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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

FRANK NICHOLS, JR., Individually and on
behalf of all similarly-situated, aggrieved
employees of Defendants in the State of
California,

Plaintiffs,

v.

VUORI, INC., a California Corporation, and
DOES 1 through 50, inclusive,

Defendants.

Case No.: 37-2021-00010367-CU-OE-CTL

CLASS ACTION [CCP § 382]

IMAGED FILE

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF FRANK NICHOLS, JR.'S
UNOPPOSED MOTION FOR AN ORDER 1)
PROVISIONALLY CERTIFYING
SETTLEMENT CLASS; 2)
PRELIMINARILY APPROVING CLASS
SETTLEMENT; 3) DIRECTING
DISTRIBUTION OF NOTICE OF
SETTLEMENT TO THE CLASS; 4)
APPOINTING CLASS COUNSEL AND
CLASS REPRESENTATIVE; AND 5)
SETTING A HEARING FOR FINAL
APPROVAL OF CLASS SETTLEMENT**

Date: April 15, 2022

Time: 9:00 a.m.

Judge: Eddie C. Sturgeon

Dept.: C-67

Date Complaint Filed: March 9, 2021

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I. INTRODUCTION

Pursuant to California Rules of Court, Rule 3.769(d) and (e), Plaintiff Frank Nichols, Jr. (hereinafter “Plaintiff”) respectfully requests that this Court grant preliminary approval for the proposed Class Settlement (“Settlement”) submitted concurrently herewith. In particular, Plaintiff respectfully requests that the Court (1) grant preliminary approval of the settlement terms; (2) grant preliminary certification of the proposed class for settlement purposes only; (3) authorize the parties to provide notice to the class in the manner set forth in the agreement; (4) appoint Plaintiff’s counsel as Class Counsel; and (d) schedule a final approval hearing.

In this motion Plaintiff seeks preliminary approval of settlement for a class of 135 current and former retail hourly non-exempt employees of Defendant, Vuori, Inc. (hereinafter “Defendant” or “Vuori”) in California during the class period, which provides for an average recovery of \$1,327.16 per employee. Many of the employees were short-term and/or part time employees and therefore the agreement’s provisions will significantly increase the recovery for those individuals who earned more pro rata wages during the class period. The key components of the Settlement are as follows:

- Defendant will pay the full amount of the non-reversionary gross settlement amount of \$325,000 in addition to employer-side taxes which shall be paid by Defendant in addition to the gross settlement amount.
- Participating Class Members are not subject to a general release or Civ. Code §1542 waiver and are only subject to a Limited Release of Claims for the wage and hour claims in this action;
- The Net Settlement Fund of \$179,167.66 is made available for direct payment to the approximately 135 Class Members based upon each employee’s pro rata share of gross wages earned during the class period, which equates to an average \$1,327.16 per employee and adjusts payment based on pro rata wages earned during the class period;
- A maximum amount of 33 1/3 percent of the Gross Settlement Fund (\$108,333.33.00) will be requested by Class Counsel to compensate them for their fees and a maximum of \$15,000 for their costs incurred during the litigation of these claims;
- The Claims Administration costs expected not to exceed \$5,000 will be allocated from the gross settlement fund; a maximum of \$7,500 will be requested as a service award to the Class Representative.

The Settlement is the result of the significant efforts of the Plaintiff and his counsel including thorough analysis of extensive informal discovery. After an in-depth analysis of the claims, potential defenses, and potential damages related to the allegations asserted, the parties engaged in an extended full-day mediation with class action mediator Tripper Ortman. With the benefit of his substantial experience

1 in wage and hour class actions and his neutral input, the parties reached the terms of this Settlement based
2 on the neutral mediator's fully-informed proposal.

