Paul T. Cullen, Esq. (SBN 193575)
paul@cullenlegal.com
THE CULLEN LAW FIRM, APC
19360 Rinaldi Street, Box 647
Porter Ranch, CA 91326
Tel: (818) 360-2529
Fax: (866) 794-5741

Attorneys for Plaintiffs
DAVID BACKHAUS, ANDREA MERINO LOPEZ and LUSINE NALBANDIAN, individually on behalf of themselves, and all others similarly situated, and the general public

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DAVID BACKHAUS, ANDREA MERINO LOPEZ, LUSINE NALBANDIAN, TALEENA PELAYO, NARCISO CHAN SOSA and ANTONIO LEIRIA individuals, on behalf of themselves, all others similarly situated, and the general public,

Plaintiffs,

vs.

THE LANGHAM HUNTINGTON HOTEL AND SPA, a business entity of unknown form; LANGHAM HOTELS PACIFIC CORPORATION, a Delaware corporation; PACIFIC LANGHAM SERVICES CORPORATION, a Delaware corporation; GREAT EAGLE HOLDINGS, a California corporation and DOES 1 to 10, inclusive,

Defendants.

Case No.: 19STCV24251
[Consolidated with Case Nos. 19STCV31136 and 20STCV36405]

Assigned for all purposes to the Hon. David S. Cunningham, Dept. SSC-11

CLASS ACTION

DECLARATION OF PAUL T. CULLEN IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS AND REPRESENTATIVE ACTION SETTLEMENT

Preliminary Approval Hearing
Date: April 20, 2023
Time: 10:00 a.m.
Dept: SSC-11

Complaint Filed: July 12, 2019
Trial Date: TBD

DECLARATION OF PAUL T. CULLEN

I, Paul T. Cullen, declare as follows:

1. I am an attorney licensed to practice law before all courts of the State of California. I have personal knowledge of the facts herein and, if called as a witness, I could and would competently testify to them.

2. I am a shareholder at the law firm of The Cullen Law, APC ("Cullen Law Firm"), counsel of record for Plaintiff David Backhaus, Andrea Merino Lopez, and Lusine Nalbandian").

3. This lawsuit was consolidated with two other wage-and-hour class actions filed against Defendant: *Pelayo v. Langham Hotels Pacific Corporation* (Los Angeles Superior Court, Case No. 19STCV31136) and *Sosa v. Langham Hotels Pacific Corporation, et al.*, LASC Case No. 20STCV36405. Donald Potter, Law Office of Donald Potter represents Plaintiff Taleena Pelayo and Anthony J. Orshansky of CounselOne PC represents the two named Plaintiffs in the *Sosa* class action: Plaintiff Narcisco Chan Sosa, and Antonio Leira.

4. I have been appointed lead counsel in this consolidated putative class and representative lawsuit ("Action") brought together by Plaintiffs David Backhaus, Andrea Merino Lopez, Lusine Nalbandian, Taleena Pelayo, Narcisco Chan Sosa, and Antonio Leira ("Plaintiffs") against Defendant Langham Hotels Pacific Corporation ("Defendant" or "Langham"); Plaintiff and Defendant are collectively referred herein as the "Parties").

5. Cullen Law Firm, CounselOne, PC., and the Law Office of Donald Potter is referred to herein as "Class Counsel."

6. I submit this declaration in support of Plaintiffs' Motion for Preliminary Approval of Class and Representative Action Settlement, filed concurrently herewith. Plaintiffs seek approval of a settlement that resolves the claims of Plaintiffs and a putative class defined as,

> **Class** – All current and former hourly-paid or non-exempt employees who have worked for Langham in the State of California at any time during the Class Period.[1]

[1] The "Class" is defined in paragraph 1.5 of the "Class Action and PAGA Settlement Agreement" (the "Settlement Agreement") which is attached as Exhibit 1 to this declaration. The "Class Period" means the period from July 12, 2015 through April 16, 2023. (Ibid., ¶ 1.12.) "Class Member" means all Class Members who do not opt out of this settlement. (Ibid., ¶¶ 1.9, 1.30, 1.36.)

SUMMARY OF SETTLEMENT

7. This Declaration is offered in support of Plaintiffs' motion for preliminary approval of the "Class Action and PAGA Settlement Agreement" ("Settlement Agreement") which was negotiated and entered into at arm's length by the Parties herein. A true and correct copy of the fully executed Settlement Agreement signed by the Parties is attached hereto as **EXHIBIT 1**.

8. The Settlement Agreement is a lightly modified version of the Los Angeles County Superior Court model class action settlement agreement form. A redline version of the Settlement Agreement showing the modifications to the model LASC form is attached hereto as **EXHIBIT 2**.

9. Under the terms of the Settlement Agreement, Defendant agreed to pay a ***non-reversionary*** maximum amount of ***$1,950,000*** into a common fund to settle the specific wage and hour claims of the Participating Class Members and Aggrieved Employees; this amount is called the "Gross Settlement Amount."

10. This Gross Settlement Amount[2] shall be inclusive of all settlement payments to Participating Class Members[3], the Enhancement Payment to the Class Representative, the Administration Costs to the Settlement Administrator, the Attorneys' Fees and Costs to Class Counsel, and the Private Attorneys General Act ("PAGA") Payment, including payment to Class members who are Aggrieved Employees and to the California Labor and Workforce Development Agency ("LWDA") for civil penalties pursuant to statute.

11. The amount available for distribution to Participating Class Members is determined by deducting the following from the Gross Settlement Amount:

- Up to $682,500 – which is 35% of the Gross Settlement Amount[4] – and up to $40,000 in litigation costs to Class Counsel[5] (the "Attorneys' Fees and Costs");

[2] Settlement Agreement, ¶ 1,22 ("Gross Settlement Amount").
[3] A "Participating Class Member is "a Class Member who does not submit a valid and timely Request for Exclusion from the Settlement." (Settlement Agreement ¶ 1.36.)
[4] Settlement Agreement ¶ 1.19 ("Fee Award".)
[5] Settlement Agreement ¶ 1.7 ("Class Counsel Litigation Expenses Payment").

- Up to $60,000 ($10,000 to each Class Representative) to the Class Representatives as an Enhancement Payment – as a service award and in exchange for a general release of claims[6];
- Up to $150,000 allocated as a PAGA Payment[7] – of which 75% of the PAGA Payment is allocated for payment to the LWDA for civil penalties pursuant to statute and 25% of the PAGA Payment is to be distributed to "Aggrieved Employees"[8]; and
- Up to $30,000 to the Settlement Administrator for Administration Costs to notify Class Members and administer the settlement.[9]

The amount remaining after the foregoing deductions, approximately $987,500, is called the "Net Settlement Amount."[10] The entire Net Settlement Amount shall be paid out to Participating Class Members (those who do not affirmatively Opt-Out of the settlement)[11]. Participating Class Members shall automatically receive payments without the need to submit a claim form, and the Aggrieved Employees shall receive PAGA payments irrespective of whether or not they opt-out.[12] Moreover, and in addition to the gross settlement amount, Defendant will separately pay its share of payroll taxes.[13]

12. The Net Settlement Amount will be the amount that is available for distribution to Participating Class Members on a *pro rata* basis, based on workweeks during the Class Period.[14]

---

[6] Settlement Agreement, ¶ 1.14.("Class Representative Service Payment").
[7] "PAGA Penalties" (Settlement Agreement ¶ 1.35.)
[8] "Aggrieved Employees" means all current and former hourly paid or non-exempt employees who worked for the Langham in the State of California during the PAGA Period. (Settlement Agreement, ¶ 1.4.) The PAGA Period is defined as the period from September 3, 2018 through April 16, 2023. (Settlement Agreement ¶ 1.32.)
[9] "Administration Expenses Payment (Settlement Agreement ¶ 1.3.)
[10] "Net Settlement Amount" (Settlement Agreement, ¶ 1.29.)
[11] "'Participating Class Member' means a Class Member who does not submit a valid and timely Request for Exclusion." (Settlement Agreement, ¶ 1.36.)
[12] Settlement Agreement ¶¶ 1,23 ("Individual Class Payment"), 1.24 ("Individual PAGA Payment"), 3.d, 3(d)(1) & 3(d)(2) (explaining payments to "Each Participating Class Member") and 3(e), 3(e)(1) & 3(e)(2)(explaining payments to Aggrieved Employees).
[13] Settlement Agreement, ¶¶ 1.22 ("Gross Settlement Amount" – "The Gross Settlement Amount is the gross sum not to exceed One Million Nine Hundred Fifty Thousand Dollars ($1,950,000), plus the Langham's share of any applicable payroll taxes on the wage portions of the Individual Class Payments")
[14] Settlement Agreement ¶¶ 1.29 ("Net Settlement Amount") and 1.23 ("Individual Class Payment").

