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11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

12 **COUNTY OF HUMBOLDT**

13 **JESSICA COLLARD,**

14 **Plaintiff,**

15 **v.**

16 **MURPHY'S MARKETS, INC., a**
17 **corporation; and DOES 1-100, inclusive,**

18 **Defendants.**

19 **Case No.: CV2101368**

20 **MEMORANDUM OF POINTS AND**
21 **AUTHORITIES IN SUPPORT OF**
22 **PLAINTIFF'S MOTION FOR PRELIMINARY**
23 **APPROVAL OF CLASS AND**
24 **REPRESENTATIVE ACTION SETTLEMENT**

25 **Date: July 24, 2023**

26 **Time: 10:30 a.m.**

27 **Dept.: 4**

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1 Plaintiff Jessica Collard (“Plaintiff” or “Collard”) hereby submits the following memorandum
2 of points and authorities in support of her Motion for Preliminary Approval of Class Action Settlement
3 (“Motion”). The Motion is not opposed by Defendant Murphy’s Markets, Inc. (“Defendant”).

4 **I. INTRODUCTION**

5 This is a wage-and-hour class action brought under the California Labor Code. The nucleus of
6 the case is nondiscretionary bonuses (related to working during the Covid-19 pandemic) that were paid
7 to Defendant’s California employees; Collard alleges that the value of these service charges were, in
8 violation of the Labor Code, not incorporated into employee’s “regular rate of pay” for purposes of
9 overtime and paid sick leave, and into the (synonymous) “regular rate of compensation” for purposes of
10 rest/meal period premiums. Collard also alleges that employees did not receive all rest and meal periods
11 to which they were entitled, did not receive accurate wage statements, and were not paid all wages due
12 upon cessation of employment. Based on these claims, Plaintiff asserts violations of Labor Code
13 sections 203, 226, 226.7, 233, 246, 510, and 512, seeking to recover unpaid wages as well as statutory
14 penalties. The Class Period, as stipulated, is September 23, 2018 through January 31, 2023.¹

15 This case was aggressively litigated from its inception. Prior to the settlement of this action,
16 Class Counsel thoroughly investigated the facts relating to the claims alleged in the complaint,
17 including reviewing and analyzing extensive wage-and-hour data and documents produced by
18 Defendant (and retaining an economics expert to assist in that regard). Plaintiff also engaged in a
19 thorough study of the legal principles applicable to the claims asserted against Defendant. Defendant
20 presented a vigorous defense, contesting a number of Plaintiff’s central claims, and creating distinct
21 risks with respect to the ultimate outcome, and certainly, the risk of protracted litigation. In the interest
22 of avoiding unnecessary litigation costs, the Parties engaged in settlement discussions and, with the
23 assistance of an experienced and highly effective mediator, as well as the detailed analysis of an
24 economics expert specializing in class and representative employment class actions, were ultimately

25
26
27 ¹ Capitalized terms herein shall have the same meaning as in the Class and Representative Action Settlement and Release
28 of Claims (“Settlement Agreement”, “Settlement”, or “SA”), a copy of which is attached as **Exhibit 1** to the Declaration
of John P. Briscoe (“Briscoe Decl.”) filed concurrently herewith.

1 able to reach a settlement in the gross amount of **\$400,000**.

2 While Plaintiff and Class Counsel are confident that they could prevail on class certification, as
3 well as on the merits, they recognize the inherent risks in drawn-out litigation and the specific risks that
4 a class might not be certified and/or that Plaintiff could fail to establish liability. Based on their own
5 independent investigation and evaluation, Class Counsel is of the opinion that the Settlement is fair,
6 reasonable, and adequate and is in the best interests of the Class.

7 Accordingly, Plaintiff and Class Counsel respectfully request that the Court grant this Motion.

8 **II. SUMMARY OF THE CASE**

9 **A. Factual and Procedural History.**

10 On August 31, 2021, Class Counsel sent written notice to Defendant and the California Labor
11 and Workforce Development Agency (“LWDA”), alleging that, during Plaintiff’s prior employment
12 with Defendant, she was not paid overtime at the correct rate of pay, was not paid sick leave at the
13 correct rate, was not timely paid all wages, was not paid all wages due upon termination, and was not
14 furnished with accurate wage statements. (Briscoe Decl., ¶ 5, Exhibit 3.) The LWDA did not provide
15 written notice that it intended to investigate the alleged violations. (*Id.*, ¶ 5.)

16 On September 23, 2021, Class Counsel filed this action in Humboldt County Superior Court as
17 against Defendant, on behalf of herself and all other California employees similarly situated. Plaintiff
18 also brought individual discrimination claims (which have already been resolved by way of a separate,
19 confidential settlement agreement). On November 8, 2021, Collard filed a First Amended Complaint to
20 add a cause of action under the Private Attorneys General Act (“PAGA”, Lab. Code, § 2698 et seq.)

21 On or around January 18, 2022, Defendant filed an Answer to the First Amended Complaint, in
22 which it denied the claims, causes of action and substantive allegations of the First Amended
23 Complaint, and asserted various affirmative defenses.

