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9 **SUPERIOR COURT OF CALIFORNIA**
10 **IN AND FOR THE COUNTY OF SANTA CLARA**

11 ANH DUONG and CHAU NGOC BAO
12 PHAN, as individuals and on behalf of all
13 others similarly situated,

14 Plaintiff,

15 vs.

16 LOAN FACTORY, INC., a California
17 corporation; THUAN NGUYEN, an
18 individual; and DOES 1-50, Inclusive,

19 Defendants.

CASE NO. 21CV382467

Assigned for All Purposes to:
Hon. Patricia M. Lucas
Dept. 3

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

[Filed concurrently with Notice of Motion
and Motion; Declarations of Zachary M.
Crosner, Anh Duong, and Chau Ngoc Bao
Phan; [Proposed] Order]

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Time: TBD
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1 **I. INTRODUCTION**

2 Plaintiffs Anh Duong and Chau Ngoc Bao Phan hereby move the Court for an order
3 granting preliminary approval to a proposed non-reversionary class action settlement to resolve
4 wage and hour claims on behalf of approximately 136 individuals employed by Defendant Loan
5 Factory, Inc. (“Loan Factory” or “Defendant”) in certain job positions during the period of May
6 26, 2017 through November 1, 2021. The proposed \$1,000,000 settlement will provide about
7 \$620,000 in cash payments to the class, with an average award of about \$4,600. The balance of
8 approximately \$380,000 will cover reasonable attorney’s fees and actual litigation costs,
9 settlement administration costs, an enhancement award to each named plaintiff, and payment of
10 civil penalties to the state. The settlement is the product of Plaintiffs’ pre-filing investigation,
11 formal discovery and a pre-mediation exchange of information, and arms-length negotiations
12 overseen by experienced mediator Steve Cerveris, Esq.

13 The proposed settlement is within the “range of reasonableness” for approval and.
14 Plaintiffs’ counsel believes the settlement is a fair result for the class given the substantial risks
15 inherent in this matter. Accordingly, Plaintiffs request the Court enter an order: (1) granting
16 preliminary approval to the proposed class action settlement; (2) conditionally certifying the
17 settlement class as defined below; (3) appointing Zachary M. Crosner, Michael R. Crosner, Blake
18 R. Jones and Kim Anglin of Crosner Legal, P.C. as Class Counsel; (4) appointing Plaintiffs Anh
19 Duong and Chau Ngoc Bao Phan as the Class Representatives; (5) appointing ILYM Group, Inc.
20 as the Settlement Administrator; (6) approving the form of notice to the class and the notice
21 procedure; and (7) scheduling a final fairness hearing.

22 **II. FACTUAL BACKGROUND AND PROCEDURAL POSTURE**

23 Loan Factory is a privately-held mortgage broker company headquartered in San Jose,
24 California. It has approximately six offices in California, each divided into four departments that
25 handles a different stage of the overall loan application, approval and funding process. Plaintiffs
26 Anh Duong started working for Defendant in March 2020 as a loan officer assistant. She was
27 compensated a monthly gross salary of \$2,200 paid in semi-monthly installments of \$1,100, and
28 her compensation was raised to \$2,600 per month in January 2021. Following a 60 day trial

1 period, she became eligible to participate in the company’s “performance bonus plan.” Plaintiffs
2 Chau Ngoc Bao Pha began working for Defendant in September 2020. Her compensation plan
3 was the same as Plaintiff Duong. Both Plaintiffs typically worked between 45 to 65 hours per
4 work week. This compensation scheme was typical of the Class Members as, until approximately
5 June 2021, Defendant compensated them with modest monthly salaries coupled with bonuses
6 earned on loan approval and other performance metrics. [Crosner Decl.”), ¶ 3.]

7 Loan Factory classified Plaintiffs and the Class Members as exempt employees and
8 therefore did not pay them overtime or provide them with meal and rest periods. Plaintiffs
9 contend, however, that they and the Class Members were misclassified as exempt for several
10 reasons. First, the amounts paid by Loan Factory did not satisfy the salary basis test, which
11 requires exempt employees be paid a salary at least two times the applicable minimum wage each
12 month (or upwards of \$4,600/month during the Class Period). Plaintiffs and the Class Members
13 also do not meet the requirements of the commissioned sales exemption, which requires an
14 employee earn at least 1.5 times the applicable minimum and at least one-half of the earnings be
15 in the of a bona fide commission. Because Loan Factory’s compensation plan did not meet the
16 requirements of either of these exemptions (and no other exemption conceivably applies),
17 Plaintiffs contend they were misclassified and accordingly should have received overtime pay,
18 meal and rest periods (or compensation in lieu thereof), and other protections afforded non-
19 exempt employees under California’s wage and hour laws. [Crosner Decl.”), ¶ 3.]

