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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

CARLA BLACKSHEAR, an individual, on behalf of herself and on behalf of all persons similarly situated,

Plaintiff,

vs.

CALIFORNIA FINE WINE & SPIRITS LLC, a Limited Liability Company; and DOES 1 through 100, inclusive,

Defendants.

CASE No. **34-2018-00245842**

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

Hearing Date: July 30, 2020
Hearing Time: 9:00 a.m.
Reservation #2512197

Judge: Hon. Christopher E. Krueger
Dept.: 54

Complaint Filed: December 5, 2018
Trial date: None Set

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I. INTRODUCTION

Plaintiff Carla Blackshear("Plaintiff") respectfully submits this memorandum in support of the unopposed motion for preliminary approval of the proposed class action settlement with Defendant California Fine Wine & Spirits LLC ("Defendant"), and seeks entry of an order: (1) preliminarily approving the proposed settlement of this class action with Defendant; (2) for settlement purposes only, conditionally certifying the following Class: "all individuals who are or previously were employed by Defendant in California, and classified as a non-exempt employee at any time during the Class Period"; (3) provisionally appointing Plaintiff as the representative of the Class; (4) provisionally appointing Norman B. Blumenthal, Kyle R. Nordrehaug, and Aparajit Bhowmik of Blumenthal Nordrehaug Bhowmik De Blouw LLP as Class Counsel for the Class; (5) approving the form and method for providing class-wide notice; (6) directing that notice of the proposed settlement be given to the class; (7) appointing ILYM Group as the Settlement Administrator, and (8) scheduling a final approval hearing date to consider Plaintiff's motion for final approval of the settlement and entry of the Judgment, and Plaintiff's motion for approval of attorney's fees and litigation expenses.

Plaintiff and Defendant (collectively the "Parties") have reached a full and final settlement of the above-captioned action, which is embodied in the Joint Stipulation of Class Lawsuit and PAGA Settlement Agreement ("Agreement") filed concurrently with the Court.[1] A copy of the fully executed Agreement is attached as Exhibit #1 to the Declaration of Kyle Nordrehaug ("Decl. Nordrehaug"), served and filed herewith. As consideration for this Settlement, the Maximum Settlement Amount is Two Million One Hundred Thousand Dollars ($2,100,000) to be paid by Defendant. This payment will settle all issues pending in the litigation between the Parties, including all settlement payments to the Class Members, Settlement Administration Costs, the Class Counsel Award, the Class Representative Service Award, and the PAGA Payment. The Maximum Settlement Amount does not include the employer's share of payroll taxes which will be separately paid by Defendant. The Settlement is all-in with no reversion to Defendant and no need to submit a claim form. Decl. Nordrehaug at ¶3.

The Parties participated in an all-day mediation presided over by Lou Marlin, Esq., a respected

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

and experienced mediator of wage and hour class actions. Following the mediation session, the Parties reached an agreement to settle the Action based on a mediator's proposal, the basic terms of which were then memorialized in the form of a Memorandum of Understanding. The Parties then prepared the Agreement which was signed by the Parties and is now presented to this Court for preliminary approval. Decl. Nordrehaug at ¶5.

The Settlement is fair, reasonable and adequate, and should be preliminarily approved because there is a substantial monetary payment, and there are substantial litigation and class-certification risks. Therefore, Plaintiff respectfully requests that this Court grant preliminary approval of the Agreement and enter the proposed order submitted herewith.

II. DESCRIPTION OF THE SETTLEMENT

The Maximum Settlement Amount is Two Million One Hundred Thousand Dollars ($2,100,000). (Agreement at ¶ 15.) Under the Settlement, the Maximum Settlement Amount consists of the following elements: (1) payment of the Individual Settlement Payments to the Class Members; (2) Class Counsel Award; (3) Settlement Administration Costs; (4) a Class Representative Service Award to the Plaintiff; and (5) the PAGA Payment to the State of California. (Agreement at ¶ 15.) The Maximum Settlement Amount does not include Defendant's share of payroll taxes. (Agreement at ¶ 15.) The Maximum Settlement Amount shall be all-in with no reversion to Defendant. Decl. Nordrehaug at ¶15.

Defendant shall fund the Maximum Settlement Amount no later than ten (10) calendar days after the Effective Date. (Agreement at ¶ 52(a).) The payment of the Individual Settlement Payments, to the Class shall be made no later than twenty-five (25) calendar days after the Effective Date. (Agreement at ¶ 52(b)(iii).) Decl. Nordrehaug at ¶16.

The Net Settlement Amount shall equal the net amount available for Individual Settlement Payments to Class Members after deducting the Court-approved amounts for the Class Representative Service Award, the Class Counsel Award, the PAGA Payment, and the Settlement Administration Costs from the Maximum Settlement Amount. (Agreement at ¶ 16.) The Net Settlement Amount will be distributed among the Class Members who do not timely request exclusion ("Settlement Class Members"). (Agreement at ¶¶ 33 and 52.) The Individual Settlement Payment for each Settlement Class Member will be calculated as follows: The respective Qualified Workweeks for each Settlement Class

Member will be divided by the total Qualified Workweeks for all Settlement Class Members, resulting in the Payment Ratio for each individual Settlement Class Member. Each Settlement Class Member's Payment Ratio will then be multiplied by the Net Settlement Amount to calculate each Settlement Class Member's estimated Individual Settlement Payment. (Agreement at ¶ 52(b)(i).) Decl. Nordrehaug at ¶17.

