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WYATT COPPERNOLL

SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

WYATT COPPERNOLL on behalf of all Aggrieved Employees and the state of California,

Plaintiff,

vs.

HAMCOR INC. D/B/A DUBLIN TOYOTA, 6450 MOTORS LLC D/B/A DUBLIN HYUNDAI, NISDAT LLC D/B/A DUBLIN NISSAN, CORNELIUS BROS. LLC D/B/A DUBLIN VOLKSWAGEN, TURIN DUBLIN LLC D/B/A DUBLIN FIAT, and DOES 1-25,

Defendants,

Case No. RG16843171
ASSIGNED FOR ALL PURPOSES TO JUDGE BRAD SELIGMAN.
DEPARTMENT 23

CLASS, COLLECTIVE, AND REPRESENTATIVE ACTION

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING MOTION FOR: PRELIMINARY APPROVAL OF SETTLEMENT AND PROVISIONAL CERTIFICATION OF SETTLEMENT CLASS; APPROVING THE NOTICE OF PROPOSED CLASS SETTLEMENT, APPOINTING SETTLEMENT ADMINISTRATOR AND SETTING FINAL APPROVAL HEARING DATE

(SUPPORTING MEMORANDUM AND [PROPOSED] ORDER SUBMITTED CONCURRENTLY HEREWITH)

Date: August 28,2018
Time: 3:00 p.m.
Dept.: 23
Reservation No.: R-1982388

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I. INTRODUCTION

By and through the instant motion, Plaintiff WYATT COPPERNOLL ("Plaintiff") hereby requests that this Court enter an Order: (1) Granting Preliminary Approval of the Settlement Agreement, provisionally certifying a class of: "all persons who worked in California at least one day during the Class Period as a technician paid on a piece-rate basis and/or hourly plus production bonus basis for Hamcor, Inc. d/b/a Dublin Toyota, 6450 Motors LLC d/b/a Dublin Hyundai, Nisdat, LLC d/b/a Dublin Nissan, Cornelius Bros., LLC d/b/a Dublin Volkswagen, and/or Turin Dublin, LLC d/b/a Dublin Fiat" for the purposes of settlement; (2) appointing Plaintiff's counsel as Class Counsel for the purposes of Settlement;[1] (3) Appointing the proposed Settlement Administrator and maximum settlement costs; and (4) Approving the Notice of Pendency of Class Action, Proposed Settlement, and Hearing Date and accompanying opt-out form ("Notice Package") and setting a Final Approval hearing date.[2]

On April 16, 2018, the parties reached an agreement in principal to resolve this litigation. After further negotiations regarding the full terms of the settlement agreement, all parties and counsel had executed the agreement by May 30, 2018.

The opt-out Settlement Agreement encompasses all claims Plaintiff asserts in the operative complaint on behalf of himself and a proposed settlement class of approximately one-hundred fifty-one (151) persons who are or were employed by the Defendant Released Parties as non-exempt technicians at any of the Hamcor family of five Bay Area automobile dealerships and their service centers at any time during the period October 13, 2012 through the date this Court grants preliminary approval of the Settlement (the "Class Period").[3]

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[1] A copy of the fully executed settlement agreement, entitled "STIPULATION AND CLASS ACTION SETTLEMENT AGREEMENT" (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 Exhibits A-B to the Settlement Agreement itself.

[3] Settlement Agreement at §§ B.5 (Class definition) and B.10 (Class Period).

Plaintiff's operative complaint alleges that Defendants failed to provide the Class with compliant meal periods and rest periods, which resulted in other derivative penalties under the Labor Code including unpaid wages and overtime under state and federal law. Plaintiff seeks to recover unpaid missed break premiums, unpaid wages and overtime and resulting derivative penalties on behalf of himself and all other similarly situated putative class members ("PCMs") employed by Defendants during the Class Period, including derivative penalties under the Private Attorneys General Act ("PAGA," Labor Code § 2698, *et seq.*).

Plaintiff has agreed to settle his claims and those of the putative class members in exchange for Defendants' agreement to pay the class $510,000, including the costs of administering the Settlement Agreement, any enhancement awards to the respective Plaintiffs, and reasonable attorneys' fees and costs. The Settlement Agreement satisfies all the criteria for preliminary class settlement approval under California Law and falls well within the range of what constitutes a reasonable compromise for claims of this nature and size.

<u>II.</u> <u>PROCEDURAL HISTORY AND SETTLEMENT NEGOTIATIONS</u>

On October 13, 2016, Plaintiff filed a hybrid Fair Labor Standards Act, 29 U.S.C. § 201, *et. seq.* ("FLSA") collective action and Rule 23 class action (*i.e.*, the "Federal Action," as defined below) in the U.S. District Court, Northern District of California against Defendant Hamcor, Inc. ("Hamcor") on behalf of all current and former non-exempt technicians who were paid on a piece rate and/or hourly plus production bonus basis and employed by Defendants from October 13, 2012 to the present for the putative class and October 12, 2013 to the present for the putative collective.[4] The Complaint alleged: (1) failure to pay regular and overtime wages for all hours worked under the FLSA; (2) failure to pay minimum wages under the Labor Code; (3) failure to pay overtime wages under the Labor Code; (4) failure to authorize, permit, or make available meal periods and rest periods under the Labor Code; (5) failure to timely pay final wages under the Labor Code;

[4] Hoyer Dec. at ¶5.

