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8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF SAN BERNARDINO

11 GILBERT VALADEZ, on behalf of himself,
12 all others similarly situated, and the general
13 public,

14 Plaintiff,

15 vs.

16 STATER BROS. MARKETS; a California
corporation, and DOES 1-50, inclusive,

17 Defendants.

Case No. CIVDS1701283

Assigned For All Purposes To The Honorable
Bryan F. Foster, Department S22

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES;
DECLARATION OF SHAUN SETAREH;
[PROPOSED] ORDER**

[Filed Concurrently with the Declaration of
Shaun Setareh; Declaration of Farrah Grant and
Proposed Order]

Date: March 12, 2019
Time: 8:30 a.m.
Place: Department S22

1 TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on March 12, 2019 at 8:30 a.m. or as soon thereafter as the
3 matter may be heard in Department S22 of the above captioned Court located at 247 West Third
4 Street, San Bernardino, California, 92415 Plaintiff Gilbert Valadez ("Plaintiff") will and does hereby
5 move this Court for an order:

- 6 1. Granting class certification of the Settlement Class, solely for settlement purposes pursuant to
7 Code of Civil Procedure section 382;
- 8 2. Preliminarily approving the Joint Stipulation of Class Action Settlement and Release
9 ("Settlement");
- 10 3. Appointing counsel for Plaintiff Setareh Law Group as Class Counsel;
- 11 4. Appointing Plaintiff Gilbert Valadez as Class Representative;
- 12 5. Approving the notice procedure set forth in the Settlement Agreement and directing that notice
13 be given to class members consistent therewith;
- 14 6. Appointing KCC LLC as the Settlement Administrator; and
- 15 7. Scheduling a hearing date for motions for final approval of class action settlement and awards
16 of attorneys' fees and costs.

17 Good cause exists to grant this Motion because:

- 18 a. The Settlement Class meets all the requirements for class certification for settlement
19 purposes under Code of Civil Procedure section 382;
- 20 b. The Settlement Agreement is a fair, adequate, and reasonable compromise of the
21 disputed wage claims based on Defendant's allegedly unlawful policies;
- 22 c. Plaintiff and Class Counsel are adequate to represent the Settlement Class;
- 23 d. The proposed notice procedures and related forms comply with California Rules of
24 Court 3.766(d) and (e), and adequately apprise Class Members of their rights and fully
25 comport with due process; and
- 26 e. Based on the foregoing, notice should be directed to the Class Members and a final
27 fairness hearing should be scheduled.

28 This Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points

1 and Authorities, the Declaration of Shaun Setareh in support thereof, all papers and pleadings on file with
2 the Court in this action, all matters judicially noticeable, and on such oral and documentary evidence as
3 may be presented in connection with the hearing on the Motion.

4
5 DATED: January 21, 2019

SETAREH LAW GROUP

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SHAUN SETAREH
THOMAS SEGAL
FARRAH GRANT
Attorneys for Plaintiff
GILBDER VALADEZ

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **II. INTRODUCTION**

3 The parties to this case have reached a settlement which provides for a non-revisionary fund
4 of \$4,500,000 to settle claims that the putative class of non-exempt retail workers were not paid
5 overtime wages by not properly calculating the regular rate of pay.¹ There are approximately 34,695
6 class members. No class member will have to make a claim in order to recover; instead class members
7 will be mailed their share of the settlement directly. No money will revert to the Defendant; instead
8 any uncashed checks will go to the *cy pres* designee California Rural Legal Assistance.

9 The “Net Settlement Amount” is defined as the amount remaining in the Settlement Amount
10 after the following deductions are made: (1) attorneys’ fees to Class Counsel (up to \$1,500,000); (2)
11 up to \$25,000 in actual litigation costs and expenses to Class Counsel; (3) up to \$5,000 as an incentive
12 award to Plaintiff; (4) \$75,000 to be paid to the California Labor and Workforce Development Agency
13 as civil penalties under PAGA; (5) reasonable settlement administration costs to be paid to the
14 Settlement Administrator up to \$100,000; and (6) Class Member’s portion of employee payroll taxes
15 (estimated by KCC LLC to be \$110,629.50); all of which are subject to court approval. Settlement
16 Agreement ¶ I(Q), III(C, D).

17 The settlement is an excellent one in light of the risks of litigation. After a daylong mediation
18 and having reviewed data provided by Defendant, the parties were able to reach a settlement that is
19 now before this Court. This settlement guarantees a recovery for the class and avoids the expense
20 and uncertainty of litigation. The Court should grant preliminary approval so that notice may go out
21 to the class.

22 **III. OVERVIEW OF THE LITIGATION**

23 Plaintiff Gilbert Valadez worked as a non-exempt hourly retail employee for Defendant Stater
24 Bros. Markets (“Defendant”) in California. The lawsuit alleges that class members were not paid all
25 of their overtime wages because the regular rate of pay was not properly calculated, as well as
26

27 ¹ A true and correct copy of the Settlement Agreement is attached to the Declaration of
28 Shaun Setareh as Exhibit 1.

1 derivative claims for not being provided with compliant written wage statements and the failure to
2 timely pay all wages at the time of separation.

3 **A. PROCEDURAL HISTORY**

4 On June 14, 2016, Plaintiff Gilbert Valadez filed this action in Los Angeles Superior Court,
5 assigned Case No. BC619332. The Complaint alleged violations of California's wage and hour laws,
6 including but not limited to claims for failure to pay hourly wages, failure to provide accurate written
7 wage statements, failure to timely pay all final wages and unfair competition. On July 20, 2016,
8 Plaintiff filed a First Amended Complaint adding a Private Attorney General Act ("PAGA") claim.

9 On or around August 16, 2016, the case was transferred from Los Angeles Superior Court to
10 San Bernardino Superior Court per the parties' joint stipulation.

11 On March 2, 2018 the parties filed a joint stipulation to file a Second Amended Complaint to
12 refine the class definition. The Second Amended Complaint alleges causes of action for: (1) failure
13 to pay proper overtime, in violation of Labor Code sections 510 and 1194, by not including shift
14 differential premiums and bonuses in calculating overtime wages; (2) failure to provide complete and
15 accurate wage statements, in violation of Labor Code section 226; (3) failure to timely pay all earned
16 wages due at separation of employment, in violation of Labor Code sections 201, 202, and 203; (4)
17 unfair business practices, in violation of Business and Professions Code section 17200 et seq.; and
18 (5) civil penalties under the Labor Code Private Attorneys General Act of 2004 (Lab. Code, § 2698
19 et seq.).

20 The Parties agree that for purposes of this settlement, Plaintiff shall file a Third Amended
21 Complaint ("TAC") to clarify the existing allegations of the "regular rate" allegations to include night
22 shift premiums, and any other pay based on the existing "regular rate" theory, and to add a cause of
23 action for alleged violation of Labor Code 227.3 related to the failure to pay vacation pay at the
24 regular rate of pay. The Parties agree that Defendant's Answer filed in response to the Second
25 Amended Complaint will be deemed as the responsive pleading to the TAC.

