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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SONOMA

ALICIA RANILLO, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

ENSIGN SONOMA LLC, a California limited liability company, and DOE 1 through and including DOE 100,

Defendants.

Case No. SCV258369

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR CONDITIONAL CLASS CERTIFICATION AND PRELIMINARY APPROVAL OF CLASS-ACTION SETTLEMENT;

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

MAR - 8 2019

Date
time 9:00 a m
Dept 16

TO EACH PARTY AND TO EACH PARTY'S ATTORNEY OF RECORD: NOTICE IS HEREBY GIVEN that, on MAR - 8 2019 at 9:00 a.m., or as soon thereafter as the matter may be heard, in Department 16 of the above-entitled Court located at 3035 Cleveland Avenue, Suite 200, Santa Rosa, California 95403, Plaintiff Alicia Ranillo will move for an order (1) conditionally certifying the Class for the purpose of a Settlement reached with Defendant Ensign Sonoma LLC; (2) approving the form and method of notice to the Class; (3) appointing David Harris of the North Bay Law Group as Class Counsel; (4) approving Plaintiff as the Class Representative; (5) appointing CPT Group as the Settlement Administrator; and (6) approving the proposed mechanism for administering the Settlement.[1]

The Motion will be made and based upon this Notice; the Memorandum of Points and Authorities appended hereto;[2] the Declaration of David S. Harris in Support of Plaintiff's Motion for Conditional Class Certification and Preliminary Approval of Class-Action Settlement as well as all of the materials attached thereto, the Declaration of Alicia Ranillo in Support of Plaintiff's Motion for Conditional Class Certification and Preliminary Approval of Class-Action Settlement, all of the pleadings, papers, and documents contained in the file of the within action; and such further evidence or argument that may be presented at or before the hearing of the Motion.

DATED: January 22, 2019

NORTH BAY LAW GROUP

David S. Harris
Attorneys for Plaintiff

[1] Where applicable, capitalized terms used herein have the meanings set forth in the Joint Stipulation of Class Action Settlement, attached as Exhibit 1 to the Declaration of David S. Harris in Support of Plaintiff's Motion for Conditional Class Certification and Preliminary Approval of Class-Action Settlement.

[2] The Memorandum exceeds fifteen pages in length, which is expressly permitted under the California Rules of Court. See Cal. R. Ct. 3.764(c)(2) (stating that "[a]n opening . . . memorandum filed in support of . . . a motion for class certification must not exceed 20 pages").

MEMORANDUM OF POINTS AND AUTHORITIES

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I. Introduction.

This Court should grant preliminary approval of the Settlement Agreement entered between Plaintiff Alicia Ranillo, on behalf of herself and the absent Class Members whom he seeks to represent, on the one hand, and Defendant Ensign Sonoma LLC., on the other hand. This Motion requests that the Court grant preliminary approval of the $135,000 Settlement, finding that there is a *prima facie* showing that the Settlement is fair, adequate, and reasonable. Given the uncertainty and risks faced by the Parties to this Action, Plaintiff has determined that the $135,000 Settlement is the most desirable way to resolve this matter. The entire Net Settlement Fund will be distributed to all Settlement Class Members who do not opt out *without the need of any Class Member to submit a claim form*, and *no funds will revert to Defendant*.

II. Summary of the Case.

The action was commenced against Defendant as a putative class action in Sonoma County Superior Court on February 8, 2016, on behalf of Plaintiff and all others similarly situated for alleged violations of the California Labor Code. (See generally Feb. 8, 2016, Compl.) On March 15, 2016, Plaintiff filed a First Amended Complaint. (See generally Mar. 15, 2016, First Am. Compl.) Thereafter the parties stipulated to the filing of a Second Amended Complaint – the operative complaint – which was filed on July 1, 2016. (See generally July 1, 2016, Second Am. Compl. ("SAC").)

Defendant Ensign Sonoma LLC ("Defendant") is a post-acute care and rehabilitation facility located in Sonoma, California. (SAC ¶ 2.) Defendant employed Plaintiff Alicia Ranillo ("Plaintiff") as a Licensed Vocational Nurse ("LVN") from March 2008 through September 2015. (SAC ¶ 7.)

In the Second Amended Complaint, Plaintiff alleges the following causes of action: (1) Labor Code sections 510 and 1194, failure to pay proper overtime compensation; (2) Labor Code section 203, continuing wages; (3) Labor Code sections 226.7 and 512, meal-period violations; (4) Labor Code section 226.7 and 512, rest-period violations; (5) Labor Code section 204, late payment of overtime wages; (6) Labor Code section 226, failure to provide accurate itemized wage statements; (7) California Business and Professions Code section 17200 *et seq.*, restitution and injunction; and (8) Labor Code Private Attorneys General Act ("PAGA"), civil penalties. (See generally SAC.)

The claims in this action relate to allegations that Defendant failed: (1) to provide employees

with adequate pay statements, (2) to provide employees with proper rest and meal breaks, (3) to properly calculate employees' overtime wages, and (4) to pay its former employees all wages owed to them at the termination of their employment. The Second Amended Complaint also seeks miscellaneous penalties, including civil penalties pursuant to Labor Code section 2698 *et seq.*, as well as additional relief under the Business and Professions Code section 17200 *et seq*.