Each Individual Class Payment shall be calculated as follows: The Net Settlement Amount shall be: (a) divided the Net Settlement Amount by the total number of Workweeks[15] worked by all Participating Class Members during the Class Period, and (b) multiplying the result by the total Workweeks worked by each Participating Class Member during the Class Period.[16]

13. In addition, each Class Member (regardless of whether they opt-out of the Class or not) who is an "Aggrieved Employee" will receive a proportional share of the 25% of the PAGA Payment based on his or her pay periods during the PAGA Period.[17] Specifically, 25% of the PAGA Payment (or $37,500) shall be divided by the total of all pay periods worked by Aggrieved Employees during the PAGA Period in order to establish the value of each pay period.[18]

14. After reduction for the employee's share of taxes on the wage portion, the net payment to each Participating Class Member/Aggrieved Employee will be the sum of his or Individual Class Payment plus, if applicable, the Individual PAGA Payment ("the "Individual Settlement Share"). As a result of the distribution formulas, the consideration paid to each Participating Class Member/Aggrieved Employee is tailored to the impact of Defendant's alleged violations as well as to the claims he or she is releasing.

15. At mediation in January 2023, and based on voluminous employment records, the Parties agreed there were 1,328 current and former employees within the putative class. (Cullen Decl., ¶ 15.) Plaintiffs' counsel is using a higher estimated class number of 1,375 to account, *potentially*, for subsequent hires that may have occurred and the possibility that additional class members will be identified when Defendant pulls the data for the Class Notice If all of the approximately 1375 Class Members participate in the settlement, then the average Individual Settlement Share would be an estimated ***$718.18*** per Class Member. Of course, any Class Member who prefers to preserve his or her right to pursue relief or seek an alternative recovery may opt out.

[15] "'Workweek' means any week during which a Class Member worked for the Langham for at least one day during the Class Period." (Settlement Agreement ¶ 1.46.)
[16] Settlement Agreement ¶ 3.d explains the payment formula to each Participating Class Member.
[17] Settlement Agreement ¶¶ 1.4 (defining "Aggrieved Employee"), 1.24 (defining the "Individual PAGA Payment"), 1.31 (defining "PAGA Pay Period") and 1.32 (defining the "PAGA Period").
[18] Settlement Agreement ¶ 1.35 ("PAGA Penalties" setting forth the amount available).

16. As part of the settlement, Plaintiffs will apply for an enhancement payment at the time of seeking final approval in the amount of $60,000 ($10,000 to each of the 6 named Plaintiffs) for services to the Settlement Class and a general release of all claims against Defendant.[19]

17. Plaintiffs' requested enhancement payment is intended to recognize the significant benefits conferred upon the Settlement Class and be proportional to the time and effort that Plaintiffs expended on behalf of the Class including, providing factual information and documents to Class Counsel, discussing the claims and theories at issue in the case with Class Counsel, identifying potential witnesses and reviewing documents, reviewing the Settlement Agreement, as well as the significant risks Plaintiffs each undertook by agreeing to serve as a named plaintiff, and the fact that Plaintiffs each agreed to a general release of all claims subject to a waiver of Civil Code § 1542.[20]

18. Class Counsel will apply for an attorneys' fees award of 35% of the Gross Settlement Amount plus reimbursement of up to $40,000 in litigation costs.[21] Plaintiffs submit that the requested fee is fair compensation for undertaking complex, risky, expensive, and time-consuming litigation on a purely contingent fee basis. Class Counsel incurred substantial attorneys' fees conducting pre-filing investigation, analyzing Plaintiff's claims, conducting legal research and analysis, opposing a demurrer and motion to strike in the *Backhaus* class action before consolidation, conducting discovery, meeting and conferring with defense counsel, interviewing putative class members, analyzing documents produced by Defendant, including corporate policies and employee time and payroll records, consulting with an expert, building damages models, preparing for and attending mediation, routine case updates and consultations with the clients, and negotiating and preparing the Memorandum of Understanding regarding the settlement, negotiating and preparing long-form Settlement Agreement and the Class and Representative Action Settlement Notice, and this motion for preliminary approval and supporting documents.

---

[19] Settlement Agreement ¶¶ 1.14 ("Class Representative Service Payment"), 3.2(a) (describing payments to Plaintiffs including Class Representative Service Payment") and 5.1 & 5.1(a) (describing named Plaintiffs' full and general release of claims.)

[20] Ibid.

[21] Settlement Agreement ¶¶ 1.19 ("Fee Award) and 1.7 ("Class Counsel Litigation Expenses Payment").

19. Class Counsel will also expend future attorney time in attending the hearing on this Motion, overseeing the notice and administration process, drafting the Final Approval Motion and supporting documents, and attending the Final Approval hearing, among other tasks, such as addressing questions from Class Members.

20. Class Counsel submit that their request for attorneys' fees is reasonable when viewed as an overall percentage of the settlement amount in light of the substantial risks and significant work undertaken, the excellent results obtained for the Class Members, and the efficiency with which the Parties have conducted the litigation. Assuming that the Court grants preliminary approval, Class Counsel will seek an award of attorneys' fees and litigation costs at the time of seeking final approval of the settlement.

21. This settlement is fair, reasonable, and adequate and should be approved pursuant to California law. (*See Clark v. American Residential Services, LLC* (2009) 175 Cal.App.4th 785 (hereinafter, "*Clark*") and *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116 (hereinafter, "*Kullar*").) After discussing these decisions, I will apply the pertinent factors to the present case.

THE *CLARK* AND *KULLAR* CASES

22. In *Clark*, the two named plaintiffs filed a class-action lawsuit alleging causes of action for unpaid wages, failure to provide meal periods and rest breaks, and other Labor Code violations. (*Clark, supra,* 175 Cal.App.4th at p. 789.) The parties subsequently settled the case. (*Ibid.*) Under the settlement each class member submitting a claim would receive approximately $6.43 per work week. (*Id.* at p. 791.) The settlement agreement further provided that each class representative would receive $25,000. (*Ibid.*) Twenty-three putative class members opted out of the settlement, *id.* at p. 792, and 20 putative class members objected. (*Id.* at p. 793.) The objectors challenged the settlement amount. (*Ibid*.) Class counsel defended the settlement amount by explaining that defendant's overtime policy was legally compliant. (*Id.* at p. 795.) According to class counsel the overtime claim had absolutely no value. (*Id*. at p. 802.) The objectors responded that class counsel had made a "staggering mistake of law" because class counsel had misunderstood

how overtime compensation is calculated for commissioned employees. (*Id*. at p. 797.) Nonetheless, the court granted final approval.

23. The Court of Appeal reversed the trial court's grant of final approval. (*Clark, supra*, 175 Cal.App.4th at p. 798.) It did so because the trial court "made no independent assessment of the strength of the plaintiffs' case, simply accepting class counsel's assessment of value, including his assertion that the overtime claim …[had] 'absolutely no' value." (*Id.* at p. 802.) Because the trial court never independently evaluated the legal strength of the overtime claim, it could not have had any way of assessing whether the settlement amount was adequate. (*Id.* at p. 803.)

24. In *Kullar*, plaintiff initially filed his lawsuit solely to recover work-related expenses for which defendant had failed to reimburse him and others similarly situated. (*Kullar, supra*, 168 Cal.App.4th at p. 121.) Plaintiff propounded written discovery to defendant relating to expense reimbursement. (*Id.* at p. 122.) Subsequently, plaintiff got wind that defendant's practices may have violated additional wage-and-hour laws, particularly failure to provide meal periods, with regard to a subclass of employees. (*Id.* at p. 121.) Plaintiff did not propound any discovery related to the new claims. (*Id*. at p. 122.) Indeed, "[t]he only documents exchanged relating to the meal period claims appear to be a two-page handwritten record of Kullar's personal meal period breaks and an employee orientation brochure stating company policies and procedures which include the statement, 'Rest breaks and meal periods are scheduled based on business levels, hours worked and applicable state laws.'" (*Id*. at p. 122 n. 1.)

