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11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF RIVERSIDE**

13 **GERRY DANIEL and BRYCE MONSON,**
14 individually and on behalf of all others
15 similarly situated,

16 Plaintiffs,

17 vs.

18 **MARS WRIGLEY CONFECTIONERY**
19 **US, LLC,** a Delaware Limited Liability
Company,

20 Defendant.

Case No. CVRI2204632

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY APPROVAL OF CLASS
AND COLLECTIVE ACTION
SETTLEMENT**

ASSIGNED FOR ALL PURPOSES TO
JUDGE HAROLD HOPP
DEPARTMENT 10

Date: May 13, 2024

Time: 8:30 a.m.

Reservation No.: 715960504311

Action Filed: October 25, 2022

Trial Date: None Set

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1 **I. INTRODUCTION**

2 Plaintiffs Gerry Daniel and Bryce Monson seek preliminary approval of a class, collective, and
3 representative action settlement of their wage and hour claims against Mars Wrigley Confectionery US,
4 LLC (“Mars”). This case was brought on behalf of Mars Territory Sales Managers (“TSMs”) alleging
5 that Mars misclassified them as “exempt” employees and denied them overtime pay and other benefits.
6 The case is a hybrid (i) class action under California law for TSMs in California (“CA TSMs”) and (ii)
7 collective action under the Fair Labor Standards Act, 29 U.S.C. § 216(b) for TSMs nationwide. Per
8 Mars’s data shared for mediation, there are 52 CA TSMs and 390 TSMs who worked in other states
9 (“Non-CA TSMs”) during the time period applicable to each group.

10 The Maximum Gross Settlement Amount is \$2,387,520. Of that amount, approximately \$525,254
11 is allocated to the CA TSMs, who will automatically participate in the settlement unless they opt out.
12 The average gross settlement per CA TSM is \$10,101. Approximately \$1,862,265 is allocated to the
13 Non-CA TSMs, who will participate in the settlement only if they opt in, as required under the FLSA.
14 The average gross settlement per Non-CA TSM is \$5,033, which is smaller due to the shorter FLSA class
15 period and to a weighting of 1.6 to 1 for California vs. non-California workweeks to account for the
16 relative value of the claims. Because Mars will only receive a release from Non-CA TSMs who opt in
17 and from CA TSMs who do not opt out, the Maximum Gross Settlement Amount (and the California and
18 Non-California Allocations, respectively) will be reduced pro rata by the workweeks of TSMs who do
19 not give a release. However, the “floor” for the Final Gross Settlement Amount will be \$1,800,000,
20 regardless of how many TSMs opt in or out.

21 The Settlement was reached after a full-day mediation with JAMS mediator Michael Loeb
22 followed by weeks of additional negotiation and then a mediator’s proposal. In advance of the mediation,
23 Mars produced extensive informal discovery and data, including pay data and time-stamp data from
24 TSMs’ iPads. The Settlement Agreement (“SA”) is attached as Exhibit 1 to the Declaration of William
25 Jhaveri-Weeks in Support of this Motion (“Jhaveri-Weeks Decl.”). This settlement provides a fair,
26 appropriate, and favorable result for TSMs and meets the California preliminary approval standard of fair
27 and reasonable, as well as the comparable FLSA standard. Plaintiffs request that the Court certify the
28 California Class and nationwide FLSA collective for settlement purposes only, grant preliminary
approval of the Settlement, approve the proposed California Class and Non-California Collective
Notices, and set a final approval hearing.

II. OVERVIEW OF THE SETTLEMENT

The Settlement resolves all claims that were alleged or could have been alleged based on the facts in the Complaint. The key Settlement terms are:

1. Class and Collective Definitions – The “CA Class” is “all persons who were employed by Defendant in California as a Territory Sales Manager (“TSM”) during the Class Period.” SA § 1.2. The Non-CA Putative Collective is “all persons who were employed by Defendant in any state other than California as a TSM during the Class Period.” *Id.* § 1.20.

2. Class Period means (a) with respect to Non-CA TSMs, from February 10, 2020 through the earlier of July 31, 2024 or the Preliminary Approval Date, and (b) with respect to CA TSMs, any time from April 30, 2018 through the earlier of July 31, 2024 or the Preliminary Approval Date. *Id.* § 1.6.

3. Maximum Gross Settlement Amount (“Maximum GSA”) – \$2,387,520. SA § 1.12. This is the amount Mars will pay if 100% of eligible TSMs participate (not including its share of payroll taxes, which Mars will pay regardless, *id.* § 4). The Maximum GSA will be reduced to the Final GSA based on the workweeks of the TSMs who do not participate in the settlement, as explained below.

4. CA Class Allocation is the Maximum GSA multiplied by the fraction in which the numerator is (number of workweeks worked by CA Class Members x 1.6) and the denominator is ((number of workweeks worked by CA Class Members x 1.6) + (number of workweeks worked by Non-CA Putative Collective Members)). The estimated CA Class Allocation is \$525,254. *See* Jhaveri-Weeks Decl. ¶ 24.

5. Non-CA Putative Collective Allocation is the Maximum GSA multiplied by the fraction in which the numerator is (number of workweeks worked by Non-CA Putative Collective Members) and the denominator is ((number of workweeks worked by CA Class Members x 1.6) + (number of workweeks worked by Non-CA Putative Collective Members)). The estimated Non-CA Putative Collective Allocation is \$1,862,265. *Id.* ¶ 64.

