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10 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **IN AND FOR THE COUNTY OF LOS ANGELES**
12

13 CHRISTY FRANCO, individually, and
on behalf of all others similarly situated,
14

Plaintiff,
15

vs.
16

SIL AFFAMATO, INC., MICHAEL
MANGIONE, ANTHONY MANGIONE
17 and DOES 1 through 100, inclusive,
18

Defendants.
19
20
21

Case No. 21STCV12228

CLASS ACTION

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

Date: February 10, 2022

Time: 11:00 a.m.

Dept.: 10

Judge: William F. Highberger

22 **NOTICE OF MOTION**

23 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, NOTICE IS**
24 **HEREBY GIVEN** that, at 11:00 a.m. on February 10, 2022, or as soon thereafter as the matter
25 may be heard in Department 10 of the above-entitled Court, located at 312 N. Spring St., Los
26 Angeles, CA 90012, Representative Plaintiff Christy Franco, on behalf of the Plaintiff Class, will
27 and hereby does apply to this Court for an order: (1) granting preliminary approval of the parties'
28

1 class action settlement agreement, (2) granting conditional certification of the settlement class, (3)
2 appointing class counsel, (4) appointing the class representative, (5) appointing a settlement claims
3 administrator, (6) approving the class notice, and (7) setting a hearing date for final settlement
4 approval.

5 This motion is based upon the accompanying memorandum of points and authorities, the
6 declaration of Scott Edward Cole, Esq. and exhibits thereto, and such other oral argument and
7 documentary evidence as may be presented to the Court at the hearing of this motion.

8
9 Dated: January 14, 2022

COLE & VAN NOTE

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11 By:


12 Scott Edward Cole, Esq.
13 Attorneys for Representative Plaintiff
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This motion seeks preliminary court approval of a \$500,000 settlement fund obtained by Plaintiff Christy Franco (hereinafter “Representative Plaintiff”) against Sil Affamato, Inc., Michael Mangione and Anthony Mangione (“Sil Affamato” or “Defendants”). Given the modest size of the Defendants’ franchise, relatively low wage rate of putative class members, early stage of litigation and challenges to class certification and liability, the settlement achieved here represents an impressive result which now merits preliminary court approval.¹

II. LITIGATION HISTORY

Representative Plaintiff worked for Defendants Sil Affamato as a food service employee at Defendants’ McDonalds’ restaurants in Moreno Valley, California.

On March 30, 2020, Representative Plaintiff on her own behalf and on behalf of all Sil Affamato non-exempt restaurant employees filed a class action Complaint in Los Angeles County Superior Court, alleging (1) unlawful failure to pay wages; (2) failure to provide meal and rest period; (3) failure to provide accurate itemized wage statements; (4) failure to pay wages on termination; (5) unfair business practices; (6) violation of child labor laws. The core of her complaint was that these conditions ran afoul of the relevant California Wage Order provisions and Labor Code §§ 226.7 and 512. As discovered during litigation, the actual class totaled roughly 574 workers.

On July 19, 2021, the Complaint was amended to add a cause of action under the Private Attorneys General Act (“PAGA”). After filing the action, the parties engaged in traditional and informal discovery efforts, including the production of documents detailing Defendants’ business

¹ A copy of the fully executed Settlement Agreement and Release of Claims (“Agreement”) is attached to the accompanying Declaration of Scott Edward Cole, Esq. (“Cole Decl.”) as Exhibit “A.” Unless otherwise noted, all exhibits cited herein are attached to the Cole Decl.

1 operations, common policies and procedures, wage rates and payroll information for numerous
2 putative class members.²

3 Prior to mediation on October 29, 2021, the parties conducted extensive discovery and
4 exchanged data needed for evaluation of the class claims. The full day mediation was culminated
5 by the settlement agreement accompanying this motion.³

6 7 **III. THE SETTLEMENT**

8 **A. SETTLEMENT TERMS**

9 The proposed settlement encompasses a class defined as “all current and former non-
10 exempt employees who worked at any time for Defendants as hourly and/or non-exempt
11 employees in California at any time between March 1, 2020 and the date of preliminary approval
12 of this settlement.”⁴

