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individually and on behalf of all others similarly situated

MARJORIE SAINT HUBERT, VALERIE MARTINEZ, and THERESE SVENGERT, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

EQUINOX HOLDINGS, INC., a Foreign Corporation; and DOES 1 through 50, inclusive,

Defendants.

Case No.: 2:21-cv-00086-VAP-JEMx

CLASS ACTION

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

Date: January 26, 2024
Time: 1:30 p.m.
Dept.: 6A

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I. INTRODUCTION

Plaintiff MARJORIE SAINT HUBERT ("Plaintiff"), as an individual and on behalf of those similarly situated, seeks certification of a wage-and-hour class for settlement purposes, as well as the preliminary approval of the settlement. After narrowing of the issues through litigation, engaging in pre-certification discovery, and with the assistance of respected mediator, Stephen Benardo, Esq., the parties have reached a settlement of $225,000.00 (the "Gross Settlement Amount") for a class size of 419 members. The Settlement will result in significant financial benefit to participating class members and merits preliminary approval by the Court. Further, the Class Notice clearly apprises the class members of their rights under the Settlement. Also, the Settlement eliminates the uncertainty and risk of continued litigation. This renewed motion also addresses the issues raised by the Court in its lates Order of November 2, 2023 denying the renewed motion without prejudice.

II. STATEMENT OF FACTS

Plaintiff, Marjorie Saint Hubert ("Plaintiff") worked at Equinox as a Membership Advisor and Front Desk Associate from on or about December 6, 2017 to September 9, 2019. She worked at various locations throughout her employment. Plaintiff alleges that throughout her employment at Equinox, she did not receive legally compliant meal and rest periods. She, and others, have alleged that Equinox had practices that required Membership Advisors and members of the Class similarly situated to work through their meal periods and rest breaks. Membership Advisors are entitled to a first meal period by the end of the fifth hour of work. However, according to Plaintiff, Membership Advisors did not take a meal period before the end of the fifth hour of work.

According to Plaintiff, Membership Advisors had to work without meal and rest breaks during the "Close Out" period of each month. The "Close Out" period typically consisted of the last three days of each month and occurred due to the Equinox's sales requirements. The pressure to reach Equinox sales goals each month

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was substantial as alleged by Plaintiff. According to Plaintiff, during the "Close Out" period, Membership Advisors had to work in difficult conditions without taking breaks for 12 to 14 hours per shift. Membership Advisors would work through meals and other breaks to ensure that they reached the goals. Membership Advisors would have formal/informal reviews sporadically. Failure to reach monthly goals would be reflected on their sales/employment record. According to Plaintiff, the constant threat was that failure to meet sales goals would result in termination if performance was not on track. Plaintiff further alleges that Equinox also failed to provide Ms. Hubert and the Class with duty-free rest periods. Further, Plaintiff alleges Equinox failed to provide compensation to Ms. Hubert and other employees in lieu of providing meal and rest periods. Therefore, in her action, Plaintiff sought to recover pay at the regular rate of pay for each workday that meal and rest periods were not provided as well as any penalties.

Plaintiff and her co-Plaintiffs, Therese Svengert and Valerie Martinez also alleged that Equinox had a parking deduction practice that violated Defendant's duty to indemnify employees for necessary expenses incurred as part of their employment. This claim was adjudicated in Equinox's favor through a Partial Motion for Summary Judgment.

III. PROCEDURAL POSTURE

On December 1, 2020, Plaintiffs Marjorie Saint Hubert, Valerie Martinez, and Therese Svengert filed a Class Action Complaint in the Superior Court of California, County of Los Angeles. (Nosrati Decl., ¶2) The Class Action Complaint contained seven causes of action under California law, namely (1) Failure to Provide Reimbursement of Business Expenses [Labor Code §2802], (2) Failure to Provide Meal Periods, (3) Failure to Provide Rest Periods, (4) Failure to Pay All Earned Wages, (5) Failure to Provide Accurate Itemized Statements [Labor Code §226], (6) Waiting Time Penalties [Labor Code §203], and (7) Unfair Business Practices [Business and Professions Code §1200, et seq.]. On January 4, 2021, Defendant

removed the action to the United States District Court for the Central District of California pursuant to 28 U.S.C. §§1332, 1367, 1441, 1446, and 1453. (Doc. 1)

On July 8, 2021, Plaintiffs Therese Svengert and Valerie Martinez filed a First Amended Class Action Complaint to add an eighth cause of action for penalties under the Private Attorney General Act of 2004 [Labor Code §2698, et seq.] ("PAGA"). (Doc. 16).

On January 7, 2022, Defendant filed its motion for partial summary judgment. (Doc.22) In its motion, Defendant argued that Equinox's parking program is "optional", not "necessary." Defendant further argued that its deduction of parking expenses from employee pay "is a lawful deduction under California law because employees who participate in the parking program do so for their own benefit and voluntarily requested such deductions in writing." (Doc. 22-1) On January 14, 2022, Plaintiffs filed their Opposition to Defendant's motion. Plaintiff argued that whether a business expense incurred is necessary for purposes of applying labor code section 2802 is ordinarily a question of fact and argued that the parking deduction was necessary because there were limited or sometimes, no alternatives for parking that were in close proximity to Defendant's facilities. After the Court granted Defendant's motion for partial summary judgment. This only left the claims for alleged meal and rest violations.

On September 9, 2022, the Parties attended mediation with mediator, Stephen Benardo ("Mr. Benardo"). (Nosrati Decl., ¶6). Named Plaintiff, Marjorie Saint Hubert, attended the mediation. (Nosrati Decl., ¶6). Through the mediator's guidance, and after comprehensive investigation by counsel regarding the claims and defenses, the Parties accepted Mr. Benardo's mediator's proposal and a settlement was reached on September 15, 2022, which was achieved through good-faith, arm's-length negotiations. (Nosrati Decl., ¶6). Accordingly, on September 9, 2022, the parties filed a Notice of Settlement and Stipulation re Vacating Further Hearing Dates. (Doc. 44) By July 13, 2023, all the Parties executed a Joint Stipulation of Class Settlement and Release. (Nosrati Decl., ¶12).

