

1 HOYER & HICKS
Richard A. Hoyer (SBN 151931)
2 rhoyer@hoyerlaw.com
Ryan L. Hicks (SBN 260284)
3 rhicks@hoyerlaw.com
4 4 Embarcadero Center, Suite 1400
San Francisco, CA 94111
tel (415) 766-3539
5 fax (415) 276-1738

6 Attorneys for Plaintiffs
LANESSA THOMAS, DAVID PRETE,
7 and LISA SHIGA

8 SUPERIOR COURT OF CALIFORNIA

9 IN AND FOR THE COUNTY OF SONOMA

10 LANESSA THOMAS, DAVID PRETE,
11 And LISA SHIGA, on behalf of all others
similarly situated, aggrieved employees,
12 and the State of California,

13 Plaintiffs,

14 vs.

15 SONOMA MISSION INN MANAGEMENT
COMPANY, LLC, d/b/a THE FAIRMONT
16 SONOMA MISSION INN, and DOES 1-25,

17 Defendant,

Case No. SCV-257470
Assigned for all purposes to:
Hon. René Auguste Chouteau

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES
SUPPORTING MOTION FOR:**

- 18 **(1) PRELIMINARY APPROVAL OF
SETTLEMENT AND
PROVISIONAL CERTIFICATION
OF SETTLEMENT CLASS;**
- 19 **(2) APPROVING THE NOTICE OF
PROPOSED CLASS
SETTLEMENT, APPOINTING
SETTLEMENT
ADMINISTRATOR AND
20 SETTING FINAL APPROVAL
HEARING DATE**

21 (SUPPORTING DECLARATIONS AND
22 [PROPOSED] ORDER SUBMITTED
CONCURRENTLY HEREWITH)

23 Date: December 14, 2016
Time: 3:00 p.m.
24 Dept.: Courtroom 18

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

I. INTRODUCTION 1

II. PROCEDURAL HISTORY AND SETTLEMENT NEGOTIATIONS 2

III. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT BECAUSE IT MEETS ALL OF THE REQUIRED CRITERIA. 4

 A. Settlement Class Size and Determination 4

 B. This is a Common Fund Settlement Which Provides for a Cy Pres Distribution of any Unclaimed Funds..... 4

 C. The Value of the Proposed Settlement to the Class Is Within the Bounds of Reasonableness. 5

 1. The Settlement Was Reached Through Arm’s-Length Negotiations. ... 6

 2. Sufficient Discovery and Investigation Have Been Completed to Warrant Settlement..... 7

 i. Rest and Meal Period Claims 8

 ii. Inaccurate Wage Statement Claims 9

 iii. Waiting Time Penalties 10

 iv. PAGA Claims..... 10

 3. Class Counsel is Experienced and Endorses the Settlement..... 11

 4. No Objections Can Be made Until the Final Approval Hearing..... 12

 D. The Scope of the Release Provisions Corresponds Only to Claims Related to the Class Claims. 12

 E. The Plaintiffs’ Proposed Enhancement Awards are Fair and Reasonable. ... 13

 F. The Obligations Placed Upon PCMs Are Reasonable and Clearly Explained in the Notice Package. 13

 G. Method of Notice. 13

 H. Explanation of Settlement Payment Calculations and Procedures..... 15

1 I. Tax Consequences 15

2 J. Estimated Administration Costs 16

3 K. Class Counsel’s Request for Attorneys’ Fees and Costs is Reasonable..... 16

4 L. The Proposed Settlement Will Have No Effect on Any Other Cases..... 19

5 IV. THE COURT SHOULD APPOINT RUST CONSULTING AS THE SETTLEMENT
6 ADMINISTRATOR AND APPROVE THE COSTS OF SETTLEMENT
ADMINISTRATION. 19

7 V. THE COURT SHOULD SET A SCHEDULE FOR FINAL APPROVAL. 19

8 VI. CONCLUSION..... 20

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

TABLE OF AUTHORITIES
State Cases

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

Abzug v. Kerkorian (L.A. Super. Ct. 1990) Case No. CA-000981..... 16

Barela v. Ralph’s Grocery Co., No. BC070061 (Los Angeles Super. Ct., June 5, 1998) 16

BCI Overtime Cases, (San Bernadino Super. Ct. 2007) J.C.C.P.4280..... 16

Big Lots Overtime Cases, JCC Proceeding No. 4283 (San Bernardino Super. Ct., Feb. 4, 2004)..... 16

Brinker v. Superior Court (2012) 54 Cal.4th 1004..... 9

Cartt v. Superior Court (1975) 50 Cal.App.3d 960..... 14

Castellanos v. The Pepsi Bottling Group, No. RG07332684 (Alameda Super Ct., Mar. 11, 2010)..... 13

Clark v. American Residential Services LLC (2009) 175 Cal.App.4th 785..... 6, 7

County of Los Angeles Board of Supervisors et al. v. Superior Court (2015) 235 Cal.App.4th 1154, review granted July 8, 2015..... 18

Cristman v. Good Guys, Inc. (San Diego Super. Ct. 2007) Case No. GIS21929..... 16

Davis v. The Money Store, Inc. (Sacramento Super. Ct. 2000) Case No. 99AS01716..... 16

Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794..... 5, 6

Duran v. U.S. Bank Nat. Assn. (2014) 59 Cal. 4th 1 9

Haitz v. Meyer (Alameda Super. Ct. 1990) Case No. No. 572968-3..... 16

Hasty v. Elec. Arts, Inc., No. CIV 444821 (San Mateo Super. Ct., Sept. 22, 2006) 13

In Re Facsimile Paper Antitrust Litigation (S.F. Super. Ct. 1995) Case Nos. 961814, 963201 and 963590 16

In Re Liquid Carbon Dioxide Cases (S.D. Super. Ct. 1996) J.C.C.P. 3012 16

In Re Milk Antitrust Litigation (L.A. Super. Ct. 1998) Case No. BC070061 16

Kullar v. Foot Locker Retail Inc. (2008) 168 Cal.App.4th 116..... 6, 7

Ling v. P.F.Chang’s China Bistro, Inc. (2016) 245 Cal.App.4th 1242 10

Meewes v. ICI Dulux Paints, No. BC265880 (Los Angeles Super. Ct. Sept. 19, 2003) 13

1	<i>Menchyuk v. Beverages & More, Inc.</i> (Alameda Super. Ct. 2006) Case No. RG05196918	16
2	<i>Miskell v. Auto. Club of S. Cal.</i> (Orange County Super. Ct., No. 01CC09035, May 27, 2003)	
3	16
4	<i>Nordstrom Commissions Cases</i> (2010) 186 Cal.App.4 th 576	11
5	<i>Novak v. Retail Brand Alliance, Inc.</i> , No. RG 05-223254 (Alameda Super. Ct., Sept. 22, 2009)	13
6	<i>O’Hara v. Factory 2-U Stores, Inc.</i> (Alameda Super. Ct. 2002) Case No. 834123-5	16
7	<i>PCLM Group, Inc. v. Drexler</i> (2000) 22 Cal.4 th 1084	17
8	<i>Sconce/Lamb Cremation Cases</i> , JCC Proceeding No. 2085, (Los Angeles Super. Ct., Mar. 24, 1992)	16
9	<i>Thurman v. Bayshore Transit Mgmt., Inc.</i> , (2012) 203 Cal.App.4 th 1112	11
10	<i>Wershba v. Apple Computer</i> (2001) 91 Cal.App.4 th 224	14