Defendant contends that it has complied with all applicable laws, including, but not limited to, those relating to the payment of regular and overtime wages, the provision of meal and rest breaks, and the provision of accurate wage statements. Defendant disputes all material allegations, as well as all claims for damages and other relief, made by Plaintiff in the Second Amended Complaint, or otherwise asserted during the course of the litigation.

Between the filing of the case in February 2016 and the Parties' mediation, the parties engaged in substantial and extensive investigation, including both formal and informal discovery. (Decl. of David S. Harris in Supp. of Pl.'s Mot. for Conditional Class Certification and Preliminary Approval of Class-Action Settlement ("Harris Decl.") ¶ 6.) Defendant provided thousands of pages of documentation and putative-class data to Plaintiff to review and analyze. (Harris Decl. ¶ 6.) This information included summary employment data for the entire putative class, information as to Defendant's policies, and a statistically significant sampling of full payroll and hourly employee punch-data for the putative class. (Harris Decl. ¶ 6.) Plaintiff's counsel spent many of hours reviewing the payroll information and hourly employee punch-data that was provided by Defendant in order to analyze the claims and prepare for mediation. (Harris Decl. ¶ 6.)

On March 6, 2016, the parties participated in an all-day mediation with an experienced employment mediator, Hon. Linda Quinn (Ret.) in Irvine, California. (Harris Decl. ¶ 6.) The case did not settle at the mediation, but with the continued assistance of Judge Quinn, the Parties ultimately reached an arms' length settlement, which was finalized and memorialized in a long-form Settlement Agreement, fully executed on November 19, 2018. (Harris Decl. ¶ 6.) Plaintiff now submits that Settlement to the Court for preliminary approval.

III. Conditional Class Certification of the Class.

In any class-wide settlement, concerns about the rights of absent class members are satisfied by a

careful fairness review of the settlement by the trial court, and pre-certification settlements that have been subjected to such a review are routinely approved at the appellate level in both the federal judicial system and California. Wershba v. Apple Computer, Inc., 91 Cal. App. 4th 224, 240 (2001). The trial court is required to make a determination that the class representative can and will adequately represent the interests of absent class members; however, this does not require that the representative's claims be identical to those of the absent members, and there is no ironclad rule requiring the court to conduct an evidentiary hearing on the issues. Lazar v. Hertz Corp., 143 Cal. App. 3d 128, 140 (1983).

Wage-and-hour cases such as the above-captioned matter "routinely proceed as class actions." Prince v. CLS Transp., Inc., 118 Cal. App. 4th 1320, 1328 (2004). Obviously, many such cases settle. Here, there has not yet been certification of a class; that is, the Settlement was negotiated *prior* to the filing of a motion for class certification. However, "[a] trial court unquestionably ha[s] the authority to conditionally certify a class for settlement purposes." Hernandez v. Vitamin Shoppe Indus. Inc., 174 Cal. App. 4th 1441, 1457 (2009).

For purposes of the Settlement, the parties seek to conditionally certify the following Class: all individuals Defendant employed as a Licensed Vocations Nurse between February 8, 2012 through the Preliminary Approval Date and all non-exempt hourly employees hired between February 8, 2012 and August 21, 2013, through the Preliminary Approval Date. (Harris Decl. Ex. 1 at ¶ II(1).) The Class will *not* include any person who has previously released all of the Released Claims under a separate agreement. Assuming the Settlement is preliminarily approved, Class Members will be given an opportunity to opt out of the Settlement, *i.e.*, the Settlement will only be binding on those Class Members who have not opted out. (See Harris Decl. Ex. 1 at ¶ II(14).) It is estimated that the Class consists of approximately 175 employees. (Harris Decl. Ex. 1 at ¶ III(16).)

As set forth in the Settlement, Defendant has agreed to make a substantial, non-reversionary, all-cash payment of $135,000, all of which will be distributed pursuant to the terms of the Settlement. (Harris Decl. Ex. 1 at ¶ II(9).) This $135,000 settlement payments shall cover the Settlement Administration Expenses, the Class Representative Enhancement award, a payment to the California Labor and Workforce Development Agency ("LWDA") for civil penalties pursuant to PAGA, and the

Plaintiff's attorney's fees and costs, all as awarded by the Court.[3] (Harris Decl. Ex .1 at ¶ II(9).) The above-referenced amounts will be deducted from the Gross Settlement Fund and individual Settlement Payments will be paid to Class Members who do not opt out of the Settlement. (Harris Decl. Ex. 1 at ¶ I(30).)