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IV. THE SETTLEMENT AGREEMENT

A. **The Class Period and Class Members**

Class Members means all persons employed by Defendant as a Membership Advisor or Senior Membership Advisor in California at any time from December 1, 2016, to date of preliminary approval. ("Class Members"). (Exh. 1, ¶6).

B. **Gross Settlement Fund.**

The "Gross Settlement Fund" is Two Hundred and Twenty-Five Thousand Dollars and Zero Cents ($225,000.00), to be paid by Defendant which is inclusive of attorneys' fees, costs, enhancement awards, and claims administration ("Gross Settlement Fund"). Defendant's settlement payment will not exceed the Gross Settlement Fund except for Defendant's share of the payroll taxes. The Gross Settlement Fund is an all-in common fund settlement. There will be no reversion of any portion of the Gross Settlement Fund to Defendant. (Exh. 1, ¶10).

C. **Class Representative Enhancement Payment.**

The named Plaintiff will receive an enhancement, to be approved by the Court, but not to exceed five thousand dollars ($5,000.00). (Exh. 1, ¶33). The Class Representative Enhancement Payment will be paid from the Gross Settlement Fund and will be in addition to Plaintiff's Individual Settlement Payment. Any funds allocated to the Class Representative Enhancement Payments but not awarded by the Court will be included in the Net Settlement Amount and distributed pro rata to the Participating Class Members. *Id.*

D. **Administrator Costs.**

The Settlement Administrator will be paid for the reasonable costs of administration of the Settlement and distribution of payments from the Gross Settlement Fund, which Settlement Administration Costs shall not exceed Twenty Thousand Dollars and No Cents ($20,000.00). These costs, will include, inter alia, the required tax reporting on the Individual Settlement Payments, the issuing of 1099 Forms, distributing Class Notices, creating and maintaining a toll-free telephone

number, calculating Individual Settlement Payments, and distributing the Gross Settlement Fund as set forth herein, and providing necessary reports and declarations. (Exh. 1, ¶34).

E. **Distribution to Class Members.**

The Individual Settlement Payment for each Participating Class Member shall be determined based upon a weekly formula set forth as follows: The Settlement Administrator will calculate the total number of workweeks worked by all Class Members during the Class Period based upon the records in Defendant's possession, custody or control ("Workweeks"). A partial workweek will be counted as a full workweek. Defendant's workweek data will be presumed to be correct, unless a particular Class Member proves otherwise to the Settlement Administrator by credible evidence. The Parties and Settlement Administrator will cooperate in an attempt to resolve all workweek disputes. The Settlement Administrator will then divide the Net Settlement by the Workweeks to obtain the Per Workweek Value. The Settlement Administrator shall then multiply the Per Workweek Value by each Class Member's individual workweeks worked to determine the Individual Settlement Payment. (Exh. 1, ¶35).

F. **Attorneys' Fees and Costs.**

Although Class Counsel can seek an award of Attorneys' Fees not to exceed one-third (1/3) of the Gross Settlement Fund, Class Counsel is seeking a lesser amount, twenty-five percent 25% ($56,250.00) in attorney's fees, and actual litigation costs and expenses not to exceed Twenty- Five Thousand Dollars and Zero Cents ($25,000.00). Any funds allocated to Attorney's Fees and Costs but not awarded by the Court will be included in the Net Settlement Amount and distributed pro rata to the Participating Class Members. (Exh. 1, ¶32).

G. **Administration of Notice, Objection, and Exclusion Process.**

a. Administration of Notice.

Within thirty (30) calendar days of Preliminary Approval, Defendant will

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provide the Class List to the Settlement Administrator. In the event Defendant fails to provide a complete Class List within said 30 calendar days, Defendant will provide the Class List it has compiled at that time to Settlement Administrator and then will have fifteen (15) additional calendar days to provide the remainder of the Class List to the Settlement Administrator. (Exh. 1, ¶39). Within thirty (30) calendar days after receiving the Class List from Defendant, the Settlement Administrator will mail a Class Notice to all Class Members via regular First-Class U.S. Mail, using the most current, known mailing addresses identified in the Class List. (Exh. 1, ¶40).

2. Objection Process.

To object to the Settlement Agreement, a Class Member must timely submit to the Settlement Administrator a written Objection. Any written Objection must be signed by the Class Member and contain all information required by this Settlement Agreement, and as specified in the Class Notice. Written Objections must be mailed to the Settlement Administrator as explained in the Class Notice. Alternatively, any Class Member may appear at the Final Approval Hearing, personally or through their own counsel, in order to have their objections heard by the Court, regardless of whether such Class Member submits a written Objection. Only those Class Members who do not submit a Request for Exclusion may object to the Settlement. (Exh. 1, ¶49).

3. Exclusion Process.

Any Class Member wishing to opt-out from the Settlement Agreement must sign and postmark a written Request for Exclusion to the Settlement Administrator within the Response Deadline. The postmark date will be the exclusive means to determine whether a Request for Exclusion has been timely submitted. (Exh. 1, ¶45).

4. Uncashed Settlement Checks.

Payments returned as undeliverable from the distributions of the First and Second Installment Payments will be added back into the Net Settlement Amount, and distributed pro rata to the Participating Class Members with the next distribution. If

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any checks remain uncashed following distribution of the Third Installment Payment, the funds represented by those checks and funds represented by Individual Settlement Payment checks returned as undeliverable will be sent to the California unclaimed fund. (Exh. 1, ¶52).

