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DAVID PATTERSON, and the putative class

8  
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 COUNTY OF SAN JOAQUIN

11 DAVID PATTERSON,

12 Plaintiff,

13 v.

14 SCHELL & KAMPETER, INC., and DOES 1-10,  
15 inclusive,

16 Defendants.

17  
18 ETHAN STARR, individually and on behalf of all  
19 others similarly situated,

20 Plaintiff,

21 v.

22 SCHELL & KAMPETER, INC., and DOES 1-10,  
23 inclusive,

24 Defendants.

Lead Case No: STK-CV-UOE-2020-9296

Case No.: STK-CV-UOE-2021-4585

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF MOTION  
FOR PRELIMINARY APPROVAL OF  
CLASS ACTION SETTLEMENT

Date: \_\_\_\_\_, 2022

Time: 9:00 a.m.

Dept: 10D

Judge: Hon. Barbara Kronlund

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1 **I. INTRODUCTION**

2 Plaintiffs Ethan Starr (“Starr”) and David Patterson (“Patterson”, collectively, “Plaintiffs”)  
3 brought class and representative claims against Defendant Schell & Kampeter, Inc. dba Diamond Pet  
4 Foods (“Defendant” or “S&K”) alleging various wage and hour violations, including failure to properly  
5 calculate and pay overtime at the regular rate of pay, failure to pay minimum wage, failure to pay meal  
6 premiums at the regular rate of pay, failure to pay sick time at the regular rate of pay failure to furnish  
7 accurate itemized wage statements, failure to pay all wages due at cessation of employment, and  
8 violations of Business and Professions Code §§ 17200, *et seq.*

9 By way of this motion, Plaintiffs seek preliminary approval of a non-reversionary settlement  
10 totaling \$765,000.00 to be shared amongst approximately 500 individuals as compensation for S&K’s  
11 alleged wage and hour violations. As will be discussed in greater detail below, the settlement here is  
12 fair, adequate, and reasonable, and should be preliminarily approved so that Class Members have an  
13 opportunity to weigh in on its propriety.

14 **II. SUMMARY OF THE CASE**

15 **A. Plaintiffs’ Claims**

16 In their consolidated actions, Plaintiffs allege that S&K failed to pay overtime at the correct  
17 rate, failed to properly calculate and pay overtime at the regular rate of pay, failed to pay minimum  
18 wage, failed to pay meal premiums at the regular rate of pay, failed to pay sick time at the regular rate  
19 of pay, failed to furnish accurate itemized wage statements, failed to pay all wages due at cessation of  
20 employment, and engaged in unfair business practices based on the foregoing. Plaintiffs specifically  
21 allege that S&K failed to pay them at the correct overtime rate because it failed to incorporate non-  
22 discretionary bonuses, including safety and attendance bonuses, and shift differentials in the regular  
23 rate of pay of its non-exempt employees for purposes of overtime compensation. Plaintiffs further  
24 allege that S&K failed to pay sick time at the correct regular rate of pay in workweeks where  
25 employees earned safety and/or attendance bonuses and used sick time. Plaintiffs further allege that  
26 S&K failed to pay meal period premiums at the correct regular rate of pay in workweeks where  
27 employees earned safety and/or attendance bonuses and received a meal period penalty. Plaintiffs  
28 allege that S&K failed to pay all minimum wage and overtime as a result of having modified employee

1 time punches in certain instances to shave time off of their recorded worktime. Plaintiffs allege that  
2 non-exempt employees did not receive all wages due at cessation of employment as a result of the  
3 above violations. Plaintiffs allege that S&K did not furnish accurate itemized wage statements based  
4 both on the foregoing violations and the allegation that S&K did not accurately state the name of the  
5 legal entity that was the employer on wage statements. Plaintiffs also assert a claim for unfair business  
6 practices in violation of Business and Professions Code sections 17200 *et seq.* based on the foregoing  
7 alleged violations.

8 S&K denies all the allegations in Plaintiff Starr's Second Amended Complaint and Plaintiff  
9 Patterson's First Amended Complaint and denies that Plaintiffs' claims are appropriate for class or  
10 representative treatment other than for purposes of settlement.

