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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

ERIN JONES and MATTHEW SHACHNO, individuals, and on behalf of other members of the general public similarly situated, Plaintiff, vs. MARRIOTT INTERNATIONAL, INC., as unknown business entity; and DOES 1 through 100, inclusive, Defendants.	CASE NO.: **30-2021-01183306-CU-OE-CXC** **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS AND PAGA SETTLEMENT** Hearing Date: April 11, 2024 Hearing Time: 2:00 p.m. **Reservation No. 74205686** Judge: Hon. Melissa McCormick Dept.: CX104 Action Filed: February 8, 2021 Trial Date: Not set

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I. INTRODUCTION

Plaintiffs Erin Jones and Matthew Shachno ("Plaintiffs") respectfully submit this memorandum in support of the unopposed motion for preliminary approval of the proposed class action and Private Attorneys General Act ("PAGA") settlement with Defendant Marriott International, Inc. ("Defendant"), and seeks entry of an order: (1) preliminarily approving the proposed settlement of this class action with Defendant (and approving the proposed PAGA settlement); (2) for settlement purposes only, conditionally certifying the Class, which is comprised of "all individuals who are or have been employed by Defendant Marriott International, Inc. at either the JW Marriott Anaheim or the Marriott Marquis San Diego hotels in California as hourly, non-exempt employees during any portion of the Class Period " which is February 8, 2017 through the date of the Preliminary Approval Order, or through an earlier date pursuant to Section 9 of the Agreement (defined below); (3) provisionally appointing Plaintiffs as the representatives of the Class; (4) provisionally appointing Blumenthal Nordrehaug Bhowmik De Blouw LLP and Lawyers for Justice, PC as Class Counsel; (5) approving the form and method for providing class-wide notice; (6) directing that notice of the proposed settlement be given to the class; (7) appointing ILYM Group as Administrator; and (8) scheduling a final approval hearing date to consider Plaintiffs' motion for final approval of the settlement and for approval of attorneys' fees, expenses and service payments. Plaintiffs and Defendant (collectively the "Parties") have reached a full and final settlement of the above-captioned action, which is embodied in the Class Action and PAGA Settlement Agreement ("Agreement") filed concurrently with the Court.[1] A copy of the fully executed Agreement is attached as Exhibit #1 to the Declaration of Kyle Nordrehaug ("Decl. Nordrehaug"), served and filed herewith. The form of the Agreement is based upon the Los Angeles County Superior Court model form for a class and PAGA settlement and has been modified to abide by this Court's Guidelines for Approval of Class Action Settlements & PAGA Settlements and any applicable Orange County Superior Court rules or guidelines.

As consideration for this Settlement, the Gross Settlement Amount is Two Million Four Hundred Seventy Thousand Dollars and Zero Cents ($2,470,000) (the "Gross Settlement Amount") to

[1] Capitalized terms shall have the same meaning as defined in the Agreement.

be paid by Defendant, as set forth in the Agreement. The Gross Settlement Amount will settle all issues pending in the Action between the Parties and will be made in full and final settlement of the Released Class Claims and Released PAGA Claims in exchange for the payments to Participating Class Members and Aggrieved Employees from the Gross Settlement Amount, and includes Individual Class Payments, Individual PAGA Payments, the LWDA PAGA Payment, Class Counsel Fees Payment, Class Counsel Litigation Expenses Payment, Class Representative Service Payment, and the Administration Expenses Payment. (Agreement at ¶ 1.21.) The Gross Settlement Amount does not include the employer's share of payroll taxes which will be separately paid by Defendant. (*Id.*) The Settlement is all-in with no reversion to Defendant and no need to submit a claim form. (*Id.*) Decl. Nordrehaug at ¶3.

The following is a table of the key financial terms of the Settlement and the proposed deductions:

$2,470,000 (Gross Settlement Amount)
- $10,000 (Plaintiffs' proposed service award not to exceed $5,000 each)
- $85,000 (Class Counsel Litigation Expenses Payment - not to exceed amount)
- $822,510 (Class Counsel Fees Payment - not to exceed 1/3 of settlement)
- $50,000 (PAGA Payment - 75% to LWDA / 25% to Aggrieved Employees)
- $25,000 (Administration Expenses Payment - not to exceed amount)

$1,477,490 (Net Settlement Amount)

Based upon 2,137 Class Members who collectively worked approximately 237,767 Workweeks, the Gross Settlement Amount provides an average value of $1,155 per Class Member and more than $10 per Workweek and after deductions the Net Settlement Amount provides an average recovery of $691.38 per Class Member and a recovery of $6.21 per Workweek. Decl. Nordrehaug at ¶6.

On June 8, 2023, the Parties participated in an all-day mediation session presided over by Jeffrey Krivis, a respected and experienced mediator of wage and hour class actions. Following the mediation, the Parties continued to negotiate through the mediator, and eventually agreed on the basic terms of a settlement pursuant to a mediator's proposal. Decl. Nordrehaug at ¶5. The Settlement is fair, reasonable and adequate, and should be preliminarily approved because there is a substantial monetary payment, and there are significant litigation and class-certification risks. Therefore, Plaintiffs respectfully request that this Court grant preliminary approval of the Agreement and enter the proposed order submitted herewith.