V. LEGAL ARGUMENT

A. The Class Should Be Certified for Settlement Purposes.

The Parties have stipulated to class certification for settlement purposes. (Exh. 1, ¶28). *See La Fleur v. Medical Management Intern, Inc.*, 2014 WL 2967475, at *2 (C.D. Cal. 2014) ("Parties seeking class certification for settlement purposes must satisfy the requirements of Federal Rule of Civil Procedure 23"); *Litty v. Merrill Lynch & Co., Inc.*, 2015 WL 4698475, at *2 (C.D. Cal. 2015).

Courts may certify a class action if it satisfies all four requirements identified in Federal Rule of Civil Procedure 23(a), and satisfies one of the three subdivisions of Rule 23(b). *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997). First, the plaintiffs must show the following: (1) the class is so "numerous" that joinder of all members individually is impracticable; (2) there are questions of law or fact "common" to the class; (3) the claims or defenses of the class representatives are "typical" of the claims or defenses of the class; and (4) the person representing the class is able to fairly and "adequately" protect the interests of all class members. Fed. R. Civ. P. 23(a); *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003).

Second, under Rule 23(b)(3), Plaintiffs must show that common questions of law or fact predominate, and class resolution is superior to other available methods of resolution. Fed. R. Civ. P. 23(b)(3).

When ruling on class certification, a district court "is bound to take the substantive allegations of the complaint as true." *Blackie v. Barrack*, 524 F.2d 891, 901, n.17 (9th Cir. 1975). A court "may not require plaintiff[s] to make a preliminary proof of [his] claim; it requires only sufficient information to form a reasonable judgment." *Baldwin & Flynn v. Nat'l Safety Assoc.*, 149 F.R.D. 598, 600 (N.D. Cal.

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1993). All elements necessary to grant class certification are present in this case.

1. The Requirements of Rule 23(a) Are Satisfied.

a. The Class Is So Numerous that Joinder Is Impracticable.

A class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). At the time of entering into the agreement, the estimate class size was approximately 419 Class Members. Because it would be impracticable to join all of these persons as plaintiffs in a single lawsuit, Plaintiff satisfies the numerosity requirement.

b. There Are Questions of Law and Fact "Common" to the Class.

The requirement of common questions of law or fact is met through the existence of a "common contention" that is capable of class wide resolution. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). This rule is "less rigorous" than the companion requirements of Rule 23(b)(3). *Ibid*. Indeed, sometimes "only...one single issue common to the proposed class" is sufficient to satisfy Rule 23(a)(2). *Haley v. Medtronic, Inc.*, 169 F.R.D. 643 (C.D. Cal. 1996).

Not all questions of law and fact need to be common in order to satisfy the commonality requirement. "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 v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). Commonality is generally satisfied where, as here, "the lawsuit challenges a system-wide practice or policy that affects all of the putative class members." *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001), abrogated on other grounds in *Davidson v. Kimberly-Clark Corporation*, 873 F.3d 1103 (9th Cir. 2017). In this case, Plaintiff alleges a system-wide practice or policy that affects all of the putative class members.

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i. Meal Periods Claims.

"An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes..." Lab. C. §512(a). An employer who fails to provide meal periods must pay the employee an additional hour of pay at the employee's regular rate for each day that a meal period was not provided. Lab.C. §226.7(c); see also 8 Cal. C. Regs. §11050, subd. 11(B) and Industrial Welfare Commission ("IWC") Wage Order No. 1-2001 ("Wage Order No. 1"), subd. 11(B). Additionally, "An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes..." Lab. C. §512(a).

In the present matter, Plaintiff has alleged that Defendant had practices that required class members to work through their meal periods. Plaintiff has alleged for example, that class members had to work without meal periods during the "Close Out" period of each month. The "Close Out" period typically consists of the last three days of each month and according to Plaintiff, would occur due to Defendant's sales requirements. These allegations present the following common questions of law or fact: (1) Whether Defendant engaged in a common course of failing to provide duty-free meal periods; (2) whether Defendant engaged in a common course of failing to provide meal periods by the end of the fifth hour of work, (3) whether Defendant engaged in a common course of failing to provide second meal periods when working in excess of 10 hours in a shift; and (4) whether Defendant failed to pay one additional hour of pay at the employee's regular rate for each day that an alleged meal period violation occurred.

ii. Rest Periods.

"Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of

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ten (10) minutes net rest time per four (4) hours or major fraction thereof." Wage Order No. 1, §12. "However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3½) hours." Id.

Furthermore, "during rest periods employers must relieve employees of all duties and relinquish control over how employees spend their time." *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 269 (citations omitted).

In the present action, Plaintiff alleges that similar to the meal period claims, Defendant had practices that required class members to work through their rest periods and that this also occurred during the "Close Out" period. These allegations present the following common questions of law or fact: (1) Whether Defendant engaged in a common course of failing to provide duty-free rest periods and (2) whether Defendants failed to pay one additional hour of pay at the employee's regular rate for each day that a rest period was not provided.

The California Supreme Court in *Brinker* stated that "[c]laims alleging that a uniform policy consistently applied to a group of employees is in violation of the wage and hour laws are of the sort routinely, and properly, found suitable for class treatment." *Brinker Restaurants Corp.*, *supra*, 53 Cal.4th at 1033; see also *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal. App. 4th 220, 233 – the lawfulness of a company policy requiring security guard employees to sign on-duty meal break agreements can be determined on a classwide basis; *Safeway, Inc. v. Superior Court* (2015), B255216 – defendants had uniform policy of directing or pressuring its employees not to take meal breaks, and a uniform policy of not calculating premium payments related to meal breaks.

