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CORAL MCQUEEN and FELICIA TREVINO

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF NAPA

CORAL MCQUEEN and FELICIA TREVINO, individually and on behalf of all others similarly situated,

Plaintiff,

v.

ODD FELLOWS HOME OF CALIFORNIA, a California corporation, and DOES 1-100,

Defendants.

Case No. C-26-64176

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Assigned to the Honorable Diane M. Price

Date: August 21, 2015
Time: 8:30 a.m.
Place: Dept. F

TO EACH PARTY AND TO EACH PARTY'S ATTORNEY OF RECORD: NOTICE IS HEREBY GIVEN that, on August 21, at 8:30 a.m., or as soon thereafter as counsel may be heard, in Department F of the above-entitled Court located at 1111 Third Street, Napa, California, 94559, Plaintiffs will move for an order (1) conditionally certifying the Settlement Class, (2) approving the form and method of Notice, (3) appointing David Harris of North Bay Law Group and James Rush of the Law Offices of James D. Rush as Class Counsel (4) approving Plaintiffs as the Class Representatives (5) appointing a Claims Administrator; and (6) approving the proposed mechanism for receiving and dealing with claims and notices of election to opt out of the settlement. The Motion will be made and based upon this Notice of Motion; the Declaration of David S. Harris in Support of Plaintiffs' Motion for Conditional Certification of Settlement Class and Preliminary Approval of Settlement, filed and served herewith, as well as all of the exhibits attached thereto; all of the pleadings, papers, and documents contained in the file of the within action; and such further evidence and argument as may be presented in support at or before the determination of the Motion.

DATED: July 29 2015

NORTH BAY LAW GROUP
LAW OFFICES OF JAMES D. RUSH

David S. Harris
James D. Rush
Attorneys for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction.

This Court should grant preliminary approval of the Joint Stipulation of Settlement and Release ("Settlement") entered between Plaintiffs Coral McQueen and Felicia Trevino ("Plaintiffs"), on behalf of the absent Class Members whom they seek to represent, on the one hand, and Defendant Odd Fellows Home of California ("Defendant" or "Odd Fellows"), on the other hand. This Motion requests that the Court grant preliminary approval of the $729,700 Settlement, finding that there is a *prima facie* showing that it is fair, adequate, and reasonable. The Motion requests that the Court (1) conditionally certify the Settlement Class, (2) approve the form and method of Notice, (3) appoint David S. Harris of North Bay Law Group and James Rush of the Law Offices of James D. Rush as Class Counsel, (4) approve Plaintiffs as the Class Representatives, (5) appoint a Claims Administrator, and (6) approve the proposed mechanism for receiving and dealing with claims and notices of election to opt out of the settlement. Given the uncertainty and risks faced by the parties to this litigation, Plaintiffs have determined that a $729,700 settlement is the most desirable way to resolve this matter.

II. Summary of the Case.

The action was commenced against Defendant as a putative class action in Napa County on May 23, 2014, on behalf of Plaintiffs and all others similarly situated for alleged violations of the California Labor Code. (See generally May 23, 2014, Compl.) On July 23, 2014, Plaintiffs filed a First Amended Complaint, the operative pleading. (See generally July 23, 2014, First Am. Compl.) As alleged in the First Amended Complaint, Defendant employed Plaintiffs as hourly "employees in the public housekeeping industry," as that term is defined in the Industrial Wage Commission ("IWC") Wage Order number 5. (July 23, 2014, First Am. Compl. ¶ 6.)

Defendant owns and operates retirement communities within California at two separate locations: The Meadows of Napa Valley ("Meadows") and Saratoga Retirement Community ("Saratoga Retirement"). The Meadows and Saratoga Retirement offer four levels of care to the residents at these two facilities: 1) Residential Living for residents that don't need personal assistance; 2) Assisted Living for residents who require assistance with the activities of daily living; 3) Skilled Nursing and rehabilitation care; and, 4) Memory Care for residents with Alzheimer's and other types of memory loss.

