2 This Motion is brought seeking preliminary approval of a wage-and-hour class action settlement
3 in the gross amount of \$600,000. *See generally* Exhibit A (Stipulation and Settlement of Class, Collective,
4 and Representative Action). Plaintiffs Silvia Madrigal Vargas (“Plaintiff Madrigal Vargas”) and Michael
5 Grebe (“Plaintiff Grebe”) (collectively known as, “Plaintiffs”) brought this class action individually and
6 on behalf of other similarly situated employees employed by Defendant Mary Ann’s Baking Co., Inc.,
7 (“Defendant”). Plaintiffs worked for Defendant in California within the applicable Class Period and
8 contend that they were subject to all the same policies and practices that are alleged to be unlawful in this
9 litigation. *See generally* Exhibit B (Plaintiffs’ Operative Complaint); Declaration of Silvia Madrigal
10 Vargas (“Decl. Madrigal Vargas”) ¶ 2; Declaration of Michael Grebe (“Decl. Grebe”) ¶ 2.

11 Plaintiffs alleged Defendant violated California law by: (a) failing to pay overtime; (b) failing to
12 provide meal and rest periods or pay premiums in lieu thereof; (c) failing to pay minimum wages; (d)
13 failing to timely pay final wages; (e) failing to provide accurate wage statements; (f) failing to reimburse
14 all expenses; and (g) failing to provide and pay all sick leave wages owed. *See generally* Exhibit B.
15 Plaintiffs have also alleged Defendant engage in unfair business practices and is liable for civil penalties
16 under the Private Attorneys General Act of 2004 (“PAGA”) based on these violations. *See id.*; Exhibit
17 C (Plaintiffs’ Ltrs. to the Labor and Workforce Development Agency [“LWDA”] Regarding PAGA
18 Claims). Plaintiffs contended this is a meritorious class action lawsuit and that this case is appropriate
19 for class certification for settlement purposes as the requisites for class certification in this case can be
20 satisfied. *See* Exhibit B.

21 Defendant denies all of Plaintiffs’ allegations in their entirety and any liability or wrongdoing of
22 any kind. *See* Declaration of Justin P. Rodriguez (“Decl. Rodriguez”), ¶ 6. Defendant denies this case
23 is appropriate for class certification other than for purposes of settlement and that Plaintiffs would have
24 been successful in establishing that class certification is proper. *See id.* However, subject to approval by
25 the Court, the Parties compromised and settle all asserted claims for monetary compensation as a result
26 of extensive investigations, informal document and data exchanges, and extended negotiations relating
27 to all aspects of the asserted claims. *See* Exhibit A. Class Counsel is convinced the proposed settlement
28 is in the best interest of the Class based on the discovery, investigations, negotiations, and a detailed

1 knowledge of the issues in this case. *See* Decl. Rodriguez, ¶¶ 2, 7-14; Decl. Douglas Han (“Decl. Han”),
2 ¶¶ 20-21.

3 It is within the discretion of this Court to grant preliminary and conditional approval of the
4 Agreement, which satisfies all the criteria for preliminary settlement approval. Plaintiffs request that the
5 Court: (1) provisionally and conditionally certify the Class; (2) grant preliminary and conditional
6 approval of the proposed Agreement (Exhibit A); (3) set dates for and direct distribution to the class of
7 (a) the Notice of Class Action Settlement (Exhibit F), and (b) the Claim Form (Exhibit G); and (4) adopt
8 the implementation schedule contained in the proposed order and schedule a final approval hearing.

9 **II. PROCEDURAL AND LITIGATION HISTORY**

10 On September 14, 2020, Plaintiff Grebe filed a Complaint against Defendant in the Superior Court
11 of the State of California, County of Sacramento, Case No. 34-2020-00285254-CU-OE-GDS. On January
12 11, 2021, Plaintiff Madrigal Vargas filed a Complaint against Defendant in the Superior Court of the
13 State of California, County of Sacramento, Case No. 34-2021-00292191, which was removed to the
14 United States District Court for the Eastern District of California on February 19, 2021, Case No. 2:21-
15 CV-00320-JAM-JDP. On May 12, 2022, Plaintiffs filed an amended complaint in this action combining
16 the claims and Parties of both actions as the result of mediation to facilitate a more streamlined, efficient
17 review of the proposed class action settlement. Exhibit B. Plaintiffs exhausted administrative remedies
18 under the PAGA by providing notice of the claims and violations to the LWDA. *See* Exhibit C; Cal. Lab.
19 Code § 2699.3(a), (c); Decl. Rodriguez, ¶ 3. There is no date set for a motion for certification or trial in
20 this matter. *See* Decl. Rodriguez, ¶ 4.