25. The *Kullar* parties then settled at mediation. (*Kullar, supra,* 168 Cal.App.4th at p. 122.) Neither the parties' stipulation of settlement nor any other materials presented to the court at preliminary approval discussed the materials reviewed, the conclusions drawn from them in assessing damages and negotiating the settlement amount, or the problematic legal positions that had been considered and analyzed. (*Id.* at pp. 122 n. 2, 126.) Putative class members objected to the settlement. The objectors averred that plaintiff "failed to conduct reasonable discovery or pre-settlement investigation to determine facts necessary to ascertain the extent of class loss…including facts regarding the extent and rate of Labor Code violations by defendant, the likely or probable range of damages sustained by…class members arising from Labor Code violations by defendant,

or the existence and nature of records maintained by defendant regarding claimed Labor Code violation." (*Id.* at p. 125 n. 7 [quoting objection].) Further:

> [T]he objectors argued . . . [that] absolutely no discovery was conducted with respect to the claim that class members were not provided meal periods to which they were entitled. No declarations were filed in support of the settlement indicating the nature of the investigation that had been conducted to determine the number of employees that had allegedly been denied meal breaks, the frequency with which the denials had occurred, or the circumstances surrounding those denials, and no analysis was provided of the factual or legal issues that required resolution to determine the extent of any one-hour-pay penalties to which class members may have been entitled. No time records were produced in discovery nor was the court presented any estimated quantification of the number of one-hour-pay penalties that might be due or any explanation of the factors that were considered in discounting the potential recovery for purposes of settlement.

(*Id*. at pp. 128-129.)

26. The *Kullar* court agreed with the objectors that plaintiff did not make an adequate showing to enable the court to intelligently assess the settlement. "There was nothing before the court to establish the sufficiency of class counsel's investigation other than their assurance that they had seen what they needed to see. The record fails to establish in any meaningful way what investigation counsel conducted or what information they reviewed on which they based their assessment of the strength of the class members' claims, much less does the record contain information sufficient for the court to intelligently evaluate the adequacy of the settlement." (*Kullar, supra,* 168 Cal.App.4th at p. 129.) The *Kullar* court required that plaintiff provide the trial court with sufficient information about the nature and magnitude of the claims being settled and the impediments to recovery to enable it to make an independent assessment of the reasonableness of the settlement. (*Id.* at p. 133.)

27. As the foregoing discussion shows, the *Clark* and *Kullar* courts principally wanted to ensure that trial courts, when deciding whether a class-action settlement is fair, adequate, and reasonable, would independently evaluate the settlement amount in light of the strength of the plaintiff's case, and that plaintiff should provide the court the information necessary to make that evaluation. The *Clark* and *Kullar* courts cite the recognized factors set forth in cases like *Dunk v. Ford Motors Co.* (1996) 48 Cal.App.4th 1794, 1801, that trial courts should examine during the approval process, including (1) the extent of discovery completed and the stage of the proceedings;

(2) the strength of plaintiff's case in light of the settlement amount; (3) the risk, expense, complexity, and likely duration of further litigation, as well as the risk of maintaining class-action status through trial; (4) the experience and views of counsel; and (5) the reaction of class members to the proposed settlement. (*Id.* at p. 1799.)

28. Having discussed the governing law on class action settlements, I will now discuss the above-listed factors.

THE EXTENT OF INVESTIGATION AND STAGE OF PROCEEDINGS

29. Prior to initiating the lawsuit, the Cullen Law Firm, A.P.C.—counsel for Plaintiffs David Backhaus, Andre Merino Lopez and Lusine Nalbandian—independently and thoroughly investigated the claims and considered the facts and circumstances underlying the pertinent issues and applicable law. This required thorough discussions and interviews with Plaintiffs David Backhaus, Andrea Merino Lopez and Lusine Nalbandian and other Class Members as well as research into the various legal issues involved in the case. After conducting their initial investigation, Class Counsel determined that the claims were well suited for class action adjudication owing to what appeared to be a common course of conduct affecting a similarly situated group of employees.

30. On July 12, 2019, the present class action (the "Backhaus class action" or "Backhaus lawsuit") was filed by Plaintiffs David Backhaus, Andrea Merino Lopez and Lusine Nalbandian asserting various wage and hour claims against Defendant. The original Backhaus complaint alleged claims for: (1) unpaid minimum and overtime wages; (2) reporting time pay; (3) meal period violations; (4) rest period violations; (5) wage statement penalties; (6) waiting time penalties; (7) declaratory relief; and (8) unfair business practices.

31. On September 3, 2019, Donald Potter, Law Office Of Donald Potter, Plaintiff Taleena Pelayo ("Pelayo") provided pre-filing written notice to the LWDA and by certified mail to Defendant of various wage-and-hour violations and the allegations supporting those claims in accord with the PAGA, California Labor Code § 2698, *et seq.*

32. On September 4, 2019, Donald Potter, Law Office Of Donald Potter Plaintiff Pelayo filed her class action, *Pelayo v. Langham Hotels Pacific Corporation* (Los Angeles Superior Court, Case No. 19STCV31136) (the "*Pelayo* class action") asserting the following claims against

Defendant: Failure to Provide Paid Rest Periods in Violation of Cal. Lab. Code §§ 226.2 & 226.7; Failure to Pay All Wages Due in Violation of Cal. Labor Code §§ 201(a), 202(a), 204, 510, 515, 1194, 1198; Failure to Provide Accurate Itemized Statements in Violation of Cal. Labor Code §§ 226(a)-(g) and 226.2; Waiting Time Penalties (Cal. Lab. Code §§ 201-203); Unfair Competition in Violation of Cal. Business & Professions Code 17200, et seq; and Violation of Cal. Labor Code § 558. The Complaint alleges, in part, that Defendant failed to properly calculate the regular rate for employees inclusive of all non-discretionary pay (e.g., bonus, etc.).

33. On December 11, 2019, Pelayo filed a First Amended Complaint adding a PAGA claim.

34. On July 30, 2020, CounselOne, PC and Plaintiffs Narcisco Chan Sosa and Antonio Leiria provided pre-filing written notice to the LWDA and by certified mail to Defendant of various wage-and-hour violations and the allegations supporting those claims in accord with the PAGA, California Labor Code § 2698, *et seq.*

35. On September 23, 2020, CounselOne, PC and Plaintiffs Narcisco Chan Sosa and Antonio Leiria filed their class action *Sosa, et al. v. Langham Hotels Pacific Corporation, et al.*, LASC Case No. 20STCV36405 (the "*Sosa* class action") asserting the following claims against Defendant for: Failure to Pay Minimum Wages; Failure to Pay All Overtime Wages; Meal Period Liability under Labor Code § 226.7; Rest Break Liability under Labor Code § 226.7; Failure to Provide Reporting-Time Pay; 1174(d); Failure to Provide Reporting-Time Pay; Failure to Provide Accurate Itemized Employee Wage Statements; "Failure to Pay All Wages Owed Timely and upon Separation of Employment "; Violation of Labor Code § 1174(d); Violation of Business & Professions Code §§ 17200, et seq,; and "Penalties Pursuant to Labor Code § 2699."

36. On March 15, 2021, the *Pelayo* and *Sosa* class actions were consolidated into the *Backhaus* class action and a consolidated complaint was filed that includes the class claims and allegations of all three lawsuits along with PAGA representative action claims.[22]

[22] The claims within the operative consolidated complaint are set forth in paragraph 2.2 of the Settlement Agreement.

37. On April 7, 2021, Defendant filed its Answer to the consolidated complaint pleading general denial of wrongdoing and asserting sixteen affirmative defenses.

38. Plaintiffs' lawsuit thus seeks to recover unpaid wages and overtime, premiums for improper meal period and rest breaks violations, reporting time pay, penalties for improper wage statements, waiting time penalties, civil penalties pursuant to the PAGA, injunctive and other equitable relief, prejudgment interest, and attorneys' fees and costs.

39. Defendant denies Plaintiffs' allegations of wrongdoing. Defendant does not believe that any liability to Plaintiffs or other Class Members exists, or that Plaintiffs or Class Members are entitled to any recovery.[23]

40. On May 24, 2017—and approximately 2 years before the *Backhaus* class action was filed—Defendant received court approval of a $650,000 class settlement and release of claims in a wage-and-hour class action entitled, *Vega v. Langham Hotels Pacific Corporation* (the "*Vega* class action").[24]

41. The *Vega* class action included similar claims to the *Backhaus* class action (e.g., unpaid overtime, meal and rest period violations, waiting-time penalties, etc.).[25] Per the Final Approval Order, the *Vega* settlement class included 345 current and former employees of the Langham Huntington and the class period was more than a 5-year period from February 13, 2011 through August 18, 2016.