6. Final Gross Settlement Amount (“Final GSA”) refers to the gross payment (including all fees and costs) Mars shall make into a QSF, and will be the sum of (a) the CA Class Allocation reduced pro rata by the workweeks of any CA Class Member who opts out, and (b) the Non-CA Putative Collective Allocation reduced pro rata by the workweeks of Non-CA TSM who does not opt in; provided that the Final GSA shall be a minimum of \$1,800,000. The Final GSA shall be non-reversionary.

7. Attorneys’ Fees, Costs, and Named Plaintiffs’ Service Awards – Class Counsel will seek fees of up to one-third of the Final GSA, out-of-pocket costs up to \$20,000, and a service award of \$10,000 for

each named Plaintiff (\$20,000 total). *Id.* §§ 6, 7.

8. PAGA Penalties – \$12,500 shall be allocated to the PAGA claim. *Id.* § 8. The LWDA will be paid 75% (\$9,375). *Id.* The remaining 25% (\$3,125) will be added to the NSA. *Id.*

9. Settlement Administration Costs are estimated not to exceed \$30,000. *Id.* § 9. The Parties solicited three bids and selected CPT Group, Inc (“CPT”), the lowest bidder. Decl. of Julie Green on Behalf of CPT (“CPT Decl.”) Exs. A (CV), B (bid); Jhaveri-Weeks Decl. ¶ 38.

10. The Net Settlement Amount (“NSA”) will be the Final GSA minus attorneys’ fees, costs, class representative awards, the LWDA’s share of PAGA Penalties, and Settlement Administration costs. The NSA will be paid pro rata based on the number of weeks each participating Class/Collective Member actively worked during the Class Period, with California workweeks valued at 1.6x non-California workweeks. SA § 5.1.1. The 25% of the PAGA Penalties allocated to the Aggrieved Employees shall become part of the NSA, to be paid pro rata based on the number of pay periods each CA Class Member worked during the PAGA Period. *Id.* All CA Class Members will receive their share of PAGA penalties, regardless of whether they opt out. *Id.* § 5.1.3.

11. Class and Collective Notice – Within 20 days of preliminary approval, Mars will provide CPT with the Class Data List. SA § 10.1.1. Within 10 business days of receiving the list, after updating addresses using the NCOA database, CPT will mail each CA Class Member (“CA CM” or “CM”) a CA Class Notice, and will mail each Non-CA Putative Collective Member a Non-CA Collective Notice in the form of **Exhibits A and B** to the SA. *Id.* §§ 10.1.2, 10.1.3. CPT will also send the notices by email to everyone for whom Mars has a personal email address. *Id.* For all returned mailed Notices, CPT will use skip tracing to update addresses and do a second mailing. *Id.* § 10.1.4. The mailed version will include a pre-paid, self-addressed, and stamped envelope with (for the Non-CA Collective Notice) a QR code linking to an electronic opt-in form on the case-specific website set up by the Settlement Administrator. *Id.* The emailed version will include a link that will permit recipients to submit responses electronically. *Id.* Thirty days after the notice is sent, a reminder postcard and reminder text message (for known personal numbers) will be sent to remind recipients of the response deadline. *Id.*

12. Automatic Participation for CA TSMs; Opt-In Required for Non-CA TSMs – each CA CM will receive his or her share of the NSA unless he or she opts out. *Id.* §§ 4, 11.3. CMs in the PAGA Period will receive a PAGA allocation even if they opt out of the class settlement. *Id.* §§ 1.13, 11.2. Non-CA TSMs will participate only if they submit a timely consent form to join the case. *Id.* § 12.1.

13. Opting Out or Objecting – CA CMs who wish to opt out must send a written Request for Exclusion to CPT within 60 days of the date the Notices are sent. *Id.* §§ 1.19, 11. Any CA CM who properly requests to opt out will not receive a payment under the Settlement and will not be bound by the SA. *Id.* § 11.2. A CA CM who remains part of the Settlement may object to the terms of the Settlement by mail or in person the final approval hearing. *Id.* § 12. Non-CA TSMs who do not wish to participate in the settlement will simply not submit consent forms.

14. Tax Consequences – For tax purposes, each settlement payment (excluding PAGA Penalties) will be allocated 40% to wages and 60% to penalties and interest. *Id.* § 5.1.2.

15. Uncashed Checks – Checks not cashed within 90 days will be voided. If \$10,000 or more remains in uncashed funds, a second *pro rata* distribution will be sent. Any uncashed funds remaining will be tendered to Legal Aid Foundation of Los Angeles. *Id.* § 14.2; Jhaveri-Weeks Decl. ¶ 37 (explaining why *cy pres* recipient meets statutory criteria). A *cy pres* recipient is reasonably necessary because there may be unclaimed funds, which can be distributed to an organization that assists people who are similarly situated to the class (*i.e.*, workers asserting wage and hour violations). *See* Decl. of Silvia Argueta of Legal Aid Foundation of Los Angeles (“LAFLA Decl.”). Plaintiffs and Counsel in this case do not have any relationship with LAFLA. Jhaveri-Weeks Decl. ¶ 37; Decl. of Linh Hua ¶ 3.

16. Scope of Release – Participating TSMs will release claims “the claims stated in the complaint and those that arise from or could have been made based upon the facts alleged in the Complaint.” SA § 16.1. The Release Period begins with the start of the Class Period and runs through: for CA TSMs, sixty (60) calendar days after the date that the CA Class Notice is distributed (“Response Deadline”); for Non-CA TSMs, the date the opt-in form is signed. *Id.* § 16.3.