(6) failure to provide accurate itemized wage statements under the Labor Code; and (7) violations of the California Business and Professions Code. *Id.* That same day, Plaintiff provided notice (the "PAGA Notice") to Hamcor and the Labor Workforce Development Agency ("LWDA") of his intent to seek penalties pursuant to the PAGA based on those allegations. *Id.* Plaintiff subsequently filed a First Amended Complaint, adding a cause of action for failure to compensate for non-productive time under Labor Code 226.2. *Id.* The First Amended Complaint, filed on February 7, 2018, was the operative complaint in the Federal Action. Hamcor answered Plaintiff's First Amended Complaint, denying all material allegations and asserting numerous affirmative defenses. *Id.*

On November 16, 2016, Hamcor filed a motion to compel Plaintiff to arbitrate his claims on an individual basis, or in the alternative stay the action pending resolution of *Morris v. Ernst & Young* (9th Cir. 2016) 834 F.3d 975 cert. granted (U.S. Jan. 13, 2017) (No.16-300) ("*Morris*") by the U.S. Supreme Court ("MTCA"). *Id.* at ¶6. On January 17, 2017, the Federal Court denied the MTCA. *Id.* at ¶_. However, recognizing the retroactive impact the U.S. Supreme Court's decision in *Morris* would have on the MTCA, the Federal Court decided to limit discovery to Named Plaintiff's individual claims until *Morris* was decided. *Id.* The Hamcor appealed the Federal Court's decision to the Ninth Circuit Court of Appeals where it has been stayed pending resolution of *Morris*. *Id.*[5]

Following the expiration of the deadline for the LWDA to respond to the PAGA Notice, on December 20, 2016, Plaintiff filed the instant State Action seeking PAGA penalties for the same Labor Code violations alleged in the Federal Action. Plaintiff initially sought to represent other aggrieved technicians employed at the Defendants' service centers. *Id.* at ¶7. Hamcor answered Plaintiff's Complaint, denying all material allegations and asserting numerous affirmative defenses. *Id.*

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[5] On May 21, 2018, the U.S. Supreme Court issued its opinion in *Epic Systems Corp. v. Lewis* (May 21, 2018) 138 S.Ct. 1612, -- U.S. -- , which reversed *Morris* holding that class action waivers in employment arbitration agreements must be enforced under the Federal Arbitration Act, and neither the Federal Arbitration Act's saving clause nor the National Labor Relations Act suggest otherwise.

Thereafter the parties engaged in an extensive pre-certification, voluntary exchange of information, including the exchange of documents and voluminous personnel and payroll data. The Parties additionally each conducted independent investigations and fact-finding, including the deposition of Defendant's Person Most Knowledgeable. *Id.* at ¶8.

Prior to the mediation, Defendants provided summary data for each of the 151 class members (as of the mediation) regarding the locations at which they worked, start and end date worked, base hourly and piece rates paid, pay periods, total clocked hours, total "flagged hours,"[6] total compensation received, and total days worked during the class period up through just prior to the mediation. *Id.* at ¶9. Defendants also provided the full timekeeping, payroll, and "flag" records for twelve PCMs to be used to audit the summary data, and an agreed upon adequate sample of the rest of the class. *Id.* During the litigation Defendants also produced documents regarding their asserted meal and rest period, payroll, and timekeeping policies in effect during the Class Period. *Id.*

Plaintiff compiled the data produced by Defendants, and estimated damages on all claims for each of the 151 PCMs for whom data were provided during the complete Class Period. *Id.* at ¶10. Plaintiff's counsel has obtained sufficient discovery to evaluate the likelihood of success on the merits and assess the potential risks facing Plaintiff and the putative class. *Id.*

On April 16, 2018, the parties attended an exhaustive full-day mediation session with Michael J. Loeb, Esq., a highly-respected mediator who specializes in wage and hour class mediations. *Id.* at ¶13. Plaintiff submitted a mediation brief summarizing the evidence that counsel had marshalled and synthesized, the state of the applicable law, and potential class-wide exposure. *Id.* Defendants submitted their own brief arguing that no class could be certified and that they would also prevail on the merits against the individual Plaintiff and any other PCMs. *Id. at* ¶14*.* With Mediator Loeb's assistance, the Parties agreed, subject to dismissal of the Federal Action without prejudice and approval by this Court, to the

[6] "Flagged Hours" indicate the time that a technician was logged into Defendants' computer systems and actually performing services. *Id.* at ¶9.

