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SUPERIOR COURT OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

ANTOINETTE BROWN, as an individual
and on behalf of all others similarly
situated,

Plaintiff,
vs.

ELA FOODS, INC., a California
corporation; POP FOODS SERVICES,
INC., a California corporation; and
DOES 1-100, inclusive,

Defendants.

CASE NO.: 22STCV26088

Assigned for All Purposes to:
Hon. Yvette M. Palazuelos
Dept SSC-9

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

[Filed concurrently with Notice of Motion and
Motion; Declarations of Nikki Trenner,
Antoinette Brown, and Chris Longley;
[Proposed] Order]

DATE: January 31, 2024
TIME: 10:00 a.m.
DEPT.: SSC-9

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1 **I. INTRODUCTION**

2 Plaintiff Antoinette Brown respectfully requests that the Court preliminarily approve the
3 Class Action and PAGA Settlement Agreement and Class Notice (“Agreement”) entered into
4 between Plaintiff and Defendants ELA Foods, Inc. and POP Foods Services, Inc. (collectively,
5 “ELA” or “Defendants”). The proposed settlement seeks to resolve claims in this matter in
6 exchange for a non-reversionary \$350,000 Gross Settlement Amount. The settlement class
7 consists of “all current and former non-exempt, hourly employees in California employed by
8 Defendants during the Class Period of September 7, 2020 to January 31, 2024 or the date the total
9 number of work weeks totals 25,786, whichever date is sooner.” (Agreement, Section 1.5).¹

10 The Agreement and Notice distribution plan are the products of adversarial, arm’s-length
11 negotiations by informed counsel and parties, facilitated by an experienced mediator. The
12 settlement is fair, reasonable, and adequate to all. Plaintiff has analyzed the strengths and
13 vulnerabilities of the claims with Defendants’ potential exposure and determined the \$350,000
14 proposed settlement is well within the range of reasonableness and is in the Class Members’ best
15 interests. The length and risks of continued litigation and trial that affect the values of the claims
16 were all carefully weighed. In addition, the defenses asserted by Defendants, the uncertainty of
17 class certification, the difficulties of complex litigation, the lengthy process of establishing specific
18 damages and possible delays and appeals, were also considered by Plaintiff and counsel in
19 negotiating the proposed settlement. Further, the proposed settlement satisfies the criteria for
20 preliminary approval under California Rules of Court, Rule 3.769.

21 Accordingly, Plaintiff seeks: (1) preliminary approval of the settlement; (2) provisional
22 certification of the Class; (3) appointment of Plaintiff as Class Representative; (4) appointment of
23 Crosner Legal, PC as Class Counsel; (5) approval of the Parties’ proposed Notice of Class Action
24 Settlement (“Notice”) and method of notifying the Class Members; (6) a hearing date for Plaintiff’s
25 Motion for Final Approval of Class Action Settlement; and (7) entry of an Order Granting
26 Preliminary Approval of Class Action Settlement.

27 ////

28

The fully executed Agreement is attached to the Declaration of Nikki Trenner as Exhibit 1.

1 **II. BACKGROUND/LITIGATION HISTORY**

2 Defendants are a Popeyes Louisiana Kitchen franchisee that own and operate Popeyes
3 Louisiana Kitchen restaurants, including ten restaurants in California. Defendants employed
4 Plaintiff as a non-exempt employee from November 2021 to January 2022 at their Palmdale,
5 California location. (Declaration of Nikki Trenner “(Trenner Decl.”), ¶ 13.)

6 Plaintiff timely exhausted her administrative remedies with the LWDA by submitting her
7 PAGA notice on August 10, 2022. (Trenner Decl. ¶ 14; Exh. 4.) Plaintiff did not receive notice
8 from the LWDA that it intended to investigate the alleged violations outlined in his PAGA letter.
9 (Trenner Decl., ¶ 14.) Consequently, on August 11, 2022, Plaintiff filed a class action complaint
10 against Defendants, and filed a First Amended Complaint adding a PAGA cause of action on
11 October 17, 2022. The operative FAC alleges claims for minimum and overtime wages, meal and
12 rest break violations, inaccurate wage statements, waiting time penalties, unfair competition, and
13 penalties under PAGA.² (Trenner Decl., ¶ 14.)

14 On July 6, 2023, the Parties participated in mediation with the Hon. Steven Denton (Ret.),
15 a respected wage and hour class action mediator. The mediation lasted a full day and, while the
16 Parties did not settle at the mediation, they continued to negotiate with the mediator’s assistance
17 and reached agreement on all major issues following a mediator’s proposal. They then formally
18 reduced the proposed settlement to the Agreement now before the Court for approval. The
19 Agreement meets the requirements in the LASC Checklist for Preliminary Approval. The
20 Agreement has also been uploaded to the LWDA. (Trenner Decl., ¶ 15; Exh. 6.)

21 **III. INVESTIGATION**

22 Prior to the mediation, Defendants provided Plaintiff with extensive informal discovery,
23 including Plaintiff’s personnel, time, and payroll records, time records and payroll records for a
24 randomly selected sampling of about 20% of the Class Members,³ wage statement exemplars,
25 Defendants’ employee handbooks, including Defendants’ policies and procedures regarding the
26 payment of wages, the provision of meal and rest breaks, timekeeping policies (including recording

27 _____
28 ² Plaintiff uploaded the complaint to the LWDA. (Trenner Decl., Exh. 5.)