17. Escalator Clause – the number of workweeks relied on at mediation was 44,282. If the total number of workweeks is greater by 7.5% then the Maximum GSA shall increase proportionately or either party shall have the right to withdraw unless they agree on an alternative solution. *Id.* § 19.

III. OVERVIEW OF THE LITIGATION

A. Pleadings and Procedural History

Plaintiff Daniel filed this lawsuit October 25, 2022 alleging (1) failure to pay overtime under the Labor Code; (2) failure to provide rest breaks; (3) failure to provide meal breaks; (4) failure to issue accurate wage statements; (5) failure to pay wages due upon discharge; and (6) violation of California Business & Professions Code § 17200, *et seq.* *See* Jhaveri-Weeks Decl. ¶ 19. Plaintiff Daniel filed a

1 First Amended Complaint on December 30, 2022 adding a claim for derivative PAGA penalties. *Id.*

2 In January 2023, Plaintiff Bryce Monson, who resides in Iowa, retained Class Counsel to assert a
3 nationwide collective action claim against Mars for unpaid overtime under the federal Fair Labor
4 Standards Act (“FLSA”), 29 U.S.C. § 216(b). *See* Jhaveri-Weeks Decl. ¶ 20. Class Counsel informed
5 Mars that Mr. Monson intended to pursue such a claim, either through amendment of the California
6 action or a separate action. *Id.* The Parties agreed to mediate both the California class and nationwide
7 FLSA claims, and for that purpose, Mr. Monson and Mars entered into a tolling agreement on February
8 17, 2023. *Id.* Class Counsel and Plaintiffs engaged additional counsel at the firm Nichols Kaster, LLP to
9 assist with the mediation and to litigate, if need be, a separate nationwide case against Mars. *Id.*

10 On April 18, 2024, Plaintiffs Daniel and Monson filed a stipulation to file the Second Amended
11 Complaint (“SAC”) adding Mr. Monson as a Plaintiff and adding a nationwide proposed collective
12 action claim for unpaid overtime under the FLSA. *Id.* ¶ 21.

13 **A. Discovery**

14 In aid of mediation, Plaintiffs requested, and Mars produced, the following: (1) payroll data for
15 all TSMs in the relevant period; (2) data showing when TSMs clocked in at the start of their first store
16 visit and end of their last store visit each day in the relevant period; (3) both Plaintiffs’ personnel files;
17 (4) key policy documents, performance review documents, training slides, bonus formulas, job
18 descriptions, and other documents bearing on the classification issue. *See* Jhaveri-Weeks Decl. ¶ 35.

19 Plaintiffs gathered statements from 12 TSMs who had covered territories in 16 states, and
20 presented them to the Mediator and Mars at mediation. *Id.* Class Counsel interviewed approximately 10
21 additional TSMs. *Id.* From this outreach, Class Counsel developed a high degree of confidence about
22 the nature of the TSM role and any risks on the merits or class/collective certification. *Id.* Plaintiffs also
23 retained an expert to assist in analyzing the data Mars produced. *Id.*

24 **B. Mediation**

25 The Parties participated in mediation with Mr. Michael Loeb, an experienced JAMS mediator, on
26 February 7, 2024. *Id.* ¶ 22. Plaintiffs submitted an 18-page single spaced brief with 19 exhibits. *Id.* The
27 brief described the facts gathered from TSMs and the informal discovery. *Id.* The brief also detailed the
28 estimated exposure. *Id.* Mars also submitted an 18-page single spaced mediation brief that described the
relevant facts and law. The mediation was unsuccessful, but the Parties remained in touch with Mr.
Loeb, and on February 20, 2024, he made a mediator’s proposal, which both Parties accepted. *Id.*

1 **IV. CLASS AND COLLECTIVE CERTIFICATION IS MERITED.**

2 To grant preliminary approval of a settlement involving class and collective claims, courts first
3 decide whether to conditionally certify the class and FLSA collective. *See Cortez v. Vieira Custom*
4 *Chopping, Inc.*, 2019 U.S. Dist. LEXIS 162454, at *6-9 (E.D. Cal. Sept. 20, 2019). Courts then ask
5 whether the settlement meets the reasonableness standard of California law and the FLSA. *Id.* at *19-24.

6 **A. Certification of the California Class Is Merited.**

7 When a California class settlement is reached before certification, the Court may certify a
8 provisional settlement class. Cal. Rule of Ct. 3.769(d). A Class is certifiable if (1) it is ascertainable and
9 numerous; (2) there is a well-defined community of interest; and (3) a class action is a superior method
10 of adjudication. *Id.* at 435; *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 1021 (2012).

11 **1. The CA Class Is Ascertainable and Sufficiently Numerous**

12 A class is “ascertainable” if CMs may be identified without unreasonable burden. *Noel v. Thrifty*
13 *Payless, Inc.*, 7 Cal. 5th 955, 986 n.15 (2019). Here, Plaintiffs assert that the Class is ascertainable from
14 Mars’s records (SA § 10.1.1; Jhaveri-Weeks Decl. ¶ 47), and is numerous because it has 52 members,
15 with each sub-class having over twenty members. *See Jhaveri-Weeks Decl. ¶ 47; Rose v. City of*
Hayward, 126 Cal. App. 3d 926, 934 (1981) (overruled on unrelated grounds).

16 **2. A “Community of Interest” Exists Among California CMs**

17 The California “community of interest” requirement has three factors: (1) common questions of
18 law or fact that predominate; (2) class representatives with typical claims; and (3) class representatives
19 who can adequately represent the class. *Fireside Bank v. Super. Ct.*, 40 Cal. 4th 1069, 1089 (2007).