26 //

27 //

1 **B. SUMMARY OF CLAIMS**

2 **1. Regular Rate of Pay**

3 Plaintiff and class members were non-exempt retail employees who worked in Defendant's
4 supermarkets in California. Plaintiff and class members earned shift premium pay, such as Sunday
5 premium pay or night shift premium pay and overtime during the relevant time period. The data
6 provided by Defendant in advance of mediation shows that many class members regularly worked
7 overtime hours in the same pay period that they received night shift premium pay or Sunday premium
8 pay.

9 Plaintiff alleges that while Defendant pays overtime to its retail employees, it did not properly
10 factor in shift premium pay such as Sunday premium pay or night shift premium pay when calculating
11 the regular rate of pay. The regular rate of pay under California law includes all remuneration for
12 employment paid to, on behalf of, the employee. This requirement includes, but is not limited to,
13 shift differentials. California law mandates that non-exempt employees be paid overtime at a rate of
14 one-and-one-half times their "regular rate of pay" for all hours worked over eight (8) in a workday or
15 over forty (40) in a workweek. Plaintiff alleges that Defendant failed to properly include the shift
16 differentials when calculating overtime compensation paid to class members. Plaintiff seeks to file a
17 TAC for alleged violation of Labor Code 227.3 related to the failure to pay vacation pay at the correct
18 regular rate of pay.

19 The California Supreme Court recently issued a ruling in *Alvarado v. Dart Container*
20 *Corporation of California* regarding the calculation of a flat rate bonus (like the one at issue here)
21 and overtime. (4 Cal.5th 542, March 5, 2018). The defendant employer in *Dart* paid the hourly
22 employee class members an "attendance bonus" if they worked on a Saturday or Sunday.² *Dart* states:

23 an employee's "regular rate of pay" for purposes of Labor Code section 510 and the
24 IWC wage orders is not the same as the employee's straight time rate (i.e., his or her
25 normal hourly wage rate). Regular rate of pay, which can change from pay period to
26 pay period, includes adjustments to the straight time rate, reflecting, among other

27 ² In both *Dart* and the instant case, the weekend premium pay is payable even if the
28 employee works no overtime at all during the relevant pay period.

1 things, shift differentials and the per hour value of any nonhourly compensation the
2 employee has earned...

3 The attendance bonus must not be viewed in isolation; rather, it is a component of the
4 employee's regular rate of pay for the entire pay period, and overtime worked at any
5 point during the workweek must, by law, be compensated at a multiple of that regular
6 rate of pay.

7 The *Dart* court ruled that when calculating overtime in pay periods in which an employee earns a
8 flat rate bonus, employers must divide the total compensation earned in a pay period by only the non-
9 overtime hours worked by an employee. This decision formally breaks from the federal manner of
10 calculating overtime which allows for dividing total compensation by total hours worked to compute
11 overtime pay. Based on the data provided by Defendant, Plaintiff alleges that Defendant failed to include
12 premium pay in calculating class member's regular rate.

12 **2. Collective Bargaining Agreement**

13 Defendant asserted various defenses in response to Plaintiff's allegations, including the
14 defense that Defendant had a controlling Collective Bargaining Agreement ("CBA"). Under Cal. Lab.
15 Code § 514, "Sections 510 and 511 do not apply to an employee covered by a valid collective
16 bargaining agreement if the agreement expressly provides for the wages, hours of work, and working
17 conditions of the employees, and if the agreement provides premium wage rates for all overtime hours
18 worked and a regular hourly rate of pay for those employees of not less than 30 percent more than the
19 state minimum wage."

20 Employees covered by a collective bargaining agreement that undisputedly provided
21 "premium wage rates for all overtime hours worked" under Section 514 of the California Labor Code
22 are not entitled to additional daily overtime. *Vranish v. Exxon Mobil Corp.*, 223 Cal.App.4th 103
23 (Cal.App. 2 Dist., 2014).

24 Defendant states that there was an applicable CBA that controls class member's rate of pay.
25 (Setareh Decl. Exhibit 3.) The CBA states in relevant part:

26 F. OVERTIME. All work performed in excess of eight (8) hours in any one
27 (1) day, or in excess of forty (40) hours in any one (1) workweek, shall be deemed
28 overtime and paid for at the overtime rate of time and one-half (1½) the employee's
regular rate of pay...

I. SIXTH OR SEVENTH DAY/MEAT. All work performed on the sixth

1 (6th) day in the workweek by Meat Department employees shall be paid for at the
2 rate of time and one-half (1½) the regular rate of pay of the employee involved, or
3 the applicable rate for Sundays and holidays as specified in this Article. No Meat
4 Department employee shall be required to work seven (7) consecutive days in the
5 workweek; however, in case of emergency work performed on the seventh (7th)
day in the workweek, or work performed on the sixth (6th) day in a holiday
workweek, exclusive of the holiday, triple pay or three (3) times the employee's
regular rate shall be paid....

6 B. HOLIDAY PREMIUM. Work can be performed on any of the
7 hereinabove mentioned holidays with the exception of Thanksgiving Day and
8 Christmas Day. However, work as such shall be compensated for at three (3) times
9 the straight-time hourly rate of pay for all hours worked. Extra Meat Department
employees working on a holiday shall be paid for their full eight (8) hour shift at
the rate of triple (3) times the regular rate of pay for the employee involved. Said
triple-time shall include any premium pay or overtime that may be applicable, and
includes pay for the holiday itself....

10 C. HOLIDAY WEEK. A regular holiday workweek shall consist of the
11 holiday itself and four (4) other eight (8) hour days. A full-time employee, not
12 working on a holiday, shall receive eight (8) hours' pay for the holiday in addition
13 to the pay specified in this Agreement for the other five (5) days referred to above.
All time worked over the forty (40) hours, exclusive of the holiday, shall be paid
for at the rate of time and one-half (1½) the employee's regular rate of pay, except
when Sunday is worked, and in that event, the higher rate shall apply....

14 D. PART-TIME EMPLOYEES. For holidays not worked, part-time
15 employees shall receive holiday pay up to eight (8) hours prorated to the number of
16 hours worked in the holiday week up to forty (40) hours. A part-time employee, as
17 used in this Section, is defined to include an employee regularly scheduled for
thirty-six (36) hours per week or less. All time worked over forty (40) hours,
exclusive of the holiday, shall be paid for at the rate of time and one half (1½) the
employee's regular rate of pay, except when Sunday is worked, and in that event,
the higher rate shall apply.

18 E. Any employee who reports to work as scheduled shall receive a minimum
19 of four (4) hours work at his regular rate of pay, provided he is available for said
20 hours and performs whatever work is assigned to him. The provision of this Section
21 shall be inapplicable in the event of Acts of God and other circumstances not within
the control of the Company.