11 **B. The Putative Class**

12 Plaintiffs seek to represent a class comprised of all persons who have been employed by S&K  
13 as non-exempt employees in the State of California at any time from November 3, 2016, through the  
14 date of preliminary approval of the settlement. Joint Stipulation and Settlement Agreement  
15 ("Settlement Agreement" or "SA") at § I.E.

16 **C. Procedural History**

17 Plaintiff Patterson filed a putative class action complaint on November 3, 2020, in this Court,  
18 Case No. STK-CV-UOE-2020-9296, alleging a cause of action for failure to furnish accurate itemized  
19 wage statements.

20 On November 3, 2020, Plaintiff Patterson sent written notice to the LWDA and S&K of alleged  
21 violations of Labor Code sections 226(a)(8), 226(b), 432, and 1198.5.

22 On January 8, 2021, Plaintiff Patterson filed a First Amended Complaint, asserting the same  
23 claims and allegations and adding claims under PAGA alleging violations of Labor Code sections  
24 226(a)(8), 226(b), 432, and 1198.5.

25 On April 2, 2021, Plaintiff Starr sent written notice to the LWDA and S&K of alleged  
26 violations of the Labor Code, specifically that S&K failed to pay overtime, failed to pay sick pay at the  
27 regular rate of pay, failed to furnish meal periods, failed to pay all wages at cessation of employment  
28

1 and failed to furnish accurate itemized wage statements, in violation of Labor Code sections 201, 202,  
2 203, 204, 218, 226(a), 233, 246, 510, 512, and 1198.

3 Plaintiff Ethan Starr filed a putative class action complaint in this Court, Case No. STK-CV-  
4 UOE-2021-4585 on May 17, 2021, alleging: 1) failure to pay overtime; 2) failure to pay sick pay at the  
5 regular rate of pay; 3) failure to pay all wages at cessation of employment; 4) failure to furnish  
6 accurate itemized wage statements; 5) unfair business practices. On August 13, 2021, Plaintiff filed a  
7 First Amended Complaint adding the above-stated PAGA claims.

8 On September 1, 2021, the Court consolidated the Starr and Patterson actions.

9 On March 28, 2022, Plaintiff Starr sent an amended PAGA notice to the LWDA and S&K,  
10 adding additional allegations of failure to pay minimum wage and overtime, failure to pay meal period  
11 premiums at the regular rate of pay, failure to provide meal and rest periods, and failure to furnish  
12 records.

13 On June 8, 2022, Plaintiff Starr filed a Second Amended Complaint, adding claims for failure  
14 to pay minimum wage and overtime based on the allegations of shaving time from employee time  
15 records, a claim for failure to pay meal period premiums at the regular rate of pay, failure to provide  
16 meal and rest periods, and PAGA claims based on Plaintiff Starr's March 28, 2022 PAGA notice.

17 On January 18, 2022, the parties engaged in a full-day mediation with Brandon McKelvey, Esq.  
18 The parties reached a preliminary agreement to resolve this matter, the terms of which are set forth in  
19 the Settlement Agreement. Declaration of Vladimir J. Kozina ("VJK Dec.") VJK Dec., ¶¶ 3-11.

20 **D. Identifying the Claims, Marshalling the Evidence, Creating a Damages Model**

21 Through independent inquiry, research, formal and informal discovery, Class Counsel  
22 thoroughly and diligently investigated the claims asserted in this Action. VJK Dec. ¶ 12. This  
23 process included, but was not limited to, (1) obtaining and reviewing Plaintiffs' personnel files,  
24 payroll records, and time records; (2) researching Defendant, its organization and operations within  
25 California; (3) researching the existence of other pending actions; (4) identifying, researching, and  
26 pleading the appropriate claims; (5) exhausting administrative remedies; (6) identifying, requesting,  
27 securing, and reviewing pertinent policies, practices, and procedures; (7) identifying, requesting, and  
28

securing a representative sampling of time and payroll documents and wage statements for the class;  
(8) creating a reliable damages model; and (9) participating in a full-day mediation. *Id.* ¶ 13.

