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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

JEROME DIVINITY, individually and on behalf of all others similarly situated,

Plaintiff,

v.

PACIFIC 2.1 ENTERTAINMENT GROUP, INC., a California Corporation; JAMES KAPENSTEIN, an individual, and DOE 1 through and including DOE 10,

Defendants.

Case No. 20STCV32700
Assigned to Hon. Elihu M. Berle, Dept. 6

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Date: February 22, 2023
Time: 10:00 a.m.
Dept.: 6
Location: Spring Street Courthouse
312 N. Spring St.
Los Angeles, CA 90012

Complaint Filed: August 27, 2020

TO EACH PARTY AND TO EACH ATTORNEY OF RECORD: NOTICE IS HEREBY GIVEN that, on February 22, 2023, at 9:00 a.m., or as soon thereafter as counsel may be heard, in Department 6 of the above-entitled Court located at 312 N. Spring Street, Los Angeles, California 90012, Plaintiff Divinity will move for an order:

1. Granting preliminary approval of the proposed class settlement of this lawsuit, one which substantially tracks the June 2022 Model Settlement;

2. Provisionally certifying the Settlement Class Pursuant to Section 382 of the California Code of Civil Procedure;

3. Appointing Plaintiffs Jerome Divinity, Paul Schwanke, Ryan Basaker, and Michael Graham as the Class Representatives;

4. Appointing Alan Harris, David Garrett and Min Ji Gal of Harris & Ruble as Class Counsel;

5. Scheduling a Final Settlement Approval Hearing to determine whether the class settlement should be approved and to award the Class Representative Service Payment to the Class Representative and attorneys' fees and costs to Class Counsel;

6. Appointing CPT Group, Inc. as a third-party settlement administrator; and

7. Approving the proposed mechanism for receiving and evaluating claims and notices of election to opt out of the settlement.

The Motion will be made and based upon this Notice of Motion; the Declarations of Alan Harris Jerome Divinity, Paul Schwanke, Ryan Basaker, and Michael Graham in Support of Plaintiff's Motion for Preliminary Approval of Settlement, filed and served herewith; all of the pleadings, papers, and documents contained in the file of the within action; and such further evidence and argument as may be presented in support at or before the determination of the Motion.

DATED: December 22, 2022

HARRIS & RUBLE

Alan Harris

Alan Harris
Attorneys for Plaintiff

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I. Introduction and Summary of the Case.

This Court should grant preliminary approval of the Class Action and PAGA Settlement Agreement and Release ("Agreement") entered between Plaintiffs Jerome Divinity, Paul Schwanke, Ryan Basaker, and Michael Graham ("Plaintiffs") on behalf of the absent Class Members whom they seek to represent, on the one hand, and Defendants Pacific 2.1 Entertainment Group, Inc. ("Pacific 2.1"), Minim Productions, Inc. ("Minim"), and ABC Signature Studios, Inc. ("ABC"), on the other hand.[1] This Motion requests that the Court grant preliminary approval of a Gross Settlement Amount totaling $2,250,000 to up to 21,500 potential class members.[2] This Court should find that there is a *prima facie* showing that the Settlement Agreement is fair, adequate, and reasonable. The $2,250,000 for a maximum of 21,500 workers represents a gross of some $105 per person (=$2,250,000/21,500). If all costs are approved, the Class will receive on average a net payment of approximately $62.00, each. The proposed resolution is fair, reasonable, and in the best interest of the Class. Declaration of Alan Harris ("AH Decl.") ¶ 4. Defendants have further expanded its previous policy of notifying workers that they need not respond to walkie-talkie calls during meal periods and rest breaks, and has made its program for reimbursement of cell phone far more robust. Defendants cooperated in achieving a reasonable, fairly prompt resolution for a matter of this complexity. This Motion requests that the Court approve: the form and method of Notice; Harris & Ruble ("H&R") as Class Counsel, Jerome Divinity, Paul Schwanke, Ryan Basaker, and Michael Graham as Class Representatives, and CPT Group, Inc. ("CPT") as Administrator; and the proposed mechanism for receiving and dealing with notices and opt out issues. The Settlement warrants approval.

