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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF RIVERSIDE**

SEAN W POWERS, as an individual and on
behalf of all employees similarly situated,

Plaintiff,

v.

MARIO'S PLACE, INC., a California
Corporation; and DOES 1 through 50, inclusive,
Defendants.

Case No.: CVRI2301652

[Assigned for all purposes to Hon. Harold W.
Hopp, Dept. 1]

**CLASS AND PAGA REPRESENTATIVE
ACTION**

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

Reservation ID: 984811064175
Date: May 15, 2024
Time: 8:30 a.m.
Courtroom: Dept. 1
Judge: Hon. Harold W. Hopp

Action Filed: April 3, 2023
Trial Date: Not Set

1
2 **TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:**

3 PLEASE TAKE NOTICE that on May 15, 2024, at 8:30 a.m., or as soon thereafter as the matter
4 may be heard, in Department 1 of the above-captioned Court, located at 4050 Main Street, Riverside, CA
5 92501, Plaintiff SEAN W POWERS (“Plaintiff”) will and hereby does move this Court for an order:

6 1. Granting class certification of the Class, solely for settlement purposes pursuant to
7 Code of Civil Procedure § 382;

8 2. Preliminarily approving the JOINT STIPULATION OF CLASS AND PAGA
9 REPRESENTATIVE ACTION SETTLEMENT (“Settlement” or “Agreement”) (attached as
10 **Exhibit 1** to the Declaration of Lilit Tunyan;

11 3. Appointing counsel for Plaintiff, Tunyan Law, APC, as Class Counsel;

12 4. Appointing Plaintiff as the Class Representative;

13 5. Approving the use of the proposed notice procedure and related Class Notice Form
14 attached as **Exhibit 1**, Exclusion Form attached as **Exhibit 2**, and Objection Form attached as
15 **Exhibit 3** to the [Proposed] Order Granting Preliminary Approval of Class and PAGA Action
16 Settlement;

17 6. Approving Phoenix Class Action Administration Solutions as the third-party
18 administrator;

19 7. Directing that the Class Notice, Exclusion Form, and Objection Form (collectively,
20 “Notice Packet”) be mailed to the Class; and,

21 8. Scheduling a hearing date for motion for final approval of class action settlement
22 and awards of attorneys’ fees and costs.

23 Good cause exists to grant this Motion because:

24 1. The Class meets all of the requirements for class certification for settlement
25 purposes under Code of Civil Procedure § 382;

26 2. The Settlement Agreement is a fair, adequate, and reasonable compromise of the
27 disputed wage and hour claims asserted by Plaintiff;

28 3. Plaintiff and Class Counsel are adequate to represent the Class;

4. The proposed notice procedures and related forms comply with California Rules of Court 3.766(d) and (e), adequately apprise Class Members of their rights, and fully comport with due process; and

5. Based on the foregoing, notice should be directed to the Class Members and a final fairness hearing should be scheduled (Plaintiff suggests about 120 days after preliminary approval is granted).

This Motion is made pursuant to Rule 3.769 and Rule 3.1113(e) of the California Rules of Court, which require approval by the Court of a class action settlement and permit the Court to extend the page limit for memoranda.

This Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the Declarations of Class Counsel Lilit Tunyan, Plaintiff, Defendant, Defendant's counsel and the proposed Settlement Administrator in support thereof, all papers and pleadings on file with the Court in this action, all matters judicially noticeable, and on such oral and documentary evidence as may be presented in connection with the hearing on the Motion.

Respectfully submitted,

Dated: April 22, 2024

TUNYAN LAW, APC

By: SPH/MS

Lilit Tunyan
Artur Tunyan

Attorneys for Plaintiff SEAN W POWERS

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1 **I. INTRODUCTION**

2 Pursuant to California Rules of Court, Rules 3.769(d) and (e), Plaintiff SEAN W POWERS
3 (“Plaintiff”) respectfully requests that this Court preliminarily approve the proposed class action
4 settlement set forth in the JOINT STIPULATION OF CLASS AND PAGA REPRESENTATIVE
5 ACTION SETTLEMENT (“Settlement” or “Agreement”) with Defendant MARIO’S PLACE,
6 INC.(“Defendant”).

7 Defendant is a restaurant located in Riverside County of the State of California. Plaintiff was
8 employed by Defendant and alleged various wage and hour violations, which Defendant denies. After
9 informal discovery, the exchange of documents, and an arm’s-length mediation session with a mediator
10 Kevin T. Barnes, Esq., Plaintiff and Defendant (collectively referred to herein as the “Parties”) reached a
11 proposed class and PAGA representative action settlement with a gross settlement amount (“GSA”) of
12 **\$201,000.00** in compromise of disputed claims asserted on behalf of the below-defined Class consisting
13 of approximately **200** members. Plaintiff believes that this settlement is a fair, adequate, and reasonable
14 compromise of the disputed claims for alleged unpaid wage and hour violations and penalties asserted in
15 this case.

16 Plaintiff now submits this Motion for Preliminary Approval of Class and PAGA Representative
17 Action Settlement, along with the Settlement (attached to the Declaration of Lilit Tunyan [“Tunyan
18 Decl.”], **Exhibit 1** thereto). In order to efficiently present the Court with necessary information to
19 determine whether to grant preliminary approval of the Settlement and to address the requirements set
20 forth in the Class Action Case Management Order #1 (“CMO”), Plaintiff also moves for an order
21 permitting the filing of this single consolidated memorandum, although it exceeds the page limit
22 established by California Rules of Court, Rule 3.1113(d), instead of filing several separate motions. For
23 the Court’s convenience, below is a summary of the key provisions of the Settlement.

24 **II. THE MAJOR TERMS OF SETTLEMENT**

25 The provisions of the proposed Settlement include the following:

- 26 • Defendant agrees not to oppose certification of a Class for purposes of Settlement only
27 (Settlement, ¶ 21);
- 28 • **Settlement Amount:** Defendant will pay a maximum of **\$201,000.00**, referred to as the

Gross Settlement Amount (or GSA herein), resulting in an estimated average **gross** payment per Class Member of approximately **\$1,005.00** (Settlement, ¶ 28(g));

- **Class Size:** approximately **200** individuals as of the date of mediation. (Settlement, ¶ 5, Tunyan Decl., ¶ 16.)
- **PAGA Group Size:** approximately **116** individuals as of the date of mediation (Tunyan Decl., ¶ 17);
- **Escalator Clause:** On March 12, 2024, the number of workweeks during the Class Period is estimated to be **18,443**. The parties stipulate a 10% escalation of the estimated workweeks without any increase to the Gross Settlement Amount. If the number of actual workweeks during the Class Period exceeds 10% of the estimated workweeks (i.e., exceeds 20,288 workweeks), Defendant can either have the Class Period end on the date that the workweeks exceed 20,288 or increase the Gross Settlement Amount by a pro-rata dollar value equal to the number of workweeks in excess of 20,288 workweeks. For example, if there is a 1% increase over 10% then the Gross Settlement Amount increases by 1%. (the “Escalator Clause”). (Settlement, ¶ 28(d).)
- **Kullar/Munoz Analysis:** Plaintiff addresses the claims analysis herein, at Part V.B.3, and in more detail the Declaration of Tunyan, at Paragraph 18;
- **No Reversion:** The Settlement is a ***non-reversionary*** settlement (Settlement, ¶ 28(e));
- **Certification:** Plaintiff addresses certification requisites herein, at Part V.A., and in the Declaration of Tunyan, at Paragraphs 34-40;
- **No Claim Form:** No claim form is required (Settlement., ¶ 28(f));
- **Class Release:** The Settlement will release specified wage-and-hour claims for Class Members (those Class Members who do not opt out of the Settlement) as defined by the First Amended Complaint and LWDA notice (Settlement, ¶ 39);
- **PAGA Release:** The Class Members will release the PAGA Claims set forth in this Action, that were identified in the Complaint and Plaintiff’s LWDA Notice Letter, regardless of whether they opt out of the class portion of the Settlement (Settlement, ¶¶ 15 and 39(c)(2));