Class Members may choose to request exclusion from (opt-out of) the Settlement by following the directions in the Class Notice. (Agreement at ¶ 51(g), Ex. 1.) All Class Members who do not submit a Request for Exclusion will be deemed Settlement Class Members who will be bound by the Settlement and will be entitled to receive a Individual Settlement Payment. (Agreement at ¶ 33.) Finally, the Class Notice will advise the Class Members of their right to object to the Settlement. (Agreement at ¶ 51(h), Ex. 1.) Decl. Nordrehaug at ¶18.

A Settlement Class Member must cash his or her Individual Settlement Payment check within 180 days after it is mailed. (Agreement at ¶ 51(b)(iv).) Any settlement checks not cashed within 180 days will be voided and any funds from such uncashed checks will be paid to the California Controller's Unclaimed Property Fund in the name of the Settlement Class Member. (Id.) Decl. Nordrehaug at ¶19.

Based upon the lowest bid received, the Parties have agreed to use ILYM Group as the Settlement Administrator for the Settlement. (Agreement at ¶ 32.) From the Maximum Settlement Amount, the Settlement Administrator shall be paid for the expenses of effectuating and administering the Settlement. (Agreement at ¶ 52(f).) The Settlement Administrator shall receive payment for services in an amount not to exceed $30,000. (Agreement at ¶ 52(f).) Decl. Nordrehaug at ¶20.

Subject to Court approval, the Agreement provides for a Class Counsel Award ini a sum not to exceed one-third of the Maximum Settlement Amount as the attorneys' fees. (Agreement at ¶ 52(d).) The Class Counsel Award also consists of an award of costs and expenses in an amount not to exceed $15,000. (Agreement at ¶ 52(d).) Subject to Court approval, the Agreement provides for a Class Representative Service Award of no more than $10,000 to Plaintiff. (Agreement at ¶ 52(c).) Decl. Nordrehaug at ¶21.

Subject to Court approval, Twenty-eight thousand dollars ($28,000.00) is allocated from the Maximum Settlement Amount for PAGA penalties under PAGA, Labor Code Section 2698 *et seq.*

Pursuant to the express requirements of Labor Code § 2699(i), seventy-five percent (75%) of the $28,000 payment, or $21,000, shall be paid to the California Labor and Workforce Development Agency (the "PAGA Payment"), and $7,000 will remain in the Net Settlement Amount for distribution to the Settlement Class Members. (Agreement at ¶ 52(e).) Decl. Nordrehaug at ¶22.

III. CASE BACKGROUND

On December 5, 2018, Plaintiff filed a Complaint against Defendant in the Superior Court of the State of California, County of San Diego on behalf of herself and a putative class. The Complaint alleged claims for failure to pay overtime wages; failure to provide compliant meal and rest breaks and related premium payments; failure to provide compliant wage statements; failure to pay final wages; and unfair business practices in violation of California Business and Professions Code § 17200 et seq. Decl. Nordrehaug at ¶7.

On February 13, 2019, Plaintiff filed a first amended complaint alleging the same claims in the original Complaint, and adding claims for civil penalties under the California Labor Code Private Attorneys General Act of 2004, Labor Code §§ 2698 et seq. On January 7, 2020, Plaintiff, by stipulation of the parties, filed a second amended complaint ("SAC") alleging the same claims in the first amended complaint, and adding new off the clock claims alleging unpaid time worked. Decl. Nordrehaug at ¶8.

On April 2, 2019, Defendant filed a general denial along with thirty-three affirmative defenses to the First Amended Complaint. On February 6, 2020, Defendant filed a general denial along with nineteen affirmative defenses to the Second Amended Complaint. Defendant disputed and disputes all claims of liability and damages and denies the allegations of wrongdoing and liability in the Action. Decl. Nordrehaug at ¶9.

Over the course of the litigation, the Parties engaged in the investigation of the claims, including production of documents, class data, and other information, allowing for the full and complete analysis of liabilities and defenses to the claims in this Action. The information obtained by Plaintiff included: (1) class data showing employees and their employment dates; (2) Payroll data for employees in the Class; (3) time sheet (punch) data showing hours worked and recorded meal periods for Class Members; (4) Defendant's employee wage and hour policies and employee handbook; (5) the employment file for the Plaintiff; and, (6) samples of wage statements provided by Defendant. Plaintiff and Defendant

agreed to discuss early resolution of the Action through a mediation. Decl. Nordrehaug at ¶10.

