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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHELLE NOURIAN MARTINEZ, on
behalf of herself and all others similarly
situated,

Plaintiff,

vs.

HELZBERG'S DIAMOND SHOPS,
INC., and DOES 1-25 inclusive,

Defendants.

Case No. 5:20-cv-01085-PSG-
SHK

**CLASS AND COLLECTIVE
ACTION**

**NOTICE AND UNOPPOSED
MOTION FOR PRELIMINARY
APPROVAL OF CLASS
SETTLEMENT**

Date: April 19, 2021
Time: 1:30 p.m.
Courtroom: 6A (6th Floor)
Judge: Hon. Philip S.
Gutierrez

Action Filed: May 27, 2020

TO ALL PARTIES AND ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on Monday, April 19, 2021, at 1:30 p.m.
in Courtroom 6A before Judge Philip S. Gutierrez of the United States District
Court, Central District of California, Plaintiff MICHELLE NOURIAN MARTINEZ
moves the Court for preliminary approval of the Stipulation of Settlement and
Release (the "Settlement Agreement" or the "Settlement," attached as Exhibit 1
to the Declaration of Ryan L. Hicks ("Hicks Dec."), filed concurrently herewith).
In particular, Plaintiff moves for orders:

1 (1) granting preliminary approval of the Settlement Agreement as to the
2 proposed settlement Class;

3 (2) conditionally certifying the Class for settlement purposes;

4 (3) approving the proposed schedule and procedure for completing the
5 final approval process of the settlement as to the Class, including scheduling
6 the final fairness hearing date;

7 (4) approving the Notice of Proposed Class Action Settlement (“Class
8 Notice”) (attached as Exhibit 1 to the Settlement Agreement);

9 (5) preliminarily appointing and approving Hoyer & Hicks as Counsel for
10 the Class;

11 (6) preliminarily approving Class Counsel’s request for attorneys’ fees and
12 costs;

13 (7) preliminarily appointing and approving the named Plaintiff as Class
14 Representatives;

15 (8) preliminarily appointing and approving Simpluris, Inc. as the
16 Settlement Administrator for the Class; and

17 (9) authorizing the Settlement Administrator to mail the approved Class
18 Notice to the Class.

19 This Motion is based on this notice, the following attached Memorandum
20 of Points and Authorities, the Declaration of Ryan L. Hicks, and all other records,
21 pleadings, and papers on file in this action and such other evidence or argument
22 as may be presented to the Court at the hearing on this Motion. Accompanying
23 this Motion is also Plaintiff’s Proposed Order Granting Preliminary Approval of
24 Settlement.

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I. INTRODUCTION

This is a class and collective action on behalf of all current and former Retail Store Managers of Defendant HELZBERG'S DIAMOND SHOPS, INC., ("Defendant" or "Helzberg") who were classified as exempt employees in California during the Class Period. Plaintiff alleges multiple violations of California labor laws resulting from the alleged misclassification of the class as exempt employees, including failure to pay overtime, failure to provide meal and rest periods and other violations of applicable law. Following informal discovery, a mediation, and extensive arm's-length negotiations between counsel, the Parties have reached a settlement of this dispute. Plaintiff seeks preliminary approval of the proposed Class Settlement. The Parties are resolving numerous wage and hour claims unlikely to have been prosecuted as individual actions which were pending in this action, and in doing so provide substantial benefit to the Class. Specifically, the Parties have resolved the claims of 31 employees, for a total settlement of \$475,000.¹ This favorable Settlement is fair, reasonable, and adequate in all respects.

II. FACTUAL BACKGROUND

Helzberg is nationwide retail jewelry store chain. Plaintiff and the Class Members (collectively, "CMs") are former and current Retail Store Managers classified by Defendant as exempt who worked in California during the applicable limitations period. Plaintiff alleges that the Retail Store Managers worked in small stores alongside their subordinates making sales along with the rest of their team. Plaintiff alleges that Defendant misclassified the CMs as exempt employees under California law due to their sales responsibilities (which Plaintiff alleges matched those of a full-time sales associate), lack of staff, and other required non-exempt tasks that rendered the CMs ineligible for any

¹ The Settlement Agreement ("Settlement") is attached as Exhibit 1 to the Declaration of Ryan L. Hicks ISO Preliminary Approval ("Hicks Dec.").

overtime exemption. As a result of the alleged misclassification, Plaintiff asserts that the Defendant failed to pay them overtime, failed to provide off-duty meal and rest periods, and also resulted in derivative issues, including failing to provide accurate, itemized wage statements, and failing to pay all wages owed after termination of employment. Defendant has at all times denied these allegations.

III. PROCEDURAL HISTORY

A. Plaintiff's Claims

On May 27, 2020, Plaintiff filed a complaint alleging class wage and hour violations in the United States District Court for the Central District of California (Dkt. # 1). That same day, Plaintiff submitted a PAGA notice to the Labor and Workforce Development Agency ("LWDA"). (Hicks Dec. at ¶ 3). Following the expiration of the LWDA 65-day response period, on August 7, 2020, Plaintiff filed the operative Amended Complaint, adding a claim for PAGA penalties. (Dkt. # 20). Defendant timely answered on September 1, 2020. (Dkt. # 26). The parties exchanged their initial disclosures, and Plaintiff propounded a full set of discovery requests. (Hicks Dec. at ¶ 3). Shortly thereafter, the Parties agreed to mediate the case. *Id.* at ¶ 3-4. In addition to the informal discovery, the Parties agreed to a *Belaire* notice process completed in December 2020. *Id.* at ¶ 3.

The substantial informal discovery that occurred prior to the mediation included aggregate information regarding the total workweeks, wage rates, pay periods and class members, as well as actual timekeeping data, payroll documents, and internal store staffing data for an audit sample of employees to confirm the other class wide data provided. *Id.* at ¶¶ 6, 30. The Parties agreed to stay all formal proceedings pending the mediation. *Id.* at ¶ 6.

In addition to the extensive pre-certification, voluntary exchange of information, the Parties each conducted independent investigations and fact-finding. *Id.* Plaintiff's counsel interviewed ten (10) CMs, two (2) of whom

1 executed sworn declarations, four (4) of whom were willing only to provide
2 anonymous written statements, and one of whom (1) eventually changed their
3 mind and retracted their statement out of fear of retaliation. *Id.* at ¶ 7.

4 On February 5, 2021, the Parties participated in an exhaustive full-day
5 mediation session via Zoom before Steve Pearl, Esq., a highly respected neutral
6 mediator out of the Los Angeles area, who specializes in wage and hour
7 mediations. *Id.* at ¶ 4. Plaintiff submitted a mediation brief summarizing the
8 evidence that counsel had marshalled and synthesized, the state of the
9 applicable law, and potential individual and class-wide exposure. *Id.* Defendant
10 submitted its own brief arguing that no class could be certified and that they
11 would also prevail on the merits against the individual Plaintiff and any other
12 PCMs, and brought fifteen (15) supporting declarations, constituting roughly
13 48% of the putative class. *Id.* With Mediator Pearl's assistance, the Parties
14 agreed, subject to approval by this Court, to a Settlement of the Actions. *Id.*
15 The Parties executed the Settlement Agreement on March 2, 2021. *Id.*; Ex. 1.