Federal Cases

13	<i>Birch v. Office Depot, Inc.</i> , Case No. 06 cv1690 (S.D.Cal. Sept. 28, 2007)	16
14	<i>Ellmore v. Ditech Funding Corp.</i> , No. SAVC 01-0093 (C.D. Cal., Sept. 12, 2002)	16
15	<i>Guifi Li v. A Perfect Day Franchise Inc.</i> , (N.D. Cal. 2012) 2012 WL 2236752	11
16	<i>Guilbaud v. Sprint/United Management Company</i> , N.D.Cal. Case No. 3:13-cv-4357-VC (April 15, 2016)	13
17	<i>In re: Autozone, Inc.</i> (N.D.Cal. August 10, 2016) 2016 WL 4208200	10
18	<i>Mousai v. E-Loan, Inc.</i> , No. C 06-01993 SI (N.D. Cal. May 30, 2007)	13
19	<i>Noyes v. Kelly Servs., Inc.</i> , 2:02-CV-2685-GEB-CMK, 2008 WL 3154681 (E.D. Cal. Aug. 4, 2008)	17
20	<i>Regino Primitivo Gomez, et al. v. H&R Gunlund Ranches, Inc.</i> , No. CV F 10–1163 LJO MJS, 2011 WL 5884224 (E.D. Cal. 2011)	16
21	<i>Rippee v. Boston Mkt. Corp.</i> , Case No. 05 cv1359 (S.D.Cal. Oct. 10, 2006)	16
22	<i>Staton v. Boeing Co.</i> (9th Cir. 2003) 327 F.3d 938	13
23		
24		

1 *Tyson Foods, Inc. v. Bouaphakeo* (2016) __ U.S. __, 136 S.Ct. 1036 9

2 *Van Vranken v. Atl. Richfield Co.* (N.D.Cal. 1995) 901 F. Supp. 294..... 16

3 *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. 338 9

4 *Wren v. RGIS Inventory Specialists*, WL 1230826, (N.D.Cal.,2011)..... 16

5 **State Statutes**

6 Bus. & Prof. Code §17200 2

7 C.R.C. 3.769..... 4, 14, 19

8 Civil Code §1781 13

9 Labor Code § 226.7 2

10 Labor Code § 2699(f)..... 11

11 Labor Code §201 2

12 Labor Code §203..... 2

13 Labor Code §204..... 2

14 Labor Code §226..... 2, 11

15 Labor Code §226.3 2, 10

16 Labor Code §2698, *et seq* 2

17 Labor Code §510..... 2

18 Labor Code §512..... 2

19 **Other Authorities**

20 Posner, *Economic Analysis of the Law*, 534, 567 (4th ed. 1992)..... 21

21

22

23

24

1 **I. INTRODUCTION**

2 By and through the instant motion, Plaintiffs LANESSA THOMAS, DAVID PRETE, and
3 LISA SHIGA (“Plaintiffs”) hereby request that this Court enter an Order: (1) Granting
4 Preliminary Approval of the Settlement Agreement, provisionally certifying a class of: “all
5 current and former non-exempt hourly employees who were employed by Defendant as a
6 spa treatment provider (massage, salon, and/or facial/esthetician) during the period May 12,
7 2011 through May 18, 2015” for the purposes of settlement, and appointing Plaintiffs’ counsel
8 as Class Counsel for the purposes of Settlement;¹ (2) Appointing the proposed Settlement
9 Administrator and maximum settlement costs; and (3) Approving the Notice of Pendency of
10 Class Action, Proposed Settlement, and Hearing Date and accompanying opt out form
11 (“Notice Package”) and setting a Final Approval hearing date.²

12 On June 29, 2016, the parties reached an agreement in principal to resolve this
13 litigation. After further negotiations regarding the full terms of the settlement agreement, all
14 parties and counsel had executed the agreement by September 26, 2016.

15 The opt-out Settlement Agreement encompasses all claims Plaintiffs asserted in the
16 operative complaint on behalf of themselves and a proposed settlement class of
17 approximately one-hundred eight (108) persons who are or were employed by Defendant as
18 non-exempt hourly spa treatment providers (performing massage, salon, and/or
19 facial/esthetician services) at any time during the period May 12, 2011 through May 18, 2015
20 (the “Class Period”).³

21
22 _____
23 ¹ A copy of the fully executed settlement agreement, entitled “SETTLEMENT AGREEMENT AND MUTUAL
24 RELEASES” (Settlement Agreement”) is attached as Exhibit 1 to the Declaration of Richard A. Hoyer (“Hoyer
Dec.”) filed concurrently herewith. The terms defined in the Settlement Agreement are used herein with the
definitions incorporated therefrom.

² The Proposed Notice Package is attached as Attachment 1 to the Settlement Agreement.

³ Settlement Agreement at §§ 7 (Class definition) and 9 (Class Period).

1 Plaintiffs' operative complaint alleges that Defendant failed to provide the Class with
2 compliant meal periods and rest periods, which resulted in other derivative penalties under
3 the Labor Code. Plaintiffs seek to recover unpaid missed break premiums and resulting
4 derivative penalties on behalf of themselves and all other similarly situated putative class
5 members ("PCMs") employed by Defendant during the Class Period, including derivative
6 penalties under the Private Attorneys General Act ("PAGA," Labor Code §2698, *et seq.*).

7 Plaintiffs have agreed to settle their claims and those of the putative class members
8 in exchange for Defendant's agreement to pay the class \$995,000, including the costs of
9 administering the Settlement Agreement, any enhancement awards to the respective
10 Plaintiffs, and reasonable attorneys' fees and costs. The Settlement Agreement satisfies all
11 the criteria for preliminary class settlement approval under California Law and falls well within
12 the range of what constitutes a reasonable compromise for claims of this nature and size.