**E. Settlement Negotiations**

At all times, the Parties’ negotiations were adversarial, non-collusive, and at arms’ length. VJK Dec. ¶ 14. Prior to mediation, Defendant provided Plaintiffs’ counsel with hundreds of documents relating to its employment policies, practices, and procedures; data relating to the class size, number of workweeks at issue, and number of wage statements at issue; and a sampling of the time and payroll data for 50 class members. Plaintiffs’ counsel provided the data to an economic expert for analysis and developed a damages model. On January 18, 2022, the Parties engaged in a full day mediation with Brandon McKelvey, Esq., where a settlement in principle was reached and a Memorandum of Understanding was executed. A long form settlement agreement was prepared and executed by the Parties on or about April 20, 2022. VJK Decl., ¶ 15, Ex. 1.

**III. SUMMARY OF THE PROPOSED SETTLEMENT**

**A. Monetary Relief Under the Settlement**

Pursuant to the Settlement, the Defendant is to remit \$765,000.00 – the Gross Settlement Amount (“GSA”) – on an all-in, non-reversionary basis to resolve the claims to be released by Participating Class Members. SA § I.U. After deducting the Administrator’s costs (\$15,000.00), Plaintiffs’ Service Payments (\$20,000), the fees (\$255,000.00) and costs (\$15,000.00) of Class Counsel, and the payment to the LWDA relating to the PAGA Claims (\$37,500), a \$422,500 net settlement amount is expected to ultimately be distributed to Participating Class Members. SA §§ I.A, I.C, I.K, I.N, I.AA. Participating Class Members are expected to receive an average payout of approximately \$845. VJK Dec. ¶ 16-17.

**B. Notice to Class**

The Class Notice will be mailed to Class Members within approximately 24 calendar days after preliminary approval of the Settlement. SA § III.K.2; Ex. A.

**C. Participation in the Settlement**

Class Members are not required to file claims to be eligible to participate in this Settlement; all Class Members who do not opt-out will be Participating Class Members. SA §§ I.V, I.CC. Class

Members will also receive a proportional share of the portion of the Net PAGA Settlement Amount payable to aggrieved employees (\$12,500), regardless of whether they opt out of the Settlement. SA § I.AA.

**D. Settlement Shares**

Individual Settlement Shares for Class Members will be based on whether the Participating Class Member is a former employee as well as the number of weeks the Participating Class Member worked for Defendant during the Class Period. All former employees will receive a flat sum of \$500 in addition to their Individual Settlement Share. SA § III.G.1.a.i. Individual Settlement Shares will be calculated by deducting the sum total of the Former Employee Shares and then providing the Participating Class Member with a proportionate share of the remaining Net Settlement Amount that is equal to: (i) the number of weeks he or she worked during the Class Period, divided by (ii) the total number of weeks worked by all Participating Class Members collectively during the Class Period, which is then multiplied by the remaining Net Settlement Amount. One day worked in a given week will be credited as a week for purposes of this calculation. SA § III.G.1.a.ii.

The average payment to each Participating Class Member is expected to be approximately \$845 (\$422,500 / 500). VJK Dec. ¶ 17. For taxes and withholdings, all amounts distributed to the Class will be allocated 50% wages and 50% non-wage income, penalties, and interest. SA, § III.G.2.

**E. Scope Of Release**

Upon Defendant's fulfillment of its payment obligations under the Settlement Agreement, Participating Class Members will forever and completely release and discharge Defendant and the Released Parties from the Released Claims. SA §§ I.GG, I.HH, III.L, III.M. Additionally, Plaintiffs will release Defendant and the Released Parties from any and all claims, known and unknown, of any kind, that arose during their employment with Defendant. SA §§ I.M, III.N. The Released Class Claims were narrowly tailored to track the claims advanced on behalf of the Class against Defendant and do not include a Civil Code section 1542 waiver. SA §§ I.GG, I.HH, III.L, III.M.

**F. Settlement Administration**

The Parties have agreed on Atticus Administration, LLC ("Atticus"), a cost-effective and experience settlement administration provider, to administer the settlement, after soliciting bids from

multiple settlement administrators. Plaintiff seeks approval of up to \$15,000 for the Administrator's fees and costs. SA §§ I.A, I.LL.

**G. Payment To The LWDA**

The SA allocates \$50,000 to resolve PAGA claims. 75% (\$37,500) will be paid to the LWDA and the remaining 25% (\$12,500) will be distributed to Class Members. SA, § I.AA. The Parties negotiated this amount in good faith, intending to serve the punitive and deterrent purposes of the PAGA. VJK Dec. ¶¶ 38-39. The LWDA has been notified of the Settlement. VJK Dec. ¶ 40, Ex. 2.

