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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CARLOS MORENO, individually, and on behalf of all others similarly situated,

Plaintiff,

v.

PRETIUM PACKAGING, L.L.C., a Delaware limited liability company, and DOES 1 through 10, inclusive,

Defendants.

Case No. 8:19-cv-02500-SB-DFM

[Hon. Stanley Blumenfeld, Jr.]

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Date: March 12, 2021
Time: 8:30 a.m.
Courtroom: 6C

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I. INTRODUCTION

Plaintiff Carlos Moreno ("Plaintiff") seeks preliminary approval of a proposed $1.6 million non-reversionary, class action settlement of this wage-and-hour case with Defendant Pretium Packaging, L.L.C. ("Defendant," and together with Plaintiff, the "Parties"). The settlement will provide substantial monetary payments to approximately 749 Class Members. And, as set forth more fully below, the proposed settlement satisfies all the criteria for settlement approval under Rule 23. The settlement was reached after extensive discovery, investigation, and negotiations. The negotiations were at arms-length and were facilitated over the course of a full-day mediation session by Hon. Peter D. Lichtman (Ret.), an experienced neutral and former head of the Los Angeles Superior Court Mandatory Settlement Program and the Complex Civil Litigation Department.

Accordingly, Plaintiff requests that the Court preliminarily approve the proposed settlement, certify the proposed settlement class, approve distribution of class notice, and set a final approval hearing.

II. SUMMARY OF THE LITIGATION AND SETTLEMENT

A. Plaintiff's Claims and Defendant's Defenses

This is a wage-and-hour class action and PAGA representative action. Plaintiff and putative class members worked in California as hourly-paid, non-exempt employees for Defendant during the class period. Defendant is a packaging solutions company based in Chesterfield, Missouri, that operates numerous locations throughout the United States, including locations in Anaheim, California and Escondido, California. Declaration of Justin F. Marquez in Support of Plaintiff's Motion for Preliminary Approval ("Marquez Decl."), ¶ 3.

Plaintiff alleges that Defendant's payroll, timekeeping, and wage-and-hour

practices resulted in Labor Code violations. Specifically, Plaintiff alleges that Defendant failed to provide employees with legally compliant meal and rest periods, and failed to pay all required meal and rest period premiums for non-compliant meal and rest periods. Plaintiff also alleges that Defendant failed to pay required double overtime for all hours worked in excess of 12 hours per workday and all worktime greater than 8 hours on the 7th consecutive day worked. Based on these allegations, Plaintiff has included claims for failure to pay overtime wages, failure to provide meal periods, failure to authorize and permit rest periods, failure to provide accurate wage statements, unfair business practices, and civil penalties under the Private Attorneys General Act ("PAGA"), California Labor Code §§ 2698 *et seq*. Marquez Decl., ¶ 4.

Defendant denies Plaintiff's allegations and denies any liability to Plaintiff and the putative class members. Specifically, Defendant contends that its wage and hour policies and practices, including those regarding overtime pay, meal periods, rest periods, record keeping, and pay stubs are lawful and have been lawful throughout the entire class period. Marquez Decl., ¶ 5. Defendant also contends that class certification would be improper in this case.

B. Procedural History

Plaintiff initiated this action in the Orange County Superior Court on November 26, 2019. Plaintiff's initial complaint alleged the following claims for relief: (1) failure to pay overtime wages (Cal. Lab. Code §§ 510, 1194 and 1198); (2) failure to provide meal periods (Cal. Lab. Code §§ 226.7, 512); (3) failure to authorize and permit rest breaks (Cal. Lab. Code § 226.7); (4) failure to provide accurate itemized wage statements (Cal. Lab. Code § 226); and (5) unfair business practices (Cal. Bus. & Prof. Code §§ 17200 *et seq*.). ECF 1-2.

On December 27, 2019, Defendant removed this action to federal court pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §§ 1332, 1441, 1446, and 1453. ECF 1. This action was initially assigned to Judge James

V. Selna. ECF 5. On January 27, 2020, Plaintiff filed a Motion to Remand on the grounds that Defendant had failed to show that the amount in controversy exceeded $5 million, as required under CAFA. ECF 15. On March 9, 2020, the Court denied Plaintiff's Motion to Remand. ECF 31.

On February 10, 2020, Plaintiff filed a First Amended Complaint, which provided additional information and facts regarding Plaintiff's allegations. ECF 16. Defendant subsequently filed a Motion to Strike Allegations from Plaintiff's First Amended Complaint, which the Court later vacated following a joint stipulation by the Parties for Plaintiff to file a Second Amended Complaint. ECF 27, 35, 36.

On April 10, 2020, Plaintiff filed a Second Amended Complaint to modify portions of the allegations and to add an additional cause of action under PAGA. ECF 35-1. Prior to filing the Second Amended Complaint, Plaintiff sent notice of alleged Labor Code violations to the Labor Workforce Development Agency ("LWDA"), pursuant to California Labor Code § 2699.3(1). *Id.*; *see also,* Marquez Decl., ¶ 8.

Defendant subsequently filed its Answer to Plaintiff's Second Amended Complaint on April 27, 2020, and then its First Amended Answer on June 1, 2020. ECF 37, 40. Following meet and confer efforts between the Parties, Plaintiff filed a Motion to Strike Affirmative Defenses on June 15, 2020. ECF 41. On July 17, 2020, the Court granted in part and denied in part Plaintiff's Motion to Strike, which prompted Defendant's filing of its Second Amended Answer on August 6, 2020. ECF 47, 48.