42. Here, the Parties engaged in formal discovery and extensive informal exchange of data and information—which included propounding written discovery, noticing PMK depositions, exchanging information and documents, and reviewing and analyzing extensive data made available by Defendant—which enabled the Parties to thoroughly evaluate each of the Plaintiffs' claims, the

[23] Settlement Agreement ¶ 12.1 ("No Admission of Liability").
[24] The class settlement in *Vega v. Langham Hotels Pacific Corporation*, Los Angeles Superior Court Case No. BC572323 received final approval on May 24, 2017. A true and correct copy of the final approval is attached to this Declaration as **EXHIBIT 3**.
[25] The *Vega* class action included claims for failure to pay overtime, failure to pay premium wages for missed meal and rest periods, failure to furnish accurate itemized wage statements, unfair business practices, and PAGA penalties. (See *Vega* Final Approval Order § 1, page 2 attached __ to this Declaration as **EXHIBIT 3**.)

claims of the putative Class Members, and the aggrieved employees' PAGA claim, along with Defendant's affirmative defenses, and the likely outcomes, risks, and expense of pursuing litigation.

43. Prior to initiating the lawsuit, my office independently and thoroughly investigated the claims and considered the facts and circumstances underlying the pertinent issues and applicable law. My efforts in this regard, required thorough discussions and interviews with my clients and other Class Members as well as research into the various legal issues involved in the case. (Ibid.) After conducting this initial investigation, I determined that the claims were well suited for class action adjudication owing to what appeared to be a common course of conduct affecting a similarly situated group of employees. I am informed and believe that my co-counsel, Anthony J. Orshansky of CounselOne and Donald Potter, Law Office of Donald Potter did the same before initiating the *Sosa* and *Pelayo* class actions.

44. I am aware that Donald Potter, counsel for Plaintiff Pelayo, conducted written discovery in the *Pelayo* class action before the three class actions were consolidated, noticed depositions of Defendant's PMK on various topics and I have reviewed the discovery, the responses and the document production in response to the written discovery. Later, and after the three cases were consolidated, I also issued substantial written discovery that resulted in the production of voluminous payroll data pertinent to the Class. Class Counsel agreed to a proposal for an exchange of significant documentation and data. This included information and documentation concerning the alleged violations, such as, Defendant's written policies concerning those claims, including Defendant's employee handbooks, policies and procedures regarding the payment of wages, the provision of meal and rest breaks, time keeping policies, such as recording hours, issuance of wage statements, and providing all wages at separation, as well as the class data regarding the number of Class Members, the mix of current versus former employees, total number of pay periods, total number of workweeks, and the average hourly rate in effect. **Defendant also produced time and pay records for Class Members for approximately 1,328 putative class members which included approximately 591,784 shifts**.

45. My co-counsel and I met and conferred at length with defense counsel regarding the information and documents produced. We also interviewed Class Members, analyzed with them the

documents and data that was produced, and we spent a significant amount of time consulting with an expert to determine Defendant's degree of liability and potential damages.

46. Thereafter, on or about January 19, 2023, the Parties participated in a full-day mediation, where we debated and discussed our respective positionswith the Mediator Jill R. Sperber, Esq. of Judicate West. Ms. Sperber is experienced in mediating complex general litigation, labor and employment claims, class actions, and PAGA cases, among others. During the mediation, the Parties exchanged further information and discussed all aspects of the case, including the risks and delays of litigation and the risk to both Parties for proceeding with a motion for class certification, liability under the claims asserted, and the implications of a PAGA representative action. These were contentious issues because of the factual and legal complexity of the case. The parties reached the general settlement terms at mediation. Subsequently, the parties negotiated and entered a Memorandum of Understanding. Thereafter, the Parties engaged in negotiations to draft the long-form Settlement Agreement that the Parties are now requesting the Court to grant preliminary approval.

47. The settlement negotiations were hard fought and conducted in good faith and at arm's length between attorneys with substantial experience litigating class actions, representative actions, and wage and hour cases. The settlement was the product of a non-collusive settlement process in which the Parties were forced to make significant compromises in the interest of reaching a full and complete settlement of the action.

48. In settling, Defendant does not admit liability with respect to the alleged claims made by Plaintiff and makes no admissions regarding any facts or law related to the lawsuit. [26]

49. From my review of the facts, strengths, and weaknesses of this consolidated case, my analysis of the *Vega* wage-and-hour class action settlement and release that preceded this class action, the Defendant's changes to its policies and practices after the *Vega* class action settlement, the risks and delays posed by further litigation, and my own prior litigation experience, I believe that the recovery being made available to Class Members is fair, reasonable, and adequate taking into

[26] Settlement Agreement ¶ 12.1 ("No Admission of Liability").

consideration the amounts received in other wage and hour class and representative actions, the risks inherent in litigation of this genre, and the reasonable tailoring of each Class Members' claim to the settlement award he or she will receive. I believe that the settlement serves the best interests of Class Members.

50. Further, and based on the settlement negotiations, which were hard fought and conducted in good faith and at arm's length between attorneys with substantial experience litigating class actions, representative actions, and wage and hour cases, the settlement was the product of a non-collusive settlement process in which the Parties were forced to make significant compromises in the interest of reaching a full and complete settlement of the action. The Parties have concluded that it is in their best interests to compromise, settle, and accept the terms of the Settlement Agreement.

THE STRENGTH OF THE CASE IN LIGHT OF THE SETTLEMENT AMOUNT

51. My-co-counsel and I carefully vetted the claims at issue and, with the assistant of an expert, arrived at a comprehensive damages model for Defendant's liability. Although Plaintiffs steadfastly maintains that their claims are meritorious, they acknowledge that there are substantial risks and uncertainty in proceeding with class certification and trial. Defendant presented numerous defenses to Plaintiffs' claims, both on the merits and with respect to class certification.

52. For example, Defendant defended against the minimum and overtime wage claims by: relying on written policies and procedures that they contend show Defendant properly included all non-discretionary income in the regular rate for overtime and premium payments for missed meal periods and rest breaks. Defendant also argued that Class Members worked in different job positions and had different managers, and that, as a result, Defendant contended there was variation to the circumstances that could allegedly cause the employees to be deprived of the opportunity to take legally compliant, duty-free meal period or rest break, and this variation in circumstances raised highly individualized questions of fact militating against certification. Additionally, with regard to Plaintiffs' meal period violation claims, Defendant contended that its employees signed valid meal period waivers that are compliant with California law. Moreover, Defendant alleged it had strengthened its policies and practices after entering the *Vega* class action settlement prior to the

filing of this class action. These risks justify a downward departure from the maximum monetary exposure that each claim carries. The merits of each claim are addressed separately below.

RISK, EXPENSE, COMPLEXITY, AND DURATION OF FURTHER LITIGATION

53. Although Plaintiffs conducted formal and informal discovery prior to settlement (including propounding Special Interrogatories, a set of Requests for Production of Documents, and noticing the depositions of the person most knowledgeable designees for Defendant in the *Pelayo* class action), the Parties agreed to focus on exhausting early settlement efforts before launching into full-fledged and hotly contested certification battle. Therefore, absent settlement, the Parties would have needed to conduct substantial additional discovery, such as the production of voluminous records and numerous depositions of experts and percipient witnesses and prepare the case for class certification and trial. The Parties would have had to depose a number of people such as managers, supervisors, human resource representatives, and employees in order to establish liability. Discovery disputes would have been in the offing and liability likely would have entailed a battle of experts. This settlement avoids the considerable time, attorneys' fees and costs, and party resources associated with conducting additional discovery, moving for class certification and potentially summary judgment or adjudication, and ultimately, trial, as well as the risks and the accompanying burden of continued litigation on the Court.