The concurrently filed proposed SAC consolidates this action along with Schwanke v. Minim Productions, Inc., Case No. 20STCV40597, Basaker v. Minim Productions, Inc., Case No. 21STCV41363 and Graham v. ABC Signature Studios, Inc., Case No. 22STCV00192. Plaintiffs Divinity, Schwanke, Basaker and Graham, on behalf of themselves and all others similarly situated, seek

[1] The Parties have concurrently filed with this Motion a stipulation to file a Consolidated Second Amended Complaint (the "SAC"), which consolidates these actions for the purpose of settlement. While Defendant denies any liability or wrongdoing of any kind associated with the claims alleged and further denies that any of the claims are appropriate for class treatment, a binding settlement is in hand.

[2] As of April 9, 2022, there were a total of approximately 17,307 Class Members. The Class Period will be the earlier of Preliminary Approval or if the Class size reaches 21,500 Class Members. AH Decl. Ex. 1 ¶¶ 1.6, 1.14, 9.

to represent all persons employed by one or more of the Defendants in California in a non-exempt position who worked for Defendants during the Class Period. The "Class Period" means the period for identifying Class Members only, and not for defining the periods of the releases applicable to the Released Class Claims, which starts from (1) August 27, 2016 for any Class Member formerly or currently employed by Pacific 2.1 Entertainment Group, Inc., (2) October 22, 2016 any Class Member formerly or currently employed by Minim Productions, Inc., and (3) January 3, 2018 for any Class Member formerly or currently employed by ABC Signature Studios, Inc., and continuing through the earlier of the date of preliminary court approval of this Settlement, or the date on which the number of Class Members exceeds 21,500. The Class Period for any Class Member employed by more than one of the Defendants shall commence based on the earliest of the preceding dates that applies to the Class Member. Defendants estimate this Class, as of April 9, 2022, consists of approximately 17,307 persons. It will be an opt out class. AH Decl. Ex. 1 ¶¶ 1.6, 1.14, 9.

In the SAC, Plaintiffs allege that Class Members and they experienced various payroll issues, including: (1) Defendants paid Plaintiff and the Class Members their final wages late; (2) Defendants failed to provide the information required by Code § 226(a); (3) Defendants failed to provide meal and rest breaks because Plaintiff and others were required to monitor and respond to their walkie talkies or cell phones throughout the work day; (4) Defendants failed to pay timely wages resulting in liquidated damages for unpaid minimum and overtime wages; and (5) Defendants failed to reimburse Plaintiff and Class Members for necessary business expenses incurred such as for the use of a personal cell phone and for motion picture production equipment and supplies. Plaintiffs also asserted claims for unfair business practices in violation of Business and Professions Code section 17200, *et seq.* and civil penalties under the Labor Code Private Attorneys General Act of 2004 ("PAGA").

The Parties engaged in informal discovery as well as formal discovery, which included Defendants' production of payroll data for Class Members and the alleged Aggrieved Employees under the PAGA claim during the relevant time period (the "Class Period" and "PAGA Period," respectively). The Parties thereafter sought resolution before a respected and experienced wage and hour class action mediator, Lynn Frank. After the mediation concluded, with her further assistance, the Parties continued to negotiate and have been successful in reaching resolution, memorialized in the Agreement, one largely

tracking this Court's June 2022 Model Agreement and Class Notice.

II. Conditional Class Certification.

Concerns about the rights of absent class members are satisfied by a careful fairness review of the settlement by the trial court. Pre-certification settlements which have been subjected to such a review are routinely approved at the appellate level in both federal and California's judicial systems. Wershba v. Apple Computer, Inc., 91 Cal. App. 4th 240 (2001). The trial court is required to determine that the class representatives 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. Here, the settlement class is limited to employees who work on differing film productions, but routinely under the same formal rules and industry-wide, informal practices. Each proposed Class Representative is typical of the others who were employed by the same Defendant insofar as they were all employed during the time that the payroll issues occurred and claim similar treatment from the respective Defendants.