On September 25, 2020, this action was transferred from the calendar of Judge James V. Selna to the calendar of Judge Stanley Blumenfeld, Jr. ECF 50. Following a stipulation by the Parties, and in light of the Parties' scheduled December 16, 2020 mediation, the Court extended deadlines for the parties to complete settlement discussions and for Plaintiff to file a Motion for Class

Certification. ECF 50-51.

C. Discovery and Investigation

The parties have engaged in extensive discovery. On April 7, 2020, Plaintiff served Defendant with written discovery, including Requests for Production of Documents and Interrogatories. The discovery sought information and documents related to, *inter alia*, Defendant's policies and procedures for compensating its employees, recording its employees' worktime, providing meal periods, authorizing and permitting rest periods, and furnishing wage statements. The discovery also sought information and documents pertaining to the identification of the class members. Marquez Decl., ¶ 9.

Defendant provided written responses to Plaintiff's discovery on June 8, 2020. Defendant subsequently produced more than 8,300 pages of documents between June 8, 2020 and early December 2020 in response to the written discovery. The documents produced by Defendant pertained to Defendant's wage-and-hour policies and procedures, including employee handbooks and other policy documents, personnel files, job descriptions, contact information for the putative class members, and a sampling of putative class member pay and time records. Marquez Decl., ¶ 10.

Plaintiff's counsel investigated and reviewed these records prior to mediation. Plaintiff's counsel hired an expert to assist in analyzing the putative class members' pay and time records and to prepare a damages model. The expert analyzed the time and pay records for the putative class members at both the Anaheim and Escondido locations to determine whether Defendant paid overtime correctly, paid double overtime correctly, provided timely and compliant meal periods, and provided any premiums for noncompliant meal or rest periods. Plaintiff's expert also calculated the total amount of unpaid double overtime, unpaid overtime, late meal periods, short meal periods, and missed meal periods. Moreover, Plaintiff's expert conducted a detailed analysis of the

frequency and severity of the recorded late, short, and missed meal periods based on the time and pay records throughout the class period. In addition to their factual investigation, Plaintiff's counsel investigated the applicable law regarding the claims and defenses to the claims asserted in the litigation. Thus, Plaintiff and his counsel are familiar with the facts of the case and the legal issues raised by the pleadings and were able to act intelligently in negotiating the Settlement. Marquez Decl., ¶ 11.

D. Settlement Negotiations

On December 16, 2020, the Parties participated in private mediation with the professional neutral Hon. Peter D. Lichtman (Ret.). Judge Lichtman (Ret.) was the former head of the Los Angeles Superior Court Mandatory Settlement Program and served as a chair of the county's Complex Civil Litigation Department. After extensive negotiations and discussions regarding the strengths and weakness of Plaintiff's claims and Defendant's defenses, the parties were able to reach an agreement at the mediation regarding the key terms and provisions of the proposed settlement. Marquez Decl., ¶ 13.

Based on the foregoing discovery and their own independent investigation and evaluation, Class Counsel is of the opinion that the proposed settlement is fair, reasonable, and adequate and is in the best interests of the Class Members in light of all known facts and circumstances, the risk of significant delay, the defenses that could be asserted by Defendant both to certification and on the merits, trial risk, and appellate risk. *Id.* at ¶ 16.

Indeed, the $1.6 million Settlement represents 32% of the realistic **maximum** recovery for all the claims, including penalties. *Id.* at ¶ 23. Although Class Counsel estimated that Defendant's realistic maximum liability for all claims was approximately $4.99 million, when the risk of prevailing at certification and trial are factored into the equation, Class Counsel believes that Defendant's realistic exposure was $1.5 million, meaning the Settlement achieves

a significant recovery. *Id.* at ¶¶ 19-24. This is plainly an excellent result for the Class. Because of the proposed Settlement, class members will be able to receive timely, guaranteed relief and will avoid the risk of an unfavorable judgment.

E. Key Terms of the Proposed Settlement

Under the Settlement Agreement, Defendant will pay $1,600,000 to resolve this litigation ("Gross Settlement Amount"). Marquez Decl., Ex. 1 (Settlement Agreement ["Settlement"]). The key terms include:

1. Settlement Class: The proposed Settlement Class is defined as: "all persons who worked for Defendant in California as an hourly paid or non-exempt employee at any time during the Class Period [which is further defined as the time period between November 26, 2015 and February 9, 2021], excluding any person who, by the time the Court grants preliminary approval of the Stipulation, has separately released the Released Claims." Settlement, at ¶¶ 2.4, 2.7.

2. $1.6 Million Non-Reversionary Settlement Fund: The Settlement provides for a $1.6 million payment to provide for Class Member settlement payments, attorneys' fees and costs, a $37,500 payment to the LWDA for the State's share of penalties under PAGA, an incentive award of $10,000 to the Class Representative, and up to $15,000 for the costs of settlement administration. Settlement, at ¶ 5.2.1. The $1.6 million settlement fund is entirely non-reversionary. Settlement, at ¶ 6.4.1. Defendant shall also separately pay the employer's share of payroll taxes (e.g., FICA, FUTA) on the portion of Class Member settlement payments that is allocated to wages. Settlement, at ¶ 6.4.7.