3 **II. SUMMARY OF ARGUMENT**

4 Pursuant to California Rules of Court, Rule 3.769, the settlement of class actions requires the
5 court's approval. Here, Plaintiff seeks only preliminary approval of this settlement. Because the eventual
6 final approval hearing will provide an opportunity to review the settlement following the notice process,
7 preliminary approval of a class action settlement is appropriate so long as the proposed settlement is
8 "within the range of possible approval." In re General Motors Corp. Engine Interchange Litig., 594 F.2d
9 1106, 1124 (7th Cir. 1979) (quoting and following the Manual for Complex Litigation); Horton v. Merrill
10 Lynch, Pierce, Fenner & Smith, Inc., 855 F. Supp. 825, 827 (E.D. N.C. 1994). Because parties seeking
11 preliminary approval are simply requesting the opportunity to allow absent and previously uninvolved
12 Class Members to respond to the settlement, preliminary approval "is at most a determination that there
13 is what might be termed 'probable cause' to submit the proposal to Class Members and hold a full-scale
14 hearing as to its fairness." In re Traffic Exec. Assoc.-Eastern R.R., 627 F.2d 631, 634 (2d Cir. 1980). In
15 approving a class settlement, courts must have sufficient information to assure themselves that the terms
16 of the agreement are fair, reasonable and adequate. Moreover, courts must understand the amount in
17 controversy and the realistic range of outcomes of the litigation. Kullar v. Foot Locker, Inc., 168 Cal.
18 App. 4th 116, 120 (2009).

19 Because, as set forth below, the instant settlement was reached through informed, arms-length
20 bargaining between skilled counsel, it is clear that the parties have met this threshold.

21 **III. FACTS AND PERTINENT PROCEDURAL BACKGROUND**

22 This wage and hour class action commenced in February 2021 when Plaintiff Frank Nichols, Jr.
23 retained ShortLegal, APC to investigate his wage and hour employment claims against his former
24 employer. Defendant Vuori, Inc. is a relatively young company established in 2014 in Solano Beach,
25 California. The company designs and sells premium performance apparel inspired by the active Coastal
26 California. Plaintiff worked for Defendant as a Sales Associate from approximately June 2020 to February
27 2021. He was paid on an hourly basis and earned non-discretionary commissions calculated based on
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1 many objective variables, including the amount of sales dollars produced during a pay period. However,
2 this additional remuneration was not calculated into his regular rate of pay and, as a result, his overtime
3 hours worked were not paid at the correct rate of compensation. In order to carry out his job duties and
4 compensate for Defendant's company-wide practice of understaffing its stores, Plaintiff like other
5 aggrieved and similarly-situated employees, was required to forgo his meal breaks. However, Defendant
6 failed to pay Plaintiff and other similarly-situated employees meal period premiums – equivalent to one-
7 hour wages – in addition to PAGA penalties associated with this violation. Plaintiff also alleged Defendant
8 failed to provide rest periods and failed to pay all wages timely upon termination of employment. Finally,
9 the lawsuit also asserts derivative claims arising from Defendant's violations including failure to provide
10 accurate itemized wage statements, failure to timely pay all wages, failure to maintain records; and
11 violation of California's unfair competition statutes. Plaintiff also seeks payment of penalties in his
12 representative capacity pursuant to PAGA. (Declaration of Brian R. Short filed in support of the instant
13 motion ("Short Decl.") ¶ 2).

14 After pre-filing investigation and analysis of the merits of his claims, on February 25, 2021,
15 Plaintiff submitted a complaint to the LWDA and thereafter filed a putative class action and PAGA
16 representative action on May 3, 2021. (Short Decl. ¶ 10). Immediately upon filing his First Amended
17 Complaint, Plaintiff's propounded written discovery requests upon Defendant, including specially drafted
18 interrogatories, form – interrogatories, and request for production of documents. (Short Decl. ¶ 13). Soon
19 thereafter, Defendant, through its counsel, approached Plaintiff's counsel to discuss the possibility and
20 benefits of early mediation. Several in-depth phone conferences between the parties' counsel were able to
21 narrow the scope of contested matters and permit the parties to further evaluate the merits and defenses
22 which could be presented at the mediation. During these discussions, the parties agreed to engage in early
23 mediation in order to evaluate the possibility of informal resolution and avoid the expenditure of
24 unnecessary funds in litigation. Thereafter, the parties cooperated to schedule a mediation and exchange
25 of sufficient informal discovery necessary for a thorough and efficient evaluation of the claims and
26 defenses. (Short Decl. ¶¶ 14-15).