Class Members do not need to submit a claim form in order to receive their Individual Settlement Payments. (Harris Decl. Ex. 1 at ¶ III(12).) Each Settlement Class Member—*i.e.*, each Class Member who does not request to be excluded—will receive a Settlement Payment automatically, based on the number of workweeks that he or she worked from February 8, 2012, through the Preliminary Approval Date, relative to the total number of workweeks that all Settlement Class Members worked during that period. (Harris Decl. Ex. 1 at ¶ III(4).) Additionally, Class Members who are no longer employed by Defendant will receive credit of an additional two workweeks in consideration for their continuing wages claims. (Id.) Each individual Settlement Payment represents amounts for the alleged miscalculation of overtime, wage premiums on account of allegedly missed rest and meal breaks, penalties for alleged wage-statement violations, and waiting-time penalties for the alleged failure to pay all wages owed to former employees on their last days of employment. Again, there are approximately 175 non-exempt potential Class Members. Thus, if no Class Members exclude themselves, it is estimated that Class Members will receive an average pre-tax payment of approximately $395. (Harris Decl. ¶ 9.) These payments constitute a significant recovery of the damages at stake in the litigation, and they are a reasonable compromise of Plaintiff's claims in light of the potentially dispositive defenses available to Defendant. (Harris Decl. ¶ 9.) Plaintiff therefore submits that this Settlement is entirely reasonable for absent Class Members.

A determination of whether an action meets the standards of class certification requires a review of section 382 of the California Code of Civil Procedure, which section provides: "[W]hen the question is one of a common or general interest, or many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." Cal. Civ. Proc. Code § 382. Here, the Class meets the criteria for certification.

[3] Unless otherwise noted, capitalized terms herein have the meanings set forth in the Settlement.

A. Numerosity and Ascertainability.

Class certification is proper when the parties are numerous and it is impractical to bring them all before the court. See Rose v. City of Hayward, 126 Cal. App. 3d 926, 934 (1981) (holding that forty-two members is sufficient for numerosity purposes); Int'l Molders' & Allied Workers' Local 164 v. Nelson, 102 F.R.D. 457, 461 (N.D. Cal. 1983) (explaining that a class size exceeding forty would satisfy the numerosity requirement); Perez-Funez v. District Dir. Immigration and Naturalization Serv., 611 F. Supp. 990, 995 (C.D. Cal. 1984) (explaining that a class size of twenty-five members is sufficient for numerosity purposes).[4] Here, the Class covers the period from February 8, 2012 through the Preliminary Approval Date and is comprised of approximately 175 Class Members. This clearly satisfies numerosity. Furthermore, individual Class Members are clearly ascertainable from a search of Defendant's own employment records. See Cal. Lab. Code § 1174 (requiring employers to maintain employee records). Joinder of all Class Members in individual actions would be impracticable and would make the case unmanageable. Disposition of the claims by class-wide settlement therefore will provide substantial benefits to the Class, as well as to Defendant.

B. Common Issues of Fact and Law Predominate.

As to each and every Class Member, the following issues of fact and law are common across the Class: (1) Was the Class Member employed by Defendant between February 8, 2012 and the Preliminary Approval Date? (2) Did Defendant have a policy of miscalculating—i.e., of using the wrong formula to calculate—Class Members' overtime rates of pay? (3) Did Defendant have a policy of not permitting Class Members to take meal and rest breaks within the time limits required by the Labor Code? (4) Did the pay-stub template used by Defendant fail to include all of the information required by the Labor Code? These issues need be decided only once for the Class as a whole, rendering this case ripe for certification.

The only "individual" or "non-common" issues will be the specific dollar amount of recovery to which each Settlement Class Member is entitled. However, this does not defeat class certification, as the individual assessment of damages is commonly required in all class actions. Bell v. Farmers Ins. Exch.,

[4] As explained by the California Court of Appeal, "California courts may look to federal authority on matters involving class action procedures." In re Cellphone Fee Termination Cases, 186 Cal. App. 4th 1380, 1392 n.18 (2010) (internal quotations omitted).

115 Cal. App. 4th 715, 743 (2004) ("[T]he necessity for an individual determination of damages does not weigh against class certification. The community of interest requirement recognizes that ultimately each class member will be required in some manner to establish his individual damages.").

C. The Claims of the Named Plaintiff Are Typical of Those of Class Members.

With respect to typicality, it is required only that the claims of the named or representative plaintiffs be *similar* to those of the putative class members. Richmond v. Dart Indus., Inc., 29 Cal. 3d 462, 474–75 (1981). In other words, the claims of class members need not be identical to the named plaintiff's. Classen v. Weller, 145 Cal. App. 3d 27, 46–47 (1983). Here, Plaintiff contends, as the putative Class Representative, that her claims are highly similar to those of absent Class Members, all of whom either formerly worked or currently work as employees for Defendant, and all of whom were subject to the same policies concerning the provision of rest and meal breaks, the payment of overtime wages and the provision of pay stubs. All Class Members have a common interest in holding Defendant responsible for amounts that may be owed to them under the provisions of the Labor Code.

D. The Named Plaintiff and Class Counsel Will Adequately Represent the Class.

Plaintiff is an adequate Class Representative. She has no conflict of interest with any Class Members, as they all share the same desire to be made whole under the Labor Code. (Decl. of Alicia Ranillo in Supp. of Pl.'s Mot. for Conditional Class Certification and Preliminary Approval of Class-Action Settlement ("Ranillo Decl.") ¶¶ 3-4.) She also is committed to pursuing the claims of the Class, and her motivation in retaining counsel and pursuing this action has been to collect owed amounts to herself and hers fellow Class Members. (Ranillo Decl. ¶ 3-4.) Indeed, Plaintiff has taken the time to be an active participant in this action, including being deposed, responding to discovery, and participating in the settlement process. (Ranillo Decl. ¶ 6.)