At the time the parties reached a Settlement in principle, the class size was estimated to be 749.[1] However, the Settlement accounts for the possibility that additional individuals may be determined to be eligible for settlement payments

[1] On December 18, 2020, Defendant confirmed the total class size at the time of settlement was approximately 749 individuals. Marquez Decl., ¶ 15.

before the close of the class period. Accordingly, the Parties agreed to include an escalation clause such that if the final class size through December 16, 2020 is increased by more than 10% above the estimated total of 749 individuals (i.e., if the class size is 824 or more individuals), Defendant shall increase the value of the gross settlement fund by an equivalent percentage. For example, if there are 20% more Class Members during the time period of November 26, 2015 through December 16, 2020 than the initial figure of 749 Class Members, then Defendant will increase the Gross Settlement Amount by 20%. Settlement, at ¶ 5.2.2.

3. Distribution of Settlement Payments: The Net Settlement Amount available for Class Member settlement payments is estimated to be $984,166.67, for a class of 749, providing for an average individual settlement payment of $1,313.97 per Class Member. Marquez Decl., ¶ 28. Individual settlement payments will be calculated as each Class Member's pro rata share of the Net Settlement Amount, based on the number of workweeks worked by each Class Member during the Class Period. Settlement, at ¶ 5.7.1.

Each Class Member who does not opt out of the Settlement and who can be located in the Notice process will automatically be mailed a settlement payment. Class Members will not be required to submit a claim or fill out a form to receive a settlement payment. Settlement, at ¶¶ 6.2.2, 6.4.2. The Settlement provides for skip tracing to locate Class Members whose Notices are returned to the Administrator as undeliverable. Class Members whose Notices are returned as undeliverable, and for whom a more current address cannot be ascertained through skip tracing, will not receive a settlement payment, but will be bound by the Settlement. The value of those Class Members' shares of the Settlement will be distributed to those Class Members who can be located in the Notice process. Settlement, at ¶¶ 6.2.6, 6.4.2.

There shall be a 180-day check cashing period for the initial settlement payments. Settlement, at ¶ 6.4.2. Following the initial distribution of settlement

payments, if more than $35,000 remains uncashed, the uncashed amount shall be redistributed to those class members who cashed their checks in the initial distribution. If less than $35,000 remains uncashed after the initial distribution, making a second distribution uneconomical, the amount shall be donated to a *cy pres* recipient, Los Angeles Trial Lawyers' Charities. Settlement, at ¶ 5.7.1(b).

4. Releases: The Class Member release is coextensive with those claims that were or could have been brought in the operative Second Amended Complaint (ECF 35-1). Settlement, at ¶ 2.31. Class Members' claims will be released through the date the Court grants preliminary approval. Settlement, at ¶¶ 5.8.1. In addition, in consideration for his incentive awards, the Class Representative will also provide a general release of claims against Defendant and a waiver of his rights under Cal. Civ. Code § 1542. Settlement, at ¶¶ 2.9, 5.8.2.

5. Tax Allocation: 40% of any payment to a Class Member shall be treated as penalties, 40% shall be treated as interest, and 20% shall be treated as wages. Settlement, at ¶ 5.7.2.

6. Attorneys' Fees and Costs: The Settlement provides that Class Counsel may seek up to 33-1/3% of the $1.6 million gross settlement fund for attorneys' fees, and up to $20,000 for their actual litigation expenses incurred. Settlement, at ¶¶5.4.1, 5.2.2. Even if the gross settlement fund is increased based on an increase in the class size, as discussed above, Class Counsel's attorneys' fees are capped at $533,333.33. Settlement, at ¶ 5.4.1. Class Counsel anticipates seeking not more than $20,000 in litigation expenses from the gross settlement fund. Marquez Decl. ¶ 35. Plaintiff will make a separate motion for attorneys' fees and costs under Rule 23(h) on a later date.

7. Incentive Awards to Class Representatives: The Settlement provides for an incentive award of $10,000 to the class representative, Carlos Moreno, in recognition of his efforts on behalf of the Class. Settlement, at ¶ 5.3.1. Plaintiff

will receive this amount in addition to his individual settlement payments. Settlement, at ¶ 5.3.1.

8. Settlement Administrative Costs: The Parties have agreed to use ILYM Group as the settlement administrator. Settlement, at ¶ 2.3. Settlement administration costs are capped at $15,000. Settlement, at ¶ 5.6.1.

III. ARGUMENT

At preliminary approval, the Court first determines whether a class exists. *Stanton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). Then, the Court evaluates whether the settlement is within the "range of reasonableness," and whether notice to the class and the scheduling of a final approval hearing should be ordered. *See, generally*, 3 Conte & Newberg, *Newberg on Class Actions*, section 7.20 (4th ed. 2002) § 11.25.

The Settlement here meets all the requirements for preliminary approval.

A. Class Certification is Appropriate for Settlement Purposes

When considering a request for certification of a settlement class for settlement purposes, the Court must first determine "whether the proposed settlement class satisfies the requirements of Rule 23(a) of the Federal Rules of Civil Procedure applicable to all class actions, namely: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). "[T]he parties seeking class certification must also show that the action is maintainable under Fed. R. Civ. P. 23(b)(1), (2) or (3)." *Id*. at 1022.