20 On May 21, 2021, Plaintiffs submitted a notice letter to the Labor & Workforce
21 Development Agency (“LWDA”) as the mandatory prerequisite to filing a claim under the Private
22 Attorneys General Act (“PAGA”). They then filed their class action complaint against all
23 Defendants on May 26, 2021, alleging claims for: (1) failure to pay all wages due, including
24 minimum and overtime wages (2) failure to provide all required meal and rest breaks or
25 compensation in lieu thereof; (3) failure to provide accurate, itemized wage statements; and (4)
26 failure to pay all wages due upon termination of employment. Plaintiffs also alleged claims for
27 unfair competition and for violations PAGA premised on the same Labor Code violations.
28 [Crosner Decl., ¶ 4.]

1 In and around April 2021 (after receiving records requests from Plaintiffs), Loan Factory
2 purportedly began conducting an independent “audit” of its payroll practices and apparently
3 realized its exemption classification decisions regarding the Class Members were problematic.
4 Consequently, starting that month and continuing into June, the company attempted to “cure” the
5 misclassifications by, inter alia, attempting to “true up” Class Member compensation and paying
6 them for overtime and meal/rest period violations. By the end of June 2021, Loan Factory paid
7 out almost \$250,000 in back wages and penalties, and the company also attempted to issue
8 revised wage statements to correct the inaccuracies in previously issued statements. Finally, Loan
9 Factory reclassified the job positions at issue as non-exempt. [Crosner Decl., ¶ 7.]

10 After Plaintiffs filed their complaint and after undertaking lengthy discovery meet and
11 confer sessions and discussions about the merits of the case, the Parties ultimately agreed to early
12 mediation. The Parties also agreed on a protocol for an exchange of substantial documents and
13 information before the mediation to facilitate the settlement discussions. Consequently,
14 Plaintiffs’ counsel reviewed payroll records, compensation plans, personnel policies/handbooks,
15 meal and rest break policies, personnel files, and a random of sampling paystubs and time records
16 for about 25% of the Class Members. Plaintiffs then had those records analyzed by Berger
17 Consulting Group to look for, inter alia, violation rates for missed, late and/or short meal breaks,
18 potential damages from unpaid overtime, etc. Defendant also provided data regarding the total
19 number of putative class members, the estimated total amount of workweeks and pay periods they
20 worked, and average pay rates among other relevant data. [Crosner Decl., ¶ 8; Exh 2.]

21 The Parties then engaged Steve Cerveris, Esq., a respected professional neutral with
22 substantial wage and hour and class action experience and, on September 25, 2021, the Parties
23 participated in a full day mediation with Mr. Cerveris. Throughout the day, the arms-length
24 negotiations were hard-fought and adversarial as the Parties exchanged extensive information on
25 their legal and factual positions, and made numerous offers and counter-offers. By the end of the
26 day they reached agreement on all major issues. The Parties then collaboratively drafted the Joint
27 Stipulation of Class Action and PAGA Settlement and Release (“Settlement Agreement”) setting
28 forth the settlement terms now before the Court for approval, and a true and correct copy of the

Settlement Agreement is attached to the Crosner Declaration as Exhibit 1. [Crosner Decl., ¶ 9.]

III. **THE PROPOSED SETTLEMENT TERMS**

Under the settlement, Loan Factory will pay \$1,000,000 into a common fund, the Maximum Settlement Amount (“MSA”). Attorney’s fees of up to \$333,333.33 (1/3 of the MSA), litigation costs of up to \$15,000, settlement administration costs of no more than \$4,000, a service award to each Plaintiff of no more than \$10,000, and a payment of \$7,500 to the Labor & Workforce Development Agency for its share of the PAGA penalties, all will be paid from the MSA. The remainder of around \$620,000 will be allocated pro rata among the Class Members based on their total weeks worked during the Class Period. No portion of the MSA will revert to Loan Factory. [Crosner Decl., ¶ 10.]