- 1 • **Release Effective Date:** The Release is not active until Defendant tenders all payments
2 required under the Settlement to the Settlement Administrator (Settlement, ¶ 39(b));
- 3 • **Net Settlement Amount Available to the Class:** After deducting Class Counsel's
4 attorneys' fees and costs, service payment to Plaintiff, administration costs, and the
5 payment to the LWDA, the remainder will be available for distribution to Class Members
6 who do not opt out, with each Class Member receiving a share based on the number of
7 workweeks each Class Member worked for a Defendant within the Class Period. The Net
8 Settlement Amount is estimated to be at least **\$86,673.90**, resulting in an average **net**
9 payment per Class Member of at least **\$433.37**, before any tax withholdings. (Settlement, ¶
10 28(g));
- 11 • **Tax Allocation:** The amounts distributed to Class Members will be characterized as 20%
12 alleged unpaid wages, 40% as unpaid penalties and 40% as unpaid interest, and PAGA
13 Settlement Payments will be allocated as 100% penalties. (Settlement, ¶ 28(k));
- 14 • **Employer's Portion of Payroll Taxes Paid Separately:** Defendant's portion of payroll
15 taxes (e.g., FICA, FUTA, etc.) owed on any settlement payments to Class Members that
16 constitute wages will be paid separate and apart from the GSM (Settlement, ¶ 28(h));
- 17 • **Settlement Administrator:** The notice portion of the Settlement and distribution of funds
18 will be administered by a third-party Administrator, Phoenix Class Action Administration
19 Solutions, and the Parties estimated that the costs of administration should not reasonably
20 exceed \$15,000.00. Phoenix Class Action Administration Solutions' low bid for settlement
21 administration services in the amount of **\$8,576.10** was selected as the lowest bid from a
22 competitive bidding process. (Settlement, ¶ 28(p));
- 23 • **Class Data for Administration:** The Settlement Administrator will receive the Class List
24 within 15 calendar days of Preliminary Approval, use the NCOA database to update the
25 Class List, and then use skip tracing on returned Notices (Settlement, ¶ 34(a));
- 26 • **Notice:** The Notice will issue within 14 days of receipt of the Class List (Settlement, ¶
27 34(b)). The Notice describes how to dispute workweeks, submit and objection in writing,
28 in person, or through an attorney, or request exclusion (Settlement, ¶ 28(s)).

- 1 • **Notice Language:** Notice will issue in English and Spanish (Settlement, ¶ 28(t));
- 2 • **Objections:** Objections can be submitted in person, through an attorney, or in writing to
- 3 the Settlement Administrator (Settlement, ¶ 28(x));
- 4 • **Exclusion Requests:** The procedure for exclusion requests, mailing a request to the
- 5 Settlement Administrator, is the same as the procedure for submitting a writing objection
- 6 (Settlement, ¶ 28(w));
- 7 • **PAGA Allocation:** From the GSA, **\$15,000** will be allocated to settle claims brought
- 8 pursuant to the California Private Attorneys General Act, Labor Code § 2699 *et seq.*
- 9 (“PAGA”), and seventy-five percent (75%), or **\$11,250**, will be paid to the California Labor
- 10 & Workforce Development Agency. (Settlement, ¶ 10.)
- 11 • **Notice to LWDA:** Notice was provided prior to the filing of this Motion. Evidence is
- 12 attached to Tunyan Declaration.
- 13 • **Service Payment to Plaintiff:** Defendant will not oppose the application for Class
- 14 Representative Service Payment of **\$7,500.00** for Plaintiff, to be paid from the GSA
- 15 (Settlement, ¶ 28(n));
- 16 • **Fees and Costs:** Defendant will not oppose Class Counsel’s application for fees not to
- 17 exceed 33 1/3% of the GSA (**\$67,000.00**), and actual costs, in an amount not to exceed
- 18 **\$20,000**, to be paid out of the GSA (Settlement, ¶ 28(m)).
- 19 • **Check Void Period:** Settlement checks will be valid for 180 days (Settlement, ¶ 36);
- 20 • **Uncashed Checks:** Any settlement checks that are mailed to the Class Members and
- 21 remain uncashed after 180 days of the date of issuance will be cancelled, and the moneys
- 22 shall be distributed to those class members who have cashed their checks (Settlement, ¶ 37);
- 23 • **Judgment Notice:** Judgment will be posted on the Settlement Administrator’s website
- 24 after entry (Settlement, ¶ 32);
- 25 • **Confidentiality Provisions:** The Settlement permits Class Counsel to discuss the
- 26 Settlement with Class Members (Settlement ¶ 60).

27 (Tunyan Decl., ¶¶ 8-9 and Exhibit 1 thereto.)

28

III. **FACTUAL AND PROCEDURAL BACKGROUND**

A. **Plaintiff's Claims**

On April 3, 2023, Plaintiff filed a putative Class Action alleging the following labelled causes of action: (1) Violation of Labor Code §§ 204, 246, 510, 551, 552, 1194, 1198 (Failure to Pay All Wages and Sick Pay); (2) Violation of Labor Code §§ 226.7, 512 (Failure to Provide Meal Periods); (3) Violation of Labor Code § 226.7 (Failure to Provide Rest Periods); (4) Violation of Labor Code § 226, (Failure to Keep Accurate Itemized Wage Statements); (5) Violation of Labor Code §§ 201-203 (Failure to Pay Wages Upon Termination of Employment); (6) Violation of Labor Code § 2802 (Failure to Reimburse for Necessary Expenditures); (7) Violation of Bus. & Prof. Code § 17200 et seq. (Unfair Business Practices). On July 7, 2023, Plaintiff filed his First Amended Complaint adding the eighth case of action for civil penalties under the Labor Code Private Attorneys General Act of 2004 [Lab. Code § 2699, et seq.] (“PAGA”). (The “Action.”) In the Complaint, Plaintiff sought to represent all persons that worked for Defendant in California as an hourly-paid, non-exempt employee at any time during the period beginning four years before the filing of the initial complaint and ending when Notice to the Class is sent. (Tunyan Decl., ¶ 3.)