³ Which sample Plaintiff’s experts suggested would be statistically reliable. (Trenner Decl., ¶ 17.)

hours), issuance of wage statements, and termination wages, as well as information regarding the number of putative Class Members who are current and former employees, sample arbitration agreements, the number of PAGA Members, the number of workweeks throughout the Class Period, and the number of pay periods throughout the PAGA Period. From this information, Plaintiff was able to analyze Defendants' liability for the claims asserted in this case and, with the assistance of Plaintiff's experts at Berger Consulting Group, the potential exposure and damages. (Trenner Decl., ¶ 16.)

Based on this informal discovery, Plaintiff contends the Class Members were not paid all minimum or overtime wages, did not receive proper expense reimbursement, not provided with legally compliant meal and rest periods, did not receive compliant wage statements, and did not receive all wages due on separation of employment. In considering the reasonableness of the proposed settlement, Plaintiff considered each of Defendants' counterarguments, which sharply contested Plaintiff's claims. Plaintiff's Counsel weighed the strength of Defendants' arguments, including the risks of prevailing at class certification and on the merits, and determined that the proposed settlement is in the best interests of the Class. Although remaining confident in the strength of their claims, all these factors led Plaintiff to discount the exposure analysis, discussed in detail below. (Trenner Decl., ¶ 17.)

IV. TERMS OF THE PROPOSED SETTLEMENT

A. Deductions from the Settlement

The Parties have agreed (subject to Court approval) that this action be settled and compromised for the non-reversionary sum of \$350,000.00 ("Gross Settlement Amount" or "GSA") (Agreement, §§ 1.22, 3.1, 4.3), which will be paid in two equal installments approximately 6 months apart. The GSA includes: (a) attorney's fees of up to \$116,666.67 (one-third of the GSA)⁴ to compensate Class Counsel for work already performed and all work remaining to be performed

⁴ The percentage method, with or without a lodestar cross-check, may be used in common fund cases like this one. *Laffitte v. Robert Half Int'l., Inc.* (2016) 1 Cal.5th 480, 503. In support of their fee request at Final Approval, Class Counsel will provide the Court with lodestar information to permit the Court to do a lodestar cross-check in connection with Class Counsel's request for attorney's fees.

(Agreement, § 3.2.1.); (b) actual litigation expenses not to exceed \$20,000.00⁵ (*Id.*); (c) Administration Costs to Atticus Administration, LLC in an amount not to exceed \$20,000.00 (Agreement, § 1.3, 3.2.2); and (e) PAGA penalties to the LWDA of \$7,500.00 (which is 75% of the \$10,000.00 PAGA Payment, with the remaining 25% or \$2,500.00 to PAGA Members) (Agreement, § 3.2.4). Employer-side payroll taxes (including FICA, FUTA, and SDI) will be paid by Defendants separate and apart from the GSA. (Agreement, §§ 3.1, 4.3.)

B. Calculation of the Individual Settlement Payments to Class and PAGA Members

After all Court-approved deductions from the GSA, it is estimated that \$183,333.33 (“Net Settlement Amount” or “NSA”), less all applicable employee-side taxes, will be distributed to the estimated 1,340⁶ Class Members, with an average individual settlement amount of around \$135.⁷ Additionally, it is estimated that the 25% PAGA Payment (\$10,000.00) will be distributed to the estimated 734⁸ PAGA Members, resulting in an average payment of \$3.40⁹ per PAGA Member. (Trenner Decl., ¶ 19.) Under no circumstances will any portion of the Settlement revert to Defendants. (Agreement, § 3.1.)

Subject to the terms and conditions of the Settlement, Atticus will calculate and issue Individual Settlement Payments to Participating Class Members based on the following formula: (a) dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating Class Members during the Class Period and (b) multiplying the result by each Participating Class Member’s Workweeks. (Agreement, § 3.2.3.)

Additionally, Atticus will calculate and issue payments to PAGA Members based on the following formula: (a) dividing the amount of the Aggrieved Employees’ 25% share of PAGA Penalties (\$2,500.00) by the total number of PAGA Period Pay Periods worked by all Aggrieved Employees during the PAGA Period and (b) multiplying the result by each Aggrieved Employee’s

⁵ At Final Approval, Class Counsel will provide documentation regarding actual expenses incurred to support Class Counsel’s request for reimbursement of actual expenses.

⁶ This is based on information provided by Defendants in advance of mediation and separately confirmed by Plaintiff.

⁷ \$183,333.33 NSA / 1,340 Class Members

⁸ This information is also based on data provided by Defendants in advance of mediation.

⁹ \$2,500 (25% PAGA Payment) / 734 PAGA Members

1 PAGA Period Pay Periods. Therefore, the value of each PAGA Member's share of the PAGA
2 Payment ties directly to the amount of pay periods that he or she worked. (Agreement, § 3.2.5.1)

3 The number of pay periods and weeks worked by each Participating Class Member
4 and PAGA Member will be derived from Defendants' records. (Agreement, § 1.8) Each
5 Class Member's gross settlement award will be apportioned as follows: 25% wages and
6 75% penalties and interest. (Agreement, § 3.2.4.1) Atticus will be responsible for issuing
7 Form W-2s for amounts deemed "wages" and Form 1099s for the portions allocated to
8 penalties and interest. (Agreement, § 3.2.4.1.)