RISK OF MAINTAINING CLASS ACTION STATUS

54. Here, settlement was reached prior to class certification and the result was a successful outcome for the Class. Class certification was by no means a foregone conclusion. Defendant defended against the minimum and overtime wage claims by relying on written policies and procedures that they contend show Defendant properly included all non-discretionary income in the regular rate for overtime and premium payments for missed meal periods and rest breaks. Defendant also argued that Class Members worked in different job positions and had different managers, and that, as a result, Defendant contended there was sufficient variation in the circumstances that could allegedly cause the employees to be deprived of the opportunity to take legally compliant, duty-free meal periods and rest breaks, and this variation in circumstances raised highly individualized questions of fact. Additionally, with regard to Plaintiffs' meal period violation

claims, Defendant contended that its employees signed valid meal period waivers that are compliant with California law. Moreover, Defendant alleged it strengthened its policies and practices after entering into the *Vega* class action settlement prior to the filing of this class action. In sum, Defendant disputed Plaintiffs' characterization of working conditions, liability, and damages.

55. Even if Plaintiff prevailed and certified a class action as to them, there is no guarantee Defendant would not later move for and obtain decertification. If the Court either denied class certification or later decertified it, the Class would recover nothing, and Class Members would be forced to retain their own counsel and proceed on the basis of individual claims only. Although Plaintiffs were prepared to litigate these claims through class certification and, ultimately, through trial, given the substantial amount offered in settlement, I predicted that it was far from certain that Plaintiffs would be able to recover a greater amount at trial, particularly after considering the increased litigation costs that would accrue.

AMOUNT OFFERED IN SETTLEMENT GIVEN REALISTIC VALUE OF CLAIMS

56. Plaintiffs' estimate of the settlement recovery is a reasonable percentage of possible recoverable damages at trial. **Plaintiffs' damages analysis shows that the $1,950,000 settlement reflects: an approximate 22% of Plaintiffs' estimated potential total maximum recovery including 100% of all civil penalties and 85% of the potential total maximum recovery for the unpaid wages, and meal and rest period violations excluding civil penalties,** while avoiding the further expense and serious risk of proceeding toward class certification and trial. Utilizing a class-wide damages study to assess the nature and magnitude of the claims in question, *see Kullar, supra,* 168 Cal.App.4th at p. 123, this case clearly meets requirements establishing that the class settlement is within the "ballpark" of reasonableness. This settlement provides a fair and reasonable monetary recovery for the Class in the face of disputed claims.

57. Based on discovery and their investigation, Class Counsel determined Defendant's degree of liability, prepared an exposure analysis, and forecasted the expected recovery for each claim as follows:

Unpaid Wages

58. Plaintiffs contend that Defendant underpaid wages due to Plaintiffs and the putative class, because they failed to include all non-discretionary income (e.g., bonus, commissions, etc.) when calculating the regular rate for the purposes of paying overtime wages and premium payments for missed meal periods and rest breaks which is legally required. See, e.g., *Marin v. Costco Wholesale Corp.*, 169 Cal.App.4th 804, 807 (2008) (holding that bonus must be included in overtime rate calculation under California law); 29 C.F.R. §§ 778.119 ("When the commission can be computed and paid, additional overtime compensation due by reason of the inclusion of the commission in the employee's regular rate must also be paid. To compute this additional overtime compensation, it is necessary, as a general rule, that the commission be apportioned back over the workweeks of the period during which it was earned.") and *Ferra v. Lowes Hollywood Hotel, LLC*, 11 Cal. 5th 858, 878 (2021) (holding that one hour of "regular rate" pay for missed meal and rest breaks has the same meaning as "regular rate" for overtime payments).

59. Class Counsel analyzed the documents and data produced by Defendant through an expert witness and, in conjunction with interviews of Plaintiffs and Class Members, they determined Defendant's degree of potential liability and amounts due in damages – specifically, the incidence and amount of underpayment of overtime and premium payments for missed meal periods due to failing to include all non-discretionary income in the regular rate, as well as, any unpaid potential reporting time pay.

60. Based on Defendant's payroll and timekeeping records, and using expert analysis, Plaintiffs determined that the following potential liability existed as to the unpaid wages due to the alleged miscalculation of the regular rate: (a) $31,511 for unpaid overtime and (b) $129,399 for underpayment on premium pay for meal period violations for a **total of $160,910 in estimated unpaid wages**. Based on the Plaintiffs review and analysis of records, and the individualized nature of reasons employees may have reported to work for a "short shift" or left prior to working less than four hours, Plaintiffs assigned a *de minimus* value for unpaid wages for reporting time pay for the purposes of settlement.

61. In opposition to Plaintiffs' arguments, Defendant contends that Plaintiff's claim for regular rate violations was not amenable to class treatment, because employees worked in a variety of departments with different compensation plans, and it would require an unmanageable series of mini-trials to determine which items of non-discretionary income should (or should not) be included in the regular rate.

62. Further, in terms of merit defenses, Defendant vigorously disagreed with Plaintiffs' contention that Defendant failed to properly calculate the regular rate for overtime and meal period and rest break premium as it asserted all required forms of non-discretionary income were included. Defendant further contends that it made changes to its policies and procedures after the *Vega* class settlement; it began paying the meal period and rest break premium payments using the overtime regular rate *before* the California Supreme Court's 2021 ruling in *Ferra*, and that Plaintiffs incorrectly include items of non-discretionary income and other amounts that are not legally-required to be included within regular rate calculation.

63. Although Class Counsel investigated Defendant's policies and procedures, and communicated with Class Members about the compensation plans, for Plaintiffs to establish that the regular rate calculation for various job titles under different compensation plans, would be hard-fought, costly, time-consuming, and daunting. And the outcome was by no means certain.

64. In light of these considerations – especially the evidentiary difficulties of demonstrating the legality of all regular rate calculations on a class-wide basis – Class Counsel applied a discount that incorporated the risks of non-certification and being unsuccessful on the merits.

Meal and Rest Period Violations

65. While Defendant produced a facially legally compliant meal period and rest break policy, Plaintiffs assert that there are compliance issues *vis-à-vis* meal breaks—some are late, missed, short, or interrupted. Furthermore, Plaintiffs review of timekeeping records found entries showing late (after 5 hours for first meal periods and after 10 for second meal periods) and missed first and second meal periods. Additionally, communications with Plaintiffs and putative class members revealed that Defendant's employees would receive late meal periods or rest periods, or

none at all, due to understaffing and directives from management to remain on-duty. Consequently, Plaintiffs alleged that Defendant violated Labor Code §§ 226.7, 512, and applicable Wage Orders by failing to compensate Plaintiff and Class Members for short, late, interrupted, and missed meal periods.

66. Defendant, however, contends that it had practices, policies, and procedures to provide meal and rest breaks every workday to their employees that fully complied with the law. Defendant vehemently argued that it complied with the requirements articulated by the California Supreme Court in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004. Specifically, Defendant maintained that it "provides" employees with a reasonable opportunity to take timely meal periods of at least 30 minutes, relieves employees of all duties during meal periods, and relinquishes control over employees' activities, including the ability to leave the premises during meal periods. Defendant further alleged that its timekeeping records evidence that it employs such a policy and that any deviance from the policy are minor, individualized occurrences and not the result of systemic policy. It further asserts, and produced records showing, that Defendant had class members sign valid, written meal period waivers which it contends explain and nullify time records showing purported meal period violations.

67. Further, after the *Vega* class action and settlement, Defendant contended it further tightened its policies and procedures to ensure compliance with California law. They also had employees sign valid, legally-complaint written meal period waivers which they claim account for many of the timekeeping entries that show no meal period taken. As such, Defendant argued that employees were apprised of their right to take meal periods and provided compliant meal periods, but some voluntarily waived them. Defendant contended that the issue of voluntary waiver would necessarily devolve into a series of individualized mini-trials, precluding class certification. (*see Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, 25 [holding that the defendant must be provided an opportunity to litigate affirmative defenses, even when they turn on individual questions].)

68. Based upon the analysis of Class Members' time and payroll records for 591,784 shifts, Plaintiffs believe that 90,584 shifts (15%) of all shifts analyzed show unique, uncompensated

meal period violations. As such, **Plaintiffs determined that the potential exposure for these missed, short, or late unique meal period violations to be $1,115,002.**

69. Plaintiffs also allege that Class Members did not receive authorized rest breaks as required whereby employers "relinquish control over how employees spend their time and relieve employees of all duties." Due to Defendant's work demands and inadequate staffing, Plaintiffs and Class Members allege they did not receive timely and compliant rest breaks, nor did Defendant relinquish control over how employees spent their 10-minute rest periods. As with the meal periods, Plaintiffs and the putative class did not receive rest break premium payments for non-compliant rest breaks, nor is there evidence that Defendant made all rest break premium payments to Class Members. Thus, Plaintiffs allege that Defendant did not provide premium pay for each non-compliant rest break as required under Labor Code § 226.7.