Settlement Agreement of the Actions, which was ultimately memorialized and executed on May 30, 2018. *Id.*

Upon executing the Settlement Agreement, on May 31, 2018, Plaintiff filed a voluntary dismissal the Federal Action without prejudice, which the Federal Court entered on June 11, 2018. *Id.* at ¶15. The parties then stipulated to the filing of the Second Amended Complaint ("2AC") in this matter, the operative complaint, which now includes all of the claims asserted previously in the Federal Action. This Court granted that stipulation and Plaintiff filed the 2AC on June 22, 2018. *Id.* Defendants then filed a motion to dismiss their appeal in the Ninth Circuit of the MTCA, which was granted on June 29, 2018. *Id.*

Plaintiff and his counsel are of the opinion that the Settlement Agreement is well within the range of reasonableness and is in the best interest of the proposed settlement class in light of all known facts and circumstances, including the risk of significant delay, defenses asserted by Defendants, and potential appellate issues.

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

A. Settlement Class Size and Determination

Pursuant to C.R.C. 3.769(d), an order certifying a provisional settlement class is appropriate. The proposed settlement class is sufficiently numerous, because Defendants have identified approximately 151 class members based on their personnel records. Hoyer Dec. at ¶16. It is also undisputed that Defendants applied the same nominal rest and meal period policies, payroll practices and meal and break policies to all of the PCMs throughout the class period, satisfying the commonality requirement. *Id.* at ¶17. It is similarly undisputed that Plaintiff's claims are typical of those of the PCMs. *Id.* at ¶18. Plaintiff is aware of no conflicts among Plaintiff and the class (*id.* at ¶19), and Plaintiff's counsel are experienced wage and hour class action attorneys and have litigated this matter in the best interests of the class (*id.*), satisfying the adequacy requirement. Defendants do not dispute the provisional certification of a class for settlement purposes.

B. <u>This is a Non-Reversionary Common Fund Settlement.</u>

The non-reversionary Settlement Agreement provides that Defendants will pay a total of $510,000 to Plaintiff and other Participating Class Members ("CMs") who do not opt-out of the class, including an enhancement award to the Plaintiff in an amount up to $10,000, attorneys' fees up to 1/3 of the Settlement Fund $170,000 plus their reasonable costs incurred, claims administrator's fees and expenses up to $15,000, and $10,000 allocated to the PAGA claims to be divided 25% to the class (to be distributed on a *pro rata* basis) and 75% to the California Labor Workforce Development Agency ("LWDA").[7] Within fourteen (14) days of the Effective Date of the Court's Final Approval of the Settlement Agreement and those deductions, Defendants will fund provide the Settlement Fund to the administrator. *Id.* at § E.5. CMs who have not opted out of the settlement will be sent a *pro rata* share of the remaining settlement fund on or before the Settlement Proceeds Distribution Deadline based on the number of workweeks that each CM worked during the Class Period while employed by Defendants.[8]

The sum of any settlement checks returned as undeliverable or otherwise un-cashed within 90 days after being mailed will be redistributed among the Participating Class Members who did timely cash their checks if the total amount of uncashed checks is $5,000 or more. *Id.* at § E.5(b). If the uncashed checks total less than $5,000 (or if there is a redistribution and any of the second set of checks are uncashed) such funds will be distributed in accordance with the requirements of CCP § 384 (which were revoked after this settlement was reached), with 25% being transmitted to the State Treasury for deposit in the Trial Court Improvement and Modernization Fund, 25% being transmitted to the State Treasury for deposit in the Equal Access Fund of the Judicial Branch, and 50% being transmitted to a non-profit organization to projects that will either: benefit the class or similarly situated persons, or promote the law consistent with the objectives and purposes

[7] Settlement Agreement at §§ D.1(a-g).

[8] *Id.* at §§ B.39 (Settlement Proceeds Distribution Deadline), B.38 (*pro rata* calculation; "Settlement Percentage"). Assuming the Court approves all maximum deductions from the Gross Settlement Fund, the Maximum Amount for Payments to Participating Settlement Class Members will be $292,500, resulting in an average payment of approximately $1,937.08 per Participating Class Member (assuming 151 class members).

of the underlying Class Action. The parties propose to the Court that the final 50% of any unclaimed funds be transmitted to Legal Aid at Work as a *cy pres* beneficiary.[9]

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

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

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

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

> [A] presumption of fairness [of a proposed class action settlement] exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and 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.

Kullar v. Foot Locker Retail Inc. (2008) 168 Cal.App.4th 116, 128 (*quoting Dunk, supra*, at 1801); *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 799. However, the *Kullar* and *Clark* courts also noted that a court must be independently satisfied that the consideration being received (here $510,000) is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation. *Clark, supra,* at 452, *quoting Kullar, supra,* at 129.