9 **C. Uncashed Funds to Unclaimed Property Fund**

10 Settlement checks must be cashed or deposited within 180 days after the checks are mailed
11 to them. (Agreement, § 4.4.1.) In the event a settlement check remains uncashed, such uncashed
12 funds shall be transmitted to the State Controller's Office Unclaimed Property Fund in the name of
13 the Participating Class Member and/or PAGA Member for later claim. (Agreement, § 4.4.3.)
14 Because this lawsuit benefits Class Members/PAGA Members who release claims by participating
15 in the lawsuit, the funds representing their settlement payments should remain their property. By
16 sending the uncashed funds to the Unclaimed Property Fund in the name of the Class
17 Member/PAGA Member, he or she can claim his or her property at a future date convenient to the
18 Class Member. Therefore, there will be no unpaid residue or unclaimed or abandoned Class
19 Member funds under California Code of Civil Procedure section 384(a). (Trenner Decl., ¶ 23.)

20 **D. Notice and Extended Response Deadline for Re-Mailed Notices**

21 Within fifteen days after entry of the Preliminary Approval Order, Defendants will provide
22 Atticus with the Class Data, containing each Class Member's first and last name, last known
23 mailing address, Social Security number, total number of weeks worked during the Class Period,
24 and total number of pay periods worked during the PAGA Period. (Agreement, § 4.2.) Atticus will
25 maintain the Class Data as private and confidential, but Class Counsel will have access to the Class
26 Data so that nothing shall impede Class Counsel from discharging their fiduciary duties to the Class.
27 (Agreement, § 4.2.)

28 Prior to mailing, Atticus will perform a search for updated addresses in the National Change

1 of Address Database. (Agreement, § 7.4.2.) Atticus will use the NCOA and skip traces to attempt
2 to find current addresses for any Notice returned as undeliverable. For any re-mailed Notice, Atticus
3 will extend the Class Member's Response Deadline by 14 calendar days. (Agreement, § 7.4.3-4.)
4 If Atticus is unable to obtain a better address for a Class Member, the Notice will be deemed
5 undeliverable. (Agreement, § 7.4.3-4.) Within 14 days after receipt of the class data, Atticus will
6 mail via regular First-Class mail the Notice to all Class Members. (Agreement, § 7.4.2.)

7 The contents of the Notice are consistent with the terms of the Agreement. The Notice
8 informs Class Members how and when to request exclusion from or object to the settlement and of
9 their estimated payment amount which they will automatically receive a settlement payment if they
10 do nothing. The Notice further advises Class Members of the Court's COVID-19 procedures, how
11 to obtain documents filed in the case from the Court, Atticus or Class Counsel, how to check the
12 Court's website to find out whether the Final Approval hearing date/location has been changed,
13 directs the Class Member to Atticus's website and the Court's website to find out whether final
14 judgment has been entered. (Trenner Decl., Exh. 3.)

15 **E. Responses to the Settlement and Deadline Thereon**

16 Class Members will have 45 days from the initial mailing of the Notice to respond to the
17 settlement by submitting a challenge to the number of weeks or pay periods attributed to them,
18 submitting an objection, or requesting to be excluded from the settlement and the consequences of
19 each choice. (Agreement, 7.4.4.) Class Members can object to the settlement in writing via mail or
20 fax by submitting a document with their name, the words "Notice of Objection" or "Formal
21 Objection" and a description of the arguments supporting their objection. Class Members are
22 informed that the Court will hear any objections from any Class Member who attends the Final
23 Approval Hearing. (Agreement, § 7.7.)

24 Class Members can also submit a written request for exclusion from the settlement by
25 mailing or faxing a written request, including his or her name, address, and phone number, and a
26 statement demonstrating his or her intent to opt out of the settlement. (Agreement, § 7.5.)

27 The Notice also informs the Class Member/PAGA Members that they can dispute the
28 number of weeks/pay periods allotted to them to calculate their settlement payments by contacting

Atticus before the Response Deadline and include any documentation supporting the dispute. Atticus will investigate the dispute, request additional information from Defendants, and make a final decision as to the number of eligible work weeks/pay periods. (Agreement, § 7.6.)

F. Funding and Distribution of the Settlement

Defendants shall fund the settlement in two equal installments, with the first installment payable as of the Effective Date, and the second payable within six months thereafter. (Agreement, § 4.3.). Atticus shall disburse all payments required under this Settlement within 14 calendar days of receipt of the second installment payment. (Agreement, § 4.4.)