24 **B. Investigation, Discovery, and Negotiations.**

25 Prior to filing this action, counsel for Collard conducted an extensive and exhaustive analysis of
26 the claims to be asserted in this action, including closely scrutinizing Collard’s wage-and-hour records.
27 Plaintiff served an initial round of written discovery, but the Parties soon agreed to attend private
28

1 mediation. Defendant produced voluminous and critical wage-and-hour data and also documents so that
2 Plaintiff and Class Counsel could conduct a thorough analysis of the size and composition of the Class,
3 as well as the maximum potential liability exposure in this case. Due to the size and complexity of the
4 data and documents provided, Class Counsel retained an economic expert—Melissa Daniels of
5 EconOne—to analyze the data and documents and, extrapolating therefrom, prepare a report as to the
6 potential, classwide exposure for penalties and unpaid wages. Based on this analysis, and chiefly due to
7 anticipated exposure for rest and meal period violations, it was estimated that Defendant faced exposure
8 for unpaid wages and statutory penalties in excess of \$1.3 million. On September 15, 2022, the Parties
9 attended mediation before Daniel Ben-Zvi, Esq., an experienced and renowned mediator of
10 employment class actions. (Briscoe Decl., ¶ 12.) Pursuant to said mediation, it was agreed that the
11 Parties would resolve all claims alleged in the First Amended Complaint, *in addition to claims for*
12 *failure to provide rest/meal periods or pay premiums*, for the Maximum Settlement Amount of
13 \$400,000. Following intensive meeting and conferring over the particular terms of the Settlement, the
14 Settlement was executed by all parties on May 5, 2023.

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

16 **A. The Terms of the Settlement Agreement.**

17 The Settlement resolves any and all claims based upon Plaintiff’s allegations supporting the first
18 through eighth causes of action of the Second Amended Complaint and all derivative claims related
19 thereto arising from the facts alleged in the Second Amended Complaint including but not limited to,
20 all claims for alleged (a) failure to properly calculate and pay overtime, (b) failure to properly calculate
21 and pay sick leave, (c) failure to provide rest and meal periods and failure to pay premiums for non-
22 compliant rest or meal periods at the correct rate, (d) failure to furnish accurate itemized wage
23 statements, (e) unfair business practices, and (f) all waiting time penalties arising from the claims
24 asserted in the Second Amended Complaint, whether known or unknown, suspected or unsuspected,
25 that existed or came into existence between September 23, 2017 through January 31, 2023. These
26 claims are referred to as the “Released Claims.”

27 A summary of the terms of the Settlement is as follows:

1 **1. Settlement Payments.**

2 Defendant shall pay a maximum of \$400,000, the Maximum Settlement Amount (“MSA”), to
3 settle the Released Claims. The MSA and other actions and forbearances taken by Defendant are paid
4 in full and final settlement of (a) the Released Claims, (b) the fees and costs of the Settlement
5 Administrator, (c) the Incentive Payment to Plaintiff, (d) the payment to the LWDA; and (e) Class
6 Counsel’s Fees and Costs. The Settlement is being made on an opt-out basis with no reversion to
7 Defendant. (Briscoe Decl., Exhibit 1, §§ 58, 66.)

8 **2. Proposed Class.**

9 The proposed Class consists of the following: All current and former non-exempt employees
10 who worked directly for Defendant in California at any time from September 23, 2017 through January
11 31, 2023. (Briscoe Decl., Exhibit 1, § 10.) For distribution purposes, the Parties have also agreed to the
12 Former Employee Subclass, defined as: All former nonexempt employees who worked directly for
13 Defendant in California at any time from September 23, 2018 through January 31, 2023.

14 **3. Scope of Release and Final Judgment.**

15 The Settlement provides that each Participating Class Member will release Defendant and the
16 other Releasees from any and all claims based upon the wage-and-hour violations alleged in the Second
17 Amended Complaint. (Briscoe Decl., Exhibit 1, § 69.) Unlike Plaintiff (who herein requests a service
18 enhancement award), Participating Class Members will *not* be asked to agree to a Civil Code section
19 1542 waiver or to waive any claims not advanced in this case.

20 **4. Claims Procedure and Participating Member Shares.**

21 Each Participating Class Member shall be entitled to a share of the Net Settlement Amount.
22 Participating Class Members will *not* be required to complete a claim form. As set forth below, Class
23 Members shall receive a Notice of Class Action Settlement informing them of the terms of the
24 Settlement, their right to opt out and/or object, and providing them with an estimate of their share of
25 the Net Settlement Amount (and an opportunity to contest the calculation of that share). (Briscoe
26 Decl., Exhibit 1, § 63; Exhibit 2.). Unless a Class Member elects to opt-out, a check representing his
27 or her share will be mailed to them pursuant to the terms of this Settlement. (*Id.*, Exhibit 1, § 64.)

1 The individual settlement payments of Participating Class Members will be calculated as
2 follows:

3 Step 1: The Maximum Settlement Amount shall be deposited into the QSF.

4 Step 2: From the Maximum Settlement Amount, the following shall be deducted:

- 5 i. \$9,000 for the fees and costs of the Settlement Administrator;
- 6 ii. \$30,000 for the payment to the LWDA (representing its statutory, 75 percent share
of assessed civil penalties under the PAGA);
- 7 iii. \$10,000 for payment to the PAGA Group Members
- 8 iv. \$7,500 for the Service Payment to Plaintiff;
- 9 v. \$20,000 for payment of costs of suit; and
- vi. \$133,333 for payment of attorney's fees to Class Counsel.

10 The remaining amount after all such deductions, or \$190,167, shall be referred to as the Net
11 Settlement Amount ("NSA"). (Briscoe Decl., Exhibit 1, ¶¶ 29, 49.) The NSA is inclusive of a set-
12 aside of \$37,539 which is to be distributed only to Participating Former Employee Subclass Members
13 (i.e., those persons who are waiving claims for waiting time penalties under Labor Code section 203).
14 (*Id.*, ¶ 64.)