1 Prior to reaching this Settlement, Defendant provided Plaintiff and his counsel with significant
2 informal discovery, including Vuori's policies concerning time keeping, compensation, meal breaks and
3 a statistically significant sampling of paystubs and corresponding time records during the relevant time
4 period. (Short Decl. ¶¶ 14-15). Additionally, Plaintiff considered additional documentation provided by
5 the named plaintiff, which included compensation policies and copies of original wage statements
6 received during his employment, and an employment contract. After a thorough review of the relevant
7 case law, the significant amount of documents and records provided by Defendant, and information
8 obtained from the class representative, Plaintiff's counsel also prepared a comprehensive damages
9 analysis in order to assess the potential damages as well as the risks involved with the probable outcomes
10 in this litigation. (Short Decl. ¶¶ 16-17).

11 The Parties thereafter attended a full-day mediation session with mediator Tripper Ortman on
12 August 11, 2021. Mr. Ortman is a prominent and well-respected mediator who is thoroughly familiar with
13 mediating employment class and representative actions. More information about Tripper Ortman
14 significant experience and qualifications is available at [https://ortmanmediation.com/mediator-tripper-](https://ortmanmediation.com/mediator-tripper-ortman/)
15 [ortman/](https://ortmanmediation.com/mediator-tripper-ortman/). After an extended full-day of negotiations and information exchanges conducted through the
16 mediator, including an exchange and comparison of each parties' damage analysis, the Parties reached a
17 settlement for which they now seek preliminary approval. (Short Decl. ¶ 18).

18 **IV. THE PROPOSED SETTLEMENT**

19 The proposed settlement calls for the certification of the following settlement class:

20 *All current and former non-exempt, hourly paid retail employees who were*
21 *employed by Defendant in the State of California at any time commencing four (4)*
years prior to the filing of this Action to the date of mediation, August 11, 2021."

22 The class is estimated to consist of approximately 135 current and former employees. The
23 identification of the defined settlement class is easily determined based on a review of the Defendant's
24 personnel records. (Agreement Sec. 5.03 (a)). The settlement provides for an individualized notice to
25 each class member which will be sent via first-class mail, postage pre-paid, and it will advise Class
26 Members about the lawsuit and settlement. (Agreement Sec. 5.03 (b)). The settlement provides for a
27 multi-layer address verification procedure that will ensure Class Members receive the notice even if they
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1 have moved since leaving their employment with Vuori. (Agreement Sec. 5.03 (b)). These additional
2 address verification measures are intended to guarantee that the maximum number of Class Members will
3 be informed of the settlement and to ensure class member settlement funds are received in a timely manner.
4 Additionally, the proposed notice will provide Class Members with information, including the anticipated
5 individual settlement payment and methodology for computation of that sum so that they will know how
6 settlement payments will be computed. (See Class Notice attached to Short Decl. as Ex. 2, p. 4).

7 Class Members who wish to participate in the settlement will not need to take any affirmative
8 action or submit a claim form. Instead, their individual settlement checks will be mailed to their best
9 available address after the multi-layer address-verification procedures are carried out by the Claims
10 Administrator. (Agreement Sec. 5.03 (b)). Any individuals who do not cash their settlement checks within
11 90 days of issuance will be sent a reminder postcard and permitted an opportunity to have the check
12 reissued if lost, stolen or misplaced. (Agreement Sec. 5.06 (d)(5)). Thereafter, individuals will have an
13 additional 30 days, for a total of 120 days, in which to cash their settlement checks. Id. If the checks
14 remain uncashed after the 120-day period, the Settlement Administrator will deposit the funds with the
15 California State Controller's Office – Unclaimed Wages division reserved in the names of the class
16 member so that they may obtain their settlement funds at a later time. Id.