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). Some 17,307 to 21,500 individuals will fall into the class definition, below:

> All persons employed by one or more of the Defendants in California in a non-exempt position who worked for Defendants during the Class Period .

AH Decl. Ex. 1 at ¶ 1.6.[3] The formal mediation session took place on September 7, 2021. Id. Ex. 1 at ¶ 2.3. The Parties completed informal discovery, including the exchange of hundreds of pages of documents, the exchange of extensive class data, and motion practice in federal court, eventually reaching a settlement after months of further negotiations. In other words, only after significant analysis of the claims by all counsel, and the assistance of two experienced mediators—Lynn Frank, privately retained by the Parties and Steven Saltiel, assigned by the Ninth Circuit Mediation Program--did the

[3] Exhibit 1 to the Harris Declaration is a copy of the Settlement Agreement.

Parties enter into the arms-length Settlement. Id. at 4:4-11, 11:25-12:12; AH Decl., 11:18-12:3. That process and investigation strongly supports approval of this Settlement. See Rodriguez v. W. Publ'g Corp., 563 F3d 948, 965 (9th Cir. 2009 ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution, and have never prescribed a particular formula by which that outcome must be tested.") (citations omitted); In re Zynga Inc. Secs. Litig., 2015 WL 6471171, at *9 (N.D. Cal. Oct. 27, 2015) (holding that the parties' use of mediator and fact that significant discovery had been conducted "support the conclusion that the Plaintiff was appropriately informed in negotiating a settlement"); Harris v. Vector Mktg. Corp., No. C-08-5198 EMC, 2011 WL 1627973, at *8 (N.D. Cal. Apr. 29, 2011) (noting that the parties' use of a mediator "suggests that the parties reached the settlement in a procedurally sound manner and that it was not the result of collusion or bad faith.").

Plaintiffs join their counsel in the belief that this Settlement is reasonable for absent Class Members. Divinity Decl. ¶ 6; Schwanke Decl. ¶ 6; Basaker Decl. ¶ 6; Graham Decl. ¶ 6; AH Decl. ¶ 4. Determining 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 Settlement Class meets the criteria for certification for settlement purposes.

Numerosity and Ascertainability. Here, the Settlement Class covers three periods for each of the Defendants based on the filing date of the complaint against each respective Defendant: 1) August 27, 2016 for any Class Member formerly or currently employed by Pacific 2.1, (2) October 22, 2016 any Class Member formerly or currently employed by Minim, and (3) January 3, 2018 for any Class Member formerly or currently employed by ABC Signature, and continuing through the earlier of the date of preliminary court approval of this Settlement, or the date on which the number of Class Members exceeds 21,500. The Class Period for any Class Member employed by more than one of the Defendants shall commence based on the earliest of the preceding dates that applies to the Class Member. The Class Members are ascertainable, as each was compensated through established, formal onboarding procedures and paid via Defendants' entertainment-industry, specialist payroll companies. AH Decl. at 14-15. The total number of Participating Class Members may be fewer than 21,500 if at the time of

Preliminary Approval, fewer than 21,500 Class Members are identified in the Class. See id. ¶ 1.14. The Class Members have been identified through Defendants' employment records, meeting the requirement of ascertainability. Class certification is proper when the parties are numerous and it is impractical to bring them all before the court. See 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); Rose v. City of Hayward, 126 Cal. App. 3d 926, 934 (1981) (holding that forty-two members is sufficient for numerosity purposes). In this case, there are over 17,000 identifiable persons in the Class, and all of them are readily identifiable from the payroll records, all as further detailed in the Harris Declaration at page 14 lines 24-27.

