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

TOM TESENE, individually, and on behalf of
other members of the general public similarly
situated;

Plaintiff,

v.

BOSSARD, INC., a Delaware corporation;
and DOES 1 through 100, inclusive;

Defendants.

ELECTRONICALLY FILED

Superior Court of California,
County of Alameda

04/28/2022 at 02:45:47 PM

By: Suzanne Pesko, Deputy Clerk

Case No.: RG21088612

Assigned for All Purposes to:
Honorable Noël Wise
Department 24

CLASS ACTION

**PLAINTIFF'S SUPPLEMENTAL BRIEF
IN SUPPORT OF PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

[Reservation ID: 004108041942]

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

Hearing Date: May 5, 2022
Hearing Time: 9:00 a.m.
Hearing Place: Department 24

Complaint Filed: February 9, 2021
Trial Date: None Set

Plaintiff Tom Tesene (“Plaintiff”) provides this supplemental submission in response to the Court’s tentative ruling on Plaintiff’s Motion for Preliminary Approval of Class Action Settlement originally scheduled for hearing on April 8, 2022. On April 1, 2022, the Court continued the hearing to May 5, 2022, with instructions to address the concerns outlined in the ruling.

The chart below lists each of the Court’s concerns from the tentative ruling and the revisions/submissions made to address each concern.

Ruling	Revisions/Submissions
<u>Reasonableness of Settlement.</u> (1) The Court appreciates the explanation provided by Plaintiff’s counsel regarding the total maximum theoretical recovery for the class, including prejudgment interest and penalties and the risks of litigation. (See <i>Kullar v. Foot Locker Retail, Inc.</i> (2008) 168 Cal.App.4th 116.) However, the operative complaint seeks injunctive relief. Counsel have not stated the value of such relief, nor have they agreed to any injunctive relief or other mechanism or policy change(s) to ensure that the alleged violations will not occur, going forward.	The operative complaint in this Action seeks injunctive relief for Defendant to cease certain alleged illegal practices and policies. Defendant has adamantly denied any wrongdoing. (Supplemental Declaration of Douglas Han (“Supp. Han Decl.”), ¶ 4.) Nevertheless, Defendant has confirmed that the following changes have been made. (Supp. Han Decl., <i>supra</i> , at ¶ 5.) Although Defendant maintains that its timekeeping rounding policy was neutral and did not favor the employee or the employer, Defendant has eliminated rounding of time altogether. (<i>Ibid.</i>) Defendant has also instituted automatic payment of a meal period premium if a nonexempt employee’s time punches reflect a short, late, or missed meal period. (<i>Ibid.</i>) This practice was instituted in 2020. (<i>Ibid.</i>) Plaintiff has valued this injunctive relief by calculating the damages that Plaintiff and the Class Members

would have continued to incur had Defendant not changed its timekeeping rounding policy and meal period premium policy. (*Ibid.*)

According to Plaintiff's expert's analysis, the net number of underpaid hours due to Defendant's rounding policy during the Class Period (February 9, 2017 – March 3, 2022) is approximately 7,956, meaning an average of approximately 1,948.4 underpaid hours per year $[(7,956 \text{ underpaid hours} \div 49 \text{ months in the Class Period}) \times 12 \text{ months} = 1,948.4]$. (Supp. Han Decl., *supra*, at ¶ 6.) Assuming the same violation rate going forward, Plaintiff and the Class Members would have suffered around \$32,733.12 in damages each year for as long as Defendant's timekeeping rounding policy continued $[1,948.4 \text{ underpaid hours} \times \$16.80 \text{ average hourly rate}]$. (*Ibid.*)

In addition, Plaintiff's expert analyzed that there were approximately 14,550 shifts that had either late or short meal breaks during the Class Period. (Supp. Han Decl., *supra*, at ¶ 7.) However, it is likely that about half these shifts (7,275) were not caused by Defendant's policies and practices, meaning employees chose to forego taking full and timely meal breaks. (*Ibid.*) Plaintiff's expert also analyzed that there were approximately 1,426 shifts

	greater than six (6) hours in length worked without a recorded meal break during the Class Period. (<i>Ibid.</i>) Thus, on average, there were approximately 2,131 shifts with short, late, and/or missed meal breaks per year [(8,701 shifts ÷ 49 months in the Class Period) x 12 months]. (<i>Ibid.</i>) Again, assuming the same violation rate going forward, Plaintiff and the Class Members would have suffered an additional \$35,800.80 in damages each year had Defendant not instituted automatic payment of a meal period premium when a nonexempt employee's time punches reflect a short, late, or missed meal period [2,131 shifts x \$16.80 average hourly rate]. (<i>Ibid.</i>) In addition to the monetary value, the value of the policy and practice change make the Settlement even more fair and reasonable. (<i>Ibid.</i>)
<u>Notice Content.</u> (2) The content and form of the notice should be improved. The notice is 14 pages, single spaced. The most critical information is buried in long, repetitive explanations of the settlement and class action process. This may actually discourage recipients from reading it and impede their ability to understand and exercise their rights.	The content and form of the Notice have been improved according to the Court's suggestions. (Supp. Han Decl., <i>supra</i>, at ¶ 8; Exhibit 3.) Long, repetitive explanations of the Settlement and class action process have been eliminated, and the Notice has been redrafted to be easier for non-lawyers to understand. (Supp. Han Decl., at ¶ 8; Exhibit 3.) The Notice has been amended to explain that it