Furthermore, in *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, 77, the California Supreme Court ruled that time records that show missed, short, or delayed meal periods with no indication of proper compensation, raise a rebuttable presumption of meal period violations, including at the summary judgment stage. Employers can rebut the presumption by presenting evidence that employees were

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compensated for noncompliant meal periods or that they had in fact been provided compliant meal periods during which they chose to work. *Id*.

c. Plaintiff's Claims Are Typical of Those of the Class.

The requirement of typicality is met if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Representative claims need only be "reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, supra, 150 F.3d at 1020. Thus, to find typicality, a "court does not need to find that the claims of the purported class representatives are identical to the claims of the other class members." *Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 649 (C.D. Cal. 1996).

Plaintiff satisfies the typicality requirement. Plaintiff alleges that she and other non-exempt putative class members experienced practices that required class members to work through their meal periods. Plaintiff has alleged for example, that class members had to work without meal periods during the "Close Out" period of each month. The "Close Out" period typically consists of the last three days of each month and according to Plaintiff, would occur due to Defendant's sales requirements. Therefore, both Plaintiff and the putative class members suffered the same injuries and were injured by the same course of conduct. Because the claims of Plaintiff and the Class arise from the same practices and policies of Defendant, and are based on the same factual and legal theories, the typicality requirement is satisfied.

d. Plaintiff and Her Counsel Are Adequate Representatives.

The satisfy the adequacy of representation requirement, Plaintiff must show "(1) that the putative named plaintiff has the ability and the incentive to represent the claims of the class vigorously; (2) that he or she has obtained adequate counsel; and (3) that there is no conflict between the individual's claims and those asserted on behalf of the class." *Fry v. Hayt, Hayt & Laundau*, 198 F.R.D. 461, 469 (E.D. Pa. 2000); *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978).

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The adequacy of representation requirement is satisfied because Plaintiff has the same interests as the putative class members in that her claims are the same as the claims of the putative class members. In addition, there is no conflict between Plaintiff and the putative class members. (Nosrati Decl., ¶19). Each Class Member has the option to opt out of the Settlement. Thus, no conflicts of interest exist between Plaintiff and the Class Members. Furthermore, Plaintiff has the same interest in staunchly litigating the case against Defendant. Moreover, Plaintiff's counsel is skilled and experienced in wage-and-hour class actions. (Nosrati Decl., ¶¶13-20). Thus, the adequacy of representation requirement is met.

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

a. Common Questions of Law or Fact Predominate.

Plaintiff also satisfies Rule 23(b)(3), under which a class action may be maintained if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc.*, supra, 521 U.S. 591, 623 (1997). " '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.' " *Hanlon*, supra, 150 F.3d at 1022. In other words, the question is whether issues " 'subject to generalized proof...predominate over those issues that are subject only to individualized proof.' " *Rutstein v. Avis Rent-A-Car Sys., Inc.* (11th Cir. 2000) 211 F.3d 1228, 1233, quoting *Kerr v. City of West Palm Beach*, 875 F.2d 1546, 1558 (11th Cir. 1989).

As set forth above, Plaintiff alleges that Defendants' practices are not legally compliant with California law regarding meal and rest periods, and therefore, common

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questions of law or fact predominate. In *Alberts v. Aurora Behavioral Health Care*, 241 Cal. App. 4th 388, 405 (2015), the plaintiffs disputed the "facial" legality of defendants' meal and rest break policies. The meal break policy stated that employees were entitled to an unpaid 30-minute meal break, approximately half way between the beginning and end of the employee's shift. *Ibid*. Defendants did not have any policies regarding a second meal break. *Id*. at 405-406. The Court found, therefore, that defendants' uniform policies regarding meal breaks demonstrated that common questions of law or fact predominated. *Ibid*.

As in *Alberts*, Plaintiff contends that Defendants' company policies were not compliant with the requirements of California law in that they did not include any information regarding: (1) when the employee must take its first lunch break; and (2) whether the employee is entitled to a second lunch break.

b. Class Action Is the Superior Method.

"[T]he purpose of the superiority requirement is to assure that the class action is the most efficient and effective means of resolving the controversy." *Wolin v. Jaguar Land Rover N.Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010). "Where recovery on an individual basis would be dwarfed by the cost of litigation on an individual basis, this factor weighs in favor of class certification." *Ibid*.

In light of the numerous common issues of fact and law that predominate in this case, proceeding by way of a class action is the superior method of adjudication. Rather than the potential that approximately 419 separate wage and hour lawsuits be brought against Defendants, all involving nearly identical issues and facts, a class action allows all individual actions to be resolved once on behalf of all plaintiffs.

B. The Settlement Meets the Standards for Preliminary Approval.

In determining whether a proposed settlement should be approved, the Ninth Circuit has a "strong judicial policy that favors settlement, particularly where complex class action litigation is concerned." *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); see also *Pigford v. Glickman*, 185 F.R.D. 82, 103 (D.D.C. 1999) (the

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court's discretion in approving a class settlement is contained by the "principle of preference" favoring and encouraging settlements in appropriate cases).

Rule 23(e) sets forth a "two-step process in which the Court first determines whether a proposed class action settlement deserved preliminary approval and then, after notice is given to class members, whether final approval is warranted." *Nat'l Rural Telecomms. Coop. v. DIRECTV Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004), citing Manual for Complex Litigation at §30.41.

At the preliminary approval stage, the Court need only "determine whether the proposed settlement is within the range of possible approval." *Gatreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982). Ultimately, a class action should be approved if it "is fundamentally fair, adequate and reasonable." *Class Plaintiffs*, supra, 955 F.2d at 1276. When reviewing the settlement, the Court should not "reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." *Id*. at 1291.

There is a "strong initial presumption that the compromise is fair and reasonable." *Hanlon*, supra, 150 F.3d at 1019. *"It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." Hanlon*, supra, 150 F.3d at 1026. (Emphasis added.)

