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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

SAMANTHA OWENS,

Plaintiff,

vs.

FIDELITY NATIONAL HOME WARRANTY
COMPANY; and DOES 1-100, inclusive,

Defendants.

Case No.: MSC21-00731

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Date: October ____, 2023

Time: 9:00 a.m.

Dept.: 12

Judge: Hon. Charles S. Treat

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1 **I. INTRODUCTION.**

2 Plaintiff Samantha Owens (“Owens” or “Plaintiff”), a current (and former) California non-
3 exempt employee of Defendant Fidelity National Home Warranty Company (“Defendant” or
4 “FNHW”) negotiated a resolution of pending wage and hour claims asserted on behalf of herself
5 and other similarly situated current and former employees of Defendant that provides a total Gross
6 Settlement Amount of \$285,000 (\$275,000 allocated to resolve Class Claims) to be shared amongst
7 all non-exempt individuals who worked for Defendant in California at any time during the Class
8 Period (the “Settlement Class”). In recognition of distinct claims and time periods implicated by
9 segments of the Settlement Class, it is divided into the following:

10 (1) the “Meal Period Subclass,” which includes those who worked at least one shift of more
11 than five (5) hours from March 1, 2020, through and including September 21, 2023; (2) the
12 “Overtime Subclass,” which includes those who earned a non-discretionary bonus or other
13 remuneration pertaining to a workweek when he or she also worked overtime on at least one
14 occasion from April 12, 2017, through and including September 21, 2023, and who were not
15 part of the “Overtime Class” in the matter of *Dillard/Menchaca v. Fidelity National Financial,*
16 *Inc., et al.*, Contra Costa County Superior Court Case No. C18-00394; and (3) the “Wage
17 Statement Subclass,” which includes those who received one or more wage statements at any
18 time from April 12, 2020, through and including September 21, 2023. Joint Stipulation for
19 Class Action Settlement and Release (“Settlement” or “SA”) at ¶ 15.¹

20 There are believed to be 104 Meal Period Subclass, 106 Overtime Subclass, and 104 Wage
21 Statement Subclass Members and the GSA is to be allocated 50% to the Meal Period Subclass, 15%
22 to the Overtime Subclass, 20% to the Wage Statement Subclass, with an additional 20% to members
23 of the Meal Period Subclass and/or Overtime Subclass whose employment ended between April 12,
24 2018 and September 21, 2023 (the “Waiting Time Penalty Share”). SA ¶¶ 28.D.iii-28.D.vi.; JDB
25 Dec. ¶¶ 22-23. **It is expected participants will actually receive cognizable distributions of**
26 **\$709.13 for Meal Period Subclass members, \$208.73 for Overtime Subclass members, \$283.65**

27
28 ¹ Capitalized terms herein shall have the same meaning as in the Joint Stipulation of Class and PAGA Action Settlement and Release (“Settlement Agreement”, “Settlement”, or “SA”), a copy of which is attached as **Exhibit 1** to the Declaration of Jenny D. Baysinger (“JDB Dec.”) filed concurrently herewith.

1 **for Wage Statement subclass members, and an additional \$737.50 for Class Members entitled**
2 **to a Waiting Time Penalty Share.** JDB Dec. ¶¶ 27, 62, 74.

3 In order to facilitate dissemination of notice of the Parties' Settlement and, ultimately,
4 distribution of the monetary recovery it engenders, Plaintiff seeks preliminary approval of the
5 negotiated resolution from this Court. The Settlement confers cognizable monetary benefits on
6 Class Members, benefits that are not likely to be realized through any other avenue. Since the
7 Settlement is fair, adequate, and reasonable, and was negotiated at arm's length with the assistance
8 of experienced wage and hour class action mediator David Phillips, Esq., it should be preliminarily
9 approved so that Class Members have an opportunity to weigh in on its propriety.

10 **II. SUMMARY OF THE CASE.**

11 **A. Plaintiff's Claims.**

12 Plaintiff contends Defendant failed to properly pay her and other non-exempt California
13 employees for all hours worked because (among other things) they unlawfully rounded time, failed to
14 properly calculate and pay overtime by miscalculating the "regular rate of pay", failed to provide meal
15 periods, failed to issue accurate itemized wage statements, failed to timely pay wages owed on
16 separation, and engaged in unfair business practices (the "Class Claims"). Plaintiff also assert a cause
17 of action to assess and collect civil penalties for violations during the PAGA Period.

18 **1. The Class and Subclasses.**

19 Plaintiff seeks to represent a single Settlement Class defined as: All non-exempt individuals
20 who worked for Defendant in California at any time between April 12, 2017 and September 21, 2023.
21 SA ¶ 15. The Settlement Class is divided into a Meal Period Subclass (March 1, 2020 through
22 September 21, 2023 claims period), an Overtime Subclass (entire Class Period), and a Wage Statement
23 Subclass (April 12, 2020 through September 21, 2023 claims period). *Ibid.* Dividing the Settlement
24 Class was done in an effort to provide proportionally appropriate compensation to each segment of
25 Class Members based on the strength and value of the claims presented. JDB Dec. ¶¶ 26, 60.