Plaintiff satisfied the administrative exhaustion requirement that is a prerequisite to filing a claim for Civil Penalties under the Labor Code Private Attorneys General Act of 2004 [Lab. Code § 2699, et seq.] (“PAGA”). On July 7, 2023, Plaintiff filed his First Amended Complaint adding the eighth case of action for civil penalties under the Labor Code Private Attorneys General Act of 2004 [Lab. Code § 2699, et seq.] (“PAGA”). (Tunyan Decl., ¶ 4.)

B. **Pre-Mediation Data Production and Analysis**

The Parties have conducted informal discovery and investigation of the facts and law. Such discovery and investigation have included, inter alia, the exchange of data and discoverable information in preparation for the mediation session. (Tunyan Decl., ¶ 5.) The Parties have analyzed payroll and other data pertaining to Plaintiff and the Class during the relevant Class Period, including but not limited to the numbers of former and current members of the Class, average workweeks, and average rate of hourly pay. (*Id.*) After reviewing the provided documents and data, Class Counsel were able to evaluate the probability of class certification, success on the merits, and the reasonably obtainable maximum

monetary exposure for all claims. Class Counsel reviewed these records and prepared a damage analysis prior to mediation. Class Counsel also investigated the applicable law regarding the claims and defenses asserted in the litigation. (*Id.*)

C. Settlement

On March 12, 2024, the Parties mediated before a mediator Kevin T. Barnes, Esq., who is a well-regarded litigator and mediator for wage and hour class action litigation. (Tunyan Decl., ¶ 6.) At the mediation, the Parties discussed at length the burdens and risks of continuing with the litigation as well as the merits of the claims and defenses. (*Id.*) The Parties have been able to reach a settlement at the mediation. The Parties have reached an agreement regarding the substantive terms of a class-wide settlement, pending the Parties' agreement on a long-form class settlement agreement. The Parties then signed a long form settlement agreement ("Agreement"). (*Id.*)

Plaintiff and Class Counsel are aware of the burdens of proof necessary to establish liability for the claims asserted in the Action, both generally and in response to Defendant's defenses thereto. (Tunyan Decl., ¶ 7.) Plaintiff and Class Counsel have also taken into account Defendant's agreement to enter into a Settlement that confers substantial relief upon the Class.

Based on the foregoing, Plaintiff and Class Counsel have determined that the Settlement set forth in this Agreement is a fair, adequate, and reasonable Settlement and is in the best interests of the Class. (Tunyan Decl., ¶ 7.) Solely for the purpose of settling this case, the parties agree that the requirements for establishing class action certification with respect to this class have been met and are met. (*Id.*) If this Settlement is not approved by the Court for any reason, Defendant reserves its rights to contest class certification. (*Id.*) This Settlement, if approved by the Court, will result in the termination with prejudice of the litigation through the entry of the Judgment and the release of all Released Claims for all Class Members, including all within the class definition who have not elected to exclude themselves from the Class. (*Id.*)

IV. CLASS DEFINITION

The Class is defined as follows:

All individuals employed by Defendant in California and classified as "non-exempt" at any time during the Class Period (the "Class Period" is April 3, 2019, through the date the Court grants preliminary approval of this Settlement or 60 days from March 12,

2024, whichever is earlier). “Settlement Class Members” are those Class Members who do not submit timely exclusion requests to the Settlement Administrator. (Settlement, ¶¶ 4-5.) (Tunyan Decl., ¶ 36 and Exhibit 1.)

The PAGA Employee is defined as follows:

All Class Members that worked at any time during the PAGA Period (the “PAGA Period” is April 3, 2022 through the date the Court grants preliminary approval of this Settlement or 60 days from March 12, 2024, whichever is earlier.) All PAGA Employees are “aggrieved employees” as defined pursuant to PAGA. PAGA Employees cannot opt out of the settlement of the PAGA claim. (Settlement, ¶¶ 11-12.)

V. **DISCUSSION**

A. **The Court Should Conditionally Certify the Class Because It Meets All the Requirements for Certification for Settlement Purposes Under CCP § 382**

Under Code of Civil Procedure § 382,¹ class certification is warranted so long as there is a numerous and ascertainable class with a well-defined community of interest among its members and that a “class action proceeding is superior to other means for a fair and efficient adjudication of the litigation.” *See, e.g., Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319, 326, 332 (2004). Any doubts as to the appropriateness of class treatment must be resolved in favor of certification, subject to later modification. *Richmond v. Dart Indus. Inc.*, 29 Cal. 3d 462, 473-475 (1981). For purposes of this Settlement only, Defendant has agreed not to oppose conditional certification of the proposed class action. (Settlement ¶ 21.)

“The certification question is ‘essentially a procedural one that does not ask whether an action is legally or factually meritorious.’” *Id.*, at 326, quoting *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-440 (2000). Indeed, the certification question simply asks whether the theory of recovery advanced by the plaintiff is likely to prove amenable to class treatment. *See, e.g., Jaimez v. Daiohs USA, Inc.*, 181 Cal. App. 4th 1286, 1298 (2010). In ruling on certification, a trial court’s task is to determine “whether ... the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial

¹ Code Civ. Proc. § 382, which is the statutory basis for the maintenance of class actions under California law, states in relevant part, “[W]hen the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.”

process and to the litigants.” *Id.* Thus, “[t]he relevant comparison lies between the costs and benefits of adjudicating plaintiffs’ claims in a class action and the costs and benefits of proceeding by numerous separate actions” *See, e.g., id.*

“[I]t is also well established that trial courts should use different standards to determine the propriety of a settlement class, as opposed to a litigation class certification. Specifically, a lesser standard of scrutiny is used for settlement cases.” *Global Minerals & Metals Corp. v. Superior Court*, 113 Cal. App. 4th 836, 859 (2003), citing *Dunk v. Ford Motor Co.* 48 Cal. App. 4th 1794, 1807 n. 19 (1996). As the court noted in *Dunk*, although certification requirements are intended “to protect the interests of the non-representative class members,” that concern is “protected by the trial court’s fairness review of the settlement.” *Dunk*, 48 Cal. App. 4th at 1807 n.19.

Indeed, numerous courts have certified settlement classes. For example, the court in *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285 (2d Cir. 1992), cert. dismissed, 506 U.S. 1088, 122 L. Ed. 497, 113 S. Ct 1070 (1993), addressed settlement before a class was certified. After a hearing, the “district court issued an order certifying the class and approving the settlement agreement.” *Id.* at 289; *see also Alaniz v. California Processors, Inc.*, 73 F.R.D. 269, 278 (N.D. Cal. 1976) (“the use of the tentative settlement class procedure was appropriate in this case”), *aff’d*, 572 F.2d 657 (9th Cir.), cert. denied, 439 U.S. 837 (1978). Certification of a settlement class is a regular feature of class action litigation and an approved procedure which ought to be followed in this case. *See Newberg on Class Actions* (3d ed. 1991) § 11.27, pp. 11-40 to 11-56; *Manual for Complex Litigation*, 2d (1993) § 30.45.

In view of these standards, and as shown below, the Class should be certified for purposes of settlement. Code Civ. Proc. § 382; Rules of Court, Rule 3.769(c).

1. The Members of the Class Are Both Objectively Ascertainable and Sufficiently Numerous.

Whether an ascertainable class exists turns on three factors: (1) the class definition, (2) the size of the class, and (3) the means of identifying class members. *See Miller v. Woods*, 148 Cal. App. 3d 862, 873 (1983). In this case, Plaintiff contends that all three considerations strongly favor class certification.