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

That the settlement was reached through arm's-length negotiations is exemplified by the nearly two years of hotly contested litigation in parallel actions and motion practice and that the proposed settlement was achieved only with the assistance of an experienced

[9] *Id* (the parties note that there is a typo in the last sentence of § E.5(b) that refers to The Impact Fund, but should instead refer to Legal Aid at Work. Legal Aid at Work's qualifications to be designated as the *cy pres* beneficiary of this proposed settlement are attached as Exhibits 3 and 4 to the Hoyer Dec. *See also https://legalaidatwork.org/our-mission-and-how-we-work/*).

mediator. Defendants, as evidenced in their mediation brief, other moving and opposition papers, and case management conference statements in both cases, believed and maintained that a class could not be certified.[10] Furthermore, the parties legitimately disputed various defenses raised by Defendants, who were faced with the prospect of lengthy and expensive litigation against experienced counsel and a lengthy potential trial, and the spectre of appellate proceedings regarding the use of representative testimony at trial. Furthermore, the parties resolved the case before the Supreme Court had decided *Epic Systems* and reversed *Morris,* which would have ultimately precluded litigation of the class claims altogether.

On the other hand, while Plaintiff's counsel remain ultimately confident in the merits of their legal arguments, Plaintiff was put in the position of negotiating a settlement at this juncture with a likely reversal of and unclear case law regarding the propriety of the use of representative testimony with respect to the PAGA claims possibly facing years of litigation and costs which could exceed any recovery for the class in order to achieve a verdict which still may not have been collectible for many years due to potential appellate issues, and/or uncertainties regarding the precise amount of damages due to each PCM. Similarly, Plaintiff's counsel was also faced with the uncertainty as to *Morris,* which was later reversed and would have precluded the prosecution of the class claims. It was agreed upon by Plaintiff and his counsel that a settlement at this juncture in the sum agreed upon was in the best interests of the class. Hoyer Dec. at ¶20.

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

A court must "receive and consider enough information about the nature and magnitude of the claims being settled, as well as the impediments to recovery, to make an independent assessment of the reasonableness of the terms to which the parties have agreed." *Kullar, supra,* at 133. Here, the parties have engaged in substantial discovery regarding certification, merits, and damages issues. Plaintiff's counsel analyzed the data

[10] *See, generally,* all Case Management Conference Statements filed to date.

provided for all PCMs and assessed the maximum total value of the non-PAGA class claims to be just under $2.1 million. Hoyer Dec. at ¶11.[11]

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

i. Rest and Meal Period Claims[12]

Plaintiff alleges that Defendants never trained or otherwise informed the PCMs of their right to take off-duty ten-minute rest periods during their shifts, which averaged well over six hours per day. Defendants also never communicated any corporate rest period policy applicable to the PCMs upon hire or thereafter that actually applied to them. Indeed, in Defendants' initial discovery responses, their prior counsel indicated that there were no documented rest period policies whatsoever. While there a few written policies related to rest and meal periods were discovered and produced by current counsel that may or may not have been provided upon hire, the PMK conceded that they were inaccurate as to Technicians.

We analyzed the timekeeping and service data ("flag records") for the representative sample to determine when there were time periods of at least ten minutes between services performed during the PCMs' shifts. Although it appears that such periods between services

[11] Including the estimated $12,946,000 in duplicative PAGA penalties, including nearly $7 million in penalties for inaccurate wage statements under 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 $15,248,561.17. Defendant asserted that its maximum potential liability was only a fraction of that amount, though it maintained that Plaintiff would recover nothing. Based on the maximum potential exposure, each PCM could have in theory recovered $13,269.50 for the non-PAGA claims, and $134,895.46 in PAGA penalties, though 75% of those would have gone to the state, leaving $33,723.87 to the PCM.

[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 ¶¶21-53 of the Hoyer Dec. That analysis is summarized here for the sake of brevity.

rendered could have provided enough time for PCMs to take breaks, they may have been performing other services for which no flag rate is provided, like multi-point inspections. Nevertheless, there were no such gaps in the service schedule of the representative sample such that both rest periods could have been taken during approximately 36.38% of the shifts, resulting in rest period violations.

Defendants also assert that in December 2016, they made a number of back payments for violations of Labor Code § 226.2 to its then-current employees, though the back payments were limited only to work performed during 2016.

Just as with rest periods, Defendants' PMK conceded at deposition that the written meal period policies were not applicable to the PCMs with respect to scheduling, and that no meal periods were ever scheduled. Again, whether a PCM could take a meal period was determined by what services they were assigned by the dispatcher, and they could not refuse a service and expect to keep their job. The PMK testified that PCMs were required to clock out for 30 minutes no matter what, or they would be reprimanded, and it appears that many PCMs did so, regardless of whether they had actually received a break. And if a PCM did not clock out for a thirty-minute meal period, they were not paid any premium. Instead, a supervisor often went through a PCM's timesheets (which repeatedly happened to Plaintiff) at the end of a pay period and inserted meal periods of lengthy and varying lengths such that the daily hours worked did not exceed 8 hours exactly.