15 Step 3: Each Class Member's Settlement Share is determined as follows: The workweeks
16 worked during the Class Period by each Participating Class Member will be divided by the
17 total workweeks worked by all Participating Class Members during the Class Period,
18 resulting in a payment ratio for each Participating Class Member. Each Participating Class
Member's payment ratio is then multiplied by the portion of the Net settlement Amount
allocated to the Class to determine his or her individual share.. (*Id.*, ¶ § 64.(i).)

19 Step 4: Participating Former Employee Subclass Members shall each receive an equal
20 share of the portion of the \$37,539 set aside for them, *in addition* to their payment under
21 paragraph 64(i) of the Settlement Agreement. (*Id.*, ¶ 64(ii).)

22 It is presently estimated that the average payment to each Participating Class Member will be
23 approximately \$314. (Briscoe Decl., ¶ 9.) This is an estimate only and could go up or down depending
24 on what the Court decides at the final approval hearing, the costs of counsel that are actually
25 incurred/approved, the number of valid requests for exclusion that are received by the Settlement
26 Administrator, etc. (*Id.*)

27 Payments to Participating Former Employee Subclass members shall be considered 100

1 percent penalties. Payments to Participating Class Members shall be treated as 25 percent wages and
2 75 percent interest and penalties. (Briscoe Decl., Exhibit 1, ¶ 56.)

3 **5. Claims Administration.**

4 The Parties have selected Phoenix Settlement Administrators to serve as Settlement
5 Administrator. The Settlement Administrator's declared fees and costs (not to exceed \$9,000) will be
6 paid out of the Maximum Settlement Amount. (Briscoe Decl., Exhibit 1, ¶ 49.) Class Counsel has
7 extensive experience using Phoenix Settlement Administrators and has found their services excellent
8 and rates competitive. (*Id.*, ¶ 20.)

9 **6. Notice to Class Members.**

10 Within ten business days following preliminary approval, Defendant shall provide the PAGA
11 Group's and Class Members' data (i.e., "Class List") to the Settlement Administrator. (Briscoe Decl.,
12 Exhibit 1, ¶ 62.) The Class Notice will be mailed to each Class Member within 10 calendar days after
13 receiving the Class List from Defendant. (*Id.*, ¶ 63.)

14 **7. Service Payment to Plaintiff as Class Representative.**

15 Plaintiff will apply for a Service Payment in the amount of \$7,500, or just 1.875 percent of the
16 \$400,000 MSA, in consideration for her service as Class Representative. (Briscoe Decl., Exhibit 1, ¶
17 54.) The sought Service Payment is (a) in line with other enhancements awarded in similar wage and
18 hour class actions, (b) less than two percent of the MSA, and (c) fair, reasonable and appropriate under
19 the unique circumstances of this case (which are detailed below). Class Members will be apprised of
20 Plaintiff's request as well as their ability to review their moving papers through the Court's website,
21 and to object to the request if they so desire. (*Id.*, Exhibit 2.)

22 **8. Class Counsel's Attorneys' Fees and Costs.**

23 Class Counsel will request attorneys' fees in the amount of one-third of the MSA, or \$133,333,
24 as well as declared litigation costs of up to \$20,000 in connection with the prosecution of this Class
25 Action. (Briscoe Decl., Exhibit 1, ¶ 55.) Class Members will be apprised of Class Counsel's request as
26 well as their ability to review their moving papers on the Court's website and to object to the request if
27 they so desire. (Briscoe Decl., Exhibit 2.)

1 **9. Final Approval Hearing.**

2 The Settlement contemplates that the Court will hold a Final Approval Hearing and, if the
3 Settlement is approved, enter an Order of Final Approval approving the Settlement in a manner
4 substantially consistent with the terms and intent of the Settlement and dismissing the Class Action
5 with prejudice. (Briscoe Decl., Exhibit 1, ¶ 73.)

6 **10. The Proposed Implementation Schedule.**

7 Class Data provided to Settlement 8 Administrator.	Within 10 days after the Court issues the Order of Preliminary Approval.
9 Notice of Class Action Settlement mailed to 10 Class Members.	Within 10 days after the Settlement Administrator receives the Class Data.
11 Deadline for Class Members to exclude 12 themselves from and/or object to the terms of 13 the Settlement.	45 calendar days after the mailing of the Notice of Class Action Settlement.
14 Date for filing of Motion for Final Approval.	16 business days before the Final Approval Hearing.
15 Final Approval Hearing Date.	Approximately 130 days after the Order of Preliminary Approval.

16 **IV. PROVISIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE**

17 Class certification is authorized when “the question is one of a common or general interest, of
18 many persons, or when the parties are numerous, and it is impracticable to bring them all before the
19 court.” (Code Civ. Proc., § 382; Fed. R. Civ. P. 23(a).) Certification is appropriate where there is an
20 ascertainable class and a well-defined community of interest among the class members. (*Richmond v.*
21 *Dart Indus.* (1981) 29 Cal. 3d 462, 470.) Courts have broad discretion to certify a class for purposes of
22 a class action settlement. (*Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1807 n.19 (holding
23 that class certification in settlement cases is subject to a “lesser standard of scrutiny”).) Provisional and
24 conditional certification is appropriate where, as here, the proposed settlement class has not previously
25 been certified by the Court and the requirements for certification are met. The practical purpose of
26 provisional and conditional certification is to facilitate distribution to all settlement class members of
27 notice of the terms of the proposed settlement, their rights thereunder, and the date and time of the final
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1 approval hearing. The additional rulings sought on this motion – e.g., approving the form, content and
2 distribution of the Notice of Class Action Settlement, scheduling of deadlines and setting of a formal
3 fairness hearing – facilitate the settlement approval process and are also typically made at the
4 preliminary approval stage. (Cal. Rules of Court, rule 3.769; 4 Herbert B. Newberg, *Newberg on Class*
5 *Actions* § 11.26 (4th ed. 2002 and Supp. 2004) (“Newberg”).)