13 **II. PROCEDURAL HISTORY AND SETTLEMENT NEGOTIATIONS**

14 On July 22, 2015, Plaintiffs filed their initial complaint on behalf of themselves and a
15 putative class of all spa treatment providers employed by Defendant during the four years
16 preceding the date of Plaintiffs' arbitration demand filed May 12, 2015 through the date of
17 judgment. The complaint alleged class claims for failure to authorize or permit rest periods
18 (Labor Code § 226.7), failure to provide meal periods (Labor Code §§ 266.7, 512, failure to
19 pay straight time wages and overtime (Labor Code §§ 204, 510), failure to furnish accurate
20 wage statements (Labor Code §§ 226, 226.3), waiting time penalties (Labor Code §§ 201-
21 203), a derivative claim for violations of Bus. & Prof. Code § 17200, and a representative
22 claim for penalties under PAGA. On September 8, 2015, Defendant filed its answer. The
23 parties subsequently agreed to an early mediation of the case, and entered into successive
24 agreements to stay proceedings while the parties prepared for mediation.

1 As a condition of the early mediation, the parties engaged in informal discovery.
2 Defendant provided to Plaintiffs extensive data related to the putative class regarding working
3 hours and schedules (including information for a representative sample of all putative class
4 members from multiple databases), wages paid to the PCMs during the class period, and
5 class composition and membership.⁴ Defendant also produced documents regarding their
6 asserted meal and rest period policies in effect during the Class Period. *Id.* at ¶7. Plaintiffs
7 communicated with dozens of PCMs and secured declarations from thirty PCMs
8 (approximately one-third of the class) regarding their experiences with respect to meal and
9 rest periods while working for Defendant during the Class Period. *Id.* at ¶8.

10 Plaintiffs compiled the data from Defendant's scheduling software and payroll records
11 and analyzed it, calculating the potential class damages on all claims. *Id.* at ¶9. Plaintiffs'
12 counsel has obtained sufficient discovery to evaluate the likelihood of success on the merits
13 and assess the potential risks facing Plaintiffs and the putative class. *Id.* at ¶10.

14 On June 29, 2016, the parties attended an exhaustive full-day mediation session with
15 Michael J. Loeb, a highly respected mediator. *Id.* at ¶11. Plaintiffs submitted a mediation brief
16 summarizing the evidence that counsel had marshalled and synthesized, the state of the
17 applicable law, and potential class-wide exposure. *Id.* Defendant submitted its own brief
18 arguing that no class could be certified and that they would also prevail on the merits against
19 the individual plaintiffs and any other PCM. *Id.* at ¶12. Ultimately, the parties agreed upon the
20 key settlement terms at the mediation. Thereafter, the parties continued to negotiate the
21 remaining details of the settlement over the next three months before they executed the final
22 Settlement Agreement on September 26, 2016. *Id.*

23 _____
24 ⁴ Declaration of Richard A. Hoyer Supporting Motion for Preliminary Approval ("Hoyer Dec."), filed concurrently
herewith, at ¶¶5-8.

1 Plaintiffs and their counsel are of the opinion that the Settlement Agreement is well
2 within the range of reasonableness and is in the best interest of the proposed settlement
3 class in light of all known facts and circumstances, including the risk of significant delay,
4 defenses asserted by Defendant, arbitration agreements, and potential appellate issues.

5 **III. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT**
6 **BECAUSE IT MEETS ALL OF THE REQUIRED CRITERIA.**

7 **A. Settlement Class Size and Determination**

8 Pursuant to C.R.C. 3.769(d), an order certifying a provisional settlement class is
9 appropriate. The proposed settlement class is sufficiently numerous, because Defendant has
10 identified approximately 108 class members based on their personnel records. Hoyer Dec.
11 at ¶13. It is also undisputed that Defendant applied the same nominal rest and meal period
12 policies and scheduling practices to all of the PCMs uniformly throughout the class period,
13 satisfying the commonality requirement. *Id.* at ¶14. Dozens of PCMs and Plaintiffs declared
14 under oath that they were routinely denied meal and rest periods, and that they regularly
15 witnessed their co-workers being subjected to the exact same policies and practices that they
16 were, so their claims are typical of those of the class members. *Id.* at ¶15. Plaintiffs are aware
17 of no conflicts among Plaintiffs and the class (*id.* at ¶16), and Plaintiffs' counsel are
18 experienced wage and hour class action attorneys and have litigated this matter in the best
19 interests of the class (*id.* at ¶13), satisfying the adequacy requirement. Defendant does not
20 dispute the provisional certification of a class for settlement purposes.

21 **B. This is a Non-Reversionary Common Fund Settlement.**

22 The non-reversionary Settlement Agreement provides that Defendant will pay a total
23 of up to \$995,000 to compensate the Plaintiffs and other Participating Class Members
24 ("CMs") who do not opt-out of the class, including enhancements to the Plaintiffs in an amount

1 up to \$10,000⁵ to each Plaintiff for their service to the class (totaling \$30,000), Plaintiffs'
2 attorneys' fees up to \$331,666.67 plus their reasonable costs not to exceed \$15,000,⁶ claims
3 administrator's fees and expenses up to \$15,000,⁷ and \$10,000 allocated to the PAGA claims
4 to be divided 25% to the class (to be distributed on a *pro rata* basis) and 75% to the California
5 Labor Workforce Development Agency ("LWDA").⁸ Within twenty-four (24) days of the
6 Effective Date of the Court's Final Approval of the Settlement Agreement and those
7 deductions, CMs who have not opted out of the settlement will be sent a *pro rata* share of the
8 remaining settlement fund based on the number of hours that each CM worked as a spa
9 treatment provider during the Class Period while employed by Defendant.⁹

10 The sum of any settlement checks returned as undeliverable or otherwise un-cashed
11 within 90 days after being mailed will be delivered to the California Department of Industrial
12 Relations Unclaimed Wages Fund. *Id.* at § 73.

13 **C. The Value of the Proposed Settlement to the Class Is Within the Bounds**
14 **of Reasonableness.**

15 The well-recognized factors that a trial court should consider in evaluating the
16 reasonableness of the value of a class action settlement agreement include, but are not
17 limited to:

18 [T]he strength of plaintiffs' case, the risk, expense, complexity and likely duration of
19 further litigation, the risk of maintaining class action status through trial, the amount
20 offered in settlement, the extent of discovery completed and stage of proceedings, the
21 experience and views of counsel, the presence of a governmental participant, and the
22 reaction of the class members to the proposed settlement.

23 *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.

24 [A] presumption of fairness [of a proposed class action settlement] exists where: (1)

⁵ Settlement Agreement at § 31.

⁶ *Id.* at § 77.

⁷ *Id.* at § 2.

⁸ Settlement Agreement at § 24.

⁹ *Id.* at §§ 69 (*pro rata* calculation), 62 (depositing settlement funds), 79 (disbursement of fund).

1 the settlement is reached through arm's-length bargaining; (2) investigation and
2 discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel
is experienced in similar litigation; and (4) the percentage of objectors is small.

3 *Kullar v. Foot Locker Retail Inc.* (2008) 168 Cal.App.4th 116, 128 (*quoting Dunk, supra*, at
4 1801); *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 799.

5 However, the *Kullar* and *Clark* courts also noted that a court must be independently satisfied
6 that the consideration being received (here \$995,000) is reasonable in light of the strengths
7 and weaknesses of the claims and the risks of the particular litigation. *Clark, supra*, at 452,
8 *quoting Kullar, supra*, at 129.