Prior to mediation, the Parties engaged in investigation and the exchange of documents and information in connection with the Action. As part of this process, Defendant provided documents and information to Class Counsel to review and analyze. On October 9, 2019, the Parties participated in all-day mediation session with Lou Marlin, a respected and experienced mediator of wage and hour class actions. At the conclusion of the negotiations, the Mediator made a mediator's proposal which the Parties both accepted. That led to preparation and execution of a mutually agreeable Memorandum of Understanding that set forth the key terms of agreement in principle between the parties. As reflected here, the negotiations were extensive, incorporated the sharing of documents and information necessary to facilitate rational analysis and decisions, contested at arm's length, and facilitated by the guidance and management of an experienced mediator. The Parties continued to negotiate the terms of the settlement and prepared the final Agreement which was signed by the Parties and is now presented to this Court for preliminary approval. Decl. Nordrehaug at ¶11.

Accordingly, for purposes of this Settlement, the "Class" is defined as "all individuals who are or previously were employed by Defendant in California, and classified as a non-exempt employee at any time during the Class Period". (Agreement at ¶ 5.) The Class Period is December 4, 2014 through February 15, 2020. (Agreement at ¶ 6.)

Although a settlement has been reached, Defendant denies any liability or wrongdoing of any kind associated with the claims alleged in the Action and further denies that, for any purpose other than settlement, this action is appropriate for class treatment. Defendant contends, among other things, that it has correctly compensated the Class Members and complied at all times with the California Labor Code, applicable Wage Order, and all other laws and regulations. Further, Defendant contends that class certification would be inappropriate for any reason other than for settlement. Decl. Nordrehaug, ¶ 12.

Plaintiff contends that Defendant violated California wage and hour laws. Plaintiff further contends that the Action is appropriate for class certification on the basis that the Plaintiff's claims meet the requisites for class certification. Without admitting that class certification is proper, Defendant has stipulated that the above Class may be certified for settlement purposes only. (Agreement at ¶ 35.) The Parties agree that certification for settlement purposes is not an admission that class certification would

be proper if the class certification issue were litigated. Further, the Agreement is not admissible in this or any other proceeding as evidence that the Class could be certified absent a settlement. Solely for purposes of settling the Action, the Parties stipulate and agree that the requisites for establishing class certification with respect to the Class are satisfied. Decl. Nordrehaug ¶ 13.

Class Counsel has conducted a thorough investigation into the facts of the class action. Over the course of the litigation, Class Counsel has diligently evaluated the Class Members' claims against Defendant. Prior to the settlement negotiations, counsel for Defendant provided Class Counsel with necessary information and data regarding the Class. In addition, Class Counsel previously negotiated settlements with other employers in actions involving nearly identical issues and analogous defenses. Based on the foregoing data and their own independent investigation, evaluation and experience, Class Counsel believes that the settlement with Defendant on the terms set forth in the Agreement is fair, reasonable, and adequate and is in the best interest of the Class in light of all known facts and circumstances, including the risk of significant delay, defenses asserted by Defendant, and potential appellate issues. Decl. Nordrehaug at ¶ 14.

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

When a proposed class-wide settlement is reached, the settlement must be submitted to the court for approval. 2 H. Newberg & A. Conte, *Newberg on Class Actions* (3d ed. 1992) at §11.41, p.11-87. California "[p]ublic policy generally favors the compromise of complex class action litigation." *Nordstrom Comm'n Cases*, 186 Cal. App. 4th 576, 581 (2010) quoting *Cellphone Termination Fee Cases*, 180 Cal.App.4th 1110, 1117-18 (2009). Class action settlements are approved where the proposed settlement is "fair, adequate and reasonable." *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996) (citing *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983)).

Preliminary approval is the first of three steps that comprise the approval procedure for settlements of class actions. The second step is the dissemination of notice of the settlement to all Class Members. The third step is a final settlement approval hearing, at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented and Class

Members may be heard regarding the settlement. *See Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996); *Manual for Complex Litigation, Second* §30.44 (1993); Cal. Rules of Court, rule 3.769.

The primary question presented on an application for preliminary approval of a proposed class action settlement is whether the proposed settlement is "within the range of possible approval." *Manual for Complex Litigation*, Second §30.44 at 229; *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982).[2] Preliminary approval is merely the prerequisite to giving notice so that "the proposed settlement... may be submitted to members of the prospective Class for their acceptance or rejection." *Sayaman v. Baxter Healthcare Corp.*, 2010 U.S. Dist. LEXIS 151997, *3 (C.D. Cal. 2010). There is "a presumption of fairness . . . where . . . [a] settlement is reached through arms-length bargaining." *Wershba v. Apple Computer, Inc.,* 91 Cal.App.4th 224, 245 (2001) (citation omitted); see also *Cho v. Seagate Tech. Holdings, Inc.*, 177 Cal. App. 4th 734, 742-45 (2009) (upholding trial court's determination that settlement was "fair, reasonable and adequate" where the settlement "provided valuable benefits to the class … that were 'particularly valuable in light of the risks plaintiff would have faced if she proceeded to litigate her case.'"); *Newberg*, 3d Ed., §11.41, p.11-88. However, the ultimate question of whether the proposed settlement is fair, reasonable and adequate is made after notice of the settlement is given to the Class Members and a final settlement hearing is held by the Court.