In determining whether a settlement is fair, adequate, and reasonable, courts consider several factors, including the following:

> "[T]he strength of plaintiffs' case; the risk, expense, complexity and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the Class Members to the proposed settlement.

Officers for Justice v. Civil Service Com'n of City and County of San Francisco, 688 F.2d 615, 625 (9th Cir. 1982); *see also Hanlon*, supra, 150 F.3d at 1026.

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Preliminary approval of a settlement and notice to the proposed class is appropriate "[i]f the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval..." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007), citing *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157 F. Supp. 2d 561, 570, n.12 (E.D. Pa. 2001); see also *Hanlon*, supra, 150 F.3d at 1027 (the court's task is to "balance a number of factors," including "the risk, expense, complexity, and likely duration of further litigation," "the extent of discovery completed and the stage of the proceedings," and "the amount offered in settlement"). The opinion of experienced counsel supporting the settlement is entitled to considerable weight in a court's evaluation of a proposed settlement. *Reed v. General Motors Corp.*, 703 F.2d 170, 175 (5th Cir. 1983) ("[T]he value of the assessment of able counsel negotiating at arm's length cannot be gainsaid. Lawyers know their strengths and they know where the bones are buried.").

1. The Settlement Is the Product of Arm's-Length Negotiations.

The Ninth Circuit has shown deference to settlements reached through arm's-length negotiation. In *Rodriguez v. West Publishing Corp.*, 563 F.3d 948 (9th Cir. 2009), the Ninth Circuit stated that courts should defer to the "private consensual decision of the [settling] parties." *Id.* at 965, citing *Hanlon*, supra, 150 F.3d at 1027.

The *Rodriguez* Court "put a good deal of stock in the product of an arm's-length, non-collusive, negotiated resolution, and have never prescribed a particular formula by which that outcome must be tested." *Rodriguez*, supra, 563 F.3d at 965 (citations omitted).

The Settlement in the present matter is the product of non-collusive, arm's-length, and informed negotiations. The parties engaged in mediation on September 9, 2022 with Stephen Benardo, Esq., a respected and experienced mediator. The parties' mediation was conducted after investigation and discovery took place. As a result of

good faith efforts, and the guidance of the mediator, the Parties reached a Settlement through a mediator's proposal.

2. The Parties Engaged in Extensive Informal Discovery.

Prior to the mediation, the parties conducted sufficient investigation of the factual allegations, legal claims, and defenses, and engaged in discovery. As set forth above, in preparation for mediation, the Parties had already litigated the issue of the parking reimbursement claim. The court granted summary judgment on that cause of cation. This narrowed the issues for settlement. Plaintiff also engaged in other discovery prior to resolving the action, including, but not limited to: (1) pre-litigation investigation; (2) a 30% sample size of class member data for time records, wage statements, total number of class members; (3) various relevant company policies and procedures relating to the claims in Plaintiff's case; (4) the shift count for the class period from 2016 to 2022, (5) a PMQ deposition, (6) written discovery including requests for admissions, three sets of interrogatories, three sets of request for production of documents, and (7) reviewing several thousand pages of documents produced by Defendant, as well as Excel spreadsheets containing approximately 130,000 lines of data for a sample of the class members during the class period. (Nosrati Decl., ¶20).

Plaintiff also retained the services of an expert consultant to prepare a damages analysis report in preparation for mediation. (Nosrati Decl., ¶21). The documents that Defendants produced, as well as the detailed damages analysis report prepared, was used in assessing Defendants' potential exposure and the strengths and weaknesses in various claims.

In addition, Plaintiff's counsel, who are highly experienced in employment law, relied on this experience and conducted significant investigation of the factual and legal issues, including: (1) inspecting and analyzing the time record and pay record data; (2) reviewing Defendants' company policies regarding meal period practices; (3) analyzing the potential class-wide damages; (4) researching and

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analyzing the applicable law relating to Plaintiff's claims and Defendants' potential defenses; (5) communicating with the Named Plaintiffs on numerous occasions regarding the allegations; and (6) communicating with putative class members regarding Plaintiffs' claims. (Nosrati Decl., ¶22).

For the meal break claim, Plaintiff's expert consultant analyzed the percentage of shifts over 6 hours, the percentage of shifts for the "close out" periods, and potential violation rate and potential damages. This was based on the sample data provided by Defendant. A similar analysis was done for the rest period claims by analyzing the percentage of the shifts over 3.5 hours, the potential violation rate and damages. Plaintiff's expert consultant also analyzed the potential wage statement violations and waiting time penalties based on the alleged meal and rest break claims.

Having analyzed the information available in discovery and the damages analysis report prepared for mediation, Plaintiff's counsel was able to make an informed decision to reach a fair and reasonable settlement, in light of litigation risks. (Nosrati Decl., ¶24).

3. The Settlement Is Within the Range of Reasonableness in Light of Litigation Risk.

a. Range of Recovery Balanced Against Risk

Given the maximum potential exposure and risks of continuing to prosecute the matter further, this Gross Settlement Amount of $225,000.00 is within the range of reasonableness and will result in a substantial benefit to the putative Class Members. (Nosrati Decl., ¶25).

While Plaintiff's counsel is confident that Plaintiff could succeed on liability, continued litigation would be costly, time-consuming, and its outcome uncertain. (Nosrati Decl., ¶26). From Plaintiff's counsel's view the thrust of the Class Action was allegations for failure to reimburse parking expenses. When summary judgment was granted as to that cause of action, the maximum potential exposure for Defendant was significantly reduced. (Nosrati Decl., ¶26).