II. DESCRIPTION OF THE SETTLEMENT

The Gross Settlement Amount is Two Million Four Hundred Seventy Thousand Dollars ($2,470,000). (Agreement at ¶ 1.21.) Under the Settlement, the Gross Settlement Amount consists of the following elements: (1) payment of the Individual Class Payments to the Participating Class Members; (2) Class Counsel Fees Payment and Class Counsel Litigation Expenses Payment; (3) Administration Expenses Payment; (4) Class Representative Service Payments to the Plaintiffs; (5) the Individual PAGA Payments; and (6) the LWDA PAGA Payment. (Agreement at ¶ 1.21.) The Gross Settlement Amount does not include Defendant's share of payroll taxes. (Agreement at ¶ 3.1.) The Gross Settlement Amount shall be all-in with no reversion to Defendant. (Agreement at ¶ 3.1.) Decl. Nordrehaug at ¶ 15.

Defendant shall fully fund the Gross Settlement Amount, and also fund the amounts necessary to fully pay Defendant's share of payroll taxes by transmitting the funds to the Administrator 30 days after the Effective Date. (Agreement at ¶ 4.3.) The distribution of Individual Class Payments to Participating Class Members along with the other Court-approved distributions shall be made by the Administrator within thirty (30) business days after Defendant funds the Gross Settlement Amount. (Agreement at ¶ 5.1.) Decl. Nordrehaug at ¶ 16.

The amount remaining in the Gross Settlement Amount after the deduction of Court-approved amounts for Individual PAGA Payments, the LWDA PAGA Payment, the Class Representative Service Payment, the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment, and the Administration Expenses Payment (called the "Net Settlement Amount") shall be allocated to Participating Class Members as their Individual Class Payments. (Agreement at ¶¶ 1.27 and 3.3.) From the Net Settlement Amount, the Individual Class Payment for each Participating Class Member will be calculated by (a) dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating Class Members during the Class Period and (b) multiplying the result by each Participating Class Member's Workweeks. (Agreement at ¶ 3.3(e).) Workweeks will be based on Defendant's records, however, Class Members can challenge their number of Workweeks. Decl. Nordrehaug at ¶ 17.

Class Members may choose to opt-out of the Settlement by following the directions in the Class

Notice. (Agreement at ¶ 8.4, Ex. A.) All Class Members who do not "opt out" will be deemed Participating Class Members who will be bound by the Settlement and will be entitled to receive an Individual Class Payment. (Agreement at ¶ 8.4(c).) All Aggrieved Employees, including those who submit an opt-out request, will still be paid their allocation of the PAGA Penalties and will remain subject to the release of the Released PAGA Claims regardless of their request for exclusion. (Agreement at ¶¶ 1.38, 6.3 and 8.4(c).) Finally, the Class Notice will advise the Class Members of their right to object to the Settlement and/or dispute their Workweeks. (Agreement at ¶¶ 8.5 and 8.6, Ex. A.) Decl. Nordrehaug at ¶ 18.

A Participating Class Member must cash his or her Individual Class Payment check within 180 days after it is mailed. (Agreement at ¶ 5.2.) Any settlement checks not cashed within 180 days will be voided and any funds represented by such checks shall be transmitted to the California Controller's Unclaimed Property Fund in the name of the Class Member thereby leaving no "unpaid residue" subject to the requirements of C.C.P. § 384(b). (Agreement at ¶ 5.4.) Decl. Nordrehaug at ¶ 19.

Subject to Court approval, the Parties have agreed on ILYM Group to administer the settlement in this action ("Administrator"). (Agreement at ¶ 1.2.) The Administrator will be paid for settlement administration in an amount estimated to be $27,850. Decl. Nordrehaug at ¶20.

Subject to Court approval, the Agreement provides for Class Counsel to be awarded a sum not to exceed one-third of the Gross Settlement Amount, as the Class Counsel Fees Payment. (Agreement at ¶ 3.3(b).) Class Counsel will also be allowed to apply separately for an award of Class Counsel Litigation Expenses Payment in an amount not to exceed $85,000. (Agreement at ¶ 3.3(b).) Subject to Court approval, the Agreement provides for payments of no more than $5,000 each to the Plaintiffs as the Class Representative Service Payment. (Agreement at ¶ 3.3(a).) Decl. Nordrehaug at ¶21.

Subject to Court approval, the PAGA Penalties will be paid from the Gross Settlement Amount for PAGA penalties. The PAGA Penalties are $50,000. (Agreement at ¶ 3.3(d).) Pursuant to the express requirements of California Labor Code § 2699(i), the PAGA Payment shall be allocated as follows: 75% shall be allocated to the Labor Workforce Development Agency ("LWDA") as its share of the civil penalties and 25% allocated to the Individual PAGA Payments to be distributed to the Aggrieved Employees based on the number of their respective PAGA Pay Periods. (Agreement at ¶

3.3(d).) As set forth in the accompanying proof of service, the LWDA has been served with this motion and the Agreement. Decl. Nordrehaug at ¶22.