13 Under the proposed non-reversionary⁵ settlement, the claims of all class members shall be
14 settled for \$500,000, which is inclusive of all individual settlement awards to class members who
15 do not timely opt out (“Settlement Class Members”), the class representative service award, the
16 PAGA allocation, CVN’s fees and costs, and reimbursement of the claims administrator costs.⁶
17 The settlement amount shall be allocated as follows:

18 Individual Settlement Awards. The Net Settlement Fund shall be distributed in its entirety
19 to Settlement Class Members. Each Settlement Class Member shall receive his/her respective share
20 thereof, based on his/her number of compensable hours worked during the Settlement Period,
21 divided by the total number of compensable hours worked by all Settlement Class Members during
22

23
24 ² In many class actions, informally-exchanged discovery protects a defendant’s proprietary and/or financial
25 information and allows a richer and faster exchange of data calculated to determine the settlement value—often putting
the parties in a far better settlement position, so long as plaintiff’s counsel knows what to ask for. Indeed, although
formal discovery was conducted, it is “not a necessary ticket to the bargaining table.” *Linney v. Cellular Alaska P’ship*,
151 F.3d 1234, 1239 (9th Cir. 1998).

26 ³ See Cole Decl. ¶¶ 5, 6.

27 ⁴ Exhibit “A,” Agreement ¶ 23.

28 ⁵ This amount is non-reversionary, such that no amount will revert back to the Defendants, and the employer’s
share of payroll taxes shall be funded independently by the company, so it does not deplete the settlement proceeds.

⁶ Exhibit “A,” Agreement ¶¶ 3, 12, 15, 18, 29.

1 that period.⁷ Settlement checks will remain valid for 180 days after the date of issuance. If a
2 Settlement Class Member does not cash his/her settlement check within 180 days, the uncashed
3 funds shall be transmitted in accordance with CCP § 384(b) to Legal Aid at Work in San Francisco,
4 CA.⁸

5 Class Representative's Service Award. Subject to Court approval, Representative Plaintiff
6 will be paid a service award not to exceed \$6,500 for her time, risk and effort in bringing the
7 lawsuit, representing the class, and releasing her claims.⁹

8 Class Counsel's Fees. The settlement provides for an attorneys' fee award of 33 1/3% of
9 the settlement amount, a typical percentage in the resolution of common fund cases.¹⁰

10 PAGA Allocation. The settlement also provides for a payment of \$15,000 for a release of
11 PAGA claims, 75% of which will be remitted to the LWDA and 25% of which will remain in the
12 Net Settlement Fund.¹¹

13 Litigation Expenses. Over the course of this litigation, CVN incurred ordinary litigation
14 costs and (just as with regard to the post-settlement efforts ordinarily attendant to class action
15 work), CVN anticipates incurring additional expenses in overseeing the settlement process,
16 making future appearances, ensuring claims administration compliance with this Court's orders,
17 responding to Settlement Class Members, CPAs, etc. CVN will submit a detailed cost report with
18 its motion for final approval of the settlement.

19 Settlement Administration Costs. The parties agreed to use Simpluris, Inc., as the
20 settlement administrator, as they provided best quote. The costs are capped at \$20,000—a very
21 reasonable amount given the size of the class and the work required to send the Notice, process
22
23

24 ⁷ Exhibit "A," Agreement ¶ 52.

25 ⁸ Exhibit "A," Agreement ¶ 77. CCP § 384(b) requires that *cy pres* awards go to organizations that "will benefit
26 the class or similarly situated persons or that promote the law consistent with the objectives and purposes of the
underlying cause of action[.]" Between the claims here and Legal Aid at Work there is a "driving nexus," given that
this organization represents "low-wage workers who are victims of wage violations." *Dennis v. Kellogg Co.*, 697 F.3d
858, 865 (9th Cir. 2012); <https://legalaidatwork.org/cy-pres/>.

27 ⁹ See Cole Decl. ¶ 17.

28 ¹⁰ See Cole Decl. ¶ 12.2.

¹¹ Cal. Labor Code § 2699(i).