16 The August 7, 2020 operative Amended Complaint asserts six causes of
17 action under the California Labor Code, applicable Industrial Welfare
18 Commission ("IWC") Wage Orders, and Bus. and Profs. Code §§ 17200, *et seq.*
19 ("UCL"). Plaintiff alleges class and collective violations on behalf of herself and
20 the Class for: (1) failure to provide minimum, straight time, and overtime wages;
21 (2) failure to authorize, permit, and/or make available meal and rest periods; (3)
22 waiting time penalties; (4) failure to provide accurate wage statements; (5)
23 violation of the UCL for unlawful, unfair, and/or fraudulent business acts or
24 practices; and (6) penalties pursuant to the California Private Attorney General
25 Act ("PAGA"). (Dtk. # 20).

26 **B. Discovery**

27 As a condition of the mediation, Plaintiff required Defendant to provide a
28 dataset sufficient to prepare a full exposure analysis (along with the audit
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1 sample information and other documents described above. Hicks Dec. at ¶¶ 7,
 2 13, 30. Plaintiff's counsel then calculated the damages for the class based on
 3 the data provided by Defendant, and the information supplied through
 4 interviews with Plaintiff and the PCMs regarding non-discretionary bonus
 5 compensation, hours worked per week, the availability of meal and rest periods,
 6 and their time performing sales and other non-exempt tasks. *Id.* at ¶ 8. Class
 7 Counsel also made a thorough study of the legal principles applicable to the
 8 claims asserted against Defendant. *Id.* Plaintiff's counsel interviewed a
 9 substantial portion of the putative class after receiving the contact information
 10 following the *Belaire* notice process, which resulted in declarations, anonymous
 11 statements, and other interview information. *Id.* at ¶ 7.

12 **C. Damages Analysis**

13 Class Counsel based their damages analysis and settlement negotiations
 14 on the informal discovery and data provided for the full class and the information
 15 obtained from the 32% of 31 CMs interviewed by counsel prior to the mediation.
 16 *Id.* at ¶ 8. Because of the data production, and the fact that every single CM
 17 Plaintiff's counsel interviewed confirmed that they spent over half of their work
 18 time on the floor making sales along-side their sales associates to meet their
 19 own sales requirements, Plaintiff's Counsel was required to make only a few
 20 assumptions regarding the exposure. *Id.*

21 Using these averages and assumptions and further assuming that Plaintiff
 22 and the CMs would certify all of their claims and prevail at trial on all claims for
 23 the absolute maximum "perfect world" exposure, Plaintiff's Counsel calculated
 24 total damages, including all penalties, through June 27, 2020² to be

25 ² Defense counsel indicated that data after that date was not as reliable for
 26 extrapolation purposes because the COVID pandemic resulted in a number of
 27 stores closing temporarily and reopening temporarily with limited staff, or for
 28 curbside pickup, and reclosing again (either temporarily or permanently). *Id.* at
 ¶ 9.

1 \$4,148,924.22 (including \$1,503,200 in derivative PAGA penalties). *Id.* at ¶ 10.
 2 The total amount of damages is further broken down as follows: overtime
 3 (\$1,593,720.05); meal periods (\$377,877.85); rest periods (\$450,119.21); wage
 4 statement penalties (\$114,762.50); and waiting time penalties (\$82,244.61). *Id.*
 5 at ¶¶ 10-11.

6 The net amount being disbursed to CMs, assuming the Court approves
 7 all deductions is \$285,416.67, which is approximately 11% of the total non-
 8 PAGA damages and penalties estimated by Plaintiff, and roughly 7% of the total
 9 damages. *Id.* at ¶ 12. The settlement amount is fair, reasonable, and adequate.
 10 *Id.* at ¶20. The settlement amount takes into account the substantial risks
 11 inherent in any wage-and-hour class action, the status of the litigation, the
 12 evidence that Defendant provided at the mediation, and the specific defenses
 13 as to certification and on the merits asserted by Defendant. *Id.* at 28.

14 **D. Mediation**

15 The Parties mediated this dispute on February 5, 2021 before Steve
 16 Pearl, Esq., a respected and experienced wage and hour mediator, engaging in
 17 arm's-length negotiations, and the Parties reached a settlement. *Id.* at ¶ 4.
 18 Thereafter, counsel for the Parties worked to finalize the settlement for the CMs
 19 and the proposed class notice, subject to the Court's approval. *Id.* The
 20 Settlement Agreement was fully executed on March 2, 2021. *Id.*; Ex. 1.

21 **IV. TERMS OF THE SETTLEMENT**

22 **A. Basic Terms**

23 Defendants have agreed to pay a total of \$475,000 to settle all aspects of
 24 the case. Settlement at ¶¶ I.18, III.43. The "Net Settlement Amount," which is
 25 the amount available to pay settlement awards to the CMs, is defined as the
 26 Settlement Fund less: any attorneys' fees and costs awarded to Class Counsel
 27 (fees of up to one-third of the Maximum Settlement Amount, \$158,333.33, plus
 28 costs up to \$10,000, any enhancement payments awarded to the Class
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Representative (up to \$10,000), the payment made to the California Labor & Workforce Development Agency (“LWDA”) pursuant to PAGA (\$7,500)³, and the Settlement Administrator’s fees and costs (which have been quoted at \$3,750⁴). *Id.*

B. Class Definition

An individual is a member of the proposed settlement Class if he or she works or worked as a Store Manager for Defendant in California at any time during the period from April 6, 2016 through the end of the Class Period, which is the date of preliminary approval of the Settlement or ninety (90) days after the execution of the Settlement Agreement. Settlement at ¶¶ I.2; I.7.

C. Allocation and Awards

The Net Settlement Fund to be paid to CMs is estimated to be \$285,416.67. Hicks Dec. at ¶ 12. All CMs who do not opt-out of the Settlement will receive a payment. Each CM’s settlement share will be determined based on the total number of weeks that the CM worked as a retail store manager during the Class Period as compared to the total weeks worked by all CMs during the Class Period. Settlement at ¶ III.54(b)(i).⁵ All eligibility and Class Settlement Award determinations shall be based on employee workweek information that the Settlement Administrator calculates based on Defendant’s data provided to the Settlement Administrator. *Id.* at ¶¶ III.53(a); III.54. CMs will have the opportunity should they disagree with the Settlement Administrator’s calculations, to provide documentation and/or an explanation to show a contrary

³ Plaintiff will submit a copy of the Settlement Agreement and these papers to the LWDA, per Cal. Lab. Code §2699(I)(2). Hicks Dec. at ¶ 15, fn. 2. \$10,000.00 of this Settlement is allocated to settle the PAGA claims. *Id.* The Settlement Administrator shall pay \$7,500 of this amount to the LWDA, and allocate the remaining 25% to the Net Settlement Amount. Settlement ¶ III.54(d).