A. **Certification of the Settlement Class**

The settlement provides for conditional certification of a settlement class including all individuals employed by Defendant in the positions of Loan Advisor, Client Advisor, Escrow Officer Assistant, Client Manager, Insurance Agent, Branch Manager, Team Lead, Loan Originator, Customer Service Manager, Underwriter, Admin, Front Desk, Business Development, Loan Officer Assistant, Loan Processor, Administration Assistant, Accountant, and/or Chief Credit Officer in the State of California during the period May 26, 2017, through November 1, 2021. The Settlement Class consists of approximately 136 individuals. [Crosner Decl., ¶ 11.]

B. **The Benefit Conferred on the Settlement Class**

As noted, the settlement obligates Loan Factory to pay \$1,000,000 to resolve the Settlement Class’s claims, inclusive of attorney’s fees and costs, and in addition to the approximately \$250,000 already paid to the Class Members. At least \$620,000 from the MSA will be distributed to the Participating Class Members. This is a cash settlement that does not require Participating Class Members to submit a claim form to receive their settlement share. Participating Class Members will receive their settlement checks automatically via First Class U.S. Mail. One-third of each settlement share will be allocated to wages and the remaining two-thirds will be allocated to penalties and interest, which allocation is consistent with Loan Factory’s potential liability as discussed below. Loan Factory will pay any and all applicable

1 employer-side payroll taxes separately and in addition to the MSA. Subject to the Court's
2 approval, any amounts not claimed (because a class member does not cash their settlement check)
3 will be forwarded to the State Controller's Unclaimed Property Fund. [Crosner Decl., ¶ 12.]

4 Each Participating Class Member will receive a share of the Net Settlement Amount based
5 on his or her total weeks worked for Loan Factory during the Class Period while employed in one
6 of the specified positions. Thus, each Class Member's Individual Settlement Payment will be
7 calculated using criteria typically used in determining appropriate amounts of unpaid wages,
8 unpaid premium wages for missed meal and rest breaks, and potential statutory penalties under
9 applicable law. These methods are intended to ensure each Class Member receives a settlement
10 award corresponding to the relative value of their potential claims. The proposed allocation
11 provides a reasonable way to compensate Class Members based on the amount of time they
12 worked for Loan Factory and the number of unpaid overtime hours, number of missed meal
13 breaks and/or rest breaks, were not provided compensation in lieu of such missed breaks, and
14 related penalties. The average gross award is estimated to be over \$4,600. [Crosner Decl., ¶ 13.]

15 As discussed below, the overall settlement amount is reasonable in light of the
16 considerable risks associated with Plaintiffs' claims, and the delay and risk posed by continuing
17 to litigate such disputed allegations. In counsel's judgment, the total value recovered for the class
18 is substantial and within the range of reasonableness.

19
20 **C. Settlement Administration**

21 Subject to the Court's approval, the Parties have agreed on ILYM Group, Inc. ("ILYM")
22 as the Settlement Administrator. ILYM is qualified and has significant experience administering
23 class action settlements, including numerous wage and hour matters. ILYM's fees and costs will
24 not exceed \$7,350.00. If the Court approves less than the above amount, the difference will
25 remain in the Net Settlement Amount for distribution to the Participating Class Members.
26 [Crosner Decl., ¶ 14; Exh. 3.]

27 **D. The Class Notice**

28 The proposed Notice of Class Action Settlement (Exhibit A to the Stipulation of

1 Settlement) sets out information about this case and explains the basic settlement terms in plain
2 language. The Notice also sets forth the individualized information used to calculate Class
3 Members' Individual Settlement Payments and each Class Member's estimated settlement award.
4 The Notice likewise details the procedures for Class Members to dispute their individual
5 information, the procedure for submitting an objection to the Settlement, the procedure to request
6 exclusion, and the fact that any final judgment will bind all class members who do not opt out.
7 Cal. Rules of Court 3.769(f) and 3.766(d). In sum, the Notice provides the Class Members with
8 the information necessary to evaluate the Settlement and decide to participate in, opt out of, or
9 object to the proposed Settlement, and meets all requirements imposed by the California Rules of
10 Court. Coupled with the notice procedure, the Notice provides the best notice practicable.
11 [Crosner Decl., ¶ 15.]