1. The Elements Of Rule 23(A) Are Satisfied

a) *Rule 23(a)(1): Numerosity*

The first requirement of Rule 23(a) is that the class be so numerous that joinder of all members would be "impracticable." *See* Fed. R. Civ. P. 23(a)(1). Numerosity is satisfied with as few as 50-60 class members. *See Welling v. Allexy*, 155 F.R.D. 654, 656 (N.D. Cal. 1994). Here, numerosity is satisfied

because there are approximately 749 Class Members – all of whom are identifiable from Defendant's records. Marquez Decl., ¶ 15.

b) *Rule 23(a)(2): Commonality*

Rule 23(a) also requires "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The commonality requirement is permissively construed by the Ninth Circuit such that the "existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon*, 150 F.3d at 1019. Plaintiff meets the criteria of Rule 23(a)(2) because the Class Members' claims turn upon answers to overarching common questions regarding Defendant's policies and procedures that are capable of class-wide resolution for settlement purposes, including: whether Defendant had legally compliant policies and practices to provide all required meal periods and authorize and permit employees to take all required rest breaks; whether Defendant provided meal and rest period premiums for legally non-compliant meal and rest periods; and whether Defendant correctly paid double overtime for all applicable hours worked. Thus, there is commonality.

c) *Rule 23(a)(3): Typicality*

Plaintiff must establish that the "claims or defense of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). This is a permissive standard that is met so long as the representative claims "are reasonably coextensive with those of absent class members." *Hanlon*, 150 F.3d at 1020. Here, the named Plaintiff has remained employed by Defendant in a non-exempt position throughout the entirety of the action and was subject to the same policies that were challenged in the Second Amended Complaint. Marquez Decl., ¶ 31.

d) *Rule 23(a)(4): Adequacy of Representation*

Rule 23 also requires that "the representative parties fairly and adequately

protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To satisfy this element, Plaintiffs must establish that: (1) the class representatives do not have a conflict of interest; and (2) class counsel will adequately represent the interests of the class. *See Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). Here, there is no conflict of interest between the Class Representative and the proposed settlement class. Furthermore, Plaintiff and Class Counsel are well qualified and willing to vigorously prosecute the interests of the class. Indeed, Class Counsel are well-regarded and accomplished attorneys who are qualified and experienced in wage-and-hour class action litigation. *See* Marquez Decl., ¶¶ 41-52. Therefore, the adequacy requirement is satisfied.

2. The Elements of Rule 23(b)(3) Are Satisfied

The predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation," and focuses on the "relationship between the common and individual issues." *Hanlon*, 150 F.3d at 1022 (quotation marks and citation omitted). "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Id*. (quotation marks and citation omitted).

As noted above, the resolution of this case would turn primarily on the existence and lawfulness of certain uniform policies and the application of various legal defenses, not on individualized issues. The evidence also permits damages to be determined through expert analysis of Defendant's payroll and timekeeping records. Accordingly, common questions of law and fact predominate over individualized issues.

Moreover, in light of the Parties' Settlement, the court need not consider any trial manageability issues that might otherwise have borne on the propriety of

class certification. *See, e.g., Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Instead, class resolution of Plaintiff's claims would be "more efficient and fairer than individual lawsuits." *Ambriz v. Coca-Cola Co*., No. CV 14-00715 SVW, 2015 WL 12683823, at *4 (C.D. Cal. March 11, 2015). Trying these claims individually in hundreds or thousands of cases would require substantial repetition of evidence and could result in conflicting judgments while imposing an extraordinary burden on the parties' and the Court's resources. The alternative of hundreds of individual actions "is not realistic." *See Wren v. RGIS Inventory Specialists*, 256 F.R.D. 180, 210 (N.D. Cal. 2009). Absent class treatment, most Class Members' claims would go unremedied regardless of their merit. Certification of a settlement class is superior to any other method of resolving this matter, since it will promote economy, expediency, and efficiency.

B. The Settlement Is Fair, Reasonable, and Adequate

"[T]here is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008); *see also Hanlon*, 150 F.3d at 1027 (endorsing the trial court's "proper deference to the private consensual decision of the parties" when approving a settlement). This policy guides the Court in determining whether a settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(1).

In determining whether a settlement is "fair, reasonable, and adequate", this Court may consider the following factors: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement. *See Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 963

(9th Cir. 2003). Plaintiff addresses each relevant factor below.[2]

1. The Strength of Plaintiff's Case

Although Plaintiff steadfastly maintains that his claims are meritorious, Plaintiff acknowledges that Defendant possessed legitimate defenses to liability and certification. First, Defendant could have successfully defeated class certification as to one or more of Plaintiff's theories of liability on the grounds that individual issues predominated over the common issues due to the varying job locations or job titles among the putative class members. Second, even if Plaintiff prevailed at certification, Defendant could have successfully asserted defenses to Plaintiff's overtime, meal period, rest period, and wage statement claims. For example, Defendant possessed strong defenses to the derivative wage statement penalties, since there existed a "good-faith" dispute that any wages were due, thereby precluding the imposition of waiting time penalties. *See* 8 Cal. Code Regs. § 13520 (a "good-faith" dispute exists to waiting time penalties "when an employer presents a defense, based in law or fact which, if successful, would preclude any recovery on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist.").

Moreover, because Plaintiff's claims for civil penalties under PAGA were wholly derivative of the underlying Labor Code claims, Defendant could have successfully defeated or minimized Plaintiff's PAGA claims if other claims were to fail. *See, e.g., Elliot v. Spherion Pacific Work, LLC*, 572 F.Supp.2d 1169, 1181-82 (C.D. Cal. 2008) ("Plaintiff's claim under the Private Attorneys General Act is wholly dependent upon her other claims. Because all of Plaintiff's other claims fail as a matter of law, so does her PAGA claim.").