9 1. The Settlement Was Reached Through Arm's-Length Negotiations.

10 That the settlement was reached through arm's-length negotiations is exemplified by
11 the over a year of preparation and informal discovery and that the proposed settlement was
12 achieved only with the assistance of an experienced mediator. Defendant, as evidenced in
13 its mediation brief and case management conference statements, believed and maintained
14 that a class could not be certified.¹⁰ Furthermore, the parties legitimately disputed various
15 defenses raised by Defendant, who was faced with the prospect of lengthy and expensive
16 litigation against experienced counsel and a lengthy potential trial, and the spectre of
17 appellate proceedings regarding the use of representative testimony at trial.

18 On the other hand, while Plaintiffs' counsel remain ultimately confident in the merits of
19 their legal arguments, Plaintiffs were put in the position of negotiating a settlement at this
20 juncture based on untested declarations and unclear case law regarding the propriety of the
21 use of representative testimony, possibly facing years of litigation and costs which could
22 exceed any recovery for the class in order to achieve a verdict which still may not have been
23

24 ¹⁰ See, generally, all Case Management Conference Statements filed to date.

1 collectible for many years due to potential appellate issues, and/or uncertainties regarding
2 the precise amount of damages due to each PCM. Plaintiffs also the potential of motions to
3 compel arbitrations of the individual PCMs' claims and a potential stay after class certification.
4 It was agreed upon by Plaintiffs' counsel and the Plaintiffs that a settlement at this juncture
5 in the sum agreed upon was in the best interests of the class. Hoyer Dec. at ¶17.

6 **2. Sufficient Discovery and Investigation Have Been Completed to**
7 **Warrant Settlement.**

8 A court must "receive and consider enough information about the nature and
9 magnitude of the claims being settled, as well as the impediments to recovery, to make an
10 independent assessment of the reasonableness of the terms to which the parties have
11 agreed." *Kullar, supra*, at 133. Here, the parties have engaged in substantial cooperative
12 informal discovery (see Section II, *supra*) regarding certification, merits, and damages issues.
13 Plaintiffs' analyzed the data provided for all PCMs and assessed the maximum total value of
14 Plaintiffs' non-PAGA claims to be just over \$2.1 million. *Id.* at ¶9.¹¹

15 The "recovery represents a reasonable compromise, given the magnitude and
16 apparent merit of the claims being released" and Plaintiffs took into account "the risks and
17 expenses of attempting to establish and collect on those claims by pursuing them in the
18 future," when discounting the value of the claims being settled here. *Clark, supra*, at 800
19 (*quoting Kullar, supra*, at 129, emphasis omitted). Plaintiffs assert that Defendant
20 implemented the following common policies and practices which resulted in violations of the
21 meal and rest period requirements of the Labor Code:

22
23 ¹¹ Including the estimated \$1,566,500 in duplicative PAGA penalties for inaccurate wage statements under
24 Labor Code § 226.3 (which provides for penalties of five times the amount available directly to employees under
§226(a)) increases the total estimated exposure to \$3,673,536.27. Defendant asserted that its maximum
potential liability was only a fraction of that amount, though it maintained that Plaintiffs would recover nothing.

1 i. Rest and Meal Period Claims¹²

2 Plaintiffs allege that Defendant simply did not schedule rest breaks or make them
3 available to PCMs. The declarant PCMs also confirm that they were never told of their right
4 to take rest breaks, either during their training or on the job. As a practical matter, Defendant
5 scheduled clients appointments such that it was physically impossible to take a ten-minute
6 rest period. Until Plaintiffs commenced this action, Defendant's practice was to schedule
7 treatments with a fifteen-minute period between appointments during which PCMs were
8 required to perform a host of preparatory and post-treatment tasks. Defendant also had a
9 policy requiring PCMs to clock out any time that they were not actively performing services,
10 or preparing for or cleaning up after an appointment. Furthermore, there is no evidence that
11 Defendant ever paid any PCM the one hour of premium pay owed for missed rest breaks or
12 even provided any method of reporting a missed rest period.

13 Plaintiffs and other PCMs also confirm that there were also occasions when Defendant
14 scheduled them to work for more than five hours without providing an off-duty meal period
15 before the end of their fifth hour of work, and that when that occurred, they were not provided
16 with any premium wages. Defendant set the PCMs' schedules, and the sample timekeeping
17 records produced indicate that on occasion PCMs worked for more than five hours without a
18 meal period during shifts.

19 Defendant asserted that there was enough time during the fifteen minute periods
20 between scheduled treatments for PCMs to take a ten-minute rest period, and that PCMs
21 often had periods of "down time" during their shifts during which it was possible for them to
22 take rest periods. It further asserted that its meal and rest period policies were at all times in

23 _____
24 ¹² An in-depth analysis of the relevant case law and evidence related to the meal and rest period and derivative claims can be found in ¶¶18-44 of the Hoyer Dec. That analysis is summarized here for the sake of brevity.

1 compliance with applicable law, and any missed breaks were due to the PCMs' choice not to
2 take such breaks.

3 The area of law regarding the propriety of class treatment of meal and rest period
4 requirements remains unsettled, notwithstanding the California Supreme Court's ruling in
5 *Brinker v. Superior Court* (2012) 54 Cal.4th 1004. Furthermore, the issue of whether "down
6 time" during or at the end of a shift can be considered off-duty meal and/or rest period time
7 is still unclear, with only a few cases touching upon the issue without a full analysis.

8 The declaration testimony from Plaintiffs' PCM declarations indicated that Plaintiffs did
9 not get rest breaks. Nevertheless, proving up individual damages would likely require costly
10 representative testimony analyzed by experts on both sides, and Defendant would likely
11 dispute the application of *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. 338, and *Duran v.*
12 *U.S. Bank Nat. Assn.* (2014) 59 Cal.4th 1 regarding any evidentiary showing and Trial Plan
13 with respect to both liability and damages. Defendant would undoubtedly move for class
14 decertification thereafter, making appellate proceedings almost certain regardless of which
15 side prevailed at trial.¹³ Plaintiffs estimated that Fairmont's potential exposure was \$75,231
16 for the meal period violations and \$1,689,284 for the rest period claims, including
17 prejudgment interest. Hoyer Dec. at ¶9. Plaintiffs' counsel were aware of these risks and took
18 them into account when discounting the claims for settlement purposes. *Id.* at ¶¶26, 33.

19 ii. Inaccurate Wage Statement Claims

20 Plaintiffs argue and maintain that the testimony and evidence shows that Defendant's
21 wage statements did not reflect the premium wages that they were owed for missed breaks.
22

23 _____
24 ¹³ In light of *Wal-Mart*, and its prohibition of so-called "trials by formula," and the California Supreme Court's recent opinion in *Duran*, it remains unclear as to what extent Plaintiffs would be permitted to use representative testimony at trial. *But see Tyson Foods, Inc. v. Bouaphakeo* (2016) ___ U.S. ___, 136 S.Ct. 1036.