70. Here again, Defendant disputed liability and damages. Defendant maintained that it authorized and permitted duty-free rest breaks of not less than ten minutes for every major fraction of four hours worked as required by Labor Code § 226.7. Defendant explained that Class Members had ample opportunity to take, and did take, regular rest breaks. As with meal periods, Defendant argued that any Class Member who failed to take a rest break, or took a short or late rest break, did so voluntarily and that all applicable rest breaks were still authorized and provided. (*Ibid.*).)

71. Unlike meal periods, rest breaks need not be recorded and thus establishing Defendant's exertion of pressure, control, and resulting violations is likely to be more difficult. Thus, **Class Counsel applied a 10% violation rate based on the narratives of Plaintiffs and other Class Members for a maximum estimated exposure rate of $1,012,710 attributed to rest break violations**. For settlement, and accounting for difficulties of certifying and proving unrecorded rest break violations, a reduction from that maximum exposure is warranted.

Wage Statement Violations

72. Plaintiffs allege a cause of action under Labor Code § 226(a) for Defendant's failure to provide accurate itemized wage statements. Failure to comply with the statute entitles employees to recover the greater of all actual damages or fifty dollars ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) for each violation in a subsequent pay period, not

exceeding an aggregate penalty of four thousand dollars ($4,000). (*See* Labor Code § 226€.) This cause of action is derivative of the foregoing causes of action because if Defendant did not provide wages for all hours worked, meal and rest breaks, and so forth, then the wage statements were inevitably inaccurate.

73. Defendant contended, however, that Labor Code § 226(e) penalties are not automatic. Rather, the employee must show that Defendant's non-compliance was "knowing and intentional." Defendant suggested that any non-compliance was not knowing and intentional. (*Ibid*.)

74. Because the damages for this cause of action are penalties, the statute of limitations is only one year prior to the filing of the original complaint. (*See* Code Civ. Proc. § 340.) The Parties discussed these issues and, based on the $50 initial violation plus the $100 per pay period subsequent violation rates, **Plaintiffs estimate the total maximum wage statement exposure to be $2,000,000.**

Derivative Waiting Time and UCL Claims

75. Plaintiffs further assert causes of action against Defendant for failure to timely pay all wages due employees at separation, for civil penalties under the PAGA, and for engaging in unfair, unlawful, and fraudulent business practices. (Cullen Decl. ¶ 75; *see* Labor Code §§ 203, 2699, *et seq*. and Cal. Business and Professions Code § 17200, *et seq*.) As with other claims, Defendant vigorously disagreed that it engaged in any conduct giving rise to liability or entitlement to recovery of penalties or equitable relief.

76. Defendant argued that waiting time penalties are not appropriate because it attempted to pay employees all final wages owed in good faith upon their separation, thereby precluding a finding of willfulness necessary to obtain waiting time penalties. (Cullen Decl. ¶ 76.) Moreover, Defendant maintained that no waiting time penalties were recoverable from alleged meal or rest period violations. (*Ibid*.) Defendant also raised that waiting-time penalties are not appropriate for employees whose employment terminated prior to the *Ferra* decision in 2021, because the prevailing view pre-*Ferra* was that the law did not require "regular rate" premium payments for missed meal periods and rest breaks. Likewise, Defendant argued that payment of waiting-time penalties is not appropriate here because such penalties for missed meal breaks and rest periods was not clearly established law until the May 2022 California Supreme Court decision in *Naranjo v. Spectrum*

Security Services, Inc., 15 Cal. 5th 93 (2022). Finally, Defendant argued that adequate remedies at law exist to render the action unsuitable for equitable remedies, and again contended that the allegations underlying the unfair competition claim lacked merit. (*Ibid.*)

77. The parties concluded that 1002 class members constitute "former employees" although many of those individuals were terminated during the pandemic and subsequently re-hired by Defendant. **Class Counsel calculated the maximum value of the waiting time claim to be $3,939,026.** (Cullen Decl. ¶ 77.) However, to account for the uncertainty of proving the underlying claims and risk, Class Counsel made a realistic allowance with the agreed upon settlement figure. (*Ibid.*)

78. Plaintiffs further assert causes of action against Defendant for failure to timely pay all wages due employees at separation, for civil penalties under the PAGA, and for engaging in unfair, unlawful, and fraudulent business practices. (*see* Labor Code §§ 203, 2699, *et seq*. and Cal. Business and Professions Code § 17200, *et seq*.) As with other claims, Defendant vigorously disagreed that it engaged in any conduct giving rise to liability or entitlement to recovery of penalties or equitable relief.

PAGA Penalties

79. The success of Plaintiff's PAGA claim is wholly dependent upon the success of her underlying claims occurring within the one-year statute of limitations applicable to the PAGA. Defendant maintained and continues to maintain it had legally compliant employment policies and practices throughout the statutory period. Defendant denied and continues to deny that it ever violated any provision of the California Labor Code and argued that, even assuming such violations occurred, Defendant will not be treated as having engaged in subsequent violations giving rise to heightened penalties. In other words, Defendant argued that heightened civil penalties for subsequent violations would not be assessed unless it could be shown that Defendant had notice that it was violating the laws, *e.g.*, it had been cited by a labor agency or adjudged by a court to have done so. (*Ibid.*; *see, e.g.*, *Amaral v. Cintas Corp.* (2008) 163 Cal.4th 1157, 1209.) Thus, Defendant contended that, at best, even if a violation giving rise to a penalty was shown for each pay period, only the lower civil penalty associated with initial violations would apply. (*Ibid.*)

80. Moreover, Defendant asserted that, before a PAGA claim could be tried, under existing law, the court of law would have to be satisfied that the adjudication of the PAGA claim, based on a theory of uniform wage and hour practices relating to a large group of aggrieved employees, is sufficiently "manageable" so as not to interfere with Defendant's right to due process. Defendant reiterated how hourly employees' job duties and work hours varied. Defendant contended that there was variation as to the compensation plans and the reasons behind an employee being deprived of the opportunity to take legally compliant, duty-free meal and/or rest periods. (*Ibid*.) Defendant further opined that these issues presented challenges not only to liability but also challenges to Plaintiff's ability to show that a PAGA claim could be efficiently and manageably adjudicated without abridging Defendant's due process rights.

81. Finally, Defendant maintained that the Court has discretion to reduce any award of PAGA penalties where it views them as duplicative. (*See* Labor Code § 2699e(2) [the Court may "award a lesser amount than the maximum civil penalty amount [authorized by PAGA] if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory."]

82. Although, strictly speaking, class certification requirements are not required to be satisfied in order to adjudicate a PAGA claim, the state of the law with respect to the adjudication and valuation of a PAGA claim remains uncertain.[27] Thus, Class Counsel applied discounts for the

[27] Instead, what is clear is that the purpose of the PAGA is not to generate revenue for the State but rather to facilitate the enforcement of the labor laws. (*Ibid.*; *see*, *e.g.*, *Williams v. Superior Court* (2017) 3 Cal.5th 531, 546; *Arias v. Superior Court* (2009) 46 Cal.4th 969, 986; Labor Code § 2699(i).) In assessing the adequacy of the recovery under a PAGA claim, the focus is not the amount which the LWDA and the aggrieved employees are to receive formally in the form of monetary civil penalties but instead whether the total settlement amount achieves the PAGA's objectives. "When PAGA claims are settled, courts "consider whether the proposed PAGA settlement is fair and adequate in view of the purposes and policies of the statute[]" and "[t]hose purposes and policies include benefit[ting] the public by augmenting the state's enforcement capabilities, encouraging compliance with California Labor Code provisions, and deterring noncompliance." (*O'Connor v. Uber Techs., Inc*. (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1132-33 and 1135.) A "[c]ourt does not review the PAGA allocation in isolation, but rather reviews the settlement as a whole, to determine whether it is fundamentally fair, reasonable and adequate, with primary consideration for the interests of absent class members." (LWDA's Comments on Proposed PAGA Settlement in *O'Connor v. Uber Techns*. (N.D. Cal. July 29, 2016) No. 13-CV-03826-EMC, Docket No. 736, at 4:17-19.) "PAGA penalties must be evaluated in terms of their public policy objective and not just through the prism of what private relief has been sought or obtained." (*Id*. at p. 4:14-16.)

risks in establishing manageability and possible bifurcation of discovery and/or trial, the risks regarding success on the merits and establishing liability, and the risks with proving the extent of penalties that are warranted and possible discretionary reduction of penalties by the Court. (*Ibid*.)