⁴ The Simpluris’ quote is attached to the Hicks Dec. at ¶ 19; Ex. 2.

⁵ Assuming no objectors. Settlement Agreement at ¶ III.54(a) (Funding Due Date); ¶ I.14 (“Effective Date”).

1 number of weeks worked. *Id.* at ¶ III.53(c). (See proposed Notice, at p. 2). For
 2 any CM that does not timely opt out of the Settlement and receives a payment,
 3 but does not timely cash his or her settlement check within 180 days, the
 4 Settlement Administrator will immediately stop payment on the check and such
 5 funds, plus any accrued interest, will be tendered to the State Controller's Office
 6 Unclaimed Property Fund in their name.⁶

7 **D. Scope of Release and Final Judgment**

8 The release contemplated by the proposed Settlement will release all
 9 claims in connection with the lawsuit, all violations asserted in any notice sent
 10 to the LWDA, as well as all predicate claims based on the factual and legal
 11 theories alleged based on the facts alleged in the complaint (i.e. based on
 12 misclassification as an exempt employee), from the beginning of any applicable
 13 statute of limitations period through the end of the Class Period. Settlement at
 14 ¶¶ I.29; III.45. Only CMs who do not opt out will release their Claims. *Id.* at ¶
 15 III.45.

16 **E. Settlement Administration**

17 The Parties have agreed to use Simpluris Group, Inc. ("Simpluris") to
 18 administer the Settlement, which has provided a capped quote of \$3,750.00 to
 19 administer this settlement. Hicks Dec. at ¶ 19. Simpluris will distribute the Notice
 20 Package, calculate individual settlement payments, calculate all applicable
 21 payroll taxes, withholdings and deductions, preparing and issuing all
 22 disbursements to be paid to CMs, the Class Representative, Class Counsel, the
 23 LWDA, any applicable local, state, and federal tax authorities, and handle
 24 inquiries and/or disputes from CMs. Settlement Agreement at ¶ III.52. Simpluris
 25 is also responsible for the timely preparation and filing of all tax returns, and
 26 payment of any and all necessary taxes and withholdings. *Id.* The Notice

27 ⁶ Settlement at ¶ III.54(b)(iv). The Settlement Administrator will also send a
 28 reminder to any CMs who have not cashed their checks after 120 days.

1 Package and relevant documents will be available on a website established by
 2 the Settlement Administrator for CMs to download as noted in the Notice.

3 **V. ARGUMENT**

4 **A. The Court Should Grant Preliminary Approval of the** 5 **Settlement as to the Class under Rule 23(b)(3).**

6 “Courts have long recognized that settlement class actions present unique
 7 due process concerns for absent class members.” *In re Bluetooth Headset*
 8 *Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (citation and internal
 9 quotations omitted). To protect the rights of absent class members, Rule 23(e)
 10 of the Federal Rules of Civil Procedure requires that the court approve all class
 11 action settlements “only after a hearing and on finding that it is fair, reasonable,
 12 and adequate.” Fed. R. Civ. P. 23(e)(2); *In re Bluetooth*, 654 F.3d at 946.

13 Review of a proposed class action settlement ordinarily involves two
 14 hearings. See Manual for Complex Litig. (4th) § 21.632. First, the court conducts
 15 a preliminary fairness evaluation. If the court makes a preliminary determination
 16 on the fairness, reasonableness, and adequacy of the settlement terms, the
 17 parties are directed to prepare the notice of proposed settlement to the class
 18 members. *Id.* (noting that the certification hearing and preliminary fairness
 19 evaluation can usually be combined). Second, the court holds a final fairness
 20 hearing to approve or reject the settlement. *Id.*; see also *Narouz v. Charter*
 21 *Commc’ns, Inc.*, 591 F.3d 1261, 1266–67 (9th Cir. 2010). The decision to
 22 approve a proposed settlement is committed to the sound discretion of the court.
 23 See *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). Rule 23
 24 requires that all class action settlements satisfy two prerequisites before a court
 25 may grant certification for purposes of preliminary approval: (1) that the
 26 settlement class meets the requirements for class certification if it has not yet
 27 been certified (Fed. R. Civ. P. 23(a),(b); *Hanlon*, 150 F.3d at 1020); and (2) that
 28 the settlement is fair, reasonable, and adequate (Fed. R. Civ. P. 23(e)(2)).

Though Rule 23 does not explicitly provide for such a procedure, federal courts generally find preliminary approval of settlement and notice to the proposed class appropriate if the proposed settlement “appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval.” *Lounibos v. Keypoint Gov’t Sols. Inc.*, No. 12-cv-00636-JST, 2014 WL 558675, at *5 (N.D. Cal. Feb. 10, 2014) (quoting *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007)); see also NEWBERG ON CLASS ACTIONS § 13:13 (5th ed. 2011); *Dearaujo v. Regis Corp.*, Nos. 2:14-cv-01408-KJM-AC, 2:14-cv-01411-KJM-AC, 2016 WL 3549473 (E.D. Cal. June 30, 2016) (“Rule 23 provides no guidance, and actually foresees no procedure, but federal courts have generally adopted [the process of preliminarily certifying a settlement class].”). While it is not a court’s province to “reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute,” a court should weigh the strength of a plaintiff’s case; the risk, expense, complexity, and likely duration of further litigation; the extent of discovery completed; and the value of the settlement. *Chem. Bank v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992); see also *Officers for Justice v. Civil Serv. Comm’n of City & Cty. of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982).

This class action settlement satisfies the requirements of Rule 23(a) and (b), and it is fair, reasonable, and adequate in accordance with Rule 23(e)(2). Hicks Dec. at ¶ 20. Accordingly, the Court should preliminarily approve the settlement.

B. The Court Should Conditionally Certify the Class.

A class may be certified under Rule 23 if (1) the class is so numerous that joinder of all members individually is “impracticable”; (2) questions of law or fact are common to the class; (3) the claims or defenses of the class representative

are typical of the claims or defenses of the class; and (4) the person representing the class can fairly and adequately protect the interests of the class. Fed R. Civ. P. 23(a). Rule 23(b)(3) provides that a class action seeking monetary relief may only be maintained if “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). The proposed Settlement Class meets all of these requirements.