The qualifications of Class Counsel—David S. Harris of the North Bay Law Group—are set forth in the accompanying Harris Declaration. (Harris Decl. ¶¶ 2–3.) Those qualifications should assure the Court that the interests of the unnamed Class Members will be adequately and vigorously represented. Class Counsel has recovered millions of dollars for employee class members in myriad wage-and-hour cases. (See, e.g., Harris Decl. ¶¶ 2–3.) Under the circumstances, this Court can be assured that the David Harris will adequately discharge his responsibilities as Class Counsel.

IV. Summary of the Proposed Settlement.

A. The Settlement Amount and the Payments to Settlement Class Members.

Again, the Settlement will result in the creation of a $135,00 Gross Settlement Fund. (Harris Decl. Ex. 1 at ¶ I(9).) This amount will be used to pay (a) the attorney's fees and costs, in an amount approved by the Court; (b) the Settlement Administration Expenses for administering the Settlement, in an amount approved by the Court; (c) a Class Representative Enhancement to the named Plaintiff for her services in connection with bringing and maintaining this action, in an amount approved by the Court; and (d) a payment to the LWDA for civil penalties pursuant to PAGA, in an amount to be approved by the Court. (Harris Decl. Ex. 1 at ¶ (9).) After these amounts are deducted, the Net Settlement Fund will be distributed to Settlement Class Members. (Harris Decl. Ex. 1 at ¶ (12).) As set forth above, the estimated average pre-tax amount that each Settlement Class Member will receive is approximately $395. (Harris Decl. ¶ 9.)

B. Tax Implications.

Payments from the Net Settlement Fund shall be subject to the withholding of all applicable local, state, and federal income, employment, and payroll taxes, with 25% of each Individual Settlement Payment representing wages subject to tax withholding (resulting in the issuance of an IRS Form W-2), and 75% of each Individual Settlement Payment representing interest and penalties not subject to tax withholding by Defendant (resulting in the issuance of an IRS Form 1099). (Harris Decl. Ex. 1 at ¶ III(5).)

C. The Appointment of Class Counsel and the Settlement Administrator.

The Parties have stipulated to the appointment of the North Bay Law Group as class counsel. (Harris Decl. Ex. 1 at ¶I(19).) Again, the qualifications of class counsel are set forth in the accompanying Harris Declaration. (Harris Decl. ¶¶ 2–3.)

The Parties also have obtained quotes from various respectable companies for the administration of the Settlement. (Harris Decl. ¶ 10.) After reviewing the quotes, the Parties selected CPT Group to manage the administration of the Settlement. (Harris Decl. ¶ 10, Ex. 3.)

D. Attorneys' Fees and Costs.

The Settlement provides that Class Counsel's attorneys' fees and costs shall be paid from the

$135,000 Gross Settlement Fund, in an amount to be approved by the Court after consideration of Class Counsel's separate application for an award of attorney's fees and costs. (Harris Decl. Ex. 1 ¶¶ III(13)(b).) Under the Settlement, Class Counsel may seek an award of attorneys' fees in an amount up to 33 1/3% of the Gross Settlement Fun, or $45,000, and an award of actual litigation costs, which counsel conservatively estimates will not exceed $6,000. (Harris Decl. Ex. 1 ¶¶ III(13)(a-b).) The Notice that will be provided to the Class provides that Class Counsel may request up to this amount in attorneys' fees and costs, and that Class Members will have an opportunity to object. (Harris Decl. Ex. 1 at Ex. A.) Class Counsel will file a motion seeking an award of fees and costs, which will be filed before the deadline for submitting objections or requests for exclusion. (Harris Decl. ¶ 11.) Accordingly, compensation for Class Counsel will be left entirely to the determination of the Court.

E. Notice Packets, Objections, and Request for Exclusion.

"[A] trial court has virtually complete discretion as to the manner of giving notice to class members." Chavez v. Netflix, Inc., 162 Cal. App. 4th 43, 57 (2008) (internal citation omitted). Here, the Settlement Administrator will deliver Notice packets to Class Members by first-class mail after updating Class Members' addresses through the National Change of Address Search. (Harris Decl. Ex. 1 at ¶ III(12)(b)(i).) If Notice packets are returned as non-delivered, the Settlement Administrator will re-mail them, either to the forwarding address affixed thereto, or to an updated address determined through the use of skip-tracing. (Harris Decl. Ex. 1 at ¶ III(12)(b)(i).)