6 To be certified, a settlement class must meet the following criteria for certification: (1)
7 numerosity, (2) typicality of the class representative’s claims, (3) adequacy of representation, (4)
8 predominance of common issues, and (5) superiority. (Code Civ. Proc., § 382; Fed. Rules Civ. Proc.,
9 rule 23(a); *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326-27; Fed. Rules Civ.
10 Proc., rule 23; *see also Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1019.²) Here, as set
11 forth below, all of these factors are met and provisional certification is appropriate.

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

13 Plaintiff contends, and Defendant does not dispute for settlement purposes, that the proposed
14 Class is ascertainable because all Class Members have worked for Defendant and can be identified
15 through its employee and payroll records. (Briscoe Decl., Exhibit 1, ¶ 8); *see also Rose v. City of*
16 *Hayward* (1981) 126 Cal.App.3d 926, 932.) Plaintiff further contends, and Defendant does not dispute
17 for settlement purposes, that joinder of the 605 Class Members would be impractical. (Briscoe Decl.,
18 Exhibit 1, ¶ 8.)

19 **B. The Commonality Requirement is Met.**

20 The commonality requirement is met if there are questions of law and fact that are common to
21 the class. (*Hanlon, supra*, 150 F.3d at 1019.) Plaintiff contends, and Defendant does not dispute for
22 settlement purposes, that commonality is satisfied. (Briscoe Decl., Exhibit 1, ¶ 8.) The claims of
23 Plaintiff and the Class Members all flow from the same facts and legal claims: i.e., Defendant’s alleged
24 failure to provide rest and meal periods (or pay premiums at the appropriate rate), to pay overtime and
25

26 ² The California Supreme Court has authorized California’s trial courts to use Federal Rule of Civil Procedure 23 and cases
27 applying it for guidance in considering class issues. *See Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821); *Green v.*
28 *Obledo* (1981) 29 Cal.3d 126, 145-146. Where appropriate, Rule 23 and federal case law will be cited in addition to
California law.

1 paid sick days at the appropriate rate, to furnish accurate wage statements, and to pay all wages upon
2 cessation of employment.

3 **C. The Typicality Requirement is Met.**

4 The typicality requirement is met if the named representative's claims are typical of those of the
5 class, though "they need not be substantially identical." (*Hanlon, supra*, 150 F. 3d at 1020; *Classen v.*
6 *Weller* (1983) 145 Cal. App. 3d 27, 46-47.) Plaintiff contends, and Defendant does not dispute for
7 settlement purposes, that her claims are typical of the claims of the Class because they arise from the
8 same factual basis and are based upon the same legal theories as those applicable to the Class Members.
9 (See *Wehner v. Syntex Corp.* (N.D. Cal. 1987) 117 F.R.D. 641, 644.) Plaintiff worked for Defendant as
10 a California employee during the Class Period, was subjected to the same uniform policies and, even if
11 she was not serving as Class Representative, would be a member of the Class. Her claims are typical of
12 the Class and satisfy this requirement.

13 **D. The Adequacy Requirement is Met.**

14 The adequacy requirement is met if the named representative and his or her counsel have no
15 interests adverse to those of the Class Members and are committed to vigorously prosecuting the case
16 on behalf of the class. (*Hanlon, supra*, 150 F. 3d at 1020; *McGhee v. Bank of Am.* (1976) 60
17 Cal.App.3d 442, 450-51.) Plaintiff contends, and Defendant does not dispute for settlement purposes,
18 that those requirements are met. Plaintiff's interests in prosecuting this Class Action and obtaining the
19 most beneficial recovery possible fully comport with the interests of the Class Members. There are no
20 conflicts between Plaintiff as Class Representative and the Class Members and she is a member of the
21 Class. (See *Hanlon* at p. 1021.) Moreover, any Class Member who wishes to opt-out and/or object to
22 the settlement will have the opportunity to do so. In addition, throughout this case, Plaintiff and Class
23 Counsel have demonstrated their commitment to vigorously prosecuting this Class Action on behalf of
24 the Class Members. This is demonstrated not only by Class Counsel's experience in litigating wage and
25 hour class actions and representative actions, but by the substantial monetary benefits they will confer
26 upon the Class Members through their representation.

1 **E. Common Issues Predominate, Rendering Classwide Settlement Superior to Other**
2 **Available Methods of Resolution.**

3 Class certification is authorized where common questions of law and fact predominate over
4 individual questions and where classwide treatment of a dispute is superior to individual litigation.
5 (*Richmond, supra*, 29 Cal.3d at p. 469; Fed. Rules Civ. Proc., rule 23(a), (b)(3).) The reviewing court
6 may consider that the class will be certified for settlement purposes only and that the manageability of
7 trial is therefore irrelevant. (*Amchem Prods., Inc. v. Windsor* (1997) 521 U.S. 591, 620.) Plaintiff
8 contends, and Defendant does not dispute for settlement purposes, that the proposed Class Members
9 share a “common nucleus of facts and potential legal remedies.” (See also *Hanlon, supra*, 150 F. 3d at
10 p. 1022.) Common questions about Defendant’s policies and practices predominate over individual
11 questions, and the Class Members’ potential legal remedies are identical – i.e., 1) all Class Members
12 were subject to Defendant’s policies and procedures, and 2) all Class Members could seek the same
13 remedies which have been secured by this Settlement. Plaintiff further contends, and Defendant does
14 not dispute for settlement purposes, that class resolution, particularly in the settlement context, is
15 superior to other available methods for the fair and efficient adjudication of the controversy. (See
16 *Hanlon* at p. 1023.)