12
13 **E. Right to Correct Information, Opt Out, or Object**

14 Class Members will have forty-five (45) days to dispute the information in their Notice
15 used to calculate their settlement award, and also have 45 days to submit any objections to the
16 settlement or to request exclusion. If a Class Member disputes their individual information, the
17 Settlement Administrator will review the Class Member's records and any other information
18 submitted, and make a final determination. [Crosner Decl., ¶ 16.]

19 **F. Release of Claims**

20 All Participating Class Members will release Loan Factory from all claims alleged in the
21 operative complaint, or that could have been brought based on the factual allegations in the
22 operative complaint, including PAGA claims, during the Class Period. The release is limited to
23 the claims that were actually pleaded or could have been pleaded based on the alleged facts in the
24 complaint. [Crosner Decl., ¶ 17.]

25
26 **G. PAGA Claims and Notice to the LWDA**

27 The Parties allocated \$10,000 of the MSA to payment of civil penalties under PAGA, as
28 addressed in more detail below. As required by Labor Code section 2699(l)(2), Plaintiffs gave

1 notice of the settlement to the LWDA via its online portal. [Crosner Decl., ¶ 18; Exh. 5.]

2 **IV. ARGUMENT**

3 **A. Standard of Review for a Class Action Settlement**

4 The law favors settlement, particularly in class actions where substantial resources can be
5 conserved by avoiding the time, costs and rigors of formal litigation. H. Newberg & A. Conte, 4
6 Newberg on Class Actions (4th ed. 2002) § 11.41; Class Plaintiffs v. City of Seattle (9th Cir.
7 1992) 955 F.2d 1268, 1276, cert. denied, 506 U.S. 953; Potter v. Pacific Coast Lumber Co.
8 (1951) 37 Cal.2d 592, 602. Nevertheless, to ensure the rights of absent class members are not
9 unjustly compromised, settlement of a class action requires court approval. Cal. Rule of Court.
10 3.769; Wershba v. Apple Computer (2001) 91 Cal.App.4th 224, 245; Dunk v. Ford Motor Co.
11 (1996) 48 Cal.App.4th 1794, 1801. This judicial review protects against fraud or collusion, and
12 ensures fairness to the absent class members. Dunk, 48 Cal.App.4th at 1800-01. Judicial review
13 occurs via a two-step process to determine, under all the circumstances, if the proposed settlement
14 is fair, reasonable and adequate. Id. at 1801; Wershba, 91 Cal.App.4th at 245.

15 The first step is a motion for preliminary approval, through which the parties present the
16 court with the proposed settlement and seek a determination that it is sufficiently fair and
17 reasonable to warrant notice to the class and further proceedings as to its fairness and adequacy.
18 Cal. Rule of Court 3.769(c). This preliminary evaluation determines if the proposed settlement is
19 within the “range of reasonableness” and if notice should be provided to the class regarding the
20 settlement’s proposed terms and conditions, and whether a final fairness hearing should be
21 scheduled. Wershba, 91 Cal.App.4th at 234-35; North County Contractors Ass’n, Inc. v.
22 Touchstone Ins. Servs. (1994) 27 Cal.App.4th 1085, 1089-90. Considering the strong judicial
23 policy favoring settlement of class actions, courts generally apply a presumption of fairness to
24 class action settlements when (1) the settlement results from arms-length bargaining, (2)
25 investigation and discovery are sufficient to allow counsel and the court to act intelligently, (3)
26 counsel is experienced in similar litigation, and (4) the percentage of objectors is small. Dunk, 48
27 Cal.App.4th at 1802; Wershba, 91 Cal.App.4th at 245.

28 If the court grants preliminary approval, it then orders the class be given notice in an

1 appropriate manner, establishes a schedule and procedures for class members to request exclusion
2 or object, and sets the matter for a final fairness hearing. Typically, any motion for attorney's
3 fees and costs is filed subsequent to preliminary approval and heard with the motion for final
4 approval, as part of the second step of the two-step approval process. Dunk, 48 Cal.App.4th at
5 1800; Wershba, 91 Cal.App.4th at 232. The proposed settlement in this matter warrants
6 preliminary approval under the liberal standard discussed above, as it is fair, reasonable and
7 adequate under all the circumstances, and represents a favorable result for the class.