Common Issues of Fact and Law Predominate. As to each and every Member of the Class, the following issues are common across the Class:

1. Whether Defendants failed to timely pay all accrued final wages upon separation or discharge under Code section 203.
2. Whether Defendants failed to timely pay all accrued wages, resulting in liquidated damages.
3. Whether Defendants failed to provide proper wage statements.
4. Whether Defendants failed to provide proper meal and rest breaks.
5. Whether Defendants failed to reimburse for necessary business expenses.
6. Whether the alleged violations of the Labor Code give rise to PAGA civil penalties.

All of these issues are common to the Class as a whole. The only significant "individual" or "non-common" issues would be the specific dollar amount of recovery to which each Class Member is entitled. However, it is Plaintiffs' position that this variation cannot defeat class certification, as the individual assessment of damages is commonly required in all class-actions. Bell v. Farmers Ins. Exchange, 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[;] . . . a class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery or as to the amount of his or her damages.") (internal citations omitted).

Typicality. With respect to typicality, it is required only that the claims of the named or representative plaintiff be *similar* to those of the class. Richmond v. Dart Indus., Inc., 29 Cal. 3d 462,

474–75 (1981). In other words, the claims of class need not be identical to those of the named plaintiff. Classen v. Weller, 145 Cal. App. 3d 27, 46–47 (1983). Here, the putative class representatives have collectively worked for all of the Defendants. Their claims are similar if not virtually identical to those they seek to represent, all of whom worked as hourly, nonexempt employees during the Class Period, and all of whom were allegedly subject to untimely wages, meal and rest break violations, and wage statement violations. All have a common interest in holding Defendants responsible for any amounts that may be owed to them under the provisions of the Code. Divinity Decl. ¶ 5; Schwanke Decl. ¶ 5; Basaker Decl. ¶ 5; Graham Decl. ¶ 5; AH Decl. ¶¶ 4, 8.

The Named Plaintiffs and Their Counsel Are Adequate. Finally, Plaintiffs are adequate class representatives. They have no conflict of interest with any Class Members, as they share the same desire to be made whole under the Code. They demonstrably committed to pursuing the claims of the Class Members, and their motivation in retaining counsel and pursuing this action has solely been to collect owed amounts for themselves and their fellow Class Members. Divinity Decl. ¶¶ 5, 7; Schwanke Decl. ¶¶ 5, 7; Basaker Decl. ¶¶ 5, 7; Graham Decl. ¶¶ 5, 7; AH Decl., ¶ 11. The qualifications of class counsel are set forth in the accompanying Harris Declaration. AH Decl. at 15:5-20:9. Those qualifications should assure the Court that the interests of the unnamed Class Members will be adequately and vigorously represented. Suffice it to say that H&R has recovered millions of dollars for employee class members in myriad wage-and-hour cases. Under the circumstances, this Court can be assured that H&R will adequately discharge its responsibilities as Class Counsel. H&R have no known conflicts. Id. ¶ 11.

III. Summary of the Proposed Settlement.

The Settlement will result in the creation of a $2,250,000 Class Settlement Fund. Id. Ex. 1 at ¶ 3.1. This amount will be used (a) to pay attorney's fees (33 1/3% or $750,000) and costs (not more than $25,000) as awarded by the court, (b) pay 75% of the $40,000 allocated to PAGA penalties to the LWDA ($30,000),[4] the Administration Costs ($88,750), and (c) to pay any Class Representative Service

[4] The allocation to the PAGA payment should be approved. Harris Decl. Ex. 1 ¶ 3.2.5. The Parties have allocated $40,000 as the PAGA payment, 1.8 percent of the Gross Settlement Amount. From the PAGA payment, 75% ($30,000), will be transmitted to the LWDA and 25% ($10,000) will be distributed to the Class Members. The settlement of the claims for penalties under PAGA is reasonable. See, e.g., Alcala v. Meyer Logistics, Inc., No. CV 17-7211 PSG (AGRx), 2019 WL 4452961, at *9 (C.D. Cal. Jun. 17,