26 **B. Procedural History.**

27 On February 2, 2021, Plaintiff's counsel sent a notification letter to the LWDA and FNHW
28 pursuant to Labor Code section 2699.3. JDB Dec. ¶ 5. After the requisite notice period outlined in

1 the PAGA expired, my office filed the operative Class and Representative Action Complaint in the
2 instant matter (the “Complaint”) on April 12, 2021. *Id.* ¶ 6. The Complaint asserts seven (7) causes
3 of action; (1) failure to pay minimum wage, (2) failure to pay overtime, (3) failure to provide meal
4 breaks, (4) failure to furnish accurate wage statements, (5) failure to pay all wages on separation, (6)
5 unfair business practices, and (7) a PAGA claim. *Ibid.*

6 **C. Identifying the Claims, Marshalling the Evidence, Creating a Damages Model and**
7 **Developing a Strategy for Mediation.**

8 Through independent inquiry, research, and informal discovery, Class Counsel thoroughly and
9 diligently investigated and pursued the claims. This process has included, but not been limited to, (1)
10 obtaining and reviewing Plaintiff’s personnel file, payroll records, and time records through both
11 formal and informal discovery; (2) identifying, researching, and pleading the appropriate claims,
12 including amending the Lawsuit to assert additional claims as they ripened and/or were discovered; (3)
13 exhausting administrative remedies; (4) identifying, requesting, and securing the payroll and time
14 records for 139 individual putative class members (nearly the entirety of each Class); (5) propounding
15 formal and informal discovery to secure relevant policy documents and numerical information
16 regarding the size of the class and the scope of the claims, (6) retaining an expert to analyze the payroll
17 and time data provided by Defendant and personally conducting spot checks to ensure the accuracy of
18 the damages calculations; (7) researching and evaluating the scope of additional and/or previous actions
19 and their potential impact on the Class Claims; (8) creating a reliable damages model; and (9)
20 developing and implementing a strategy for mediation and settlement. JDB Dec. ¶ 7.

21 **D. Settlement Negotiations.**

22 At all times, the Parties’ negotiations were adversarial, non-collusive, and at arms’ length,
23 ultimately culminating in mutual acceptance of a mediator’s proposal. JDB Dec. ¶¶ 19-20. Between
24 August 2021 and execution of the SA in September 2023, Defendant provided more than 1,000 pages
25 of documents and more than 60,000 line items of data relating to the relevant time and payroll records
26 of nearly the entirety of the Class. *Id.* ¶ 13. In conjunction with those same negotiations, the Parties
27 spoke at length about the strengths and weaknesses of each sides’ claims and defenses, including
28 Defendant’s counsel regarding the scope of claims, their merits, and the potential impact of a prior class

1 action settlement in *Dillard v. Fidelity National Home Warranty*, Contra Costa Superior Court Case
2 NO. MSC18-00394 (the “*Dillard Matter*”). *Id.* ¶¶ 16, 56, 63-73. On May 5, 2023, the Parties
3 participated in an all-day mediation with Mr. Phillips, but were unable to reach an agreement. After an
4 additional two (2) months of negotiation and discussion, the mediator issued a mediator’s proposal that
5 was mutually accepted on July 20, 2023. *Id.* ¶ 19. Following additional negotiation, a long-form
6 settlement agreement was executed in September 2023. *Id.* ¶ 20, Exh. 1.

7 **III. SUMMARY OF THE PROPOSED SETTLEMENT.**

8 **A. Monetary Relief Under the Settlement.**

9 Pursuant to the Settlement, Defendant will remit a total Gross Settlement Amount (“GSA”) of
10 \$285,000, on an all-in, non-reversionary basis, to resolve the Released Claims—\$10,000 of the GSA is
11 allocated to resolve PAGA Claims and \$275,000 is allocated to resolve Class Claims. SA ¶¶ 28.B,
12 28.H. In order to provide appropriate proportional relief to the Class based on the nature of different
13 claims and different time periods over which specific claims were asserted, the Class was divided into
14 three (3) distinct subclasses; the Meal Period Subclass, which resolves only alleged meal period claims
15 and derivative claims beginning March 1, 2020, the Overtime Subclass, which resolves only minimum
16 wage/overtime claims beginning in 2017 that were not resolved in the *Dillard* matter, and the Wage
17 Statement Subclass, which resolves wage statement claims beginning April 12, 2020. SA ¶¶ 15, 43.A-
18 C. The settlement proceeds will be distributed 50% to the Meal Period Subclass, 15% to the Overtime
19 Subclass, 20% to the Wage Statement Subclass, with an additional 15% to be divided between
20 members of the Meal Period and Overtime subclasses whose employment ended between April 12,
21 2018 and September 21, 2023. SA ¶ 28.D.iii-vi.