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[2] Because there are no government participants in the instant lawsuit, Plaintiff has omitted the seventh factor from discussion. Should the Court grant preliminary approval of the propose settlement such that notice is given to the Class Members, Plaintiff will address the eighth factor in their motion for final approval.

In short, Plaintiff's ability to certify, and prevail on his claims was far from guaranteed. Indeed, "[i]n most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Nat'l Rural Telecomm. Coop. v. DIRECTTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) (internal quotations omitted). Thus, this factor supports preliminary approval.

2. Risk, Expense, Complexity, and Duration of Further Litigation

Although the Parties had engaged in a significant amount of investigation and class-wide data analysis, the Parties had not yet completed formal discovery. *See* Marquez Decl., ¶ 27. Plaintiff intended to depose Defendant's Rule 30(b)(6) witnesses on all topics related to Defendant's wage and hour policies. *Id*. Moreover, preparation for class certification and a trial remained for the Parties as well as the prospect of appeals in the wake of a disputed class certification ruling for Plaintiff and/or adverse summary judgment ruling. *Id*. As a result, the Parties would incur considerably more attorneys' fees and costs through trial. *Id*. This settlement avoids those risks and the accompanying expense. *See, e.g., In re Portal Software, Inc. Securities Litig.*, No. C-03-5138 VRW, 2007 WL 4171201, at *3 (N.D. Cal. Nov. 26, 2007) (noting that the "inherent risks of proceeding to summary judgment, trial and appeal also support the settlement").

3. Risk of Maintaining Class Action Status

Plaintiff has not yet filed his motion for class certification when the Parties reached this proposed class-wide resolution. Had the Court certified any claims, Defendant could move to decertify the claims. Marquez Decl., ¶ 27. Absent settlement, there was a risk that there would not be a certified class at the time of trial. Thus, this factor, too, supports preliminary approval of the settlement.

4. Amount Offered in Settlement Given Realistic Value

As detailed immediately below, the Settlement provides a substantial

monetary recovery for the Settlement Class in the face of hotly disputed claims. Thus, preliminary approval is appropriate.

Before mediating this case, Defendant provided Plaintiff's counsel with randomized timekeeping and payroll records for the putative class members. Plaintiff's counsel hired an expert to analyze this data and create a damages model. The damages model is based on an estimated 269,000 total shifts worked by Class Members and an average hourly rate of $15.48 per hour. *Id* at ¶ 18.

With respect to the meal period claim, Plaintiff estimates that Defendant's potential maximum liability is $1.26 million. As discussed above, Plaintiff contends that Defendant failed to provide legally compliant meal periods to the putative class members for all shifts worked in excess of 5 hours and failed to provide the requisite meal period premiums owed. Plaintiff's expert found that 98.2% of the total shifts worked by Class Members (or 25,303 shifts among the 25,762 shifts analyzed) were greater than 5 hours, and thus entitled those employees to receive at least one uninterrupted, 30-minute meal period. Moreover, Plaintiff's expert determined 33.3% (or 8,569 shifts among the shifts analyzed) had at least one facially non-compliant meal period (i.e., a short meal period, late meal period, and/or missed meal period). Specifically, among the eligible shifts where the employees worked at least 5 hours, Plaintiff's expert found that 20.4% of the shifts had a first meal period recorded after the employee's 5th hour of work; 11.6% of the recorded shifts had a first meal period recorded that was less than 30 minutes long; 0.7% of the eligible shifts had no recorded meal period; and 98.3% of the shifts exceeding 10 hours had no recorded second meal period. Plaintiff's expert also found that Defendant began paying meal period premiums in or around July 2019, and may have paid up to $75,000 meal period premiums to the class members from July 2019 to the present. Assuming that Defendant was liable to pay additional meal premiums for 100% of all the remaining facially non-compliant meal periods in the records

analyzed, and subtracting potential liability based on the assumed premium wages already paid, Plaintiff's expert determined the potential maximum exposure for this claim was approximately $1.26 million. *Id.* at ¶ 19.

With respect to the rest period claim, Plaintiff estimates that Defendant's realistic maximum liability is $2.08 million. Plaintiff argues that Defendant's rest break policy is facially defective because it failed to provide rest breaks for every four hours "or major fraction thereof language," as required by the Wage Order and *Brinker Rest. Corp. v. Super. Ct.,* 53 Cal.4th 1004 (2012), raising the inference that Defendant failed to authorize and permit Class Members to take second rest periods when they worked shifts between 6 to 8 hours long, and failed to authorize and permit Class Members to take a third rest periods during shifts exceeding 10 hours. Plaintiff also contends that Defendant failed to provide off-duty rest periods by requiring employees to remain on the company premises during allocated rest periods. *Augustus v. ABM Sec. Servs., Inc.,* 2 Cal.5th 257 (2016). Assuming a 100% violation rate, Plaintiff's expert determined that potential exposure for this claim would be approximately $4,164,000 (269,000 shifts multiplied by $15.48). However, Plaintiff concedes that it is incorrect to assume Defendant violated the law 100% of the time because Class Members occasionally were able to take breaks, and Defendant may have succeeded in showing that on-premises rest breaks were not *always* required; to account for this, Plaintiff's counsel reduced the $4.16 million figure by 50% to $2.08 million. Marquez Decl., ¶ 20.