Our review of the representative sample data showed overwhelmingly that whenever a PCM clocked out for a meal period, there was a corresponding gap between services being performed. Our review of the data also shows that meal periods were not provided before the end of the fifth hour of work, or were less than 30 minutes, during 44.96% of shifts in the sample, yet Defendant has conceded that no premiums were ever paid.

Defendants assert that there was enough time for PCMs to take a ten-minute rest period, and that PCMs often had periods of "down time" during their shifts during which it was possible for them to take rest periods. It further asserted that its meal and rest period policies were at all times in compliance with applicable law, and any missed breaks were

due to the PCMs' choice not to take such breaks. They also argued that rest and meal periods were actually provided to the PCMs a majority of the time, which appears to be accurate based on Plaintiff's review of the sample data.

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

Furthermore, proving up individual damages would likely require costly representative testimony analyzed by experts on both sides, and Defendants would likely dispute the application of *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. 338, and *Duran v. U.S. Bank Nat. Assn.* (2014) 59 Cal.4th 1 regarding any evidentiary showing and Trial Plan with respect to both liability and damages. Defendants would undoubtedly move for class decertification thereafter, making appellate proceedings almost certain regardless of which side prevailed at trial.[13] Plaintiff estimated that Defendants' potential exposure was $537,224.32 for the rest period violations and $663,925.88 for the meal period claims. Hoyer Dec. at ¶11. Plaintiff's counsel were aware of these risks and took them into account when discounting the claims for settlement purposes. *Id.* at ¶¶30, 38.

ii. Unpaid Wages and Overtime

Plaintiff also asserts that Defendants committed overtime violations to the extent that meals were falsely inserted into timekeeping records, or when clocked meal periods were less than 30 minutes yet still unpaid. However, Plaintiff was precluded from conducting class discovery on this issue and the inquiry was highly individualized as to the timing of each meal period made class certification on the issue highly unlikely. Hoyer Dec. At ¶39.

[13] In light of *Wal-Mart*, and 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 Plaintiff would be permitted to use representative testimony at trial. *But see Tyson Foods, Inc. v. Bouaphakeo* (2016) __ U.S. __, 136 S.Ct. 1036.

Shortly before the mediation, Plaintiff discovered that at Defendants had implemented an alternative work schedule (AWS) of but was unable to locate any documents regarding that AWS on the appropriate state agency website. Plaintiff estimated that the value of those AWS claims was roughly $600,000, but would pose a significant problem at certification, as the AWS was implemented after Plaintiff's employment terminated, making his ability to represent the class on those claims unlikely due to typicality problems. *Id.* at ¶40.

Plaintiff's counsel were aware of these risks and took them into account when discounting the claims for settlement purposes. *Id.* at ¶41.

iii. Inaccurate Wage Statement Claims

Plaintiff argues and maintains that the testimony and evidence show that Defendants' wage statements did not reflect the premium wages that PCMs were owed for missed or otherwise noncompliant breaks, and that they were also inaccurate on other bases as well. *Id.* at ¶42. Using the data provided by Defendants, the maximum value of the inaccurate wage statement claim was approximately $314,550.00. *Id.* at ¶11. The parties have vigorously disputed whether Plaintiff and the other CMs were "injured" as a result of any inaccurate wage statements. *Id.* at ¶43.[14] Plaintiff's counsel were aware of these risks and took them into account when discounting the claims for settlement purposes. *Id.* at ¶44.

iv. Waiting Time Penalties

Plaintiff asserts that any failure to pay the premium wages for a missed meal or rest period or unpaid wages, including overtime, necessarily exposed Defendants to liability for waiting time penalties. *Id.* at ¶¶45-47. Based on the data provided by Defendants, Plaintiff

[14] We also note that there is one recent California case, that asserts in dicta that claims for inaccurate wage statement and 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 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 available for wage payments under section 226.7….")

estimated Defendants' exposure for the Waiting Time Penalties to be approximately $488,264.91. *Id.* at ¶11. Plaintiff's counsel were aware of these risks and took them into account when discounting the claims for settlement purposes. *Id.* at ¶47.

v. PAGA Claims[15]

Plaintiff also asserts that the underlying alleged meal and rest period violations gave rise to penalties for violations of Labor Code §§ 204, 226.3, 210, 512, 1174, and 1174.5 available under the Private Attorneys' General Act. *Id.* at ¶48. Defendants contend that no claim for PAGA penalties of any nature is valid. The PAGA claims were at issue and were resolved as a part of the overall settlement of the case. In such cases, California Courts have held that none of the proceeds of a settlement must necessarily be allocated and distributed to the LWDA as settled PAGA penalties. *Nordstrom Commissions Cases* (2010) 186 Cal.App.4th 576, 589.[16]

Notwithstanding Defendants' asserted defenses based on the underlying meal and rest period and unpaid wages claims, the case law regarding the wholly-derivative and duplicative PAGA claims remains inconsistent at best, and downright murky and conflicted at worst. The asserted § 226.3 penalties sought under PAGA derive from the same conduct for which Plaintiff seeks penalties under § 226, which itself is derivative of the missed break claims, and all of the asserted PAGA penalties are derivative of other underlying claims. Courts have discretion to reduce any amount of penalties awarded under PAGA, and there is currently no uniform guidance or authority available to predict whether this Court would award all of the PAGA penalties, deem them to be wholly duplicative, or something in between.[17] In counsel's experience, Plaintiffs always calculate potential PAGA penalties,

[15] See ¶¶48-53 for a further in-depth discussion of the PAGA claims, with citations to relevant authority which are summarized here for the sake of brevity.