20 **a. Common Questions of Law and Fact Predominate**

21 The ultimate question of predominance is whether “the issues which may be jointly tried, when
22 compared with those requiring separate adjudication, are so numerous or substantial that the maintenance
23 of a class action would be advantageous to the judicial process and to the litigants.” *Brinker*, 53 Cal. 4th
24 at 1021 (citations omitted). This depends on whether the theory of recovery is “as an analytic matter,
likely to prove amenable to class treatment.” *Id.*

25 Here, Plaintiffs assert that common questions predominate: TSMs across California performed
26 the same basic job duties – every day, they visited stores that sold Mars products, ran through a
27 standardized set of tasks, and encouraged the store to buy more Mars products from wherever the store
28 bought its candy; all were paid the same way; and none could actually “sell” Mars products to the stores.

1 See Jhaveri-Weeks Decl. ¶ 48. Whether these tasks satisfied the outside sales exemption is a common
2 question. *Id.* The meal- and rest-break, wage statement, waiting time, and UCL claims are all derivative
3 of this common question, so resolving this question will drive the outcome of the whole litigation. *Id.*

4 **b. Plaintiff Daniel's Claims Are Typical**

5 Typicality asks whether Plaintiff Daniel suffered a similar injury as the CA Class. *Seastrom v.*
6 *Neways, Inc.*, 149 Cal. App. 4th 1496, 1502 (2007). Here, he suffered the same alleged injury, and seeks
7 the same relief, as the CA Class. Jhaveri-Weeks Decl. ¶ 49.

8 **c. Plaintiff and His Attorneys Will Adequately Represent the Class**

9 Adequacy depends on whether the plaintiff's attorney is qualified and the plaintiff's interests are
10 not antagonistic to those of the class. *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 669 n.21
11 (1993) (citations omitted). Proposed Class Counsel have extensive class action litigation experience.
12 Jhaveri-Weeks Decl. ¶¶ 6-18. Plaintiff Daniel has undertaken to represent the interests of the Class, and
13 Counsel are not aware of any conflicts between Plaintiff and the Class. Jhaveri-Weeks Decl. ¶ 3.

14 **3. A Class Action Is a Superior Method of Adjudication**

15 Plaintiff Daniel's California claims depend on common evidence, including alleged standardized
16 TSM duties and Mars's uniform pay practices. Jhaveri-Weeks Decl. ¶ 50. The claims of each CM are
17 relatively small and Plaintiff asserts that they would be impractical to litigate on an individual basis. *Id.*;
18 *see also Bufile v. Dollar Fin. Grp., Inc.*, 162 Cal. App. 4th 1193, 1208 (2008).

19 **B. Certification of the FLSA Nationwide Collective Is Merited.**

20 The standard for conditionally certifying a FLSA collective action is "lenient," requiring only a
21 "plausible" showing that the employees are "similarly situated" with respect to their FLSA rights. *See*
22 *Campbell v. City of L.A.*, 903 F.3d 1090, 1109 (9th Cir. 2018); *Cortez*, 2019 U.S. Dist. LEXIS 162454,
23 at *18-19 (approving collective certification for settlement where employees had "similar job duties" and
24 were subject to "uniform policies and practices"). Here, Plaintiff maintains that this standard is met for
25 the same reasons class certification is merited: all TSMs, regardless of location, performed the same
26 standard duties and were paid in the same way. *See* Jhaveri-Weeks Decl. ¶ 51. This was alleged in the
27 complaint, and was supported at mediation through common documents that applied nationwide and
28 through declarations. *Id.* Thus, Plaintiff asserts that TSMs are similarly situated for purposes of
evaluating whether their common duties satisfy the federal outside sales exemption.

1 **V. THE COURT SHOULD APPROVE THE SETTLEMENT BECAUSE IT IS FAIR,**
2 **REASONABLE, AND ADEQUATE TO THE CA CLASS**

3 **A. The Two-Step Class Settlement Approval Process**

4 Approval of a California class settlement is a two-step process: first, the Court makes a
5 preliminary review of the reasonableness of the settlement; then, after notice has been distributed to the
6 Class, the Court conducts a final analysis. Cal. Rule of Ct. 3.769; *Dunk v. Ford Motor Co.*, 48 Cal. App.
7 4th 1794, 1800-01 (1996). Courts analyzing whether a settlement is reasonable (either at the preliminary
8 or final step) consider: (1) the strength of Plaintiffs' case balanced against the settlement amount; (2) the
9 risk, expense, complexity, and likely duration of further litigation and the risk of maintaining class action
10 status; (3) the extent of discovery; (4) the experience and views of counsel; and (5) the reaction of the
11 Class. *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 128, 130 (2008). At preliminary
12 approval, courts generally approve the sending of notice if the settlement appears to be within the range
13 of acceptable settlements. Cal. Rule of Ct. 3.769(f); *N. Cty. Contractor's Ass'n v. Touchstone Ins. Servs.*,
14 27 Cal. App. 4th 1085, 1089-90 (1994). A settlement is "presumed to be fair" when (1) it "is reached
15 through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the
16 court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of
17 objectors is small." *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 52 (2008).