1. The Class is Numerous and has Been Ascertained.

The numerosity prerequisite demands that a class be large enough that joinder of all members would be impracticable. Fed. R. Civ. P. 23(a)(1). The numerosity requirement demands “examination of the specific facts of each case and imposes no absolute limitations.” *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 330 (1980). Courts have found the requirement satisfied when the class comprises of as few as twenty members, or where joining all class members would serve only to impose financial burdens and clog the court’s docket. See *Murillo v. Pac. Gas & Elec. Co.*, 266 F.R.D. 468, 474 (E.D. Cal. 2010) (citing *Jordan v. L.A. County*, 669 F.2d 1311, 1319 (9th Cir.), *vacated on other grounds*, 459 U.S. 810 (1982)) (discussing Ninth Circuit thresholds for numerosity); *Rannis v. Recchia* (N.D. Cal. 2010) 380 Fed. Appx. 646, 650-651. (Class size of 20 satisfies numerosity requirement). The 31 members of the Class satisfies the numerosity requirement. Hicks Dec. at ¶ 21.

2. Plaintiff’s Claims Raise Common Issues of Fact or Law.

To satisfy the commonality requirement, the class representatives must demonstrate that common points of facts and law will drive or resolve the litigation. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (“What matters to class certification . . . is not the raising of common ‘questions’—even in droves—but, rather the capacity of a classwide proceeding to generate

1 common answers apt to drive the resolution of the litigation.”) (internal citations
2 omitted).⁷ The rule does not require all questions of law or fact to be common
3 to every single class member. See *Hanlon*, 150 F.3d at 1019 (commonality can
4 be found through “[t]he existence of shared legal issues with divergent factual
5 predicates”). Rule 23(a)(2) has been construed permissively. *Hanlon v. Chrysler*
6 *Corp.*, 150 F.3d 1011 (9th Cir. 1998). Plaintiff “need not show that every
7 question in the case, or even a preponderance of questions, is capable of
8 classwide resolution . . . a single common question” satisfies commonality.
9 *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538 (9th Cir. 2013).

10 Here, Defendant classified all CMs as exempt employees, and Plaintiff
11 alleges that they all had to meet sales requirements equivalent to a full time
12 sales associate, and were required to spend more than half their time selling on
13 the sales floor, and as exempt, the company’s policies regarding meal and rest
14 periods did not apply to CMs. Hicks Dec. at ¶ 22. Defendant represented that
15 CMs have no personal sales quotas, that no company policies require personal
16 sales quotas, and that several declarations from CMs confirm that they have no
17 personal sales quotas. Defendant also represented that sworn testimony from
18 almost half of the CMs in the class confirm that CMs spend well more than 50%
19 of their time on exempt duties. Plaintiff’s other derivative claims will rise or fall
20 with the primary claims. *Id.* Plaintiff contends that these questions can be
21 resolved at the same juncture, and thus the commonality requirement is
22 satisfied for the Class. *Id.*

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⁷ See also *Lowe v. Popcornopolis LLC*, No. CV196984PSGRAOX, 2020 WL
26 5991509, at *3 (C.D. Cal. July 8, 2020); *Freeze v. PVH Corp.*, No. CV 19-1694
27 PSG (EX), 2020 WL 5769085, at *2 (C.D. Cal. July 1, 2020); *de Cabrera v. Swift*
28 *Beef Co.*, No. EDCV182551PSGEX, 2020 WL 5356704, at *3 (C.D. Cal. June
25, 2020).

1 **3. Plaintiff's Claims are Typical of the Claims of the Class.**

2 “Rule 23(a)(3) requires that the claims of the named parties be typical of
3 the claims of the members of the class.” *Fry v. Hayt, Hayt & Landau*, 198 F.R.D.
4 461, 468 (E.D. Pa. 2000). “Under the rule’s permissive standards, a
5 representative’s claims are ‘typical’ if they are reasonably coextensive with
6 those of absent class members; they need not be substantially identical.”
7 *Hanlon*, 150 F.3d at 1020. Here, Plaintiff’s claims are typical of those of all other
8 retail store managers, as she was subject to the same practices regarding sales,
9 staffing, and management as the other CMs. Hicks Dec. at ¶ 23. She was
10 classified as exempt, yet, as Plaintiff contends, still required to spend more than
11 half of her time doing non-exempt work like selling on the sales floor, and was
12 subject to the other alleged illegal policies and practices that form the basis of
13 the claims asserted in this case, as confirmed by interviews with other CMs. *Id.*
14 Thus, this requirement is also satisfied. *Id.*

15 **4. Plaintiff and Class Counsel will Adequately Represent**
16 **the Class.**

17 To meet the adequacy of representation requirement in Fed R. Civ. P.
18 23(a)(4), Plaintiffs must show “(1) that the putative named Plaintiffs have the
19 ability and the incentive to represent the claims of the class vigorously; (2) that
20 they have obtained adequate counsel, and (3) that there is no conflict between
21 the individuals’ claims and those asserted on behalf of the class.” *Fry*, 198
22 F.R.D. at 469. Plaintiff’s claims are not antagonistic to the claims of CMs, but
23 are in line with them. Hicks Dec. at ¶ 24. Plaintiff has prosecuted this case with
24 the interests of the CMs in mind (even turning down an offered individual
25 severance package that would have resulted in the dismissal of this action). *Id.*
26 Class Counsel has extensive experience in class action and employment
27 litigation, including wage and hour class actions, and do not have any conflict
28 with the class. *Id.*

1 **5. The Rule 23(b)(3) Requirements for Class Certification**
 2 **are Met.**

3 Under Rule 23(b)(3), Plaintiff must demonstrate that common questions
 4 “predominate over any questions affecting only individual members” and that a
 5 class action is “superior to other available methods for fairly and efficiently
 6 adjudicating the controversy.” “The predominance analysis under Rule 23(b)(3)
 7 focuses on ‘the relationship between the common and individual issues’ in the
 8 case and ‘tests whether proposed classes are sufficiently cohesive to warrant
 9 adjudication by representation.’” *Wang*, 737 F.3d at 545 (9th Cir. 2013). Class
 10 actions in which a defendant’s uniform policies are challenged generally satisfy
 11 the predominance requirement of Rule 23(b)(3). *See Palacios v. Penny*
 12 *Newman Grain, Inc.*, 2015 WL 4078135, at *5–6 (E.D. Cal. July 6, 2015); *see*
 13 *also Lowe, supra*, 2020 WL 5991509, at *4; *Freeze, supra*, 2020 WL 5769085,
 14 at *3; *de Cabrera, supra*, 2020 WL 5356704, at *4-5.