A class is ascertainable when “it is defined ‘in terms of objective characteristics and common transactional facts’ that make ‘the ultimate identification of class members possible when that

1 identification becomes necessary.” *Noel v. Thrifty Payless, Inc.*, 7 Cal. 5th 955, 980 (2019). No set
2 number of class members is required to maintain a class action. *Hebbard v. Colgrove*, 28 Cal. App. 3d
3 1017, 1030 (1972). In fact, the California Supreme Court has upheld a class of as few as ten members.
4 *Bowles v. Superior Court*, 44 Cal. 2d 574 (1955).

5 The class definition is sufficiently specific to enable the Parties, Class Members, and the Court to
6 determine makeup of the class. *See Clothesrigger, Inc. v. GTE Corp.*, 191 Cal. App. 3d 605, 617 (1987)
7 (proposed class defined as all persons nationwide subscribing to telephone service since January 1, 1981,
8 who were charged for one or more unanswered long distance calls, deemed “plainly” ascertainable).

9 The question of whether class members are easily identifiable turns on whether a plaintiff can
10 establish “the existence of an ascertainable class,” not whether the plaintiff can “identify the individual
11 members of such class as prerequisite to the class suit.” *Daar*, 67 Cal.2d at 706; *see also, Reyes v. San*
12 *Diego County Bd. of Supervisors*, 196 Cal. App. 3d 1263, 1275 (1987).

13 In this case, there are approximately 200 Class Members, all of whom may be identified by
14 reference to Defendant’s records. In addition, to facilitate the administration of the Settlement, Defendant
15 has agreed to share the information from records and has already demonstrated that it can do so when
16 providing class-wide discovery to Plaintiff to facilitate settlement discussions. Accordingly, the Class is
17 not only ascertainable, but also sufficiently numerous. (Tunyan Decl., ¶ 37.)

18 **2. There Are Common Questions That Predominate Over Any Questions That**
19 **May Be Unique to Individual Class Members.**

20 The community of interest requirement embodies three factors: (1) predominant questions of law
21 and fact; (2) class representatives with claims or defenses typical of the class; and (3) class
22 representatives who can adequately represent the class. *Dunk*, 48 Cal. App. 4th at 1806; *Richmond*, 29
23 Cal. 3d at 473-75. In this case, Plaintiff’s claims satisfy all three factors.

24 A question of law or fact is common to the members of a class if it may be resolved through
25 common proof. *See, Jaimez*, 181 Cal.App.4th at 1305. As for predominance, it “is a comparative
26 concept, and ‘the necessity for class members to individually establish eligibility and damages does not
27 mean individual fact questions predominate.’” *Sav-on*, 34 Cal. 4th at 334, quoting *Reyes v. Los Angeles*
28 *County Bd. of Supervisors*, 196 Cal. App. 3d 1263, 1278 (1979). Thus, “[i]ndividual issues do not render

1 class certification inappropriate so long as such issues may effectively be managed.” *Id.* This is
2 especially so where the key difference between class members solely concerns their damages. *See id.*

3 In this case, common questions include, but are not limited to: i. Whether or not Defendant paid
4 proper wages to the Class; ii. Whether or not Defendant provided meal periods to the Class; iii. Whether
5 or not Defendant provided rest periods to the Class; iv. Whether or not Defendant paid compensation
6 timely upon separation of employment to former Class Members; v. Whether or not Defendant paid
7 compensation timely throughout Class Members’ employment; vi. Whether or not Defendant provided
8 accurate itemized wage statements to the Class; vii. Whether or not waiting-time penalties are available
9 to the Class for violation of California Labor Code § 203; viii. Whether or not Defendant reimbursed for
10 necessary business expenses pursuant to California Labor Code § 2802; ix. Whether or not Defendant
11 engaged in unlawful or unfair business practices affecting the Class in violation of California Business
12 and Professions Code §§ 17200-17208; and x. Whether or not Plaintiff and the Class are entitled to
13 penalties pursuant to PAGA (Tunyan Decl., ¶ 39.)

14 In the Action, Plaintiff’s claims present sufficient common issues of law and fact that
15 predominate over individual issues and warrant class certification. From their review of the
16 documentation provided, Class Counsel determined that for purposes of these claims, Defendant’s
17 policies and practices are either identical, or sufficiently similar, to raise the same questions of liability,
18 and applied to all Class Members. Because Class Members would have to prove the same issues of law
19 and fact to prevail, and because their potential legal remedies are identical, it would be preferable to
20 resolve all Class Members’ claims by means of the Settlement than to require each Class Member to
21 litigate his or her individual claims. Therefore, common questions predominate over any questions that
22 may be unique to individual Class Members, and class-wide settlement is superior to any other method
23 of resolution.

24 3. Plaintiff’s Claims Are Typical of Those of the Class.

25 Typicality “requires a showing that the class representative has claims or defenses typical of the
26 class.” *See, e.g., Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524, 1534 (2008), citing
27 *Fireside Bank v. Super. Ct.*, 40 Cal. 4th 1069, 1089 (2007), and *Sav-On*, 34 Cal. 4th at 326, approved by
28 *Jaimez*, 181 Cal. App. 4th at 1298 and *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal. 4th 1004 (2012).

1 To satisfy the typicality requirement, California law does not require that Plaintiff has claims
2 identical to the other class members. Rather, the test of typicality for a class representative is whether
3 other members have the same or similar injury, whether the action is based on conduct which is not
4 unique to the named plaintiffs, and whether other class members have been injured by the same course of
5 conduct. *Seastrom v. Neways, Inc.*, 149 Cal. App. 4th 1496, 1502 (2007). The typicality requirement for
6 a class representative refers to the nature of the claim or defense of the representative, and not to the
7 specific facts from which it arose or the relief sought. *Id.*; *Hanon v. Dataproducts Corp.*, 976 F.2d 497,
8 508 (9th Cir. 1992).

9 The purpose of this requirement is to ensure that the representative plaintiff has interests that are
10 reasonably co-extensive with those of absent class members. *See id.* “The test of typicality ‘is whether
11 other members have the same or similar injury, whether the action is based on conduct which is not
12 unique to the named plaintiffs, and whether other class members have been injured by the same course of
13 conduct.’” *Id.*, quoting *Schwartz v. Harp* 108 F.R.D. 279, 282 (C.D. Cal. 1985). Notably, “it has never
14 been the law in California that the class representative must have *identical* interest with the class
15 members.” *Classen v. Weller*, 145 Cal. App. 3d 27, 46 (1983). In light of these standards, Plaintiff is
16 typical of class members.

17 Here, like other Class Members, Defendant employed Plaintiff in a non-exempt position during
18 the Class Period, and Plaintiff was subject to the same policies alleged to have impacted the entire class.
19 (Tunyan Decl., ¶ 38.) Plaintiff and other Class Members share the same claims stemming from
20 Defendant’s alleged violations of the Labor Code and relevant wage order. In addition, Defendant’s
21 main defense, namely that its policies and practices comply with California law, apply equally to the
22 claims of all Class Members. Thus, Plaintiff is typical of the Class.