21 **III. INVESTIGATION AND DISCOVERY CONDUCTED**

22 Plaintiffs thoroughly investigated issues affecting certification, the merits of the class claims, and
23 potential damages for such claims. *See id.* Plaintiffs worked during the time all Defendant’s policies
24 and practices at issue in the Complaint were in effect and provided information regarding these policies
25 and practices. *See* Decl. Madrigal Vargas ¶¶ 3, 5; Decl. Grebe ¶¶ 3, 5. The Parties engaged in formal and
26 informal discovery and exchange of documents, including a representative sampling of employee data.
27 Plaintiffs also reviewed documents relating to Defendant’s financial condition to determine its ability to
28 continue litigation and pay any settlement and/or judgment higher than what has been agreed to in the

1 Settlement now before the Court. The discovery covered all aspects of the asserted claims, including
2 certification issues, merits issues, damages, the scope and configuration of Class Members, the content
3 and implementation of the wage-and-hour policies at issue, issues relating to manageability concerns at
4 trial, among other relevant areas. *See* Decl. Rodriguez, ¶¶ 7-11. The information allowed Plaintiffs to
5 determine the extent and frequency of any violations in accordance with Plaintiffs' contentions and create
6 an accurate damages model to assess the reasonableness of any settlement. *See id.*

7 **IV. NEGOTIATION AND PROPOSED SETTLEMENT**

8 **a. Plaintiffs and Defendant Engaged in Extensive Arm's Length Negotiations**

9 The final settlement occurred only after extended arm's length negotiations. Over the course of
10 nearly two (2) years, Plaintiffs have been investigating the claims and discussing with Defendant's
11 counsel the merits of the claims and certification issues present in this case. *See id.* at ¶¶ 6-12. The
12 Parties exchanged substantial amounts of information and legal analysis regarding the asserted claims.
13 *See id.* Then, only after nearly two (2) years of litigation and negotiation, which included a full day
14 mediation with Jeffrey Krivis, the Parties able to reach a mutually agreeable settlement. *See id.* at ¶ 12.
15 In light of the claims and defenses at issue, the Parties agreed to a Gross Fund Value of \$600,000. *See*
16 Exhibit A.

17 **b. The Terms of the Settlement**

18 Under the Agreement, Defendant has agreed to the following:

19 1. The following groups of individuals are covered by the Settlement (*See* Exhibit A, ¶¶ I.e-
20 I.e, I.s-I.t):

21 All non-exempt, hourly individuals who performed work for any amount of
22 time for Defendant as non-exempt, hourly employees, however titled, in
23 California, at any time from April 6, 2019 through February 28, 2022
("PAGA Group Members").

24 All non-exempt, hourly individuals who performed work for any amount of
25 time for Defendant as non-exempt, hourly employees, however titled, in
26 California at any time from April 6, 2016 through February 28, 2022
("Class" and "Class Members").

27 2. Pay a Gross Fund Value of no more than \$600,000, exclusive of the employer's share of
28 payroll taxes, on a claims made basis to resolve and release the claims alleged in the Complaint. *See id.*
at ¶¶ I.h, I.n. Defendant will be obligated to pay out a minimum of forty percent (40%) of the Net

Settlement Amount. *See id.* at ¶¶ VI, VIII. In the event that less than forty percent (40%) of the Net Settlement Amount is claimed by Class Members who submit valid Claim Forms, the Settlement Class Members, *i.e.* Class Members who have submitted valid Claim Forms, will have their individual claim amounts increased pro rata until forty percent (40%) of the Net Settlement Amount is distributed. *See id.*

3. The Parties agree that up to \$10,000, each, for Plaintiff Madrigal Vargas and Plaintiff Grebe will be paid as a Class Representative Enhancement Payment. This amount will be in addition to any amount Plaintiffs may be entitled to under the terms of the Agreement. *See id.* at ¶ I.g.

4. The Parties agree the cost of administering this class action settlement shall be paid from the settlement proceeds. Subject to Court approval, the Parties have selected Simpluris, Inc. to act as the Settlement Administrator, who has provided a maximum cost estimate of \$10,500 to administer the class settlement. *See* Exhibit D (Simpluris, Inc. Quote). The difference between any actual administration costs and the \$10,500 allocated under the Agreement, if any, will be added to the Net Settlement Amount and paid to Settlement Class Members on a pro rata basis. *See* Decl. Rodriguez, ¶ 24.

5. The Parties agree that \$20,000 of the Gross Fund Value shall be allocated to resolving claims under the PAGA. Seventy-Five percent (75%) of the PAGA Payment will be paid to the LWDA and Twenty-Five percent (25%) will be paid to PAGA Group Members. *See id.* at ¶ I.r. Given the derivative nature of the penalties, the efforts by Defendant to maintain compliant policies and take corrective action, the presence of what may likely be deemed good faith disputes, and the Court's discretion to reduce any penalty award, Plaintiff believes the PAGA Payment allocation represents a meaningful settlement aimed at deterring non-compliance given the facts of this case. *See* Decl. Rodriguez, ¶ 14; *see also Davis v. Cox Commc'ns California, LLC*, 2017 U.S. Dist. LEXIS 63514, *1 (S.D. Cal. 2017) (preliminarily approving \$4,000 PAGA allocation in \$275,000 settlement); *Jack v. Hartford Fire Ins. Co.*, 2011 U.S. Dist. LEXIS 118764, *6 (S.D. Cal. 2011) (approving \$3,000 PAGA allocation in \$1,200,000 settlement); *Singer v. Becton Dickinson & Co.*, 2010 U.S. Dist. LEXIS 53416, *2 (S.D. Cal. 2010) (approving \$3,000 PAGA allocation in \$1,000,000 settlement); *Hopson v. Hanesbrands Inc.*, 2009 U.S. Dist. LEXIS 33900, *9 (N.D. Cal. 2009) (approving \$1,500 PAGA