22 (Setareh Decl. Exhibit 3 page 20, 31, 32, 82). Defendant states that it acted in accordance with
23 the CBA in calculating employee's pay and that they fully paid employee's all wages owed.
24 Defendant states that like in *Vranish*, class members are not entitled to additional daily overtime
25 because the class members are covered by a collective bargaining agreement that provided premium
26 wage rates for all overtime hours worked under Section 514 of the California Labor Code.

27 Plaintiff argues that the CBA is invalid, in part because the CBA does not pay all employees
28 "not less than 30 percent more than the state minimum wage." (Cal. Lab. Code § 514).

1 Regardless, Defendant's reliance on the CBA is a potentially persuasive defense to the
2 assertion that Defendant's actions were willful. Defendant has vigorously argued that, irrespective of
3 their arguments on the merits of Plaintiff's wage and hour claims, Plaintiff still would not prevail in
4 showing that Defendant acted with the requisite intent necessary for the alleged claims for penalties
5 under Labor Code §§ 203 and 226. (*See Choate v. Celite Corp.* (2013) 215 Cal.App.4th 1460
6 (reversing award of § 203 penalties based on good faith defense where underlying wage claim
7 presented issue of first impression).)

8 **3. Derivative Claims**

9 **a. Wages Upon Separation of Employment**

10 Plaintiff's claim under Labor Code §§ 201, 202 and 203 for failure to pay final wages is
11 derivative of the regular rate claim.

12 **b. Wage Statements**

13 Plaintiff also alleges a derivative violation of Lab. Code § 226 for Defendant's alleged failure
14 to provide Class Members with accurate written wage statements, as a result of the underlying Labor
15 Code violations.

16 **c. UCL**

17 Plaintiff's claim under the UCL also is derivative of the underlying Labor Code violations.
18 That is, Defendant is alleged to have engaged in unfair and unlawful practices of denying wages to
19 Plaintiff and all others similarly situated.

20 **4. Class Certification**

21 Plaintiff contends that this case is amenable to class treatment and, had the case moved
22 forward, he would have sought class certification. As explained in detail *infra*, Plaintiff assert that
23 the class is readily ascertainable and sufficiently numerous, class members share common questions
24 of law and fact that predominate over any tangential individualized inquiries, Plaintiff's claims are
25 typical of the class he seeks to represents, Plaintiff and his counsel are adequate representatives of
26 the class, and the class action mechanism is superior to numerous, individual lawsuits.

27 Summary judgment was denied and class certification was granted in a case where Office
28 Depot failed to pay the named plaintiff only \$0.23 in overtime compensation. *Howard David Provine*,

1 *et al. v. Office Depot, Inc.*, United States District Court, Northern District of California Case No. C
2 11-00903 SI, 2012 WL 2711085. (Setareh Decl. Exhibit 3). In the *Provine* case, the plaintiff
3 contended that Office Depot violated California law by not factoring Bravo Awards into the regular
4 rate of pay of employees who earned a Bravo Award during a period in which they earned overtime.
5 Just as the Court in *Provine* found this issue certifiable, Plaintiff here would be able to establish the
6 elements needed for class certification.

7 Thus, although Plaintiff was prepared to litigate the case through class certification and,
8 eventually, to trial, Plaintiff also recognized that there were significant risks in going forward with
9 litigation, both on the merits and in terms of class certification.

10 **C. Mediation and Settlement Discussions**

11 On July 11, 2018, the parties participated in a mediation session with Steve Rottman, Esq., a
12 highly respected mediator with extensive experience resolving wage and hour class actions. In
13 connection with the mediation, Plaintiff obtained discovery including, among other things, class
14 information, a sampling of time and pay records for class members, Defendant's relevant policies,
15 and Plaintiff's personnel records. (Declaration of Shaun Setareh ("Setareh Decl.") ¶ 9.) Before
16 mediation, Plaintiff investigated the claims asserted, the legal authorities supporting and challenging
17 them, retained an expert to assist in analyze the data and calculating damages and Plaintiff prepared
18 a mediation brief. (*Id.*, ¶¶ 10, 25.)

19 The parties reached a settlement as a result of the mediation. Plaintiff now submits the
20 Settlement to the Court for preliminary approval.

21 **IV. OVERVIEW OF THE SETTLEMENT**

22 The complete terms of the Settlement are set forth in Exhibit 1 to the Declaration of Shaun
23 Setareh, filed concurrently herewith. The Settlement provides for a Settlement Amount of \$4,500,000
24 paid by Defendant on behalf of the defined Settlement Class. The essential terms are summarized
25 below.

26 **A. Settlement Class Definition**

27 The "Settlement Class" is defined as follows: "All non-exempt retail employees who were
28

1 employed between June 14, 2012 and September 6, 2018 and (1) worked overtime and received a
2 premium rate during the same pay period. Defendant estimates that the Class Members consist of
3 approximately 34,695 individuals.” Settlement Agreement ¶¶ I(F).

4 **B. Allocation of Settlement Funds**

5 The “Net Settlement Amount” is defined as the amount remaining in the Settlement Amount
6 after the following deductions are made: (1) attorneys’ fees to Class Counsel (up to \$1,500,000); (2)
7 up to \$25,000 in actual litigation costs and expenses to Class Counsel; (3) up to \$5,000 as an incentive
8 award to Plaintiff; (4) \$75,000 to be paid to the California Labor and Workforce Development
9 Agency as civil penalties under PAGA; (5) reasonable settlement administration costs to be paid to
10 the Settlement Administrator up to \$100,000; and (6) Class Member’s portion of employee payroll
11 taxes (estimated by KCC LLC to be \$110,629.50); all of which are subject to court approval.
12 Settlement Agreement ¶ I(Q), III(C, D).

13 Class members who do not request exclusion will receive payment on a pro-rata basis through
14 calculation of number of workweeks worked. Settlement Agreement ¶ III(F)(1).

15 **C. Release of Claims**

16 The “Released Claims” means:

17 In exchange for the consideration, undertakings, and covenants undertaken by Stater
18 Bros. in this Settlement, all Class Members will release all state and federal wage
19 claims against Defendant, and its present and former parents, subsidiaries, co-
20 employers, and each of their respective present and former owners, boards, directors,
21 officers, trustees, shareholders, members, partners, employees, agents, attorneys,
22 representatives, successors and assigns, and present and former parents, subsidiaries,
23 affiliated and related parties, and each of them, of any and all claims, debts, liabilities,
24 demands, actions, or causes of actions of every nature and description that were
25 alleged or that reasonably could have arisen out of the factual allegations contained
in the operative Complaint (the “Complaint”) on file with this court including, but
not limited to: all wages earned, including any straight-time, overtime, double time
or other premium wages, vacation pay, waiting time penalties, itemized wage
statement penalties, any other related penalties, attorney’s fees, and/or costs and all
claims under the Private Attorneys General Act of 2004, and the Unfair Competition
Law, arising from the claims described above within the Class Period (the “Claims”).