17 **F. Class Counsel Adequately Represents the Interests of Class Members.**

18 From the inception of this case, Class Counsel has zealously represented the interests of the
19 Class. As explained in his declaration, Class Counsel have substantial experience litigating wage and
20 hour class actions and have been approved as class counsel on numerous occasions. (Briscoe Decl., ¶¶
21 21-26.)

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

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

24 A class action may not be dismissed, compromised or settled without approval of the trial court.
25 (Civil Code, § 1781, subd. (f); Cal. Rules of Court, rule 3.769; Fed. Rules Civ. Proc., rule 23(e).)
26 Proper review and approval of a class action settlement requires three steps: (1) preliminary approval
27 of the proposed settlement after submission of a written motion; (2) dissemination of mailed and/or
28

1 published notice of the settlement to all class members; and (3) a formal fairness hearing, or final
2 settlement approval hearing, at which class members may be heard regarding settlement, and at which
3 evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement is
4 presented. (Manual for Complex Litigation (4th Ed. 2004) § 21.61.) This procedure safeguards class
5 members’ procedural due process rights and enables the court to fulfill its role as guardian of class
6 interests. (*See* 4 Newberg §§ 11:22, *et seq.*)

7 The decision to approve or reject a proposed settlement is committed to the sound discretion of
8 the court. (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128; *Wershba v. Apple*
9 *Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-35; *Hanlon, supra*, 150 F.3d at pp. 1026-27.) The
10 purpose of the preliminary evaluation of a proposed class action settlement is to determine whether the
11 settlement is within the range of possible approval, and thus whether notice to the class of the terms and
12 conditions and the scheduling of a formal fairness hearing are warranted. (*Wershba* at pp. 234-35;
13 *Spann v. J.C. Penney Corp.* (C.D. Cal. 2016) 314 F.R.D. 312, 319; 4 Newberg § 11.25.) In passing on
14 class action settlements, this Court has broad powers to determine whether a settlement is fair under the
15 circumstances of the case. (*Spann* at p. 319.) Indeed, a court need only find that the settlement falls
16 within the range of possible final approval, also described as the “reasonable range.” (*N. Cnty.*
17 *Contractors’ Ass’n v. Touchstone Ins. Svcs.* (1994) 27 Cal.App.4th 1085, 1089-90; 4 Newberg *on Class*
18 *Actions* § 11:25.)

19 To make this fairness determination, courts consider several relevant factors, including “the
20 strength of the Plaintiffs’ case; the risk, expense, complexity and likely duration of further litigation;
21 the risk of maintaining class action status throughout the trial; the amount offered in settlement; the
22 extent of discovery completed and the stage of the proceedings; [and] the experience and views of
23 counsel . . .” (*Dunk, supra*, 48 Cal.App.4th at p. 1801.) “[I]f the proposed settlement appears to be the
24 product of serious, informed, noncollusive negotiations, has no obvious deficiencies, does not
25 improperly grant preferential treatment to class representatives or segments of the class, and falls within
26 the range of possible approval, then the court should direct that notice be given to the class members of
27 a formal fairness hearing.” (*Chun-Hoon v. McKee Foods Corp.* (N.D. Cal. 2009) 2009 WL 3349549, at
28

1 *2.) The Ninth Circuit has repeatedly ruled that the courts “put a good deal of stock in [class
2 settlements that are] the product of arms-length, non-collusive, negotiated resolution.” (*Rodriguez v.*
3 *West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 965; *Hanlon, supra*, 150 F.3d at 1027.)
4 Importantly, there is a presumption of fairness “if the settlement is recommended by class counsel after
5 arm’s-length bargaining.” (*Wren v. RGIS Inventory Specialties* (N.D. Cal. 2011) 2011 U.S. Dist. Lexis
6 38667, *19.) Further, the fact that “the settlement could have been better . . . does not mean the
7 settlement presented was not fair, reasonable or adequate.” (*Hanlon* at p. 1027.) The district courts
8 have “wide discretion in assessing the weight and applicability of each factor.” (*Nat’l Rural*
9 *Telecomms. Coop. v. DIRECTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 526.) The factors are non-
10 exclusive, not all need be shown, and the court is free to engage in a balancing and weighing of factors
11 depending on the circumstances of each case. (*Churchill Village, LLC v. General Electric Co.* (9th Cir.
12 2004) 361 F.3d 566, 576 n.7; *Wershba, supra*, 91 Cal. App. 4th at p. 245.) Indeed, “one factor alone
13 may prove determinative in finding sufficient grounds for court approval.” (*Nat’l Rural Telecomms.*
14 *Coop., supra*, 221 F.R.D. at p. 525; *Torrisi v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370,
15 1376 (upholding settlement where one factor predominated).) The court’s inquiry “into what is
16 otherwise a private consensual agreement negotiated between parties to a lawsuit must be limited to the
17 extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or
18 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole,
19 is fair, reasonable and adequate to all concerned.” (*Hanlon* at p. 1027.) Ultimately, a court’s
20 “determination is nothing more than an ‘amalgam of delicate balancing, gross approximations, and
21 rough justice.’” (*Nat’l Rural Telecomm. Coop.* at p. 526 (citations omitted).) Accordingly, a court’s
22 decision to approve a class action settlement may be reversed only upon a strong showing of clear
23 abuse of discretion. (*Hanlon* at p. 1027; *Class Plaintiff v. City of Seattle* (9th Cir. 1992) 955 F.2d 1268,
24 1276 (in context of class action settlement, appellate court cannot “substitute [its] notions of fairness
25 for those of the [trial] judge and the parties to the agreement,” and will reverse only upon strong
26 showing of abuse of discretion) (citation omitted).)