1 settlement checks, publish relevant to the claim information on their website
2 (www.Simpluris.com/Case-Information), and communicate with class members and counsel.¹²

3 Tax Treatment of Individual Settlement Shares. Settlement Class Members' settlement
4 shares will be allocated as 20% wages and 80% interest and statutory penalties for tax purposes.¹³

6 IV. THE RELEASE

7 Upon the Effective Date, Settlement Class Members shall release and discharge
8 Defendants from "any and all debts, liabilities, costs, demands, obligations, claims, causes of
9 action, or complaints arising during the Settlement Period that were pled, or which could have
10 been pled based on the same facts as pled [in the Complaint]." For unnamed class members,¹⁴ a
11 Civil Code § 1542 release applies, but only to those claims.¹⁵

12 Within twenty-one (21) calendar days of the granting of preliminary approval, Defendants
13 will provide the claims administrator with class members' names, social security numbers, dates
14 of employment, email addresses, and last known addresses, which the claims administrator will
15 verify and update using the National Change of Address ("NCOA") Database. Within fourteen
16 (14) calendar days of receipt of this class member information from Defendants, the claims
17 administrator will disseminate the Notice by first class mail,¹⁶ and update information on the
18 website, where class members will be able to see all information relevant to this case. To avoid
19 unnecessary confusion, maximize their recoveries, and reduce administrative costs, Settlement
20 Class Members will not be required to file a claim form to receive their portion of the settlement.

21 The proposed Notice meets the requirements of CRC Rule 3.766(b).¹⁷ The Notice costs
22 will be included in the settlement administration expenses to be paid from the Gross Settlement
23 Fund.¹⁸ A notice sent by mail to class members' last known addresses, accompanied by reasonable

24 ¹² Exhibit "A," Agreement ¶ 51; Cole Decl. ¶ 12.1.

25 ¹³ See Cole Decl. ¶ 12.3.

26 ¹⁴ In exchange for her option of receiving a service award, the Representative Plaintiff agreed to a § 1542 release of
all potential claims (whether pled or not). Exhibit "A," Agreement ¶ 79.

27 ¹⁵ Exhibit "A," Agreement ¶ 78.

¹⁶ Exhibit "A," Agreement ¶ 64.

¹⁷ Exhibit "B," Notice of Settlement of Class Action Lawsuit.

28 ¹⁸ Exhibit "A," Agreement ¶¶ 14, 51.

1 attempts to locate class members where those notices are returned as undeliverable, is sufficient to
2 ensure due process. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-76 (1974). Finally, the
3 contents of the Notice soundly comply with CRC Rule 3.766(d).

4 Class members will have 60 calendar days (or 15 calendar days after the date the Notices
5 are re-mailed after having been returned as undeliverable) to opt out or object. Class members who
6 wish to exclude themselves or “*opt out*” of the settlement must submit a signed, written request
7 therefor to the claims administrator by the response deadline.¹⁹ A class member wishing to *object*
8 must submit a written objection thereto describing why the objector believes the settlement is
9 unfair and whether the objector intends to appear at the final approval hearing.²⁰ Class members
10 will have a right to appear at the final approval hearing to have their objections heard by the Court.

11 12 **V. JUDICIAL APPROVAL OF CLASS ACTION SETTLEMENTS**

13 A class action may not be dismissed, compromised, or settled without the approval of the
14 Court. Cal. Civ. Code § 1781(f); California Rules of Court (“CRC”) Rule 3.769(a); Fed. R. Civ.
15 P. 23(e). The policy under California law, however, favors and encourages settlement of class
16 actions. *Ferguson v. Lieff, Cabraser, Heimann & Bernstein*, 30 Cal.4th 1037, 1054 (2003)
17 (acknowledging the “overriding public policy favoring settlement of class actions”). The purpose
18 of the Court’s preliminary evaluation of the proposed settlement is to (1) determine whether it is
19 within the “range of possible approval” (4 Newberg § 13.13 at 311) and to (2) provisionally certify
20 the proposed settlement class (4 Newberg § 13:12 at 305) in order to facilitate dissemination of
21 the Notice—which outlines the key settlement terms—to the class members and apprises them of the
22 date and time of the final approval hearing. Manual for Complex Litigation (4th ed. 2004)
23 (“MCL”) § 21.63; CRC Rule 3.769(e). Representative Plaintiff requests the Court take the first
24 step and grant preliminary approval of the settlement.