17 The Settlement Amount Defendant will pay in this matter is \$325,000 and is non-reversionary.
18 Of this amount, up to a court-approved 33 1/3% of the Gross Settlement Fund (\$108,333.33.00) is
19 allocated for attorney's fees, up to \$15,000 for reimbursement of advanced litigation costs, up to \$7,500
20 for the Class Representative as a service award, up to approximately \$5,000 for the cost of claims
21 administration, \$10,000 for PAGA penalties – 75% of which (\$7,500) shall be paid to the LWDA and
22 25% of which (\$2,500) shall be distributed pro-rata to Class Members. In order to provide an equitable
23 distribution of the settlement funds, each Settlement Class Member will receive a payment equal to the
24 pro rata portion of the number of gross wages earned by that class member in proportion to total aggregated
25 gross wages earned by All Settlement Class Members during the class period. (Agreement Sec. 5.06
26 (c)(1)). Once all of the components of the Maximum Settlement Amount are accounted for, the settlement
27 makes on average, approximately \$1,327.16 available for direct payments to participating Class Members
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1 on a non-reversionary basis, assuming 100% participation of all putative Class Members. However,
2 because the formula is based upon the wages earned by Class Members and there was a significant number
3 of part-time and/or short-term employees, individual Class Members are likely to receive significantly
4 greater settlements based on their tenure with Defendant. If less than 100% of Class Members participate
5 in the settlement, the participating Class Members' portion will increase pro-rata based on their original
6 settlement share such that the full amount of the settlement is completely distributed. Id.

7 Upon the Effective Date of the Judgment, all Settlement Class Members will be deemed to have,
8 and by operation of the Judgment will have, released all Released Claims as defined in the Agreement
9 (Agreement Sec. 7.02). This release is specifically tailored to be as narrow as possible and is limited to
10 the release of wage and hour claims based on the facts alleged in the operative complaint. Id. Class
11 Members who do not wish to be a part of the Settlement Class and do not wish to be subject to the
12 Judgment may request exclusion from the class action settlement. Those Class Members who submit a
13 request to be excluded from the class action settlement will not be subject to the Judgment and will be
14 deemed to have never participated in this action. (Agreement Sec. 5.04 (a)). All Class Members who do
15 not timely request exclusion will become members of the Settlement Class and will be subject to the
16 Judgment and its associated release, however only those individuals who cash their settlement checks will
17 be subject to the relevant FLSA release in compliance with applicable law requiring opt-ins for release of
18 these claims. Id.

19 In addition to making payments to Participating Claimants, and subject to Court final approval,
20 Defendants will pay up to 33 1/3% of the Gross Settlement Fund (\$108,333.33.00) for attorney's fees and
21 up to \$15,000 for reimbursement of litigation costs to class counsel. These payments will reimburse
22 Plaintiff and his counsel for all attorney's fees, costs and other litigation expenses incurred in this case.
23 (Agreement Sec. 5.06 (b)(1)). As will be set forth in further detail in Plaintiff's Motion for Approval of
24 Attorney's Fees and Costs, which will be submitted to be heard in conjunction with the Motion for Final
25 Approval, this maximum attorney fee payment represents a reasonable reimbursement for the Plaintiff's
26 attorney's lodestar accrued during the litigation of the action and recognizes the significant efforts of
27 experienced counsel who obtained this significant result for the Class Members at the expense of other
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1 guaranteed potential hourly work. (Short Decl. ¶ 30). This payment will be paid after the judgment
2 becomes final along with payments made to settlement Class Members.

3 Under the terms of the settlement, the cost of the professional claims administration fees will be
4 allocated from the Settlement Amount. Any excess of the allotted funds will be used to carry out any
5 potential difficulties in the claims administration process and any unused portion will be reallocated
6 wholly to the class in order to increase Class Members' settlement share. (Agreement Sec. 5.06.e). Finally,
7 as the Class Representative's compensation for his unique efforts, the significant risks undertaken by
8 bringing about this litigation in the internet age when it may easily be discovered by other employers and
9 used as an "unstated" excuse to refuse to hire him, and in exchange for a much broader general release
10 pursuant to California Civil Code section 1542, Defendant will pay the Representative Plaintiff a service
11 award in the amount of up to \$7,500. (Agreement at Sec. 5.06 (b)(3). Plaintiff has attached the Settlement
12 Agreement and the Notice as Exhibits 1 and 2, respectively to the Declaration of Brian Short in support
13 of this Motion for Preliminary Approval.