III. CASE BACKGROUND

The description of the case and claims, along with the procedural history is set forth in the Declaration of Kyle Nordrehaug at ¶¶ 7-14. The Parties engaged in thorough investigation and the exchange of documents and information in connection with the Action over three years which permitted Class Counsel to perform a thorough analysis of the claims. Decl. Nordrehaug, ¶¶ 10 and 14. The Parties participated in mediation on June 8, 2023 with Jeffrey Krivis (and two previous all-day mediations on May 19, 2022 and August 18, 2022), which after arms' length negotiations, resulted in this Settlement. Decl. Nordrehaug, ¶12.

IV. THE SETTLEMENT MEETS THE CRITERIA NECESSARY FOR THIS COURT TO GRANT PRELIMINARY APPROVAL

California "[p]ublic policy generally favors the compromise of complex class action litigation." *Nordstrom Comm'n Cases*, 186 Cal. App. 4th 576, 581 (2010) quoting *Cellphone Termination Fee Cases*, 180 Cal.App.4th 1110, 1117-18 (2009). Class action settlements are approved where the proposed settlement is "fair, adequate and reasonable." *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996) (citing *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983)).

Preliminary approval is the first of three steps that comprise the approval procedure for settlements of class actions. The second step is the dissemination of notice of the settlement to all class members. The third step is a final settlement approval hearing, at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented, and class members may be heard regarding the settlement. *See Dunk*, 48 Cal.App.4th at 1801; *Manual for Complex Litigation, Second* §30.44 (1993); Cal. Rules of Court, rule 3.769.

The primary question presented on an application for preliminary approval of a proposed class action settlement is whether the proposed settlement is "within the range of possible approval." *Manual for Complex Litigation*, Second §30.44 at 229; *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th

Cir. 1982).[2] Preliminary approval is merely the prerequisite to giving notice so that "the proposed settlement... may be submitted to members of the prospective Class for their acceptance or rejection." *Sayaman v. Baxter Healthcare Corp.*, 2010 U.S. Dist. LEXIS 151997, *3 (C.D. Cal. 2010). There is "a presumption of fairness . . . where . . . [a] settlement is reached through arms-length bargaining." *Wershba v. Apple Computer, Inc.,* 91 Cal.App.4th 224, 245 (2001) (citation omitted); see also *Cho v. Seagate Tech. Holdings, Inc.*, 177 Cal. App. 4th 734, 742-45 (2009) (upholding trial court's determination that settlement was "fair, reasonable and adequate" where the settlement "provided valuable benefits to the class … that were 'particularly valuable in light of the risks plaintiff would have faced if she proceeded to litigate her case.'"); *Newberg*, 3d Ed., §11.41, p.11-88. However, the ultimate question of whether the proposed settlement is fair, reasonable and adequate is made after notice of the settlement is given to the class members and a final settlement hearing is held by the Court.

A. <u>The Role Of The Court In Preliminary Approval Of A Class Action Settlement</u>

The approval of a proposed settlement of a class action is a matter within the broad discretion of the trial court. *Wershba, supra,* 91 Cal.App.4th at 234-235; *Dunk,* 48 Cal.App.4th 1794. In considering a potential settlement for preliminary approval purposes, the trial court does not have to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute, and need not engage in a trial on the merits. *Wershba*, *supra*, 91 Cal.App.4th at 239-40; *Dunk*, *supra*, 48 Cal.App. 4th at 1807. The Ninth Circuit explains, "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Officers for Justice*, 688 F.2d at 624. Thus, when analyzing the settlement, the amount is "not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Officers for Justice*, 688 F.2d at 625, 628.

With regard to class action settlements, the opinions of counsel should be given considerable weight both because of counsel's familiarity with this litigation and previous experience with cases

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[2] California courts look to federal authority on class actions. *Vasquez v. Superior Court*, 4 Cal.3d 800, 821 (1971). "It is well established that in the absence of relevant state precedents trial courts are urged to follow the procedures prescribed in Rule 23 of the Federal Rules of Civil Procedure for conducting class actions." *Frazier v. City of Richmond*, 184 Cal. App.3d 1491, 1499 (1986), *citing Green v. Obledo*, 29 Cal.3d 126, 145-146 (1981).

such as these. *Officers for Justice*, 688 F.2d at 625. As a result, courts hold that the recommendation of counsel is entitled to significant weight. *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004).

B. Factors To Be Considered In Granting Preliminarily Approval

A number of factors are to be considered in evaluating a settlement for purposes of preliminary approval. In determining whether to grant preliminary approval, the court considers whether the "(1) the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, (2) has no obvious deficiencies, (3) does not improperly grant preferential treatment to class representatives or segments of the class, and (4) falls within the range of possible approval." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007). Courts hold that "a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 128 (2008). Here, the Settlement meets all of these criteria for preliminary approval and therefore the presumption applies.