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

The approval of a proposed settlement of a class action suit is a matter within the broad discretion of the trial court. *Wershba, supra,* 91 Cal.App.4th at 234-235; *Dunk ,* 48 Cal.App.4th 1794. Preliminary approval does not require the trial court to answer the ultimate question of whether a proposed settlement is fair, reasonable and adequate. That final determination is made only after notice of the settlement has been given to the class members and after they have been given an opportunity to voice their views of the settlement or to be excluded from the settlement. 3B J. Moore, *Moore's Federal Practice* §§23.80 - 23.85 (2003).

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

In considering a potential settlement for preliminary approval purposes, the trial court does not have to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute, and need not engage in a trial on the merits. *Wershba*, *supra*, 91 Cal.App.4th at 239-40; *Dunk*, *supra*, 48 Cal.App. 4th at 1807. The Ninth Circuit explains, "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Officers for Justice*, 688 F.2d at 624. The question whether a proposed settlement is fair, reasonable and adequate necessarily requires a judgment and evaluation by the attorneys for the parties based upon a comparison of "'the terms of the compromise with the likely rewards of litigation.'" *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982), *cert. denied* 464 U.S. 818 (1983) (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968)). Thus, when analyzing the settlement, the amount is "not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Officers for Justice*, 688 F.2d at 625, 628.

With regard to class action settlements, the opinions of counsel should be given considerable weight both because of counsel's familiarity with this litigation and previous experience with cases such as these. *Officers for Justice*, 688 F.2d at 625; *In re Wash. Public Power Supply System Sec. Litig.*, 720 F. Supp. 1379, 1392 (D. Ariz. 1989); *Kirkorian v. Borelli*, 695 F. Supp. 446, 451 (N.D. Cal. 1988); *Weinberger*, 698 F.2d at 74. For example, in *Lyons v. Marrud, Inc.*, [1972-1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) Paragraph 93,525 (S.D.N.Y. 1972), the court noted that "[e]xperienced and competent counsel have assessed these problems and the probability of success on the merits.... The parties' decision regarding the respective merits of their position has an important bearing." *Id.* at ¶ 92,520. "The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 622 (N.D. Cal. 1979). As a result, courts hold that the recommendation of counsel is entitled to significant weight. *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004).

B. Factors To Be Considered In Granting Preliminarily Approval

A number of factors are to be considered in evaluating a settlement for purposes of preliminary approval. In determining whether to grant preliminary approval, the court considers whether the "(1) the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, (2)

has no obvious deficiencies, (3) does not improperly grant preferential treatment to class representatives or segments of the class, and (4) falls within the range of possible approval." *In re Tableware Antitrust Litig.*, 484 F.Supp. 2d 1078, 1079 (N.D. Cal. 2007). No one factor should be determinative, but rather all factors should be considered. The analysis has been summarized as follows:

> If the proposed settlement appears to be the product of serious, informed, noncollusive 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, then the court should direct that notice be given to the class members of a formal fairness hearing, at which evidence may be presented in support of and in opposition to the settlement.

Manual of Complex Litigation, Second § 30.44, at 229.

Here, the Settlement meets all of these criteria for preliminary approval.

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

This settlement is the result of extensive and hard fought negotiations following an exchange of necessary source documentation, class-related information and developed legal analysis and arguments for and against the claims and defenses at issue, all as overseen and guided by insights from an experienced and well-respected mediator who conducted the parties' settlement negotiations. Defendant has expressly denied and continues to deny any wrongdoing or legal liability arising out of the conduct alleged in the Action. Plaintiff and Class Counsel have determined that it is desirable and beneficial to the Class to resolve the Released Class Claims of the Class in accordance with this Settlement.[3]

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[3] Released Class Claims are defined as: "all causes of action that were alleged or reasonably could have been alleged in the SAC based on the facts, legal theories, or causes of action contained therein, including all of the following claims for relief: (i) any and all claims for alleged unpaid wages including, but not limited to, claims for minimum wage, overtime, double-time, seventh day pay, the failure to pay for all hours worked, and the failure to pay for all hours worked at correct rates; (ii) any and all claims for meal period violations including, but not limited to, claims for late, short, interrupted and/or missed meal periods and/or the failure to pay premium wages therefor; (iii) any and all claims for rest break violations including but not limited to, claims for late, short, interrupted and/or missed rest breaks and/or the failure to pay premium wages therefor; (iv) any and all claims for improper or inaccurate itemized wage statements including, but not limited to, claims for injuries suffered therefrom; (v) any and all claims for statutory penalties premised on the facts, claims, or legal theories described above or in the SAC, or that reasonably could have been raised in the SAC based on the facts, legal theories, and causes of action alleged in the SAC, including waiting time penalties under Labor Code Section 203 and/or wage statement penalties under Labor Code Section 226(e); (vi) any and all civil penalties under the Labor Code Private Attorneys General Act of 2004, Labor Code Section 2698

Class Counsel are experienced and qualified to evaluate the class claims, the viability of the defenses asserted, and the risks and benefits of trial and settlement, and Class Counsel are particularly experienced in wage and hour employment law class actions, as Class Counsel has previously litigated and certified similar claims against other employers. Decl. Nordrehaug at ¶31. The view of qualified and well-informed counsel that a class action settlement is fair, adequate, and reasonable is entitled to significant weight. See *Kullar v. Foot Locker*, 168 Cal. App. 4th 116, 133 (2008) (the trial court "may and undoubtedly should continue to place reliance on the competence and integrity of counsel, the involvement of a qualified mediator, and the paucity of objectors to the settlement."); *Dunk*, 48 Cal. App. 4th at 1802.