23 **4. Plaintiff and Plaintiff’s Counsel Will Adequately Represent the Class.**

24 The adequacy requirement is met where the plaintiff is represented by counsel qualified to
25 conduct the litigation and the plaintiff’s interest in the litigation is not antagonistic to class members’
26 interests. *McGhee v. Bank of America*, 60 Cal.App.3d 442, 451(1976). In other words, where the plaintiff
27 has adequate counsel, the plaintiff may represent the entire class absent any disabling conflicts of interest
28 that might hinder the plaintiff’s ability to represent the class. *Id.*

1 In the Action, Plaintiff has no conflicts of interest with other Class Members and has agreed to
2 place Class interests above Plaintiff's own. (Powers Decl., ¶¶ 4-23; Tunyan Decl., ¶ 41.) Moreover,
3 Plaintiff's counsel are experienced in wage and hour class action litigation and have no conflicts of
4 interest with absent Class Members. (Tunyan Decl., ¶¶ 22-28, 41.) As such, this Court should appoint
5 Plaintiff as Class Representative for the Class and appoint Plaintiff's Counsel as Class Counsel.

6 **5. Proceeding as a Class Action is Superior to Individual Actions**

7 Under the circumstances, proceeding as a class action is a superior means of resolving this
8 dispute, as the Class Members and the Court will derive substantial benefits. Class certification would
9 serve as the only means to deter and redress the alleged Labor Code violations. *See Linder v. Thrifty Oil*
10 *Co.* 23 Cal. 4th at 434 (relevant considerations include the probability that each class member will come
11 forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the
12 class approach would actually serve to deter and redress the alleged wrongdoing). Furthermore,
13 individual actions arising out of the same operative facts would unduly burden the courts and could result
14 in inconsistent results, which may be avoided by class certification.

15 **B. The Court Should Preliminarily Approve the Settlement Because It Is a Fair,** 16 **Adequate, and Reasonable Compromise of Disputed Wage Claims in View of** 17 **Defendants' Potential Liability Exposure and the Risks of Continued Litigation**

18 California courts favor settlement. *See, e.g., Stambaugh v. Superior Court*, 62 Cal. App. 3d 231,
19 236 (1976). Unlike most settlements, class action settlements involve a court approval process that exists
20 to prevent fraud, collusion, and unfairness to class members. *Malibu Outrigger Bd. of Governors v.*
21 *Superior Court*, 103 Cal.App.3d 573, 578-579 (1980). This approval process consists of preliminary
22 settlement approval, notice being given to class members, and a final fairness and approval hearing being
23 held at which class members may be heard with respect to the settlement. *Id.* For the reasons discussed
24 below, this Court should preliminarily approve the Settlement, allow the Parties to give notice to the
25 Class as proposed, and schedule a final fairness and final approval hearing.

26 **1. Class Action Settlements Are Subject to Review and Approval.**

27 Any settlement of class litigation must be reviewed and approved by the presiding court. Rules
28 of Court, Rule 3.769(a). Approval occurs in two steps: (1) an early (preliminary) review by the trial

1 court and (2) a subsequent (final) review after notice has been distributed to the class members. The
2 Preliminary Approval Hearing and Final Approval Hearing coincide with these two steps. The present
3 motion seeks *preliminary approval* and the setting of a Final Approval Hearing.

4 To evaluate a settlement, the trial court must receive “basic information about the nature and
5 magnitude of the claims in question and the basis for concluding that the consideration being paid for the
6 release of those claims represents a reasonable compromise.” *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.
7 App. 4th 116, 133 (2008). However, the record need *not* contain an explicit statement of the maximum
8 theoretical amount that the class could recover:

9 Greenwell misunderstands *Kullar*, apparently interpreting it to require the record in all
10 cases to contain evidence in the form of an explicit statement of the maximum amount
11 the plaintiff class could recover if it prevailed on all its claims—a number which
12 appears nowhere in the record of this case. But *Kullar* does not, as Greenwell claims,
require any such explicit statement of value; it requires a record which allows “an
understanding of the amount that is in controversy and the realistic range of outcomes
of the litigation.”

13 *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal. App. 4th 399, 409 (2010).

14 **2. The Parties Reached the Settlement Through Arms’ Length Negotiations**
15 **Between Experienced Counsel with the Assistance of a Highly Qualified**
16 **Mediator After Sufficient Data Was Exchanged to Evaluate Settlement.**

17 A settlement is presumptively fair where it is reached through arms’ length bargaining, based on
18 sufficient discovery and investigation to allow counsel and the court to act intelligently, counsel is
19 experienced in similar litigation, and the percentage of objectors is small.² *Dunk*, 48 Cal.App.4th at 1802;
20 *In re Microsoft I-V Cases*, 135 Cal. App. 4th 706, 723 (2006); *7-Eleven Owners for Fair Franchising v.*
21 *Southland Corp.*, 85 Cal. App. 4th 1135, 1146 (2000). In deciding whether to approve a settlement, a
22 trial court has broad powers to determine whether it is fair under the circumstances of the case. *See, e.g.,*
23 *Mallick v. Superior Court*, 89 Cal. App. 3d 434, 438 (1979). In exercising these powers, the overriding
24 concern is to ensure that a proposed settlement is “fair, adequate, and reasonable.” *Dunk*, at 1801,
25 quoting *Officers for Justice v. Civil Serv. Comm’n of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

26
27 ² Because the fourth prerequisite for the presumption to arise cannot be addressed until the final
28 approval hearing, only the first three prerequisites are relevant at this preliminary stage of the settlement
approval process.

1 Relevant factors in making this determination, include, but are not limited to:

2 [T]he complexity and likely duration of further litigation, the risk of maintaining class
3 action status through trial, the amount offered in settlement, the extent of discovery
4 completed and the state of the proceedings, the experience and views of counsel, the
presence of a governmental participant, and the reaction of the class members to the
proposed settlement.

5 *Id.* These factors require balancing, are non-exhaustive, and, as such, trial courts should tailor the factors
6 considered to each case and give due regard to “what is otherwise a private consensual agreement
7 between the parties.” *Id.*

8 Here, the Settlement resulted from thorough, arms’ length negotiations between experienced
9 counsel with the assistance of highly regarded mediator. (Tunyan Decl., ¶¶ 6-7, 16.) With respect to the
10 claims at issue in this case, Plaintiff obtained data from Defendant and then carefully reviewed that
11 information. Counsel for Plaintiff also examined relevant policies in detail about their work experiences
12 and Defendant’s practices.

13 Based on the totality of that review, Plaintiff estimated the potential exposure and then estimated
14 risk factors to adjust the reasonable expected outcome. The investigation and discovery that Plaintiff’s
15 counsel conducted were sufficient to provide them with enough information to intelligently evaluate the
16 estimated exposure in this action for purposes of negotiating the Settlement in view of the risks discussed
17 below and are also sufficient to allow this Court to do the same. *See, e.g., Wershba v. Apple Computer,*
18 *Inc.*, 91 Cal. App. 4th 224, 245 (2001).