Payment as awarded by the Court to Plaintiffs for their services in connection with bringing and maintaining their respective actions ($5,000 each, totaling $20,000). Id. at 14:9, Ex. 1 at ¶¶ 3.2.1, 3.2.2, 3.2.3, 3.2.5. The remainder is the Net Settlement Amount of $1,326,250. As most of the unpaid wages have been paid, the portion allocated as penalties and interest claims are 80% of the total. Id. Ex. 1, at ¶ 3.2.4.1. Based on Plaintiffs' review of the data, it is their view that only small amounts of wages may not have been paid at all. Defendants contend that all wages were paid.

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

In sum, the maximum potential recovery for Class Members for damages and statutory penalties is detailed in the Harris Declaration. Id. at 13:1-14:22. The Settlement Agreement memorializes an outstanding recovery of a significant percent of the theoretical maximum, particularly in light of the fact that this case is arguably a pure penalty matter. A significant reduction in possible PAGA penalties is warranted in this case, one in which Defendants acted in good faith in its efforts to address the issues that led to this lawsuit and participated in good faith in mediation.

The Net Settlement Amount of approximately $1,326,250 will be distributed to Class Members who do not opt out. All Participating Class Members will receive a pro rata share of the Net Settlement Amount calculated according to the number of Wage Statements received by the Class Member during the applicable Class Period as compared to the total number of Wage Statements received by all Class Members, provided, however, that the distribution formula may be modified so that no participating Class Member receives a payment of less than $10.00. Harris Decl. Ex. 1 ¶ 1.23.

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

The Parties have stipulated to the appointment of H&R as Class Counsel. The qualifications of Class Counsel are set forth in the accompanying Harris Declaration. AH Decl. 15:6-20:9. Subject to Court approval, the Parties have also agreed to the appointment of CPT Group, Inc. (https://www.CPT.com/), last accessed Dec. 22, 2022) as the Settlement Administrator to provide Notice

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2019) (approving PAGA settlement of 1.25 percent); Hopson v. Hanesbrands, Inc., No. CV 08-0844 EDL, 2008 WL 3385452, at *1 (S.D. Cal. Apr. 13, 2009) (approving a PAGA settlement of 0.3 percent); Nordstrom Comm'n Cases, 186 Cal. App. 4th 576, 589 (2010) (approving settlement of wage and hour class action claims and PAGA claims under which no money was allocated to the PAGA claims). A copy of the Settlement Agreement and proposed SAC have been uploaded onto the LWDA website. (Harris Decl. at 14:22.)

and to administer the settlement. Id. Ex. 1 ¶ 1.3.

C. Attorney's Fees and Costs.

The Settlement provides that Class Counsel's fees and costs shall be paid from the settlement fund, of 33 1/3%, to be approved and ordered by the Court after consideration of Class Counsel's application for attorney's fees and costs. AH Decl. Ex. 1 at ¶ 3.2.2. Defendants have agreed not object to an award to Class Counsel of fees in an amount up to 33 1/3% of the settlement fund. Id. The Settlement Agreement provides for recovery of litigation costs of up to $25,000. Id. The Class Notice provides that Class Members will have an opportunity to object. Class Counsel will file a motion seeking an award of fees and costs along with the final-approval papers after the Class notice process has been completed. Accordingly, compensation for Class Counsel will be left entirely to the determination of the Court.

D. Class Notice 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). Notice to Class Members herein will be by first-class mail. AH Decl. Ex 1 ¶ 4.4.1. The Settlement Administrator will update addresses with the National Change of Address database prior to mailing. Id. ¶ 8.4.2. The proposed Notice will accurately and adequately describe the Settlement and will inform the Members of the Class of their right to object to any aspect of it, including the fees to be sought by Class Counsel. Each Member of the Class will have sixty days from the date of mailing to request exclusion. Plaintiff contends that the proposed mailing is the best means of giving notice under the circumstances and will likely give actual notice to many of the Class Members. An English-only notice is sufficient as the vast majority of Defendant's production employees require English proficiency to perform their jobs. Id. at 20:19, Ex. 1 ¶ 1.12.