22 After deducting the expected administration costs (\$7,500), Plaintiff’s Enhancement Payment
23 (\$10,000 total), the fees (\$95,000) and costs (\$15,000) of Class Counsel, and the PAGA Allocation
24 (\$10,000), a \$147,500 net amount is expected to ultimately be distributed to Qualified Class Members.
25 SA ¶ 28.C; JDB Dec. ¶ 84. The actual expected average distributions across the subclasses are as
26 follows: \$709.13 for Meal Period Subclass members, \$208.73 for Overtime subclass members, and
27 \$283.65 for Wage Statement subclass members. JDB Dec. ¶¶ 27, 62. The average distribution to
28 Qualified Class Members eligible for a portion of the Waiting Time Penalty Share is \$737.50. *Ibid.*

1 **B. Notice to Class and Participation in the Settlement.**

2 Notice will be mailed within 28 days after preliminary approval. SA ¶ 32; Exh. A. Settlement
3 Class Members are not required to file claims in order to be eligible to participate in this Settlement; all
4 Settlement Class Members who do not opt-out will be Qualified Class Members. SA ¶ 12.

5 **C. Individual Settlement Payments.**

6 The net settlement amount of \$147,500 will be divided amongst the subclasses in an effort to
7 provide proportionally appropriate recoveries based on the value and relative risks of the claims
8 available to each. Specifically, 50% (\$73,750) will be distributed to Meal Period Subclass Members,
9 15% (\$22,125) will be distributed to Overtime Subclass Members, 20% (\$29,500) will be distributed to
10 Wage Statement Subclass Members, and 15% (\$22,125) will be shared amongst Meal Period Subclass
11 and Overtime Subclass Members whose employment ended between April 12, 2018 and September 21,
12 2023. SA ¶ 28.D.iii-vi. Meal Period Subclass, Overtime Subclass, and Wage Statement Subclass
13 Member Individual Settlement Shares will be calculated based proportionally on the number of
14 workweeks Qualified Class Members are employed during each respective subclass period and eligible
15 Qualified Class Members will share equally in the Waiting Time Penalty Share. SA ¶ 28.D.iii-vi.

16 For the purpose of taxes and withholdings, the entire amounts allocated/distributed to Meal
17 Period Subclass, Wage Statement Subclass, and Waiting Time Penalty Share will constitute penalties
18 and the entire Overtime Subclass allocation/distribution will constitute wages. SA ¶ 28.D.vii.
19 Defendant will separately pay Employer-side Taxes. SA ¶¶ 28.B, 30.

20 **D. Scope Of Release And Final Judgment.**

21 Upon the Effective Date, Qualified Class Members will forever and completely release and
22 discharge the Released Parties as follows:

23 Meal Period Subclass Members shall release the Released Parties from the Meal Period
24 Subclass Released Claims, which consist of claims predicated on alleged meal period violations
25 (including derivative claims) between March 1, 2020 and September 21, 2023. SA ¶ 43.A.
26 Overtime Subclass Members shall release the Released Parties from the Overtime Subclass
27 Released Claims, which consist of claims predicated on alleged regular rate and overtime
28 violations (including derivative claims and minimum wage claims) between April 12, 2017 and

1 September 21, 2023. SA ¶ 43.B. Wage Statement Subclass Members shall release the Released
2 Parties from the Wage Statement Subclass Released Claims, which consist of claims predicated on
3 alleged wage statement violations between April 12, 2020 and September 21, 2023. SA ¶ 43.C.

4 Additionally, Plaintiff will release the Released Parties from any and all claims and will
5 execute a Civil Code section 1542 waiver. SA ¶¶ 45-46. The Released Claims of each subclass
6 were narrowly to track the factual allegations underlying the claims advanced on behalf of that
7 respective subclasses and do not include a Civil Code section 1542 waiver. Each subclass is only
8 waiving claims implicated by the theories asserted by *that* particular subclass, as opposed to broad
9 waivers of all claims asserted in the pleadings. JDB Dec. ¶ 76.

10 **E. Settlement Administration.**

11 Plaintiff solicited bids from several administrators. After negotiating to obtain the most reliable
12 and cost-effective service, Phoenix Class Action Administrators was selected. JDB Dec. ¶ 89. Plaintiff
13 seeks approval of up to \$7,500 for the Administrator's fees and costs. SA ¶ 28.I; JDB Dec. ¶ 90.

14 **F. Payment To The LWDA.**

15 The SA allocates \$10,000, 3.5% of the GSA and 0.6% of the maximum civil penalty exposure,
16 to resolve PAGA claims. JDB Dec. ¶ 83. 75% (\$7,500) will be paid to the LWDA and the remaining
17 25% (\$2,500) will be distributed to Settlement Class Members who were employed during the PAGA
18 Period. SA ¶ 28.H. The Parties negotiated this amount in good faith, intending to serve the punitive
19 and deterrent purposes of the PAGA, and it exceeds the range approved by courts in other class
20 actions with PAGA components.² JDB Dec. ¶¶ 80-85. The LWDA has been notified of the
21 Settlement. *Id.* ¶¶ 92-93, Exh. 3.