allocation in \$1,026,000 settlement); *Garcia v. Gordon Trucking, Inc.*, 2012 U.S. Dist. LEXIS 160052, at *7 (E.D. Cal. 2012) (approving \$10,000 PAGA allocation in a \$3,700,000 settlement).

6. The Parties agree that up to thirty-five percent (35%) of the Gross Fund Value (\$210,000) will be paid for Plaintiffs' attorneys' fees incurred in the litigation of this case. Defendant will not oppose any application for attorneys' fees so long as it is within this threshold. *See id.* at ¶ I.b. Additionally, the Parties agree Plaintiffs will also be entitled to the actual litigation costs as approved by the Court in an amount not to exceed \$18,500. *See id.* The difference between any actual costs and the \$18,500 will be redistributed to Settlement Class Members on a pro rata basis. *See id.* The proposed notice to be sent to Class Members will state this information. *See* Exhibit F.

7. Any Settlement Administrator Costs, any amounts paid for attorneys' fees and costs, the Class Representative Enhancement Payments, and PAGA Payment will be paid out from the Gross Fund Value, not in addition to the Gross Fund Value. *See* Exhibit A, ¶ I.f.

8. Class Members who fail to timely opt-out of this settlement will waive all Released Claims as set forth in the Agreement. *See id.* at ¶ I.z.

9. For any portion of the Net Settlement Amount or PAGA Payment allocated to Settlement Class Members or PAGA Group Members that is not claimed by them by cashing their respective settlement checks within one hundred eighty (180) calendar days of issuance, shall escheat to the State of California's Controller, to be held in the name of each expired check payee, pursuant to applicable unclaimed property laws. *See id.* at ¶ XIII.c. Because the Agreement provides a plan for distribution of any uncashed checks, section 384 does not apply. *See In re Microsoft I-V Cases*, 135 Cal. App. 4th 706, 718, 722 (2006) ("Under our interpretation, the procedure of section 384, subdivision (b) does not apply to a judgment approving a settlement agreement that includes its own provisions for distribution of any unpaid residue"). The treatment of uncashed checks in this manner is fair, reasonable, and adequate because Settlement Class Members who do not cash their checks within the time provided will not lose their share of the settlement and still have an opportunity to claim it as set out in the unclaimed property laws. Even to the extent the Court were to apply section 384 to this settlement, because all funds are being distributed or held for putative class members in the unclaimed property fund, there is no residue to distribute.

1 **c. Allocation of Settlement Funds**

2 Payment to Class Members of their share of the Net Settlement Amount will require the submission
3 of a Claim Form. Payment of Settlement Class Members shall be as follows: A Net Settlement Amount
4 will be determined by subtracting from the Gross Fund Value any amounts for approved attorneys' fees
5 and costs, any Class Representative Enhancement Payment to the Class Representatives, the Settlement
6 Administrator Costs, and the PAGA Fund payable to the LWDA. See Exhibit A, ¶¶ I.n, I.r. Each
7 Settlement Class Member's share of the Net Settlement Amount shall be determined by dividing the
8 number of workweeks worked by the Individual Settlement Class Member by all workweeks worked by
9 the Class during the Class Period, multiplied by the Net Settlement Amount (*i.e.*, (number of individual
10 workweeks worked / total workweeks worked by the Class) x Net Settlement Amount). Each Settlement
11 Class Member's share of the Net Settlement Amount, which shall be distributed to the Settlement Class
12 Members, will be less employee portions of state and federal withholding taxes, including the employee
13 FICA, FUTA and SDI contributions and any other applicable payroll deductions required by law as a
14 result of the payment of the amount allocated to such Settlement Class Member as set forth in the
15 Agreement. If the amount of the Individual Settlement Payments for the Class Members who submit valid
16 and timely Claim Forms is less than forty percent (40%) of the Net Settlement Amount, then Defendant
17 will be obligated to pay only the Settlement Floor Amount, which will equal forty percent (40%) of the
18 Net Settlement Amount. To achieve the Settlement Floor Amount, all Individual Settlement Payments to
19 the Settlement Class Members will be multiplied by a number equivalent to the Settlement Floor Amount
20 divided by the aggregate amount of Individual Settlement Payments for all Settlement Class Members
21 (*i.e.*, Settlement Floor Amount / total amount claimed by Settlement Class Members). By applying this
22 multiplier, the amount of the Individual Settlement Payments for the Settlement Class Members will equal
23 forty percent (40%) of the Net Settlement Amount. See *id.* at ¶ VI.