The Parties extensively mediated this case at arms-length before Lou Marlin, a respected mediator who is experienced with wage and hour class actions. In preparation for the mediation, Defendant provided Class Counsel with information and data concerning the members of the Class, including time data, payroll data and data concerning the composition of the Class. Plaintiff analyzed the data with the assistance of damages expert, Berger Consulting Group, and prepared and submitted a mediation brief to the Mediator. On October 9, 2019, the Parties participated in all-day mediation session with Lou Marlin. Following the full-day in person mediation session, Mediator Marlin made a mediator's proposal which the Parties eventually accepted leading to this Settlement. The final settlement terms were negotiated and set forth in the Agreement now presented for this Court's approval. Decl. Nordrehaug ¶ 5. Importantly, Plaintiff and Class Counsel believe that this Settlement is fair, reasonable and adequate.

As consideration for this Settlement, the Maximum Settlement Amount to be paid by Defendant

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et seq. ("PAGA") premised on the facts, claims, or legal theories described above or in the SAC; (vii) any and all claims under the Business & Professions Code (including Section 17200 et seq.) premised on the facts, claims, or legal theories described above or in the SAC, or that reasonably could have been raised in the SAC based on the facts, legal theories, and causes of action alleged in the SAC, and other equitable relief, liquidated damages, punitive damages, or penalties arising from the foregoing alleged claims; and any other benefit claimed on account of the allegations asserted in the SAC (collectively, the "Released Claims"). The Released Claims shall expressly exclude claims for wrongful termination, unemployment insurance, disability, social security, workers' compensation, and claims outside of the Class Period." (Agreement at ¶ 27.)

is Two Million One Hundred Thousand Dollars ($2,100,000). The Settlement is all-in with no reversion to Defendant and no need to submit a claim form. Decl. Nordrehaug at ¶ 3.

Class Counsel has conducted a thorough investigation into the facts of the class action. Over the course of the litigation, Class Counsel has diligently evaluated the Class Members' claims against Defendant. Prior to the settlement negotiations, counsel for Defendant provided Class Counsel with necessary information and data regarding the Class. In addition, Class Counsel previously negotiated settlements with other employers in actions involving nearly identical issues and analogous defenses. Based on the foregoing data and their own independent investigation, evaluation and experience, Class Counsel believes that the settlement with Defendant on the terms set forth in the Agreement is fair, reasonable, and adequate and is in the best interest of the Class in light of all known facts and circumstances, including the risk of significant delay, defenses asserted by Defendant, and potential appellate issues. Decl. Nordrehaug at ¶ 14.

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

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

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

The proposed Settlement herein has no "obvious deficiencies" and is well within the range of possible approval. All Class Members will receive an opportunity to participate in the Settlement and

receive payment according to the same formula. (Agreement at ¶ III(C)(2).)

The calculations to compensate for the amount due to the Settlement Class Members at the time this Settlement was negotiated were calculated by Plaintiff's expert, Berger Consulting Group, in advance of mediation. Decl. Nordrehaug, ¶6. For the individuals whose claims are at issue in this Action, Plaintiff analyzed the data for class members and determined the potential maximum damages for the class claims. For the Class, Plaintiff determined that the maximum potential overtime damages due to the alleged miscalculation of the regular rate were $57,066, the alleged maximum potential off-the-clock damages were $592,977, the alleged maximum potential meal period damages were estimated to be $1,102,713, and the alleged rest period damages were estimated to be $3,328,964, which assumes 50% of rest periods were on-duty. Defendant has asserted that it regularly authorizes, permits, and encourages rest breaks and thus the actual percentage of on-duty rest periods was far lower. As a result, the total alleged damages for the Class were calculated to have a maximum total value of $5,081,720. In addition, Plaintiff calculated that the maximum value of the alleged waiting time penalties were $5,589,253 and the alleged wage statement penalties were $2,893,250, however, these wage statement and waiting time penalties claims potentially have a much smaller value even if damages were awarded because the primary basis for these claims was the alleged failure to provide meal and rest breaks.[4]

Given the aggressive violation rate assumptions, and the difficulty in certifying and proving these