G. Release of Claims

Upon Defendants' payment funding the GSA, Participating Class Members shall forever release the Released Parties¹⁰ for the Released Claims for the Class Period. (Agreement, § 5.) The Released Claims are:

all claims that were alleged, or reasonably could have been alleged, based on the facts stated in the Operative Complaint, including, (1) failure to pay minimum wages and liquidated damages; (2) failure to pay overtime; (3) failure to provide meal periods; (4) failure to provide rest periods; (5) failure to reimburse business expenses; (6) failure to provide accurate wage statements; and (7) failure to pay all wages due upon separation of employment during the Class Period. Participating Class Members only release these claims for the duration of the Class Period. Except as set forth in Section 5.3 of this Agreement, Participating Class Members do not release any other claims, or claims based on facts occurring outside the Class Period

(Agreement, § 5.1.) Likewise, upon Defendants' payment funding the GSA, Plaintiff, the Aggrieved Employees, and the State of California shall forever release the Released Parties for the PAGA Released Claims for the PAGA Period. (Agreement, § 5.) The PAGA Released Claims are:

all claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the facts stated in the Operative Complaint and the PAGA Notice, including, (1) failure to pay minimum wages and liquidated damages; (2) failure to pay overtime; (3) failure to provide meal periods; (4) failure to provide rest periods; (5) failure to reimburse business expenses; (6) failure to provide accurate wage statements; (7) failure to pay all wages due upon separation of employment; (8) failure to keep accurate records; (9) failure to produce employee records; (10) failure to provide paid sick leave; (11) failure to provide supplemental paid sick leave; (12) refusal to make payment; (13) failure to provide

¹⁰ "Released Parties" means Defendants and each of their former and present directors, officers, shareholders, owners, members, managing agents, attorneys, insurers, predecessors, successors, assigns, subsidiaries, affiliates (Agreement, § 1.42.)

1 suitable resting facilities; (14) failure to provide suitable seating; (15) statutory
2 wage violations; (16) failure to pay vested vacation pay; (17) failure to provide
3 employees with notice of state employment laws; (18) standard conditions of labor
violations; and (19) unlawful agreements during the PAGA Period. Aggrieved
Employees only release these claims for the duration of the PAGA Period.

4 (Agreement, § 5.2.)

5 As discussed below, Plaintiff's Counsel is convinced that the proposed settlement is in the
6 Class Members' best interests based on the negotiations and a detailed knowledge of the issues
7 present in this action. The length and risks continued litigation that affect the value of the claims
8 were all carefully weighed. In addition, the affirmative defenses asserted by Defendants, the
9 uncertainty of class certification, the difficulties of complex litigation, the lengthy process of
10 establishing specific damages and various possible delays and appeals were also carefully
11 considered by Plaintiff's Counsel in arriving at the proposed settlement. (Trenner Decl., ¶ 32.)

12 **IV. ARGUMENT**

13 In deciding whether to approve a proposed class action settlement under Code of Civil
14 Procedure section 382, the Court must find that a proposed settlement is "fair, adequate and
15 reasonable." *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801 [quoting *Officers for*
16 *Justice v. Civil Serv. Comm'n* (9th Cir. 1982) 688 F.2d 615, 625, cert. den. (1983) 459 U.S.
17 1217]. A proposed class action settlement is **presumed** fair under the following circumstances:
18 (1) the parties reached settlement after arms-length negotiations; (2) investigation and discovery
19 were sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in
20 similar litigation; and (4) the percentage of objectors is small. *Id.* at 1802. As the following
21 shows, all of these elements are present here and the Court should grant of preliminary approval.

22 **A. The Settlement was Reached as a Result of Arm's Length Negotiations**

23 The proposed settlement was reached as a result of arm's-length negotiations. Though
24 cordial and professional, the settlement negotiations have been, at all times, adversarial and non-
25 collusive in nature. Following mediation, Counsel for the Parties further negotiated regarding the
26 settlement terms memorialized in the Agreement. (Trenner Decl., ¶ 33.)

27 While Plaintiff believes in the merits of his case, she also recognizes the inherent risks of
28 litigation and understand the benefit of Class Members receiving significant settlement funds

1 immediately as opposed to risking continued litigation in achieving class certification, the merits
2 of the case before and after trial, the damages awarded and/or an appeal that can take several more
3 years to litigate. (Trenner Decl., ¶ 34.)

4 **B. The Settlement is the Result of Thorough Investigation and Discovery**

5 The Parties thoroughly investigated and evaluated the factual strengths and weaknesses of
6 their arguments before reaching the proposed settlement, and engaged in sufficient investigation,
7 research and discovery, referenced above, to support the settlement. The proposed settlement was
8 only possible following significant analysis and evaluation of Defendants' relevant policies and
9 procedures, as well as the data it produced for the putative Class, which permitted Plaintiff's
10 Counsel and expert to engage in a comprehensive analysis of liability and potential damages to
11 prepare for mediation. (Trenner Decl., ¶ 35.) This litigation has reached the stage where "the Parties
12 certainly have a clear view of the strengths and weaknesses of their cases" sufficient to support the
13 Settlement. *Boyd v. Bechtel Corp.* (N.D. Cal. 1979) 485 F. Supp. 610, 617.

14 **C. Counsel for the Parties are Experienced in Similar Litigation**

15 Counsel for the Parties are particularly experienced in wage and hour employment law,
16 class actions and PAGA actions. Plaintiff's Counsel has prosecuted numerous cases on behalf of
17 employees for wage and hour violations and thus are experienced and qualified to evaluate the class
18 and PAGA claims, evaluate settlement versus trial on a fully informed basis, and to evaluate the
19 viability of the defenses. This experience informed Plaintiff's Counsel on the risks and uncertainties
20 of further litigation and guided their determination to endorse the proposed settlement.¹¹ (Trenner
21 Decl. ¶¶ 6-12.)