8 **B. The Proposed Settlement Class Should Be Conditionally Certified**

9 The purpose of conditional class certification for purposes of settlement is to facilitate
10 provision of notice of the proposed settlement's terms, and the date and time of the final fairness
11 hearing. In this context, courts apply lesser scrutiny than they would otherwise in the context of
12 certifying a class. Dunk, 48 Cal.App.4th at 1807, n.19; Global Minerals & Metals Corp. v.
13 Superior Court (2003) 113 Cal.App.4th 836, 839 ("[I]t is well established that trial courts should
14 use different standards to determine the propriety of a settlement class.")

15 In the present matter, conditional certification is proper since this matter satisfies all
16 requirements for class certification under Code of Civil Procedure section 382. First, the class is
17 both sufficiently numerous, consisting of approximately 136 individuals, and ascertainable by
18 reference to Defendant's personnel and payroll records. [Crosner Decl., ¶ 19.] Next, Plaintiffs
19 both are adequate class representatives, as their claims do not conflict with and are not
20 antagonistic to the claims of other class members. [Crosner Decl., ¶ 20.] Further, their claims are
21 typical given both are members of the class and their claims arise from the same employment
22 practices and course of conduct giving rise to the claims of the other class members. [Id.]
23 Lastly, their counsel is experienced and adequate class counsel. [Crosner Decl., ¶¶ 35-41.]

24 Next, common questions of law and fact predominate – particularly for purposes of a
25 settlement class – as the Class Members all were paid via substantially similar compensation
26 plans that resulted in their being misclassified as exempt employees. As a result of the
27 misclassification decision, Plaintiffs and the Class Members were denied overtime pay and
28

1 appropriate breaks. Since the focus of the claims against Loan Factory concerns the legality of
2 common policies applied uniformly to the entire class, common issues predominate over
3 individualized inquiries concerning liability. For instance, Loan Factory’s compensation plans
4 either meet the salary basis test or they don’t. Similarly, the same policies either meet the
5 commissioned sales exemption or they don’t. Regardless of these determinations, it will decide
6 liability for all Class Members one way or another. [Crosner Decl., ¶ 21.]

7 By now it is well-settled a theory of recovery asserting the existence of a uniform policy
8 violating California law is sufficient to satisfy the requirements for class certification. Jones v.
9 Farmers Ins. Exch. (2013) 221 Cal.App.4th 986, 996 (“Claims alleging that a uniform policy
10 consistently applied to a group of employees is in violation of the wage and hour laws are of the
11 sort routinely, and properly, found suitable for class treatment”); Williams v. Superior Court
12 (2013) 221 Cal.App.4th 1353 (“A company-wide practice can sustain a common question of fact
13 or law that supports commonality for class certification”). Lastly, a class action is superior to
14 other means for the fair and efficient adjudication of this controversy. [Crosner Decl., ¶ 22.]

15 **C. The Proposed Settlement Meets the Kullar Factors and is within the Range of**
16 **Reasonableness**

17 The proposed settlement resulted from serious, arms-length negotiations facilitated by
18 respected mediator, Steve Cerveris, Esq., who has considerable experience mediating wage and
19 hour class action cases. [Crosner Decl., ¶ 9.] Plaintiffs’ counsel Michael R. Crosner, Zachary M.
20 Crosner, Blake R. Jones, and Kim Anglin of Crosner Legal, P.C. have years of experience
21 litigating wage and hour class actions. Plaintiffs’ counsel is well-qualified to evaluate the risks
22 and benefits of pursuing further litigation or settling the matter. [Crosner Decl., ¶¶ 35-41.]

23 Next, California law recognizes several factors bearing on the fairness, adequacy, and
24 reasonableness of a proposed class settlement. Kullar v. Foot Locker Retail, Inc. (2008) 168
25 Cal.App.4th 116, 128. These factors include: 1) the amount offered in settlement 2) the strength
26 of plaintiff’s case; 3) the risk, expense, complexity, and likely duration of further litigation; 4) the
27 risk of maintaining class action status throughout trial; and 5) the experience and views of
28

1 counsel. Id. As demonstrated below, the proposed settlement satisfies these requirements.