19 **3. The Settlement Represents a Fair, Adequate, and Reasonable Compromise**
20 **of Class Members’ Claims Based on Defendant’s Estimated Liability**
21 **Exposure Given the Risks Continued Litigation Would Entail.**

22 A settlement is not judged against what might have been recovered had a plaintiff prevailed at
23 trial and does not have to provide 100% of damages sought to be fair and reasonable. “In the context of a
24 settlement agreement, the test is not the maximum amount plaintiffs might have obtained at trial on the
25 complaint, but rather whether the settlement is reasonable under all of the circumstances.” *Wershba*, 91
26 Cal.App.4th at 250. Accordingly, because settlements involve compromise, even one that provides for
27 substantially narrower relief than would likely be obtained if the suit were successfully litigated can be
28 reasonable given that “the public interest may indeed be served by a voluntary settlement in which each

side gives ground in the interest of avoiding litigation.” *Id.*, quoting *Air Line Stewards & Stewardesses Ass’n, Local 550 v. American Airlines, Inc.*, 455 F.2d 101, 109 (7th Cir. 1972).

With respect to the claims asserted on behalf of the Class in this case, there are serious risks that support the reduced compromise amount. These risks include, but are not limited to: (i) the risk that Plaintiff would be unable to establish liability for unpaid straight time or overtime wages, see *Duran v. US Bank Nat’l Ass’n*, 59 Cal. 4th 1, 39 & n. 33 (2014) (“*Duran*”), citing *Dilts v. Penske Logistics, LLC* 2014 WL 205039 (S.D. Cal. 2014); (ii) the risk that uncertainties pertaining to the ultimate legality of Defendant’s policies and practices could preclude class-wide awards of statutory penalties under Labor Code §§ 203 and 226(e); (iii) the risk that individual differences between Class Members could be construed as pertaining to liability and not solely to damages, see *Duran*, 59 Cal. 4th at 19; (iv) the risk that any civil penalties award under the PAGA could be reduced by the Court in its discretion, see Labor Code § 2699(e)(1); (v) the risk that class treatment could be deemed improper as to one or more claims, except for settlement purposes; and, (vi) the risk that lengthy appellate litigation could ensue. (Tunyan Decl., ¶ 15.) These risks are non-exhaustive.

In light of the uncertainties of protracted litigation, the settlement amount reflects a fair and reasonable recovery for the Class Members. (Tunyan Decl. ¶¶ 10-15.) The settlement amount is, of course, a compromise figure. (Tunyan Decl. ¶ 16.) By necessity it took into account risks related to liability, damages, and the defenses asserted by Defendant. (*Id.*) Moreover, each Class Member will be given the opportunity to opt-out of the Settlement, allowing those who feel they have claims that are greater than the benefits they can receive under this Settlement to pursue their own claims. (*Id.*) For the approximately 200 members of the Class, the average **gross** recovery is at least **\$1,005.00** per class member, and the estimated average **net** recovery for each Class Member is approximately **\$433.37**. (*Id.*) Given that Defendant could challenge certification and liability, this is a significant sum to have achieved in settlement. Moreover, a Class Member who worked a greater number of weeks for Defendant will receive a larger share of the Settlement than a Class Member who worked for a shorter amount of time during the class period. (*Id.*)

After analyzing the claims in this matter, Plaintiff has concluded that the value of this Settlement is fair, adequate, and reasonable. (Tunyan Decl., ¶ 17.) The Gross Settlement Amount of **\$201,000.00** is

1 about 68% of the **\$296,584.71** estimate of *risk-adjusted* recovery (excluding interest) at this stage in the
2 litigation. On that basis, it would be unwise to pass up this settlement opportunity. This assessment is
3 based on a carefully constructed model of the current fair value of the case, using estimated risks,
4 average wage rates, numbers of employees, and the amount of time covered by the class period. (*Id.*)
5 The maximum calculated reasonable exposure is **\$2,126,972.86**, *including* PAGA penalties. (*Id.*)

- 6 • A reasonably estimated exposure for underpaid minimum wages, with the assistance of
7 an expert, to be approximately **\$5,642.22**. However, with the risk factor discounts for
8 certification and liability proof, the value of that claim is estimated by Plaintiff's
9 counsel to be approximately **\$3,611.02**, assuming certification probability of 80% and
10 merits success at 80%.
- 11 • A reasonably estimated exposure for unpaid wages for the off-the clock work was
12 calculated, with the assistance of an expert, to be approximately **\$301,358.62**. However,
13 with the risk factor discounts for certification and liability proof, the value of that claim
14 is estimated by Plaintiff's counsel to be approximately **\$18,081.52**, assuming
15 certification probability of 30% and merits success at 20%.
- 16 • A reasonably estimated exposure for unpaid sick leave pay was calculated, with the
17 assistance of an expert, to be approximately **\$31,679.66**. However, with the risk factor
18 discounts for certification and liability proof, the value of that claim is estimated by
19 Plaintiff's counsel to be approximately **\$6,335.93**, assuming certification probability of
20 50% and merits success at 40%.
- 21 • A reasonably estimated exposure for rest break violations over the class period was
22 calculated at **\$301,358.62**, but with chances of certification and proof of liability (50%
23 and 40% respectively) for a risk-adjusted exposure of **\$60,271.72**.
- 24 • A reasonably estimated exposure for meal break violations over the class period was
25 calculated at **\$602,717.24**, with chances of certification and liability risks (50% and 40%
26 respectively) resulting in a risk-adjusted exposure of **\$120,543.45**.
- 27 • Risk-adjusted penalty recoveries for wage statement and Labor Code § 203 penalties
28 with chances of certification and liability risks (30% and 20% respectively) were

estimated to be approximately **\$19,050.00** and **\$19,136.67**, respectively, on maximum exposures of **\$317,500.00** and **\$318,944.50**, respectively.

- A reasonably estimated exposure for unreimbursed expenses over the class period was calculated at **\$73,772.00**, with chances of certification and liability risks (50% and 40% respectively) resulting in a risk-adjusted exposure of **\$14,754.40**.
- Performing risk-adjusted valuations for all claims yields a total value in the range of **\$261,784.71**, excluding PAGA.³ (*Id.*)
- PAGA penalties were calculated as having a maximum realistic exposure of **\$174,000.00**, but a risk adjusted value of **\$34,800.00**, after factoring in risks of reduction in penalties pursuant to Court discretion and the high risk of the inability to prove violations for all aggrieved employees.

The concurrently filed Declaration of Lilit Tunyan sets forth claim valuation in additional detail. (*See*, Tunyan Decl., ¶ 17.)

This result here is fully supportable as reasonable. First, it is important to recognize the wilfulness finding required for Labor Code §§ 203 and 226 is challenging to establish. (Tunyan Decl., ¶ 18.) Second, rest break and meal period claims have been challenging to certify for many years, even after *Brinker*. (Tunyan Decl., ¶ 18.) Third, the certification rates in California are lower than conventional wisdom holds. *See*, H. Scott Leviant, *Second Interim Report on class actions in California sheds new light on certification* (February 19, 2010), www.thecomplexlitigator.com, available at <http://www.thecomplexlitigator.com/post-data/2010/2/19/second-interim-report-on-class-actions-in-california-sheds-n.html>; *see also*, *Findings of the Study of California Class Action Litigation, 2000-2006*, available at <http://www.courtinfo.ca.gov/reference/documents/class-action-lit-study.pdf> (finding, at page 5, and in Table 9, at page 15, that only 21.4% of all class actions were certified either as part of a settlement **or** as part of a contested certification motion).