1 *Id.* at ¶34. Using the data provided by Defendant, the maximum value of the inaccurate wage
2 statement claim was approximately \$158,500. *Id.* at ¶9. The parties have vigorously disputed
3 whether Plaintiffs and the other CMs were “injured” as a result of any inaccurate wage
4 statements. *Id.* at ¶35.¹⁴ Plaintiffs’ counsel were aware of these risks and took them into
5 account when discounting the claims for settlement purposes. *Id.* at ¶36.

6 iii. Waiting Time Penalties

7 Plaintiffs assert that any failure to pay the premium wages for a missed meal or rest
8 period necessarily exposed Fairmont to liability for waiting time penalties. *Id.* at ¶¶37-38.
9 Based on the data provided by Defendant, Plaintiffs estimated Fairmont’s exposure for the
10 Waiting Time Penalties to be approximately \$184,019, including interest. *Id.* at ¶9. Plaintiffs’
11 counsel were aware of these risks and took them into account when discounting the claims
12 for settlement purposes. *Id.* at ¶39.

13 iv. PAGA Claims¹⁵

14 Plaintiffs also assert that the underlying alleged meal and rest period violations gave
15 rise to penalties for violations of Labor Code § 226.3 available under the Private Attorneys’
16 General Act. *Id.* at ¶40. Fairmont contends that no claim for PAGA penalties of any nature is
17 valid. The PAGA claims were at issue and were resolved as a part of the overall settlement
18 of the case.¹⁶ In such cases, California Courts have held that none of the proceeds of a
19 settlement must necessarily be allocated and distributed to the LWDA as settled PAGA

21 ¹⁴ Hoyer Dec. at ¶¶34-36. We also note that there is one recent California case, that asserts in dicta that a claim
22 for waiting time penalties cannot be based on a claim for missed meal or rest breaks (*Ling v. P.F.Chang’s China*
Bistro, Inc. (2016) 245 Cal.App.4th 1242), contrary to the vast majority of cases reaching the opposite
23 conclusion. See *In re: Autozone, Inc.* (N.D.Cal. Aug. 10, 2016) 2016 WL 4208200 (disagreeing with *P.F.*
Chang’s “[b]ecause the Court is persuaded by the numerous [courts] recognizing that section 203 penalties are
24 available for wage payments under section 226.7....”)

¹⁵ See ¶¶40-45 for a further in-depth discussion of the PAGA claims, with citations to relevant authority which
could not be condensed to fit within the 20-page limit granted on November 16, 2016.

¹⁶ Settlement Agreement at § 65.

1 penalties. *Nordstrom Commissions Cases* (2010) 186 Cal.App.4th 576, 589.¹⁷

2 Notwithstanding Fairmont’s asserted defenses based on the underlying meal and rest
3 period claims, the case law regarding the wholly-derivative and duplicative PAGA claims
4 remains inconsistent at best, and downright murky and conflicted at worst. The asserted §
5 226.3 penalties sought under PAGA derive from the same conduct for which Plaintiffs seek
6 penalties under § 226. Courts have discretion to reduce any amount of penalties awarded
7 under PAGA, and there is currently no uniform guidance or authority available to predict
8 whether this Court would award all of the PAGA penalties, deem them to be wholly
9 duplicative, or something in between.¹⁸ In counsel’s experience, Plaintiffs always calculate
10 potential PAGA penalties, but they are given little weight in settlement negotiations, due to
11 an expectation that a Court would, like the Labor Commissioner, refuse to “stack” duplicative
12 penalties and focus instead on the underlying violations. Hoyer Dec. at ¶43. Plaintiffs’ counsel
13 were aware of these risks and took them into account when discounting the claims for
14 settlement purposes. *Id.* at ¶43.

15 **3. Class Counsel is Experienced and Endorses the Settlement.**

16 Experienced counsel, operating at arm’s length, have weighed the foregoing factors
17 and endorse the proposed settlement. Plaintiffs’ counsel has experience not only in class
18 actions and employment litigation, but specifically in wage and hour class actions. *Id.* at ¶¶2-
19 4. Plaintiffs’ counsel is experienced and qualified to evaluate the class claims and the viability
20 of the defenses. *Id.* The recovery for each participating class member will be reasonable,

21 _____
22 ¹⁷ Plaintiffs will submit the proposed settlement agreement to the LWDA on the same date that they file the
instant motion through the LWDA’s new online submission system. Hoyer Dec. at ¶43.

23 ¹⁸ Labor Code § 226 incorporates its own penalty provisions, so an award of the maximum penalty amount
provided by PAGA is uncertain. See Lab. Code § 2699(f); see also *Guifi Li v. A Perfect Day Franchise Inc.*,
24 (N.D. Cal. 2012) 2012 WL 2236752 at *17. Moreover, even assuming Plaintiffs’ remaining claims qualify for
PAGA penalties, any such award is not automatic. Cal. Lab. Code § 2699(e)(2); see also *Thurman v. Bayshore
Transit Mgmt., Inc.*, (2012) 203 Cal.App.4th 1112, 1135-36.

1 given the risks inherent in litigation, the defenses asserted, the potential for a successful
2 motion to compel individual arbitration of the non-PAGA claims of the majority if not all of the
3 class, and the unsettled nature of wage and hour and class action law with respect to
4 representative testimony and penalties under the PAGA.¹⁹ This settlement is fair, adequate
5 and reasonable, and in the best interests of the proposed settlement class.

6 **4. No Objections Can Be made Until the Final Approval Hearing.**

7 It is impossible to address the fourth factor in the reasonableness assessment unless
8 and until after the class is notified of the proposed settlement. Should any proposed
9 settlement CMs file objections, the Court can evaluate such concerns at the Final Approval
10 Hearing.

11 **D. The Scope of the Release Provisions Corresponds Only to Claims**
12 **Related to the Class Claims.**

13 Pursuant to the Settlement Agreement, the CMs would release Defendant and its
14 corporate parents, subsidiaries and affiliates from any claims which could have been
15 asserted based on the allegations of the operative complaint, i.e. claims based on meal and
16 rest period violations during the Class Period.²⁰ The settlement does not ask the Court to

17 ¹⁹ Hoyer Dec. at ¶¶45-46 (further testimony regarding the value of the settlement).