26 Id. ¶ III(P)(1).

27 The settlement also contemplates that Plaintiff Valadez, in consideration for receipt of an
28 enhanced award, will execute a general release of any and all claims, including his Claims in the

1 Complaint. *Id.*

2 **D. Notice Procedures**

3 Within 30 days after entry of an order preliminarily approving the settlement, Defendant will
4 provide the settlement administrator with the names, last known addresses, and social security
5 numbers of the Settlement Class Members. Settlement Agreement ¶ III(I)(1). Within 30 calendar days
6 from receipt of this information the Settlement Administrator will mail notice to the class by First
7 Class Mail. Settlement Agreement ¶ III(I)(2). The Settlement Administrator will perform a National
8 Change of Address Search on the entire class list prior to mailing of the Class Notice.

9 *Id.* The Claims Administrator will re-mail any Class Notices returned as undeliverable. If there is no
10 forwarding address, the Claims Administrator will perform a skip-trace. Settlement Agreement ¶
11 III(I)(3).

12 Class Members will not need to submit a claim form to participate in the Settlement.
13 (Settlement, ¶ III(J).) In order to opt out a Class Member will need to submit an opt-out notice within
14 30 days of the class mailing which contains (1) full name, address, and last four digits of Social
15 Security number; and (2) a signature. It should state in substance: “I wish to exclude myself from the
16 class action Settlement in the Valadez case and I understand that by requesting to be excluded from
17 the Settlement, I will receive no money from the Settlement.”) (Settlement, ¶ III (J).)

18 Any Class Member who wishes to object to the Settlement must file with the Court and serve
19 on the Claims Administrator a written objection within 30 days of the mailing of Class Notice.
20 (Settlement, ¶ III(J)(2).)

21 If a Class Member wishes to dispute the number of Compensable Weeks Worked stated in
22 their notice they submit a writing under penalty of perjury with any documentation to the Claims
23 Administrator. (Settlement, ¶ III(K)(1.) The Claim’s Administrator’s determination shall be binding
24 unless Class Counsel or Defendant’s Counsel submit the issue to the Court which will make a final
25 non-appealable decision at the Final Approval hearing. (Settlement, ¶ (K)(2.)

26 **E. Notice and PAGA Payment to the LWDA**

27 The proposed settlement provides for a total amount of \$100,000 in settlement of all claims
28 for civil penalties under PAGA. Pursuant to Labor Code section 2699(i), Defendant will pay 75% of

1 the PAGA settlement amount (*i.e.*, \$75,000), to the California Labor and Workforce Development
2 Agency. The remaining \$25,000 will be included in the net settlement pool available for distribution
3 to the Settlement Class Members. Plaintiff has submitted this motion and the Settlement Agreement to
4 the LWDA on the same date it was filed in court. Declaration of Farrah Grant ¶ 2.

5 **V. ARGUMENT**

6 **A. The Court Should Conditionally Certify the Settlement Class Because It Meets All** 7 **the Requirements for Class Certification for Settlement Purposes Only under CCP §** 8 **382**

9 Under Code of Civil Procedure § 382, class certification is warranted so long as there is “a
10 numerous and ascertainable class with a well-defined community of interest among its members” and
11 a “class action proceeding is superior to other means for a fair and efficient adjudication of the
12 litigation.” (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326, 332.) “The
13 certification question is ‘essentially a procedural one that does not ask whether an action is legally or
14 factually meritorious.’” (*Id.* at 326 (quoting *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439-
15 440).) Indeed, the certification question simply asks whether the theory of recovery advanced by the
16 plaintiff is likely to prove amenable to class treatment. (*E.g., Jaimez v. Daiohs USA, Inc.*, (2011) 181
17 Cal.App.4th at 1298.) In ruling on a certification motion, a trial court’s task is to determine
18 “whether...the issues which may be jointly tried, when compared with those requiring separate
19 adjudication, are so numerous or substantial that the maintenance of a class action would be
20 advantageous to the judicial process and to the litigants.” (*Id.*)

21 “[I]t is also well established that trial courts should use different standards to determine the
22 propriety of a settlement class, as opposed to a litigation class certification. Specifically, a lesser
23 standard of scrutiny is used for settlement cases.” (*Global Minerals & Metals Corp. v. Superior Court*
24 (2003) 113 Cal.App.4th 836, 859 (*citing Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1807
25 n.19 (“*Dunk*”)).) As the court noted in *Dunk*, although certification requirements are intended “to
26 protect the interests of the non-representative class members,” that concern is “protected by the trial
27 court’s fairness review of the settlement.” (*Id.*)

28 Indeed, numerous courts have certified settlement classes. For example, *In re Drexel Burnham*

1 *Lambert Group, Inc.*, 960 F.2d 285 (2d Cir. 1992), cert. dismissed, 506 U.S. 1088, 122 L. Ed. 497,
2 113 S. Ct 1070 (1993), the parties entered into a tentative settlement before a class was certified.
3 After a hearing, the "district court issued an order certifying the class and approving the settlement
4 agreement." (*Id.* at 289; *see also, Alaniz v. California Processors, Inc.*, 73 F.R.D. 269, 278 (N.D.
5 Cal. 1976) ("the use of the tentative settlement class procedure was appropriate in this case"), *aff'd*,
6 572 F.2d 657 (9th Cir.), cert. denied, 439 U.S. 837 (1978).) Certification of a settlement class is a
7 regular feature of class action litigation and an approved procedure which ought to be followed in
8 this case. (*See Newberg on Class Actions* (3d ed. 1991) § 11.27, pp. 11-40 to 11-56; and *Manual for*
9 *Complex Litigation*, 2d (1993) § 30.45.)

10 As shown below, this Settlement and the Settlement Class easily meet all of the requirements
11 for certification for settlement purposes.

12 **1. Objectively Ascertainable and Sufficiently Numerous Class**

13 A class is ascertainable when it may be readily identified via an objectively stated definition
14 without unreasonable expense or time by reference to official records. (*Rose v. City of Hayward*
15 (1981) 126 Cal.App.3d 926, 932.) No set number of class members is required to maintain a class
16 action (*Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1030), and the California Supreme Court
17 has upheld a class of as few as ten members (*Bowles v. Super. Ct. (Nickel, Jr.)* (1955) 44 Cal.2d 574,
18 577-81.) Here, the Settlement Class is made up of about 34,695 individuals, all of whom may be
19 readily ascertained by reference to Defendant's personnel records. (Settlement Agreement., ¶ I(F).)
20 Thus, the Settlement Class is not only ascertainable, but also sufficiently numerous.

21 **2. Predominance of Common Questions**

22 A question of law or fact is common to the members of a class if it may be resolved through
23 common proof. (*See Jaimez, supra*, 181 Cal.App.4th at 1305.) As for predominance, it "is a
24 comparative concept, and 'the necessity for class members to individually establish eligibility and
25 damages does not mean individual fact questions predominate.'" (*Sav-on v. The Superior Court of*
26 *Los Angeles County*, 34 Cal.4th 319 (*quoting Reyes v. San Diego Cty. Bd. of Supervisors* (1979) 196
27 Cal.App.3d 1263, 1278).) Thus, "[i]ndividual issues do not render class certification inappropriate
28 so long as such issues may effectively be managed." (*Id.*) This is especially so where the key

1 difference between class members solely concerns their respective amounts of damages. (*See id.*)
2 As a general rule, if a Defendant's liability can be determined by facts common to all members, a
3 class will be certified even if these members must individually prove their damages. (*See Hicks v.*
4 *Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916.)