14 **V. ARGUMENT**

15 California Rules of Court 3.769(c)-(e) authorize courts to grant conditional certification of
16 settlement classes and provide preliminary approval of class action settlements if, as is the case here, the
17 proposed settlement and class notice have been lodged with the Court. When considering whether to grant
18 such certification, courts apply a "lesser standard of scrutiny" in the context of a stipulated settlement than
19 they do for a contested motion for class certification in the course of litigation. Dunk v. Ford Motor Co.,
20 48 Cal. App. 4th 1794, 1807 fn. 19 (1996). More generally, it is axiomatic that California law strongly
21 favors and encourages settlements. Stambaugh v. Super. Ct., 62 Cal. App. 3d 231, 236 (1976); Ferguson
22 v. Lieff, Cabraser, Heimann & Bernstein, 30 Cal. 4th 1037, 1054 (2003) (Kennard, J., concurring and
23 dissenting) ("[p]ublic policy favoring settlement is especially weighty for class actions"); see also Franklin
24 v. Kaypro Corp., 884 F.2d 1222, 1229 (9th Cir. 1989) ("it hardly seems necessary to point out that there
25 is an overriding public interest in settling and quieting litigation. This is particularly true in class action
26 suits.") (quoting Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 950 (9th Cir. 1976)).

The trial court has broad discretion to determine whether a class action settlement is fair. It should consider factors such as the strength of plaintiff's case; the risk, expense, complexity and likely duration of further litigation; the risk of maintaining class action status through trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the Class Members to the proposed settlement. Nordstrom Com. Cases, 186 Cal. App. 4th 576, 581 (2010). The trial court must determine that the settlement "was not the product of fraud, overreaching or collusion, and that the settlement is fair, reasonable and adequate to all concerned." Id.

Against the backdrop of this strong public policy favoring settlements, court approval of class action settlements is a two-step process: "First, counsel submit the proposed terms of the settlement and the court makes a preliminary fairness evaluation....If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval, the court should direct that notice under Rule 23(e) be given to the Class Members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement." Newberg & Conte, Newberg on Class Actions § 11.25 (4th ed. 2002) at pp. 38-39 (quoting Manual for Complex Litigation § 30.41 (3d ed. 1995)).

The Class Members are easily ascertainable from Defendant's employment records with similar potential claims as Plaintiff based on the positions and classification of each class member. See Sevidal v. Target Corp., 189 Cal. App. 4th 905, 918 (2010). Because the claims of Plaintiff and the absent Class Members are similar and individual resolution of each class member's claims cannot be efficiently adjudicated, a class action is the superior method of resolving these claims. Precisely because Class Members will subsequently receive notice and have an opportunity to be heard on the settlement, the Court need not pass final judgment on the settlement at this juncture. Instead, preliminary approval is appropriate so long as the proposed settlement falls "within the range of possible approval." Id.; see also In re General Motors Corp., supra, 594 F.2d at p. 1124; Holden v. Burlington Northern, supra, 665 F.

1 Supp. at p. 1402; In re Montgomery County Real Estate Antitrust Litig., 83 F.R.D. 305, 313 (D. Md.
2 1979). As noted by the court in In re Traffic Exec. Assoc.-Eastern R.R., supra, 627 F.2d at 634, approving
3 dissemination of notice “is at most a determination that there is what might be termed ‘probable cause’ to
4 submit the proposal to Class Members and hold a full-scale hearing as to its fairness.” See also Horton v.
5 Merrill Lynch, supra, 855 F. Supp. at 827 (same).

6 **A. This Case Presents No Deficiencies Suggesting Unfairness.**

7 The proposed settlement was the product of arms-length negotiations, including a mediation
8 session before an experienced mediator and ultimately culminated in both parties accepting the Mediator’s
9 Proposal suggested by neutral mediator Tripper Ortman. (Short Decl. ¶18). Fairness is presumed if the
10 settlement follows a formal mediation, especially where the mediator is a respected member of the legal
11 community. Dunk v. Ford, supra, 48 Cal. App. 4th at 1802-03. More specifically, as the Settlement
12 Agreement itself reveals, there is no preferential treatment for any segment of the class. In addition, the
13 settlement was reached after investigation and analysis of voluminous documents provided by Defendant
14 and the named plaintiff including pay records, corresponding detailed time records, and policies regarding
15 meal breaks, rest breaks and expense and reimbursement. (Short Decl. ¶¶ 11-14). Based in large part on
16 this analysis, Plaintiff agreed to the terms of the current settlement. (Short Decl. ¶ 25).