24 **V. ARGUMENT**

25 **a. Class Action Settlements are Subject to Court Review and Approval Under the**
26 **California Rules of Court**

27 A class action may not be dismissed, compromised, or settled without Court approval and the
28 decision to approve or reject a settlement is committed to the Court's sound discretion. See Cal. Rules of

1 Court, Rule 3.769; Fed. R. Civ. Proc., Rule 23(e)¹; *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th
2 224, 234-35 (2001); *see also* Cal. Lab. Code §§ 2699(l)(2) (requiring Court review of PAGA settlements).
3 However, courts should give “proper deference to the private consensual decision of the parties,” since
4 “the court’s intrusion upon what is otherwise a private consensual agreement negotiated between the
5 parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement
6 is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the
7 settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” *Hanlon v. Chrysler Corp.*,
8 150 F.3d 1011, 1027 (9th Cir. 1998). Where a settlement is reached on terms agreeable to all parties, a
9 court should disapprove of the settlement “only with considerable circumspection.” *Jamison v. Butcher*
10 *& Sherrerd*, 68 F.R.D. 479, 481 (E.D. Pa. 1975). The law favors settlement of lawsuits, particularly class
11 actions and other complex cases where substantial resources can be conserved by avoiding the time,
12 expense, and rigors of formal litigation. *See Neary v. Regents of Univ. of Cal.*, 3 Cal. 4th 273, 277-81
13 (1992).

14 **b. The Terms of The Settlement Are Fair and Within the Range of Reasonableness**

15 The purpose of the Court’s preliminary evaluation of a proposed class action settlement is to
16 determine only whether the proposed settlement is within the range of possible approval and whether
17 notice to the class of its terms and conditions and the scheduling of a formal fairness hearing is warranted.
18 *See Wershba*, 91 Cal. App. 4th at 234-35. If the Court finds a proposed settlement falls within “the range
19 of reasonableness,” it should grant preliminary approval of the class action settlement. *See, e.g., North*
20 *County Contr.’s Assn., Inc. v. Touchstone Ins. Svcs.*, 27 Cal. App. 4th 1085, 1089-90 (1994); *Kullar v.*
21 *Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 133 (2008). To make the fairness determination, the
22 Court must consider several factors, including:

23 the strength of the Plaintiff’s case, the risk, expense, complexity and likely
24 duration of further litigation, the risk of maintaining class action status
25 through trial, the amount offered in settlement, the extent of discovery
26 completed and the stage of the proceedings, the experience and views of
27 counsel, the presence of a governmental participant, and the reaction of the
28 class members to the proposed settlement.

¹ The California Supreme Court has authorized California’s trial courts to rely on these federal resources to decide class certification issues. *See Green v. Obledo*, 29 Cal.3d 126, 145-46 (1981).

1 *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996). However, this Court should begin its
2 analysis with a presumption that the proposed settlement is fair. “A presumption of fairness exists where:
3 (1) the settlement is reached through arm’s length bargaining; (2) investigation and discovery are
4 sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar
5 litigation; and (4) the percentage of objectors is small.” *Id.* at 1802.

6
7 **i. The Settlement is a Result of Extensive, Non-Collusive Arm’s Length
Negotiations Between the Parties**

8 Settlement in this case was reached only after litigation and extensive arm’s length negotiations
9 lasting nearly two (2) years, which included a full day mediation with Jeffrey Krivis. *See* Decl. Rodriguez,
10 ¶¶ 6-12. At all times, the negotiations were adversarial and contentious, although still professional in
11 nature. *See id.* Further, while Plaintiffs contend they would prevail on the claims and the issue of
12 certification, this is not a certainty and there is substantial risk in proceeding to further litigation. *See id.*
13 at ¶¶ 6-12. The ability to secure a guaranteed settlement ensure Class Members receive some
14 compensation was a motivating factor in reaching this settlement. *See id.*

15 **ii. The Extent of Investigation and Discovery Completed Provided Ample
16 Information to Enter Into an Informed and Reasonable Settlement**

17 The Parties were in possession of all necessary information during the negotiations. The Parties
18 engaged in substantial formal and informal discovery and exchange of documents, including a
19 representative sampling of employee data and policy documents, which covered all aspects of the class
20 claims and helped thoroughly vet the extent of Plaintiffs’ claims against Defendant and create an accurate
21 damages model. *See id.* at ¶¶ 6-11. As a result, Plaintiffs made a reasonable estimation of Defendant’s
22 potential liability and its ability to satisfy any judgment or settlement. *See id.* The settlement was reached
23 at a stage where “the parties certainly have a clear view of the strengths and weaknesses of their cases”
24 sufficient to support the settlement. *Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 617 (N.D. Cal. 1979).