5 In this case, the Settlement Class meets these requirements. Plaintiff submits that Defendant's
6 liability arises from the same set of facts and legal questions that apply to and are answered equally
7 as to all Class Members. Class Members who all work as retail employees for Defendant were not
8 paid all overtime as the regular rate of pay was not properly calculated taking into consideration all
9 other forms of remuneration paid to them such as shift differentials. The overarching question is
10 whether Defendant paid employees all overtime wages at the correct rate.

11 The Court accordingly should certify the Settlement Class for purposes of settlement under
12 C.C.P. § 382 and Rule of Court 3.769(c).

13 3. Typicality of Plaintiff's Claims

14 Typicality "requires a showing that the class representative has claims or defenses typical of
15 the class." (*See e.g., Fireside Bank v. Super. Ct. (Gonzalez)* (2007) 40 Cal.4th 1069, 1090.) This
16 focuses on "the nature of the claim or defense of the class representative, and not to the specific facts
17 from which it arose or the relief sought." (*Hanon v. Dataproducts Corp.* (9th Cir. 1992) 976 F.2d
18 497, 508 (internal citations omitted).) "The test of typicality 'is whether other members have the
19 same or similar injury, whether the action is based on conduct which is not unique to the named
20 plaintiffs, and whether other class members have been injured by the same course of conduct.'" (*Id.*
21 (*quoting Schwartz v. Harp* (C.D. Cal. 1985) 108 F.R.D. 279, 282; *accord Classen v. Weller* (1983)
22 145 Cal.App.3d 27, 46 ("it has never been the law in California that the class representative must
23 have *identical* interest with the class members.")).

24 Under these standards, Plaintiff's claims are typical of those of the class members. Like
25 Settlement Class Members, Plaintiff worked for Defendant in California as a retail employee and was
26 paid overtime and shift differentials. (Setareh Decl. ¶ 18.) (*See Classen, supra*, 145 Cal. App. 3d at
27 46 (representative plaintiffs need not have all claims or identical interests with class members; they
28 need only have claims that are "typical of the class"); *see also B.W.I. Custom Kitchen v. Owens-*

1 *Illinois, Inc.* (1987) 191 Cal. App. 3d 1341, 1347 (representative plaintiffs need not suffer all of the
2 exact same damages as every class member).) Accordingly, Plaintiff pursues claims typical of the
3 class he seeks to represent.

4 **4. Adequacy of Plaintiff and Class Counsel to Represent the Class**

5 The adequacy requirement is met where the named plaintiffs are represented by counsel
6 qualified to conduct the litigation and the plaintiffs' interest in the litigation is not antagonistic to the
7 class's interests. (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450-51.) In other words,
8 where the named plaintiffs have adequate counsel, the plaintiffs may represent the entire class absent
9 any disabling conflicts of interest that might hinder the named plaintiffs' ability to represent the class.
10 (*Id.*)

11 In this case, Plaintiff has no conflict of interest with absent Settlement Class Members and
12 has agreed to place the class's interests above his own. (Setareh Decl., ¶ 19.) (*See Global Minerals,*
13 *supra* 113 Cal.App.4th at 851 (the inquiry into the adequacy of a class representative is intended to
14 uncover any conflicts between the plaintiff and the class he or she seeks to represent).) Plaintiff's
15 counsel, Setareh Law Group, is experienced in wage and hour class action litigation and has no
16 conflicts of interest with absent Settlement Class Members. (Setareh Decl., ¶¶ 19, 21). Thus, this
17 Court should appoint Plaintiff as Class Representative for the Settlement Class and appoint his
18 counsel as Class Counsel.

19 **B. The Court Should Preliminarily Approve the Settlement Because It Is a Fair,** 20 **Adequate, and Reasonable Compromise of Disputed Wage Claims in View of** 21 **Defendant's Potential Liability Exposure and the Risks of Continued Litigation**

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

1 Settlement Class as proposed, and schedule a final fairness and final approval hearing.

2 **1. The Settlement Was Reached Via Arm's-Length Negotiations of Experienced**
3 **Counsel and an Experienced Mediator with Sufficient Information to**
4 **Intelligently Negotiate a Fair Settlement**

5 A settlement is presumptively fair where it is reached through arm's-length bargaining, based
6 on sufficient discovery and investigation to allow counsel and the court to act intelligently, counsel
7 is experienced in similar litigation, and the percentage of objectors is small. (*Dunk, supra*,
8 Cal.App.4th at 1802.) In deciding whether to approve a proposed settlement, a trial court has broad
9 powers to determine if the settlement is fair under the circumstances of the case. (*Mallick v. Superior*
10 *Court* (1979) 89 Cal.App.3d 434, 438.) In exercising these powers, the overriding concern is to
11 ensure that a proposed settlement is "fair, adequate, and reasonable." (*Dunk*, 48 Cal.App.4th at p.
12 1801 [internal quotations omitted].) Relevant factors for that determination, include, but are not
13 limited to:

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

18 (*Id.*) These factors require balancing, are non-exhaustive, and, as such, trial courts should tailor the
19 factors consider to each case and give due regard to "what is otherwise a private consensual agreement
20 between the parties." (*Id.*)

21 "In the context of a settlement agreement, the test is not the maximum amount plaintiffs might
22 have obtained at trial on the complaint, but rather whether the settlement is reasonable under all of
23 the circumstances." (*Wershba, supra*, 91 Cal.App.4th at 250.) Because settlements inherently involve
24 compromise, even settlements providing for substantially narrower relief than likely would be
25 obtained if the suit were successfully litigated can be reasonable because "the public interest may
26 indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding
27 litigation." (*Id.* (quoting *Air Line Stewards, etc., Local 550 v. Am. Airlines, Inc.* (7th Cir. 1972) 455
28 F.2d 101, 109).) In addition, courts review the discovery process and information received through

1 it to aid them in assessing whether the parties sufficiently developed the claims and their supporting
2 factual bases before reaching settlement. (*See Kullar v. Foot Locker Retail Inc.* (2008) 168
3 Cal.App.4th 116, 129-131.) Information is sufficient where it allows the parties and the court to form
4 “an understanding of the amount that is in controversy and the realistic range of outcomes of the
5 litigation.” (*Clark v. Am. Residential Servs. LLC* (2009) 175 Cal.App.4th 785, 801.) This requirement
6 exists so that the parties can provide the court with “a meaningful and substantiated explanation of
7 the manner in which the factual and legal issues have been evaluated.” (*Kullar, supra*, 168
8 Cal.App.4th at p. 118.)