The Notice packet will include a Notice of Class-Action Settlement, which describes the nature of the Action, the definition of the Class, and the class-wide claims being settled; explaining that Class Members may object to the Settlement and enter an appearance through an attorney, and that the Court will exclude those Class Members who properly request exclusion; specifying the time requirements and manner of requesting exclusion, as well as the binding effect of a class-wide judgment; and setting forth the Released Claims. (Harris Decl. Ex. 1 at Ex. A.) The Notice packet also will include a Settlement Allocation Form that lists the estimated amount the Class Member will receive, as well as the dates the Class Member worked during the Class Period, which are the dates used for computing his or her individual Settlement Payments. (Harris Decl. Ex. 1 at Ex. B.) If a Class Member believes the information contained on the Settlement Allocation Form is inaccurate, he or she is permitted—and the

Settlement Allocation Form advises him or her—to so inform the Settlement Administrator. (Harris Decl. Ex. 1 at Ex. B.) Finally, the Notice packet contains an Opt-Out Form the Class Member can utilize in order to provide notice to the Claims Administrator that the Class Members does not want to participate in the settlement, is requesting to be excluded and shall not be subject to the release. (Harris Decl. Ex. 1 at Ex. C.)

Each Class Member will have forty-five days from the date of mailing to request exclusion or object. (Harris Decl. Ex. 1 at Ex. A.) All told, the contemplated notice provisions are the best means of giving notice under the circumstances and will likely give actual notice to the overwhelming majority of Class Members.

F. Class Representative Service Award.

The Settlement provides for an additional payment in an amount up to $5,000 to the named Plaintiff on account of the services she has rendered to the Class in bringing this action and on account of the time that she has devoted in litigation. (Harris Decl. Ex. 1 at ¶III(13)(d).) The Ranillo Declaration sets forth the significant efforts and services Plaintiff has provided to date in securing this very favorable Settlement.

Enhancement awards "are not uncommon and can serve an important function in promoting class action settlements." Sheppard v. Consol. Edison Co. of N.Y., Inc., 2002 U.S. Dist. LEXIS 16314 at *16 (E.D.N.Y. filed Aug. 1, 2002). "Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." In re S. Ohio Corr. Facility, 175 F.R.D. 270, 272 (S.D. Ohio 1997), *rev'd on other grounds*, 191 F.3d 453 (6th Cir. 1999). It is appropriate to provide a payment to class representatives for their services to the class. Van Vraken v. Atl. Richfield Co., 901 F. Supp. 294, 299 (N.D. Cal. 1995).

Plaintiff's Enhancement Award of $5,000 is in addition to whatever portion of the Net Settlement Amount she is entitled to receive. (Harris Decl. Ex. 1 at ¶ III(3)(a).) In light of her willingness to come forward with this action on behalf of the Class, and in light of her efforts in advancing the litigation, this proposed payment is entirely reasonable. Plaintiff obtained the services of counsel, provided documentation and information relevant to the action's claims, Plaintiff had her deposition taken for an entire day, participated in both formal and informal discovery and was actively

involved in both pre- and post-mediation activities. (See generally Ranillo Decl. ¶¶ 3-7.) In doing so, she has successfully brought and maintained claims that may have never been brought. See Crab Addison, Inc. v. Superior Court, 169 Cal. App. 4th 958, 971 (2008) ("Current employees suing their employers run a greater risk of retaliation. . . . For them, individual litigation may not be a viable option . . . . [In addition], employees may be unaware of the violation of their rights and their right to sue."). In addition, unlike the unnamed Class Members, Plaintiff is entering a general release of all claims against Defendant. See, e.g., Lemus v. H & R Block Enters. LLC, 2012 WL 3638550 at *6 (N.D. Cal. Aug. 22, 2012) (finding that a $15,000 enhancement award was appropriate "in exchange for releasing and waiving certain non-class claims"); Taylor v. FedEx Freight, Inc., 2016 WL 6038949 at *7–8 (E.D. Cal. Oct. 13, 2016) (reducing an incentive award from $25,000 to $15,000 on the ground that the plaintiff was not executing a general release); La Fleur v. Md. Mgmt. Int'l, Inc., 2014 WL 2967475 at *8 (C.D. Cal. June 25, 2014) (awarding $15,000 enhancement awards on the ground that "the named plaintiffs have released all claims against [the defendant], unlike the remainder of the [c]lass"). The named Plaintiff should be compensated accordingly for her efforts on behalf of the Class—especially since the amount requested here comports with the amounts awarded by other courts in class-wide litigation. See, e.g., Barcia v. Contain-A-Way, Inc., 2009 WL 587844 at *7 (S.D. Cal. Mar. 6, 2009) ("The payment of service awards to successful class representatives is appropriate and the amounts of $25,000 are well within the currently accepted range.").

G. PAGA Payment.

The Settlement provides that $2,500 of the Settlement shall be used to pay alleged civil penalties under PAGA. (Harris Decl. Ex. 1 at ¶¶ I(16).) The Settlement Administrator shall pay 75% of the PAGA Payment, or $1,875, to the LWDA; the remaining 25%, or $625, will remain part of the Net Settlement Fund, meaning that it will be distributed to Settlement Class Members as part of their individual Settlement Payments. (Harris Decl. Ex. 1 at ¶ I(12).) Notwithstanding the total theoretical civil penalties that may be at play on account of Labor Code violations, courts have discretion under PAGA to set the amount of such civil penalties. See Cal. Lab. Code § 2699(e)(2) ("I]n any action by an aggrieved employee seeking recovery of a civil penalty . . . , a court may award a lesser amount than the maximum civil penalty specified by this part 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.")