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Although Plaintiff's Labor Code Section 2802 claim for parking expenses reimbursement was disposed by summary judgment, Plaintiff, Hubert still had the pending claims regarding meal and rest violations, where Plaintiff alleged that she and the class were regularly not provided with compliant meal periods, particularly during the last three days of each month considered the "close out period". Plaintiff obtained several declarations from putative class members across California that detailed this practice through Defendant's locations. Putative class members asserted that working through meal periods was the most prevalent during the "close out" periods at the end of each month and that there was a pressure to meet sales goals. Plaintiff further alleged that Defendant failed and/or refused to implement a relief system by which Plaintiff and those similarly situated employees or aggrieved employees could receive rest breaks and/or work free rest breaks for every four hours worked, or major fraction thereof. (Nosrati Decl., ¶27).

During mediation, Defendant also contended that it paid meal premiums for meal break violations totaling nearly 2,000. (Nosrati Decl., ¶28). As for the rest break claim, this was greatly disputed on the merits and could have posed a manageability issue. Defendant also argued that in her deposition, Plaintiff testified that no one ever told her she could not take a rest breaks. Another risk that Plaintiff had to take into consideration was that Defendant's policies are facially valid. (Nosrati Decl., ¶28).

Furthermore, Plaintiff learned that Defendant has California operations administrators who monitor all time punches and their computer program automatically generates a premium payment when there is a meal period violation. Accordingly, even if there were meal period violations, there was evidence that some meal premium payments were made. (Nosrati Decl., ¶29).

With respect to the meal break claim, the total maximum exposure was estimated at approximately $136,625.98. Analysis was performed based on the shift count for the class period for shifts longer than 6 hours as well as for the percentage of those shifts for the "close out" periods. For off-clock hours resulting in additional

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hours worked due to having to work through a meal period, the calculation was based on the estimated violation count, the estimated off-clock hours, and average overtime rate. This amount came to $90,426,34 for the class period. (Nosrati Decl., ¶24).

In regard to the rest break claim, the total maximum exposure was estimated at approximately $302,071.55. Analysis was performed based on the shift count and an estimated violation rate for the class period for shifts longer than 3.5 hours. The total estimated violation count was multiplied by the straight time rate for each year of the class period. (Nosrati Decl., ¶24).

As for the waiting time penalty, the total maximum exposure was estimated at approximately $333,921.60. Analysis was performed based on the termination count for the class period. The paystub penalty was calculated to have an estimated maximum exposure of $94,750. Analysis was performed based on the employee count, pay periods, and penalty amounts, both for the first violation and subsequent violations. A regular rate of pay violation analysis was done for the class period with a maximum estimated total exposure of $763,463.40. All of the above amounts included prejudgment interest. (Nosrati Decl., ¶24).

The overarching exposure analysis was based on addressing the written policies on meal and rest periods of Defendant. Under *Brinker Restaurant Corporation v. Sup. Ct.* 53 Cal.4th 1004 (2012), "an employer must relieve the employee of all duty for the designated period, *but need not ensure that the employee does no work*." Id. at 1034 (Emphasis added). "An employer's duty with respect to meal breaks under both section 512, subdivision (a) and Wage Order No. 5 is an obligation to provide a meal period to its employees. The employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities *and permits them a reasonable opportunity to take an uninterrupted 30-minute break and does not impede or discourage them from doing so." Id.* at 1040. (Emphasis added)

"[T]he employer is *not obligated to police meal breaks* and ensure no work thereafter is performed. Bona fide relief from duty and the relinquishing of control

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satisfies the employer's obligations, and work by a relieved employee during a meal break does not thereby place the employer in violation of its obligations and create liability for premium pay under Wage Order No. 5, subdivision 11(B) and Labor Code section 226.7, subdivision (b)." *Id.* at 1040-1041. (Emphasis added)

In the present case, an in addition to the analysis already set forth in Plaintiff's original motion, Defendant produced documents in discovery regarding their meal and rest policies, which supports their argument of having legally compliant policies and complying with the requirements under *Brinker*. As an example, an excerpt of their written policy provides in relevant part as follows:

> "It is also your responsibility to take a full, uninterrupted 30-minute break anytime you have a work period that exceeds 4 hours and 59 minutes. Failure to do so will result in a Mealtime Violation.
> • When taking a meal break, using the "Start Meal' option, then select "End Meal" when you return.
> • Refer to the charts on the next page for further guidance on appropriate meals and breaks." (Nosrati Decl., ¶24).

If Defendant is able to demonstrate that it had compliant policies relieving employees of all duty, then that could dispense with the meal and rest violation claims *entirely, and all the related causes of action* for waiting time penalties, regular rate of pay violations, unpaid wages, and pay stub penalty violations. If Defendant can demonstrate that it complied with the requirements under *Brinker*, then there was a substantial risk that Plaintiff and putative class members would not prevail in this action. (Nosrati Decl., ¶24).

Based on the risk analysis, The likelihood of recovery was discounted for settlement purposes as set forth below. Based on the discount of risks, the potential range of recovery would be approximately $254,437.87 and therefore the settlement of $225,000.00 is within the range of reasonableness.

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$136,625.98 Meal period – 80% discount = $27,325.20

$90,426.34 Unpaid wages – 80% discount = $18,085.27

$302,071.55 Rest break claim – 90% discount = $30,207.15

$333,921.6 Waiting time – 85% discount = $50,088.24

$94,750 Paystub penalty - 85% discount = $14,212.5

$763,463.40 Regular rate of pay – 85% discount = $114,519.51

Total: $254,437.87

The meal period and unpaid wage claims were discounted by 80%, the rest break claim was discounted by 90% and the related claims were discounted by 85%, which is the average of 80% for meal break claims and 90% for rest break claims.