15 Here, Plaintiff contends the common questions raised in this action, the
 16 challenge to Defendant’s uniform policy of classifying the CMs as exempt
 17 employees, predominates over any individualized questions. Hicks Dec. at ¶ 25.
 18 As a result, resolution of these claims would be resolved through common forms
 19 of proof, such as uniform policies, sales data and requirements, and
 20 timekeeping records, and not inquiries specific to individual CMs. *Id.*

21 Further, Plaintiff contends that the class action mechanism is a superior
 22 method of adjudication compared to a multitude of individual suits. Hicks Dec.
 23 at ¶ 26. In resolving the Rule 23(b)(3) superiority inquiry, “the court should
 24 consider class members’ interests in pursuing separate actions individually, any
 25 litigation already in progress involving the same controversy, the desirability of
 26 concentrating in one forum, and potential difficulties in managing the class
 27 action—although the last two considerations are not relevant in the settlement
 28 context.” *See Palacios*, 2015 WL 4078135, at *6 (citing *Schiller v. David’s Bridal*

1 *Inc.*, No. 10-0616, 2012 WL 2117001, at *10 (E.D. Cal. June 11, 2012)).⁸ Here,
 2 the CMs do not have a strong interest in controlling their individual claims. Hicks
 3 Dec. at ¶ 26. If the CMs proceeded on these claims as individuals, their many
 4 individual suits would require duplicative discovery and litigation in potentially
 5 dozens of individual lawsuits. *Id.* In contrast, the class action mechanism would
 6 efficiently resolve numerous substantially identical claims at the same time
 7 while avoiding a waste of judicial resources and eliminating the possibility of
 8 conflicting decisions. *Id.* Manageability is not a concern in the settlement
 9 context, *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 593 (1997). Accordingly,
 10 class treatment is superior.

11 **C. The Settlement Should Be Preliminarily Approved as to the**
 12 **Class Because It Is Fair, Reasonable, and Adequate.**

13 In deciding whether to approve a proposed class action settlement, the
 14 Court must find that the proposed settlement is “fair, reasonable, and adequate.”
 15 Fed. R. Civ. P. 23(e)(2); *Bluetooth*, 654 F.3d at 946. “[P]reliminary approval of
 16 a settlement has both a procedural and substantive component.” See, e.g., *In*
 17 *re Tableware Antitrust Litigation*, 484 F. Supp. 2d at 1079 (citing *Schwartz v.*
 18 *Dallas Cowboys Football Club, Ltd.*, 157 F. Supp. 2d 561, 570 n.12 (E.D. Pa.
 19 2001)). Preliminary approval is appropriate if “the proposed settlement appears
 20 to be the product of serious, informed, non-collusive negotiations, has no
 21 obvious deficiencies, does not improperly grant preferential treatment to class
 22 representatives or segments of the class, and falls within the range of possible

23 ⁸ See also *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir.
 24 1978) (“Numerous individual actions would be expensive and time-consuming
 25 and would create the danger of conflicting decisions as to persons similarly
 26 situated.”). CMs could face difficulty finding legal representation and could lose
 27 the incentive to bring their claims in isolation. See *In re Napster, Inc. Copyright*
 28 *Litig.*, No. C 04-1671 MHP, 2005 WL 1287611, at *8 (N.D. Cal. June 1, 2005)
 (finding superiority in part because many class members would individually lack
 the time, resources, and legal sophistication to enforce their rights).

1 approval.” *Ma v. Covidien Holding, Inc.*, No. SACV 12-2161 DOC, 2014 WL
 2 360196, at *4 (C.D. Cal. Jan. 31, 2014); see also *Eddings v. Health Net, Inc.*,
 3 No. CV 10-1744 JST (RZx), 2013 WL 169895, at *2 (C.D. Cal. Jan. 16, 2013).
 4 Importantly, courts apply a presumption of fairness “if the settlement is
 5 recommended by class counsel after arm’s-length bargaining.” *Wren v. RGIS*
 6 *Inventory Specialists*, No. C-06-05778 JCS, 2011 WL 1230826, at *6 (N.D. Cal.
 7 Apr. 1, 2011).

8 **1. Procedural Fairness.**

9 A settlement is presumed fair if it “follow[s] sufficient discovery and
 10 genuine arms-length negotiation.” *Adoma v. Univ. of Phx., Inc.*, 913 F. Supp. 2d
 11 964, 977 (E.D. Cal. 2012) (quoting *Nat’l Rural Telecomms. Coop. v. DIRECTV,*
 12 *Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004)). There is also “a strong judicial policy
 13 that favors settlements, particularly where complex class action litigation is
 14 concerned.” *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008). In
 15 light of these factors, the proposed settlement is fair, reasonable, and adequate.

16 As noted above, in February 2021, the Parties attended mediation with
 17 Steve Pearl, who specializes in resolving wage and hour class action matters.
 18 Hicks Dec. at ¶ 27. During the mediation, the Parties engaged in good-faith,
 19 non-collusive negotiations. *Id.* The Parties exchanged information regarding
 20 Defendant’s realistic exposure to damages, the relative strengths and
 21 weaknesses of Plaintiff’s claims, the risks and delays of further litigation, the
 22 current state of the law as it related to Plaintiff’s claims, and the difficulty Plaintiff
 23 may have in obtaining and maintaining class certification on each of their claims.
 24 *Id.* Moreover, Plaintiff’s counsel conducted a thorough investigation into the
 25 merits of the claims, including: reviewing Plaintiff’s employment records;
 26 exchanging hundreds of pages of documents, including data regarding the
 27 entire class, a *Belaire* process, employee handbooks and policies applicable to
 28 the class members, time records, store scheduling software and data, and pay

1 records. Plaintiff also conducted detailed phone interviews with a substantial
 2 number of the CMs. *Id.* at ¶¶ 6-8, 27. The Parties' negotiation constituted
 3 genuine, informed, arm's length bargaining.

4 **2. Substantive Fairness.**

5 In evaluating the fairness of a proposed settlement, courts compare the
 6 settlement amount with the estimated maximum damages recoverable in a
 7 successful litigation. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th
 8 Cir.2000). Courts routinely approve settlements that provide a fraction of the
 9 maximum potential recovery. *See, e.g., Officers for Justice v. Civil Serv.*
 10 *Comm'n of San Francisco*, 688 F.2d 615, 623 (9th Cir. 1982).⁹ "It is well-settled
 11 law that a cash settlement amounting to only a fraction of the potential recovery
 12 does not per se render the settlement inadequate or unfair." *In re Mego*, 213
 13 F.3d at 459; *see also Rigo v. Kason Indus., Inc.*, No. CV 11-0064 MMA (DHBx),
 14 2013 WL 3761400, at *5 (S.D. Cal. July 16, 2013) ("[D]istrict courts have found
 15 that settlements for substantially less than the plaintiff's claimed damages were
 16 fair and reasonable, especially when taking into account the uncertainties
 17 involved with the litigation."). To determine whether a settlement "falls within the
 18 range of possible approval" a court must focus on "substantive fairness and
 19 adequacy," and "consider plaintiffs' expected recovery balanced against the
 20 value of the settlement offer." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d
 21 1078, 1080 (N.D. Cal. 2007).

22 A review of the Settlement Agreement reveals the fairness,
 23 reasonableness, and adequacy of its terms. Hicks Dec. at ¶ 28. The Net

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 25 ⁹ *In Re Sunrise Secs. Litig.*, 131 F.R.D. 450, 457 (E.D. Pa. 1990) (approving
 26 20% of damages); *In Re Armored Car Antitrust Litig.*, 472 F.Supp. 1357, 1373
 27 (N.D. Ga.1979) (settlements with a value of 1% to 8% of the estimated total
 28 damages were approved); *Entin v. Barg*, 412 F.Supp. 508, 514 (E.D. Pa. 1976)
 (approving 17% of damages); *In Re Four Seasons Secs. Laws Litig.*, 58 F.R.D.
 19, 37 (W.D. Okla.1972) (approving 8% of damages).