³ In a sense, it is nonsensical to assign specific percentages to future events, but it does provide a specific method for attempting to reduce the concept of “very high risk” or “high risk” to a quantifiable amount. Certification of a claim is typically a binary event. One does not obtain a 20% certification; a claim is either certified or it is not. But the current expected value is best quantified by applying a risk reduction, based on the total experience of counsel.

1 Here, the estimated certification probabilities are **above** the average rate at which cases were
2 certified in California over the study years, based upon data available through the California Courts
3 websites. (Tunyan Decl., ¶ 18.) In sum, well *under* 20% of all cases filed as proposed class actions are
4 ultimately certified by way of a *contested* motion. (*Id.*) The recovery is roughly **9.5%** of the maximum
5 theoretical recovery (estimated to be approximately **\$2,129,972.86**, including PAGA), which falls within
6 the expected outcome under the likelihood of success metric. (*Id.*) This Settlement achieves the goals of
7 the litigation.

8 **4. The Proposed Method for Allocating Settlement Funds Is Fair, Adequate,**
9 **and Reasonable.**

10 The proposed method of allocating the Settlement Fund to Class Members also is fair and
11 reasonable. As noted, the parties agreed to allocate the Settlement Fund between all Class Members
12 based on time worked by the Class Member during the Class Period, in relation to the total amount of
13 time worked by all participating Class Members collectively during the class period. This proposed
14 method is fair and reasonable because each Class Member's actual potential damages vary based on the
15 number of workweeks he or she actually worked (e.g., Lab. Code § 226.7 provides for an extra hour of
16 pay at the employee's regular rate of pay for each violation, resulting in a higher potential damage when
17 a higher number of incidents occur). A Class Member who worked a greater number of weeks for
18 Defendant will receive a larger payment under the Settlement than a Class Member who worked for a
19 shorter amount of time during the relevant period. (Tunyan Decl., ¶¶ 9, 16.)

20 **5. The Proposed Service Payment to Plaintiff Is Fair, Adequate, and**
21 **Reasonable and Warrants Preliminary Approval.**

22 The proposed service payment to Plaintiff is intended to recognize the substantial initiative and
23 significant efforts on behalf of the Class. Courts routinely approve incentive awards to compensate
24 named plaintiffs for the services they provide and the risks they incur during class action litigation, often
25 in much higher amounts than that sought here. *See, e.g., Bell v. Farmers Ins. Exchange*, 115 Cal. App.
26 4th 715, 726 (2004) (upholding "service payments" to named plaintiffs for their efforts in bringing the
27 case); *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294 (N.D.Cal. 1995) (approving a \$50,000
28 enhancement award). Plaintiff contributed time to the prosecution of this matter, including assistance

prior to the mediation with discovery, information and substantial time conferring with counsel over the course of this litigation and before it was filed. (Powers Decl., ¶¶ 4-23; Tunyan Decl., ¶ 34.) The enhancement also recognizes the considerable risks Plaintiff undertook on behalf of the Class to be personally liable for all costs incurred regardless of the success of the litigation or class certification, as well as the personal risk of facing intrusive discovery and potential disclosure to future employers that Plaintiff sued a former employer, making future employment prospects uncertain.

6. The Proposed Award of Attorneys' Fees and Costs Is Also Fair, Adequate, and Reasonable and Merits Preliminary Approval.

The California Supreme Court removed any lingering doubt about the use of the percentage of the fund method to award attorney's fees in California Courts:

We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created. The recognized advantages of the percentage method—including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation (See pt. I, *ante*; *Lealao*, *supra*, 82 Cal.App.4th at pp. 48–49, 97 Cal.Rptr.2d 797; *Rawlings v. Prudential–Bache Properties, Inc.*, *supra*, 9 F.3d at p. 516)—convince us the percentage method is a valuable tool that should not be denied our trial courts.

Laffitte v. Robert Half Intern. Inc., 1 Cal. 5th 480, 503 (2016).⁴ Thus, this Court may and, as strongly encouraged by the California Supreme Court, *should* award attorney's fees to Plaintiff's counsel based upon the percentage of the fund methodology.

Setting *Laffitte* aside, whether the once-again-confirmed percentage of the fund method or the lodestar method is used, the outcome is roughly the same: "Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery." *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 47 n. 11 (2008), quoting *Shaw v. Toshiba America Information Systems, Inc.*, 91 F.Supp.2d 942, 972 (E.D. Tex. 2000). This is

⁴ The Supreme Court also corrected the misconception that *Dunk* should be viewed as expressing doubt about the use of the percentage method: "The *Dunk* court, while finding the percentage method inapplicable to the settlement before it due to the lack of a readily valued common fund, did not purport to bar its usage generally in common fund cases." *Laffitte*, 1 Cal. 5th at 501.

also consistent with Plaintiff's counsel's experience in these types of cases. Here, Plaintiff's attorneys intend to request attorneys' fees of up to \$67,000.00 (one-third of the GSA), and costs capped at \$20,000 (which includes payment for mediation, filing fees, and other standard expenses). (Tunyan Decl., ¶¶ 29-33.) Given the efforts and risks involved in this case, as well as the results achieved, these amounts are within the range of reasonableness and warrant *preliminary approval*.

7. The Proposed Payment to the Administrator Is Fair and Reasonable

In deciding whether to approve a proposed settlement, a trial court must determine if the proposed settlement is fair under the circumstances of the case. *Mallick*, 89 Cal.App.3d at 438. In exercising this power, the overriding concern is to ensure that a proposed settlement is "fair, adequate, and reasonable." *Dunk*, 48 Cal.App.4th at 1801 (internal quotations omitted). Phoenix Class Action Administration Solutions, which has been selected due to its competitive bid, estimates that administration can be performed for **\$8,576.10**. In counsel's experience, based on similar wage-and-hour actions, an estimated cost of **\$8,576.10** is a fair and reasonable amount for administration fees and should be preliminarily approved. (Tunyan Decl., ¶ 35.)