18 ²⁰ Settlement Agreement at § 30 ("Released Claims"). Specifically, the settlement releases only: "[A]ll known
19 and unknown claims, demands, rights, liabilities, debts, and causes of action that (a) were asserted in the
20 operative Complaint filed in the ACTION, or (b) which might have been asserted in the in the operative
21 Complaint filed in the ACTION (whether in tort, contract, or otherwise) and which arise from or relate to the
22 facts, circumstances, or legal theories alleged in the in the operative Complaint filed in the ACTION, under state,
23 federal, or local laws or regulations. The RELEASED CLAIMS include, without limitation (A) any alleged failure
24 to pay all wages owed to CLASS MEMBERS; (B) failure to pay overtime wages to CLASS MEMBERS and/or
to ensure that overtime compensation was properly calculated, (C) any alleged failure to pay "premiums" for
missed or interrupted meal or rest breaks, or to provide such breaks; (D) any alleged failure to pay minimum
wage; (E) any alleged failure to pay all wages due upon separation of employment, (F) any alleged failure to
pay wages on a timely basis during employment; (G) any alleged failure to issue accurate paystubs; (H) any
alleged failure to keep required payroll records; and (I) any alleged violation of California Business and
Professions Code section 17200. They include claims for unpaid wages, economic damages, non-economic
damages, amounts due under California's Private Attorney General Act ("PAGA"), restitution, statutory
penalties, civil penalties, interest, attorneys' fees and costs, and/or any other monetary losses or obligations of
any kind to the extent they arise from or relate to the facts, circumstances, and legal theories alleged in the in
the operative Complaint filed in the ACTION."

1 enjoin CMs from filing related claims until Final Approval.

2 **E. The Plaintiffs' Proposed Enhancement Awards are Fair and Reasonable.**

3 Named Plaintiffs in class action litigation are eligible for reasonable service awards.
4 See *Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 977.²¹ The settlement agreement
5 provides for class representative service payments of up to \$10,000 to each of the Plaintiffs
6 subject to the Court's approval, in recognition of their efforts and work in prosecuting the
7 class action.²² If approved, the \$10,000 enhancement awards would each constitute only 1%
8 of the total Common Settlement Fund. In Plaintiffs' experience, the enhancement awards will
9 be reviewed at the Final Approval stage, and Plaintiffs will submit declarations at that time
10 which detail the time they put into the case, and the risks that they faced in doing so.

11 **F. The Obligations Placed Upon PCMs Are Reasonable and Clearly**
12 **Explained in the Notice Package.**

13 The Notice Packet (Attachment 1 to the Settlement Agreement) clearly identifies the
14 options available to PCMs under the Settlement Agreement. (1) request exclusion from the
15 lawsuit and not be bound by the settlement and be free to file their own lawsuit; (2) file an
16 objection to and be bound by the proposed settlement; or (3) do nothing, and be bound by
17 the settlement and receive a *pro rata* share of the settlement proceeds.

18 **G. Method of Notice.**

19 California law vests the Court with broad discretion in fashioning an appropriate notice
20 program so long as it satisfies all due process requirements. Civil Code §1781; *Cartt v.*

21 _____
22 ²¹ See, e.g. *Castellanos v. The Pepsi Bottling Group*, No. RG07332684 (Alameda Super Ct., Mar. 11, 2010)
23 (award of \$12,500); *Novak v. Retail Brand Alliance, Inc.*, No. RG 05-223254 (Alameda Super. Ct., Sept. 22,
24 2009) (award of \$12,500); *Hasty v. Elec. Arts, Inc.*, No. CIV 444821 (San Mateo Super. Ct., Sept. 22, 2006)
(award of \$30,000); *Meewes v. ICI Dulux Paints, No. BC265880* (Los Angeles Super. Ct. Sept. 19, 2003)
(service awards of \$50,000, \$25,000 and \$10,000 to the plaintiffs); *Mousai v. E-Loan, Inc.*, No. C 06-01993 SI
(N.D. Cal. May 30, 2007) (service award of \$20,000); *Guilbaud v. Sprint/United Management Company*,
N.D.Cal. Case No. 3:13-cv-4357-VC (April 15, 2016, \$10,000 awards).

²² Settlement Agreement at § 31.

1 *Superior Court* (1975) 50 Cal.App.3d 960, 970-974; C.R.C. 3.769. The actual form and
2 contents of the notice are within the Court's discretion. *Wershba v. Apple Computer* (2001)
3 91 Cal.App.4th 224, 251.

4 The parties have drafted a Class Notice document based upon the general form
5 proposed by the Federal Judicial Center and in "Plain English." Plaintiffs' counsel have
6 utilized this same general format in multiple Class Notices approved by Courts in California.
7 The notice explains to the PCMs the meaning and nature of the action and the proposed
8 settlement class, the key terms of provisions of the Settlement Agreement, the manner in
9 which payments to PCMs will be calculated, the minimum estimated amount that a PCM will
10 receive per hour of work for the defendant during the class period if they do not opt out of the
11 class, the number of hours that the PCM worked as a spa treatment provider during the Class
12 Period, the proposed amounts of attorneys' fees and costs, the Plaintiffs' proposed
13 enhancement awards, the time, date and place of the Final Approval Hearing (once set by
14 the Court), and the procedures and deadlines for requesting exclusion from the Class and/or
15 objecting to the settlement.

16 Upon this Court granting Preliminary Approval of the Settlement Agreement, within ten
17 (10) days Defendant will provide the Class List to the proposed settlement administrator, Rust
18 Consulting (<http://www.rustconsulting.com/>).²³ The administrator will then perform a search
19 of the Lexis Database System as well as the National Change of Address Database to obtain
20 the most current mailing addresses of the PCMs. *Id.* at § 49. No later than fourteen days
21 following receipt of the information above, Rust Consulting will send the PCMs by First-Class
22 U.S. Mail the Notice Package. *Id.* at § 50. The Exclusion and Objection ("Notice Response")

23 _____
24 ²³ Settlement Agreement at § 49. The Class List includes: the full name, last known mailing address, employee
number, telephone number, Social Security Number, and total hours worked during the Class Period as a PCM.

1 Deadline will be forty-five (45) days from the date Notice is mailed. *Id.* at § 23. A copy of the
2 Notice Package will also be available on Class Counsel's website. Plaintiffs are unaware of
3 any method available to provide greater notice to the PCMs.

4 **H. Explanation of Settlement Payment Calculations and Procedures**

5 A CM's *pro rata* share of the Settlement Agreement's common fund will be determined
6 based on the number of hours that he or she worked as a spa treatment provider during the
7 Class Period as compared to all CMs. *Id.* at § 69 ("Settlement Sum"). The Settlement Sum
8 for each individual CM shall be calculated by a numerical formula based on the number of
9 hours that each CM worked as a spa treatment provider during the Class Period ("Qualifying
10 Work Hours") to derive a percentage entitlement for each CM from the Class Distribution
11 Fund. The total of all individual Settlement Awards will be equivalent to the Class Distribution
12 Fund. *Id.* at § 66. If a CM disputes the Qualifying Work Hours identified in their Class Notice,
13 they can provide documentation and/or some explanation of the disputed number of shifts to
14 the administrator. *Id.* at § 58; See also Proposed Notice at § VI, page 3-4.