1 Settlement Fund of \$285,416.67, derived from a Gross Settlement Amount of
 2 \$475,000.00, will result in fair and just relief to CMs. *Id.* Payments to the Class
 3 members are roughly 11% of the total non-PAGA damages, penalties and
 4 interest attainable in this case, and roughly 7% of the total damages including
 5 the duplicative PAGA penalties.¹⁰ *Id.* The result is well within the reasonable
 6 standard when considering the difficulty and risks presented by pursuing further
 7 litigation. *Id.* The final settlement amount takes into account the substantial risks
 8 inherent in any class action wage-and-hour case, as well as the specific
 9 defenses asserted by Defendant, including a class size of just over 30, nearly
 10 half of whom provided declarations harmful to certification to the Defendant prior
 11 to the mediation. *Id.* See *Officers for Justice*, 688 F.2d at 623. Despite the fact
 12 that certification would be an uphill climb, the Settlement confers a substantial
 13 benefit on CMs who faced the significant risk of no recovery and ongoing
 14 litigation expenses if they filed their own lawsuit, if they could retain their own
 15 counsel to do so. Given that “the risk of continued litigation balanced against
 16 the certainty and immediacy of recovery from the Settlement” is a relevant
 17 factor, *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 489 (E.D. Cal.
 18 2010) (*citing In re Mego*, 213 F.3d at 458), this reality also supports preliminary
 19 approval.

21 ¹⁰ The \$10,000 allocation for PAGA penalties falls within the range of
 22 reasonableness previously approved by courts in this Circuit. See, e.g., *In re*
 23 *M.L. Stern Overtime Litig.*, No. CV 07-0118 BTM (JMAx), 2009 WL 995864, at
 24 *1 (S.D. Cal. Apr. 13, 2009) (approving PAGA settlement of 2 percent); *Hopson*
 25 *v. Hanesbrands, Inc.*, No. CV 08-0844 EDL, 2008 WL 3385452, at *1 (S.D. Cal.
 26 Apr. 13, 2009) (approving a PAGA settlement of 0.3 percent); see also *Dearaujo*
 27 *v. Regis Corp.*, No. 2:14-cv-01408-KJM-AC (E.D. Cal. June 29, 2016), 2016 WL
 28 3549473 at *3 (\$1.95 million settlement allocating \$10,000 to PAGA penalties);
Garcia v. Gordon Trucking, Inc., No. 1:10-CV-0324 AWI SKO (E.D. Cal. Oct.
 31, 2012), 2012 WL 5364575 at *7 (\$3.9 million settlement allocating \$10,000
 to PAGA penalties)).

1 **3. The Distribution of Settlement Proceeds is Tailored to the**
 2 **Class and Their Respective Claims.**

3 In an effort to further ensure fairness for the employees, the Parties have
 4 agreed to allocate the settlement proceeds amongst CMs on a *pro rata* basis
 5 so that CMs receive a proportion of the Net Settlement Amount that corresponds
 6 to the time that they worked compared to the other CMs. Hicks Dec. at ¶ 29.
 7 The allocation was made based on Class Counsel's assessment of the risk of
 8 continued litigation and risk on certification and merits. *Id.*

9 A class action settlement need not benefit all class members equally.
 10 *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1148 (11th Cir.1983); *In re AT*
 11 *& T Mobility Wireless Data Services Sales Tax Litigation*, 789 F.Supp.2d 935,
 12 979–80, 2011 WL 2204584 at *42 (N.D.Ill. 2011). Rather, although disparities
 13 in the treatment of class and collective members may raise an inference of
 14 unfairness and/or inadequate representation, this inference can be rebutted by
 15 showing that the unequal allocations are based on legitimate considerations.
 16 *Holmes*, 706 F.2d at 1148; *In re AT & T*, 789 F.Supp.2d at 979–80. Here, the
 17 only consideration is the length of a CM's employment during the Class Period.

18 **4. The Informal Discovery Exchange Enabled the Parties to**
 19 **Make Informed Settlement Decisions.**

20 The amount of discovery completed prior to reaching a settlement is
 21 important because it bears on whether the Parties and the Court have sufficient
 22 information before them to assess the merits of the claims. *See, e.g., Lewis v.*
 23 *Starbucks Corp.*, No. 2:07-cv-00490-MCE-DAD, 2008 WL 4196690, at *6 (E.D.
 24 Cal. Sept. 11, 2008); *Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 617 (N.D. Cal.
 25 1979). Informal discovery is a strong factor in favor of settlement approval so
 26 long as the Parties had an opportunity to “form a clear view of the strengths and
 27 weaknesses of their cases.” *Monterrubio v. Best Buy Stores, L.P.*, 291 F.R.D.
 28 443, 454 (E.D. Cal. 2013).

1 The Parties engaged in an exchange of informal discovery to enable both
2 sides to assess the claims and potential defenses. Hicks Dec. at ¶¶ 6-8, 27, 30.
3 The Parties accurately assessed the legal and factual issues that would arise if
4 the case proceeded to trial. *Id.* at ¶ 30. In addition, in reaching this Settlement,
5 Class Counsel relied on their substantial litigation experience in similar wage
6 and hour class and collective actions. *Id.* Class Counsel's liability and damages
7 evaluation was premised on a careful and extensive analysis of the effects of
8 Defendant's policies and practices, and a review of the relevant documents and
9 data, including actual timekeeping data and payroll records, and interviews with
10 32% of the class members. *Id.* Ultimately, facilitated by Mediator Pearl, the
11 Parties used this information and discovery to fairly resolve the litigation. *Id.*

12 **5. Litigating the Action Not Only Would Delay Recovery,**
13 **But Would Be Expensive, Time Consuming, and Involve**
14 **Substantial Risk.**

15 The total monetary value of the proposed Settlement represents a fair
16 compromise given risks and uncertainties posed by continued litigation. Hicks
17 Dec. at ¶ 31. If this case were to go to trial as a class action, Class Counsel
18 estimates that fees and costs would exceed \$1,000,000.00. *Id.* Litigating the
19 class and collective claims would require substantial additional discovery,
20 including depositions of experts, the presentation of percipient and expert
21 witnesses at trial, as well as the consideration, preparation, and presentation of
22 voluminous documentary and expert evidence. *Id.* Recovery of the full exposure
23 previously referenced would also require complete success and certification of
24 all of Plaintiff's claims, a questionable feat in light of the small class size, and
25 Defendant's asserted defenses, including its 15 CM declarations. *Id.* In contrast,
26 resolving this case by means of a global settlement will yield a prompt, certain,
27 and substantial recovery for the CMs (an average payment of at least \$9,200).
28 *Id.* Such a result will benefit the Parties and the court system. *Id.*

1 **6. The Class Representative Award is Reasonable.**

2 Named Plaintiffs in class action litigation are eligible for reasonable
3 service awards. See *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003).¹¹
4 The enhancement payment of \$10,000 for Plaintiff is intended “to compensate
5 class representatives for work done on behalf of the class, to make up for
6 financial or reputational risk undertaken in bringing the action, and, sometimes,
7 to recognize their willingness to act as a private attorney general.” *Rodriguez v.*
8 *West Publ’g Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009).