25 **iii. Class Counsel are Experienced in Similar Litigation**

26 Class Counsel has considerable experience in class and PAGA actions and wage-and-hour
27 litigation. Class Counsel brought and are currently bringing several wage-and-hour class and/or PAGA
28 actions. Thus, Class Counsel are qualified to evaluate the class claims, value of settlement versus moving

for certification and going to trial, and the viability of possible affirmative defenses. *See* Decl. Rodriguez, ¶¶ 17-22; Decl. Han, ¶¶ 2-8; Exh. 1 to Decl. Han. Class Counsel believes the settlement is fair and reasonable considering the complexities of the case, the uncertainties of class certification and litigation, and the secured benefit to the class. Decl. Rodriguez, ¶¶ 6-14; Decl. Han, ¶¶ 20-21.

iv. The Settlement is Fair and Reasonable Based on the Strength of Plaintiffs' Case and the Risks and Costs of Further Litigation

A review of the Agreement's terms does not give rise to any doubts about its fairness. Based on the records and facts of this case, Plaintiffs have secured a gross recovery of approximately 7.8 % and a net recovery of approximately 4.3% of the claims' maximum likely value. *See* Decl. Rodriguez, ¶¶ 13-14. Additionally, the average net award per class member is approximately \$592.73. *See id.* This settlement is a reasonable compromise of the class and PAGA claims, and is within the percentile ranges of the total available damages that have been approved in other class settlements. *See Wershba*, 91 Cal. App. 4th at 246, 250; *Rebney v. Wells Fargo Bank*, 220 Cal.App.3d 1117, 1139 (1990); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 628 (9th Cir. 1982); *see also In re Omnivision Technologies, Inc.*, 559 F.Supp.2d 1036, 1042 (2007) (noting that certainty of recovery in settlement of 6% of maximum potential recovery after reduction for attorney's fees was higher than median percentage for recoveries in shareholder class action settlements, averaging 2.2%-3% from 2000 through 2002); *Bravo v. Gale Triangle, Inc.*, 2017 U.S. Dist. LEXIS 77714 (C.D. Cal. 2017) (approving a settlement where the net recovery to class members was approximately 7.5% of the projected maximum recovery amount); *Avila v. Cold Spring Granite Co.*, 2017 U.S. Dist. LEXIS 130878 (E.D. Cal. 2017): (approving a settlement with a gross recovery of 11% of the projected maximum damages available and a net recovery of approximately 6.7% of the projected maximum recovery); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245 (N.D. Cal 2015) (approving a settlement where the gross recovery was approximately 8.5% of the projected maximum recovery).

A settlement agreement may also provide for a claims made and reversion procedure so long as the settlement, as a whole, is still fair, reasonable, and adequate. *See In re Microsoft I-V Cases*, 135 Cal.App.4th 706, 721 (2006) ("The analysis additionally recognized that a court approved settlement could properly include a 'reversion of ... funds to the defendant'"); *Cundiff v. Verizon California, Inc.*,

1 167 Cal.App.4th 718, 728 (2008) (noting that *In re Microsoft I-V Cases* found that a class settlement may
2 provide for a reversion so long as it does not render the settlement, as a whole, unfair, inadequate, or
3 unreasonable and distinguishing the case before it on the grounds that the class settlement agreement
4 made no provision for unclaimed funds). The claims made and reversion procedure in this case was
5 agreed to as a result of the Defendant’s financial condition. See Decl. Rodriguez, ¶¶ 7-10. It was only
6 after Plaintiffs’ counsel reviewed financial documents to verify Defendant’s financial condition, weighed
7 the relevant interests, and considered potential alternatives that the claims made and reversion procedure
8 was ultimately agreed to. See Decl. Rodriguez, ¶¶ 7-10. The claims made and reversion procedure
9 appropriately balance the relevant interest in this case and do not render the settlement unfair,
10 unreasonable, or inadequate.

11 **v. The Proposed Settlement is a Reasonable Compromise of Claims**

12 The case of *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116 (2008) requires additional
13 information be presented to the Court, acting as a fiduciary for the absent class members “to ensure that
14 the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims
15 being released, discounted by the risks and expenses of attempting to establish and collect on those claims
16 by pursuing the litigation” *Id.* at 129. *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186
17 Cal. App. 4th 399 (2010), clarified a *Kullar* showing does not require submitting an illusory prediction
18 of the outer reaches of exposure without considering the risks of certification, decertification, dispositive
19 motions, and trial. *Kullar* also does not require an explicit statement of the maximum amount the plaintiff
20 class could recover if it prevailed on all its claims provided there is a record that allows “an understanding
21 of the amount that is in controversy and the realistic range of outcomes of the litigation.” *Id.* at 409. The
22 *Munoz* Court found the record before the trial court was sufficient, having included the number of class
23 members, payroll data, declarations describing hours and overtime worked, as well as variances in duties
24 and rest and meal period experience, and a companion action alleging less than \$5,000,000 in damages.
25 This information constituted “an adequate basis from which to garner a reasonably adequate
26 understanding of the amount that is in controversy within the meaning of *Kullar*.” *Id.*