22 **D. The Proposed Settlement is a Reasonable Compromise of Claims**

23 An understanding of the amount in controversy is an important factor into whether the
24 settlement "of the class members' claims is reasonable in light of the strengths and weaknesses of
25 the claims and the risks of the particular litigation." *Kullar v. Foot Locker Retail, Inc.* (2008) 168

26
27 ¹¹ The final factor mentioned in *Dunk* - the number of objectors - is not determinable until the Notice of
28 Class Action Settlement has been provided to the Class and they have had an opportunity to respond. This
information will be provided to the Court in conjunction with the Motion for Final Approval of Class Action
Settlement.

1 Cal.App.4th 116; 129; *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186
2 Cal.App.4th 399, 409. The most important factor in this regard is “the strength of the case for
3 plaintiffs on the merits, balanced against the amount offered in settlement.” *Kullar*, 168
4 Cal.App.4th at 129.

5 In weighing the strength of Plaintiff’s case, *Kullar* instructs that the court is not to “decide
6 the merits of the case or to substitute its evaluation of the most appropriate settlement for that of
7 the attorneys.” 168 Cal.App.4th at 133. Further, this analysis does not require an explicit statement
8 of the maximum amount the plaintiff class could recover if it prevailed on all its claims, provided
9 there is a record which allows “an understanding of the amount that is in controversy and the
10 realistic range of outcomes of the litigation.” *Munoz*, 186 Cal. App. 4th at 409. Put differently, “as
11 the court does when it approves a settlement as in good faith under Code of Civil Procedure section
12 877.6, the court must at least satisfy itself that the class settlement is within the ‘ballpark’ of
13 reasonableness.” *Kullar*, 168 Cal. App. 4th at 133 citing *Tech-Bilt v. Woodward-Clyde &*
14 *Associates* (1985) 38 Cal. 3d 488, 499-500. As shown below, the Parties’ investigation and
15 discovery revealed several reasons to discount claims and agree to this settlement.

16 **E. The Settlement is Fair and Reasonable Based on the Strengths of Plaintiff’s**
17 **Case and the Risks and Costs of Further Litigation**

18 The proposed settlement was only possible following significant analysis and evaluation of
19 Defendants’ relevant policies and procedures, as well as the data that Defendants produced for the
20 Class. This permitted Plaintiff’s Counsel to engage in a comprehensive analysis of liability and
21 potential damages. The discovery conducted resulted in Plaintiff’s central theories of liability,
22 which are based on Plaintiff’s claims that Defendants failed to provide compliant meal and rest
23 periods, failed to pay all minimum and overtime wages, failed to provide accurate, itemized wage
24 statements and failed to pay all wages due on separation of employment As explained above,
25 Defendants maintain that the discovery produced demonstrates that it would succeed at both class
26 certification and on the merits. (Trenner Decl., ¶ 36.)

27 Plaintiff believes this case is suitable for certification on the claimed basis that there are
28 company-wide policies that Plaintiff contends violate California law and uniformly affect the Class

Members. However, Defendants' counterarguments raise uncertainties with respect to both class certification and success on the merits. As the California Supreme Court emphasized in *Sav-On v. Superior Court* (2004) 34 Cal.4th 319 (2004), class certification is always a matter of the trial court's sound discretion, and decisions following *Sav-On* have reached different conclusions with respect to certification of wage and hour claims.¹² While remaining confident in the strengths of his claims, all of these factors led Plaintiff to discount the following maximum potential damage claims. (Trenner Decl., ¶ 37.)

1. The Settlement Amount is Reasonable

Defendants provided Plaintiff with class-wide data from which Plaintiff's Counsel could extrapolate a damage analysis in preparation of mediation. Prior to mediation, there were a total of about 1,340 Class Members (685 formerly employed in the limitations period) and 23,442 work weeks in the Class Period. There are also approximately 734 aggrieved employees and 10,091 pay periods within the PAGA Period. (Trenner Decl. ¶ 38.)

Plaintiff contends Defendants failed to provide legally compliant meal and rest breaks. Specifically, Plaintiff contends the volume of work Defendants imposed made it difficult if not impossible for the class members to take all required meal and breaks, and further made it difficult to take breaks on a fully compliant basis even when they were able to take one at all. Plaintiff claims this violates Labor Code sections 512, 226.7, and the applicable IWC Wage Orders, as well as *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 and *Augustus v. ABM Security Serv., Inc.* (2016) 2 Cal.5th 257 for failure to provide meal and rest periods and within the applicable time frames. Furthermore, Plaintiff contends Defendants unlawfully restricted how employees used their break time, such as prohibiting naps, requiring supervisor permission to leave the premises, and restricting use of cell phones, such that the Class Members were not relieved of all employer control. (Trenner Decl., ¶ 39.)

¹² E.g., *Harris v. Superior Court*, 154 Cal.App.4th 164 (2007) (reversing decertification of class claiming misclassification and ordering summary adjudication in favor of employees), *review granted*, 171 P.3d 545 (2007) (not cited as precedent, but rather for illustrative purposes only); *Walsh v. IKON Solutions, Inc.*, 148 Cal.App.4th 1440 (2007) (affirming decertification of class claiming misclassification); *Aguilar v. Cintas Corp. No. 2*, 144 Cal.App.4th 121 (2006) (reversing denial of certification); *Dunbar v. Albertson's Inc.*, 141 Cal.App.4th 1422 (2006) (affirming denial of certification).