E. The Proposed Plaintiffs' Class Representative Service Payment.

The Settlement provides to Plaintiffs Divinity, Schwanke, Basaker and Graham an Individual Class Payment as a Class Member and an additional Class Representative Service Payment of up to $5,000 each, on account of the services that they have rendered to the Settlement Class in bringing this litigation and on account of the time that they have each devoted in support of the process. AH Decl.,

Ex. 1 ¶ 3.2.1. Incentive 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 his or his services to the class. Van Vraken v. Atlantic Richfield Co., 901 F. Supp. 294, 299 (N.D. Cal. 1995); Wang v. Chinese Daily News, Inc., 231 F.R.D. 602, 614 (C.D. Cal. 2005) ("Proceeding by means of a class action avoids subjecting each employee to the risks associated with challenging an employer"); Bogosian v. Gulf Oil Corp., 621 F. Supp. 27, 32 (E.D. Pa. 1985); St. Marie v. Eastern R.R. Ass'n., 72 F.R.D. 443, 449 (S.D.N.Y. 1976) ("The risks entailed in suing one's employer are such that the few hardy souls who come forward should be permitted to speak for others when the vocal ones are otherwise fully qualified"), rev'd on other grounds, St. Marie v. Eastern R.R. Ass'n., 650 F.2d 395 (2d Cir. 1981).

In light of Plaintiffs' willingness to come forward with this action on behalf of the Class, and in light of their efforts in advancing the litigation, this proposed payment is reasonable. Plaintiffs obtained the services of counsel, conferred with counsel and assisted in gathering information and documents for the prosecution of the lawsuit. They spent a considerable amount of time conferring with Counsel, providing factual background and support, analyzing and providing data, and consulting Counsel before and after the full-day mediation. Divinity Decl. ¶¶ 3-10; Schwanke Decl. ¶¶ 3-10; Basaker Decl. ¶¶ 3-10; Graham Decl. ¶¶ 3-10. In doing so, they have 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. . . . 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."). They should be compensated accordingly.

F. Releases.

The Settlement provides for a limited release for Class Members. The Settlement provides that "[e]ffective on the date when Defendants fully fund the entire Gross Settlement Amount and fund all

employer payroll taxes owed on the Wage Portion of the Individual Class Payments, Plaintiffs, Class Members, and Class Counsel will release claims against all Released Parties as follows:"

> All Participating Class Members, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, release Released Parties from (i) all claims that were alleged, or reasonably could have been alleged, based on the Class Period facts stated in the Operative Complaint and ascertained in the course of the Action, including claims for (i) failure to pay wages, including unpaid minimum wages and overtime premium pay; (ii) failure to correctly calculate the regular rate for overtime pay and/or payments for non-complaint meal and/or rest periods; (iii) failure to provide meal and/or rest periods in accordance with applicable law, including payments for meal and/or rest periods; (iv) unreimbursed business expenses; (v) failure to timely pay wages, both during employment and upon termination of employment; (vi) failure to provide accurate itemized wage statements; and (vii) all civil and statutory penalties, including PAGA penalties, arising during the period from August 27, 2016 through seven days prior to final approval ("Class Release Period"). Participating Class Members do not release any other claims, including claims for vested benefits, wrongful termination, violation of the Fair Employment and Housing Act, unemployment insurance, disability, social security, workers' compensation, or claims based on facts occurring outside the Class Release Period.

> The release for PAGA Aggrieved Employees is as follows:

> All Non-Participating Class Members who are Aggrieved Employees are deemed to release, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, the Released Parties from all claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the PAGA Period facts stated in the Operative Complaint, the PAGA Notice, and ascertained in the course of the Action, including PAGA penalties for (i) failure to pay wages, including unpaid minimum wages and overtime premium pay; (ii) failure to correctly calculate the regular rate for overtime pay and/or payments for non-complaint meal and/or rest periods; (iii) failure to provide meal and/or rest periods in accordance with applicable law, including payments for meal and/or rest periods; (iv) unreimbursed business expenses; (v) failure to timely pay wages, both during employment and upon termination of employment; and (vi) failure to provide accurate itemized wage statements arising during the period from August 27, 2019 through seven days prior to final approval ("PAGA Release Period").