2 Prior to mediation, the parties engaged in significant informal discovery to facilitate
3 settlement discussions. Thus, Plaintiffs reviewed documents and information regarding Loan
4 Factory's payroll practices, a random sampling of pay stubs and time records from class
5 members, applicable compensation plans, meal and rest break policies, etc., and information from
6 Defendant regarding class size and breakdown, work weeks/pay periods, rates of pay, and other
7 information used to formulate a damages model. Plaintiffs then had that information analyzed by
8 a consulting expert to assist in determining potential violation rates and other data used to
9 formulate a damages model. Plaintiffs' counsel are confident they obtained sufficient information
10 to understand the law and facts of this case and make an informed decision regarding the
11 proposed settlement and whether it is fair and reasonable. [Crosner Decl., ¶¶ 8, 23.]

12 Next, the proposed settlement falls within the range of reasonableness warranting
13 preliminary approval. The proposed settlement involves a significant sum that, when distributed,
14 will confer direct monetary benefits on the class members. Each class member will be entitled to
15 a monetary payment without having to file a claim and each payment will be relative to the value
16 of his or her potential claims. Through the information exchanged and analysis undertaken,
17 Plaintiffs weighed the risks of continued litigation against the benefits of the proposed settlement
18 and determined settlement to be the most reasonable option.

19 That analysis was supported by the pre-mediation production of payroll and other data
20 permitting counsel to estimate potential damages on various theories of liability. Using that data,
21 Plaintiffs ran various calculations and estimated Loan Factory's likely maximum exposure on the
22 class claims at approximately \$2,274,000, including approximately \$281,000 on the unpaid
23 minimum wage claims; approximately \$1,112,000 on the unpaid overtime claims; about
24 \$592,000 on the meal and rest break claims, approximately \$117,000 on the wage statement
25 claims, and approximately \$372,000 on the waiting time penalty claims.. [Crosner Decl., ¶¶ 24-
26 25.] Plaintiffs' counsel substantially discounted the value of these claims, however, in light of
27 the risks posed by proceeding with the litigation, as well the delay and increase in costs that
28 would result from what would likely be protracted class action litigation.

1 As noted, the crux of Plaintiffs' claims turns on applicability of two overtime exemptions,
2 neither of which Defendant can meet. An employee is exempt under California law under if the
3 employee (1) earns "a monthly salary equivalent to no less than two (2) times the state minimum
4 wage for full-time employment" and (2) is primarily engaged in exempt duties. Here, Plaintiffs
5 and the Class Members did not meet the salary test requirements of two times minimum wage.
6 For example, to meet the salary test, Defendant would have needed to compensate Plaintiffs and
7 the Class Members approximately \$4,160/month in 2020 ($\$26.00 * 40 * 4 = \$4,160.00$) and
8 \$4,480/month in 2021 ($\$28.00 * 40 * 4 = \$4,480.00$). Plaintiffs were both compensated \$2,200
9 per month in 2020 and \$2,600 per month in 2021. Since Defendant can only attribute an
10 additional 10% of its non-discretionary bonuses to the required salary amount,¹ there is no way
11 that Defendant can meet the salary requirements even if bonuses are included in the calculation.
12 [Crosner Decl., ¶¶ 24-25.]

13 Further, the Class Members do not meet the commission sales exemption requirements for
14 several reasons. First, the Class Members generally were not compensated 1.5 times the minimum
15 wage for all their hours worked. For example, Plaintiffs typically worked between 45 to 65 hours
16 per week. In order to meet the commission sales salary requirement Plaintiffs would have to be
17 compensated more than \$2,145 per pay period in 2020 ($\$19.50/\text{hr} * 55 \text{ hours on average} * 2$
18 $\text{workweeks} = \$2,145$), far in excess of their \$1,100 bimonthly salary compensation. Even in pay
19 periods where Plaintiffs (and the Class Members) were paid more than 1.5 minimum wage for
20 hours worked, they were not compensated by commission. Rather, they were paid flat amounts as
21 bonuses that were not tethered to a percentage of any sale or loan amount. [Crosner Decl., ¶¶ 24-
22 25.]

23 As previously described, Plaintiffs allege that the Class Members worked 55 hours per
24 work week on average, or 110 hours per two week pay period. This amounts to approximately
25 \$1,430 per pay period, yet Defendants generally only compensated the Class Members a salary of

26
27 ¹ “. . . the amount of non-discretionary bonuses, incentive payments or commissions an employer may
28 credit against the weekly standard salary level is limited to 10 percent of the required salary amount.”
Semprini v. Wedbush Sec., Inc. (2020) 57 Cal.App.5th 246, 252.