8. The Proposed Class Notice Complies with Rule 3.766(d) and (e)

Notice requirements are set forth in Rules of Court, Rule 3.766. In determining the manner of the notice, the court must consider the interests of the class, the type of relief requested, the stake of the individual class members, the cost of notifying class members, the resources of the parties, the possible prejudice to class members who do not receive notice, and the *res judicata* effect on class members. Rules of Court, Rule 3.766(e).

a) The Notice Procedure Satisfies Due Process

Plaintiff requests that the Court approve the proposed plan for giving notice to the Class and administering the Settlement. The notice process is set forth in the Settlement. The standard for determining the adequacy of notice is whether the notice has "a reasonable chance of reaching a substantial percentage of the class members." *Cartt v. Sup. Ct.*, 50 Cal.App.3d 960, 974 (1975). California law vests the Court with broad discretion in fashioning an appropriate notice program. *Cartt*, 50 Cal. App. 3d at 973-74. There is no statutory or due process requirement that all class members receive actual notice, but in this matter, the Class Members will receive direct mailed notice. Direct mail

notice to Class Members’ last known address is the best possible notice under the circumstances.
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

As the Court of Appeal has explained, “[t]he notice given should have a reasonable chance of reaching a substantial percentage of the Class Members” *Cartt*, 50 Cal. App. 3d at 974. For class claims “for money damages or similar relief at law, notice sent by first class mail to the last known address of each member of the plaintiff class is sufficient.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985). Here, the proposed procedure includes safeguards, including, but not limited to, searches for address changes and the re-mailing of returned notices after skip traces. As such, the proposed procedure provides a reasonable chance that Class members will receive notice.

b) The Notice is Accurate and Informative

The proposed Notice of Class Action Settlement should be approved for dissemination to the Class Members. It will be disseminated through direct mail to the last known address for each Class Member. It informs the Class Members of the terms of the settlement and their right to be excluded from the Settlement. If there are Class Members who wish to object to this proposed class action settlement, they will have the opportunity to file their objections and be heard at the Final Approval Hearing.

Rule 3.769(f) of the Rules of Court provides as follows:

If the court has certified the action as a class action, notice of the final approval hearing must be given to the 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.

Rules of Court, rule 3.769(f).

The Notice also fulfills the requirement of neutrality in class notices. 3 NEWBERG § 8.39. It summarizes the proceedings and the terms and conditions of the proposed Settlement, in an informative and coherent manner, in compliance with the Manual for Complex Litigation (“MANUAL”), (2d Ed. 1993), which states that “the notice should be accurate, objective, and understandable to Class Members” MANUAL, § 30.211. It makes clear that the Settlement does not constitute an admission of liability by the Defendant and recognizes that this Court has not ruled on the merits. It also states that the final settlement approval decision has yet to be made. Accordingly, the Notice complies with the standards of fairness, completeness, and neutrality required of a combined settlement-certification class notice.

1 Upon the Court's approval, the Notice of Class Action Settlement will be mailed by the
2 Administrator to each Class Member, in Spanish as well.

3 **9. The PAGA Allocation is Reasonable**

4 The PAGA allocation is reasonable because the settlement of the underlying wage and hour
5 claims is robust and serves the deterrent purpose of the PAGA statute. *O'Connor v. Uber Technologies,*
6 *Inc.*, 201 F.Supp.3d 1110, 1135 (N.D. Cal. 2016) ("By providing fair compensation to the class members
7 as employees and substantial monetary relief, a settlement not only vindicates the rights of class
8 members as employees, but may have a deterrent effect upon the defendant employer and other
9 employers, an objective of PAGA."); *see also Visceral v. Mistras Group*, 2016 WL 5907869 *9 (N.D.
10 Cal. 2016) ("Applying O'Connor's sliding scale approach, settlement of the PAGA claim may be
11 substantially reduced below its standalone settlement value without sacrificing its statutory purposes
12 because the non PAGA settlement is relatively substantial.")

13 In addition, there is no evidence that a court or a commissioner had informed Defendant that its
14 conduct violated the Labor Code. *Amaral v. Cintas Corp.*, 163 Cal. App. 4th 1157, 1209 (2008); *Willis v.*
15 *Xerox Bus. Servs., LLC*, 2013 WL 6053831, *7-8 (E.D. Cal. 2013) ("Under California law, courts have
16 held that employers are not subject to heightened penalties for subsequent violations until and unless a
17 court or commissioner notified the employer that it is in violation of the Labor Code.").

18 Finally, the PAGA allocation is fair. The LWDA is receiving **\$11,250.00**. The Class is
19 receiving, net, an estimated **\$86,673.90** for the releases for eight theories of recovery (including the
20 \$3,750.00 as the aggrieved employees' share of the PAGA Allocation). An allocation to the LWDA
21 equal to **13%** of the Net Settlement Amount is not unfair and satisfies the policies underlying
22 California's wage and hour laws.

23 **VI. THE COURT SHOULD SCHEDULE A FINAL FAIRNESS HEARING**

24 The last step in the settlement approval process is the fairness hearing, where the Court makes a
25 final determination about the propriety of settlement. Plaintiff requests that the fairness hearing in this
26 case be scheduled for about 120 days after issuance of the Court's Order granting preliminary approval
27 of the Settlement. Under the Settlement, Defendant will have 15 days to provide the mailing data to the
28 Settlement Administrator, which will then have 14 days to mail out class notice. Class Members have 45

1 days after mailing of the notice to submit exclusions or objections (with a 14-day extension available for
2 late-returned and re-mailed notices). Therefore, Plaintiff proposes a final approval hearing scheduled for
3 the first available hearing date that is about 120 days after preliminary approval is granted.

4 **VII. CONCLUSION**

5 For all the foregoing reasons, because the Class meets the requirements for certification, because
6 the Settlement bears all requisite indicia of fairness, reasonableness, and adequacy, and because the
7 proposed notice procedure and forms comport with Rule 3.766 and due process, this Court should grant
8 this Motion for Preliminary Approval, adopt the [Proposed] Order Granting Preliminary Approval of
9 Class Action Settlement submitted herewith, and schedule a Final Fairness Hearing.

10 Respectfully submitted,

11 Dated: April 22, 2024

TUNYAN LAW, APC

12
13 By: _____



14 Lilit Tunyan
15 Artur Tunyan

16 Attorneys for Plaintiff SEAN W POWERS
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1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA)
3) ss
4 COUNTY OF LOS ANGELES)

5 I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a
6 party to the within action; my business address is 535 N Brand Blvd. Suite 285, Glendale, CA 91203.

7 On the date indicated below, I served the document described as: **PLAINTIFF'S NOTICE OF MOTION**
8 **AND MOTION FOR PRELIMINARY APPROVAL OF CLASS AND PAGA REPRESENTATIVE**
9 **ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**
10 **THEREOF** on the interested parties in this action by sending a true copy thereof to interested parties as
11 follows and as stated on the attached service list:

12 Matthew Kraus
13 mkraus@lc-lawyers.com
14 Nickolaus Buchholz
15 nbuchholz@lc-lawyers.com
16 Monique Patino
17 mpatino@lc-lawyers.com
18 Marcella Buchheit
19 mbuchheit@lc-lawyers.com

20 **LESTER, CANTRELL & KRAUS, LLP**

21 1770 Iowa Avenue, Suite 110
22 Riverside, California 92507
23 Telephone: (951) 300-2690
24 Facsimile: (951) 300-2694

25 *Attorneys for Defendant MARIO'S PLACE, INC.*

26 [✓] **BY E-MAIL:** I hereby certify that this document was served from Glendale, California, by e-
27 mail delivery on the parties listed herein at their most recent known e-mail address or e-mail of
28 record in this action.

[✓] **BY ELECTRONIC SERVICE:** Based on an agreement of the parties to accept electronic
service, I caused the documents to be sent to the persons at the electronic service addresses
listed above via electronic mail. I did not receive an error message.

I declare under penalty of perjury under the laws of the State of California that the above is
true and correct.

Executed on April 22, 2024, at Glendale, California.

Lilit Tunyan

Name



Signature