With respect to the claim that Defendant failed to pay overtime and double overtime correctly, Plaintiff estimates that Defendant's potential maximum liability is $0.15 million, which also includes interest. Again, Plaintiff's expert arrived at this figure by doing a shift-by-shift analysis of the sample data to determine the total amount of recorded double overtime paid below twice the regular rate of pay, and the total amount of unpaid overtime compensation when

non-discretionary renumeration earned was not included in the calculation for the regular rate of pay. *Alvarado v. Dart Container Corp. of Cal.* 4 Cal.5th 542, 554 (2018) (confirming that "[r]egular rate of pay, which can change from pay period to pay period, includes adjustments to the straight time rate, reflecting, among other things, shift differentials and the per-hour value of any nonhourly compensation the employee has earned.") Plaintiff's expert then extrapolating those results to the class. Marquez Decl., ¶ 21.

With respect to Plaintiff's derivative claims for statutory and civil penalties, Plaintiff estimates that Defendant's realistic maximum liability is $1.5 million. While Defendant's maximum potential liability for wage statement penalties is $0.9 million for approximately 19,200 inaccurate wage statements provided to 310 employees within the 1-year statute of limitations, and $3.8 million for PAGA based on the Court assessing the initial $100 and subsequent $200 penalties for the same pay periods within the 1-year statute of limitations, Plaintiff's counsel believes that it would be unrealistic to expect a Court to award the maximum $4.7 million in penalties given Defendant's defenses described above and the discretionary nature of penalties. *See, e.g.*, *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1203-4 (2008) (holding that the employer did not willfully fail to pay wages under Cal. Lab. Code § 203 even though the class prevailed on the merits on the underlying claim for failing to pay wages); *see also Willner v. Manpower Inc.*, 35 F.Supp.3d 1116, 1131 (N.D. Cal. 2014) (violation of Cal. Lab. Code § 203 requires a finding of willfulness). And considering that the underlying claims are realistically estimated to be $4.7 million, such a disproportionate award would also raise Due Process concerns. *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 1135 (2012) (affirming trial court's finding that awarding the maximum PAGA penalties would be unjust). Weighing these factors, Plaintiff's counsel arrived at $1.5 million for statutory and civil penalties. Marquez Decl., ¶ 22.

Using these estimated figures, Plaintiff predicted that his realistic maximum recovery would be approximately $4.99 million. But after factoring in the risk of failing at class certification, post-certification, or trial, it is appropriate to discount this figure by 70%, resulting in a risk-discounted figure of $1.5 million.[3] Marquez Decl., ¶ 23.

The proposed settlement of $1.6 million therefore represents a substantial recovery when compared to Plaintiff's reasonably forecasted recovery. Marquez Decl., ¶¶ 19-29. Given the litigation risks involved, the proposed settlement is well within the realm of being fair, reasonable, and adequate because the proposed settlement compensates Class Members for all of their unpaid overtime and double overtime compensation, and provides substantial, additional compensation for the hotly contested meal and rest period claims, and related penalty claims. *Id*.

5. Discovery Completed and the Status of Proceedings

The parties engaged in a significant amount of investigation, class-wide discovery, and analysis prior to reaching the proposed settlement. *See* Marquez Decl., ¶¶ 9-11. Defendant responded to Plaintiff's written discovery, provided extensive information on the company's wage and hour policies and practices, provided the contact information for the Class Members, and produced over 8,300 pages of relevant documents. *Id.* It was only after the exchange of a substantial amount of data and information that the parties participated in a full-day mediation session and ultimately reached this proposed settlement. *Id.*

6. The Experience and Views of Counsel

"Parties represented by competent counsel are better positioned than courts

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[3] A 70% discount for risk at certification and trial is also reasonable because the Judicial Council of California found that only 21.4% of all class actions were certified either as part of a settlement *or* as part of a contested certification motion. *See* Findings of the Study of California Class Action Litigation, 2000-2006, available at http:// www.courts.ca.gov/documents/class-action-lit-study.pdf.

to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Pac. Enter. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Here, Plaintiff is represented by experienced wage and hour class action counsel who pressed Plaintiff's claims forward against a large employer who retained the well-regarded firms Armstrong Teasdale LLP and TroyGould, PC, both of which regularly litigate large, high-stakes cases throughout the country. *See* Marquez Decl., ¶¶ 48-52. Therefore, this factor strongly supports preliminary approval. *See, e.g., Gribble v. Cool Transports Inc.*, No. CV 06-04863 GAF SHx, 2008 WL5281665, at *9 (C.D. Cal. Dec. 15, 2008) ("Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation.").

C. The Settlement Meets the Requirements for Preliminary Approval

At this stage, the Court can grant preliminary approval of the settlement and direct that notice be given if the proposed settlement (1) falls within the range of possible approval; (2) appears to be the product of serious, informed and non-collusive negotiations; and (3) has no obvious deficiencies. *See* Manual for Complex Litigation (3d ed. 1995) § 30.41; 4 Newberg et al., *Newberg on Class Actions* (4th ed. 2013) § 11:24-25. These criteria are met here.

1. The Settlement is Within the Range of Possible Approval

As detailed above, the proposed settlement reflects a substantial recovery in light of real litigation risks to both merits and certification. Thus, the proposed settlement is within the range of possible approval, such that notice should be provided to the settlement class so that they can consider the settlement. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) ("the Settlement amount of almost $2 million was roughly one-sixth of the potential recovery, which, given the difficulties in proving the case, is fair and adequate"). The Court will have the opportunity to again assess the reasonableness of the settlement after the Settlement Class has the opportunity to opt-out or object.