Defendant employed named Plaintiff Coral McQueen from 2004 to 2006 and from March 2007 to January 28, 2014, as a Certified Nursing Assistant in the Assisted Living department in Defendant's Meadows facility. Defendant has employed named Plaintiff Felicia Trevino from December 2012 to date. Plaintiff Trevino works as a Certified Nursing Assistant in the Assisted Living and Memory Care departments in Defendant's Meadows facility.

In the First Amended Complaint, Plaintiffs allege the following violations: (1) Cal. Lab. Code § 203 (Continuing Wages); (2) Cal Lab. Code §§ 226.7 and 512; Wage Order 5 (Meal Period Violations); (3) Cal Lab. Code § 226.7; Wage Order 5 (Rest Period Violations); (4) Cal. Lab. Code § 204 (Late Payment of Overtime Wages); (5) Cal. Lab. Code §§ 510 and 1194 (Overtime violations); (6) Cal. Bus. & Prof. Code section 17200 *et seq.* (Restitution and Injunction); (7) Cal. Lab. Code § 226 (Failure to Provide Accurate Itemized Wage Statements); and (8) Labor Code Private Attorneys General Act ("PAGA") (Civil Penalties on account of labor law violations). (See generally July 23, 2014, First Am. Compl.)

The claims in this action generally relate to allegations that (1) Defendant failed to provide employees with proper rest and meal breaks, (2) Defendant failed to properly calculate employees overtime wages for hours worked in excess of eight in a day, and (3) Defendant failed to provide employees with adequate pay statements. (See generally July 23, 2014, First Am. Compl.) The operative First Amended Complaint also seeks miscellaneous penalties, including waiting time penalties pursuant to California Labor Code section 203, civil penalties pursuant to California Labor Code sections 226 and 2698 *et seq.*, and additional relief under the California Business and Professions Code section 17200 *et seq*.). (July 23, 2014, First Am. Compl.)

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

Between the filing of the case in May 2014 and the parties' mediation, the parties engaged in substantial investigation, as well as formal and informal discovery in connection with the litigation.

(Decl. of David S. Harris in Supp. of Prelim. Appr. of Settlement ("Harris Decl.") ¶ 7.) Defendant provided extensive documents and thousands of pages of documentation and putative class data to Plaintiffs and their counsel to review and analyze. (Harris Decl. ¶ 7.) This information included summary employment data for the entire putative class, Defendant's policies and documents relevant to the issues and claims in the instant litigation, and a statistically-significant sampling of full payroll and hourly employee punch data for the putative class. (Harris Decl. ¶ 7.) Counsel for each side interviewed numerous witnesses, and Defendant obtained numerous declarations from employee witnesses. (Harris Decl. ¶ 7.) Plaintiffs' counsel and its staff spent a hundreds of hours reviewing the payroll information and hourly employee punch data that was provided by Defendant in order to analyze the claims and prepare for mediation. (Harris Decl. ¶ 7.)

On May 29, 2015, the parties participated in an all-day mediation with an experienced mediator, Mr. Jeffrey Krivis, in downtown San Francisco. (Harris Decl. ¶ 7.) With the assistance of Mr. Krivis, the parties ultimately reached an arms-length settlement, which Plaintiffs now submit to this Court for preliminary approval.

III. CONDITIONAL CLASS CERTIFICATION.

Concerns about the rights of absent class members are satisfied by a careful fairness review of the settlement by the trial court, and pre-certification settlements that have been subjected to such a review are routinely approved at the appellate level in both federal and California's judicial systems. Wershba v. Apple Computer, Inc., 91 Cal. App. 4th 240 (2001). The trial court is required to make a determination that the class representatives can and will adequately represent the interests of absent class members. However, this does not require that the representatives' claims be identical to those of the absent members. Nor is there any ironclad rule requiring the trial court to conduct an evidentiary hearing on the issues. Lazar v. Hertz Corp., 143 Cal.App.3d 128, 140 (1983); Clothesrigger, Inc v. GTE Co., 191 Cal. App. 3d 605, 617 (1987).