1. The Settlement is the Product of Serious, Informed and Arm's Length Negotiations by Experienced Counsel

This settlement is the result of extensive and hard-fought litigation as well as negotiations before an experienced and well-respected mediator. Defendant has expressly denied and continues to deny any wrongdoing or legal liability arising out of the conduct alleged in the Action. Plaintiff and Class Counsel have determined that it is desirable and beneficial to the Class to resolve the Released Class Claims of the Class in accordance with this Settlement.[3]

Class Counsel are experienced and qualified to evaluate the class claims, the defenses asserted, and the risks and benefits of trial and settlement, and Class Counsel are particularly experienced in wage and hour employment class actions, as Class Counsel has previously litigated and certified similar claims against other employers. Decl. Nordrehaug at ¶ 31; Declaration of Brian J. St. John at ¶¶ 2-7.

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[3] The release applicable to the Class is appropriately tethered to the allegations in the Action. (See Agreement at ¶¶ 1.37 and 6.2.)

The view of qualified and well-informed counsel that a class action settlement is fair, adequate, and reasonable is entitled to significant weight. *See Kullar*, 168 Cal. App. 4th at 133 (the trial court "undoubtedly should continue to place reliance on the competence and integrity of counsel, the involvement of a qualified mediator, and the paucity of objectors to the settlement."); *Dunk*, 48 Cal. App. 4th at 1802.

The Parties attended an arms-length mediation session with Jeffrey Krivis, a respected and experienced mediator of wage and hour class actions, in order to reach this Settlement (and the Parties, in their separate cases, also attended two prior full-day mediations). In advance of and in preparation for the mediation, Defendant provided Class Counsel with extensive payroll, time punch, and employment data and other pertinent information regarding the Class Members, various internal documents, and other compensation and employment-related materials. Class Counsel analyzed the data with the assistance of damages expert Berger Consulting and prepared and submitted a mediation brief to the mediator. The final settlement terms were negotiated and set forth in the Agreement now presented for this Court's approval. Decl. Nordrehaug at ¶ 5. Importantly, Plaintiffs and Class Counsel believe that this Settlement is fair, reasonable and adequate.

As consideration for this Settlement, the Gross Settlement Amount to be paid by Defendant is Two Million Four Hundred Seventy Thousand Dollars ($2,470,000). The Settlement is all-in with no reversion to Defendant and no need to submit a claim form. Decl. Nordrehaug at ¶ 3.

Class Counsel investigated the facts of the class action. Extensive formal discovery was performed, including multiple rounds of written discovery, depositions, and the production of 33,000 pages of relevant documents, and the Parties engaged in several discovery motions, conferrals, and informal discovery conferences. Class Counsel engaged in a thorough review and analysis of the relevant documents and data with the assistance of an expert. Accordingly, the agreement to settle did not occur until Class Counsel possessed substantial and sufficient information to make an informed judgment regarding the likelihood of success on the merits and the results that could be obtained through further litigation. In addition, Class Counsel previously negotiated settlements with other employers in actions involving nearly identical issues and analogous defenses. Based on the foregoing data and their own independent investigation, evaluation and experience, Class Counsel believes that the settlement with Defendant on the terms set forth in the Agreement is fair, reasonable, and adequate and is in the best interest of the Class in light of all known facts and circumstances, including the risk of significant delay, defenses asserted by Defendant, and potential appellate issues. Decl. Nordrehaug at ¶ 14.

Plaintiffs and Class Counsel recognize the expense and length of continuing to litigate and trying this Action against Defendant through possible appeals which could take several years. Class Counsel has also taken into account the uncertain outcome and risk of litigation, especially in complex class actions such as this Action. Class Counsel is also mindful of and recognize the inherent problems of proof under, and alleged defenses to, the claims asserted in the Action. Based upon their evaluation, Plaintiffs and Class Counsel have determined that the Settlement set forth in the Agreement is in the best interest of the Class Members. Decl. Nordrehaug, ¶ 23.

Here, there can be no dispute that the litigation has been hard-fought with aggressive and capable advocacy on both sides. The Parties were represented by experienced and capable counsel who zealously advocated their positions. Accordingly, "[t]here is likewise every reason to conclude that settlement negotiations were vigorously conducted at arms' length and without any suggestion of undue influence." *In re Wash. Public Power Supply System Sec. Litig.*, 720 F. Supp. at 1392.

2. The Settlement Has No "Obvious Deficiencies" and Falls Well Within the Range for Approval

The proposed Settlement herein has no "obvious deficiencies" and is well within the range of possible approval. All Class Members will receive an opportunity to participate in the Settlement and receive payment according to the same formula. (Agreement at ¶ 3.3(e).) Based upon 2,137 Class Members who collectively worked approximately 237,767 Workweeks, the Gross Settlement Amount provides an average value of $1,155 per Class Member and more than $10 per Workweek and after deductions the Net Settlement Amount provides an average recovery of $691.38 per Class Member and a recovery of $6.21 per Workweek. Decl. Nordrehaug, ¶6.