25
26
27 ¹⁹ Exhibit “A,” Agreement ¶¶ 27, 67.

28 ²⁰ Exhibit “A,” Agreement ¶ 69.

1 **A. THE SETTLEMENT FALLS WITHIN THE RANGE OF**
2 **REASONABLENESS**

3 At the preliminary approval stage, a proposed settlement is *presumed* to be fair when (1) it
4 is reached through arm's-length negotiations, (2) the putative class is represented by experienced
5 counsel, and (3) the parties have conducted sufficient investigation or discovery. *Wal-Mart Stores,*
6 *Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005).²¹ All three elements are satisfied here.

7 In determining whether the settlement is *actually* within the range of fairness, courts
8 consider additional factors such as the strength of the plaintiff's case, the risk, expense, complexity
9 and likely duration of further litigation, the risk of maintaining class action status throughout trial,
10 the amount offered in settlement, and the experience and views of counsel. *Hanlon v. Chrysler*
11 *Corp.*, 150 F.3d 1011, 1026 (1998); *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116
12 (2008).

13 **B. VALUATION OF PRIMARY CLAIMS ALLEGED**

14 **1. Missed Meal Breaks**

15 The allegation that Defendants deprived class members of meal and rest periods was the
16 driving force of this litigation. CVN maintained that the violations stemmed more from scheduling
17 practices (versus a *per se* noncompliant policy) whereby many workers were required to remain
18 "on-duty" during their breaks, an inadequate labor budget to consistently permit employee
19 coverage during breaks and/or that workers were uninformed as to what constituted a valid break
20 to begin with.

21 Despite Representative Plaintiff's allegations, however, the arguable lack of a *per se*
22 violative policy presented significant challenges to class certification, as did Defendants' argument
23 that this class of workers served at various locations, under (at least, potentially) varying degrees
24 and styles of management oversight. And, even if the Court certified the class (or a subclass
25 thereof), Defendants would undoubtedly argue it need only make breaks *available* and that it had

26
27 ²¹ This Motion occasionally cites federal case law and commentaries thereon which construe authority for
28 conditional class certification and settlement approval in California courts. The California Supreme Court has
authorized and urged California's trial courts to use federal resources for guidance in considering class issues. *Vasquez*
v. Superior Court, 4 Cal.3d 800, 821 (1971); *Green v. Obledo*, 29 Cal.3d 126, 145-46 (1981).

1 no obligation to *ensure* that breaks were actually taken. *Brinker Restaurant Corp. v. Superior*
2 *Court*, 53 Cal.4th 1004 (2012); *White v. Starbucks Corp.*, 497 F.Supp.2d 1080 (N.D. Cal. 2007).

3 Based on CVN's analysis of the available payroll records, it was determined that the
4 number of pay periods in which meal periods could be missed was as high as 8,713. Using this
5 information and data provided by Defendants, an average (weighted) hourly wage of \$14, and
6 assuming a violation every time a worker worked a full time shift five days per week, every week,
7 the liability exposure possible for this claim could exceed \$1.2 million over the period since March
8 1, 2020. This best-case scenario was, of course, based on a variety of assumptions, none of which
9 Defendants have agreed to, on schedules for this largely part time workforce that would be
10 unrealistic (i.e., that every worker worked every day for eight full hours), and on the assumption
11 that all elements of this claim could be proven (as well as its frequency) at trial.

12 Moreover, given that class members would rarely have made or kept independent records
13 of compliant breaks, it may be that many, if not the vast majority, of any breaks missed would be,
14 in fact, punch-in/punch-out errors or class member neglect in punching in/out at all. It is plausible
15 that many workers simply took their breaks without punching out properly or notifying
16 management when they left for a break. These challenges—and the paucity of records to
17 demonstrate the violations—reveals that a substantial discount off the original damages estimate
18 was appropriate.

19 **2. Missed Rest Breaks**

20 As discussed above, the risk of losing class certification, proof of compliant policies and
21 aggressive enforcement measures means CVN was also compelled to deeply discount its rest break
22 damages analysis. Using the same data points enumerated above and based upon its investigation,
23 the liability exposure possible for missed rest periods could also exceed \$1.2 million. Again,
24 however, it is suspect if even a substantial percentage of these occurrences could constitute
25 violations of § 226.7.