A. The Settlement Class.

Wage-and-hour cases such as the above-captioned matter "routinely proceed as class actions." Prince v. CLS Transp., Inc., 118 Cal. App. 4th 1320, 1328 (2004). Obviously, many such cases settle. Here, there has not yet been certification of a class; that is, the Settlement was negotiated *prior* to the

filing of a motion for class certification. However, "[a] trial court unquestionably ha[s] the authority to conditionally certify a class for settlement purposes." Hernandez v. Vitamin Shoppe Indus. Inc., 174 Cal. App. 4th 1441, 1457 (2009).

For purposes of the Settlement, the parties seek to conditionally certify the following Class: all persons who are or previously were employed as non-exempt or hourly employees of Odd Fellows Home of California between May 23, 2010 and May 29, 2015. (Harris Decl., Ex. 1 at 5:24-28.) The Class will *not* include any person who files a timely request for exclusion. (Harris Decl. Ex. 1 at 8:22-25). It is estimated that the Class will consist of approximately 980 employees. (Harris Decl., ¶ 10).

As set forth in the Settlement, Defendant has agreed to pay a substantial settlement fund of $729,700, which is the maximum possible amount that Defendant shall pay under the terms of the Settlement. This $729,700 payment (the "Gross Settlement Amount") shall cover the costs for claims administration, the class representatives' incentive awards, a PAGA payment to the California Labor and Workforce Development Agency ("LWDA") and attorneys' fees and costs of litigation, all as awarded by the Court.[1] (Harris Decl., ¶ 9.) The above-referenced amounts will be deducted from the Gross Settlement Amount in order to determine the net Claim Pool, which is the total aggregate amount that will be made available to Class Members who submit a valid claim form. (Harris Decl., ¶ 9.)

The Claim Pool will be divided by those eligible settlement Class Members who submit valid claims based on each eligible Class Member's number of weeks worked during the Class Period ("Pro Rata Settlement Payment"). (Harris Decl., ¶ 9, Ex. 1 at 10:28-11:1-12.) Additionally, each Class Member who submits a valid claim form and who was no longer employed by Defendant as of May 29, 2015, shall receive an additional $150 in consideration of their waiting time penalties, which compensates the former employees for not being paid all wages owed to them on their last day of employment ("Former Employee Payment"). (Harris Decl., Ex. 1at 11:3-6). Finally, any Class Member that was hired after January 1, 2015, and who submits a valid claim form shall receive a flat payment of $100 in lieu of receiving a Pro Rata Settlement Payment. (Harris Decl., Ex. 1 at 11:6-9). The settlement represent payments for alleged unpaid overtime, wage premiums on account of missed rest and meal breaks, wage statement violations and the waiting time penalties for those class members who were no

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

longer employed by Defendant on the last day of the class period. There are approximately 980 potential Class Members. (Harris Decl. ¶ 10.) Accordingly, it is estimated Eligible Class Members will receive an average pre-tax net payment of approximately $430 per person. (Harris Decl. ¶ 10.) As the average hourly wage during the class period was approximately $12.00 per hour, this estimated recovery amounts to approximately one-week's wages for all eligible Class Members who participate in the settlement. These payments represent a large percentage of the damages at stake in the litigation and are a reasonable compromise of those claims in light of the potentially dispositive defenses available to Defendant in this action. (Harris Decl. ¶ 23.)