2. The Settlement Resulted from Serious, Informed and Non-Collusive Negotiations.

The Settlement is the product of a mediation session with the assistance of a highly experienced mediator and former Superior Court Judge, Hon. Peter D. Lichtman (Ret.). *In re Apple Computer, Inc. Derivative Litig.*, No. C 06-4128 JF (HRL), 2008 U.S. Dist. LEXIS 108195 (N.D. Cal. Nov. 5, 2008) (mediator's participation weighs considerably against any inference of a collusive settlement), *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (a "mediator's involvement in pre-certification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure.") At all times, the Parties' negotiations were adversarial and non-collusive.

3. The Settlement is Devoid of Obvious Deficiencies

The Settlement contains none of the provisions that courts sometimes identify as cause for concern.

a) *The Settlement terms are fair and reasonable*

There are no deficiencies in the terms of the Settlement. The Settlement provides for a pro rata distribution of the Net Settlement Fund based on each class member's weeks worked during the class period. In addition, Class Members will not have to make claims to receive a settlement payment. Each Class Member who can be located will be mailed a payment automatically. To protect the interests of all Class Members, the Settlement incorporates procedures to ensure that as many Class Members as possible can be located. Also, the release given by Class Members is limited to those claims that were or could have been alleged in the operative Second Amended Complaint.

b) *The Class Representative will not receive disproportionate payments to those of class members*

The Class Representative will not receive any premium above the amounts received by other Class Members, but instead will receive settlement shares

calculated by the same method. Although the Class Representative will be eligible to receive an incentive award in addition to his individual settlement payments, the Settlement is not contingent on Court approval of the incentive awards. Any amount that is not approved by the Court will be added to the Net Settlement Fund for Class Member settlement payments.

Moreover, the proposed $10,000 incentive award to the Class Representative is within the range that courts in this circuit routinely approve. *See, e.g.*, *Hightower v. JP Morgan Chase Bank, NA*, No. CV 11-1802 PSG, 2015 WL 9664959, at *12 (C.D. Cal. Aug. 4, 2015) (approving $10,000 incentive awards to each of seven lead plaintiffs in $12 million wage and hour settlement); *LaFleur v. Med. Mgmt. Int'l, Inc.*, No. EDCV 13–00398–VAP (OPx), 2014 WL 2967475, at *8 (C.D. Cal. June 5, 2014) (approving incentive awards of $15,000 each to two class representatives from $535,000 wage and hour class action settlement). The total of $10,000 in a proposed incentive award comprises a mere 0.6 % of the gross settlement amount of $1.6 million, and is therefore well within the range of reasonableness. *See, e.g.*, *In re On-Line DVD Rental Antitrust Litig.*, 779 F.3d 934, 937-38 (9th Cir. 2015) (approving incentive awards that comprised in the aggregate less than 1% of gross settlement value). Plaintiff will provide a declaration in support of final approval detailing his active participation and the services he provided to the class.

c) *The Settlement's provisions for attorneys' fees and costs are in the range that is routinely approved*

The attorneys' fees and costs provisions of the Settlement are similarly fair and reasonable. The Settlement permits Class Counsel to seek attorneys' fees of up to one-third of the gross settlement amount of $1.6 million, except that if the gross settlement amount is increased because the final class size exceeds 824 employees, Class Counsel's fees will remain capped at one-third of $1.6 million. A fee award of one-third of the common fund is consistent with fee awards made

by federal courts in the Ninth Circuit. *See, e.g., In re Pac. Enter. Sec. Litig.*, 47 F.3d at 378-79 (affirming fee award of one-third of settlement); *Singer v. Becton Dickinson & Co.*, No. 08-821 IEG, 2010 WL 2196104, at *8-9 (S.D. Cal. Jun. 1, 2010) (33.33% of wage and hour settlement "falls within the typical range ... in similar cases"; citing awards of 33.33%-40%); *Stuart v. Radioshack Corp.*, No. C-07-4499 EMC, 2010 WL 3155645, at *6 (N.D. Cal. Aug. 9, 2010) (awarding one-third of settlement fund in wage-and-hour class action and noting that "[t]his is well within the range of percentages which courts have upheld as reasonable in other class action lawsuits").

Class Counsel will file a separate motion for attorneys' fees and costs pursuant to Federal Rule 23(h) two weeks before the deadline for class members to opt-out or object to afford Class Members a full opportunity to review and comment on it. *See In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 991 (9th Cir. 2010).

d) *The allocation of $37,500 to the State's share of PAGA penalties effectuates PAGA's purposes*

The allocation of $50,000 to the PAGA claim, which amounts to a $37,500 payment to the LWDA for the State's share of PAGA penalties, is consistent with recent authority regarding the allocation of settlement proceeds to PAGA in large wage and hour class actions. In a combined class action and PAGA settlement of wage and hour claims, "the Court must evaluate the adequacy of compensation to the class as well as the adequacy of the settlement in view of the purposes and policies of PAGA. In doing so, the court may apply a sliding scale. For example, if the settlement for the Rule 23 class is robust, the purposes of PAGA may be concurrently fulfilled." *O'Connor v. Uber Technologies, Inc.*, 201 F.Supp.3d 1110, 1134 (N.D. Cal. 2016).