3. Waiting Time Penalties

The strongest claims in this case were the meal and rest break claims, neither of which *conclusively* generates a “wage” to which a Labor Code § 203 claim could be tethered. The California Court of Appeal stated, *arguably in dicta*, that a meal break violation under Labor Code § 226.7 cannot support a “waiting time penalty” under Labor Code § 203. *Ling v. P.F. Chang’s China Bistro, Inc.*, 245 Cal.App.4th 1242, 1261 (2016).

Based on a typical eight-hour workday, on records showing that over 391 class members were “severed” employees, and that their average (weighted) hourly wage was \$14, Defendants’ liability could reach as high as \$1.3 million for waiting time penalties. Given the state of the law, and that an unrealistic full eight-hour workday was used to calculate this penalty for all severed workers, the value of this claim was discounted *significantly*.

4. Wage Statement Violations

Although some federal court decisions have held break premiums under Labor Code § 226.7 can support a wage statement penalty under Labor Code § 226(e), there are no published California state court decisions issuing a similar holding. *Maldonado v. Epsiolon Plastics, Inc.*, 22 Cal.App.5th 1308, 1337 (2018) (meal and rest claims cannot support a class-wide claim for inaccurate wage statements); *Finder v. Leprino Foods Co.*, No. 1:13-CV-2059 AWI-BAM, 2015 U.S. Dist. LEXIS 30652, at *1 (E.D. Cal. March 12, 2015). In light of the California authority explaining that a violation of Labor Code § 226.7 cannot support a § 203 waiting time penalty, the same logic may apply to § 226 wage statement penalties, making those entirely unrecoverable in this litigation.

Under § 226, class members may recover \$50.00 for the initial violation and \$100.00 for each subsequent violation. Based on data provided by Defendants and subsequent analysis thereof by CVN, class members stood to potentially recover \$900,000 if they fully prevailed on these claims at trial. Given the numerous elements Representative Plaintiff would be required to demonstrate, and anticipating Defendants’ “penalties on penalties” argument, CVN’s “reality check” and, thus, significant discount to the potential value of this claim, was appropriate. What’s

1 more, this analysis assumes the penalties for all class members would never have reached the §
2 226 cap of \$4,000—although numerous workers stayed with the company beyond the tipping point
3 where their aggregated per-pay-period penalties would have reached that cap.

4 **5. PAGA Penalties**

5 Representative Plaintiff also alleged that Defendants’ conduct created liability under the
6 Labor Code Private Attorney General Act (“PAGA”). PAGA claims are extraordinarily difficult
7 to evaluate because there are several obstacles to the actual award of the civil penalty. First, it is
8 arguably unclear whether penalties continue to accrue until the court finds a violation to exist.
9 Second, Labor Code § 2699(e)(1) and (2) give trial courts immense discretion to access or lower
10 the penalty amount.²² Indeed, several courts have exercised their broad discretion and have
11 dramatically limited PAGA awards. Third, defendants routinely argue that, when other statutory
12 penalties have been imposed, additional penalties under PAGA are unjust (e.g., in cases where
13 damages are already “in play” based on underlying wage violation claims, as we have here).

14 Thus, while the PAGA calculation herein for approximately 8,713 pay periods could reach
15 \$1.8 million (i.e., a calculation identical here to the one for § 226 penalties), the likelihood of that
16 sum ever being awarded, or anything even close to it, is extremely slim. Despite this potential
17 recovery, given that PAGA penalties would likely be deemed duplicative of other penalties
18 awardable here, given the extreme “haircuts” many courts are giving to PAGA penalties, and given
19 the presence here of class action allegations (the absence of which often being the reason so-called
20 “Plan B” PAGA penalties are sought to begin with), PAGA penalties were significantly
21 discounted.