27 Plaintiffs similarly relied upon payroll data and Class Members’ data to determine the realistic
28 potential damages suffered by the class as a whole. See Decl. Rodriguez, ¶¶ 7, 11. This analysis allowed

1 Plaintiffs to determine the extent and frequency of potential violations on all claims as to all Class
2 Members. *See id.* Plaintiffs secured a percentage of the total demand for the putative class that is within
3 the range of what has been found to be sufficient in several other cases. *See, supra*, Section V.c.iv; *see*
4 *also, e.g., In re Omnivision Technologies, Inc.*, 559 F.Supp.2d at 1042; *Reed v. 1-800 Contacts, Inc.*,
5 2014 U.S. Dist. LEXIS 255 (S.D. Cal. 2014) (approving a settlement of \$11.7 million where the
6 maximum range of damages was \$5,000 for each of the alleged 300,000 instances of unlawful recording
7 violations (\$1.5 billion), equaling approximately .78% of the total demand and approximately \$800 per
8 class member). This settlement represents a reasonable compromise given the percentage of the total
9 demand that was secured, the average recovery per class member, the Court's ability and discretion to
10 cut PAGA penalties, Defendant's financial condition, and the uncertainty of class certification. *See Decl.*
11 *Rodriguez*, ¶¶ 7-14.

12 **vi. The Attorneys' Fees and Costs, Enhancement Payments, and Settlement**
13 **Administration Costs To Be Requested In Connection With Final Approval**

14 Should the Court grant preliminary approval of the Agreement, Plaintiffs will make a request in
15 connection with the final approval briefing for attorney's fees in the amount of \$210,000 (35% of the
16 Gross Fund Value), costs in an amount not to exceed \$18,500, Settlement Administration Costs in an
17 amount not to exceed \$10,500, and Enhancement Payments for the Class Representatives in the amount
18 of \$10,000 each. Plaintiffs believe an award of attorney's fees under the common fund doctrine is
19 appropriate in this case. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 477-478 (1980) ("A lawyer who
20 recovers a common fund for the benefit of persons other than . . . her client is entitled to a reasonable
21 attorney's fee from the fund as a whole."); *Laffitte v. Robert Half Internat., Inc.*, 1 Cal.5th 480, 506
22 (2016). Similarly, Plaintiffs believe the amounts to be requested for attorney's fees and costs are within
23 accepted ranges. Historically, attorneys' fee awards in common fund cases in general range from 20%
24 to 50% of the fund, depending on the circumstances of the case. *See Newberg on Class Actions*, (3rd
25 Ed. 1992), §14.03 (finding 50% to be the upper limit). *Decl. Rodriguez*, ¶¶ 23; *Decl. Han*, ¶¶ 23-27.
26 Awards ranging between 30% and 40% of the fund are generally approved as reasonable in
27 representative litigation settlements below \$10 million. *See Martin v. Ameripride Servs.*, 2011 U.S.
28 Dist. LEXIS 61796, *22-23 (S.D. Cal. 2011) (collecting cases); *Birch v. Office Depot, Inc.*, USDC

1 Southern District, Case No. 06cv1690 DMS (WMC) (awarding 40% fee on a \$16 million wage and
2 hour class action settlement); *Rippee v. Boston Mkt. Corp.*, USDC Southern District, Case No.
3 05cv1359 BTM (JMA) (awarding a 40% fee on a \$3.75 million wage and hour class action settlement).
4 Similarly, the amounts to be requested for Settlement Administration Costs and Enhancement
5 Payments to the Class Representatives are within accepted ranges. *See West v. Circle K Stores, Inc.*,
6 2006 U.S. Dist. LEXIS 76558, at *7-*8, *12, *27 (E.D. Cal. Oct. 19, 2006) (awarding a \$15,000
7 representative enhancement where 10,000 class members were to receive a gross award of
8 approximately \$500 each from the \$5,000,000 settlement); *see Dent v. ITC Serv. Croup*, 2013 U.S.
9 Dist. LEXIS 139359, at *9-*10, *15-*16 (D. Nev. Aug. 6, 2013) (awarding a \$15,000 representative
10 enhancement out of a \$150,000 settlement for approximately 530 class members); *See Patel v. Nike*
11 *Retail Services, Inc.*, 2019 WL 2029061 at *2 (N.D. Cal. 2019) (\$5,261 for settlement administrator's
12 fees was not excessive where PAGA group consisted of 40 employees).