1 Defendants deny Plaintiff's contentions, claiming they made meal and rest breaks available
2 to Class Members in compliance with California law. Defendants contend their meal and rest break
3 policies are lawful and that Class Members were frequently reminded, via training and supervisors,
4 that they were required to take all meal and rest breaks. Defendants also contend that time records
5 demonstrate that Class Members took duty-free, timely meal and rest breaks. Defendants contend
6 their meal and rest break policies and practices comported with the flexibility the *Brinker* court
7 held was integral to California's meal and rest period requirements. Finally, Defendants argue that
8 Plaintiff's meal and rest break claims are not susceptible to common proof, as the claims would
9 require individualized inquiry, including whether there was an unlawful companywide policy,
10 whether employees had the opportunity to take meal and rest periods, whether they voluntarily
11 chose to forego their meal and rest periods, and whether Defendants ever prevented them from
12 taking meal and rest periods. Accordingly, Defendants contend these claims are vulnerable to a
13 ruling that class treatment is not appropriate. (Trenner Decl. ¶ 40.) Without taking into
14 consideration any of Defendants' defenses to certification or on the merits, Plaintiff calculated
15 Defendants' maximum exposure for the meal and rest break claims as approximately \$926,500.
16 (Trenner Decl., ¶ 41.)

17 Plaintiff also asserts Defendants' failed to pay for all hours worked, particularly with
18 respect to a few minutes needed to don and doff food safety clothing such as hair nets, aprons, etc.,
19 and also for sometimes "auto deducting" 30 minutes for a meal period even if it didn't last a full
20 30 minutes. Plaintiff further contends Defendants failed to pay all overtime wages at the regular
21 rate of pay, as Defendants failed to incorporate non-discretionary bonuses paid during the same pay
22 periods that overtime wages were earned, in violation of *Alvarado v. Dart Container Corp.* (2018)
23 4 Cal.5th 542. Without considering any of Defendants' defenses to certification or on the merits,
24 Plaintiff's expert calculated Defendants' maximum exposure for this claim as about \$152,400 on
25 the off the clock claim and about \$1,500 on the regular rate claim. (Trenner Decl., ¶ 42.)

26 Plaintiff also contends Defendants required Plaintiff and the Class Members to use their
27 personal cell phones for work related purposes including communicating with supervisors before
28 and after their shifts. However, Defendants failed to reimburse employees for the use of their

1 personal cell phones *Cochran v. Schwan's Home Service, Inc.* (2014) 228 Cal.App.4th 1137, it was
2 held that § 2802 requires employers to always reimburse employees who are required to use
3 personal cell phones for work-related calls for a reasonable percentage of their cell phone bills. On
4 the other hand, Defendants argued there was no reason for employees to use their own phones while
5 working, and any other use was purely for personal preference and therefore not reimbursable.
6 Without taking into consideration any of Defendants' defenses to certification or on the merits,
7 Plaintiff calculated Defendants' maximum exposure for expense reimbursement as about \$87,500.
8 (Trenner Decl., ¶ 43.)

9 Plaintiff's claims for inaccurate wage statements and waiting time penalties are derivative
10 of the unpaid wage claims. Should those claims fail, Plaintiff's claim for inaccurate wage
11 statements and waiting time penalties would also fail. Defendants also contend they would not be
12 liable for waiting time penalties because a "good faith dispute" exists over the payment of past
13 wages. Cal. Code Regs. Tit. 8 § 13520; *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157,
14 1201. Further, Defendants contend Plaintiff would have to prove that Defendants "willfully" failed
15 to pay Class Members appropriate wages due upon separation of employment. Defendants contend
16 that any failure to pay wages upon separation was not willful. (Trenner Decl., ¶ 44.) Without taking
17 into consideration any of Defendants' defenses to certification or on the merits, Plaintiff calculated
18 Defendants' maximum exposure for wage statement penalties as \$966,700 and waiting time
19 penalties as \$2,391,600. (Trenner Decl., ¶ 45.)

20 As far as potential PAGA liability, the theoretical civil penalties likely exceed \$5 million
21 should Plaintiff prevail on all claims and establish violations of the multiple Labor Code sections
22 at issue. (Trenner Decl., ¶ 46.) As with the class claims, Plaintiff discounted the potential PAGA
23 penalties based on Defendants' various defenses on the merits and also accounted for the Court's
24 wide discretion to reduce such penalties, or to decline to award penalties at all. Labor Code §
25 2699(e)(2); *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504 (trial court awarded penalties
26 of \$5 per pay period after a bench trial, which decision was upheld on appeal); *In re Taco Bell*
27 *Wage and Hour Actions* (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. LEXIS 48557 (PAGA penalties
28 denied after trial). Accordingly, the Parties allocated \$10,000 to PAGA penalties.

1 Plaintiff submits this amount is reasonable under the circumstances and in line with
2 comparable settlements in other wage and hour class actions in California. *E.g., Van Kempen v.*
3 *Matheson Tri-Gas, Inc.* (N.D. Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182 (granting final
4 approval of \$5,000 PAGA penalty from \$370,000 settlement, or 1.4 percent of total settlement);
5 *Slavkov v. First Water Heater Partners I* (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS 116303
6 (finding a \$7,500 PAGA payment reasonable when measured against the overall settlement of
7 \$345,000 and the possible weaknesses in plaintiffs' case, or 2.2 percent of total settlement).
8 Additionally, the LWDA has been informed of the terms of the PAGA portion of the settlement,
9 and will be able to weigh in as necessary. *Jennings v. Open Door Mktg. Inc.* (N.D. Cal. Oct. 3,
10 2018) 2018 U.S. Dist. LEXIS 171356, at *27 (approving settlement with PAGA penalties of 0.6%
11 where "[p]laintiffs [have] submitted the settlement agreement to the LWDA, and the LWDA has
12 not objected to the settlement.