83. Using the "initial" $100 per pay period violation and the $200 subsequent per violation rate to calculate PAGA exposure, Plaintiffs determined the maximum PAGA penalty exposure to be $8,617,800 – of which, by statute, only 25%, or $2,154,450 – would be recoverable by aggrieved employees. (*Ibid.*)

84. Plaintiff further asserted causes of action against Defendant for failure to timely pay all wages due employees at separation, for civil penalties under the PAGA, and for engaging in unfair, unlawful, and fraudulent business practices. (*See* Labor Code §§ 203, 2699, *et seq*. and Cal. Business and Professions Code § 17200, *et seq*.) As with other claims, Defendant vigorously disagreed that it engaged in any conduct giving rise to liability or entitlement to recovery of penalties or equitable relief.

Summary

85. After Class Counsel calculated the realistic possible recovery to Class Members for each of the above claims, **the aggregate estimated maximum dollar amount result is $8,997,323 in realistic total damages and penalties**.[28] **Of that total estimated maximum value, $6,708,701 — or 75% of the total amount — is attributed to civil penalties** under statutes that, generally, give the Court discretion as to whether or not to award those penalties and, if so, in what (if any) amount.

86. Thus, the proposed settlement amount to Class Members of **$1,950,0000 represents approximately 22% of Plaintiffs' estimated potential *total* maximum recovery including 100% of *all* civil penalties. More importantly, it represents approximately 85% of the potential total maximum recovery for the unpaid wages, and meal and rest period violations *excluding* civil penalties. ,** while avoiding the further expense and serious risk of proceeding toward class certification and trial. "The fact that a proposed settlement may only amount to a fraction of the

[28] *To wit*, $160,910 (unpaid wages) + $2,127,712 (meal and rest violations) + $2,000,000 (226 penalties) + $3,939,026 (203 penalties) + $769,675 (25% of PAGA penalties) = $8,997,323.

potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." (*Linney v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242 [internal quotations omitted]; *see, e.g., Altamirano v. Shaw Industries, Inc.* (N.D. Cal. 2015) 2015 WL 4512372, at *9 [preliminarily approving wage and hour class action settlement stating, "[a]lthough 15% represents a modest fraction of the hypothetical maximum recovery estimated by Plaintiff, that figure is sufficient for the Court to grant preliminary approval given the merits of Plaintiff's claims."].) Taking into account the risk of non-certification, failure to prevail on the merits, and the Court's power to reduce the civil penalties, the proposed settlement falls within the realm of being fair, reasonable, and adequate.

EXPERIENCE AND VIEWS OF LEAD COUNSEL

87. The Cullen Law Firm has represented tens of thousands of employees in numerous employment and consumer class actions, primarily on the West Coast. I am the founder and sole owner of the Cullen Law Firm. I am licensed and in good standing with the state bars of Washington, Oregon and California, where I have maintain active practices since 1997. I began my legal career in Los Angeles in 1997 as a litigator, and I have devoted a substantial percentage of my practice to class action litigation, particularly in the areas of employment..

88. I have personally litigated approximately two dozen wage and hour class actions that were certified, either in contested hearings or for purposes of settlement. I have also litigated multiple mass actions as a sole practitioner with client groups as large as 120 plaintiffs. I have never had an application to act as class counsel denied, and I estimate that I have certified about five of them in contested hearings. As such, the Cullen Law Firm is well qualified because of its over 25 years of experience in class actions. Not only do we have the experience, but we also have the skill, knowledge, and resources necessary to act as counsel and represent the putative class in this action.

89. Over the past 25 years, the Cullen Law Firm, and its attorneys, have obtained favorable judgments and settlements against a range of defendants, including many large trucking companies, hospitals, and service industries, which settlements and judgments have exceeded $75 Million. A representative list of some of Cullen Law Firm's class action cases that have received final approval are as follows:

a. *Holt, et al. v. Arrowhead Mountain Spring Water Company, a division of Great Spring Waters of America, Inc.,* LASC No. BC210181, case involving alleged misclassification of bottled-water delivery drivers as exempt from overtime, precertification settlement class certified for a $4,000,000 settlement;

b. *Cruz, et al. vs. Suntory Water Group, Inc.,* LASC No. BC243596, case involving alleged misclassification of bottled-water delivery drivers as exempt from overtime; precertification settlement class certified for a $800,000 settlement;

c. *Rodriguez et al. v. Belaire West Landscape, Inc*., LASC Case No. BC321310, certified in 2009 by Judge Strobel as class action in a contested hearing for all causes of action a class of several hundred laborers for off the clock and related wage & hour claims. That case ultimately settled for $975,000; whereafter, the defendant filed for chapter 7 bankruptcy and the company owner/guarantor of the settlement died with a $1 million tax lien against her. The case was ultimately dismissed without prejudice as uncollectible, but it continues to have importance as it was the genesis of the *Belaire West* letter;

d. *Ortega et al. v. J.B. Hunt Transport, Inc*., USDC Case No. 2:07-CV-08336-FMCFMOx; certified in 2009 by Hon. Florence Cooper as class action for all causes of action for a class of approximately 6,500 local and regional truck drivers for off the clock and related wage & hour claim; decertified by Hon. Gary Klausner in 2018 a month before a federal trial, after which the case settled for $15,000,000;

e. *Van Heyn et al. v. WMC Mortgage et al*., LASC Case No. BC385594, case involving allegations of unlawful deductions from commissions for approximately 180 mortgage loan sales representatives, pre-certification class settlement in 2009 in the amount of $3,000,000.

f. *Pasquale et al. v. Kaiser Foundation Hospitals, Inc. et al.,* USDC (S.D. Cal.) Case No 08-cv-0785 MMA NLS, case involving alleged misclassification of computer "Application Coordinators" who processed and effectuated approved

functionality changes to Defendant's computer software system. Pre-certification settlement in 2009 for $3,700,000.

g. *Autrey v. Shoe Pavilion,* LASC No. GC030302, case involving alleged misclassification of shoe store managers as exempt from overtime; case settled for $975,000 prior to certification with certification motion pending. This represented approximately 1/7 of the company's market capitalization on the NASDAQ;

h. *Wu vs. Multicultural Radio Broadcasting Inc.,* LASC No. BC312128, case involving failure to reimburse business mileage expenses for outside sales personnel. Case settled post-certification for $185,000;

i. *Roberts v. Mpower Communications Corp.,* San Diego Superior Court Case No. GIC829228; case involving post-termination non-payment of sales commissions to employer's outside sales personnel. Precertification settlement class certified for a $98,480.00 settlement;

j. *Roberts v. Mpower Communications Corp.;* LASC Case No. BC 329012; case involving failure to reimburse business expenses (e.g. mileage) for outside sales personnel. Pre-certification settlement class certified for settlement of $300,000;

k. *Pineda et al. v. No Fault Industries, Inc.,* LASC Case No. BC305676; precertification settlement class certified while certification motion was pending for a $100,000 settlement;

l. *Johnson v. Kaiser,* LASC Case No. BC 335531; pre-certification settlement class certified for a $1,000,000 settlement;

m. *Dorfman et al. v. Home Depot USA, Inc. et al.,* LASC Case No. 332353; precertification settlement class certified for a $550,000 settlement;

n. *Roman v. ITS Technologies, LLC,* LASC Case No. BC 328783; precertification settlement class certified while certification motion was pending for $557,837.60.

o. *Recio v. Labor Ready et al.,* LASC Case No. BC28925, pre-certification settlement class certified for a $330,000 settlement.

p. *Hansen et al. v. THD At Home Services*, LASC case no. BC 512804, designated class counsel in $2.3 million non-reversionary settlement for alleged misclassification of a settlement class of 89 managers, final approval scheduled for August 2, 2016.

q. *Whitaker et al. v. Countrywide Financial Corporation, et al.,* USDC Case No 09-CV-5898-CAS, and JMS Case No 1100072060, $7.5 million non-reversionary settlement for off the clock claims for call center employees. Arbitrator's award granting final approval confirmed by the US District Court Judge Christina A. Snyder on October 29, 2014.

90. The qualifications set forth above give me the ability and perspective necessary to properly assess the reasonableness of proposed settlements such as the one at issue here. Based on my experience, I have concluded that this action could not have been settled on better terms at the present time than those that are provided in the proposed settlement agreement before the Court.