**H. Enhancement Payment to Plaintiffs for Service to the Class**

Plaintiffs will apply for an enhancement payment in the amount of \$10,000 each (\$20,000 total). Class Members will be apprised of Plaintiffs' request and ability to review the moving papers on the Court's website and to object to the request if they so desire. SA, Ex. A.

**I. Class Counsel's Attorneys' Fees And Costs**

Class Counsel will request attorneys' fees of \$255,000.00 (one-third of the GSA), as well as declared litigation costs up to \$15,000. SA §§ I.C, I.N. Class Members will be apprised of Class Counsel's request, their ability to review the moving papers on the Court's website and to object to the request if they so desire. SA, Exh. A.

**J. Final Approval Hearing**

At a date set by the Court, the SA contemplates the Court will hold a Final Approval Hearing and, if the Settlement is approved, enter an Order of Final Approval approving the SA in a manner substantially consistent with its terms and intent, and enter Judgment accordingly. SA, § III.K.6.

**K. Proposed Implementation Schedule**

|                                                                         |                                                                                              |
|-------------------------------------------------------------------------|----------------------------------------------------------------------------------------------|
| Defendant to provide Class List to Administrator.                       | Within 10 calendar days of the Court's execution of the Order Granting Preliminary Approval. |
| Administrator to mail Class Notice.                                     | Within 24 calendar days of the Order Granting Preliminary Approval                           |
| Deadline for Class Members to object or opt out.                        | Within 45 calendar days after Notice mailed.                                                 |
| Plaintiff to file Motion for Attorneys' Fees, Cost and Service Payment. | Not less than 16 court days before the Final Approval hearing.                               |
| 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 the Order Granting Preliminary Approval.                        |

1 **IV. PROVISIONAL CLASS CERTIFICATION IS WARRANTED**

2 **A. The Legal Standard**

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

10 California courts have broad discretion to certify a class for settlement purposes. *Dunk v. Ford*  
11 *Motor Co.* (1996) 48 Cal.App.4th 1794, 1807 n. 19 (holding that class certification in settlement cases  
12 is subject to a “lesser standard of scrutiny”). Provisional and conditional certification is appropriate  
13 where there is an ascertainable class and a well-defined community of interest among the members;  
14 when “the question is one of a common or general interest, of many persons, or when the parties are  
15 numerous, and it is impracticable to bring them all before the court.” Code Civ. Proc. § 382; *Richmond*  
16 *v. Dart Industries* (1981) 29 Cal.3d 462, 470; see also *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695,  
17 704. The practical purpose of provisional certification is to facilitate notice to class members of the  
18 terms of the proposed settlement, rights thereunder, and the date and time of the final approval hearing.

19 To be certified, a settlement class must meet the following criteria: (1) the individuals in the  
20 class are so numerous that joinder would be impractical; (2) there is a commonality of interest between  
21 the plaintiff and the members of the class; (3) plaintiff’s claims are typical of the claims of the class  
22 members; and (4) plaintiff and their counsel will fully and adequately represent the interests of the class  
23 members. Code Civ. Proc. § 382; *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319,  
24 326-27; Fed. R. Civ. P. 23.<sup>1</sup> All of the prerequisites to certification are met for each of the proposed  
25 classes here for settlement purposes.

26 ///

27 \_\_\_\_\_  
28 <sup>1</sup> The California Supreme Court has authorized California’s trial courts to use Federal Rule of Civil Procedure 23  
and cases applying it for guidance in considering class issues. See *Vasquez v. Sup. Ct.* (1971) 4 Cal.3d 800, 821; *Green v.*  
*Obledo* (1981) 29 Cal.3d 126, 145-146. Where appropriate, federal case law will be cited in addition to California law.

1           **B.     The Proposed Class Is Ascertainable and Joinder Would be Impractical**

2           The identity of each Class Member is ascertainable because all Class Members worked for  
3 Defendant within California during the Class Period and can be easily identified through employee and  
4 payroll records. *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932. With approximately 500  
5 individuals, joinder is impractical.