13 Thus, Plaintiff and her counsel discounted the value of the class claims consistent with the
14 risks discussed above, as well as the potential applicability of arbitration agreements signed by
15 many class members. They carefully weighed the likelihood of the class receiving substantially
16 greater benefit if the litigation continued, and concluded – in light of these very real and substantial
17 risks – settlement on the proposed terms and without prolonged and costly litigation was in the best
18 interests of the class. The overall \$350,000 recovery represents a significant percentage of
19 Defendants' potential exposure and, given Defendants' multi-layered defenses and all other
20 potential risks of continued litigation, a total recovery for the class of \$350,000, which will result
21 in average award of some \$135 per class member, plus additional sums under PAGA, is a
22 significant result well within the range of reasonableness considering all potential outcomes, and it
23 will provide direct monetary awards to all Class Members without further delay. [Trenner Decl.,
24 ¶¶ 47-48.]

25 Importantly, the mere fact that a settlement does not provide the same recovery as might be
26 achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and adequate.
27 *Wershba*, 91 Cal.App.4th at 246, 250 ("Compromise is inherent and necessary in the settlement
28 process...even if the relief afforded by the proposed settlement is substantially narrower than it

1 would be if the suits were to be successfully litigated, this is no bar to a class settlement because
2 the public interest may indeed be served by a voluntary settlement in which each side gives ground
3 in the interest of avoiding litigation”); *7-Eleven Owners for Fair Franchising v. Southland Corp.*
4 (2000) 85 Cal.App.4th 1135, 1150 (“The fact that a proposed settlement may amount to only a
5 fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is
6 grossly inadequate and should be disapproved”); *White v. Experian Information Solutions, Inc.*
7 (C.D. Cal. 2011) 803 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and
8 reasonable even though it represented 99% discount off the maximum value of the claims); *Lane*
9 *v. Facebook, Inc.* (9th Cir. 2012) 696 F.3d 811, 819 (“[T]he question whether a settlement is
10 fundamentally fair . . . is different from the question whether the settlement is perfect in the
11 estimation of the reviewing court”). Importantly as well, the proposed settlement is non-
12 reversionary and will provide immediate benefits to the Class Members without a claims process.
13 *White*, 803 F.Supp.2d at 1098; c.f., Federal Judicial Center, *Managing Class Action Litigation: A*
14 *Pocket Guide for Judges* (3d ed. 2010) at 20, available at [http://](http://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf)
15 www.fjc.gov/sites/default/files/2012/ClassGd3.pdf (reversionary provisions and/or cumbersome
16 claims process may indicate lack of fairness). Plaintiff and his counsel submit the settlement is
17 within the “range of reasonableness,” and is fair and adequate for the Class.

18 **F. Provisional Class Certification Should be Granted**

19 A class action is appropriate when the class is ascertainable and there is “a well-defined
20 community of interest in the questions of law and fact involved affecting the parties to be
21 represented.” Code Civ. Proc. § 382. Class certification requirements under Section 382 follow
22 Rule 23 of the Federal Rules of Civil Procedure, and require: numerosity, typicality of the class
23 representatives’ claims, adequacy of representation, predominance of common issues, and
24 superiority. Fed.R.Civ.Pro. 23(b)(3); *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011,
25 1019. While a court must certify a class for settlement purposes if a class has not already been
26 certified, “it is well established that trial courts should use different standards to determine the
27 propriety of a settlement class, as opposed to a litigation class certification. Specifically, a lesser
28 standard of scrutiny is used for settlement cases.” *Glob. Minerals & Metals Corp. v. Superior Court*

(2013) 113 Cal.App.4th 836, 859 *citing Dunk*, Cal.App.4th 1794, 1807, n.19; *Wershba v. Apple Computer* (2001) 91 Cal.App.4th 224, 237-38.

Here, Plaintiff seeks approval of the following Class for settlement purposes only: all current and former non-exempt, hourly employees in California employed by Defendants during the Class Period of September 7, 2020 to January 31, 2024 or the date the total number of work weeks totals 25,786, whichever date is sooner.” (Agreement, Section 1.5).

1. The Proposed Class is Sufficiently Numerous and Ascertainable

First, the class is both sufficiently numerous, consisting of approximately 1,340 individuals, and ascertainable by reference to Defendants’ personnel and payroll records. (Trenner Decl., ¶ 49.) “There is no set number required to maintain a class action, and the statutory test is whether a class is so numerous that ‘it is impracticable to bring them all before the court.’” *Hebbard v. Colgrove* (1972) 28 Cal. App. 3d 1017, 1030 (noting that there is no set minimum to meet the numerosity prerequisite, but that a class of as few as 28 is acceptable); *Bowles v. Superior Court* (1995) 44 Cal. 2d 574 (upholding a class of ten members); *Rose v. City of Hayward* (1981) 126 Cal. App. 3d 926, 932 (finding that “Class Members are ‘ascertainable’ where they may be readily identified without unreasonable expense or time by reference to official records.”). Thus, the ascertainability requirement is met.