17 Furthermore, pursuant to California Rule of Court, Rule 3.769(b), the parties have disclosed the
18 agreed upon and proposed attorney fee award and the amount of reimbursable costs, which is well within
19 the range of reasonableness for matters of this nature. As the Court is already aware, Class Counsel are
20 experienced in this type of litigation, and they have (and hereby do) represent that this settlement is fair
21 and reasonable. (Short Decl. ¶¶ 3-8).

22 **B. The Proposed Notice is More Than Adequate.**

23 Pursuant to California Rule of Court 3.769(f), the proposed form of notice is more than adequate.
24 Reviewing proposed class notices, courts have held that the method and the content of the notice should
25 be designed to fairly apprise Class Members of the terms of the proposed settlement and the options
26 available to them. Cho v. Seagate Technology Holdings, Inc., 177 Cal. App. 4th 734,746 (2009). An
27 appropriate notice is one which has a reasonable chance of reaching a substantial percentage of the Class
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Members. Cartt v. Super. Ct., 50 Cal. App. 3d 960, 974 (1975). Here, the proposed form of notice will be sent via first class mail to the last known address of each class member, and prior to this mailing, the Claims Administrator will consult the U.S. Postal Service's National Change of Address Database service and Accurint in order to update any addresses for any returned notices. White v. Nat'l Football League, 41 F.3d 402, 408-09 (8th Cir. 1994) (abrogated on other grounds); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 618-20 (1997) individual mailings to each class member's last known address is a sufficient form of notice). (Agreement Sec. 5.03 (b)). Under the instant settlement, the Claims Administrator will immediately forward any notices returned with forwarding addresses, and it will conduct additional address verification measures through the use of a secondary credit agency search for any notices returned without forwarding addresses. (Agreement Sec. 5.03 (b)). The notice will provide details on the settlement and the options available to Class Members. In particular, it will inform each class member of her or his options to not take any action and automatically receive their individual settlement payment, to be excluded from the class action settlement or to object to it. ("Class Notice", Exhibit 2 to Short Decl.)

C. The Maximum Allowable Attorney's Fees Request is Reasonable

Although Plaintiff's counsel will submit a more detailed analysis of the attorney's fees which they will request in conjunction with the Motion for Final Approval, Plaintiff's counsel will be requesting a maximum amount of fees of 33 1/3% of the Gross Settlement Fund (\$108,333.33). This amount is reasonable and merits preliminary approval. Plaintiff's performed a thorough investigation and analysis of the claims prior to submitting the requisite notice letter to the Labor Workforce and Development Agency. (Short Decl. ¶¶10-11). Prior to mediation, Plaintiff's counsel engaged in a thorough analysis of the claims including conducting interviews with the Plaintiff, performing complex calculations related to non-discretionary bonuses and their potential effect on overtime calculations, and the examination of voluminous documents including pay records and time records, commission reward documents, and review of other documents related to this litigation. (Short Decl. ¶¶ 12-14). Additionally, Plaintiff's counsel examined various case law in order to fully analyze the various theories of recovery based on the information to date. The case law applicable to wage and hours class and representative actions has been

1 constantly evolving, and therefore it is required that Plaintiff's counsel spends an extensive amount of
2 research and analysis while litigating this type of cases.

3 The requested fees are reasonable under the preferred common-fund theory which bases recovery
4 of attorney's fees as a percentage of any Gross Settlement Fund obtained on behalf of the class. Lafitte v.
5 Robert Half International, Inc., 1 Cal. 5th 480 (2016). Additionally, Class Counsel's fee request is
6 reasonable if analyzed utilizing the alternative lodestar method as a cross-check and Plaintiff's counsel's
7 lodestar will only increase as Class Counsel carries out the various additional duties related to the claims
8 administration process, the filing of final approval and dealing with any post-settlement issues related to
9 this action. (Short Decl. ¶¶ 29-30). Therefore, the maximum allowable attorney's fees permissible under
10 the Settlement Agreement of \$108,333.33.00 are fair and reasonable at this stage of the proceedings and
11 merits preliminary approval.