The calculations to determine Plaintiffs' claimed amount due to the Class at the time of the mediation were calculated by Berger Consulting, Plaintiffs' damage expert. As to the Class whose claims are at issue in this Action, Plaintiffs utilized the expert to analyze the data and determine the potential unpaid wages for the employees. The maximum potential damages were calculated to be $5,167,678 for the alleged unpaid minimum and overtime wages due to off the clock, or during break, work based upon 15 minutes per shift, $483,703 for alleged meal period damages based upon a 3.6% potential violation rate for shifts worked and after deducting the amount already paid for meal period premiums, $588,971 for alleged rest period damages based upon the same potential 3.6% violation rate, $520,025 for alleged unreimbursed business expenses for uniform maintenance, cleaning, and/or purchase and personal cell phone usage at $10 per month, and $877,827 for alleged underpayment of gratuity compensation payments. Failure to properly or accurately calculate and/or pay all wages/compensation (including based on the "regular rate" of pay) are derivative (including regarding sick pay wages). Decl. Nordrehaug, ¶ 6. As a result, the total damage valuation was calculated that Defendant was subject to a maximum damage claim in the amount of $7,638,204. As to potential penalties, Plaintiff calculated that potential waiting time penalties were a maximum of between $1,032,379 and $4,129,514, depending on the predicate violation, and potential wage statement penalties were $7,397,104. The California Business & Professions Code §§ 17200, *et seq.* and failure to keep/maintain complete and accurate records claims are derivative and encompassed within the above valuations. Defendant vigorously disputed Plaintiffs' calculations and exposure theories. Decl. Nordrehaug, ¶ 6.

Consequently, the Gross Settlement Amount of $2,470,000 represents more than 32% of the maximum value of the alleged damages at issue in this case at the time this Settlement was negotiated.[4] The above maximum calculations should then be adjusted in consideration for both the risk of class certification and the risk of establishing class-wide liability on all claims. Given the amount of the settlement as compared to the potential value of claims in this case and the defenses asserted by Defendant, this settlement is fair and reasonable.[5] Clearly, the goal of this litigation has been met.

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[4] Because the PAGA claim is not a class claim and primarily is paid to the State of California, Plaintiff has not included the PAGA claim in this discussion of the value of the class claims. The PAGA claim is addressed in the Decl. Nordrehaug at ¶33.

[5] *See In re Omnivision Tech., Inc.*, 559 F. Supp. 1036, 1042 (2007) (noting that certainty of recovery in settlement of 6% of maximum potential recovery after reduction for attorney's fees was higher than median percentage for recoveries in shareholder class action settlements, averaging 2.2%-3% from

Decl. Nordrehaug, ¶6.

Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Here, a number of defenses asserted by Defendant present serious threats to the claims of the Plaintiffs and the other Class Members. Defendant asserted that its procedures and practices complied with all applicable labor and employment laws. As examples only, Defendant argued that Class Members were paid for all time worked, that all work time was timely, properly, and accurately recorded, and that all wages were properly paid (including, but not limited to, minimum wages, overtime wages, sick pay wages, gratuities, meal/rest break premiums, final pay wages, and the like). Defendant contended that its meal and rest period policies and practices fully complied with California law and Defendant did not fail to provide the opportunity for legally required meal and rest breaks (or otherwise paid the premium where applicable). Defendant contended that there was no failure to pay for business expenses. For instance, Defendant contended that and (i) any uniform maintenance, cleaning, or purchase costs were either paid or not legally required to be paid; and (ii) any personal cell phone usage for business purposes was strictly against company policy, and, if it occurred, such usage was merely convenient and voluntary such that reimbursement was not legally required. Finally, Defendant could argue that the Supreme Court decision in *Brinker v. Superior Court,* 53 Cal. 4th 1004 (2012), weakened Plaintiffs' claims, on liability, value, and class certifiability as to the meal and rest period claims. Defendant also argues that based on its lawful practices, Defendant acted in good faith and without willfulness, which if accepted would negate the claims for waiting time penalties and/or inaccurate wage statements. If successful,

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2000 through 2022); *Glass v. UBS Fin. Servs.*, 2007 U.S. Dist. LEXIS 8476 (N.D. Cal. 2007) (approving a settlement where the settlement amount constituted approximately 25% of the estimated overtime damages for the class); *Stovall-Gusman v. W.W. Granger, Inc.*, 2015 U.S. Dist. LEXIS 78671, at *12 (N.D. Cal. 2015) (granting final approval where "the proposed Total Settlement Amount represents approximately 10% of what class might have been awarded had they succeeded at trial."); *Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 459 (9th Cir. 2000) (affirming approval of a class settlement which represented "roughly one-sixth of the potential recovery".) See also *Viceral v. Mistras Grp., Inc.*, 2016 WL 5907869 (N.D. Cal. 2016) (approving wage and hour class action settlement amounting to 8.1% of full value); *Ma v. Covidien Holding, Inc.*, 2014 WL 2472316, (C.D. Cal. 2014) (approving wage and hour class action settlement worth "somewhere between 9% and 18%" of maximum valuation).

Defendant's defenses could eliminate or substantially reduce any recovery to the Class. Plaintiffs believe these defenses have potential merit and therefore present a serious risk to recovery by the Class. Decl. Nordrehaug, ¶ 24.