22 **G. Service Payment To Plaintiff For Her Service To The Class.**

23 Plaintiff will apply for an Enhancement Payment in the amount \$10,000, or 3.5% of the GSA.
24 Class Members will be apprised of Plaintiff's request as well as their ability to review the moving
25 papers on the Court's website and to object to the request if they so desire. JDB Dec. ¶¶ 96-97; SA ¶
26 28.G; Exh. A.

27
28 ² See, e.g., *Nordstrom Comm'n Cases* (2010) 186 Cal.App.4th 576, 589 (\$0 PAGA allocation approved; *Munoz v. UPS Ground Freight, Inc.* (N.D. Cal. 2009) 2009 WL 1626376, at 1 (2% or \$60,000 PAGA allocation approved).

1 **H. Class Counsel’s Attorneys’ Fees And Costs.**

2 Class Counsel will request attorneys’ fees of 33 1/3% of the GSA, or \$95,000, as well as
3 declared litigation costs up to \$15,000. SA ¶ 28.E-F. Class Members will be apprised of Class
4 Counsel’s request as well as their ability to review their moving papers on the Court’s website and to
5 object to the request if they so desire. SA Exh. A.

6 **I. Proposed Implementation Schedule.**

7 Defendant to provide Class List	Within 14 days of preliminary approval order
8 Administrator to mail Class Notice	Within 14 calendar days of provision of Class List
9 Deadline for Class Members to object or opt out	Within 45 calendar days after Notice mailed.
10 Plaintiff to file Motion for Attorneys’ Fees, Costs and Enhancement Payment.	Not less than 16 court days before the Final Approval hearing.
11 Deadline for Plaintiff to file Motion for Final Approval.	Not less than 16 court days before the Final Approval hearing.
Final Approval Hearing.	Not less than 100 days after preliminary approval

12 **IV. PROVISIONAL CERTIFICATION OF EACH CLASS/SUBCLASS IS PROPER**

13 Prior to obtaining class certification, the parties to a class action may appropriately negotiate a
14 proposed settlement, subject to court approval. See *Wershba v. Apple Computer, Inc.* (2001) 91
15 Cal.App.4th 224, 240. To facilitate the resolution, the parties may stipulate that a defined class (or
16 classes) be conditionally certified for settlement purposes only. Cal. R. Court 3.769(d); *Hernandez v.*
17 *Vitamin Shoppe Industries, Inc.* (2009) 174 Cal.App.4th 1441, 1456-1457. This Court must review the
18 propriety of certification and independently determine the standards for class-wide treatment exist.

19 California courts have broad discretion to certify a class for purposes of settlement. *Luckey v.*
20 *Sup. Ct.* (2014) 228 Cal.App.4th 81, 93-94; *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1807
21 n. 19 (class certification in settlement cases is subject to a “lesser standard of scrutiny”). Provisional
22 and conditional certification is appropriate where there is an ascertainable class and a well-defined
23 community of interest among the members; when “the question is one of a common or general interest,
24 of many persons, or when the parties are numerous, and it is impracticable to bring them all before the
25 court.” Code Civ. Proc. § 382; *Richmond v. Dart Industries* (1981) 29 Cal.3d 462, 470; see also *Daar*
26 *v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 704. The practical purpose of provisional/conditional
27 certification is to facilitate notice to class members of the terms of a proposed settlement, their rights
28 thereunder, and the date and time of the final approval hearing.

1 To be certified, a settlement class must meet the following criteria: (1) the individuals in the
2 class are so numerous that joinder would be impractical; (2) there is a commonality of interest between
3 the plaintiff and the members of the class; (3) plaintiff's claims are typical of the claims of the class
4 members; and (4) plaintiff and their counsel will fully and adequately represent the interests of the class
5 members. Code. Civ. Proc. § 382; *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319,
6 326-27; Fed. R. Civ. P. 23.³ All of the prerequisites to certification are met here.

7 **A. The Proposed Class is Ascertainable and Joinder Would be Impractical.**

8 The identity of each Class Member is ascertainable because all Class Members worked for
9 Defendant as non-exempt employees within California during specified periods of time and can be
10 easily identified through Defendant's employee and payroll records. *Rose v. City of Hayward* (1981)
11 126 Cal.App.3d 926, 932. With each subclass consisting of over 100 people, joinder is impractical.

12 **B. The Commonality Requirement is Met for the Settlement Class and Each Subclass.**

13 The commonality requirement is met if questions of law and fact common to the class
14 predominate and the theory of recovery is "amenable to class treatment." *Sav-On Drug Stores*, 34
15 Cal.4th p. 327; *Brinker Restaurant Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004, 1033. The claims of
16 Plaintiff and the members of each respective Subclass flow from the same facts and legal claims.
17 Specifically, members of the Meal Period Subclass experienced uniform application of an alleged
18 unwritten policy/practice that infringed on employee's ability to take **full** and uninterrupted meal
19 periods, Overtime Subclass Members were exposed to Defendant's uniform failure to include non-
20 discretionary bonuses when calculating "regular rate of pay" for overtime and, and uniform
21 rounding policies/practices, and Wage Statement Subclass Members were all provided wage
22 statements in the same format that Plaintiff contends violated Labor Code section 226(a)(2) and
23 were thereby inaccurate and caused presumed injury. JDB Dec. ¶¶ 33, 38, 40, 44. The alleged
24 unlawful practices as to the Meal Period Subclass and Overtime Subclass Members whose
25 employment ended between April 12, 2018 and September 21, 2023 was each denied timely
26 provision of all wages upon separation. *Id.* ¶ 48. Factually, the policies and practices alleged to
27