The foregoing follows the June 2022 Model Form Settlement Agreements. Harris Decl. Ex. 1. at ¶ 6.

G. Uncashed Checks.

California Code of Civil Procedure section 384 ("Section 384") was revised effective June 27, 2018. It now states that it is "the policy of the State of California to ensure that the unpaid cash residue ... in class action litigation are distributed ... in a manner designed either to further the purposes of the underlying class action ... or to promote justice for all Californians." Cal. Code Civ. Proc. § 384(a). The parties believe that the Joint Stipulation satisfies the purpose of Section 384 and complies with its

statutory language. The Settlement Agreement will provide that any checks paid to Participating Class Members or Aggrieved Employee shall remain valid and negotiable for one hundred eighty (180) calendar days from the date of their issuance. If any checks remain uncashed after 180 calendar days from the mailing, the funds represented by such checks shall be cancelled after the void date, and the Administrator shall transmit the funds represented by such checks to Inclusion Matters by Shane's Inspiration (U.S. Tax I.D. No. 95-4760497), a nonprofit disabled children's advocacy and support organization (see, inclusionmatters.org), or such other such children's advocacy and support organization which the Court might approve, consistent with Civil Procedure Code Section 384(b) (the "Cy Pres Recipient"). The Parties, Class Counsel and Defense Counsel represent that they have no interest or relationship, financial or otherwise, with the intended Cy Pres Recipient. All of the foregoing is subject to the proviso that in the event the total amount of uncashed checks exceeds $30,000, the amount that exceeds $30,000 shall be equally divided and paid to those Class Members who cashed their initial checks, with any uncashed second checks being distributed to the approved Cy Pres Recipient. AH Decl. Ex. 1 ¶ 4.4.3.

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

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

> The trial court must determine whether a class action settlement is fair and reasonable, and has broad discretion to do so.

Clark v. Am. Residential Servs. LLC, 175 Cal. App. 4th 785, 799 (2009).An informed 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 (citing Kullar v. Foot Locker Retail, Inc., 168 Cal. App. 4th 116, 120 (2008)). A detailed analysis of the potential recovery, comparing it with that offered in settlement, is found in the Harris Declaration at pages 13 and 14.

Here, in Plaintiffs' view, there is a strong case for the untimely payment of wages. Defendants, however, deny each of Plaintiffs' allegations in the operative pleading and admits no wrongdoing. For example, Defendants contend that no damages are owed for the "untimely" payment of wages because the wages were not paid late, or not paid late with willful intent. Defendants may further argue that any

claims for late payments by union employees are entirely preempted because the applicable agreements provide alternative pay arrangements. Schwanke v. Minim Prods., Inc., No. 2:21-CV-00111, 2021 WL 4924772, at *3-6 (C.D. Cal. May 24, 2021) appeal filed (June 23, 2021) (waiting time claim preempted where Section 201.5 CBA exception applied).

Defendants could likewise assert that section 203, as with all penalty statutes, is strongly disfavored, must be narrowly construed, and that no waiting time penalties are owed since all wages were paid and if any wages are owed, there was no willful failure to pay said wages. See Hale v. Morgan, 22 Cal. 3d 388, 405 (1978). The same could be said with respect to Plaintiff's paystub claim under section 226 of the Code. Here, in the context of a settlement, a substantial reduction in PAGA penalties is warranted. Defendants participated in good faith in early mediation, and here much of the possible penalties accrue for an alleged violation of section 226(a) of the Code which, if the case proceeded to trial, might not be found to be a violation at all.