1 A settlement is presumed fair where: (1) the settlement is reached through arm's length
2 bargaining; (2) investigation and discovery are sufficient to allow counsel and the Court to act
3 intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is
4 small. (*Dunk, supra*, 48 Cal.App.4th at p. 1802; *Spann, supra*, 314 F.R.D. at p. 323.) The law and
5 public policy strongly favor settlement prior to trial, particularly in class actions and other complex
6 cases where substantial resources can be conserved by avoiding the time, expense and rigors of
7 litigation. (*Neary v. Regents of Univ. of California* (1992) 3 Cal. 4th 273, 277-281; *Lealao v.*
8 *Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 52.) In light of the foregoing, and as set forth
9 below, the proposed Settlement satisfies the standards for preliminary approval.

10 **B. The Settlement Terms are Fair, Reasonable, and Adequate and Well Within the Range of**
11 **Reasonableness.**

12 The proposed Settlement in this class action is well within the range of reasonableness and is
13 fair and adequate. The Settlement will result in substantial benefits to all Participating Class Members.
14 The proposed Settlement would result in a substantial monetary benefit to Participating Class
15 Members—approximately \$190,167, even after deducting the fees and costs of the Settlement
16 Administrator, the fees and costs of Class Counsel, the payment to the LWDA, and the Incentive
17 Payment to the Class Representative. (Briscoe Decl., ¶ 13.)

18 The proposed Settlement is approximately 30.5 percent of the realistic calculated exposure
19 for unpaid wages and statutory penalties under the Labor Code—an eminently reasonable result.
20 (Briscoe Decl., ¶¶ 8-11.) Prior to mediation, Class Counsel, with their retained economic expert,
21 requested and analyzed *thousands* of pages of wage statements and time records, relating not only
22 to Defendant's wage-and-hour practices but also the size and composition of the Class. That data
23 yielded the following information:

- 24 a. Defendant owed only approximately \$126 for underpaid overtime wages
25 (underpaid as a result of a failure to include nondiscretionary bonuses in the
26 regular rate of pay).

b. Defendant potentially owed a maximum of \$998,000 in unpaid rest and meal period premiums.

c. Defendant potentially owed a maximum of \$901,336 in waiting time penalties under Labor Code section 203.

d. Defendant potentially owed a maximum of \$726,736 in statutory penalties for inaccurate wage statements, under Labor Code section 226(e).

(Briscoe Decl., ¶ 8.) As shown above, though there are an estimated total of 605 class members. The Settlement amount allocated to the class claims represents approximately 15 percent of these *maximum* damages. (*Id.*)

Because 100 percent success in litigation (particularly class litigation) is unrealistic and the waiting time and statutory penalties artificially inflated, Class Counsel also determined an aggressive, but much more realistic estimate for the potential recovery of the Class as a barometer from which to evaluate appropriate settlement ranges and develop a mediation strategy. Under this more measured approach, Class Counsel (1) applied a 33 percent discount to the meal period claim to account for the fact that the ostensibly missed meal breaks were evidenced by only timecards, and that many of the missed meal breaks were likely voluntarily foregone by the Class Members; (2) applied a 50 percent discount to the rest period claim to account for the fact that most of the timecards produced by Defendant were initialed by the employee to reflect “all breaks taken” and that, as with meal periods, it was likely that a portion of the missed rest periods were voluntarily foregone by the Class Members; (3) applied a 50 percent discount to the waiting time penalty claim (Lab. Code, § 203) to account for the potential that some of the Class Members who are also Former Employee Subclass Members would be unable to demonstrate any compensable damages that were actually unpaid during employment, as well as Defendant’s anticipated argument that its failure to pay rest and meal period premiums was not willful and that the law was unsettled at the time of the alleged non-payments (see *Naranjo v. Spectrum Security Svcs., Inc.* (2022) 13 Cal.5th 93, 102); and (4) applied a 50 percent discount to the wage statement claim to account for the potential that “injury”, as defined by Labor Code section 226, could not be demonstrated due to the wholly derivative nature of the alleged inaccuracies in the wage

1 statements. Under this more measured approach, Class Counsel determined the Class’ recoverable
2 damages and statutory penalties to be approximately \$1,313,000. (Briscoe Decl., ¶¶ 10-11.)

3 Were settlement not obtained at mediation, Defendant intended to both challenge certification
4 and assert numerous defenses on the merits. Among other things, Defendant contends it maintained a
5 timekeeping system designed to capture all time recorded, required its employees to record all time
6 worked, and paid them for all time they reported and/or Defendant was otherwise aware of being
7 performed. (Briscoe Decl., ¶ 15.) Defendant also intended to argue that its employees were, at all times
8 relevant, authorized and permitted to take rest and meal periods. (*Id.*; see also *Brinker Restaurant*
9 *Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1037.) In connection with the waiting time penalty
10 claims, Defendant maintained and would continue to maintain that it acted in good faith (relying on
11 guidance from the Division of Labor Standards Enforcement) and that its failure to incorporate service
12 charges into overtime and premiums was not willful, and also that the failure to pay premiums for
13 allegedly noncompliant rest and meal periods does not give rise to penalties under Labor Code section
14 203. Defendant also argued Class Members could not establish the “injury” or “knowing and
15 intentional” elements of their Labor Code section 226(a)(1), (2), (5), and (9) claim where (i) the
16 alleged inaccuracies did not themselves cause any distinct injury and are frowned upon by some
17 courts³, (ii) Defendant accurately listed the amounts actually paid to its non-exempt California
18 employees, and (iii) case law suggests such does not create derivative wage statement violations⁴.
19 (Briscoe Decl. ¶ 15.)