28 ³ California courts use FRCP 23 and cases applying it for guidance on class issues. See *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821; *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146. Where appropriate, federal case law will be cited.

underscore the claims of each respective Subclass and/or segment of the Settlement Class apply uniformly and liability can be determined by facts, and applicable California law, common to all members—common issues undeniably predominate. JDB Dec. ¶¶ 63-74.

There is similarly no question that resolving the claims of Class Members through this single action is superior to individual litigation or any alternative resolution method that may exist. The value of each individual claim is relatively insignificant and is likely not nearly enough to incentivize individual action, particularly in an arbitral forum. *Shroyer v. New Singular Wireless Svcs., Inc.* (9th Cir. 2007) 498 F.3d 976, 986; *Wolin v. Jaguar Land Rover N.A., LLC* (9th Cir. 2010) 617 F.3d 1168, 1175-1176; JDB Dec. ¶ 52. It is expected that individual claims are worth less than \$10,000 and such a small amount is not likely to motivate individual representation and/or prosecution. *Ibid.* Class treatment is, by far, the superior procedure in this case. Class treatment provides the best, most cognizable avenue for class members to secure fair, adequate, and reasonable recovery.

C. The Typicality Requirement is Met.

The typicality requirement is met if the named representative's claims are typical of those of the class, though "they need not be substantially identical." *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1020; *Sav-On Drug Stores, Inc.*, 34 Cal.4th p. 326. Plaintiff's claims are typical of the claims of every Class Member because they arise from the same factual bases and uniform application of policies and practices, and are based upon the same legal theories. *Wehner v. Syntex Corp.* (N.D. Cal. 1987) 117 F.R.D. 641, 644. Importantly, were she not serving as Class Representative, Plaintiff would unquestionably be members of *each* Subclass *and* entitled to a portion of the Waiting Time Penalty Share. Typicality is satisfied.

D. The Adequacy Requirement is Met.

The adequacy requirement is met if the named representative and counsel have no interests adverse to those of the Class Members and are committed to vigorously prosecuting the case on behalf of the class. *Hanlon*, 150 F. 3d 1020; *McGhee v. Bank of Am.* (1976) 60 Cal.App.3d 442, 450-51. Plaintiff's interests in prosecuting this Class Action and obtaining the most beneficial recovery possible fully comports with the interests of the Class. There are no conflicts between Plaintiff and the other

1 Class Members, and she is a member of the Class and each Subclass. *Hanlon*, 150. F 3d 1021. In
2 addition, throughout this case Plaintiff and Class Counsel have demonstrated their commitment to
3 prosecuting this lawsuit on behalf of the Class. Such is reflected by Class Counsel’s experience in
4 wage and hour cases and the cognizable benefits they have and will continue to confer upon Class
5 Members, including securing the GSA. JDB Dec. ¶¶ 74, 98-101.

6 **V. PRELIMINARY APPROVAL OF THE SETTLEMENT IS WARRANTED.**

7 **A. Legal Standards for Preliminary Approval of Class Action Settlements.**

8 The purpose of the preliminary evaluation of a proposed class action settlement is to
9 determine whether it is within the range of possible approval, and thus whether notice to the class of
10 the terms and conditions are warranted. *7-Eleven Owners for Fair Franchising v. Southland Corp.*
11 (2000) 85 Cal.App.4th 1135, 1145; *Spann v. J.C. Penney Corp.* (C.D. Cal. 2016) 314 F.R.D. 312,
12 319; 4 Newberg on Class Actions § 11.25. In passing on its propriety, this Court has broad
13 discretion to determine whether a settlement is fair under the unique circumstances. *Dunk*, 48
14 Cal.App.4th 1801. Indeed, the Court need only find that the settlement falls within the range of
15 possible final approval, also described as the “reasonable range.” *Cordy v. USS-Posco Indus.* (N.D.
16 Cal. 2013) 2013 WL 4028627 *3; 4 Newberg on Class Actions § 11:25. To make this fairness
17 determination, courts consider several relevant factors, including “the strength of the plaintiffs’
18 case; the risk, expense, complexity and likely duration of further litigation; the risk of maintaining
19 class action status throughout the trial; the amount offered in settlement; the extent of discovery
20 completed and the stage of the proceedings; [and] the experience and views of counsel . . .”
21 *Hanlon*, 150 F.3d 1026 (citations omitted). Importantly, there is a presumption of fairness when the
22 settlement is the result of arm’s-length negotiation, investigation and discovery are sufficient to
23 permit counsel and the court to act intelligently, and counsel are experienced in similar litigation, as
24 is the case here. *Dunk*, 148 Cal.App.4th 1801; *Wren v. RGIS Inventory Specialties* (N.D. Cal. 2011)
25 2011 WL 1230826 *6. California courts put a great deal of stock into what is, otherwise, a private,
26 negotiated, consensual agreement. Accordingly, a court’s inquiry is limited “to the extent necessary
27 to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or
28

1 collusion between, the negotiating parties, and that the settlement, taken as a whole is fair,
2 reasonable and adequate to all concerned.” *Dunk*, 148 Cal.App.4th 1801.