2. The Typicality and Adequacy Requirements Are Met

The typicality requirement is met if the claims of the named representative are typical of those of the Class, though, “they need not be substantially identical.” *Classen v. Weller* (1983) 145 Cal.App.3d 27, 46-47. Here, Plaintiff contends her claims are typical of the Class Members’ claims because they arise from the same factual basis and are based on the same legal theories applicable to the Class Members. Plaintiff further contends Defendants’ policies applied to all Class Members and each Class Member is challenging the same policies and practices. As such, the typicality requirement is satisfied for purposes of settlement. (Brown Decl., ¶¶ 2-3; Trenner Decl. ¶ 50.)

Adequacy requires that the Plaintiff have no interests adverse to the interests of the proposed Class Members and be committed to vigorously prosecuting the case on behalf of the Class. *McGhee v. Bank of America* (1976) 70 Cal.App.3d 442, 450-51. Plaintiff has been and will continue

1 to be committed to vigorously prosecuting this case, and she has no conflicts of interest with the
2 Class. Plaintiff has been and will continue to be committed to vigorously prosecuting this case, and
3 she has no conflicts of interest with the Class. In this regard, the settlement of her individual claims
4 is not an obstacle to her ability to serve as class representative for several reasons. First, her
5 independent claim in no way impacted negotiation of the final class settlement which, as noted,
6 was achieved following a mediator's proposal that took into account Plaintiff's individual claims –
7 in other words, the settlement amount represents a professional neutral's independent evaluation of
8 the value of the case. Further, Plaintiff is not seeking an enhancement award in recognition of the
9 fact she is receiving additional monies for her individual claims. Thus, Plaintiff has in no way
10 “sold out” the class members for her own personal benefit but instead has simply received fair value
11 for her separate claims in addition to securing a positive result for the absent class members. For
12 these reasons, Plaintiff contends she is an adequate class representative. (Brown Decl., ¶¶ 3-7;
13 Trenner Decl., ¶ 51.)

14 **3. The Commonality Requirement is Met**

15 Next, common questions of law and fact predominate – particularly for purposes of a
16 settlement class – as the Class Members all were subject to the same meal and rest break policies
17 and alleged “de facto” policies resulting in meal period violations, and similarly subject to the same
18 improper regular rate policy. Since the focus of the claims against Defendants concerns the legality
19 of common policies applied uniformly to the entire class, common issues predominate over
20 individualized inquiries concerning liability. For instance, Defendants’ meal and rest break policy
21 is company-wide policy applied equally and consistently to all class members, and this policy is
22 either compliant with California law or it is not. Regardless of that determination, it will decide
23 liability for all class members one way or another. Similarly, whether properly calculated and paid
24 for overtime is another question common to all class members. [Trenner Decl., ¶ 52.]

25 By now it is well-settled a theory of recovery asserting the existence of a uniform policy
26 violating California law is sufficient to satisfy the requirements for class certification. Jones v.
27 Farmers Ins. Exch. (2013) 221 Cal.App.4th 986, 996 (“Claims alleging that a uniform policy
28 consistently applied to a group of employees is in violation of the wage and hour laws are of the

sort routinely, and properly, found suitable for class treatment”); Williams v. Superior Court (2013) 221 Cal.App.4th 1353 (“A company-wide practice can sustain a common question of fact or law that supports commonality for class certification”). Lastly, a class action is superior to other means for the fair and efficient adjudication of this controversy. [Trenner Decl., ¶ 53.]

G. Atticus Should be Appointed as the Settlement Administrator

The Parties agreed to use Atticus Administration, LLC as the Settlement Administrator in this matter. (Agreement, § 1.2). Atticus is highly qualified and experienced as a settlement administrator, committed to the security of data (having experienced no data breaches at all), carries insurance for the theft of money or data, and has no relationship with Counsel. (Declaration of Chris Longley, ¶¶ 2-12; Exhs. 1-2; Trenner Decl., ¶ 54.)

H. Notice to Class Members Complies With California Rule of Court 3.769(f)

California Rule of Court 3.769(f), provides: “If the court has certified the action as a class action, notice of the final approval hearing must be given to class members in the manner specified by the court. The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement.” Here, the proposed Notice meets all of these requirements, as it advises Class Members of their rights to participate in the settlement, how to and when to object to or request exclusion from the settlement, and the date, time, and location of the final approval hearing. Class Members need not do anything to receive their *pro rata* share of the settlement. (Trenner Decl., Exh. 2.)

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V. CONCLUSION

Plaintiff respectfully submits that the proposed settlement is in the best interests of the Class Members, as it is fair, adequate, and reasonable. Plaintiff accordingly requests the Court certify the class for settlement purposes, appoint Plaintiff as Class Representatives, appoint Plaintiff's Counsel as Class Counsel, appoint Atticus as Settlement Administrator, approve the method of notice and the Notice to be sent to the Class, preliminarily approve the Settlement Agreement, enter the proposed order filed herewith, and set a Final Approval hearing date.

Dated: November 30, 2023

CROSNER LEGAL, P.C.

RT

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