22 **6. Summary**

23 Based on CVN’s conversations with the named plaintiff, knowledge of workflows and
24 typical conditions within the fast food restaurant industry (with which CVN has vast experience),
25 and analysis of Defendants’ meal and rest break policies, a number of deductions would be
26 appropriate from those totals, due to:

27
28 ²² Cal. Labor Code § 2699(e)(2) (courts have discretion to deny or significantly reduce PAGA penalties, particularly
when the prescribed award would be “unjust, arbitrary and oppressive, or confiscatory.”)

Meal/Rest Periods: Many workers worked below the threshold number of hours for meal or rest period entitlements, worked less than five days per week, and only missed breaks (when they did) out of choice or mis-punches. More likely, one to two violations per pay period is more realistic.

Waiting Time Penalties: If not all workers had meal/rest period violations to begin with, worked less than 8 hours per day, the starting place for this penalty analysis needs to be discounted.

Wage Statement Penalties: For the same reasons as those supporting a Waiting Time Penalty reduction, the top end/potential §226 penalty level should be reduced, even before a liability analysis for them begins. Under current case law, this number could easily be zero.

PAGA: The penalties only apply if a predicate violation applies, which it oftentimes likely would not. Given that, the starting place for a PAGA analysis should be reduced.

Thus, *before even considering the likelihood of recovering these damages/penalties*, the analysis would look more like this:

REALISTIC "STARTING PLACE" VALUATIONS					
Meal Breaks	Rest Breaks	Waiting Time	Wage Statements	PAGA	TOTAL
~\$300K	~\$300K	~\$150K	\$0K	~\$250K	~\$1.0M

Indeed, while, on its face, the total damages and penalties available to class members under either scenario are certainly higher than the settlement amount, so were the risks and delays inherent in protracted litigation. As a result, a *non-reversionary* \$500,000.00 fund is more than reasonable when balanced against the risks of continued litigation.

C. THE RISK, EXPENSE AND LIKELY DURATION OF FURTHER LITIGATION SUPPORTS SETTLEMENT

In evaluating for fairness, the Court should weigh the benefits of settlement against the expense and delay involved in achieving an equivalent or even more favorable result at trial. *Young v. Katz*, 447 F.2d 431, 433 (5th Cir. 1971); *Kullar*, 168 Cal.App.4th 116 (2008). As California jurists have recognized, there exists "an overriding public policy favoring settlement of class

actions.” *Ferguson v. Lieff, Cabraser, Heimann & Bernstein*, 30 Cal.4th 1037, 1054 (2003) (citing *Franklin v. Kayrpo Corp.*, 884 F.2d 1222, 1229 (9th Cir. 1989) (“public policy favor[s] the compromise and settlement of disputes”)). Here, however, the settlement provides *all* Settlement Class Members, regardless of their means, the opportunity of monetary recovery in a prompt and efficient manner, without the risk of the Court denying class certification and these workers potentially recovering nothing at all.

VI. THE SETTLEMENT MEETS THE STANDARD FOR PROVISIONAL CLASS CERTIFICATION

Prior to obtaining class certification, the parties to a class action suit may appropriately negotiate a proposed settlement. *Wershba*, 91 Cal.App.4th at 240. When the class has not been certified prior to settlement—as here—the parties may stipulate that a defined class be conditionally certified for settlement purposes only. *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1422, 1425 (E.D.N.Y. 1989). However, the traditional prerequisites for certification are used to determine whether conditional certification of the proposed class should be granted. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997).²³ This case satisfies these elements for purposes of conditional certification.

A. THE CLASS IS SUFFICIENTLY NUMEROUS

For class certification, CCP § 382 requires the parties be “numerous [and it be] impracticable to bring them all before the court...” *Daar v. Yellow Cab Co.*, 67 Cal.2d 695, 704 (1967); *Gay v. Waiters’ & Dairy Lunchmen’s Union*, 489 F.Supp. 282 (N.D. Cal. 1980), *aff’d* 694 F.2d 531 (9th Cir. 1982). Here, the class consists of approximately 574 employees, which is sufficiently numerous.