15 **I. Tax Consequences**

16 Thirty-three percent (33%) of each CM's *pro rata* Settlement Sum payment will be
17 treated as wages in the form of back pay for tax purposes, and sixty-seven (67%) percent of
18 each payment will be treated as penalties, interest and other non-wage payments. *Id.* at §
19 71. This allocation is appropriate because the potential damages arise out of the underlying
20 meal and rest period claims for premiums, but a substantial portion of the potential damages
21 are made up of prejudgment interest on the premium wages, and all of the potential derivative
22 penalties. A CM's *pro rata* share of the twenty-five (25%) of the PAGA payment to be
23 distributed to the Settlement Class will also be treated as penalty. *Id.*; Hoyer Dec. at ¶48.

1 Defendant will pay the employer's share of payroll taxes, such as FICA.²⁴ The Settlement
2 Administrator will issue tax forms to all individuals receiving a payment. *Id.* at §§ 86-87.

3 **J. Estimated Administration Costs**

4 Rust Consulting has provided an estimate of approximately \$9,077 for administration
5 costs (Hoyer Dec. at ¶49, Ex. 2). In the event that Rust does not incur the full \$15,000 of
6 estimated costs permitted by the Settlement Agreement, any costs not incurred will be
7 distributed to the Participating Class Members. (Settlement Agreement at § 84.)

8 **K. Class Counsel's Request for Attorneys' Fees and Costs is Reasonable.**

9 Class Counsel's request for attorneys' fees and costs in the amount of \$331,666.67
10 (33% of the total amount of the settlement) plus up to \$15,000 for reasonable costs incurred²⁵
11 is entirely reasonable when viewed against analogous cases filed in California courts, where
12 awards of similar proportion are not uncommon and can often reach 45%, particularly in
13 cases where the total recovery is under \$1,000,000.²⁶ California Courts, in exercising their

14 _____
24 Settlement Agreement at § 86.

15 25 Settlement Agreement at § 77.

16 26 See, e.g., *Van Vranken v. Atl. Richfield Co.* (N.D.Cal. 1995) 901 F. Supp. 294, 297-98 (citation to 73 district
17 court opinions in which fees awarded ranged from 30 to 50%); *Cristman v. Good Guys, Inc.* (San Diego Super.
18 Ct. 2007) Case No. GIS21929 (33.33% fee award plus costs); *BCI Overtime Cases*, (San Bernadino Super. Ct.
19 2007) J.C.C.P.4280 (same); *Menchyuk v. Beverages & More, Inc.* (Alameda Super. Ct. 2006) Case No.
20 RG05196918 (same); *O'Hara v. Factory 2-U Stores, Inc.* (Alameda Super. Ct. 2002) Case No. 834123-5
21 (same); *Davis v. The Money Store, Inc.* (Sacramento Super. Ct. 2000) Case No. 99AS01716 (same); *In Re Milk*
22 *Antitrust Litigation* (L.A. Super. Ct. 1998) Case No. BC070061 (33.33% award); *In Re Facsimile Paper Antitrust*
23 *Litigation* (S.F. Super. Ct. 1995) Case Nos. 961814, 963201 and 963590 (33.33% award plus costs); *In Re*
24 *Liquid Carbon Dioxide Cases* (S.D. Super. Ct. 1996) J.C.C.P. 3012 (same); *Big Lots Overtime Cases*, JCC
Proceeding No. 4283 (San Bernardino Super. Ct., Feb. 4, 2004) (same); *Barela v. Ralph's Grocery Co.*, No.
BC070061 (Los Angeles Super. Ct., June 5, 1998) (same); *Davis v. The Money Store, Inc.*, No. 99AS01716,
(Sacramento Super. Ct., Dec. 26, 2000) (same); *Ellmore v. Ditech Funding Corp.*, No. SAVC 01-0093 (C.D.
Cal., Sept. 12, 2002) (same); *Miskell v. Auto. Club of S. Cal.* (Orange County Super. Ct., No. 01CC09035, May
27, 2003) (same); *Sconce/Lamb Cremation Cases*, JCC Proceeding No. 2085, (Los Angeles Super. Ct., Mar.
24, 1992) (same). *Birch v. Office Depot, Inc.*, Case No. 06 cv1690 (S.D.Cal. Sept. 28, 2007) (awarding
a 40% fee on a \$16 million wage and hour class action); *Rippee v. Boston Mkt. Corp.*, Case No. 05 cv1359
(S.D.Cal. Oct. 10, 2006) (awarding a 40% fee on a \$3.75 million wage and hour class action); *Wren v. RGIS*
Inventory Specialists, WL 1230826, (N.D.Cal.,2011) (approving attorneys' fee award of just under 42% of
common fund); *Abzug v. Kerkorian* (L.A. Super. Ct. 1990) Case No. CA-000981 (45% award plus costs); *Haitz*
v. Meyer (Alameda Super. Ct. 1990) Case No. 572968-3 (45% award); *Regino Primitivo Gomez, et al. v. H&R*
Gunlund Ranches, Inc., No. CV F 10-1163 LJO MJS, 2011 WL 5884224 (E.D. Cal. 2011) (approving attorneys'
fees award equal to 45% of the settlement fund).

1 broad discretion to determine the appropriate fee pursuant to a fee-shifting statute, may base
2 their calculations on the “lodestar” and “multiplier” methods. See, e.g. *PCLM Group, Inc. v.*
3 *Drexler* (2000) 22 Cal.4th 1084, 1095 (“trial court has broad authority to determine the amount
4 of a reasonable fee,” ordinarily using lodestar/multiplier approach).

5 In this case, given the results expeditiously achieved, the effort expended litigating the
6 case, and the difficulties attendant to litigating this case, the attorneys’ fees requested are
7 reasonable. Hoyer Dec. at ¶¶50-58. There was no guarantee of compensation or
8 reimbursement. *Id.* Rather, counsel undertook all the risks of this litigation on a completely
9 contingent fee basis. *Id.* Defendant’s vigorous and skillful defense further confronted Class
10 Counsel with the prospect of recovering nothing or close to nothing for their commitment to
11 and investment in the case, particularly in the event that Plaintiffs successfully obtained
12 certification of a class only to face scores of motions to compel arbitration claims of individual
13 class members which could erase three years of the four-year limitations period. *Id.*

14 Nevertheless, Plaintiffs and Class Counsel committed themselves to developing and
15 pressing Plaintiffs’ legal claims to enforce the employees’ rights and maximize the class and
16 collective recovery. *Id.* During the litigation, counsel turned away other less risky cases to
17 remain sufficiently resourced for this one. *Id.* The challenges that Class Counsel confronted
18 and the risks they fully absorbed on behalf of the class are precisely the reasons for
19 multipliers in contingency fee cases.²⁷

20 Attorneys who litigate on a wholly or partially contingent basis expect to receive
21 significantly higher effective hourly rates in cases where compensation is contingent on
22

23 ²⁷ See, e.g., *Noyes v. Kelly Servs., Inc.*, 2:02-CV-2685-GEB-CMK, 2008 WL 3154681 (E.D. Cal. Aug. 4, 2008);
24 Posner, *Economic Analysis of the Law*, 534, 567 (4th ed. 1992) (“A contingent fee must be higher than a fee
for the same legal services paid as they are performed... because the risk of default (the loss of the case, which
cancels the debt of the client to the lawyer) is much higher than that of conventional loans”).