6           **C.     The Commonality Requirement is Met for the Settlement Class**

7           The commonality requirement is met if questions of law and fact that are common to the class  
8 predominate and the theory of recovery is “amenable to class treatment.” *Sav-On Drug Stores*, 34  
9 Cal.4th at p. 327; *Brinker Restaurant Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004, 1033. The claims of  
10 Plaintiffs and each of the Class Members flow from the same facts and legal claims, i.e., Defendant’s  
11 alleged failure to pay overtime, failure to pay minimum wage, failure to pay sick time at the regular  
12 rate, failure to pay meal premiums at the regular rate, failure to pay all wages at cessation of  
13 employment, and failure to furnish accurate itemizes wage statements. VJK Dec. ¶ 46. Common  
14 questions predominate for settlement purposes.

15           **D.     The Typicality Requirement is Met**

16           The typicality requirement is met if the claims of named representatives are typical of those of  
17 the class, though “they need not be substantially identical.” *Hanlon v. Chrysler Corp.* (9th Cir. 1998)  
18 150 F.3d 1011, 1020; *Sav-On Drug Stores, Inc.*, 34 Cal.4th at p. 326. Each of the Plaintiffs’ claims are  
19 typical of the claims of every Class Member because they arise from the same factual bases and  
20 uniform application of policies and procedures and are based upon the same legal theories. *Wehner v.*  
21 *Syntex Corp.* (N.D. Cal. 1987) 117 F.R.D. 641, 644. Importantly, were Plaintiffs not serving as Class  
22 Representatives, they would be members of the Class. VJK Dec. ¶ 46. Typicality is satisfied here for  
23 settlement purposes.

24           **E.     The Adequacy Requirement is Met with Respect to the Class**

25           The adequacy requirement is met if the named representative and counsel have no interests  
26 adverse to those of the Class Members and are committed to vigorously prosecuting the case on behalf  
27 of the class. *Hanlon*, 150 F. 3d at 1020; *McGhee v. Bank of Am.* (1976) 60 Cal.App.3d 442, 450-51.  
28 Plaintiffs’ interests in prosecuting this matter and obtaining the most beneficial recovery practicable

1 fully comports with the collective interests of each respective Class. There are no conflicts between  
2 either Plaintiff and the other Class Members, and Plaintiffs are members of the Class. *Hanlon*, 150. F  
3 3d at 1021. Moreover, any Class Member who wishes to opt-out and/or object to the Settlement will  
4 have the opportunity to protect his/her individual interest by doing so. *Hanlon, supra*, 150. F.3d 1021.

5 In addition, throughout this case Plaintiffs and Class Counsel have demonstrated their  
6 commitment to vigorously prosecuting this lawsuit on behalf of the Class. This is demonstrated by  
7 Class Counsel’s experience in wage and hour cases, and by the substantial benefits they have and will  
8 continue to confer upon Class Members, including securing the Class Settlement Amount of \$765,000,  
9 which benefits Class Members. VJK Dec. ¶¶ 47-54.

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

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

12 The purpose of the preliminary evaluation of a proposed class action settlement is to determine  
13 whether it is within the range of possible approval, and thus whether notice to the class of the terms and  
14 conditions are warranted. *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85  
15 Cal.App.4th 1135, 1145; *Spann v. J.C. Penney Corp.* (C.D. Cal. 2016) 314 F.R.D. 312, 319; William B.  
16 Rubenstein, 4 NEWBERG ON CLASS ACTION (4th Ed. 2002) § 11.25. In passing on its propriety, this  
17 Court has broad discretion to determine whether a settlement is fair under the unique circumstances.  
18 *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. Indeed, the Court need only find the  
19 settlement falls within a “reasonable range”, as courts recognize that approving class action settlements  
20 is “an amalgam of delicate balancing, gross approximations and rough justice.” *Ibid.*; *Cordy v. USS-*  
21 *Posco Indus.* (N.D. Cal. 2013) 2013 WL 4028627 \*4; 4 NEWBERG § 11:25.