Here, the PAGA Payment contemplated by the Settlement comports with the civil-penalty amounts approved in other wage-and-hour litigation. See, e.g., Schiller v. David's Bridal, Inc., 2012 WL 2117001 at *2, 14 (E.D. Cal. June 11, 2012) (in a $518,245 settlement, recommending approval of a $7,500 payment to the LWDA for PAGA after explaining that "[t]his comports with settlement approval of PAGA awards in other cases") (citing Chu v. Wells Fargo Investments, LLC, 2011 WL 672645 at *1 (N.D. Cal. Feb. 16, 2011) (approving a PAGA settlement payment of $7,500 out of a $6.9 million settlement)); Bui v. Sprint Corp., 2016 WL 727163 at *2, 3 n.5 (E.D. Cal. Feb. 24, 2016) (in a $4.85 million settlement, approving a PAGA payment to the LWDA of $3,750).

H. Release.

The Settlement provides for a *limited* release of claims asserted in the operative Complaint.[5] (See Harris Decl. Ex. 1 at ¶ III.B.) The Settlement Class Members' Released Claims are limited specifically to those claims based on the facts and claims pled in the Litigation. See Class Plaintiffs v. City of Seattle, 955 F.2d 1284, 1287–88 (9th Cir. 1992) (noting that the weight of authority holds that courts may release claims which are not in the complaint provided they are based on the "same factual predicate"); In re Prudential Ins. Co. America Sales Practice Litig., 148 F.3d 283, 326 (3rd Cir. 1998) (finding it reasonable for a release to include "other claims," and stating that "releases may include all claims, including unpleaded claims that arise out of the same conduct alleged in the case").

V. The Settlement Is Fair, Reasonable, and Adequate.

The proposed Settlement is fair, reasonable, and adequate. According to the California Court of Appeal:

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[5] As defined in the Settlement, "Settlement Class Members' Released Claims" means "any and all claims, debts, liabilities, demands, obligations, guarantees, costs, expenses, attorneys' fees, damages, actions or causes of action which are alleged, or reasonably could have been alleged based on the facts and claims asserted in the Litigation, including without limitation to, claims for restitution, and other equitable relief, claims for unpaid wages, unpaid overtime wages, meal period penalties, rest period penalties, waiting time penalties, unfair business practices, failure to provide accurate wage statements, declaratory relief, accounting, injunctive relief, PAGA penalties, or any other benefit claimed on account of allegations and claims which are reasonably related to the allegations and claims asserted in the Litigation. This release shall apply to claims arising at any point during the Settlement Period. However, claims under the Fair Labor Standards Act ("FLSA") shall be released only by those Class Members who negotiate their settlement checks. Class Members who do not negotiated their settlement checks will not be deemed to have released claims under the FLSA." (Harris Decl. Ex. 1 at ¶ I(29).)

> The trial court must determine whether a class action settlement is fair and reasonable, and has broad discretion to do so. That discretion is to be exercised through the application of several well-recognized factors. The list, which is not exhaustive and should be tailored to each case, includes the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through 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. The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement.

Clark v. Am. Residential Servs. LLC, 175 Cal. App. 4th 785, 799 (2009) (internal quotations and citations omitted). See also Chavez, 162 Cal. App. 4th at 52. An evaluation of a proposed settlement also requires "an understanding of the amount in controversy and the realistic range of outcomes of the litigation." Clark, 175 Cal. App. 4th at 801.

Settlement is an extremely attractive option for Plaintiff and Defendant, given the reasonable arguments that can be made by both sides. Plaintiff contends that Defendant violated the Labor Code by failing to provide Class Members with properly calculated overtime wages. Further, she contends that Defendant failed to provide its non-exempt employees with rest and meal periods mandated by sections 226.7 and 512 of the Labor Code. Accordingly, she contends that Defendant's employees are entitled to "one additional hour of pay at [their] regular rate of compensation for each work day that [a] meal or rest period [w]as not provided." Cal. Lab. Code § 226.7(b). In addition, Plaintiff contends that Defendant willfully failed to pay in a timely fashion those Class Members whose employment with Defendant had been terminated. Accordingly, she contends that those employees are entitled to the "waiting-time penalties" specified by section 203 of the Labor Code. Finally, Plaintiff contends that Defendant failed to issue pay stubs that contain all of the information required by the Labor Code. Defendant vigorously disputes all of Plaintiff's contentions.