3 Here, the Settlement was the product of protracted arm’s length negotiations after provision
4 and evaluation of payroll and time data for nearly the entire Settlement Class and affords Class
5 Members a substantial recovery; Meal Period Subclass Members’ gross recovery is 33.5% of their
6 maximum damages, Overtime Subclass Members’ gross recovery is 90% of their maximum
7 damages; Wage Statement Subclass Members’ gross recovery is 13.2% of the maximum recovery
8 to that subclass, and individuals entitled to a Waiting Time Penalty Share are making a gross 32.8%
9 recovery of maximum penalties. JDB Dec. ¶¶ 36, 42, 46, 50. The Meal Period, Overtime, and
10 Wage Statement subclasses will enjoy *net* recovery of 50.2%, 90%, and 26.4% of their realistic
11 recovery, respectively. JDB Dec. ¶ 59. The actual expected average distributions are as follows:
12 \$709.13 for Meal Period Subclass members, \$208.73 for Overtime subclass members, and \$283.65
13 for Wage Statement subclass members. Meal Period subclass and Overtime subclass members
14 whose employment ended between April 12, 2018 and September 21, 2023 will receive an
15 additional of \$737.50. JDB Dec. ¶¶ 27, 52, 62; *Shroyer*, 498 F.3d 986. Overall, it is fair, adequate,
16 and reasonable.

17 **B. The Settlement Terms are Fair, Reasonable, and Adequate.**

18 The Class Action and Settlement have and will result in substantial benefits to the Class. While
19 the GSA represents only a fraction of Defendant’s maximum exposure, it represents a fair compromise
20 given the risks and uncertainties presented by continued litigation.

21 **1. Defendant’s Maximum and Realistic Exposure to the Class.**

22 With the help of an expert, Class Counsel developed a damages model and determined the
23 maximum potential exposure Defendants face for the claims of all Settlement Class Members is
24 \$997,566.24. JDB Dec. ¶ 52. Because 100% success in litigation is unrealistic, Class Counsel also
25 determined a reasonable, but much more realistic estimate of potential recovery. Under this more
26 measured approach, Class Counsel (1) applied no discount to wage claims of the Overtime Subclass
27 leaving \$45,867.24; (2) applied a 33.33% discount to the meal period claim to account for the
28 likelihood that some of the presumptively denied meal periods were actually taken by Class

1 Members and/or were voluntarily foregone without any input/interference by Defendant, and to
2 account for the overarching difficulty of certifying meal break claims (E.g. *Aguirre v. Genesis*
3 *Logistics* (C.D. Cal. 2016) 2016 WL 6573986 * 6 (cataloguing cases), leaving \$273,468.67; (3)
4 applied a 50% discount to the wage statement claim to account for the potential that injury could not
5 be demonstrated and accounting for Defendant’s argument that the total hours worked can be
6 ascertained by simply adding the total “Overtime” hours and the total “Regular” hours (*Morgan v.*
7 *United Retail* (2010) 186 Cal.App.4th 1136) and/or that the wage statements complied with the
8 principles of *General Atomics v. Sup. Ct.* (2021) 64 Cal.App.5th 987, leaving \$208,000; and (4)
9 applied a 25% discount to the waiting time penalty claim to account for the potential that some of the
10 Meal Period Subclass and Overtime Subclass who are also former employees will be unable to
11 demonstrate any compensable wages that were actually unpaid during employment and Defendant’s
12 anticipated argument that its failure to pay meal/rest premium wages was not willful and the law was
13 unsettled at the time of the non-payments, that bonuses paid were discretionary (or there was a valid
14 legal argument to that effect), that the law at the time as to the propriety of rounding was unsettled at
15 least until recently (*Donahoe v. AMN Svcs., LLC* (2021) 11 Cal.5th 58, 74-75) leaving \$94,122. JDB
16 Dec. ¶ 56. Under this more measured approach, the Class’ realistic expected recovery is
17 **\$621,457.91**. *Id.* ¶ 57.