9 Here, the Settlement resulted from thorough, arm’s-length negotiations between experienced
10 counsel, with the assistance of a highly regarded mediator, after sufficient information was exchanged
11 to assess the relative strengths and weaknesses of Plaintiff’s claims, both on their merits and for
12 purposes of class certification, and Defendant’s estimated exposure. (Setareh Decl., ¶¶ 8-12.)
13 Plaintiff’s counsel has reviewed information provided by Defendant leading up to the mediation. *Id.*
14 Plaintiff’s counsel and Defendant’s counsel are experienced in handling class action wage-and-hour
15 litigation and have represented many classes and clients in similar class actions. (*Id.* ¶ 21.) Although
16 the parties were willing to explore the potential for settlement, each side also was fully committed
17 and prepared to litigate the case through trial and appeal if this Settlement had not been reached.

18 **a. Defendant’s Estimated Liability Exposure**

19 As noted above, Plaintiff’s counsel reviewed the records and information provided by
20 Defendant to assess the relative strengths and weaknesses of Plaintiff’s claims, both on their merits
21 and for purposes of class certification, and Defendant’s estimated exposure. (Setareh Decl., ¶¶ 8-12.)
22 Plaintiff’s counsel estimates that the maximum potential recovery in this case is \$5,559,862.32 in
23 unpaid overtime, exclusive of penalties.³ (Setareh Decl. ¶¶ 25-26.) This amount encompasses
24

25 ³ This is proper because, first, PAGA penalties are discretionary (*see* Lab. Code § 2699(e)(2) (the
26 court in its discretion “may award a lesser amount than the maximum civil penalty amount specified
27 by this part...”), and courts evaluate the strength of a proposed settlement without taking potential
28 penalties or interest into consideration. (*See Rodriguez v. West Publishing Corp.* (9th Cir. 2000) 563
F.3d 948, 955; *see also Millere v. CEVA Logistics U.S.A., Inc.* (E.D. Cal. Feb. 19, 2015) 2015 WL

1 penalties for failure to pay overtime rates, which forms the underlying claim in Plaintiff's complaint.

2 Consequently, the settlement of \$4,500,000, before deductions, represents about 80.93% of
3 the value of the unpaid premium wages at issue in this case, which far exceeds percentages routinely
4 approved by courts, assuming these amounts could be proven at trial. *See, e.g., Glass v. UBS Fin.*
5 *Servs.*, 2007 WL 221862, *4 (N.D. Cal. 2007) (approving settlement which represented 25% to 35%
6 of potential damages); *Dunleavy v. Nadler*, 213 F.3d 454, 459 (9th Cir. 2000) (approving settlement
7 which represented "roughly one-sixth of the potential recovery"); *Nat'l Rural Telecomm. Coop. v.*
8 *DirecTV, Inc.* 221 F.R.D. 523, 527 (C.D. Cal. 2004) ("it is well-settled law that a proposed settlement
9 may be acceptable even though it amounts to only a fraction of the potential recovery that might be
10 available to the class members at trial"). Moreover, there were several significant risks attendant in
11 continued litigation, both on the merits and in terms of maintaining this case as a class action.

12 Courts regularly approve settlements where the recovery is less than one quarter of the
13 maximum potential realistic recovery. *E.g., Bravo v. Gale Triangle*, 2017 WL 708766 *9 (C.D. Cal.
14 2017) (approving settlement where recovery was 7.5% of projected maximum recovery amount);
15 *Officers for Justice v. Civil Service Com'n of City & County of S.F.*, 688 F.2d 615, 628 (9th Cir. 1982).
16 Given the amount of the settlement as compared to the potential value of the of the claims in this case,
17 the settlement is fair and reasonable. Clearly, the goals of this litigation have been met.

18 In *Glass v. UBS Fin. Svcs.*, 2007 WL 221862 (N.D. Cal. Jan. 26, 2007), the Northern District
19 of California approved a settlement of an action claiming unpaid overtime wages where the settlement
20 amount constituted only about 25% of the estimated actual loss to the class and found the settlement
21 amount to be fair, reasonable and adequate. *Glass* at *9.⁴ Here, the settlement consideration falls well
22 above the percentage approved in *Glass*. As a result, this settlement is most certainly entitled to
23

24
25 729638, at *7 (court utilized calculation of a defendant's exposure exclusive of interest and penalties
26 to determine whether the settlement fell within the range of possible approval).)

27 ⁴ *See also Dunleavy v. Nadler (In Re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 459 (9th Cir. 2000)
28 (approving settlement which represented "roughly one-sixth of the potential recovery"); *Barcia v. Contain-*
A-Way, Inc., 2009 WL 587844, *4 (S.D. Cal. 2009) (approving settlement of overtime wage class action
where the recovery was within the 25% to 35% benchmark established in *Glass*).

1 preliminary approval.

2 Moreover, Defendant has vigorously argued that, irrespective of their arguments on the merits
3 of Plaintiff's wage and hour claims, Plaintiff still would not prevail in showing that Defendant acted
4 with the requisite intent necessary for the alleged claims for penalties under Labor Code §§ 203 and
5 226. Specifically, § 203 requires that a plaintiff show the employer committed a "willful" violation
6 of the law in withholding wages. "A good faith dispute that any wages are due will preclude
7 imposition of waiting time penalties under Section 203." (8 Cal. Code Regs. § 13520.) Similarly,
8 penalties pursuant to § 226 require a "knowing and intentional" violation. Defendant contends that
9 it would present several good faith defenses that would preclude a finding of willfulness under § 203.
10 (*See Choate v. Celite Corp.* (2013) 215 Cal.App.4th 1460 (reversing award of § 203 penalties based
11 on good faith defense where underlying wage claim presented issue of first impression).) As such, in
12 view of the risk that a good faith dispute as to liability for the alleged violations in this case could
13 preclude any penalty awards, the proposed Settlement is fair and adequate. (Setareh Decl., ¶ 31.)

14 **b. Risks in Going Forward with Litigation**

15 Plaintiff has estimated Defendant's liability exposure in this case at approximately
16 \$5,559,862.32, exclusive of penalties.⁵ (*See Setareh Decl.* ¶ 26.) This amount encompasses unpaid
17 overtime wages pursuant to the regular rate claim. (*Id.*)

18 Notwithstanding the raw monetary amount of the potential exposure, Plaintiff and Class
19 Counsel are cognizant of the risks that continued litigation would entail that consequently make the
20 Settlement amount of \$4,500,000 a fair, adequate and reasonable compromise of the disputed claims
21 at issue. Class Counsel also is of the opinion that the settlement represents an excellent bargain for
22 the class given the inherent risks, hazards and expenses of carrying the case through trial. (*See,*
23 *Rodriguez v. West Publ. Corp.*, 2007 WL 2827379 at *9 (C.D. Cal. 2007) (explaining that "the trial
24

25 ⁵ This is proper because the Court may evaluate the strength of a proposed settlement without taking
26 potential penalties into consideration. (*See Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563
27 F.3d 948, 955; *see also Miller v. CEVA Logistics U.S.A., Inc.* (E.D. Cal. Feb. 19, 2015) 2015 WL
28 729638, at *7 (accepted calculation of defendant's exposure exclusive of interest and penalties to
determine whether the settlement falls within the range of possible approval).)