13 The Notice of Class Action Settlement will state the amounts to be requested to provide Class
14 Members the ability to comment thereon, which will provide evidence of whether the requested amounts
15 are reasonable. *See* Exhibit F at pg. 2, § II.A; *see also In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS
16 13555, 71 (C.D. Cal. 2005) (“the absence of objections or disapproval by class members to class
17 counsel’s fee request further supports finding the fee request reasonable”). In connection with the final
18 approval briefing, Plaintiff will provide information to enable a lodestar cross check of the requested fee,
19 a detailed declaration from Plaintiffs regarding their time spent on the case as well as any risks and
20 burdens incurred as the Class Representatives, an updated, finalized costs spreadsheet, and a declaration
21 from the Settlement Administrator detailing the work performed and Settlement Administration Costs
22 incurred. Decl. Rodriguez, ¶ 23; Exhibit E; Decl. Han, ¶¶ 27-28; Exh. 2 to Decl. Han. Any allocated
23 amounts not ultimately awarded by the Court will be distributed to Settlement Class Members pro rata.
24 *See* Exhibit A, ¶¶ I.b., I.g., I.l., I.n., I.ee, VI.

25 **c. The Proposed Notice Procedures Comply With Class Members’ Due Process Rights**

26 It is not required that Class Members be given actual notice of class settlement; instead, “the
27 best practicable notice under the circumstances, including individual notice to all members who can be
28 identified through reasonable effort” is all that is required. *See* Fed. R. Civ. Proc. 23(c)(2)(b); *Silber v.*

1 *Mabon*, 18 F.3d 1449, 1453 (9th Cir. 1994); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1129 (9th
2 Cir. 2017); *Walsh v. CorePower Yoga LLC*, 2017 U.S. Dist. LEXIS 163991, at *12-14 (N.D. Cal.
3 2017); *Wright v. Linkus Enters.*, 259 F.R.D. 468, 474-75 (E.D. Cal. 2009). In *Silber v. Mabon*, 18 F.3d
4 1449 (9th Cir. 1994), the Court rejected a class member's argument that he had not received due
5 process because he did not receive notice until after the opt out period, finding that, so long as the
6 notice process utilized is the best practicable under the circumstances, due process is satisfied even if
7 there is no actual receipt of the notice. See *Silber*, 18 F.3d at 1453-1454. With regard to any potential
8 undeliverable Notice of Settlement in this case, the Court in *Rannis v. Recchia*, 380 F. App'x 646 (9th
9 Cir. 2010) found that class members who did not receive actual notice due to their mailings being
10 deemed undeliverable were still properly held to be part of the class settlement because they received
11 the best notice practicable under the circumstances. See *Rannis v. Recchia*, 380 F. App'x at 650-651.
12 In *Noel v. Thrifty Payless, Inc.*, 7 Cal. 5th 955, 980-984 (2019), the California Supreme Court noted
13 that California has adopted a similar approach regarding providing notice to class members.

14 The notice method in *Rannis* is similar to that used in the present case. For example, the Notice
15 of Class Action Settlement contains all information necessary for a Class Member to assess the
16 litigation, the settlement, and whether they wanted to participate, object, or opt-out. See Exhibit F. The
17 Settlement Administrator will utilize a national change of address database, forwarding notices, and
18 skip tracing in an effort to ensure that all reasonable means were exhausted in attempting to provide
19 Class Members notice of this settlement. See Exhibit A, ¶¶ XI.a-d. The content of the notice provided
20 and the manner in which it will be provided to Class Members is the best practicable notice to satisfy
21 due process. In a case utilizing similar claim and notice procedures, approximately 78% of the net
22 settlement amount was claimed. See Decl. Rodriguez, ¶ 15.

23 **d. Provisional Certification of the Class is Appropriate**

24 Class certification is appropriate when (1) the class is ascertainable and (2) there is "a well-defined
25 community of interest in the questions of law and fact involved affecting the parties to be represented."
26 *Dunk*, 48 Cal. App. 4th at 1806. The "community of interest" element "embodies three factors: (1)
27 common questions of law or fact predominate; (2) class representatives with claims or defenses typical
28

of the class; and (3) class representatives who can adequately represent the class.” *Id.* The Parties agree, for the purposes of settlement only, these prerequisites are met. *See* Exhibit A.

i. The Proposed Settlement Class is Ascertainable and Sufficiently Numerous

The proposed settlement class is ascertainable because all putative class members can be readily identified through employee personnel and payroll files. *See Noel v. Thrifty Payless, Inc.*, 7 Cal.5th 955, 980 (2019); *Rose v. City of Hayward*, 126 Cal.App.3d 926, 932 (1981); *Lee v. Dynamex, Inc.*, 166 Cal. App. 4th 1325, 1334 (2008). The numerosity requirement is met because there are approximately 500 individuals who fall within the definition of Class Member, which makes joinder of all members impracticable. *See Gay v. Waiters’ & Dairy Lunchmen’s Union*, 489 F.Supp. 282 (N.D. Cal. 1980), *aff’d* 694 F.2d 531 (9th Cir. 1982); *Hebbard v. Calgrove*, 28 Cal. App. 3d 1017, 1030 (1972) (noting no set minimum to meet the numerosity prerequisite, but a class as few as twenty-eight (28) members is acceptable). Thus, these requirements are satisfied.