Also, as set forth in the original motion, if litigation were to proceed, Plaintiff would be required to conduct further discovery and take depositions of key witnesses; move for class certification; oppose Defendants' likely motion for summary judgment; and prepare for trial. *Ibid*. (Nosrati Decl., ¶31). Weighed against all these risks and uncertainty, counsel's view was that the settlement presented was within the range of reasonableness.

If 100% of the Settlement Class Members participate (419 Class Members), and assuming that each member worked the same amount of shifts, and assuming a Net Settlement Fund amount of $118,750, the average recovery for each eligible Class Member will be approximately $283.41 and therefore, is well within the range of reasonableness. This is a fair and reasonable amount paid in settlement of disputed claims regarding meal and rest periods. Further, the Settlement provides no preferential treatment for Plaintiff or other Class Members. Plaintiff will receive distributions from the settlement proceeds calculated in the same manner as the distributions to other putative Class Members. Furthermore, Class Counsel is seeking 25% attorney's fees (which is less than was is set forth in the agreement, i.e. 33%), which has helped to increase the Net Settlement Fund amount to $118,750.

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b. PAGA Settlement and Release

In its Order (Doc. 63), the Court required "additional information supporting the PAGA settlement and release of the 'PAGA' allegations asserted.' (*See Settlement* ¶¶22-23." The parties have revised the Agreement to remove reference to "PAGA" allegations because (1) there is no PAGA release in this action and (2) any PAGA claim was rendered moot after the granting of partial summary judgment.

At the outset, Plaintiff, Hubert did not bring an action under PAGA. The only Plaintiffs that brought an action under PAGA were Plaintiffs, Svengert and Martinez. The only class that Svengert and Martinez represented were "All current and former employees of Defendants who worked in the State of California whose pay was deducted or not reimbursed for necessary business-related expenses, including parking expenses, at any time during the period from four years preceding the filing of this Complaint through the final disposition of this action (the 'Class Period')" (*See* First Amended Complaint, par. 16a.i)

Although the 4th through 7th causes of action in the Fist Amended Complaint mention that these are being brought by all Plaintiffs, and the 8th cause of action makes reference to various labor code violations, these are attributable to ambiguities resulting from unclear drafting of the FAC. The only Class that Plaintiffs, Svengert and Martinez were representing were those employees "whose pay was deducted or not reimbursed for necessary business-related expenses, including parking expenses." The only non-reimbursed expense alleged here was the parking. Thus, when partial summary judgment was granted and the parking reimbursement claim was dismissed, there were no further claims that were being presented by Svengert and Martinez. Therefore, there is no PAGA penalty claim left to adjudicate. Accordingly, the settlement agreement does not have any allocation for PAGA penalties because it was rendered moot by the court's granting of the partial summary judgment.

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c. FLSA

In its August 23, 2023 Order, the court raised the concern that while "the Complaint does not allege any FLSA causes of action, the Released Class Claims include 'all claims under state, federal or local law…" The Court therefore stated that this provision "implicates FLSA" and that the Settlement Agreement violates FLSA. In her renewed motion, Plaintiff submitted briefing in support of her position that the Settlement Agreement does not violate the FLSA. On November 2, 2023, the Court denied Plaintiff's renewed motion without prejudice. Plaintiff and Defendant have executed a revised stipulation for settlement which incorporates the Court's proposed language in order to comply with FLSA requirements. The class notice has also been revised in accordance with the Court's proposed language.

4. The Enhancement to the Class Representative Is Reasonable.

"[N]amed plaintiffs, as opposed to designated class members who are not named plaintiffs, are eligible for reasonable incentive payments." *Staton v. Boeing Co.*, supra, 327 F.3d at 977. Factors to consider when assessing whether individual incentive payments are reasonable include: (1) the actions the plaintiff has taken to protect the interests of the class; (2) the degree to which the class has benefitted from those actions; (3) the amount of time and effort the plaintiff expended in pursuing the litigation; and (4) reasonable fears of workplace retaliation. *Ibid.*

The proposed enhancement of $5,000.00 to the Named Plaintiff is intended to recognize her initiative, the time she expended, and her efforts on behalf of the Class. Plaintiff communicated extensively with Class Counsel and provided a helpful, first-hand account of how the various alleged wage-and-hour violations were occurring, which form the basis of this action. Plaintiff also produced documents relevant to the action. In addition, she attended the mediation and was an active participant at the mediation. (Hubert Decl.).

The enhancement award of $5,000.00 is fair and reasonable, in light of courts in the Ninth Circuit preliminarily approving enhancement awards greater than $5,000.00.

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See Rodriguez v. D.M. Camp & Sons, 2012 WL 6115651, at *10 (E.D. Cal. 2012) (preliminarily approving incentive award up to $10,000.00); *La Fleur*, supra, 2014 WL 12589663, at *9 (preliminarily approving incentive awards of $15,000.00 to each named plaintiff). Thus, the enhancement award of $5,000.00 should be preliminarily approved.

5. The Requested Attorneys' Fees and Costs Are Reasonable.

Although the Settlement Agreement permits a request for attorney's fees up to 33% of the settlement, Class Counsel instead seeks an award of attorneys' fees of twenty-five percent (25%) of $225,000.00 (or, $56,250.00), and costs up to $25,000.00.

The Ninth Circuit has established 25% of the common fund as a starting benchmark for contingency attorneys' fees awards, with courts typically exceeding this amount. *Hanlon*, supra, 150 F.3d 1011, 1029 (9th Cir. 1998); *Staton v. Boeing Co.*, 327 F.3d 938, 968 (9th Cir. 2003) (finding the same); *In re Activision Sec. Litig*, 723 F. Supp. 1373, 1377-78 (N.D. Cal. 1989) ("nearly all common fund awards range around 30%).