20 Furthermore, each Participating Class Member (easily identified from Defendant’s personnel
21 records) will receive their appropriate and proportional share of the NSA based upon the number of
22 wage statements they received during the Class Period.

24 ³ See e.g., *Elliott v. Spherion Pacific Workforce, LLC* (C.D. Cal. 2008) 572 F.Supp.2d 1169, 1179 (shortening the term
25 “Workforce” to “Work” while otherwise stating the full name of the employer); *York v. Starbucks Corp.* (C.D. Cal.
26 2009) 2009 WL 8617536 *7-8 (showing the registered dba “Starbucks Coffee Company” instead of “Starbucks
27 Corporation”); and *Hurst v. Buczek Enters. LLC* (N.D. Cal. 2012) 2012 WL 1564733 *17 (granting summary judgment
28 to defendant on the plaintiff’s Labor Code § 226 claim on the basis of the good faith dispute defense).

⁴ See e.g., *Maldonado v. Epsilon Plastics, Inc.* (2018) 22 Cal.App.5th 1308 and *Naranjo v. Spectrum Sec. Svcs., Inc.*
(2019) 40 Cal.App.5th 444, on review in California Supreme Court Case No. S258966.

1 The benefits of the proposed Settlement are, in Class Counsel’s view, certainly preferred to
2 continued, lengthy, and costly litigation. Although Class Members could *conceivably* receive a larger
3 payment after years of costly litigation and a lengthy trial, recovery is far from guaranteed and could
4 only occur after years of costly litigation that is rife with risk. Lengthy and in-depth discovery
5 (including depositions of percipient witnesses and persons most qualified) would incur costs which
6 would ultimately be deducted from a later settlement or verdict. Defendants would doubtless continue
7 to assert numerous legal defenses and would almost certainly oppose class certification. Absent
8 settlement, Class Counsel anticipates a vigorous and lengthy challenge to both class certification and
9 the merits of the Class Action. While Class Counsel remain confident certification and ultimate victory
10 could potentially be attained on at least some of the Class’ claims, continued litigation is guaranteed to
11 be costly, time consuming and uncertain. Appellate proceedings would only further delay and
12 jeopardize recovery by Class Members. By contrast, the proposed Settlement ensures timely,
13 meaningful and substantial relief to the Class. (Briscoe Decl., ¶¶ 14-16.)

14 The proposed Settlement is the result of protracted arms-length negotiations by experienced
15 counsel, following meticulous analysis of extensive payroll records and a mediation before a most
16 experienced and qualified mediator of employment class actions. Thereafter, the Parties spent
17 considerable time meeting and conferring and finally agreeing to the terms of the long form Settlement,
18 with substantial back and forth on the details of the settlement. “‘Great weight’ is accorded to the
19 recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation.
20 This is because ‘[p]arties represented by competent counsel are better positioned than courts to produce
21 a settlement that fairly reflects each party’s expected outcome in the litigation.’ Thus, ‘the trial judge,
22 absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of
23 counsel.’” (*Nat’l Rural Telecomms. Coop.*, *supra*, 221 F.R.D. at p. 528.) Class Counsel, having
24 demonstrated a high degree of competence in the litigation of this case, and numerous other wage and
25 hour class actions and PAGA representative actions, strongly believe that the proposed Settlement is a
26 fair, adequate, and reasonable resolution of the Class Action and is preferable to continued litigation.
27 (*See In re Wachovia Corp. “Pick-A-Payment” Mortgage Mktg. & Sales Practices Litig.*, No. 5:09-MD-

1 02015-JF, 2011 WL 1877630, at *3 (N.D. Cal. May 17, 2011) (approving settlement based upon,
2 among other factors, the belief of “Plaintiff” counsel, who are experienced attorneys . . . that the
3 settlement is extremely favorable to the class”). Accordingly, Plaintiff and Class Counsel respectfully
4 request that the Settlement be preliminarily approved.

5 **C. The Court Should Order Dissemination of the Proposed Notices.**

6 In order to protect the rights of class members, courts must ensure that settlement class
7 members receive the best notice practicable. (*Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797,
8 811-12; *Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156, 174-75.) Procedural due process requires
9 that affected parties have the right to be heard at a meaningful time and in a meaningful manner. It
10 does not guarantee any particular procedure but rather only requires notice reasonably calculated “to
11 apprise interested parties of the pendency of the action and afford them an opportunity to present their
12 objections.” (*Ryan v. Cal. Interscholastic Fed’n – San Diego Section* (2001) 94 Cal.App.4th 1048,
13 1072; *see also Silber v. Mabon* (9th Cir. 1994) 18 F.3d 1449, 1454.) The law requires that notice of a
14 proposed settlement inform class members of the following: (1) the nature of the pending litigation; (2)
15 the general terms of the proposed settlement; (3) that complete information is available from the court
16 files; and (4) that any class member may appear and be heard at the fairness hearing. (See Cal. Rules of
17 Court, rules 3.766(d)-(f) and 3.769(f); 3 *Newberg on Class Actions* (4th ed.) § 8:32.)