Settlement is an attractive option with respect to Plaintiff's meal-and-rest-break claims. Based on a review of materials produced by Defendant and on discussions with Defendant's Counsel, Plaintiff acknowledges that Defendant may argue that the number of meal and rest breaks missed by any given Class Member may require an individualized inquiry, with a result that class certification might be denied on these claims. (Harris Decl. ¶ 17.) Furthermore, Defendant argues there is no improper common policy or procedure to support a claim for the failure to provide rest and meal breaks. (Harris

Decl. ¶ 17.) Indeed, Defendant argues that its only common policy regarding meal and rest breaks is that non-exempt, hourly employees are permitted to take them, which policy Defendant contends is articulated in its written break policy. (Harris Decl. ¶ 17.) In summary, Defendant argues that Plaintiff would be unable to secure class certification for the meal and rest-break claims. See Washington v. Joe's Crab Shack, 271 F.R.D. 629, 641 (N.D. Cal. 2010) (denying certification of rest-break claims where the written policy was fully compliant with the law and individualized inquiries would be required to determine whether and when rest breaks were missed).

Defendant also argues that, due to the nature of its business, in reality there are disparate break practices resulting from a variety of factors, including the job title, nature of the work, position within the facility, management styles and employee preferences. (Harris Decl. ¶ 17.) Defendant argues that, when faced with similar facts, courts have denied class certification because employees' breaks, in practice, are not uniform. See, e.g., Hughes v. WinCo Foods, 2012 WL 34483 at *5–6 (C.D. Cal. Jan. 4, 2012) ("[T]he decision-making with respect to when employees may take meal and rest breaks is diverse. It varies from store to store, and from department-to-department within the same store. There is simply no manner in which the timing of such breaks can be proven reliably with evidence of 'a single stroke.'"). Defendant argues that Plaintiff cannot meet her burden to certify the class action because a highly individualized inquiry would have to be made to determine whether a particular missed break was the personal choice of the employee, or was somehow mandated by Defendant. (Harris Decl. ¶ 18.) Under Brinker Restaurant Corp. v. Superior Court, 53 Cal. 4th 1004, 1040–41 (2012), the key inquiry is whether the employee had a reasonable opportunity to take an uninterrupted break. This inquiry, Defendant contends, will necessarily involve an evaluation of the individual facts and details of each job assignment worked by each employee, whether breaks were taken in accordance with Defendant's policy, and, if not, why they were not taken. In light of the reasonable arguments that can be made by both sides, compromise of the meal- and rest-break claims is appropriate.

Similarly, Plaintiff's overtime claim relates to Defendant's alleged failure to compute the correct regular rate when calculating overtime compensation. In particular, the applicable overtime rate to be used when computing the overtime compensation to be paid to an employee is based on the employee's "regular rate of pay," which is the compensation an employee normally earns for the work he or she

performs. The regular rate of pay includes an employee's base pay (*i.e.*, hourly rate), plus any shift-differential rates earned by the employee during the pay period. Plaintiff contends that Defendant failed to include both regular and shift-differential rates (hours worked for early or late shifts) when calculating the regular rate. Defendant vigorously disputes this allegation and contends that the proper regular rate was used when calculating overtime compensation. Plaintiff concedes that the magnitude of damages for the miscalculation of the regular rate and overtime wages is small. Plaintiff also acknowledges that Defendant may argue that the miscalculation of overtime and the resulting damages owed to any given Class Member may require a rather individualized inquiry, which may result in class certification being denied on this claim. (Harris Decl. ¶ 18.) Thus, in light of the reasonable arguments that can be made, compromise of the overtime-miscalculation claim is appropriate under the circumstances.

Settlement is also an attractive option with respect to Plaintiff's section 203 claim. Plaintiff's waiting-time penalty claim is based on her contention that Defendant failed to compute overtime wages accurately. Defendant argues that, to the extent there are no overtime violations, there exist no derivative waiting-time penalties. Furthermore, Defendant contends no damages are owed for the alleged "untimely" payment of final wages because its behavior was not "willful"—a requirement under section 203. See Cal. Lab. Code § 203(a). Defendant likewise asserts that section 203, as with all penalty statutes, is strongly disfavored and must be narrowly construed. See Hale v. Morgan, 22 Cal. 3d 388, 405 (1978). Defendant also argues that any section-203 liability stems only from the miscalculation of the proper overtime rate, which is a very small damage calculation in comparison to the theoretical section 203 penalty liability. (Harris Decl. ¶ 19.)

The same could be said with respect to Plaintiff's pay-stub claim under section 226 of the Labor Code. With respect to the pay-stub claim, Plaintiff recognizes that Defendant has arguable defenses with respect to whether such violations merit awarding employees statutory penalties, namely, that such violations are purely technical in nature, that Defendant substantially complied with section 226, that none of Defendant's employees were actually injured by the alleged violation, and that the alleged violation was neither knowing nor intentional. Cf., e.g., Milligan v. American Airlines, 327 Fed. Appx. 694 (9th Cir 2009). Defendant further argues that this technical violation—failing to list the legal name

of the employer—only occurred on a subset of employee paystubs, all of which Defendant contends cut against awarding any substantial penalties under section 226. (Harris Decl. ¶ 20.)