12 **D. Liability Is Contested and the Settlement Provides For Reasonable, Fair and Adequate**
13 **Relief and It is Within the Realistic Range of Outcomes of Litigation**

14 In approving a class action settlement, courts must have sufficient information to assure
15 themselves that the terms of the agreement are fair, reasonable and adequate. Moreover, courts must
16 understand the amount in controversy and the realistic range of outcomes of the litigations. Kullar, 168
17 Cal. App. 4th 116; Clark v. Am. Residential Serv. LLC, 175 Cal. App. 4th 785, 806 (2009). In reaching
18 the Settlement, counsel on both sides relied on their respective substantial litigation experience in similar
19 employment class actions, and thorough analysis of the legal and factual issues presented in this case. (See
20 generally Short Decl.). Information obtained through informal discovery process led to Plaintiff's
21 counsel's assessment of the strengths and weaknesses of the case and the benefits of the Settlement.

22 In preparation for mediation, Plaintiff reviewed documents including pay records and time
23 records for putative Class Members and the policies contained within the various policies governing the
24 Class Members' employment during the class period. Based on these policies, Class counsel reviewed and
25 analyzed these pay and time records to perform a comprehensive damage analysis based on the numerous
26 theories of liabilities. (Short Decl. ¶¶ 11-14). A statistically-significant representative sample of
27 Defendant's pay and time records were examined to obtain estimated damages for Class Members. (Short
28

Decl. ¶¶ 14-17). Based on an analysis of these time records, Plaintiff's examination reflected that the Class Members were not properly paid for their overtime hours worked which resulted from Defendant's failure to incorporate non-discretionary bonuses and commissions into the regular rate for the purpose of calculating overtime rate. (Short Decl. ¶¶ 15-16). Additionally, Plaintiff confirmed that Class Members were not paid timely upon separation of employment. *Id.* This extensive research performed by Class Counsel and their in-depth knowledge concerning the wage and hour claims enabled Class Counsel to quickly identify these additional claims and perform a comprehensive damages analysis to not only account for the maximum available damages at trial for the claims asserted, but to also defend its analysis against attacks from defense counsel. *Id.*

Plaintiff utilized the statistical sampling to determine, for each class member, the total number of days worked per week, the average rate of pay, the average number and length of days worked, the number of rest periods and meal periods missed, the average number of overtime hours worked, and the amount of underpaid overtime wages per pay period. Based upon an extensive review of the pay and time records, Plaintiff's firm calculated class member's claims for unpaid overtime wages on account of improper regular rate of pay to be \$11,069.69. Damages for failure to provide wage statements totaled \$259,650. Unpaid rest premium wages amounted to \$259,650 (assuming 100% violation rate). Unpaid meal period premium wages totaled \$373,457.60 (assuming 100% violation rate). Damages for missed rest breaks amounted to \$186,728.80. Waiting time penalties totaled and additional \$186,163.20 (Short Decl. ¶ 17). Many of these theories of recovery are duplicative of other theories and therefore cannot be stacked. Likewise, much of the calculated damages is subject to a finding of "willful" misconduct of the Defendant and/or is discretionary in nature.

E. The Class Recovery Avoids the Risks of Class Certification

While Plaintiff's counsel believes that this cause of action could be certified, there is inherent risk associated with attempting to certify a class based on unpaid hour worked. Indeed, Defendant strongly disputed Plaintiff's claims for unpaid wages. First, Defendant valued Plaintiff's overtime rate of pay claims as near *de minimus* due to the fact that only a very small fraction of the Class Members in the whole class worked overtime in the same workweek in which earned their earned commissions. (Short Decl. ¶¶

20-23) Defendant further maintained that each employee received a full thirty-minute meal period. Defendant claimed that all retail non-exempt employees were required to clock in and out for the lunches and the timecards reflected timely and complaint meal periods. This defense, if successful, could create problems with the certification of the meal break claim and bolster Defendant's arguments regarding the predominance of individualized issues concerning activities of each employee with respect to his/her ability to take complaint meal breaks *Id.* Contrary to Plaintiff's claims, Defendant contended that employees were not required to use their cell phones and computers while working remotely and were provided phones and/or computer if requested. Defendant consequently valued Plaintiff's L.C. Section 2802 claim at \$0. Defendant further maintained that the wage statement claims were a derivative of the other causes of actions, which it believed to be unsubstantiated.