[16] Plaintiff submitted the proposed settlement agreement along with these moving papers to the LWDA on the same date that they file the instant motion through the LWDA's new online submission system. Hoyer Dec. at ¶52.

[17] 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.*, (N.D. Cal. 2012) 2012 WL 2236752 at *17. Moreover, even assuming Plaintiff's 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.

but they are given little weight in settlement negotiations, due to an expectation that a Court would, like the Labor Commissioner, refuse to "stack" duplicative penalties and focus instead on the underlying violations. Hoyer Dec. at ¶51. Plaintiff's counsel were aware of these risks and took them into account when discounting the claims for settlement purposes. *Id.* at ¶53.

vi. *Morris v Ernst & Young* and the PCMs' Arbitration Agreements.

All PCMs executed arbitration agreements that contained a class and representative action waiver. *Id.* at ¶54. Though Plaintiff successfully repelled Defendants' MTCA based on *Morris*, at mediation Plaintiff provided a significant discount to all claims due to the potential that the U.S. Supreme Court would reverse *Morris* and compel Plaintiff's individual claims to arbitration, dismiss all class claims asserted, and then this Court would stay all proceedings until the individual arbitration was resolved. *Id.* As a condition of the mediation, the parties agreed that any settlement reached would remain if and when *Morris* was decided. Plaintiff's discount was prescient as weeks later the high Court indeed reversed *Morris,* which would have rendered the underlying claims in this case without any settlement value had the parties not settled when they did. *Id.*

3. Class Counsel is Experienced and Endorses the Settlement.

Experienced counsel, operating at arm's length, have weighed the foregoing factors and endorse the proposed settlement. Plaintiff's counsel has experience not only in class actions and employment litigation, but specifically in wage and hour class actions. *Id.* at ¶¶1-4. Plaintiff's counsel is experienced and qualified to evaluate the class claims and the viability of the defenses. *Id.* The recovery for each participating class member will be reasonable, given the risks inherent in litigation, the defenses asserted, the unsettled nature of wage and hour and class action law with respect to representative testimony and penalties under the PAGA, and the risk that the Supreme Court would (and did) reverse *Morris* and all of the class claims could be compelled to individual arbitrations.[18] This

[18] Hoyer Dec. at ¶¶55-56 (further testimony regarding the value of the settlement).

settlement is fair, adequate and reasonable, and in the best interests of the proposed settlement class.

4. No Objections Can Be Made Until the Final Approval Hearing.

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

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

Pursuant to the Settlement Agreement, the CMs would release Defendants and their corporate parents, subsidiaries and affiliates from any claims which could have been asserted based on the allegations of the operative complaint, i.e. claims based on meal and rest period violations during the Class Period.[19] The settlement does not ask the Court to enjoin CMs from filing related claims until Final Approval.

E. The Plaintiff's Proposed Enhancement Award is Fair and Reasonable.

Named Plaintiffs in class action litigation are eligible for reasonable service awards. *See Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 977.[20] The settlement agreement provides for a Class Representative Payment of up to $10,000 to Plaintiff subject to the

[19] Settlement Agreement at § B.31 ("Released Claims"). Specifically, the "Released Claims" are: "Any and all Claims arising on or before the date on which the State Court enters an order of preliminary approval regarding this Settlement that relate to, are based on, or arise out of the facts and Claims alleged or litigated in the Actions including, but not limited to, claims for failure to pay compensation for all hours worked, failure to pay for all non-productive time, failure to provide meal periods, failure to authorize and permit rest periods, failure to pay for rest breaks, failure to pay straight time and overtime (as a result of the Alternative Workweek Schedule), failure to pay minimum wage, failure to comply with wage statement requirements, waiting time penalties, violations of IWC Wage Orders and Labor Code sections 200, 201, 201.5, 202, 203, 204, 210, 221, 222, 223, 226, 226.2, 226.2, 226.7, 510, 512, 518, 558, 1174, 1174.5, 1175, and 1194, violations of the federal Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.*, 211, and its regulations, and violations of Business and Professions Code sections 17200, *et seq.* and Labor Code sections 2698, *et seq.*" Notably, the release is narrowly tailored to the facts asserted in the operative complaint.

[20] *See, e.g. Castellanos v. The Pepsi Bottling Group,* No. RG07332684 (Alameda Super Ct., Mar. 11, 2010) (award of $12,500); *Novak v. Retail Brand Alliance, Inc.,* No. RG 05-223254 (Alameda Super. Ct., Sept. 22, 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).