1 \$1,100 in pay periods. As a result, Defendants also failed to meet minimum wage obligations in
2 pay periods where they did not compensate the Class Members additional bonuses that exceeded
3 the minimum wages for all hours worked in the pay period. [Crosner Decl., ¶¶ 24-25.]

4 For the meal and rest break claims, Plaintiffs argued because of the misclassification,
5 Defendant failed provide all meal and rest breaks required under California law, and really didn't
6 even have a written policy applicable to the Class Members. Defendant argued the Class
7 Members received lunches and breaks and at a minimum this fact would raise individualized
8 inquiries regarding the extent to which breaks were or were not taken. Defendant further noted
9 this would potentially impact damages as well by substantially reducing the number of potential
10 violations. [Crosner Decl., ¶¶ 24-25.]

11 Plaintiffs also alleged derivative claims under Labor Code § 226 (alleged inaccurate
12 wage statement violations) and §§ 201-203 (waiting time penalties). These claims were based on
13 the unpaid minimum and overtime wage claims and will rise or fall along with those primary
14 claims, in addition to being subject to "good faith" and other defenses available to Defendant.²
15 E.g., Amaral v. Cintas Corp. No. 2 (2008) 163 Cal.App.4th 1157, 1203-04 (holding employer did
16 not willfully fail to pay wages under Labor Code § 203 even though the class prevailed on the
17 merits on the underlying claim for failing to pay living wages). Accordingly, Plaintiffs
18 discounted the derivative claims significantly in light of these multiple potential defenses.
19 [Crosner Decl., ¶ 30.]

20 As far as potential PAGA liability, the theoretical penalties theoretically totaled around
21 \$625,000 should Plaintiffs prevail on all claims and establish violations of the multiple Labor
22 Code sections at issue for every single eligible pay period. [Crosner Decl., ¶ 31.] As with the
23 class claims, Plaintiffs discounted the potential PAGA penalties for defenses proffered by
24 Defendants, and further discounted these claims since the Court possesses wide discretion to
25 reduce such penalties even if Plaintiffs ultimately prevailed. Fleming v. Covidien (C.D. Cal.
26 2011) 2011 U.S. Dist. LEXIS 154590, *8-9 (court reduced the potential penalties by over 82%

27
28 ² Defendant almost certainly will argue the alleged meal and rest break violations cannot support these
claims based on Maldonado v. Epsilon Plastics, Inc. (2018) 22 Cal.App.5th 1308.

1 after a bench trial); Carrington v. Starbucks Corp. (2018) 30 Cal.App.5th 504 (after a bench trial,
2 the trial court awarded penalties of just \$5 per pay period, a 90% reduction, which decision was
3 upheld on appeal); In re Taco Bell Wage and Hour Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S.
4 Dist. Lexis 48557 (PAGA penalties denied after trial). Accordingly, the Parties allocated \$10,000
5 to PAGA penalties, after taking into account Defendant's efforts to cure the alleged violations
6 under Labor Code section 2699.3 and the substantial amounts already paid. Plaintiffs further
7 contend the amount is reasonable and in line with comparable settlements in other class actions in
8 California. Van Kempen v. Matheson Tri-Gas, Inc. (N.D. Cal. Aug. 25, 2017) 2017 U.S. Dist.
9 LEXIS 137182 (granting final approval of \$5,000 PAGA penalty from \$370,000 settlement, or
10 1.4 percent of total settlement). Additionally, the LWDA has been informed of the terms of the
11 PAGA portion of the settlement, and will be able to weigh in as necessary. Jennings v. Open
12 Door Mktg. Inc. (N.D. Cal. Oct. 3, 2018) 2018 U.S. Dist. LEXIS 171356, at *27 (approving
13 settlement with PAGA penalties of 0.6% where "[p]laintiffs [have] submitted the settlement
14 agreement to the LWDA, and the LWDA has not objected to the settlement").