Furthermore, as a class action, this case presents a clear risk of lengthy and expensive litigation. It would probably be another twelve to eighteen months before this case went to trial so that, *inter alia*, the parties could properly complete class discovery, Plaintiff could file a motion for certification, and the Parties could file cross-motions for summary judgment. That said, the Parties have, in fact, conducted extensive discovery and analysis of the claims. Defendant has provided Plaintiff with relevant information regarding the employment records of Plaintiff and a statistically significant sample of the entire Class. Nevertheless, the law makes clear that exhaustive, protracted, and costly discovery need not be conducted in a class action before a settlement can be reached. 7-Eleven Owners for Fair Franchising, 85 Cal. App. 4th 1135, 1150 (2000). "In the context of class action settlements, 'formal discovery is not a necessary ticket to the bargaining table' where the parties have sufficient information to make an informed decision about settlement . . . . '[N]otwithstanding the status of discovery, Plaintiffs' negotiators had access to a plethora of information regarding the facts of their case.'" Linney v. Cellular Alaska P'ship, 151 F.3d 1234, 1239–40 (9th Cir. 1998) (citations omitted). Here, there was more than sufficient investigation and discovery conducted to permit Plaintiff to enter the Settlement.

With the proposed Settlement, Settlement Class Members will receive Individual Settlement Payments from a settlement fund totaling $135,000, less the class counsel attorney's fees and costs, amounts for the costs of administration, the Class Representative enhancement award, and a payment to the LWDA pursuant to PAGA. This $135,000 Settlement Fund is a substantial amount, particularly given the actual amount of compensable damages that are the subject of the underlying violations. The Ninth Circuit opinion in Rodriguez v. West Publishing Corp., 563 F. 3d 948 (9th Cir. 2009), establishes that class settlements of this nature should focus on the recovery of *actual losses* rather than recovery of *penalties* (such as Plaintiff's claims under sections 203 and 226 of the Labor Code).[6] Viewed in that

[6] It is submitted that the decision in Rodriguez, an antitrust class-action lawsuit, supports the granting of preliminary approval in this case. In Rodriguez, as here, most of the potential damages were funds that are theoretically recoverable as penalties: in Rodriguez, threefold "treble damages," Rodriguez, 563 F. 3d at 964 (citing 15 U.S.C. § 15(a) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained . . . ."); here, penalties for violations of the Labor Code. Rodriguez teaches

light, and assessing the general amount that shall be recovered by each Class Member, the Settlement is entirely reasonable and favorable.

Obviously, the reaction of Class Members to the proposed Settlement cannot be known until preliminary approval is granted, Notice packets are sent out, and responses are received. That said, Class Counsel is of the view that the Settlement is reasonable for all involved. Again, Class Counsel has substantial experience in prosecuting class actions, including actions involving the application of state and federal wage-and-hour laws. (Harris Decl. ¶¶ 2–3.) While acknowledging that some persons might feel that Defendant should pay more and others might feel that Defendant is paying too much, the undersigned is of the opinion that the proposed Settlement represents a reasonable balancing of the various strengths and weaknesses borne by each of the Parties. Considering the inherent risks, hazards, and expenses of carrying the case through trial, Class Counsel is of the opinion that the settlement is fair, reasonable, and adequate.

V. Conclusion.

It is respectfully submitted that the $135,000 Settlement with Defendant is fair, reasonable, and adequate. The Court should (1) conditionally certify the Class; (2) approve the Notice packet and method of delivering notice; (3) approve David S. Harris of the North Bay Law Group as Class Counsel; (4) approve Plaintiff as the Class Representative, (5) appoint CPT Group as the Settlement Administrator; and (6) approve the proposed mechanism for administering the Settlement.

DATED: January 22, 2019

NORTH BAY LAW GROUP

David S. Harris
Attorneys for Plaintiff

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that, in considering whether to approve an antitrust class-action settlement, a court can conclude that the settlement is "reasonable even though it evaluate[s] the monetary potion of the settlement *based only on an estimate of single damages* [rather than treble damages]." Id. at 955. Similarly, here, the Court may consider the Settlement based only on an estimate of the actual damages, putting the penalty aspects of the case to the side in the process. Given the uncertainty and the risks faced by the parties to the litigation, it is reasonable for this Court to give preliminary approval of the $135,000 Settlement.

PROOF OF SERVICE

I, J. Michael Solano, am over the age of eighteen years, and not a party to the within action. My business address is North Bay Law Group, 116 E. Blithedale Avenue, Suite 2, Mill Valley, California 94941.

On January 22, 2019, I served the within document(s):

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR CONDITIONAL CLASS CERTIFICATION AND PRELIMINARY APPROVAL OF CLASS-ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF.

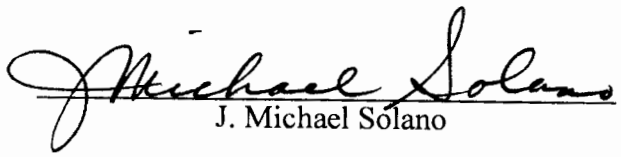
I caused such document to be delivered by regular mail:

I am readily familiar with the Firm's practice of collection and processing correspondence for mailing. Under that practice, the document(s) would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business, addressed as follows:

Julie Trotter
Delavan Dixon
CALL & JENSEN
610 Newport Center Drive, Suite 700
Newport Beach, CA 92660

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

Executed on January 22, 2019, at Mill Valley, California.



J. Michael Solano