The notice should be redrafted with the goal of making it easier to understand for non-lawyers. See The Federal Judicial Center's "Illustrative" Forms of Class Action Notices at http://www.fjc.gov/. Counsel should try to comply with the standards in the S.E.C.'s plain English rules. (17 C.F.R. § 230.421.) The court understands that there can be a trade-off between precise and comprehensive disclosures and easily understandable disclosures, and is willing to err on the side of making the disclosures understandable. The notice can explain that it is a summary notice and that additional, more detailed explanations are provided (perhaps as a FAQ) on the website where the pleadings and other information will be posted.	provides only a summary of the claims alleged in the Action and the key terms of the Settlement, and that more detailed explanations of the terms of the Settlement can be found on the Settlement Administrator's website, the URL to which is provided. (Supp. Han Decl., at ¶ 8; Exhibit 3, at p. 2.)
(3) The Options Box should be streamlined to eliminate repetitive, lengthy explanations and should appear on page 1 of the Notice. If necessary, each box can refer to a more detailed explanation, later in the Notice, by section number.	The "Options" box, previously included in Section 3 of the Notice, has been streamlined to eliminate repetitive, lengthy explanations and has been moved to page 1 of the Notice. (Supp. Han Decl., <i>supra</i>, at ¶ 9; Exhibit 3, <i>supra</i>, at p. 1.)
(4) The release should be succinctly explained in layperson's terms. (E.g., If you do not opt out, in exchange for your settlement payment, you will be releasing claims against Defendant, which arose between [date] and	The Notice has been amended to succinctly explain the Released Claims and PAGA Released Claims in layperson's terms. (Supp. Han Decl., <i>supra</i>, at ¶ 10; Exhibit 3, <i>supra</i>, at § 9.)

1	[date], relating to, ... and	
2	That means	
3	you will not be able to file your own lawsuit	
4	against Defendant for these claims. The exact	
5	terms of the release can be reviewed at	
6	[URL].)	
7	(5) Given that many class members are still	Page 1 of the Notice has been amended to
8	employed by Defendant, page 1 of the notice	include that there will be no retaliation against
9	must state that there will be no retaliation	Class Members for exercising any of the rights
10	against class members for exercising any of	set forth in the Notice. (Supp. Han Decl.,
11	the rights set forth in the Notice.	<i>supra</i> , at ¶ 11; Exhibit 3, <i>supra</i> , at p. 1.)
12	(6) Also, telephone and email information for	The contact information for Counsel for
13	Defense counsel should not be provided in the	Defendant has been removed from Section 4
14	Notice unless Plaintiff's counsel consents to	of the Notice. (Supp. Han Decl., <i>supra</i> , at ¶
15	have class members communicate with	12; Exhibit 3, <i>supra</i> , at § 4.)
16	opposing counsel about the settlement. (CRPC	
17	2-100.)	
18	(7) The envelope for the notice must clearly	The Settlement Agreement has been amended
19	state that it concerns a class action settlement	to include that the envelopes for the Notice
20	and the recipient may be entitled to money.	Packets will clearly state that the contents of
21		the envelope concern a class action settlement
22		and that the recipient may be entitled to
23		money. (Supp. Han Decl., <i>supra</i> , at ¶ 13;
24		Exhibit 2, § III (J)(2)(b).)
25	<u>Incentive Award.</u>	Prior to the final approval hearing, Plaintiff
26	(8) The court will not decide the amount of	will provide evidence regarding the nature of
27	any incentive award until final approval	his participation in the Action, including a
28	hearing. Each plaintiff must provide evidence	description of his specific actions and the
	regarding the nature of his or her participation	amount of time he committed to the