15 Thus, Defendant raised various defenses to Plaintiffs' claims that, if successful, could
16 have negatively impacted Plaintiffs' claims or potentially reduced potential damages.
17 Accordingly, Plaintiffs faced some risk going forward with this litigation, and given the need to
18 secure class certification, try the case, and deal with post-trial appeals, it would have taken years
19 to realize any recovery in this action. Plaintiffs' counsel discounted the value of the class claims
20 consistent with the risks discussed above, and carefully weighed the likelihood of the class
21 receiving substantially greater benefit if the litigation continued. Plaintiffs' counsel concluded –
22 in light of these very real and substantial risks – settlement on the proposed terms and without
23 prolonged and costly litigation was in the best interests of the class. The overall \$1,000,000
24 recovery represents a significant percentage of Defendant's potential exposure, and is roughly
25 50% of the maximum value of the class claims. Given these risks, a total recovery for the class of
26 \$1,000,000, with an average award of over \$4,600 per class member (plus the amounts previously
27 paid), is a fair result within the range of reasonableness considering all potential outcomes.

28 [Crosner Decl., ¶¶ 32-34.]

1 Importantly, the mere fact that a settlement does not provide the same recovery as might
2 be achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and
3 adequate. Wershba, 91 Cal.App.4th at 246, 250 (“even if the relief afforded by the proposed
4 settlement is substantially narrower than it would be if the suits were to be successfully litigated,
5 this is no bar to a class settlement because the public interest may indeed be served by a voluntary
6 settlement in which each side gives ground in the interest of avoiding litigation”); 7-Eleven
7 Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135, 1150 (“The fact that
8 a proposed settlement may amount to only a fraction of the potential recovery does not, in and of
9 itself, mean that the proposed settlement is grossly inadequate and should be disapproved”); Lane
10 v. Facebook, Inc. (9th Cir. 2012) 696 F.3d 811, 819 (“[T]he question whether a settlement is
11 fundamentally fair . . . is different from the question whether the settlement is perfect in the
12 estimation of the reviewing court”). Importantly as well, the proposed settlement is non-
13 reversionary and will provide benefits to the Class Members without a claims process. White,
14 803 F.Supp.2d at 1098; c.f., Federal Judicial Center, Managing Class Action Litigation: A Pocket
15 Guide for Judges (3d ed. 2010) at 20, available at [www.fjc.gov/sites/](http://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf)
16 [default/files/2012/ClassGd3.pdf](http://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf) (reversionary provisions and/or cumbersome claims process may
17 indicate lack of fairness). Plaintiffs and their counsel submit the settlement is within the “range of
18 reasonableness,” and is fair and adequate for the Class.

19 **E. Attorney’s Fees and Costs**

20 The terms of the Parties’ settlement also allow Plaintiffs’ counsel to apply for an award of
21 attorney’s fees of up to one-third of the MSA, or \$333,333.33 and reimbursement of actual costs
22 and expenses of up to \$15,000.00. In advance of the Final Approval Hearing, Plaintiffs’ counsel
23 will submit a separate motion for attorney’s fees and actual litigation costs per the terms of the
24 Stipulation of Settlement and applicable law, and will provide the Court with appropriate
25 information and evidence regarding hourly rates, tasks performed, and time expended on the case.
26 [Crosner Decl., ¶ 43.]
27
28

1 **F. Plaintiffs' Enhancement Awards**

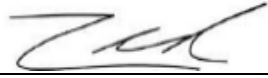
2 A modest incentive award for Plaintiffs is appropriate under applicable law. See Staton v.
3 Boeing (9th Cir. 2003) 327 F.3d 938, 977 (collecting cases awarding class representatives service
4 and incentive payments ranging from \$2,000 to \$25,000). Both devoted time and resources to the
5 litigation, provided documents, assisted Class Counsel with investigating the claims asserted and
6 in preparing for mediation. [Crosner Decl., ¶ 47.] The service payment provided to Plaintiffs as
7 the class representatives is typical in class action cases and reasonable. Rodriguez v. W Publ'g
8 Corp. (9th Cir. 2009) 563 F.3d 948, 958-59 (incentive awards are “intended to compensate class
9 representatives for work done on behalf of the class, to make up for financial or reputational risk
10 undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a
11 private attorney general.”). Plaintiffs declarations detailing their their efforts in assisting counsel
12 and the time devoted to the case are submitted herewith.

13 **V. CONCLUSION**

14 For all the foregoing reasons, Plaintiffs respectfully request that the Court grant this
15 motion, conditionally certify the settlement class, grant preliminary approval to the proposed
16 class action settlement, and enter the [Proposed] Order filed herewith.

17
18
19 Dated: November 15, 2021

CROSNER LEGAL, PC

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