There was also a significant risk that, if the Action was not settled, Plaintiff would be unable to obtain a certified class and maintain the certified class through trial, and thereby not recover on behalf of any other employees. At the time of the mediation, Defendant forcefully opposed the propriety of class certification, arguing, among other things, that individual issues precluded class certification. Class Counsel is aware of other cases where certification of similar claims was denied. Further, as demonstrated by the California Supreme Court decision in *Duran v. U.S. Bank National Assn.*, 59 Cal. 4th 1 (2014), there are significant hurdles to overcome for a class-wide recovery even where the class has been certified. While other cases have approved class certification in wage and hour claims, class certification in this action was hotly disputed and the maintenance of a certified class through trial was by no means a foregone conclusion. Decl. Nordrehaug, ¶ 25.

After arm's length negotiations between experienced and informed counsel, the Parties recognized the potential risks and agreed on the Settlement with a Gross Settlement Amount of $2,470,000. As the Court held in *Glass*, where the parties faced uncertainties similar to those here:

> In light of the above-referenced uncertainty in the law, the risk, expense, complexity, and likely duration of further litigation likewise favors the settlement. Regardless of how this Court might have ruled on the merits of the legal issues, the losing party likely would have appealed, and the parties would have faced the expense and uncertainty of litigating an appeal. 'The expense and possible duration of the litigation should be considered in evaluating the reasonableness of [a] settlement.'

2007 WL 221862, at *4 (quoting *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000)).

3. The Settlement Does Not Improperly Grant Preferential Treatment To Class Representatives or Segments Of The Class

The relief provided in the Settlement will benefit all members of the Class. The Settlement does not grant preferential treatment to Plaintiffs or segments of the Class in any way. Payments to the Class Members are all determined under a neutral methodology. Each Participating Class Member will receive the same opportunity to participate in and receive payment through a neutral formula that is based upon the Workweeks for that individual. Decl. Nordrehaug, ¶ 4.

Plaintiffs will apply to the Court for Class Representative Service Payments in consideration for their service and for the risks undertaken on behalf of the Class. (Agreement at ¶ 3.3(a).) Plaintiffs performed their duties admirably by working with Class Counsel for several years in this litigation. The Declarations of the Plaintiffs are submitted herewith in support. Decl. Nordrehaug at ¶ 27. At this stage, the requested service award of $5,000 is well within the accepted range of awards for purposes of preliminary approval. *See, e.g.*, *Mathein v. Pier 1 Imps. (U.S.), Inc.,* 2018 U.S. Dist. LEXIS 71386 (E.D. Cal. 2018) (awarding $12,500 where average class member payment was $351); *Holman v. Experian Info. Sol., Inc.*, 2014 U.S. Dist. LEXIS 173698 (N.D. Cal. 2014) (approving $10,000 service award where class member recovery was $375); *Louie v. Kaiser Found. Health Plan, Inc*., 2008 WL 4473183, *7 (S.D.Cal. 2008) (awarding $25,000 service award to each of six plaintiffs in overtime class action); *Glass v. UBS Fin. Servs.*, 2007 WL 221862, *16-17 (N.D.Cal. Jan. 27 2007) (awarding $25,000 service award in overtime class action and a pool of $100,000 in enhancements). As explained in *Glass*, service awards are routinely awarded to class representatives to compensate the employees for the time and effort expended on the case, for the risk of litigation, for the fear of suing an employer and retaliation there-from, and to serve as an incentive to vindicate the statutory rights of all employees. 2007 WL 221862 at *16-17.

4. The Stage Of The Proceedings Are Sufficiently Advanced To Permit Preliminary Approval Of The Settlement

The stage of the proceedings at which this Settlement was reached also militates in favor of preliminary approval and ultimately, final approval of the Settlement. Class Counsel has conducted a thorough investigation into the facts of the class action. Class Counsel began investigating the Class Members' claims well before the Action was filed, and during the course of litigation, Class Counsel performed formal and informal discovery which included the production of tens of thousands of pages of relevant employment documents. Class Counsel conducted an extensive review and analysis of the relevant documents and data. Class Counsel was also experienced with the claims at issue here, as Class Counsel previously litigated and settled similar claims in other actions. Accordingly, the agreement to settle did not occur until Class Counsel possessed substantial and sufficient information to make an informed judgment regarding the likelihood of success on the merits and the results that could be obtained through further litigation. Decl. Nordrehaug at ¶ 28.

Based on the foregoing data and their own independent investigation and evaluation, Class Counsel is of the opinion that the Settlement with Defendant for the consideration and on the terms set forth in the Agreement is fair, reasonable, and adequate and is in the best interest of the Class in light of all known facts and circumstances, including the risk of significant delay, defenses asserted by Defendant, and numerous potential appellate issues. There can be no doubt that Counsel for both Parties possessed sufficient information to make an informed judgment regarding the likelihood of success on the merits and the results that could be obtained through further litigation. Decl. Nordrehaug at ¶ 29.

V. THE CLASS IS PROPERLY CERTIFIED FOR SETTLEMENT PURPOSES ONLY

Plaintiffs contends that the proposed settlement meet all of the requirements for class certification under California Code of Civil Procedure § 382 as demonstrated below, and therefore, the Court may conditionally certify the the Class as defined in the Agreement, for settlement purposes only, defined as follows:

> All individuals who are or have been employed by Defendant at either the JW Marriott Anaheim or the Marriott Marquis San Diego hotels in California as hourly, non-exempt employees during any portion of the Class Period.