1 success, particularly in cases where, as here, the result is uncertain due to conflicting
2 evidence and unclear case law. This does not result in any windfall or undue bonus. In the
3 legal marketplace, a lawyer who assumes a significant financial risk on behalf of a client
4 rightfully expects that his or her compensation will be significantly greater than if no risk was
5 involved (*i.e.*, if the client paid the bill on a monthly basis), and that the greater the risk, the
6 greater the “enhancement.” Adjusting court-awarded fees upward in contingent fee cases to
7 reflect the risk of recovering no compensation whatsoever for hundreds of hours of labor
8 simply makes those fee awards consistent with the legal marketplace, and in so doing, helps
9 to ensure that meritorious cases will be brought to enforce important public interest policies
10 and that clients who have meritorious claims will be better able to obtain qualified counsel.

11 Class Counsel has invested approximately 720 hours into this case to date. *Id.* at ¶55.
12 Counsel estimates that they will invest another 50 to 75 hours from the date that preliminary
13 approval is granted through final approval, judgment, and post-judgment based on their
14 experiences in other class actions. *Id.* at ¶56. Plaintiffs’ Counsel’s hourly rates are
15 reasonable, and the requested fees and costs are supported by contemporaneous time
16 records which will be converted to a task-based lodestar report and summary at the Final
17 Approval stage.²⁸ The requested attorneys’ fees are justified and reasonable, especially in
18 light of the difficulty of the class claims and the potential for motions to compel individual
19 arbitrations upon certification of the class. Furthermore, in Plaintiffs’ experience in State and
20 Federal courts, requests for attorneys’ fees are not reviewed until the Final Approval stage,
21 when the amount of total hours spent on the case includes work responding to inquiries from

22 _____
23 ²⁸ Though a court recently found that billing records constituted confidential and privileged attorney-client
24 communications (*County of Los Angeles Board of Supervisors et al. v. Superior Court* (2015) 235 Cal.App.4th
1154, review granted July 8, 2015), the Court instructed counsel at the most recent case management
conference to include time records with their preliminary approval submission, so class counsel’s hours and
lodestar through November 16, 2016 are attached to the Hoyer Dec. as Exhibit 3.

1 class members and preparing the Final Approval papers.

2 **L. The Proposed Settlement Will Have No Effect on Any Other Cases.**

3 Plaintiffs' are aware of no case pending in any other jurisdiction in which similar claims
4 are asserted on behalf of any PCMs against this Defendant.²⁹

5 **IV. THE COURT SHOULD APPOINT RUST CONSULTING AS THE SETTLEMENT**
6 **ADMINISTRATOR AND APPROVE THE COSTS OF SETTLEMENT ADMINISTRATION.**

7 The settlement contemplates that the parties would jointly select a Settlement
8 Administrator who will be responsible for mailing and re-mailing class notices, processing
9 claim forms and requests for exclusion, calculating settlement awards, preparing reports, and
10 verifying payments. Rust Consulting is well qualified to serve as the Administrator and has
11 administered hundreds of settlements in the state of California alone. The parties nominate
12 Rust Consulting to be the Settlement Administrator and request that the Court preliminarily
13 approve the payment of up to \$15,000 to Rust Consulting to administer the settlement, noting
14 of course that Rust has agreed not to charge for any work not performed, and such leftover
15 funds will be distributed to the Participating Class Members. (Settlement Agreement at § 84.)

16 **V. THE COURT SHOULD SET A SCHEDULE FOR FINAL APPROVAL.**

17 Where a court grants preliminary approval to a class settlement, the court's order must
18 include the time, date and place of the final approval hearing, and any other matters deemed
19 necessary for the proper conduct of a settlement hearing. C.R.C. 3.769(e). The parties
20 respectfully propose the following schedule for the final approval hearing and related events,
21 assuming the Court preliminarily approves the Settlement Agreement:

22 ///

23 ///

24 _____
²⁹ Hoyer Dec. at ¶59.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

24 Days After Preliminary Approval	Mailing of the Notice Package.
45 Days after Mailing of the Notice Package	Opt out Submission Deadline. The last day for PCMs to request exclusion from the class or submit objections.
88 Days after Preliminary Approval	Earliest date for Final Approval hearing. (the earliest Wednesday is March 8, 2017)
14 Days after the Final Effective Date	Deadline for full disbursement of the Settlement to the CMs, Plaintiffs Class Counsel, the Settlement Administrator, and the LWDA.
90 Days after mailing of Settlement Payments	Disbursement of any uncashed funds to <i>Unclaimed Wages Fund</i> ³⁰

VI. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court grant the instant motion in its entirety and preliminarily approve the Settlement Agreement.

Respectfully submitted,

Date: November 18, 2016

HOYER & HICKS



Richard A. Hoyer
Ryan L. Hicks
Attorneys for Plaintiffs

³⁰ The Settlement Agreement provides that any uncashed Settlement Checks be deposited in the PCM's name to the State of California Unclaimed Wages Fund. Settlement Agreement at § 73.

1 **PROOF OF SERVICE**

2 RE: *Thomas, et al. v. Sonoma Mission Inn Mgmt. Co. LLC*, Sonoma County Case
3 No. SCV-257470

4 I declare that I am employed in the City and County of San Francisco, State of
5 California. I am over eighteen years of age and not a party to the within entitled cause. My
6 business address is 4 Embarcadero Center, Suite 1400, San Francisco, California 94111.

7 I served the within:

8 **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING MOTION
9 FOR:**

- 10 (1) **PRELIMINARY APPROVAL OF SETTLEMENT AND PROVISIONAL
11 CERTIFICATION OF SETTLEMENT CLASS;**
12 (2) **APPROVING THE NOTICE OF PROPOSED CLASS SETTLEMENT,
13 APPOINTING SETTLEMENT ADMINISTRATOR AND SETTING FINAL
14 APPROVAL HEARING DATE**

15 To:

16 Coblenz Patch Duffy & Bass LLP
17 Susan K. Jamison
18 Charmaine G. Yu
19 1 Montgomery Street, Suite 3000
20 San Francisco, California 94104

21 on:

22 **November 18, 2016**

23 by dispatching a true copy of items listed above with Western Messenger courier service for
24 immediate, same-day hand delivery.

I declare under penalty of perjury that the foregoing is true and correct, and that this
declaration was executed at San Francisco, California, on the date above.



Ryan L. Hicks