²³ A pre-certification settlement may stipulate that a defined class be conditionally certified for settlement purposes. This enables the defendant to get the benefit of a final judgment binding on all class members without conceding certification should the court disapprove the settlement. *Weil & Brown*, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2015) ¶ 14:139, *et seq.*

1 **B. THE CLASS HAS A WELL-DEFINED COMMUNITY OF INTEREST IN**
2 **QUESTIONS OF LAW AND FACT**

3 The “community of interest” requirement requires: (1) predominant common questions of
4 law or fact, (2) class representatives whose claims or defenses are typical of the class, and (3) class
5 representatives who adequately represent the class. *Brinker Rest. Corp. v. Superior Court*, 53 Cal.
6 4th 1004, 1021 (2012).

7 **1. The Class Satisfies the Commonality Element**

8 The first prong of the test (i.e., predominant common questions of law or fact) is met so
9 long as common questions are likely to arise in the action and the theory of recovery is “amenable
10 to class treatment.” *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319, 327 (2004).²⁴ The
11 class members’ claims in this action stem from Defendants’ alleged uniform practice of short-
12 staffing, failing to provide “rovers” to cover for class members during their meal and rest periods,
13 and Defendants’ commitment of full-time staffing to its clients. Representative Plaintiff contended
14 these alleged practices undermined Defendants’ otherwise compliant break policies.

15 Moreover, arguably, class members’ duties did not vary significantly, nor did their actual
16 experiences. During this class period, Defendants’ policies and procedures changed little, and
17 Defendants required all class members to adhere to them. Not only do class members thus share
18 common policies on paper, CVN’s investigation revealed they were treated as a homogenous
19 group. Given the uniform nature of class members’ job duties, Defendants’ policies and
20 procedures, and the fact that working conditions were common, this case is suitable for class
21 treatment. Allowing adjudication of these claims on a class basis would be superior²⁵ to letting
22 individual claims from transient, low-income workers, which would be less efficient and lead to a

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24
25 ²⁴ Borrowing from federal authority, FRCP Rule 23 applies a permissive standard to demonstrate common questions
26 of law or fact. *Hanlon*, 150 F.3d at 1011 (9th Cir. 1998) (emphasizing the “minimal” requirements and “permissive”
27 interpretation of Rule 23(a)(2)). The presence of merely one common issue of law or fact is sufficient. *Haley v.*
28 *Medtronic, Inc.*, 169 F.R.D. 643, 648 (C.D. Cal. 1996); *Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 655 (C.D. Cal. 2000).

25 ²⁵ Even manageability issues will not foreclose certification for settlement purposes. *Amchem Prods., Inc. v.*
26 *Windsor*, 521 U.S. 591, 117 S.Ct. 2231 (1997) (“Confronted with a request for settlement-only class certification,
27 [the] court need not inquire whether the case, if tried, would present intractable manageable problems [citations
28 omitted], for the proposal is that there be no trial.”).

1 waste of resources and potentially inconsistent results. Indeed, the following common questions
2 of law and fact, among others, flow logically from the practices detailed above:

- 3 • Whether Defendants violated each of the elements of Labor Code §§ 203, 226, 226.7
4 and 512 (the primary claims);
- 5 • Whether failing to pay and record meal and rest period premiums on employees' pay
6 stubs was a violation of Labor Code § 226;
- 7 • Whether a violation of §§ 226.7 and/or 512 supports penalties under §§ 203 and/or 226;

8 Given the host of common questions of law and fact, the commonality requirement is
9 satisfied. *Hanlon*, at 1019-20; *Gutierrez v. Kovacevich "5" Farms*, 2004 WL 3745224, at *5 (E.D.
10 Cal. Dec. 2, 2004) (finding commonality satisfied where plaintiffs presented common questions
11 of whether defendants failed to pay plaintiffs for all time worked); *Rainbow Bus. Solutions v.*
12 *Merch. Servs.*, 2013 U.S. Dist. LEXIS 179288, *15 (N.D. Cal. 2013) (shared legal issues with
13 divergent factual predicates sufficient for class certification); *Tierno v. Rite Aid Corp.*, 2006 U.S.
14 Dist. LEXIS 71794 (N.D. Cal. Aug. 31, 2006) (certifying a wage and hour class of retail store
15 managers based on a common evaluation process). Following the California Supreme Court's
16 seminal decision in *Brinker*, courts are routinely certifying these types of claims.