9 Here, Plaintiff has requested an incentive payment of \$10,000. This would
10 represent approximately 2% of the overall settlement. The average payment a
11 member of the Class will receive is \$9,206.99. Settlement at ¶ III.54(b)(i).

12 This proposed award is “not outside the realm of what has been approved
13 as reasonable by other courts” in this Circuit. *Aguilar v. Wawona Frozen Foods*,
14 No. 1:15-cv-00093-DAD-EPG, 2017 WL 2214936, at *8 (E.D. Cal. May 19,
15 2017) (approving an incentive award of \$7,500 to each class representative
16 where average class recovery was approximately \$500); see also *Davis v.*
17 *Brown Shoe Co., Inc.*, No. 1:13-cv-01211-LJO-BAM, 2015 WL 6697929, at *12
18 (E.D. Cal. Nov. 3, 2015) (approving \$7,000 incentive award where average
19 class recovery was approximately \$400). Further, courts typically examine the
20 propriety of an incentive award by comparing it to the total amount other class
21 members will receive. See *Staton*, 327 F.3d at 975. Here, Plaintiff’s requested
22 enhancement award is only *eight percent* more than the average award.
23 Moreover, in this case Plaintiff estimates that she has spent dozens of hours

24 _____
25 ¹¹ “Courts routinely approve incentive awards to compensate named Plaintiffs
26 for the services they provided and the risks they incurred during the course of
27 the class action litigation.” *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294,
28 300 (N.D. Cal. 1995) (named Plaintiff received \$50,000 for work in class action);
Castellanos v. Mousai v. E-Loan, Inc., No. C 06-01993 SI (N.D. Cal. May 30,
2007) (approving service award of \$20,000).

performing work related to this case, and will submit a declaration at the Final Approval stage testifying to her time spent on the case. Hicks Dec. at ¶ 60. Finally, as stated above, Plaintiff's employment with Defendant will end as a condition of the Settlement (Settlement at ¶ III.46), and Plaintiff executed a general release of *all* claims against Defendant.

7. The Requested Attorneys' Fees and Costs are Reasonable.

In their fee motion to be submitted at final approval, Class Counsel will request up to thirty-three percent (33%) of the Gross Settlement Amount, \$158,333.33 plus reimbursement of costs, which are currently estimated to be under the \$10,000 permitted by the Settlement. Hicks Dec. at ¶ 61. The typical range of acceptable attorneys' fees in the Ninth Circuit is 20% to 33.33% of the total settlement value, with 25% considered the benchmark. *Vasquez v. Coast Valley Roofing*, 266 F.R.D. 482, 491-492 (E.D. Cal. 2010) (citing *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000)); *Hanlon*, 150 F.3d at 1029; *Staton*, 327 F.3d at 952. However, the exact percentage varies depending on the facts of the case, and in "most common fund cases, the award exceeds that benchmark." *Id.* (citing *Knight v. Red Door Salons, Inc.*, 2009 WL 248367 (N.D. Cal. 2009); *In re Activision Sec. Litig.*, 723 F.Supp. 1373 (N.D. Cal. 1989) ("nearly all common fund awards range around 30%")). In California, courts have customarily approved payments of attorneys' fees amounting to one-third of the common fund in comparable wage and hour class actions. See *Ellmore v. Ditech Funding Corp.*, No. SAVC 01-0093 (C.D. Cal., Sept. 12, 2002) (approving award of attorneys' fees of 33% of the recovery).¹²

¹² *Regino Primitivo Gomez, et al. v. H&R Gunlund Ranches, Inc.*, No. CV F 10-1163 LJO MJS, 2011 WL 5884224 (E.D. Cal. 2011) (approving attorneys' fees award equal to 45% of the settlement fund). *Wren v. RGIS Inventory Specialists*, 2011 WL 1230826, (N.D.Cal.,2011) (approving attorneys' fee award of just under 42% of common fund); *Big Lots Overtime Cases*, JCC Proceeding No. NOTICE AND MOTION FOR PRELIMINARY APPROVAL

1 In this case, given the results achieved, the effort expended litigating
2 these claims, and the difficulties attendant to litigating the case in the face of
3 changing law, such an upward adjustment is warranted. Hicks Dec. at ¶ 61.
4 There was no guarantee of compensation or reimbursement. *Id.* Rather,
5 counsel undertook all the risks of this litigation on a completely contingent fee
6 basis. *Id.* Defendant's vigorous and skillful defense further confronted Class
7 Counsel with the prospect of recovering nothing or close to nothing for their
8 commitment to and investment in the case. *Id.*

9 Nevertheless, Plaintiff and Class Counsel committed themselves to
10 developing and pressing Plaintiff's claims to enforce the employees' rights and
11 maximize the class recovery. *Id.* During the litigation, Counsel turned away
12 other less risky cases to remain sufficiently resourced for this one. *Id.* The
13 challenges that Class Counsel had to confront and the risks they had to fully
14 absorb on behalf of the class here are precisely the reasons for multipliers in
15 contingency fee cases. See, e.g., *Noyes v. Kelly Servs., Inc.*, 2:02-CV-2685-
16 GEB-CMK, 2008 WL 3154681 (E.D. Cal. Aug. 4, 2008); Posner, *Economic*
17 *Analysis of the Law*, 534, 567 (4th ed. 1992) ("A contingent fee must be higher
18 than a fee for the same legal services paid as they are performed... because
19 the risk of default (the loss of the case, which cancels the debt of the client to
20 the lawyer) is much higher than that of conventional loans").

21 Attorneys who litigate on a contingent basis expect to receive significantly
22 higher effective hourly rates in cases where compensation is contingent on
23

24 4283 (San Bernardino Super. Ct., Feb. 4, 2004) (approving award of attorneys'
25 fees of 33% of the recovery); *Barela v. Ralph's Grocery Co.*, No. BC070061
26 (Los Angeles Super. Ct., June 5, 1998) (same); *Davis v. The Money Store, Inc.*,
27 No. 99AS01716, (Sacramento Super. Ct., Dec. 26, 2000) (same); *Miskell v.*
28 *Auto. Club of S. Cal.* (Orange County Super. Ct., No. 01CC09035, May 27,
2003) (same); *Sconce/Lamb Cremation Cases*, JCC Proceeding No. 2085, (Los
Angeles Super. Ct., Mar. 24, 1992) (same).