Plaintiff also made claims for penalties; however, Plaintiff was forced to consider that California Labor Code section 2699 penalties are discretionary in nature and an award of significant penalties seemed unsure based on Defendant's belief that its employees were properly compensated and the amount of unpaid wages per employee may not support imposition of significant penalties. (Short Decl. ¶ 23). Additionally, Defendant claimed that any potential PAGA penalties were subjection to the ultimate discretion of the Court and referenced recent case law where the trial court awarded only 10% of the total PAGA penalties even upon successfully obtaining a favorable ruling for Plaintiff. With respect to the Cal. Lab. Code section 203 claim for waiting time penalties, Defendant believed that it could present a good faith dispute which would preclude the imposition of waiting time penalties for former employees. *Id.* Considering these potentials, the parties agreed to characterize the settlement payments to the class as 25% for wages and the remainder to penalties and interest. In observance of these risks, the parties agreed that \$10,000 will be allocated as PAGA penalties from which \$7,500 will be allocated for payment to the LWDA. The remaining \$2,500 will be distributed pro rata among the participating Class Members. (Agreement Sec. 5.06.b.4).

While the Plaintiff in this case certainly has his own strong opinions about the expected outcome, the Defendant shares an equally strong and opposite opinion. The realities associated with these risks of protracted litigation and a potential appeal, even if successful at trial, was appropriately considered during

the mediation and ultimately the decision to accept the instant settlement. Though it may be tempting for an advocate to insist that their position will ultimately prevail, Plaintiff and his counsel cannot ignore the value of minimizing risk, particularly when an attractive alternative is available.

F. Payment to the Named Plaintiff for his Service to the Settlement Class Is Reasonable And Routinely Awarded

“Courts routinely approve incentive awards to compensate named plaintiffs for the services they provide and the risks they incurred during the course of the class action litigation.” See Ingram v. The Coca-Cola Co., 200 F.R.D. 685, 694 (N.D. Ga. 2001); See also Manual § 30.42 n. 763 (noting that such awards “may sometimes be warranted for time spent meeting with Class Members or responding to discovery.”) In the *Coca-Cola* case, supra, the Court approved incentive awards of \$300,000 to each named Plaintiffs in recognition of the services they provided to the class by responding to discovery, participating in the mediation process and taking the risk of stepping forward on behalf of the class. See Ingram, 200 F.R.D. at 694; See also Van Vranken v. Atlantic Richfield Co., 901 F. Supp. 294 (N.D. Cal. 1995) (approving a \$50,000 participation award). See also Clark, 175 Cal. App. 4th at 806. (“[T]he rationale for making enhancement awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class.”)

In determining whether to make a service award, the criteria courts consider may include: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representatives; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation; 5) the personal benefits (or lack thereof). In re Cellphone Fee Termination Cases, 186 Cal. App. 4th 1380, 1394 (2010). Service payments to representative plaintiffs in class action settlements are intended to recognize their level of risk, the time expended and the efforts undertaken on behalf of the class.

In this case, the parties agreed to pay the Representative Plaintiff service award in the amount of up to \$7,500 because of his extensive contribution during the case, his significant assistance with the investigation of the claims, filing of the Complaint, preparations for the extended full-day mediation session, and the risks that he incurred by serving as a named representative in a public class action lawsuit.

(Short Decl. ¶¶ 31-33). He spent numerous hours on the phone with class counsel, provided valuable factual resources, assisted with the settlement negotiations and the mediation and will sign a much more comprehensive general release and a § 1542 waiver ((Agreement at Sec. 7.03); Short Decl. ¶ 33). In addition, Plaintiff took risks that bringing this action against his former employer would result in difficulty in obtaining employment opportunities where a simple Google search could reveal Plaintiff's participation in this employment lawsuit and used as a "unspecified" reason for declining his employment application. Accordingly, the service award to the Plaintiff as class representative is appropriate and justified as part of the overall Settlement.

VI. CONCLUSION

For these reasons, Plaintiff respectfully requests pursuant to California Rules of Court, Rule 3.769(d) and (e) that the Court issue an order (1) granting preliminary certification of the settlement class for settlement purposes only; (2) granting preliminary approval for the proposed settlement including appointment of Plaintiff's counsel as Class Counsel; (3) authorizing the parties to provide the proposed notice to the class; and (4) scheduling a final approval or fairness hearing.

Dated: September 27, 2021

SHORTLEGAL, APC



By: _____

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