(Agreement at ¶ 1.5.)

The Class Period is February 8, 2017 through the date of the Preliminary Approval Order, or through an earlier date pursuant to Section 9 of the Agreement. (Agreement at ¶ 1.12.)

A. California Code of Civil Procedure § 382

Plaintiffs seek certification of this Class for settlement purposes under California Code of Civil Procedure § 382. The California Supreme Court has summarized the standard for determining whether class certification is appropriate as follows:

> Code of Civil Procedure Section 382 authorizes class actions "when 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...." The party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members. (*citations omitted*). The "community of interest" requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.

Sav-On Drug Stores, Inc. v. Superior Court, 34 Cal. 4th 319, 326 (2004).

While Defendant reserves all rights to dispute that the Plaintiffs can satisfy these requirements, the Parties agree that Defendant will not dispute that these requirements may be satisfied in this case for purposes of settlement only and therefore, the proposed Class should be certified for purposes of settlement only. (Agreement at ¶ 2.11.)

B. The Proposed Class Is Ascertainable and Numerous

Plaintiffs bring this action on behalf of a Class of hourly, non-exempt employees of Defendant who worked at two particular hotel locations during the Class Period. Plaintiffs assert that all of these individuals are ascertainable because the class members can readily be determined through examination of Defendant's files. Given that the Class consists of approximately 2,137 members, Plaintiffs maintain that numerosity is clearly satisfied. *See Bowles v. Superior Court*, 44 Cal.2d 574 (1955) (class with 10 members sufficiently numerous); *Rose v. City of Hayward*, 126 Cal.App.3d 926, 934 (1981) (class of 48 members satisfies numerosity requirement.) Here, Plaintiffs assert that the 2,137 current and former employees that comprise the Class can be identified based on Defendant's records and are sufficiently numerous for class certification. Decl. Nordrehaug at ¶ 30.

C. Common Issues of Law and Fact Predominate

Predominance of common issues of law or fact does not require that the common issues be dispositive of the entire controversy or even that they be dispositive of all liability issues. 1 *Newberg on Class Actions*, Section 4.25 at 4-82, 4-83 (1992). "Predominance is a comparative concept, and 'the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate.'" *Sav-On*, 34 Cal. 4th at 334.

Commonality exists if there is a predominant common legal question regarding how an employer's policies impact its employees. *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524, 1536 (2008) ("[T]he common legal question remains the overall impact of Diva's policies on its drivers.") Whether the plaintiff is likely to prevail on their theory of recovery is irrelevant at the certification stage since the question is "essentially a procedural one that does not ask whether an action is legally or factually meritorious." *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-440 (2003).

Here, Plaintiffs contend that common questions of law and fact are present based on Defendant's alleged unlawful policies, practices, or procedures. Common questions include, for instance, whether Defendant unlawfully failed to properly and accurately calculate and pay all overtime, regular, minimum and premium wages (including for sick pay), gratuities, and other compensation, whether Defendant's failure to pay wages or other compensation, without abatement or reduction, in accordance with the California Labor Code, was willful, whether Defendant failed to provide fully compliant meal and rest periods to Class Members, or proper premiums in lieu thereof, whether Class members were lawfully compensated for all hours worked at their correct rates of pay, whether Defendant failed to provide required business expense reimbursements, whether Defendant failed to provide accurate itemized wage statements, wage reporting, and records maintenance as required by applicable law, whether Defendant failed to pay all wages due within the required time during employment and/or upon discharge or resignation, whether Defendant engaged in unfair business practices in violation of California Business & Professions Code § 17200 et seq., and whether Class Members are entitled to damages, compensation, and/or penalties as a result of these practices, and the like. Plaintiffs contend that certification of this Class is appropriate because Defendant allegedly engaged in uniform practices with respect to the Class Members. As a result, these common questions of liability could be answered on a class wide basis. Decl. Nordrehaug, ¶ 30. Defendant disputes that common questions predominate but will not oppose such a finding for purposes of this Settlement only.

D. The Claims of the Plaintiffs Are Typical of the Class Claims

The typicality requirement requires the Plaintiffs to demonstrate that the members of the class have the same or similar claims as the Plaintiff. "The typicality requirement is met when the claims of the [p]laintiff arise from the same event or are based on the same legal theories." *Tate v. Weyerhaeuser Co.*, 723 F.2d 598, 608 (8th Cir. 1983). In *Hanlon*, *supra*, 150 F.3d at 1020, the Ninth Circuit held that "[u]nder the rule's permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical."

In the Action, Plaintiffs contend that the typicality requirement is fully satisfied. Plaintiffs, like every other member of the Class, were employed by Defendant as non-exempt employees at either the JW Marriott Anaheim or the Marriott Marquis San Diego hotels, and, like every other member of the Class, were subject to the same employment practices. Plaintiffs, like every other member of the Class, also claim owed compensation as a result of the Defendant's uniform company policies and practices. Thus, the claims of Plaintiff and the members of the Class arise from the same course of conduct by Defendant, involve the same issues, and are based on the same legal theories. Decl. Nordrehaug at ¶ 30. For purposes of settlement only, Plaintiffs assert that the typicality requirement is met as to the common issues presented in this case. Defendant disputes typicality, but does not oppose a finding of typicality for purposes of this Settlement only.