22 To make this fairness determination, courts consider several relevant factors, including “the  
23 strength of the plaintiffs’ case; the risk, expense, complexity, and likely duration of further litigation;  
24 the risk of maintaining class action status throughout the trial; the amount offered in settlement; the  
25 extent of discovery completed and the stage of the proceedings; [and] the experience and views of  
26 counsel . . .” *Hanlon*, 150 F.3d at 1026 (citations omitted). Importantly, there is a presumption of  
27 fairness when the settlement is the result of arm's-length negotiation, investigation and discovery that  
28 are sufficient to permit counsel and the court to act intelligently, and counsel are experienced in similar

1 litigation, as is the case here. *Dunk*, 148 Cal.App.4th 1801; *Wren v. RGIS Inventory Specialties* (N.D.  
2 Cal. 2011) 2011 WL 1230826 \*6. California courts put a great deal of stock into what is otherwise, a  
3 private, negotiated, consensual agreement. Accordingly, a court’s inquiry is limited “to the extent  
4 necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching  
5 by, or collusion between, the negotiating parties, and that the settlement, taken as a whole is fair,  
6 reasonable and adequate to all concerned.” *Dunk*, 148 Cal.App.4th 1801. The Settlement here satisfies  
7 all of the legal standards for preliminary approval and provides a cognizable average monetary  
8 recovery to each Class Member, particularly in light of the challenges and risks to securing relief on a  
9 class-wide basis.

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

11 The Class Action and Settlement have and will result in substantial benefits to the Class. The  
12 Gross Settlement Amount represents 31.9% of the maximum approximate damages recoverable to the  
13 Class and 80.9% of the realistic damages recoverable to the Class, and accounts for the substantial risks  
14 inherent in both maintaining class certification and ultimately prevailing at trial. VJK Dec. ¶¶ 23-34.

15 By contrast, the proposed Settlement ensures timely relief, cognizable monetary and non-  
16 monetary benefits, and is undeniably fair, reasonable and adequate.

17 **1. Defendant’s Exposure to the Class**

18 Under Class Counsel’s damages model, Defendant faced up to a maximum of \$2,392,042 in  
19 maximum potential exposure relative to alleged damages and penalties to the Class. VJK Dec. ¶¶ 23-  
20 31. Because of anticipated challenges to certification, success on the merits at trial, and on appeal,  
21 Class Counsel adjusted the exposure for reasonableness to account for all of the risks. *Id.* ¶¶ 32-35.

22 **2. Defendant’s Defenses**

23 Defendant asserted numerous defenses and planned to employ a multipronged attack aimed at  
24 circumscribing both the scope of the Class and the available damages. Defendant asserted legal and  
25 factual grounds to defend against Plaintiff’s claims including, but not limited to, its bonuses were  
26 discretionary, that the bonus payments themselves already accounted for retroactive overtime, that  
27 any discrepancies in the time records was the result of a neutral rounding policy employed by  
28 Defendant, that to the extent Defendant underpaid any employees, such underpayment was not

1 willful such that former employees would not be entitled to waiting time penalties, that Defendant  
2 substantially complied with its meal and rest period obligations and that any variation from that was  
3 the result of individualized issues, that Defendant's use of a dba on its wage statements complied  
4 with Labor Code section 226(a)(8), and that Defendant was not liable for derivative wage statement  
5 penalties as a matter of law. *Id.* ¶¶ 32-33.

6 In sum, the Settlement, which was negotiated at arms' length, by experienced, well-informed  
7 counsel after significant investigation and information exchange, with the assistance of a mediator with  
8 substantial experience in wage and hour class actions, is fair, reasonable and adequate in light of the  
9 strengths and weaknesses of the Class Claims and Defendant's defenses. "'Great weight' is accorded  
10 to the recommendation of counsel, who are most closely acquainted with the facts of the underlying  
11 litigation. This is because '[p]arties represented by competent counsel are better positioned than courts  
12 to produce a settlement that fairly reflects each party's expected outcome in the litigation.' Thus, 'the  
13 trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that  
14 of counsel.'" *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 528.  
15 Class Counsel, having demonstrated a high degree of competence in the litigation of this case, as well  
16 as numerous other wage and hour class actions, strongly believe that the proposed Settlement is a fair,  
17 adequate, and reasonable partial resolution of the Class Action and is preferable to continued litigation  
18 against Defendant. VJK Dec. ¶¶ 35-36<sup>2</sup>. The Settlement should be preliminarily approved such that  
19 the Class Members have an opportunity to evaluate and voice their opinions on the Settlement.