18 **1. The Notice of Class Action Settlement is Accurate and Informative.**

19 The Notice of Class Action Settlement will be sent to all Class Members, will inform them of
20 the terms of the Settlement and will be neutrally worded so as to avoid prejudice. The Notice of Class
21 Action Settlement meets all of the requirements of procedural due process and California Rules of
22 Court, Rules 3.766 and 3.769 by identifying the Plaintiff and Defendant and describing the claims and
23 the Class Action in a straightforward manner; succinctly describing the essential terms of the proposed
24 Settlement, including identifying the claims that are being released and all parties against whom those
25 claims are being released; describing Plaintiff’s proposed Service Payment as well as the amount of
26 Class Counsel’s attorney’s fees and costs; providing a mechanism for disputing the number of Pay
27 Periods used to calculate their individual payment from the Net Settlement Amount; providing
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1 information on how to participate in, opt out of, or object to the Settlement; clearly providing all
2 applicable deadlines for such action; and informing Class Members that if they do not exclude
3 themselves, and the Settlement is approved, they will be bound by the resulting judgment. In short, the
4 Notice of Class Action Settlement will provide Class Members with all of the necessary information to
5 make an informed decision regarding the proposed Settlement.

6 **2. The Notice of Class Action Settlement Satisfies Due Process.**

7 Courts are vested with broad discretion to fashion an appropriate notice program which
8 provides the best notice practicable under the circumstances. (Civ. Code, § 1781; *Cartt v. Superior*
9 *Court* (1975) 50 Cal.App.3d 960, 973-74; see also Fed. Rules Civ. Proc., rules 23(e)(1), 23(c)(2)(B).)
10 The Settlement provides for direct mail notice of the Settlement to each Class Member based upon
11 Defendant' records, performing additional skip traces as necessary. (Briscoe Decl., Exhibit 1, ¶ 63.)
12 Because all Class Members are current or former employees of Defendant, for whom Defendant have
13 current or last known addresses as well as social security numbers, notice here is simpler and more
14 reliable than in other types of class actions that require published notice to reach unidentifiable class
15 members. Class Members will also be able view the Order of Preliminary Approval, Motion for Final
16 Approval, and Motion for Attorneys' Fees, Costs, and Incentive Payment, as well as any updates
17 regarding the scheduling of the Final Approval Hearing. (Briscoe Decl., Exhibit 2.) The Notice of
18 Class Action Settlement and notice plan is consistent with similar notices approved by state and federal
19 courts, and under the circumstances here, is the best notice practicable. (*Cartt, supra*, 50 Cal.App.3d at
20 pp. 973-974.)

21 **VI. A FINAL APPROVAL HEARING AND DEADLINES SHOULD BE SET**

22 Plaintiff requests that the Court set a date for the Final Approval Hearing, deadlines for any
23 motions to be submitted to the Court, including a Motion for Final Approval of the Settlement and a
24 Motion for Attorneys' Fees and Costs and Incentive Payment, as well as deadlines for Class Members
25 to opt out and/or object to the terms of the settlement. In order to enable sufficient time for the Parties
26 and the Settlement Administrator to mail the Notice of Class Action Settlement, for Class Members to
27 submit claims, and for the Parties to respond to any objections, Plaintiff requests that the date for the
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1 Final Approval Hearing be set approximately 130 days from the date of the Court's preliminary
2 approval of the Settlement and preliminary class certification.

3 **VII. CONCLUSION**

4 For all of the reasons stated above, Plaintiff respectfully requests that the Court enter an Order
5 which 1) preliminarily and conditionally certifies the Class, 2) preliminarily approves of Plaintiff as
6 Class Representative, 3) preliminarily approves of Mayall Hurley P.C. as Class Counsel, 4)
7 preliminarily approves the Settlement Agreement as fair, reasonable and adequate, 5) approves the
8 proposed Notice of Class Action Settlement, 6) approves the method of notice, 7) authorizes
9 dissemination of the Notice of Class Action Settlement, 8) appoints and approves Phoenix Settlement
10 Administrators, Inc. as Settlement Administrator, 9) preliminarily approves the requested fees and
11 costs of Class Counsel; 10) sets a schedule for the implementation of the terms of the Settlement
12 Agreement, and 11) sets the date of the Final Approval Hearing.

13 **DATED:** June 23, 2023

MAYALL HURLEY P.C.

14 By 

15 ROBERT J. WASSERMANN

16 JOHN P. BRISCOE

17 Attorneys for Plaintiff and the Putative Class
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PROOF OF SERVICE

I, the undersigned, certify and declare as follows:

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

On June 23, 2023, I served the following document:

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

addressed to:

Laurie E. Yoon
Murchison & Cumming LLP
Mt. Diablo Plaza
2175 N. California Blvd., Ste. 900
Walnut Creek, CA 94596
Lyoon@murchisonlaw.com
Ken H. Moreno
kmoreno@murchisonlaw.com

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

☐ **BY EXPRESS SERVICE CARRIER:** On the date specified below, I directed to be deposited in a box or other facility regularly maintained by Federal Express or delivered to a courier or driver authorized by said express service carrier to receive documents, a copy of the document mentioned above, in an envelope designed by the said express service carrier, with delivery fees paid or provided for, addressed to the individuals and/or entities mentioned above.

☒ **BY EMAIL:** In accordance with Code of Civil Procedure, Section 1010.6, on the date specified below, I caused a copy of the document described above to be sent to the person(s) at the e-mail address(es) listed above. My business e-mail address is riley@mayallaw.com.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 23, 2023, at Lodi, California.


LINDSAY RILEY SHIELDS