in the action, including a description of his or her specific actions and the amount to time s/he committed to the prosecution of the case. (Clark v. American Residential Services LLC (2009) 175 Cal.App.4th 785, 804-807.)	prosecution of the case, so that the Court may decide the amount of any Class Representative Enhancement Payment. (Supp. Han Decl., <i>supra</i>, at ¶ 14.)
<u>Attorneys' Fees and Costs.</u> (9) The court notes and approves of the settlement term that funds not paid to counsel as fees will be distributed to the class pro rata. The court will not approve the amount of attorneys' fees until the final approval hearing. The court cannot award attorneys' fees without reviewing information about counsel's hourly rate and the time spent on the case. This is the law even if the parties have agreed to the fees. (Robbins v. Alibrandi (2005) 127 Cal.App.4th 438, 450-451.) Counsel must provide sufficient information for a lodestar analysis, such as task-based summaries. (See, e.g., Syers Properties III, Inc. v. Rankin (2014) 226 Cal.App.4th 691, 700 [discussing task-based summaries of hours billed]; Laffitte v. Robert Half Int'l Inc. (2006) 1 Cal.5th 480, 505 [permitting counsel to submit summaries in support of reasonableness of lodestar].) Class counsel shall also substantiate their costs request at final approval. The court anticipates requiring 10% of any fee award to be kept in	Prior to the final approval hearing, Class Counsel will provide information regarding their hourly rates and the time spent on the case as well as sufficient information for a lodestar analysis for the Court to review before awarding the Attorney Fee Award and Cost Award. (Supp. Han Decl., <i>supra</i>, at ¶ 15.) Class Counsel shall also substantiate their requests for the Attorney Fee Award and Cost Award at final approval. (<i>Ibid.</i>) The Settlement Agreement has been amended to provide that the Settlement Administrator will conduct a final accounting following the completion of the distribution process, upon the expiration of the one hundred eighty (180) day period with which Participating Class Members and Eligible Aggrieved Employees shall be provided to cash or deposit their settlement checks and after the Settlement Administrator has paid any unclaimed funds from uncashed settlement checks to the State Bar Impact Fund. (<i>Ibid.</i>; Exhibit 2, <i>supra</i>, at § III (J)(9)(c).) The Settlement Agreement has

the administrator's trust fund until the completion of the distribution process and court approval of a final accounting.	been further amended to provide that ten percent (10%) of any Attorney Fee Award shall be kept in the Settlement Administrator's trust fund until the completion of the distribution process and Court approval of a final accounting. (Supp. Han Decl., at ¶ 15; Exhibit 2, at § III (J)(9)(b).)
<u>Settlement Administration Costs.</u> (10) The court notes and approves of the settlement term that funds not paid to the Settlement Administrator will be distributed to the class pro rata. The court will not approve the amount of the costs award to the Settlement Administrator until the final approval hearing. Admissible evidence to support the request should be provided prior to the final approval hearing.	Prior to the final approval hearing, Plaintiff will provide admissible evidence to support the request for Administration Costs. (Supp. Han Decl., <i>supra</i>, at ¶ 16.)
<u>Uncashed Checks.</u> (11) The court is unsure whether the California Department of Industrial Relations Unclaimed Wages Fund is available to receive unclaimed funds in wage and hour litigation (as opposed to administrative proceedings). Counsel should provide information about the fund, how moneys would be used and/or distributed, or other evidence suggesting that the proposed disposition would benefit the class or persons like them. Alternatively, the	The Settlement Agreement has been amended to provide that unclaimed funds from uncashed settlement checks will be paid to the State Bar Impact Fund, located at 2080 Addison Street, Suite 5, Berkeley, California 94704 – the <i>cy pres</i> beneficiary identified by the Parties pursuant to Code of Civil Procedure section 384(b). (Supp. Han Decl., <i>supra</i>, at ¶ 17; Exhibit 2, <i>supra</i>, at § III (J)(10).)

Court encourages the parties to identify a cy pres beneficiary that complies with C.C.P. § 384.

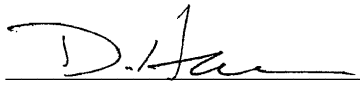
Proposed Order.

(12) Counsel shall revise the proposed order in accordance with the foregoing tentative ruling, including, but not limited to deferring approval of incentive award, attorneys' fees and costs and settlement administration costs until final approval; including a provision for a final accounting and 10% holdback of fees pending final accounting; and attaching a revised proposed notice. Class counsel shall file and serve copies of the revised order prior to the hearing.

The Proposed Order, filed concurrently herewith, has been amended to be consistent with the changes made to the Settlement Agreement and Notice and with the Court's tentative ruling, including, but not limited to deferring approval of the Class Representative Enhancement Payment, the Attorney Fee Award, the Cost Award, and Administration Costs until final approval and including a provision for a final accounting and a holdback of ten percent (10%) of the Court approved Attorney Fee Award pending Court approval of the final accounting. (Supp. Han Decl., *supra*, at ¶ 18.) In addition, a redlined version of the revised Notice is attached hereto as Exhibit 3, as stated in Section 3(b) above. (*Ibid.*)

Dated: April 28, 2022

JUSTICE LAW CORPORATION

By: 
Douglas Han
Shunt Tatavos-Gharajeh
Talía Lux
Attorneys for Plaintiff

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