E. The Class Representation Fairly and Adequately Protected the Class

Plaintiffs contends that the Class Members are adequately represented here because Plaintiffs and representing counsel (a) do not have any conflicts of interest with other class members, and (b) will prosecute the case vigorously on behalf of the class. *Hanlon*, 150 F.3d at 1020. This requirement is met here. First, Plaintiffs are well aware of their duties as the representatives of the Class and have actively participated in the prosecution of this case to date. Plaintiffs effectively communicated with Class Counsel, provided documents and information to Class Counsel, participated in the investigation and resolution of the Action, and responded to discovery. The personal involvement of the Plaintiffs was essential to the prosecution of the Action and the monetary settlement reached. Second, Plaintiffs retained competent counsel who are experienced in employment class actions and who have no conflicts. Decl. Nordrehaug at ¶ 31; Declaration of Brian J. St. John at ¶¶ 2-7. Third, there is no antagonism between the interests of the Plaintiffs and those of the Class. Both the Plaintiffs and the Class Members seek monetary relief under the same set of facts and legal theories. Under such circumstances, there can be no conflicts of interest, and adequacy of representation is satisfied. *Reaves v. Ketoro, Inc.*, 2020 U.S. Dist. Lexis 167926, *23 (C.D. Cal. 2020). Defendant disputes that the adequacy requirement is satisfied but will not oppose such a finding for purposes of this Settlement only.

F. The Superiority Requirement Is Met

To certify a class, the Court must also determine that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. "Where classwide litigation of common issues will reduce litigation costs and promote greater efficiency, a class action may be superior to other methods of litigation." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir.

1996). As courts have previously observed:

> Absent class treatment, each individual plaintiff would present in separate, duplicative proceedings the same or essentially the same arguments and evidence, including expert testimony. The result would be a multiplicity of trials conducted at enormous expense to both the judicial system and the litigants.

Sav-On, 34 Cal. 4th at 340.

Here, Plaintiffs contend that a class action is the superior mechanism for resolution of the claims as pled by the Plaintiffs. While Defendant disputes that class treatment is superior, Defendant does not dispute a finding of superiority in this action for purposes of this Settlement only.

VI. THE PROPOSED METHOD OF CLASS NOTICE IS APPROPRIATE

The Court has broad discretion in approving a practical notice program. The Parties have agreed upon procedures by which the Class Members will be provided with written notice of the Settlement similar to that approved and utilized in hundreds of class action settlements. In accordance with the Agreement, Defendant will provide to the Administrator a confidential electronic spreadsheet containing the Class Data. (Agreement at ¶ 4.2.) Within 14 days after receiving the Class Data, the Administrator will mail the Class Notice to all Class Members via first-class U.S. Mail using the most current mailing address information available. (Agreement at ¶ 8.3(b).) A Spanish translation of the Class Notice Packet will be included in the mailing. (Agreement at ¶ 1.11.)

The Class Notice, drafted jointly and agreed upon by the Parties through their respective counsel and to be approved by the Court, includes all relevant information. (*See* Exhibit "A" to the Agreement.) The Class Notice will include, among other information: (i) information regarding the Action; (ii) the impact on the rights of the Class Members if they do not opt out, including a description of the applicable releases; (iii) information to the Class Members regarding how to opt out and how to object to the Settlement; (iv) the estimated Individual Class Payment for each of the Class Members; (iii) the amount of attorneys' fees and expenses to be sought; (v) the amount of the Plaintiffs' service award requests; and (vi) the anticipated expenses of the Administrator. Pursuant to the Court's guidelines, the Class Notice mailing will also include an Objection form, Exclusion form and Dispute form. (Agreement at ¶ 1.11.) Decl. Nordrehaug at ¶ 32.

The Class Notice will state that the Class Members shall have forty-five (45) days from the date that the Class Notice is mailed to them (the "Response Deadline") to request exclusion (opt-out) or to submit a written objection, which will be extended to sixty (60) days in the event of a re-mailing. (Agreement at ¶¶ 1.18, 1.43, 8.4, 8.6.) Class Members shall be given the opportunity to object to the Settlement and/or requests for attorneys' fees and expenses and to appear at the Final Approval Hearing. (Agreement at ¶ 8.6.) Class Members who do not submit a timely and proper request to opt-out will automatically receive a payment of their Individual Class Payment. This notice program was designed to meaningfully reach the Class Members and it advises them of all pertinent information concerning the Settlement. Decl. Nordrehaug at ¶ 32. The mailing and distribution of the Class Notice satisfies the requirements of due process and is the best notice practicable under the circumstances and complies with Rules of Court 3.766 and 3.769(f).

VII. CONCLUSION

Plaintiffs respectfully request that the Court preliminarily approve the proposed settlement and sign the proposed Preliminary Approval Order, and schedule the final approval hearing for the proposed date that is at least one hundred fifty (150) days from the date of Preliminary Approval.

Dated: January 12, 2024

BLUMENTHAL NORDREHAUG BHOWMIK DE BLOUW LLP

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