[4] Importantly, while Plaintiff alleged claims for statutory penalties pursuant to Labor Code Sections 203 and 226, for purposes of mediation Plaintiff conceded these claims had no value when predicated on meal and rest break claims. While this issue will soon be decided by the California Supreme Court in *Naranjo v. Spectrum Security Svcs.*, Case No. S258966 (review granted Jan. 2, 2020), there is recent legal authority rejecting the argument that violations of the meal and rest period regulations, which require payment of a "premium wage" for each improper meal period, would give rise to claims under sections 203 and/or 226. See *Ling v. P.F. Chang's China Bistor, Inc.*, 245 Cal. App. 4th 1242, 1261 (2016) and *Maldonado v. Epsilon Plastics*, Inc., 22 Cal. App. 5th 1308, 1336 (2018). Plaintiff also recognized that these claims were subject to various defenses asserted by Defendant, including, but not limited to, a good faith dispute defense as to whether any premium wages for meal or rest periods or other wages were owed given Defendant's position that Plaintiff was properly compensated. See *Reber v. AIMCO/Bethesda Holdings, Inc.*, 2008 WL 4384147, at *9 (C.D. Cal. Aug. 25, 2008); See *Nordstrom Commission Cases*, 186 Cal. App. 4th 576, 584 (2010) ("There is no willful failure to pay wages if the employer and employee have a good faith dispute as to whether and when the wages were due."). Additionally, the question of whether violations of the meal and rest period regulations, which require payment of a "premium wage" for each improper meal period, give rise to claims under sections 203 and 226. As a result, the viability of Plaintiff's claims on these theories uncertain.

claims, the settlement of $2,100,000 represents a realistic maximum exposure for settlement purposes based on these risks. Given the amount of the settlement as compared to the potential value of the Class claims, the settlement is most certainly fair and reasonable.[5] Clearly, the goal of this litigation has been met. Decl. Nordrehaug, ¶6.

Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Here, a number of defenses asserted by Defendant present serious threats to the claims of the Plaintiff and the other Class Members. Defendant asserted that Defendant's practices complied with all applicable Labor laws. Defendant also contends that its meal and rest period practices fully complied with California law, and showed that its timekeeping system paid employees meal period premiums when applicable. Finally, Defendant could also argue that the Supreme Court's decision in *Brinker v. Superior Court,* 53 Cal. 4th 1004 (2012), undermined Plaintiffs' claims, on liability, value, and class certifiability as to the meal and rest period claims. Defendant also argued that they acted in good faith and without willfulness, which if accepted would negate the claims for waiting time penalties and/or inaccurate wage statements. In fact, under the current state of the law, it is questionable whether these penalties could be awarded at all based upon the alleged meal and rest period violations. If successful, Defendant's defenses could eliminate or substantially reduce any recovery to the Class. While Plaintiff believes that these defenses could be overcome, Defendant maintains these defenses have merit and therefore present a serious risk to recovery by the Class. Decl. Nordrehaug, ¶ 24.

There was also a significant risk that, if the Action was not settled, Plaintiff would be unable to obtain class certification and thereby not recover on behalf of any employees other than herself. Defendant argued that the individual experience of each individual varied with respect to the claims. Plaintiff is aware of cases where class certification of similar claims was denied. See e.g. *Cacho v. Eurostar, Inc.*, 43 Cal. App. 5th 885 (2019) (denying certification of meal and rest break claims).

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[5] See *Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 459 (9th Cir. 2000) approving settlement which represented "roughly one-sixth of the potential recovery"); *Stovall-Gusman v. W.W. Granger, Inc.*, 2015 U.S. Dist. LEXIS 78671, at *12 (N.D. Cal. 2015) (granting final approval where "the proposed Total Settlement Amount represents approximately 10% of what class might have been awarded had they succeeded at trial.")

Defendant could also contest class certification by arguing injury and good faith were also case by case determinations that precluded class certification. Finally, even if class certification was successful, as demonstrated by the California Supreme Court decision in *Duran v. U.S. Bank National Assn.*, 59 Cal. 4th 1 (2014), there are significant hurdles to overcome for a class wide recovery even where the class has been certified. While other cases have approved class certification in wage and hour claims, class certification in this action would have been hotly disputed and was by no means a foregone conclusion. Decl. Nordrehaug, ¶ 25.

On the other hand, Defendant faced the significant cost of defending extensive discovery, efforts to certify the class and merits of these claims. Thus, after arm's length negotiations between experienced and informed counsel, the Parties respectively recognized their potential risks and agreed on the settlement of $2,100,000. As the federal court held in *Glass*, where the parties faced uncertainties similar to those here:

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

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

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

The relief provided in the settlement will benefit all members of the Class. The settlement does not grant preferential treatment to Plaintiff or segments of the Class in any way. Payments to the Class Members are all determined under a neutral methodology. All Class Members will receive the same opportunity to participate in and receive payment through a neutral formula that is based upon the weeks worked by that individual. Decl. Nordrehaug, ¶4.