18 As previously outlined, the Meal Period, Overtime, and Wage Statement subclasses will
19 enjoy *net* recovery of 50.2%, 90%, and 26.4% of their realistic recovery, respectively. JDB Dec. ¶
20 59. The actual expected average distributions are as follows: \$709.13 for Meal Period Subclass
21 members, \$208.73 for Overtime subclass members, and \$283.65 for Wage Statement subclass
22 members. Meal Period subclass and Overtime subclass members whose employment ended
23 between April 12, 2018 and September 21, 2023 will receive an additional of \$737.50. JDB Dec.
24 ¶¶ 27, 52, 62; *Shroyer*, 498 F.3d 986. This is a positive result and is within the range of
25 reasonableness, especially considering the uncertainties involved with continued litigation. See *In*
26 *re Mego Fin. Corp. Sec. Litig.* (9th Cir. 2000) 213 F.3d 454, 459 (settlement of 16.67% of potential
27 recovery was fair). Indeed, “it is well-settled law that a cash settlement amounting to only a
28 fraction of the potential recovery does not . . . render the settlement inadequate or unfair.” *Officers*

1 *for Justice v. Civil Service Com'n of City and County of San Francisco* (9th Cir. 1982) 688 F.2d
2 615, 628. Of course, “the very essence of a settlement is compromise, ‘a yielding of absolutes and
3 an abandoning of highest hopes.’” *Linney v. Cellular Alaska P'ship.* (9th Cir. 1998) 151 F.3d
4 1234, 1242. As such, “[t]he fact that a proposed settlement may only amount to a fraction of the
5 potential recovery does not, in and of itself, mean that the proposed settlement is grossly
6 inadequate and should be disapproved.” *Id.*

7 Considering all of the circumstances, particularly the substantive challenges to both
8 certification and ultimate liability facing the Class Claims, the Settlement represents a fair,
9 reasonable, and adequate outcome that affords Class Members cognizable recovery they are
10 unlikely to otherwise realize. JDB Dec. ¶¶ 53, 60, 63-74, ; see also, *In re Wachovia Corp. “Pick-
11 A-Payment” Mortgage Mktg. & Sales Practices Litig.* (N.D. Cal. 2011) 2011 WL 1877630, at *3
12 (belief of “Plaintiffs’ counsel, who are experienced attorneys . . . that the settlement is extremely
13 favorable to the class” supports approval). Notably, the recoveries here are comparable to those
14 enjoyed by class members in the previously approved *Dillard Matter*, where an average gross
15 recovery of \$281.86 for overtime claims (versus \$389.15 here), \$651.92 for wage statements
16 claims (versus \$528.84 here), and 643.65 for waiting time penalty claims (versus \$1,375 here).
17 JDB Dec. ¶ 79.

18 C. **The Court Should Order Dissemination of the Proposed Notice.**

19 In order to protect the rights of class members, courts must ensure each receives the best notice
20 practicable. *Phillips Petroleum Co. v. Shutts* (1985) 72 U.S. 797, 811-12. Procedural due process
21 requires that affected parties have the right to be heard at a meaningful time and in a meaningful
22 manner. It does not guarantee any particular procedure but rather only requires notice reasonably
23 calculated “to apprise interested parties of the pendency of the action and afford them an opportunity to
24 present their objections.” *Ryan v. Cal. Interscholastic Fed’n – San Diego Section* (2001) 94
25 Cal.App.4th 1048, 1072. The law typically requires notice of a proposed settlement inform class
26 members of: (1) the nature of the pending litigation; (2) the general terms of the proposed settlement;
27 (3) that complete information is available from the court files; and (4) that any class member may
28 appear and be heard at the fairness hearing. See Cal. Rules of Court, Rules 3.766(d)-(f) and 3.769(f).

1 **1. The Class Notice is Accurate, Informative, and Satisfies Due Process.**

2 California law vests the court with broad discretion to fashion an appropriate notice program.
3 Civ. Code §1781; Fed. R. Civ. Proc. Rule 23(e)(1); Rule 23(c)(2)(B); *Cartt v. Superior Court* (1975) 50
4 Cal.App.3d 960, 973-74. Because all Class Members are current and former employees for whom
5 Defendant has current or last known addresses as well as SSNs, notice is simpler and more reliable than
6 in other types of class actions. The Class Notice and notice plan are consistent with those approved by
7 state and federal courts and, under the circumstances, afford the best notice practicable.

8 The Class Notice will be sent to all Class Members, will inform them of the terms of the
9 Settlement and is neutrally worded to avoid prejudice. The Class Notice meets all of the requirements
10 of procedural due process and California Rules of Court, Rules 3.766(d)-(f) and 3.769(f). The Class
11 Notice will provide Class Members all information necessary to make an informed decision.

12 **D. The Settlement Administrator's Fees are Reasonable.**

13 The Parties have selected Phoenix Class Action Administrators to serve as Administrator.
14 Phoenix has substantial experience in administering class action settlements. The Administrator's fees
15 and costs will be paid out of the GSA/QSF. The Administrator will, among other things, distribute the
16 Court-approved Class Notice, calculate Individual Settlement Shares, prepare and mail settlement
17 checks respond to inquiries/disputes as appropriate, prepare requisite tax forms, and generally perform
18 all normal and customary duties associated with the administration of such settlements. Plaintiff seeks
19 preliminary approval of \$7,500 of Administrator's fees and costs. SA ¶ 28.I; JDB Dec. ¶ 90.