18 As detailed below, the CA Class Allocation of \$525,254 (or \$10,101 per CA TSM on average)
19 represents about **43%** of Mars's realistic exposure on the California class's claims (excluding PAGA
20 Penalties (discussed below) and interest) after adjusting the maximum exposure to reflect risks on the
21 merits and class certification. Jhaveri-Weeks Decl. ¶ 24. Given the certainty of receiving substantial
22 relief now rather than years of uncertainty, the SA meets the criteria for preliminary approval. *Id.* ¶ 52.

23 **1. The Gross Settlement Amount Is Reasonable Compared to the Risk-**
24 **Adjusted Potential Recovery**

25 A comparison of the settlement amount to the strength of the Class's claims is the most important
26 factor. *Kullar*, 168 Cal. App. 4th at 130. Here, an analysis of each cause of action demonstrates that the
27 proposed Settlement's CA Class Allocation of \$525,254 is reasonable.

28 **Overtime:** The California outside sales exemption applies to an employee who "customarily and
regularly works more than half the working time away from the employer's place of business selling
tangible or intangible items or obtaining orders or contracts for products, services, or use of facilities."
IWC Wage Order No. 7-2001, 1(C); Cal. Lab. Code § 1171. The analysis is "purely quantitative,"
focusing on whether the employee "works more than half the working time" selling or obtaining orders.

1 *Ramirez v. Yosemite Water Co.*, 20 Cal.4th 785, 797 (1999). Mars argued that the very purpose of the
2 TSM role is to obtain orders of Mars products, and TSMs would complete a proposed order form that
3 they would leave with the store owner or, in some cases, would actually input orders for the store owner
4 to buy Mars products from a wholesaler. Jhaveri-Weeks Decl. ¶ 25. Mars argued that TSMs spend nearly
5 100% of their time in the field visiting stores that buy Mars products, with their primary goal being to
6 increase the amount of Mars product those stores buy. *Id.* Plaintiff relied on the fact that Mars generally
7 does not actually sell directly to the stores (except for one line of business) – rather, Plaintiff’s position
8 (with which Mars disagreed) is that the stores buy Mars’s products primarily through wholesalers and
9 that much of the TSMs’ time in each store was spent on tasks such as checking inventory and stocking
10 shelves. *Id.* In addition, TSMs were not paid on a commission basis. *Id.*

11 Even if Plaintiffs won on the merits, a serious concern was the damages (overtime) that the Class
12 would be able to prove. Jhaveri-Weeks Decl. ¶ 26. TSMs had to “clock in” on an iPad when they started
13 and ended at each store, and Mars produced the clock-in/out data to Plaintiffs. *Id.* The weekly data
14 showed that many TSMs worked much fewer than 40 hours per week on average. *Id.* Although Plaintiffs
15 assert that TSMs worked additional compensable time before the first store and after the last (*e.g.*,
16 planning their routes, completing trainings, and other tasks), proving that time would require
17 individualized inquiries. *Id.* Plaintiff estimated that in a realistic best-case scenario (which Mars would
18 have relied on data and testimony to challenge), they could prove that TSMs worked an average of four
19 hours of overtime per week, every single week, for 48 weeks per year. *Id.* Plaintiffs calculated
20 Defendant’s maximum exposure as \$1,317,345. *Id.*

21 Plaintiffs applied a 30% risk on the merits (*i.e.*, misclassification), Plaintiffs saw risk on damages
22 – *i.e.*, that they might prove fewer than 4 hours of overtime on average. For this, Plaintiffs applied a 30%
23 discount. With respect to class certification, Plaintiffs applied a 15% discount based on the need for
24 individualized inquiries into each CM’s hours worked (*e.g.*, Mars argued that some CMs never worked
25 overtime, which was a liability issue, not a damages issue). *Id.* ¶ 27. After the discounts, Plaintiffs
26 calculated Mars’s realistic exposure on this claim as **\$548,674**. *Id.*

27 In addition, CA Class Members, by negotiating their settlement checks, will release their FLSA
28 overtime claims. Jhaveri-Weeks Decl. ¶ 28. These claims are duplicative of (and less protective than)
the California overtime claims (California provides for overtime after 40 hours in a week *or* eight hours
in a day, while the FLSA only requires overtime after 40 hours in a week). *Id.* However, the FLSA

1 provides for liquidated damages in an amount equal to the unpaid overtime due under the FLSA unless
2 the employer establishes a “good faith” effort to comply with the FLSA. *Id.* This adds exposure of
3 approximately **\$125,871** to the overtime claims of CA TSMs. *Id.*; *see also infra* (evaluating “good faith”
4 defense, noting that Mars had obtained two prior legal opinions that TSMs were classified correctly).

5 **Meal and Rest Breaks:** Plaintiffs argued that CA TSMs were not provided an unpaid 30-minute
6 meal break or two 10-minute paid rest breaks each day. Jhaveri-Weeks Decl. ¶ 29. Mars argued that
7 TSMs controlled their own schedules and were free to take lunches and rest breaks whenever they wished,
8 citing *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal.4th 1004, 1039-41 (2023) (“[T]he employer is not
9 obligated to police meal breaks... Bona fide relief from duty and the relinquishing of control satisfies the
10 employer’s obligations.”). *Id.* Plaintiffs estimate that they could prove at trial that, on average, TSMs
11 did not take lunch breaks three times per week and did not take compliant rest breaks three times per
12 week. *Id.* Plaintiffs assumed 20% of calendar weekdays in the year were non-work days (vacations,
13 holidays, sick days, etc.) for which no penalties were incurred. *Id.* Plaintiffs’ maximum recovery under
14 these assumptions would have been \$518,281 for meal breaks and \$518,281 for rest breaks. *Id.*