91. In sum, proposed Class Counsel, the attorneys at Cullen Law Firm, are experienced in employment class and representative actions and are adequate to represent the Settlement Class in the instant action.

CRITERIA SATISFIED FOR CERTIFICATION OF SETTLEMENT CLASS

92. The proposed class satisfies the criteria for certification of a settlement under California law, as embodied in California Code of Civil Procedure, section 382. Defendant has agreed to the certification of the class for settlement purposes. In general, courts may take a proposed settlement into account in evaluating the propriety of class certification. (*See Dunk v. Ford Motor Co.*, *supra*, 48 Cal.App.4th at 1807 n. 19.) Indeed a "lesser standard" of scrutiny applies in certifying classes for settlement purposes. (*Ibid*.) Therefore, the Court should take into consideration the fact that the Parties have settled their claims and stipulated to certification for settlement purposes when making its assessment.

93. **Numerosity and Ascertainability**. Here, the class definition is "precise, objective and presently ascertainable." (*Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 919.) Class Members are comprised of all current and former hourly-paid or non-exempt employees who worked

for Defendant in the State of California at any time during the Class Period.[29] Further, the Class Period is defined as the period between July 12, 2015 through April 16, 2023.[30] Thus, all Class Members are of a specific type (hourly-paid or non-exempt employees) employed within California. Defendant is required to and does maintain employment records of such persons, including contact information and Social Security numbers. At mediation in January 2023, and based on employment records, the Parties agreed there were 1,328 current and former employees within the putative class. Plaintiffs' counsel is using a higher estimated class number of 1,375 to account, *potentially*, for subsequent hires that may have occurred and the possibility that additional class members will be identified when Defendant pulls the data for the Class Notice. Thus, the proposed Class satisfies the ascertainability and numerosity requirements. (*See, e.g., Collins v. Rocha* (1972) 7 Cal.3d 232 [finding a class of 44 farm workers sufficiently numerous].)

94. **Commonality**. Here, the litigation is predicated on uniform company policies and systemic top-down business practices revolving principally around Defendant's timekeeping and pay practices – *e.g.,* failing to include all non-discretionary income within the regular rate, not paying for reporting time pay/short shifts, not providing legally-compliant meal periods and rest breaks, failure to properly pay meal and rest break premiums. These allegations have given rise to the following claims: failure to pay minimum and overtime wages; meal period liability; rest break liability; and derivative claims arising therefrom.

95. Plaintiffs have alleged a single top-down compensation scheme where "the relevant proof [does] not vary among class members" and "clearly presents a common question fundamental to all class members." (*See In Re NASDAQ Market-Makers Antitrust Litigation* (S.D.N.Y. 1997) 172 F.R.D. 119, 123 [citing *In Re NASDAQ Market-Makers Antitrust Litigation* (S.D.N.Y. 1997) 169 F.R.D. 493, 518].) California courts show "no hesitancy" in inferring class-wide causation, class-wide injury, and class-wide damages, when a common course of action has been shown. (*B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1350 [granting class certification in a manufacturing defect case when a common course of action had been proven].)

[29] Settlement Agreement ¶ 1.5.
[30] Settlement Agreement ¶ 1.12.

This inference "*eliminates* the need for each class member to prove individually the consequences of the defendants' actions to him or her." (*Id.* at p. 1351 [emphasis added].) Thus, the outcome of this matter depends upon questions that are common to members of the Class. These types of claims are commonly held to be proper for class certification.

96. **Typicality**. Here, Plaintiffs' claims are typical of those held by the members of the Class. Like all other Class Members, Plaintiffs were non-exempt hourly employee working for Defendant in California during the Class Period. As alleged, Plaintiffs were not properly compensated for all hours worked, and not provided with legally compliant meal and rest breaks. Plaintiffs were therefore impacted by the same challenged policies that allegedly injured the Class as a whole and subject to the same defenses forwarded by Defendant as to the Class, thus each of their claims are therefore typical. (Ibid.)

97. **Adequacy**. Here, Plaintiffs and Class Counsel will adequately represent the Class as there are no conflicts between the named Plaintiff and the Class she seeks to represent. (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450 [finding adequacy satisfied where there was no indication that plaintiff's counsel were not qualified and the named plaintiff had no interests antagonistic to those of the proposed class].) Class Counsel also have extensive experience in wage and hour litigation.

98. **Superiority**. By consolidating hundreds of individual actions into a single proceeding, this Court's use of the class action device enables it to manage this litigation in a manner that serves the efficiency interests of the litigants and the judicial system. Absent class treatment, the only alternative would be to force these employees to file individual actions. (*Sav-On Drug Stores v. Super. Ct.* (2004) 34 Cal.4th 319, 339 n. 10 [stating "[t]he relevant comparison lies between the costs and benefits of adjudicating plaintiffs' claims in a class action and the costs and benefits of proceeding by numerous separate actions – *not* between the complexity of a class suit that must accommodate some individualized inquires and the absence of any remedial proceeding whatsoever."].) Finally, in the context of settlement, the superiority concerns are essentially non-existent.

PROPOSED NOTICE PROVIDES ADEQUATE NOTICE TO CLASS MEMBERS

99. This proposed Class Notice entitled, "COURT APPROVED NOTICE OF CLASS ACTION SETTLEMENT AND HEARING DATE FOR FINAL COURT APPROVAL"— is the LASC form Class Notice with minor modifications and is attached as Exhibit A to the Settlement Agreement ("Class Notice"). A redline version of the changes made to the model LASC Class notice included with the redline version of the Settlement Agreement attached hereto as **EXHIBIT 2**.

100. The Settlement Agreement provides the Class Notice will include Spanish translation.[31] The Court should order distribution of the Class Notice to the Class by first class mail, postage prepaid, using the last known mailing address information provided by Defendant.

101. Here, Plaintiffs propose that the settlement be administered by CPT Group, Inc. ("CPT"), an experienced class action settlement administrator.[32] All Class Counsel have worked with CPT in the past with good results. Additionally, class counsel obtained multiple bids for potential administrators in connection with this settlement and CPT was the lowest bid.

102. Class Members' addresses will be ascertainable through Defendant's personnel and payroll records, which Defendant will provide to the settlement administrator within thirty (30) calendar days after preliminary approval of the settlement.[33] To the extent that any notices are returned, CPT will run those addresses through the National Change of Address database and/or conduct skip traces to obtain current address information.[34]

103. The content of the proposed notice satisfies California Rules of Court, Rule 3.766(d) because it advises Class Members of the nature of the claims, basic contentions and denials of the Parties, the key terms of the Settlement Agreement, the uniform 60-day deadline to submit a dispute, opt-out, or object to the class settlement and the procedure by which to do so, and explains the recovery formula and credited number of workweeks and pay periods for each Class Member. The

---

[31] Settlement Agreement, ¶¶ 7.4.b.
[32] Settlement Agreement ¶¶ 1.2 and 7,1.
[33] Settlement Agreement, ¶¶ 1.8 (defining "Class Data") and 4.1 ("Delivery of Class Data").
[34] Settlement Agreement, ¶¶ 1.10 ("Class Member Address Search"), 4.3(b) (Requiring Class Member Address Search relating to settlement checks) and 7.4(c) (Requiring Class Member Address Search relating to Class Notices).

proposed notice will also notify Class Members of the final approval hearing date, provide the contact information for Class Counsel, and advise Settlement Class Members that they may enter an appearance through counsel if they wish. This manner of giving notice satisfies California Rules of Court, Rule 3.766(e) as the most reliable and cost-effective method of reaching Class Members. Thus, the proposed method of notice is reasonably calculated to reach Class Members by the best means practicable and should be approved. (This Court should order distribution of the proposed Class Notice (*see* Exh. A to the Settlement Agreement, a true and correct copy of which is attached hereto as Exhibit 1) to the Class by first class mail, postage prepaid, using the last known mailing address information provided by Defendant.

104. A true and correct copy of the proof of the submission of the proposed settlement agreement to the LWDA is attached hereto as **EXHIBIT 4**. The underlying PAGA claims in this litigation are: Taleena Pelayo v. Langham Hotels Pacific Corporation (LWDA-CM-740071-19) and Narciso Chan Sosa, Antonio Leiria v. Langham Hotels Pacific Corporation (LWDA-CM-800824-20)

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 28th day of March 2023, at Los Angeles, California.

Paul T. Cullen, Declarant