1 court is entitled to, and should, rely upon the judgment of experienced counsel for the parties”) (aff’d
2 in relevant part at 563 F.3d 948 (9th Cir. 2009).) Even assuming Plaintiff prevailed on a class
3 certification motion, any appeal by Defendant could prolong protracted litigation and delay remedies
4 to the class.

5 At this juncture, the Settlement Amount (before deductions for costs, fees, enhancement
6 award), provides a gross recovery to each Settlement Class Member of about \$129.70 ($\$4,500,000 /$
7 $34,695$ class members = \$129.70). The Net Settlement Amount is approximately \$2,684,370.50
8 [$\$4,500,000 - \$1,500,000$ (attorneys’ fees) - \$25,000 (costs) - \$5,000 (incentive award) - \$75,000
9 (LWDA) - \$100,000 (Settlement Administrator) - \$110,629.50 (employee payroll taxes)]. Thus, the
10 Settlement Amount provides a net recovery of approximately \$77.37 per class member
11 ($\$2,684,370.50 / 34,695$ class members = \$77.37). This is an excellent result for the class, given the
12 risks in continued litigation.

13 Defendant asserted various defenses in response to Plaintiff’s allegations, both on the merits
14 and in terms of maintaining this case as a class action. Defendant states that there was an applicable
15 Collective Bargaining Agreement (“CBA”) that controls class member’s rate of pay. Defendant states
16 that it acted in accordance with the CBA in calculating employee’s pay and that they fully paid
17 employee’s all wages owed. Plaintiff argues that the CBA is invalid, in part because the CBA does
18 not pay all employees “not less than 30 percent more than the state minimum wage.” (Cal. Lab. Code
19 § 514).

20 Regardless, Defendant’s reliance on the CBA is a persuasive defense to the assertion that
21 Defendant’s actions were willful. Defendant has vigorously argued that, irrespective of their
22 arguments on the merits of Plaintiff’s wage and hour claims, Plaintiff still would not prevail in
23 showing that Defendant acted with the requisite intent necessary for the alleged claims for penalties
24 under Labor Code §§ 203 and 226. (*See Choate v. Celite Corp.* (2013) 215 Cal.App.4th 1460
25 (reversing award of § 203 penalties based on good faith defense where underlying wage claim
26 presented issue of first impression).)

27 There are many risks in going forward with litigation. First, there is the risk that a court would
28 find that, as a matter of law, Defendant’s policies were lawful under the Labor Code and the Wage

1 Orders and/or that the way in which Defendant calculated Class Members' "regular rates" of pay was
2 lawful. Second, Plaintiff might not have been able to prove that Defendant's conduct was willful, as
3 Defendant asserts that they complied with the CBA. Third, there is the risk that Defendant could show
4 that potential distinctions among the job sites and duties in California where the various employees
5 worked could cause class certification to be denied or narrow the scope of the certified claims. Fourth,
6 even if Plaintiff succeeded on the merits, there also is risk with regard to class certification, including
7 whether, for example, individualized inquiries predominated depending on employee location, job
8 position, or other factors.

9 In light of these risks, as well as the hazards and expenses of carrying the case through trial,
10 Plaintiff's counsel is of the opinion that the Settlement represents an excellent bargain for the class.
11 (*See, Rodriguez v. West Publ. Corp.* (C.D. Cal. 2007) 2007 WL 2827379 at *9 (explaining that "the
12 trial court is entitled to, and should, rely upon the judgment of experienced counsel for the parties")
13 (aff'd in relevant part at 563 F.3d 948 (9th Cir. 2009).) At this juncture, the Settlement would entitle
14 each Settlement Class Member to a significant recovery. In contrast, if the case would continue in
15 litigation, even if Plaintiff prevailed on a class certification motion, any appeal by Defendant would
16 prolong already protracted litigation and delay remedies to the Class.

17 To review, although Plaintiff is confident that he would have prevailed had litigation
18 continued through class certification and ultimately trial, considerable risks, delays and uncertainties
19 nevertheless exist with continued litigation. The parties have achieved a fair Settlement that reflects
20 a meaningful recovery on behalf of Settlement Class Members and that merits the Court's preliminary
21 approval.

22 **2. The Proposed Method of Allocating the Settlement Fund Among Settlement** 23 **Class Members Is Fair, Adequate, and Reasonable**

24 The proposed method of allocating the Settlement Fund to Settlement Class Members also is
25 fair and reasonable. The amount that each Class Member will be eligible to receive under the
26 Settlement will be determined by dividing the number of workweeks worked by each individual
27 Settlement Class member by the total number of workweeks worked by all Settlement Class members
28 in the Class Period who do not opt out, resulting in a payment ratio for each individual Settlement

1 Class member. Settlement Agreement III(F)(1). Furthermore, this formula ensures that the entire net
2 settlement amount is distributed to participating class members. The gross settlement award payable
3 to each Class Member will be apportioned as follows: 20% as taxable wages, 40% non-taxable
4 penalties and 40% interest. *Id.*

5 **3. The Proposed Incentive Award to Plaintiff Is Fair, Adequate, and Reasonable**

6 Courts routinely approve incentive awards to compensate named plaintiffs for the services
7 they provide and the risks they incur during class action litigation, often in much higher amounts than
8 that sought here. (*See, e.g., Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App. 4th 715, 726
9 (upholding “service payments” to named plaintiffs for their efforts in the case); *Van Vranken v.*
10 *Atlantic Richfield Co.* (N.D. Cal. 1995) F. Supp. 295 (approving \$50,000 enhancement award).)

11 Here, under the Settlement Plaintiff may seek an incentive award of up to \$5,000. (Settlement
12 Agreement ¶ III(D)(1).) This is entirely reasonable given Plaintiff’s efforts in this case and the risks
13 he undertook on behalf of the class. Plaintiff spent considerable time speaking with his counsel,
14 gathering documents, and reviewing the Settlement, among other things, and his assistance was
15 instrumental in achieving a settlement amount that is significant to the similarly situated individuals
16 he sought to represent. (Setareh Decl., ¶ 38.) Further, Plaintiff took on the personal risk of facing
17 intrusive discovery demanded by his former employer, of making his future employment prospects
18 uncertain, and exposed himself to a possible cost award if the litigation were lost. (*Id.*) Thus, the
19 incentive award requested is appropriate and justified as part of the overall Settlement secured on
20 behalf of the Class. In any event, any Settlement Class Member who feels the requested amounts are
21 not warranted will have an opportunity to object under the terms of the Settlement.