15 The meal and rest break claims were dependent upon success of the misclassification claim, so
16 the same 25% merits discount would apply. *Id.* ¶ 30. In addition, even if the class was not exempt and
17 therefore was entitled to breaks, there was a risk that Mars would prevail in its argument that TSMs were
18 free to take breaks any time they wished between store visits. Plaintiffs applied an additional 30%
19 discount for this risk. *Id.* With respect to class certification, given that the only way to establish whether
20 TSMs took breaks would have been through individual testimony, Plaintiffs applied a 30% discount. *Id.*
21 The risk adjusted-value of the meal- and rest-break claims was \$190,468 each, or **\$380,937** together. *Id.*

22 **Wage Statement Penalties:** If TSMs were misclassified, they were entitled to penalties for the
23 failure to provide wage statements setting forth their hours worked and hourly rate. *See* Labor Code
24 § 226(e). Plaintiffs calculated the maximum penalty at \$116,400. Jhaveri-Weeks Decl. ¶ 31. Because
25 this is a derivative claim, the same merits discount (25%) and class certification discount (15%) apply as
26 for the overtime claim resulting in a risk-adjusted claim of **\$74,205**. *Id.*

27 **Waiting Time Penalties:** Plaintiffs’ claim for waiting time penalties under Labor Code § 203
28 was also derivative of the claim for unpaid wages. Jhaveri-Weeks Decl. ¶ 32 Plaintiffs calculated that
30 days’ penalties at CMs’ average daily rate of pay amounted to \$201,684. *Id.* Plaintiffs applied a
discount on the merits for two reasons: 1) this claim is derivative of the misclassification claim, and 2)

1 to recover waiting time penalties, Plaintiffs would have to prove that Mars's violation was "willful,"
2 which might have been difficult given that Mars had obtained two legal opinions prior to the class period
3 opining that TSMs were classified correctly. Jhaveri-Weeks Decl. ¶ 32. Thus, Plaintiffs applied a 45%
4 discount on the merits. The certification risk was the same as the claims of which it is derivative: 15%.
5 After applying discounts, Mars's realistic exposure on this claim was **\$94,287**. *Id.*

6 **Defendant's Total Exposure on All Class Claims:** Plaintiffs calculated the Class's maximum
7 recovery if they were to win full damages on every single claim as approximately **\$2,671,992** (excluding
8 PAGA penalties and interest). Jhaveri-Weeks Decl. ¶ 24. After applying the foregoing discounts for
9 certification and merits risks on each claim, Defendant's realistic liability to the CA Class for settlement
10 purposes is **\$1,263,165** (including FLSA). *Id.* The Settlement reached by the Parties (CA Class
11 Allocation of \$525,254) represents **43%** of Defendant's realistic exposure in Plaintiffs' view. *Id.* This
12 substantial recovery (gross average of over \$10,100 per CM) is a fair, appropriate, and favorable result
13 for the Class given the risks of a much lower recovery or no recovery at all. *Id.* ¶ 52.

14 **The PAGA Allocation Is Fair and Adequate:** The \$12,500 allocated to PAGA Penalties, 2.4%
15 of the California Class Allocation (\$525,254), is fair and adequate. *Id.* ¶ 53. There were approximately
16 1,636 pay periods in the PAGA Period. *Id.* If the Court were to award PAGA penalties at the "initial"
17 violation rate of \$100 per pay period and were to decline to "stack" PAGA penalties (*i.e.*, decline to
18 award multiple penalties for each employee in each pay period), the PAGA exposure was \$163,600. *Id.*
19 (citing *Castillo v. ADT, LLC*, 2017 U.S. Dist. LEXIS 10579, at *11 (E.D. Cal. Jan. 25, 2017) (declining
20 to stack PAGA penalties); *Bernstein v. Virgin Am., Inc.*, 990 F.3d 1157, 1172-73 (9th Cir. 2021)
21 (awarding only "initial" violation penalties)).

22 The PAGA allocation is reasonable for several reasons. First, the Court has discretion to reduce
23 any award of PAGA penalties as "unjust, arbitrary and oppressive, or confiscatory" under Labor Code
24 § 2699(e)(2). Jhaveri-Weeks Decl. ¶ 54. This is a risk when, as here, the PAGA penalties are sought
25 along with statutory penalties on the Labor Code claims. *Id.* Plaintiff's counsel was involved in a
26 misclassification case that was tried recently in San Francisco Superior Court in which the Court awarded
27 15% of the PAGA exposure. *Id.* Here, 15% of the non-stacked PAGA exposure is \$24,540, supporting
28 the \$12,500 PAGA allocation. *Id.* Second, there is risk that Plaintiffs' claims for PAGA penalties would
fail for the same reasons as the underlying claims. *Id.* Third, the percentage of Settlement devoted to
the PAGA allocation as compared to the CA Class Allocation is comparable to PAGA allocations that

1 have received final approval in similar wage and hour cases. *Id.* (citing examples).