Court's approval, in recognition of their efforts and work in prosecuting the class action.[21] If approved, the $10,000 enhancement award would constitute .0196% of the total Settlement Fund. In counsel's experience, the enhancement awards will be reviewed at the Final Approval stage, and Plaintiff will submit a declaration from Plaintiff at that time which details the time he put into the case, and the risks that he faced in doing so.

F. <u>The Obligations Placed Upon PCMs Are Reasonable and Clearly Explained in the Notice Package.</u>

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

G. <u>Method of Notice.</u>

California law vests the Court with broad discretion in fashioning an appropriate notice program so long as it satisfies all due process requirements. Civil Code § 1781; *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 970-974; C.R.C. 3.769. The actual form and contents of the notice are within the Court's discretion. *Wershba v. Apple Computer* (2001) 91 Cal.App.4th 224, 251.

The parties have drafted a Class Notice document based upon the general form proposed by the Federal Judicial Center and in "Plain English," and have incorporated information discussed in the Court's guidance documents for class settlements and notices available on the Court's website. Plaintiff's counsel have utilized this same general format in multiple Class Notices approved by Courts in California. The notice explains to the PCMs the meaning and nature of the action and the proposed settlement class, the key terms of provisions of the Settlement Agreement, the manner in which payments to PCMs will be calculated, the minimum estimated amount that a PCM will receive per workweek for the Defendants during the class period if they do not opt out of the class, the number of

[21] Settlement Agreement at § B.13.

workweeks that the PCM worked during the Class Period, the proposed amounts of attorneys' fees, the Plaintiff's proposed enhancement award, the time, date and place of the Final Approval Hearing (once set by the Court), and the procedures and deadlines for requesting exclusion from the Class and/or objecting to the settlement.

Within twenty-one (21) days of this Court granting Preliminary Approval of the Settlement Agreement, Defendants will provide the Class List to the proposed settlement administrator, CPT Group (http://www.cptgroup.com/).[22] The administrator will then perform a Reasonable Address Verification Measure, or "skip trace" to obtain the most current mailing addresses of the PCMs. *Id.* at § E.1(c). No later than ten days following receipt of the information above, the administrator will send the PCMs by First-Class U.S. Mail the Notice Package. *Id.* at § E.1(a). The Opt Out Period will last sixty (60) days from the date Notice is mailed. *Id.* (Addendum) at § B.43 (defining "Opt Out Period"). A copy of the Notice Package will also be available on Class Counsel's website. Plaintiff is unaware of any method available to provide greater notice to the PCMs. Assuming the Court grants final approval of the Settlement, class members will be mailed a Notice of Final Approval providing notice of same. *Id.* § F.8.

H. <u>Explanation of Settlement Payment Calculations and Procedures</u>

A CM's *pro rata* share of the Settlement Agreement's common fund will be determined based on the number of weeks that he or she worked as a PCM during the Class Period as compared to all CMs. *Id.* at §§ B.38 ("Settlement Percentage"). The total of all individual Settlement Awards will be equivalent to the Net Settlement Fund. *Id.* at § B.24. If a CM disputes the Weeks Worked identified in their Class Notice, they can provide documentation and/or some explanation of the disputed number of shifts to the administrator. *Id.* at § E.1(e); *See also* Proposed Notice at p. 4.

[22] Settlement Agreement at § E.1(a-g) (notice procedures). The Class List includes: name and Last Known Address, Social Security number, and number of weeks worked.

I. Cy Pres Beneficiary Process

This Settlement Agreement was reached prior to the July 1, 2018 revocation of the recent amendments to CCP § 384, and tracks the requirements of that recently revoked amendment. In the event that there are uncashed checks that total less than $5,000 after the 90 days for cashing them has expired, then the residue will be distributed as follows:[23] 25% being transmitted to the State Treasury for deposit in the Trial Court Improvement and Modernization Fund, 25% being transmitted to the State treasury for deposit in the Equal Access Fund of the Judicial Branch, and 50% being transmitted to a non-profit organization—the parties propose Legal Aid at Work as the *cy pres* beneficiary of this settlement.[24] If the total amount of uncashed checks is $5,000 or above, there will be a redistribution of the uncashed funds to the Participating Class Members who did cash their checks, and if any of those redistributed checks are uncashed, then any uncashed residue will be similarly distributed as described above. *Id.*

J. Tax Consequences

As for the settlement payments, thirty-three percent (33%) of each CM's *pro rata* Settlement Sum payment will be treated as wages in the form of back pay for tax purposes, thirty-three percent (33%) will be treated as interest, and thirty-four percent (34%) percent of each payment will be treated as penalties, interest and other non-wage payments. *Id.* at § D.3. This allocation is appropriate because the potential damages arise out of the underlying meal and rest period claims for premiums, but a substantial portion of the potential damages are made up of prejudgment interest on the premium wages, and all of the potential derivative penalties. A CM's *pro rata* share of the twenty-five (25%) of the PAGA payment to be distributed to the Settlement Class will also be treated as penalty. *Id.;* Defendants will pay the employer's share of payroll taxes, such as FICA. *Id.* The Settlement Administrator will issue tax forms to all individuals receiving a payment. *Id.* at § D.3(b).