With regard to the claim that the paystubs did not include all required information, such as the "Employer's Legal Name," Defendants will argue that providing the registered fictitious business name on the paystub is sufficient under the law. Noori v. Countrywide Payroll & HR Sols., Inc., 43 Cal. App. 5th 957, 965 (2019) ("Similarly, fictitious business names can satisfy the statute."); Allchin v. Volume Servs., Inc., No. 3:16-00488, 2017 WL 3337141, at *9 (S.D. Cal. Aug. 4, 2017) (explaining why courts have refused to find a per se violation if an employer uses a DBA name); York v. Starbucks Corp., No. 08-07919, 2009 WL 8617536, at *8 (C.D. Cal. Dec. 3, 2009) (finding no violation of Section 226 where defendant used its DBA name).

With regard to the missed meal and rest break claims based on the requirement that employees respond to calls or their walkie talkies, Defendants have a reasonable argument that it never directed employees to keep devices on during breaks. Defendants will also argue that such claims require individualized inquiries that make class certification impossible.

Furthermore, as a class action, this case presents a clear risk of lengthy and expensive litigation. It would probably be another two years before this case went to trial so that, *inter alia*, the Parties could properly complete class discovery, Plaintiffs could file a motion for certification, and the Parties could file cross-motions for summary judgment. Based on case law—especially since Defendants did not

appear to act in egregious bad faith toward the Settlement Class—in a case of this nature it is appropriate to substantially discount penalties and civil penalties. E.g., Rodriguez v. West Publishing Corp., 563 F. 3d 948, 955 (9th Cir. 2009) (antitrust); In re Cmty. Bank of N. Virginia, 622 F.3d 275, 311–12 (3d Cir. 2010), as amended (Oct. 20, 2010) (illegal home equity lending scheme).

The Parties have, in fact, conducted extensive informal discovery as well as formal discovery. Defendants provided Plaintiffs relevant information regarding the employment records of Plaintiffs and the Class, including hundreds of pages of documents. The class payroll data were analyzed by Plaintiffs' Counsel. AH Decl. at 4:7-19, ¶ 4. Of course, 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, Plaintiff's 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 sufficient investigation conducted to permit counsel to negotiate and agree to the Settlement.

With the proposed settlement, participating Class Members will look to receiving shares of a gross fund totaling $2,250,000, less the amount awarded to Class Counsel for fees and costs, administration fees, PAGA Payment, and the Class Representative Service Payment to the named Plaintiffs. 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 Plaintiffs' claims under sections 203 and 226 of the Code). Viewed in that light, and accessing the general amount that shall be recovered by each Class Member, the Settlement is entirely reasonable.

The reaction of Class Members to the proposed Settlement cannot be known until preliminary approval is granted, notice sent out, and responses to that notice 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. While acknowledging that some persons might feel that Defendants should pay

more and others might feel that Defendants are paying too much, the undersigned are 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, Counsel is of the opinion that the settlement is fair, reasonable, and adequate. Notice of the Final Approval and Judgment will be provided along with the settlement checks.

V. Conclusion.

The settlement is fair, reasonable, and adequate. The Court should grant preliminary approval.

Dated: December 22, 2022

Alan Harris
Attorney for Plaintiff

PROOF OF SERVICE

I am an attorney for the plaintiff(s) herein, over the age of eighteen years, and not a party to the within action. My business address is Harris & Ruble, 655 N. Central Ave., 17th Floor, Glendale CA, 91203. On December 22, 2022, I served the within documents:

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Electronic Service: I caused the above-entitled document(s) to be served through Case Anywhere addressed to all parties appearing on the electronic service list for the above-entitled case and on the interested parties in this case:

Stephen L. Berry (SBN 101576)
Blake Bertagna (SBN 273069)
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695 Town Center Dr. 17th Fl.
Costa Mesa, CA 92626
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I declare under penalty of perjury that the above is true and correct. Executed on December 22, 2022, at Los Angeles, California.

Min Ji Gal