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

21 In order to protect the rights of absent class members, courts must ensure each receives the best  
22 notice practicable. *Phillips Petroleum Co. v. Shutts* (1985) 72 U.S. 797, 811-12. Procedural due  
23 process requires affected parties have the right to be heard at a meaningful time and in a meaningful  
24 manner. It does not guarantee any particular procedure but rather only requires notice reasonably  
25 calculated "to apprise interested parties of the pendency of the action and afford them an opportunity to  
26 present their objections." *Ryan v. Cal. Interscholastic Fed'n – San Diego Section* (2001) 94

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28 <sup>2</sup> See also, *In re Wachovia Corp. "Pick-A-Payment" Mortgage Mktg. & Sales Practices Litig.* (N.D. Cal. 2011)  
2011 WL 1877630, at \*3 (approving settlement based upon, among other factors, the belief of "Plaintiffs' counsel, who are  
experienced attorneys . . . that the settlement is extremely favorable to the class").

1 Cal.App.4th 1048, 1072. The law typically requires that notice of a proposed settlement inform class  
2 members of: (1) the nature of the pending litigation; (2) the general terms of the proposed settlement;  
3 (3) that complete information is available from the court files; and (4) that any class member may  
4 appear and be heard at the fairness hearing. See Cal. Rules of Court, Rules 3.766(d)-(f) and 3.769(f);  
5 William B. Rubenstein, 3 NEWBERG ON CLASS ACTIONS (4th Ed.) § 8:32.

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

7 California law vests the court with broad discretion to fashion an appropriate notice program.  
8 Cal. Civ. Code §1781; Fed. R. Civ. Proc. Rule 23(e)(1); Rule 23(c)(2)(B); *Cartt v. Superior Court*  
9 (1975) 50 Cal.App.3d 960, 973-74. Because all Class Members are current and former employees of  
10 Defendant for whom Defendant has current or last known addresses as well as SSNs, notice is simpler  
11 and more reliable than in other types of class actions. The Class Notice is consistent with notices  
12 approved by state and federal courts and, under the circumstances, affords the best notice practicable.

13 The Class Notice will be sent to all Class Members, informs them of the terms of the  
14 Settlement, and is neutrally worded to avoid prejudice. The Class Notice meets all of the requirements  
15 of procedural due process and California Rules of Court, Rules 3.766(d)-(f) and 3.769(f) by identifying  
16 Plaintiffs and Defendant, describing the claims and the Action in a straightforward manner; succinctly  
17 describing the essential terms of the Settlement, including identifying the scope of the release and all  
18 parties against whom claims are being released; describing Plaintiffs proposed Service Payments as  
19 well as the amount of Class Counsel's attorney's fees and costs; providing information on how to  
20 participate in, opt-out of, or object to the Settlement; providing all applicable deadlines; and informing  
21 Class Members of the consequences of not opting out. SA, Exh. A. In short, the Class Notice provides  
22 Class Members with all the necessary information to make an informed decision.

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

24 The Parties have selected Atticus to serve as Administrator. Atticus has substantial experience  
25 in administration, having handled thousands of class action settlements. The Administrator's fees and  
26 costs will be paid out of the GSA/QSF. The Administrator will, among other things, distribute the  
27 Court-approved Class Notice, calculate Participating Class Members' shares, prepare and mail  
28 settlement checks, respond to inquiries/disputes as appropriate, prepare requisite tax forms, and

generally perform all normal and customary duties associated with the administration of such settlements. Plaintiffs seek preliminary approval of \$15,000 for the Administrator's fees and costs. VJK Dec. ¶¶ 44-45.