2 Plaintiffs submitted the SA to the LWDA on the date of this filing, with information about the
3 date and time of the preliminary approval hearing, giving the LWDA the opportunity to object. *Id.* ¶ 55

4 **2. The Risk, Expense, Complexity, and Likely Duration of Further Litigation**
5 **Support the Reasonableness of the Settlement**

6 This case would take years to resolve absent settlement. Jhaveri-Weeks Decl. ¶ 56. Voluminous
7 evidence would be needed to prove damages for the 52 CMs; expert testimony and expert discovery
8 would be required; and trial would be complex. *Id.* Neither side would likely prevail on all positions,
9 making appeals likely. *Id.* Absent a settlement, the Class would not receive relief for many years, if
10 ever. *Id.* This Settlement provides an early resolution of this dispute, and CMs will obtain a substantial
11 recovery without the risks and delays of further litigation. *Id.*

12 **3. The Settlement Is the Product of Informed, Non-Collusive Negotiations**

13 The Settlement is the result of arm's-length negotiations, reached after mediation with an
14 experienced mediator. *Id.* ¶ 22. Class Counsel engaged in significant informal discovery, in addition to
15 conducting their own investigation that included interviewing CMs. *Id.* ¶ 35. Thus, Plaintiffs were well-
16 informed about the strengths and weaknesses of the Class's claims.

17 **4. Views of Experienced Counsel Support the Settlement**

18 Class Counsel has extensive class experience, including in settlements approved by this Court.
19 *Id.* ¶¶ 6-18. Class Counsel consider the Settlement an excellent result. Jhaveri-Weeks Decl. ¶ 17.

20 **B. The Proposed Class Notice Content and Procedure Are Adequate**

21 Due process requires that CMs be provided with notice sufficient to give them an opportunity to
22 be heard. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). Proper notice must
23 provide information to allow CMs to make an informed decision to accept or object to the settlement.
24 *Id.*; see also *Wershba v. Apple Comput., Inc.*, 91 Cal. App. 4th 224, 251-52 (2001). Here, the proposed
25 Notice provides: (1) the material terms of the Settlement, including the hybrid class/collective nature of
26 the settlement, (2) the CM's anticipated payment, (3) how to object or opt out, (4) how to obtain more
27 information, (5) the proposed attorneys' fees, costs, settlement administration costs, and service awards,
28 and (6) the date and time of the final approval hearing. See **Exhibit A** to the SA (Class Notice); see also
Cal. Rule of Ct. 3.766. The procedure for distribution of the Class Notice has "a reasonable chance of
reaching a substantial percentage of the [CMs]." *Cartt v. Super. Ct.*, 50 Cal. App. 3d 960, 974 (1975).

1 The Notice will be sent by first class mail to the most recent address of each CM, updated using the
2 National Change of Address Database. SA §§ 10.1.1-10.1.3. If a Notice is returned as undeliverable,
3 CPT will perform a skip trace and resend it if a new address is identified. SA § 10.1.4. The notice will
4 also be sent by email to any CM for whom Mars has a personal email address. In Class Counsel’s
5 experience, this proposed method of providing notice has been highly effective. *See* Jhaveri-Weeks Decl.
6 ¶ 57. Thus, the Notice is likely to reach most, if not all, CMs.

7 In evaluating whether the contents of the Notice and related forms are likely to be readily
8 understood by CMs, this Court considers factors such as the age, education, and experience of CMs.
9 Here, CMs are Territory Sales Managers who have extensive experience dealing with store managers in
10 English. *See* Decl. of Larry Lupo ¶ 3. There is no risk that CMs will lack the ability to read the Notice.

11 **VI. THE COURT SHOULD APPROVE THE SETTLEMENT BECAUSE IT IS FAIR AND**
12 **REASONABLE TO THE FLSA COLLECTIVE MEMBERS**

13 Courts deciding whether to approve FLSA settlements must decide whether the settlement is of a
14 “bona fide dispute” over wages, and whether it is “fair and reasonable.” *Cortez*, 2019 U.S. Dist. LEXIS
15 162454, at *9 (citing cases). A “bona fide dispute” exists when there are legitimate questions about the
16 existence and extent of Defendant’s FLSA liability.” *Id.* (internal quotes and citations omitted). If a
17 bona fide dispute exists, courts typically look at the same general factors as in a class settlement to
18 evaluate whether the settlement is “fair and reasonable,” including: “the strength of the plaintiffs’ case;
19 the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action
20 status throughout the trial; the amount offered in settlement; the extent of discovery completed and the
21 stage of the proceedings; the experience and views of counsel; the presence of a governmental participant;
22 and the reaction of the class members to the proposed settlement.” *Id.* at *10.

23 Liability under the FLSA claim turns on whether TSMs are exempt under the federal “outside
24 sales” exemption, which is similar to the California exemption. Jhaveri-Weeks Decl. ¶ 58. To be exempt
25 under the FLSA’s “outside sales” exemption, an employee’s “primary duty” must be making sales or
26 obtaining orders. 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541.500. (Mars also asserted that the administrative
27 exemption applied to individuals who promote sales of others). Jhaveri-Weeks Decl. ¶ 58.

28 Under the FLSA, there is a bona fide dispute about whether TSMs’ “primary duty” was, as Mars
contends, “making sales or obtaining orders,” or was, as Plaintiffs contend, scanning inventory, stocking
shelves, and deploying marketing material to stores. *See* Jhaveri-Weeks Decl. ¶ 59. As under California
law, Plaintiffs rely on the fact that Mars did not actually sell directly to most of the stores TSMs visited,

1 and spent time on tasks that were clearly not selling. *Id.* Mars relies on federal case law, including
2 *Christopher v. Smithkline Beecham Corp.*, 132 S. Ct. 2156, 2173 (2012), and cases citing it for the
3 proposition that the employee need not actually consummate the sales to satisfy the exemption, and Mars
4 argues that the entirety of TSMs' work was geared toward selling. *Id.* The risk on the merits is
5 comparable under state and federal law. *Id.*

6 To maintain FLSA collective certification through trial, Plaintiffs would be required not only to
7 meet the "lenient" test for sending notice of the case, but a "more exacting" examination after completion
8 of discovery. *Campbell*, 903 F.3d at 1109. The potential need for individualized inquiries would give
9 rise to risks similar to the certification risks on the California overtime claim. Jhaveri-Weeks Decl. ¶ 60.