ii. The Commonality, Predominance, and Typicality Requirements are Met

The commonality requirement is met when there are questions of law or fact regarding the class as a whole. *See Hanlon*, 150 F.3d at 1019. Commonality requires only that some common legal or factual questions exist; Plaintiffs need not show that all issues in the litigation are identical. *See Richmond v. Dart Ind., Inc.*, 29 Cal.3d 462, 473 (1981); *City of San Jose v. Superior Court*, 12 Cal.3d 447, 460 (1974). Common questions of law or fact must also predominate over individual questions and class-wide treatment of a dispute must be superior to individual litigation.² *See Richmond*, 29 Cal.3d at 469. Predominance requires a putative class be sufficiently cohesive to warrant adjudication by representation. *See Hanlon*, 150 F.3d at 1022. The typicality requirement is met when claims of the named representative are typical of those of the class, though “they need not be substantially identical.” *Id.* at 1020; *Classen v. Weller*, 145 Cal. App. 3d 27, 46-47 (1983).

The common questions of law and fact in this case stem from Plaintiffs’ contention Defendant violated California law by: (a) failing to authorize and permit meal and rest periods due to inadequate staffing, excessive production quotas, and being required to don and doff personal protective equipment

² When assessing predominance and superiority, a court may consider that the class will be certified for settlement purposes only and that manageability of trial is therefore irrelevant. *See Amchem Products v. Windsor*, 521 U.S. 591 (1997).

1 (“PPE”) while off-the-clock during meal periods; (b) failing to pay for all hours worked; (c) failing to
2 factor in bonuses and other non-discretionary incentive payments into employees’ regular rate of pay for
3 overtime, sick leave, and other premium wage payment purposes; (d) failing to pay daily overtime; (e)
4 failing to provide required sick leave and pay sick leave wages; and (f) failing to reimburse for business
5 expenses, including for the use of employee’s personal cell phones and requiring employees to purchase
6 non-slip shoes without reimbursement. *See* Exhibit B. The waiting time penalties, unfair competition,
7 and PAGA claims are derivative of these violations. *See id.* Plaintiffs and the Class Members seek the
8 same remedies under state law. Under these specific circumstances, and for purposes of settlement only,
9 the commonality and predominance requirements are satisfied. Regarding the typicality requirement,
10 Plaintiffs contend they suffered from the same unlawful policies, treatment, and circumstances as Class
11 Members did, will request the same remedies, and will rely on the same methods of proof to establish
12 liability and damages. *See id.* Thus, the typicality requirement is also satisfied for settlement purposes.

13 **iii. The Adequacy Requirement is Met**

14 The adequacy of representation requirement is met if the named representative and counsel have
15 no interests adverse to those of the putative class members and are committed to vigorously prosecuting
16 the case on behalf of the class. *See Hanlon*, 150 F.3d at 1020; *McGhee v. Bank of America*, 60 Cal.App.3d
17 442, 450-51 (1976). Those standards are met here. Under the proposed settlement, Plaintiffs and the
18 putative Settlement Class Members will receive a pro rata share of the settlement based on the number
19 of workweeks they worked for Defendant. *See* Exhibit A. Finally, any Class Member who wishes to
20 opt-out of the settlement may do so, and any Settlement Class Member may also dispute the number of
21 workweeks stated in the Notice of Class Action Settlement (Exhibit F).

22 There is no conflict of interest between Plaintiffs and Class Members. Plaintiffs and Class
23 Counsel pursued the claims made in the operative Complaint vigorously on behalf of the Class. Class
24 Counsel, with Plaintiffs’ assistance, thoroughly investigated the claims made in this case by speaking
25 with Plaintiffs and reviewing substantial amounts of documents. Class Counsel engaged Defendant’s
26 counsel in settlement discussions over the course of nearly two (2) years. Class Counsel have experience
27 defending and bringing wage-and-hour claims. Because Class Counsel vigorously pursued Plaintiffs’
28 and the Class Members’ claims, the adequacy requirement is met. *See generally* Decl. Rodriguez.

1 **VI. CONCLUSION**

2 For all of the foregoing reasons, Plaintiffs respectfully request this Court preliminarily and
3 conditionally certify the class for settlement purposes; grant preliminary and conditional approval to the
4 proposed settlement, including the Plaintiffs' Class Representative Enhancement Payments, the payment
5 to the LWDA under PAGA, and Class Counsel's application for reasonable attorneys' fees and costs;
6 approve the Notice of Settlement and Claim Form, including the proposed deadlines for opting-out of
7 and objecting to the settlement; and schedule the final settlement approval hearing. A copy of Plaintiffs'
8 proposed order is being filed concurrently herewith.

9
10 Dated: September 29, 2022

Shimoda & Rodriguez Law, PC

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12 By: 
13 Galen T. Shimoda
14 Justin P. Rodriguez
15 Attorneys for Plaintiffs
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