**F. The Service Payments to Plaintiffs Are Reasonable**

Named plaintiffs in class action litigation are eligible for reasonable service payments. *Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 977. "Courts routinely approve incentive awards to compensate plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Ingram v. Coca-Cola Co.* (N.D. Ga. 2001) 200 F.R.D. 685, 694 (approving \$300,000 payment to each class representative in employment action settling before certification).<sup>3</sup> Factors used by courts in determining the amount of the service payments include (1) a comparison between service awards and the range of monetary recovery available to the class (*see Ingram*, 200 F.R.D. at 694; (2) time and effort put into the litigation (*see Van Vranken*, 901 F. Supp. at 299); (3) whether the litigation will further the public policy underlying the statutory scheme (*see Roberts*, 979 F. Supp. at 201 n.23); and (4) risks of retaliation (*see Roberts*, 979 F. Supp. at 202). All factors support the enhancement payments requested here. Plaintiffs will request \$10,000 each. The sought payments are fair, reasonable and appropriate under the circumstances of this case, including Plaintiffs' provision of general releases and Civil Code section 1542 waivers. Plaintiffs, who have worked diligently with Class Counsel throughout this entire litigation, including participating in discovery, mediation, and taking numerous calls with Class Counsel, should be rewarded for taking the initiative to pursue these claims on behalf of the Class, and for their role in reaching a substantial settlement providing valuable relief to the Class. VJK Dec. ¶¶ 46-49.

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

Plaintiffs, in the settlement of this wage and hour class action, are entitled to payment of attorneys' fees and costs. Cal. Lab. Code §§ 218.5, 226(e) (1), 1194, and 2699(g); *Early v. Superior Court* (2000) 79 Cal.App.4th 1420, 1427. In conjunction with final approval, Plaintiffs will seek an award of Class Counsel's fees under the common fund doctrine, which is customarily used in awarding

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<sup>3</sup> *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 fees and costs in settlement of Labor Code class actions and an approved method under California law.<sup>4</sup>  
2 The traditional method for calculating a common fund fee is to award a percentage of the total fund.  
3 *Blum v. Stenson* (1984) 465 U.S. 886, 900 n. 16; *Mex. Workers v. Ariz. Citrus Growers* (9th Cir. 2002)  
4 904 F.2d 1301, 1311. Courts customarily approve payments of attorney's fees between one-third to  
5 forty percent of the common fund in comparable wage and hour class actions.<sup>5</sup> Here, Plaintiffs will  
6 seek attorneys' fees of one-third of the MSA, or \$255,000 and declared costs of up to \$15,000.  
7 Because these fees and costs are reasonable, within the range commonly awarded by state and federal  
8 courts in wage and hour class actions, and because Class Counsel have conferred and will confer  
9 meaningful monetary and non-monetary benefits upon the Class from Defendant, the Court should  
10 preliminarily approve the requested awards as fair and reasonable.

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

12 Plaintiffs request the Court set a date for hearing on a motion for final approval as well as a  
13 motion for fees, costs, and enhancement payments, deadlines for Class Members to opt-out, object, and  
14 for the submission of associated moving papers. For sufficient time to mail the Class Notice and for  
15 Class Members to decide how they wish to proceed, Plaintiffs request that the date for the final  
16 approval hearing be set not less than 100 days after preliminary approval.

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25 <sup>4</sup> *Wershba*, 91 Cal.App.4th at 254; *Lealao v. Beneficial Cal.* (2000) 82 Cal.App.4th 19, 26-30; *Serrano v. Priest*  
26 (1977) 20 Cal.3d 25, 34 (“[w]hen a number of persons are entitled in common to a specific fund, and an action brought by a  
27 plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs may  
be awarded attorney's fees out of the fund.”); see also *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478 (“[A] lawyer  
who recovers for a common fund . . . is entitled to a reasonable attorney's fee from the fund as a whole.”); *Hanlon*, 150  
F.3d. at 1029.

28 <sup>5</sup> 4 NEWBERG § 14:6 (Studies show that “Fee awards in class actions average around one-third of the recovery”);  
*Williams v. MGM-Pathe Commc'ns Co.* (9th Cir. 1997) 129 F.3d 1026, 1027 (33% fee award); *Wren*, 2011 WL 1230826, at  
\*29 (42% fee award in common fund wage and hour class action).

1 **VII. CONCLUSION**

2 For all the reasons stated above, Plaintiffs' Motion for Preliminary Approval of Class Action  
3 Settlement should be granted.

4 **DATED:** June 14, 2022

**MAYALL HURLEY P.C.**

5  
6 By \_\_\_\_\_  
7 WILLIAM J. GORHAM, III  
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9 Attorneys for Plaintiffs and the Putative Class  
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