Applying the sliding scale analysis, courts have held that comparable allocations to PAGA penalties in a class action settlement fulfill the purposes of

PAGA and warrant approval. *See, e.g., Syed v. M-I, LLC*, No. 1:12-cv-01718-DAD, 2017 WL 714367, at *13 (E.D. Cal. Feb. 22, 2017) (granting preliminary approval of allocation of $100,000 to PAGA penalties from gross settlement of $3.95 million settlement of California wage and hour claims); *Viceral v. Mistras Group, Inc.*, No. 15-cv-02198-EMC, 2016 WL 5907869, at *9 (N.D. Cal. Oct. 11, 2016) (granting preliminary approval of allocation of $20,000 to PAGA penalties from $6 million settlement based on overall quality of settlement balanced against litigation risks).

D. There Is Good Cause for Selecting Los Angeles Trial Lawyers' Charities as the *Cy Pres* Recipient

A *cy pres* award allows for "aggregate calculation of damages, the use of summary claim procedures, and distribution of unclaimed funds to indirectly benefit the entire class." *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990). "To ensure that the settlement retains some connection to the plaintiff class and the underlying claims, however, a *cy pres* award must qualify as 'the next best distribution' to giving the funds directly to class members." *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012), quoting *Six Mexican Workers,* 904 F.2d at 1308.

Here, under the terms of the settlement agreement, in the event settlement checks remain uncashed after 180 days, and the total amount of those checks is less than $35,000.00, those funds shall be donated to Los Angeles Trial Lawyers' Charities ("LATLC") as a *cy pres* beneficiary. Settlement, ¶ 5.7.1(b). In the past, LATLC has been the *cy pres* recipient in numerous wage and hour class action settlements. Declaration of LATLC President Daniel Kramer ("Kramer Decl."), ¶ 5. "In connection with this *cy pres* wage and hour award, LATLC will allocate the award to specific charitable efforts specifically related to employment and professional development and monitor those charitable efforts to ensure the *cy pres* funds are indeed utilized for the earmarked purposes." *Id.*

at ¶ 7. "Since it began in 2006, LATLC has donated $2,778,784.69 to organizations helping people seek employment and promoting educational and professional opportunities." *Id.* at ¶ 8.

E. The Court Should Approve the Proposed Class Notice

Rule 23(c)(2)(B) requires that absent class members receive the "best notice that is practicable under the circumstances." "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 Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (internal quotations marks and citations omitted). Such notice is reasonable if mailed to each member of a settlement class "who can be identified through reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974).

The proposed Notice meets all of the requirements. The Notice will be provided in English. The Notice explains in plain and easily understood language what the case is about; the class definition and claims; the settlement amount and approximate individual amount each Class Member will receive; the requested amounts to be paid to Class Counsel and as incentive awards to the Class Representatives; the rights of Class Members to appear through attorneys; the rights of Class Members to opt-out or object to the Settlement's terms and the process by which they can do so; the binding effect of the Settlement on those who do not request exclusion, including a description of the Claims being released; and the particulars of the final fairness hearing. Class Members will have 60 days to decide whether to opt out or object to the Settlement. *See* Settlement, Ex. A.

The Parties' proposed plan for directing notice to the Class is also "the best notice that is practicable under the circumstances." Using last-known addresses provided by Defendant, the Settlement Administrator will send the Notice by First Class U.S. Mail to all Class Members. Settlement, at ¶ 6.2.3. Further, the Settlement Administrator will perform skip traces to obtain the correct address of

any Class Members for whom the Notice is returned as undeliverable, and shall attempt re-mailings where new addresses are ascertained. Settlement, at ¶ 6.2.6.

For these reasons, the Settlement's plan for directing notice to class members satisfies Rule 23(c)(2)(B). *See, e.g., Wright v. Linkus Enter., Inc.*, 259 F.R.D. 468, 475 (E.D. Cal. 2009); *Misra v. Decision One Mortg. Co.*, No. 07-0994 DOC, 2009 WL 4581276, *9 (C.D. Cal. Apr. 13, 2009).

F. The Court Should Set a Schedule for Final Approval

Because the case meets the requirements for certification of a settlement class and the Settlement meets the requirements for preliminary approval, the Court should direct notice to issue and set a final fairness hearing to decide whether to grant final approval to the Settlement, as well as whether to grant the Class Representative's application for an award of service payments and Class Counsel's motion for attorney's fees and costs. *See* Fed. R. Civ. P. 23(e)(2).

Plaintiff requests that the Court set the Fairness Hearing for August 6, 2021, or the earliest available date thereafter. As reflected in the proposed order submitted herewith, Plaintiff further requests that the Court order the following briefing schedule:

Plaintiff's motion for attorneys' fees and costs	14 days before the deadline for Class Members to submit objections to the settlement
Plaintiff's motion for final approval of the settlement and for Class Representative service payments	28 days before the Final Approval Hearing
Defendant's Counsel shall file with the Court a declaration attesting that CAFA Notice has properly been served pursuant to 28 U.S.C. §1715	14 days before the Final Approval hearing
Reply briefs, if any	14 days before the Final Approval hearing

IV. CONCLUSION

For the foregoing reasons, Plaintiff's counsel respectfully requests that the Court grant preliminary approval of the proposed class action settlement.

Dated: February 12, 2021

Respectfully submitted,

WILSHIRE LAW FIRM

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