1 success, particularly in hard-fought cases where, like in the case at bar, the
 2 result is uncertain. This does not result in any windfall. In the legal marketplace,
 3 a lawyer who assumes a significant financial risk on behalf of a client rightfully
 4 expects that his or her compensation will be significantly greater than if no risk
 5 was involved (*i.e.*, if the client paid the bill on a monthly basis), and that the
 6 greater the risk, the greater the “enhancement.” Adjusting court-awarded fees
 7 upward in contingent fee cases to reflect the risk of recovering no compensation
 8 whatsoever for hundreds of hours of labor simply makes those fee awards
 9 consistent with the legal marketplace, and helps to ensure that meritorious
 10 cases will be brought to enforce important public interest policies and that clients
 11 who have meritorious claims will be better able to obtain qualified counsel.

12 The requested attorneys’ fees and expense award is also reasonable
 13 when compared to Class Counsel’s lodestar. Hicks Dec. at ¶ 62. See, *e.g.*,
 14 *Vizcaino v. Microsoft Corp.*, 290 F. 3d 1043, 1050-51 (9th Cir. 2002)
 15 (“Calculation of the lodestar, which measures the lawyers’ investment of time in
 16 the litigation, provides a check on the reasonableness of the percentage
 17 award”). Here, Class Counsel’s current lodestar is over \$105,000,000. Hicks
 18 Dec. at ¶ 62. This amount will increase for preparation of the final approval
 19 papers and any remaining hearings, correspondence and communications with
 20 CMs, and settlement administration and oversight. *Id.* Class Counsel’s costs will
 21 remain below the \$10,000 permitted by the Agreement. *Id.* Class Counsel also
 22 requests reimbursement for these expenses. *Id.* Class Counsel respectfully
 23 submits that a one-third recovery for fees is appropriate and should be
 24 preliminarily approved. *Id.*

25 **8. Release of Claims**

26 Finally, the release appropriately tracks the claims at issue in this case.
 27 Settlement at ¶ III.46. The Settlement provides that all participating CMs shall
 28 be deemed to have forever released and dismissed with prejudice all released

claims as defined in the Agreement that could have been alleged based on the facts alleged in the Actions, and that accrued from April 6, 2016, through the end of the Class Period.

D. The Proposed Notice Process is Reasonable.

The Court must ensure that CMs receive the best notice practicable under the circumstances of the case. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174-75 (1974). Procedural due process requires only notice reasonably calculated “to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994). A settlement notice “is satisfactory if it ‘generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.’” *Churchill Village LLC*, 361 F.3d at 575.

The Class Notice (Ex. 1 to the Settlement) and manner of distribution is “the best notice practicable.” Settlement at ¶ III.54; Fed. R. Civ. P. 23(c)(2)(B). All CMs have been identified and the Notice Package will be mailed directly to each CM. *Id.* at ¶ III.54(b)(iii). In addition, the proposed Notice is clear and straightforward, and provides information on the meaning and nature of the Class definition, the class action, the terms and provisions of the Settlement Agreement, and the monetary awards that the Settlement will provide CMs. Hicks Dec. at ¶¶ 63-67.

The proposed Notice also fulfills the requirement of neutrality in class notices. See Conte, Newberg on Class Actions, § 8.39 (3rd Ed. 1992). It summarizes the proceedings necessary to provide context for the Settlement Agreement and the terms and conditions of the settlement, including an explanation of how the settlement amount will be allocated between the named

1 Plaintiffs, Class Counsel, the Settlement Administrator, and the CMs, all in
2 compliance with the Manual for Complex Litigation's recommendation that "the
3 notice contain a clear, accurate description of the terms of the settlement."
4 Manual for Complex Litigation, *Settlement Notice*, § 21.312 (4th ed. 2004).

5 The Notice clearly explains the procedures and deadlines for requesting
6 exclusion, objecting to the estimated award, the consequences of taking or
7 foregoing the various options available to CMs, and the date, time and place of
8 the final approval hearing. Pursuant to Rule 23(h), the proposed Notice also
9 sets forth the amount of attorneys' fees sought by Plaintiff, as well as an
10 explanation of the procedure by which Class Counsel will apply for them. See
11 Ex. 1 to Settlement. In addition, the Notice explains that CMs have the
12 opportunity to object to Class Counsel's motion for attorneys' fees and costs.
13 *Id.* It makes clear that the final settlement approval decision has yet to be made.
14 *Id.* Accordingly, the Notice complies with the standards of fairness,
15 completeness, and neutrality required of a settlement class notice disseminated
16 under authority of the Court. See Conte, Newberg on Class Actions, §§ 8.21
17 and 8.39 (3rd Ed. 1992); Manual for Complex Litigation, *Certification Notice*, §
18 21.311; *Settlement Notice*, § 21.312 (4th ed. 2004).

19 Furthermore, reasonable steps will be taken to ensure that all CMs
20 receive the Notices. Before mailing, Defendant shall provide to Simpluris the
21 last-known name, Social Security number, last-known address, the number of
22 Weeks Worked during the Class Period, and email address if available.
23 Settlement at ¶¶ I.5, III.54(a). The Settlement Administrator shall use one or
24 more commercially reasonable skip tracing methods to update the contact
25 information in the Database. *Id.* at ¶ III.54(b)(iv). Simpluris will then mail the
26 Notice to each CM. *Id.* With respect to Notices returned as undeliverable,
27 Simpluris will promptly attempt to obtain a valid mailing address by use of one
28 or more skip trace databases such as the Equifax, National Change of Address

1 (“NCOA”) database search, and skip trace. *Id.* at ¶ III.54(b)(iv). If another
 2 address is identified, Simpluris will send the Notice to the new address. *Id.* CMs
 3 who are re-mailed a notice will have 15 additional days to opt-out, object to the
 4 Settlement, or dispute the information shown on his or her Class Notice. *Id.* Any
 5 CM who fails to submit a timely request to exclude themselves from the
 6 Settlement will be deemed a Class member whose rights and claims are
 7 determined by any order the Court enters granting final approval, and any
 8 judgment the Court ultimately enters in the case. *Id.* at ¶ I.36.

9 The proposed Notice clearly and concisely describes the terms of the
 10 Settlement and the obligations of CMs who participate, will be disseminated in a
 11 way calculated to provide notice to as many CMs as possible, and thus should
 12 be preliminarily approved.

13 **VI. CONCLUSION**

14 For the foregoing reasons, Plaintiff respectfully requests that this Court
 15 grant preliminary approval of the Settlement Agreement in accordance with the
 16 schedule set forth herein, and set a Final Approval Hearing approximately 100
 17 days from the date of Preliminary Approval in order to complete the notice
 18 process. See Hicks Dec. at ¶ 68.

19
 20 Respectfully submitted,

21
 22 Date: March 5, 2021

HOYER & HICKS

23 /s/ Ryan L. Hicks

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