22 **4. The Proposed Award of Attorneys’ Fees and Costs Is Fair, Adequate, and** 23 **Reasonable**

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

26 We join the overwhelming majority of federal and state courts in holding that when class action
27 litigation establishes a monetary fund for the benefit of the class members, and the trial court in
28 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,

1 alignment of incentives between counsel and the class, a better approximation of market
2 conditions in a contingency case, and the encouragement it provides counsel to seek an early
3 settlement and avoid unnecessarily prolonging the litigation (See pt. I, *ante*; *Lealao, supra*, 82
4 Cal.App.4th at pp. 48–49, 97 Cal.Rptr.2d 797; *Rawlings v. Prudential-Bache Properties, Inc.*,
5 *supra*, 9 F.3d at p. 516)—convince us the percentage method is a valuable tool that should not be
6 denied our trial courts.

7 *Laffitte v. Robert Half Intern. Inc.*, 1 Cal. 5th 480, 503 (2016).⁶ Thus, this Court may, and, as strongly
8 encouraged by the California Supreme Court, *should*, award attorney’s fees to Plaintiff’s counsel based
9 upon the percentage of the fund methodology.

10 Setting *Laffitte* aside, whether the once-again-confirmed percentage of the fund method or the
11 lodestar method is used, the outcome is roughly the same: “Empirical studies show that, regardless
12 whether the percentage method or the lodestar method is used, fee awards in class actions average
13 around one-third of the recovery.” (*Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 47 fn. 11
14 quoting *Shaw v. Toshiba America Information Systems, Inc.*, 91 F.Supp.2d 942, 972 (E.D. Tex.
15 2000).) This is also consistent with Class Counsel’s experience in these types of cases. (Setareh
16 Decl., ¶ 37.) In the present case, Class Counsel intends to request attorneys’ fees of up to \$1,500,000
17 (33 ⅓% of the Settlement Amount) and actual costs not to exceed \$25,000. (Settlement Agreement ¶
18 III(3)(B).) In view of Class Counsel’s efforts and risks in pursuing this case, and the expenses incurred
19 in litigating these claims, these amounts are well within the range of reasonableness, and thus warrant
20 preliminary approval. (*Id.*) In any event, any Settlement Class Member who feels that the attorneys’
21 fees or costs awards are unfair will have an opportunity to object under the terms of the Settlement.

22 **5. The Proposed Payment to the Claims Administrator Is Fair, Adequate, and** 23 **Reasonable**

24 In deciding whether to approve a proposed settlement, a trial court has broad powers to
25 determine if the proposed settlement is fair under the circumstances of the case. (*Mallick, supra*, 89
26 Cal.App.3d at 438.) In exercising these powers, the overriding concern is to ensure that a proposed

27 ⁶ The Supreme Court also corrected the misconception that *Dunk* should be viewed as
28 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*, at 501.

1 settlement is “fair, adequate, and reasonable.” (*Dunk*, 48 Cal.App.4th at 1801 (internal quotations
2 omitted).) The parties have selected KCC LLC as the settlement administrator. KCC LLC has
3 estimated that it will perform the services set forth in the Settlement Agreement for no more than
4 \$100,000. Settlement Agreement ¶ III(E). The proposed Settlement Administrator KCC LLC is an
5 experienced administrator. (Setareh Decl. ¶ 28.)

6 **6. The Proposed Settlement Administration Plan Complies with Rule of**
7 **Court 3.766(e)**

8 In determining the manner of the notice, the court must consider: the interests of the class; the
9 type of relief requested; the stake of the individual class members; the cost of notifying class
10 members; the resources of the parties; the possible prejudice to class members who do not receive
11 notice; and the *res judicata* effect on class members. (C.R.C. Rule 3.766(e).)

12 Plaintiff requests that the Court approve the proposed plan for giving notice to the class and
13 administering the Settlement. The notice process is set forth in the Settlement at ¶ III(I). The standard
14 for determining the adequacy of notice is whether the notice has “a reasonable chance of reaching a
15 substantial percentage of the class members.” (*Cartt v. Sup. Ct.* (1975) 50 Cal.App.3d 960, 974.) For
16 class claims “for money damages or similar relief at law, notice sent by first class mail to the last
17 known address of each member of the plaintiff class is sufficient.” (*Phillips Petroleum Co. v. Shutts*
18 (1985) 472 U.S. 797, 811.) Here, the proposed notice process includes multiple measures to ensure
19 that as many Settlement Class members as practicable receive actual notice of the Settlement and
20 have sufficient time to exercise their rights.

21 **7. The Proposed Class Notice Complies with Rule 3.766(d) and (e)**

22 Rule 3.766(d) provides that the Court must approve class notice. If class members are given
23 the right to exclude themselves – which the parties here agree is appropriate – the notice must include:
24 (1) a brief explanation of the case, including the basic contentions or denials of the parties; (2) a
25 statement that the Court will exclude the members from the Class, if the member so requests by a
26 specific date; (3) a procedure for the member to follow in requesting exclusion from the Class; (4) a
27 statement that the judgment, whether favorable or not, will bind all members who do not request
28 exclusion; and (5) a statement that any member who does not request exclusion may, if the member

1 so desires, enter an appearance through counsel.

2 Whether notice is adequate is determined by whether the notice has a reasonable chance of
3 reaching a substantial percentage of the class members. (*Wershba, supra*, 91 Cal.App.4th at 251.) The
4 purpose of the notice is to give class members sufficient information to decide whether they should
5 accept the benefits offered, opt out and pursue their own remedies, or object to the settlement. (*Id.*)
6 Here, the Class Notice, attached as Exhibit 2 to the Declaration of Shaun Setareh and Exhibit A to
7 the Settlement Agreement, provides Settlement Class Members with all pertinent information they
8 need to fully evaluate their options and exercise their rights under the Settlement. It clearly and
9 concisely explains, among other things: (1) what the Settlement is about; (2) who is a Settlement
10 Class Member; (3) how class members will receive payment (4) how to opt-out of the Settlement; (5)
11 how to object to the Settlement; (6) how the Settlement amount will be allocated; (7) how Settlement
12 payments to Class Members will be calculated; (8) how Class Counsel will be paid; (9) the scope of
13 the Released Claims; and (10) a statement that the judgment, whether favorable or not, will bind all
14 members who do not request exclusion. Accordingly, the Notice should be approved because it
15 describes the Settlement with sufficient clarity and specificity to explain to Settlement Class Members
16 what this case is about, their rights under the Settlement, and how to exercise those rights.

17 **VI. CONCLUSION**

18 For all the foregoing reasons, because the Class meets the requirements for certification under
19 CCP § 382, because the Settlement bears all requisite indicia of fairness, reasonableness, and
20 adequacy, and because the proposed notice procedure and related forms comport with Rule 3.766 and
21 principles of due process, this Court should grant this Motion for Preliminary Approval in its entirety,
22 adopt the [Proposed] Order Granting Preliminary Approval of Class Action Settlement submitted
23 herewith, and schedule a Final Fairness Hearing.

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1 DATED: January 21, 2019

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