10 Under the FLSA, Plaintiffs are also entitled to liquidated damages equal to the amount of unpaid
11 overtime, unless the employer proves that it acted in "good faith." *See* 29 U.S.C. § 260. In mediation,
12 Mars revealed that it had obtained two legal opinions from two separate firms prior to the relevant time
13 period opining that TSMs were appropriately classified as exempt. Jhaveri-Weeks Decl. ¶ 61. Thus,
14 there was significant risk that Plaintiffs would not recover liquidated damages. *Id.* Similarly, Plaintiffs
15 faced a risk of being limited to a two-year statute of limitations, which is the period that applies unless
16 Plaintiffs can prove willfulness or reckless disregard. *Id.*; *see* 29 U.S.C. § 255.

17 Plaintiffs also faced a significant risk that their overtime rate would be calculated under the federal
18 "fluctuating workweek" methodology, pursuant to which they would have received only 0.5x their hourly
19 rate for each overtime hour, rather than 1.5x their hourly rate. *See* Jhaveri-Weeks Decl. ¶ 62. Federal
20 courts have reached different outcomes on this issue. *Id.*

21 Plaintiffs estimated that their realistic best-case scenario at trial would be to prove an average of
22 three hours of unpaid overtime per week for each Non-CA TSM (lower than the estimate of four hours
23 for CA TSMs because FLSA overtime is owed only for hours in excess of 40 per week, not 8 per day),
24 with the assumption that 20% of weeks would include some vacation, sick leave, or holiday time that
25 would prevent overtime from being incurred. *Id.* ¶ 63. If Plaintiffs succeeded on all issues (three-year
26 statute of limitations, fluctuating workweek, and liquidated damages), the total best-case exposure on
27 these claims was \$11,083,627. *Id.*

28 Plaintiffs estimated the risk of losing on the merits at 30%, slightly higher than under California
law. *Id.* Plaintiffs estimated their chances of losing FLSA decertification as 10%. *Id.* ¶ 64. Plaintiffs
estimated their chances of prevailing on the fluctuating workweek issue at 50%. *Id.* Plaintiffs estimated

1 their chances of prevailing on liquidated damages and the three-year statute of limitations at 65%.
2 Applying these discounts yields a risk-adjusted exposure of **\$3,369,548**. *Id.* The Non-CA Putative
3 Collective Allocation (\$1,862,265.60) reflects a recovery of **55%** of the risk-adjusted exposure. This is
4 a fair and reasonable settlement of the FLSA claims. *Id.*

5 The risk-adjusted exposure of the FLSA claims, as compared to the California claims, confirms
6 that weighting California workweeks at 1.6x the value of non-California workweeks is reasonable,
7 resulting in roughly similar percentages of the settlement recovery compared to the expected value of the
8 case at trial. Jhaveri-Weeks Decl. ¶ 65 (citing similar case approving same ratio).

9 **VII. THE CLASS/COLLECTIVE REPRESENTATIVE SERVICE AWARDS ARE**
10 **PRELIMINARILY REASONABLE**

11 In conjunction with seeking final approval, Plaintiffs will move for approval of a Service Award
12 of \$10,000 for each Class/Collective Representative to recognize their effort for the Class and the general
13 release they are giving. SA §§ 7, 16.3; Jhaveri-Weeks Decl. ¶ 66. That motion will be supported by
14 declarations from the Plaintiffs. *Id.* The requested awards fall well within the range of those typically
15 awarded. *See, e.g., Cellphone Term. Fee Cases*, 186 Cal. App. 4th 1380, 1393 (2010) (affirming awards
16 of \$10,000); *Santillan v. Verizon Connect, Inc.*, 2024 U.S. Dist. LEXIS 25902, at *32 (same).

17 **VIII. THE REQUESTED ATTORNEYS' FEES AND COSTS ARE PRELIMINARILY**
18 **REASONABLE**

19 In conjunction with final approval, Plaintiffs will move for an award of attorneys' fees of one-third
20 of the Final GSA, which will be between the minimum Final GSA amount of \$1,800,000 and the
21 Maximum GSA amount of \$2,387,520 (fee award of \$600,000 to \$795,840). SA § 6. This is the
22 benchmark award in common fund settlements. *See, e.g., Laffitte v. Robert Half Int'l Inc.*, 1 Cal. 5th
23 480, 487 (2016) (affirming fee award of one-third). Plaintiffs will also request reimbursement of
24 litigation costs not to exceed \$20,000. SA § 6; Lab. Code §§ 226(e), 1194.2, 2802. If the Court grants
25 preliminary approval, Plaintiffs will file a fully-briefed motion, supported by detailed lodestar
26 information, to be heard with the final approval motion. Jhaveri-Weeks Decl. ¶ 67.

27 **IX. CONCLUSION**

28 Plaintiffs respectfully request that the Court enter the proposed order certifying the settlement
California Class, certifying the FLSA collective, preliminarily approving the Settlement, and ordering
distribution of the Notices to the Class.

1 DATED: April 19, 2024

Respectfully submitted,

2 

3 William C. Jhaveri-Weeks

4 Sarah Abraham

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Collective*