20 **E. The Enhancement Payment to Plaintiff Is Reasonable.**

21 Named plaintiffs in class action litigation are eligible for reasonable service payments. *Staton v.*
22 *Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 977. "Courts routinely approve incentive awards to
23 compensate plaintiffs for the services they provided and the risks they incurred during the course of the
24 class action litigation." *Ingram v. Coca-Cola Co.* (N.D. Ga. 2001) 200 F.R.D. 685, 694 (approving
25 \$300,000 payment to each class representative in employment action settling before certification).⁴
26 Factors used by courts in determining the amount of the service payments include (1) a comparison

27 _____
28 ⁴ *Roberts v. Texaco, Inc.* (S/D.N.Y. 1997) 979 F. Supp. 185 (approving incentive payments up to \$85,000 for named
plaintiffs in employment action settling before certification); *Van Vranken v. Atl. Richfield Co.* (N.D. Cal. 1995) 901 F.
Supp. 294, 300 (\$50,000 service payment for named plaintiff in class action).

1 between service awards and the range of monetary recovery available to the class (*see Ingram*, 200
2 F.R.D. at 694; (2) time and effort put into the litigation (*see Van Vranken*, 901 F. Supp. at 299); (3)
3 whether the litigation will further the public policy underlying the statutory scheme (*see Roberts*, 979
4 F. Supp. at 201 n.23); and (4) risks of retaliation (*see Roberts*, 979 F. Supp. at 202).

5 All of the aforementioned factors support the enhancement payment that will be requested here.

6 **F. Class Counsel's Attorneys' Fees and Costs are Reasonable, Fair, and Appropriate.**

7 Plaintiff, in the settlement of this wage and hour class action, is entitled to payment of
8 attorneys' fees and costs. Lab. Code §§ 218.5, 226(e) (1), 1194, and 2699(g); *Earley v. Superior Court*
9 (2000) 79 Cal.App.4th 1420, 1427. Plaintiff will seek an award of Class Counsel's fees under the
10 common fund doctrine, which is customarily used in awarding fees and costs in settlement of Labor
11 Code class actions and an approved method under California law.⁵ Courts customarily approve
12 payments of attorneys' fees of as much as one-third to forty percent of the common fund in comparable
13 wage and hour class actions.⁶ Here, Plaintiff will seek attorneys' fees of 33 1/3% of the GSA, or
14 \$95,000, and declared litigation costs of up to \$15,000.

15 **VI. A FINAL APPROVAL HEARING SHOULD BE SET.**

16 Plaintiff requests the Court set a date for hearing regarding final approval of the Settlement and
17 for approval of Plaintiff's sought attorneys' fees, costs, and enhancement payments, deadlines for Class
18 Members to opt-out, object, and for the submission of motions associated with final approval.

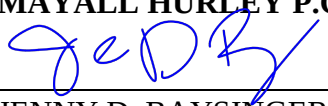
19 **VII. CONCLUSION.**

20 For all the reasons stated above, Plaintiff's unopposed Motion should be granted.

21 **DATED:** October 9, 2023

MAYALL HURLEY P.C.

22 By


JENNY D. BAYSINGER

Attorneys for Plaintiff and the Class

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25
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27 ⁵ *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478 (“[A] lawyer who recovers for a common fund . . . is entitled to a
28 reasonable attorney’s fee from the fund as a whole.”); *Wershba*, 91 Cal.App.4th 254; *Lealao v. Beneficial of Cal.* (2000) 82
Cal.App.4th 19, 26-30; *Serrano v. Priest* (1977) 20 Cal.3d 25, 34; *Hanlon*, 150 F.3d. 1029.

⁶ *Newberg*, § 14:6 (Studies show that “Fee awards in class actions average around one-third of the recovery”).

PROOF OF SERVICE

I, the undersigned, certify and declare as follows:

I am over the age of eighteen years and not a party to this action. My business address is 112 S. Church Street, Lodi, CA 95240, that is located in the county where the mailing and/or delivery below took place.

On October 9, 2023, I served the following document:

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S
MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

addressed to:

Curtis A. Graham
LITTLER MENDELSON P.C.
633 West 5th Street, 63rd Floor
Los Angeles, California 90071
Email: cagraham@littler.com
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Email: arafoth@littler.com

☐ **BUSINESS PRACTICE TO ENTRUST DEPOSIT TO OTHERS:** I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business. On the date specified below, at my place of business at Stockton, California a copy of the document described above was placed for deposit in the United States Postal Service in a sealed envelope, with postage fully prepaid addressed to the individuals and/or entities mentioned above; and that envelope was placed for collection and mailing on that date following ordinary business practice.

☒ **BY EMAIL:** In accordance with Code of Civil Procedure, Section 1010.6, on the date specified below, I caused a copy of the document(s) described above to be sent to the person(s) at the e-mail address(es) listed above. My business e-mail address is lriley@mayallaw.com. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Executed on October 9, 2023, at Lodi, California.


LINDSAY RILEY