17 **2. Representative Plaintiff Satisfies the Typicality Element**

18 The second prong (i.e., typicality) is met when the class representative has claims or
19 defenses typical of the class. *Sav-On*, 34 Cal.4th at 326. Here, typicality is met because
20 Representative Plaintiff's claims arise from the same facts and are based on the same legal theories
21 as those applicable to the class as a whole, yet those claims "need not be substantially identical."
22 *Sav-On*, 34 Cal.4th at 326; *Hanlon*, 150 F.3d at 1020. In deciding whether individual variations
23 preclude typicality, the focus should be on the behavior of the defendants. *Day v. NLO*, 851 F.
24 Supp. 869, 884 (S.D. Ohio 1994). Here, Representative Plaintiff alleges the denial of meal and rest
25 periods based on Defendants' policies and practices as applied to the class as whole. Accordingly,
26 because the offending policies and procedures applied equally to all class members, Typicality is
27 satisfied.

1 **3. The Adequacy Requirement is Satisfied**

2 Under the third prong, class members are adequately represented if the named plaintiff and
3 its counsel (1) do not have conflicts of interest with class members and (2) will prosecute the case
4 vigorously for the class. *Hanlon*, 150 F.3d at 1020.²⁶ Here, there is no conflict of interest between
5 Representative Plaintiff (or her attorneys) and the remaining class members. Even if there were
6 such a conflict in a certain instance, any class member may “opt-out” of the class. Finally, CVN
7 has significant experience in wage and hour class action litigation and is routinely appointed class
8 counsel in cases alleging precisely these issues.²⁷ Thus, CVN and its client clearly have the
9 motivation and ability to litigate this class action had a fair settlement not been obtained.

10
11 **VII. THE COURT SHOULD APPROVE THE PROPOSED CLASS NOTICE**

12 Adequate notice is critical to court approval of a class settlement. *Hanlon*, 150 F.3d at
13 1025. The threshold requirement concerning the sufficiency of class notice is whether the means
14 employed to distribute the notice is reasonably calculated to apprise the class of the pendency of
15 the action, of the proposed settlement, and of class members’ rights to opt out or object. *Eisen*, 417
16 U.S. at 173-74 (1974). Notice is satisfactory if it “generally describes the terms of the settlement
17 in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and
18 be heard.” *Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 575 (9th Cir. 2004).

19 The Notice is written in simple, straightforward language.²⁸ Since the Notice provides class
20 members with sufficient information to make an informed and intelligent decision about the
21 settlement, it satisfies all due process requirements.²⁹ *In re Wells Fargo Loan Processor Overtime*
22 *Pay Litig.*, 2011 WL 3352460, at *4 (N.D. Cal. Aug. 2, 2011); *Rodriguez v. West Publ’g Corp.*,
23 563 F.3d 948, 963 (9th Cir. 2009) (where class notice communicated the essentials of the proposed

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26 ²⁶ Notably, mere divergence of opinion between the class and its representatives is not sufficient to constitute a
conflict. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000).

27 ²⁷ Cole Decl. ¶¶ 19-23; Exhibit “C,” CVN’s Professional Resume.

28 ²⁸ Cole Decl. ¶ 12.5.

28 ²⁹ Exhibit “B,” Notice of Settlement of Class Action Lawsuit.

1 settlement in a sufficiently balanced, accurate, and informative way, it satisfied due process
2 concerns).

3
4 **VIII. A FINAL APPROVAL HEARING SHOULD BE SET**

5 The final step in the settlement approval process is a final fairness hearing at which the
6 Court may hear all evidence and arguments necessary to make its evaluation regarding the
7 settlement. *MCL* § 21.63 at 318. Representative Plaintiff requests the Court set a final approval
8 hearing at a time convenient for the Court, roughly 120 calendar days after preliminary approval.

9
10 **IX. CONCLUSION**

11 For the reasons set forth above, Representative Plaintiff respectfully requests that the Court
12 (1) grant preliminary settlement approval, (2) approve the content and plan for distribution of the
13 Notice, (3) appoint class counsel, representative plaintiff and a claims administrator, (4)
14 conditionally certifying the class, and (5) schedule a Final Approval Hearing.

15
16 Dated: January 14, 2022

COLE & VAN NOTE

17
18 By:



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Attorneys for Representative Plaintiff