Plaintiff will apply to the Court for Class Representative Service Award in consideration for his service and for the risks undertaken on behalf of the class. (Agreement at ¶ 52(c)(i).) Plaintiff performed his duty admirably by working with Class Counsel. Decl. Nordrehaug at ¶27. At this stage, the requested service award is well within the accepted range of awards for purposes of preliminary

approval. *See e.g. Mathein v. Pier 1 Imps. (U.S.), Inc.*, 2018 U.S. Dist. LEXIS 71386 (E.D. Cal. 2018) (awarding $12,500 where average class member payment was $351); *Holman v. Experian Info. Solutions, Inc.*, 2014 U.S. Dist. LEXIS 173698 (N.D. Cal. 2014) (approving $10,000 service award where class member recovery was $375); *Rausch v. Hartford Fin. Servs. Grp.*, 2007 U.S. Dist. LEXIS 14740, 2007 WL 671334 (D. Or. 2007) (approving award of $10,000 where class member recoveries were as little as $150)*; Louie v. Kaiser Foundation Health Plan, Inc*., 2008 WL 4473183, *7 (S.D.Cal. Oct. 06, 2008) (awarding $25,000 service award to each of six plaintiffs in overtime class action); *Glass v. UBS Fin. Servs.*, 2007 WL 221862, *16-17 (N.D.Cal. Jan. 27 2007) (awarding $25,000 service award in overtime class action and a pool of $100,000 in enhancements). As explained in *Glass*, service awards are routinely awarded to class representatives to compensate the employees for the time and effort expended on the case, for the risk of litigation, for the fear of suing an employer and retaliation there from, and to serve as an incentive to vindicate the statutory rights of all employees. 2007 WL 221862 at *16-17.

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

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

Based on the foregoing data and their own independent investigation and evaluation, Class Counsel is of the opinion that the settlement with Defendant for the consideration and on the terms set forth in the Agreement is fair, reasonable, and adequate and is in the best interest of the Class in light of all known facts and circumstances, including the risk of significant delay, defenses asserted by

Defendant, and numerous potential appellate issues. There can be no doubt that Counsel for both parties possessed sufficient information to make an informed judgment regarding the likelihood of success on the merits and the results that could be obtained through further litigation. Decl. Nordrehaug ¶29.

In *Glass*, the Northern District of California granted final approval of an overtime wage action although in *Glass* no formal discovery had been conducted prior to the settlement:

> Here, no formal discovery took place prior to settlement. As the Ninth Circuit has observed, however, '[i]n the context of class action settlements, 'formal discovery is not a necessary ticket to the bargaining table' where the parties have sufficient information to make an informed decision about settlement.'"

Glass, 2007 U.S. Dist. LEXIS 8476 at *14 (quoting *In re Mego Financial Corp. Securities Litigation*, 213 F.3d at 459).

Here, Class Counsel was in an equal position to evaluate the fairness of this settlement because Class Counsel had the same sufficient information, as well as independent investigations and due diligence to confirm the accuracy of the information supplied by Defendant.

V. THE CLASS IS PROPERLY CERTIFIED FOR SETTLEMENT PURPOSES ONLY

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

> All individuals who are or previously were employed by Defendant in California, and classified as a non-exempt employee at any time during the Class Period.

(Agreement at ¶ 5.)

The Class Period is December 5, 2014 through February 15, 2020. (Agreement at ¶ 6.)

A. California Code of Civil Procedure § 382

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

> Code of Civil Procedure Section 382 authorizes class actions "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court...." The party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members. (*citations omitted*). The "community of

> interest" requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.

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

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

B. The Proposed Class Is Ascertainable and Numerous

Plaintiff brings this action on behalf of a class of employees during the applicable Class Period. Plaintiff asserts that all of these individuals are ascertainable because the class members can readily be determined through examination of Defendant's files. Given that the class consists of approximately 2,500 members, Plaintiff maintains that numerosity is clearly satisfied. *See Bowles v. Superior Court*, 44 Cal.2d 574 (1955) (class with 10 members sufficiently numerous); *Rose v. City of Hayward*, 126 Cal.App.3d 926, 934 (1981) (class of 48 members satisfies numerosity requirement.) Here, Plaintiff asserts that the 2,500 current and former employees that comprise the class can be identified based on Defendant's records and are sufficiently numerous for class certification. Decl. Nordrehaug at ¶30.

C. Common Issues of Law and Fact Predominate

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

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

Here, Plaintiff contends that common questions of law and fact are present, and specifically the common questions of whether the Defendant properly paid for overtime using the correct regular rate, whether Defendant paid for pre-shift activity, whether the Defendant failed to provide off-duty meal and periods, and whether Class Members are entitled to damages and penalties as a result of these practices. Decl. Nordrehaug, ¶30. Defendant disputes that common questions predominate, but will not oppose such a finding for purposes of this settlement only.

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

The typicality requirement requires the Plaintiff to demonstrate that the members of the class have the same or similar claims as the Plaintiff. "The typicality requirement is met when the claims of the Plaintiff arise from the same event or are based on the same legal theories." *Tate v. Weyerhaeuser Co.*, 723 F.2d 598, 608 (8th Cir. 1983). In *Hanlon v. Chrysler Co.*, 150 F.3d 1011, 1020 (9th Cir. 1998), the Court explained that "[u]nder the rule's permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical."

In the instant case, Plaintiff contends that there can be little doubt that the typicality requirement is satisfied. The Plaintiff, like every other member of the Class, worked for Defendant as a non-exempt employee during the Class Period. Plaintiff contends that, like every other member of the Class, she was subject to the same practices and policies of Defendant which are all subject to the same defenses. Thus, Plaintiff asserts that the claims of the Plaintiff and the Class Members arise from the same course of conduct by the Defendant, involve the same employment policies and practices of Defendant, and are based on the same legal theories. Decl. Nordrehaug at ¶30. For purposes of settlement, Plaintiff asserts that the typicality requirement is met as to the common issues presented in this case. Defendant does not oppose a finding of typicality for purposes of this settlement only.