The requested fees are reasonable for undertaking risky, expensive, and time-consuming litigation solely on a contingency basis. Also, the request is fair in light of the fact that courts have customarily approved payments of attorneys' fees even greater than Plaintiff's Counsel's requested fees of 25%. See *Williams* v. *MGM-Pathe Communic'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (awarding 33% of total fund amount); *In re Activision Sec. Litig.*, supra, 723 F. Supp. at 1375 (noting that fee awards in common fund cases "almost always hover[] around 30% of the fund created by the settlement"). Furthermore, other courts have granted final approval of attorneys' fees totaling 33% of the Gross Settlement Amount to Plaintiff's Counsel, which is greater than the amount that Plaintiff's Counsel seeks in the present matter.

When assessing whether the percentage requested is reasonable, courts look to: (a) the results achieved; (b) the risk of litigation; (c) the skill required; (d) the quality

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of work; (e) the contingent nature of the fee and the financial burden; and (f) the awards made in similar cases. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). These factors weigh in favor of Plaintiff's Counsel's fee request.

a. The Results Achieved and Plaintiff's Counsel's Skill Support the Requested Fees.

Given the maximum potential exposure and risks of continuing to prosecute the matter further, this Settlement of $225,000.00 is well within the range of reasonableness and will result in a substantial benefit to all Class Members. As set forth above, assuming 100% participation and assuming that the putative Class Members worked the same amount of shifts, the putative Class Members will receive individual settlement amounts of approximately $283.41.

Moreover, Plaintiff's Counsel achieved this result without years of litigation. The Ninth Circuit has recognized that the lodestar method "creates incentives for counsel to spend more hours than may be necessary on litigating a case so as to recover a reasonable fee, since the lodestar method does not reward early settlement." *Vizcaino*, supra, 290 F.3d at 1050, n. 5. While a lodestar may be used as a crosscheck on the reasonableness of a percentage fee method if a district court in its discretion chooses to do so, a lodestar calculation is not required and "class counsel should [not] necessarily receive a lesser fee for settling a case quickly." *Ibid*. Thus, a lodestar crosscheck need not be performed where counsel achieves a significant result through an early settlement. *See Lewis v. Starbucks Corp.*, 2008 WL 4196690 (E.D. Cal. 2008) (favoring percentage method over lodestar for settlements achieved at relatively early litigation stages); *Glass v. UBS Fin. Servs., Inc.*, 2007 WL 221862 (N.D. Cal. 2007) (finding that the lodestar crosscheck would unfairly penalize counsel for settling the case in the early litigation stages, where there was no litigation activity of substance other than the filing of the complaints). As a result of the excellent result and substantial benefits that the Settlement provides to the putative Class Members, the first, third, and fourth factors weigh in favor of awarding Plaintiff's requested fees.

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b. Plaintiff's Counsel Litigated the Case on a Contingency-Fee Basis and Faced Considerable Risk.

The second and fifth *Vizcaino* factors also favor the requested fee award. Courts recognize the risks of litigating cases on a contingency fee basis. See *In re Washington Pub. Power Supply* 19 F.3d 1291, 1300-01 (9th Cir. 1994) ("in the common fund *context*, attorneys whose compensation depends on their winning the case, must make up in compensation in the cases they win for the lack of compensation in the cases they lose."). Thus, due to the significant risks of not prevailing, attorneys who accept contingent fee cases should be compensated in amounts greater than those attorneys who accept an hourly rate of compensation.

Plaintiff's Counsel has litigated the case on a contingency fee basis, facing considerable risk in doing so and without guarantee of payment. (Nosrati Decl., ¶44). Moreover, Plaintiff's Counsel risked losing reasonable costs incurred to date. *Ibid*. "Courts consistently recognize that the risk of non-payment or reimbursement of expenses is a factor in determining the appropriateness of counsel's fee award." *In re Heritage Bond Litig.*, 2005 WL 1594403, *21 (C.D. Cal. 2005).

In addition, as set forth in detail in section V.B.3, Plaintiff's Counsel faced the risks that the Court would not certify all of the claims asserted, and that Plaintiff would lose at summary judgment or trial. Accordingly, given the risks involved in this wage-and-hour class action, the second and fifth factors weigh in favor of awarding Plaintiff's requested fees. Accordingly, Plaintiff's counsel's request for 25% for attorneys' fees and reimbursement for costs should be preliminarily approved as fair and reasonable.

6. The Notice Apprises the Class Members of Their Rights.

"For any class certified under Rule 23(b)(3), the court must direct to Class Members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. Rule 23(c)(2)(B). A class action settlement notice "is satisfactory if it 'generally

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describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.' " *Churchill Village LLC v. General Electric*, 361 F.3d 566, 575 (9th Cir. 2004), quoting *Mendoza v. U.S.*, 623 F.2d 1338, 1352 (9th Cir. 1980).

The parties have included the changes to the class notice pursuant to the Court's Order (Doc. 63). Attached as Exhibit 2 to the Nosrati Declaration is the updated class notice.

The Class Notice in the present matter is "the best notice practicable" as it informs the Class in sufficient detail about the terms of the Settlement and explains the payments to which they are entitled. The Notice informs Class Members of (1) the nature of the action; (2) that Class Members have the right to object or opt out of the Settlement; (3) an explanation of how the settlement amount will be allocated; (4) the attorneys' fees and costs requested, as well as the administration costs requested; and (5) that a final approval hearing has been scheduled. For these reasons, the proposed Notice is reasonable and the Court should approve it.

VI. THE PROPOSED SCHEDULING ORDER

Attached as Exhibit "3" to Nosrati Declaration is the proposed schedule for the notice and final approval, which Plaintiff respectfully submits for the Court's approval.

VII. CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court grant preliminary approval, approve the proposed Class Notice, and approve the proposed schedule for the notice and final approval.

Dated: December 14, 2023

NOSRATILAW, APLC

By: */s/ Omid Nosrati*
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