[23] Settlement Agreement at § E.5(b).

[24] Attached as Exhibits 3-4 to the Hoyer Dec. are documents provided by Legal Aid at Work which describe their qualifications to be designated as the *cy pres* beneficiary of this class settlement.

K. Estimated Administration Costs

CPT Group has provided an estimate of approximately $11,200 for administration costs (Hoyer Dec. at ¶49, Ex. 2). In the event that Rust does not incur the full $15,000 of estimated costs permitted by the Settlement Agreement, any costs not incurred will be distributed to the Participating Class Members. (Settlement Agreement at § D.1(d)).

L. Class Counsel's Request for Attorneys' Fees and Costs.

Class Counsel seeks fees in the amount of $170,000 (one-third of the total amount of the settlement) plus reasonable costs incurred,[25] which will result in a negative multiplier to their lodestar which substantially exceeds the amount requested. Plaintiff's counsel will address that request at the final approval stage, as is counsel's experience with the Alameda County Complex Litigation departments.

M. The Proposed Settlement Will Have No Effect on Any Other Cases.

Plaintiff is aware of no case pending in any other jurisdiction in which similar claims are asserted on behalf of any PCMs against these Defendants.[26]

IV. THE COURT SHOULD APPOINT CPT GROUP AS THE SETTLEMENT ADMINISTRATOR AND APPROVE THE COSTS OF SETTLEMENT ADMINISTRATION.

The settlement contemplates that the parties would jointly select a Settlement Administrator who will be responsible for mailing and re-mailing class notices, processing claim forms and requests for exclusion, calculating settlement awards, preparing reports, and verifying payments. CPT Group is well qualified to serve as the Administrator and has administered hundreds of settlements in the state of California alone. The parties nominate CPT Group to be the Settlement Administrator and request that the Court preliminarily approve the payment of up to $15,000 to CPT Group to administer the settlement, noting of course that CPT has agreed not to charge for any work not performed, and such leftover funds will be distributed to the Participating Class Members. (Settlement Agreement at § D,1(d).)

[25] Settlement Agreement at § D.1(a).
[26] Hoyer Dec. at ¶¶61-68.

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

Where a court grants preliminary approval to a class settlement, the court's order must include the time, date and place of the final approval hearing, and any other matters deemed necessary for the proper conduct of a settlement hearing. C.R.C. 3.769(e). The parties respectfully propose the following schedule for the final approval hearing:

31 Days After Preliminary Approval (9/28/18)	Mailing of the Notice Package.
60 Days after Mailing of the Notice Package (11/27/18)	Opt out Submission Deadline. The last day for PCMs to request exclusion or submit objections.
112 Days after Preliminary Approval	Earliest date for Final Approval hearing. (the earliest Tuesday is 12/18/18)[27]
10 Days after the Final Effective Date	Full Disbursement of the Settlement Fund to the CMs, Counsel, the Administrator, and the LWDA Deadline for transfer of the Settlement Fund to the Administrator
90 Days after mailing of Settlement Payments	Redistribution of uncashed funds (if $5,000 or more), or disbursement of uncashed funds per CCP § 384

VI. CONCLUSION

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

Respectfully submitted,

Date: July 13, 2018

HOYER & HICKS

Richard A. Hoyer
Ryan L. Hicks
Attorneys for Plaintiff
WYATT COPPERNOLL

[27] Motion for Final Approval, Attorneys' Fees and Enhancement Awards filed no later than 12/11/18.

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PROOF OF SERVICE BY EMAIL

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

NOTICE OF MOTION AND MOTION FOR: PRELIMINARY APPROVAL OF SETTLEMENT AND PROVISIONAL CERTIFICATION OF SETTLEMENT CLASS; APPROVING THE NOTICE OF PROPOSED CLASS SETTLEMENT, APPOINTING SETTLEMENT ADMINISTRATOR AND SETTING FINAL APPROVAL HEARING DATE

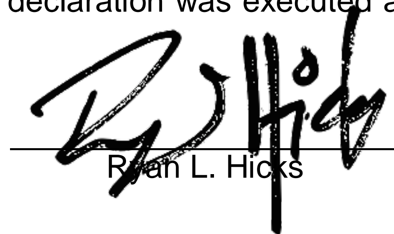
to:

Joshua Cliffe
Perry Miska
Littler Mendelson
333 Bush Street, 34th Floor
San Francisco, CA 94104
jCliffe@littler.com
PMiska@littler.com
Bpalomo@littler.com

on:

JULY 13, 2018

BY EMAIL: I served the document(s) on the person(s) listed above by emailing them pursuant to the parties' written e-service agreement. 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