E. The Class Representation Fairly and Adequately Protects the Class

Plaintiff contends that the Class Members are adequately represented here because Plaintiff and representing counsel (a) do not have any conflicts of interest with other class members, and (b) will prosecute the case vigorously on behalf of the class. *Hanlon*, 150 F.3d at 1020. This requirement is met here. First, Plaintiff is well aware of her duties as the representative of the Class and has actively

participated in the prosecution of this case to date. She effectively communicated with counsel, provided documents to counsel and participated in the investigation and negotiations in the Action. Second, Plaintiff retained competent counsel who is experienced in employment class actions and who have no conflicts. Decl. Nordrehaug at ¶ 31. Third, there is no antagonism between the interests of the Plaintiff and those of the Class. Both the Plaintiff and the Class Members seek monetary relief under the same set of facts and legal theories. Defendant disputes that the adequacy requirement is satisfied, but will not oppose such a finding for purposes of this settlement only.

F. The Superiority Requirement Is Met

To certify a class, the Court must also determine that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. "Where classwide litigation of common issues will reduce litigation costs and promote greater efficiency, a class action may be superior to other methods of litigation." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). As courts have previously observed:

> Absent class treatment, each individual plaintiff would present in separate, duplicative proceedings the same or essentially the same arguments and evidence, including expert testimony. The result would be a multiplicity of trials conducted at enormous expense to both the judicial system and the litigants. "It would be neither efficient nor fair to anyone, including defendants, to force multiple trials to hear the same evidence and decide the same issues."

Sav-On, 34 Cal. 4th at 340, citing *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 67 (S.D. Ohio 1991).

Here, Plaintiff contends that a class action is the superior mechanism for resolution of the class claims pled in the Action. While Defendant disputes that class treatment is superior, Defendant does not dispute a finding of superiority in this action for purposes of this settlement only.

VI. THE PROPOSED METHOD OF CLASS NOTICE IS APPROPRIATE

The Court has broad discretion in approving a practical notice program. The Parties have agreed upon procedures by which the Class Members will be provided with written notice of the Settlement similar to that approved and utilized in hundreds of class action settlements. In accordance with the Agreement, Defendant will provide to the Settlement Administrator an electronic database containing for each Class Member their full name, last known address, last known telephone number, and Social Security number; as well as information sufficient to allow the Settlement Administrator to calculate the

number of "Workweeks" for all Class Members during the Class Period. (Agreement at ¶¶ 4 and 51.) Within 14 days after receipt of the Class Data, the Settlement Administrator will mail the Class Notice Packets to all Class Members via first-class regular U.S. Mail using the most current mailing address information available. (Agreement at ¶ 51(c).)

The Class Notice, drafted jointly and agreed upon by the Parties through their respective counsel and to be approved by the Court, includes all relevant information. (See Exhibit 1 to the Agreement.) The Class Notice will include, among other information: (i) information regarding the Action; (ii) the impact on the rights of the Class Members if they do not opt out; (iii) information to the Class Members regarding how to opt out and how to object to the Settlement; (iv) the estimated Individual Settlement Payment for each of the Class Members; (iii) the amount of attorneys' fees and litigation expenses to be sought; (v) the amount of the service award request; and (vi) the anticipated expenses of the Settlement Administrator. Decl. Nordrehaug at ¶32.

The Class Notice will state that the Class Members shall have forty-five (45) days from the date that the Notice is mailed to them (the "Response Deadline") to request exclusion or to submit an objection. (Agreement at ¶ 51(g)-(h).) Class Members shall be given the opportunity to object to the terms of the Agreement and/or requests for attorneys' fees and costs and to participate at the Final Approval Hearing, in accordance with the instructions set forth in the Class Notice. Class Members who do not opt out will automatically receive a payment of their Individual Settlement Payment. This notice program was designed to meaningfully reach the Class Members and it advises them of all pertinent information concerning the settlement. Decl. Nordrehaug at ¶32. The mailing and distribution of the Class Notice satisfies the requirements of due process, and is the best notice practicable under the circumstances and constitutes due and sufficient notice to all persons entitled thereto. The Class Notice provides information on the terms and provisions of the settlement; the benefits that settlement provides for Class Members; the date, time and place of the Final Approval Hearing; and the procedure and deadlines for submitting comments, objections and requests for exclusion and complies with Rules of Court 3.766 and 3.769(f).

VII. CONCLUSION

Plaintiff respectfully requests that the Court preliminarily approve the proposed settlement, sign

the proposed Preliminary Approval Order, which is submitted herewith, and schedule the final approval hearing for a date that is at least one hundred twenty (120) days from the date of Preliminary Approval.

Dated: June 15, 2020

BLUMENTHAL NORDREHAUG BHOWMIK DE BLOUW LLP

By: _____

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