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

1. Numerosity and Ascertainability.

Class certification is proper when the parties are numerous and it is impractical to bring them all before the court. See Int'l Molders' & Allied Workers' Local 164 v. Nelson, 102 F.R.D. 457, 461 (N.D. Cal. 1983) (explaining that a class size exceeding forty would satisfy the numerosity requirement); Rose v. City of Hayward, 126 Cal. App. 3d 926, 934 (1981) (holding that forty-two members is sufficient for numerosity purposes); Perez-Funez v. District Dir. Immigration and Naturalization Serv., 611 F. Supp. 990, 995 (C.D. Cal. 1984) (explaining that a class size of twenty-five members is sufficient for numerosity purposes); Caesar v. Chemical Bank, 460 N.Y.S. 2d 235, 237–38 (1983) (certifying a class of thirty-eight "potential" class members). Here, the Settlement Class covers the period between May 23, 2010 and May 29, 2015, and is comprised of approximately 980 Class Members. (Harris Decl. ¶ 10.) Individual Class Members are clearly ascertainable from a search of Defendant's own employment records. See Cal. Lab. Code § 1174 (requiring employers to maintain employee records).

2. Common Issues of Fact and Law Predominate.

As to each and every Class Member, the following issues of fact and law are common across the

Class: (1) Was the Class Member employed as a non-exempt or hourly employee of Odd Fellows Home of California between May 23, 2010 and May 29, 2015? (2) Did the Class Member receive all wages, including minimum wage and overtime? (3) Did the Class Member receive all rest breaks? (4) Did the Class Member receive all meal breaks? (5) Did the Class Member receive all of the information on the pay stub as required by section 226(a) of the California Labor Code? (6) Was the Class Member still employed by Defendant on May 29, 2015?

The only significant "individual" or "non-common" issues will be the specific dollar amount of recovery to which each Class Member is entitled. However, this does not defeat class certification, as the individual assessment of damages is commonly required in all class-action cases. Bell v. Farmers Ins. Exchange, 115 Cal. App. 4th 715, 743 (2004) ("[T]he necessity for an individual determination of damages does not weigh against class certification. The community of interest requirement recognizes that ultimately each class member will be required in some manner to establish his individual damages[;] . . . a class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery or as to the amount of his or her damages.") (internal citations omitted).

3. The Claims of the Named Plaintiffs Are Typical of Those of Class Members.

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

4. The Named Plaintiffs and Their Counsel Will Adequately Represent the Class.

Plaintiffs are adequate class representatives. They have no conflicts of interest with any Class

Members, as they all share the same desire to be made whole under the Labor Code. The named Plaintiffs are committed to pursuing the claims of the Class Members, and their motivation in retaining counsel and pursuing this action has been to collect owed amounts for themselves and their fellow Class Members. (See generally Harris Decl. ¶ 13, Exs. 6-7.)

The qualifications of Class Counsel—David S. Harris of the North Bay Law Group and James Rush of the Law Offices of James D. Rush—are set forth in the accompanying Harris Declaration. (Harris Decl. ¶¶ 2-4.) Those qualifications should assure the Court that the interests of the unnamed Class Members will be adequately and vigorously represented. Suffice it to say that the North Bay Law Group and the Law Offices of James D. Rush have recovered millions of dollars for employee class members in myriad wage-and-hour cases. (See, e.g., Harris Decl. ¶¶ 2-4.) Under the circumstances, this Court can be assured that the North Bay Law Group and the Law Offices of James D. Rush will adequately discharge their responsibilities as Class Counsel.

IV. Summary of the Proposed Settlement.

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

The Settlement will result in the creation of a $729,700 settlement fund. (Harris Decl. Ex. 1 at 2:10-12.) This amount will be used (a) to pay attorney's fees and costs (as awarded by the Court), (b) to pay the fees and costs of the Claims Administrator (as awarded by the Court) for providing Notice to the Class and for administering the Settlement, (c) to pay incentive payments (as awarded by the Court) to the named Plaintiffs for their services in connection with bringing and maintaining this action, and (d) to pay the LWDA on account of alleged civil penalties pursuant to California Labor Code section 2699, the Private Attorneys General Act ("PAGA") (as awarded by the Court). (Harris Decl. ¶ 9.) After these amounts are deducted, the remainder of the Net Claim Pool will be made available for claims submitted by eligible Class Members. As set forth above, the estimated average pre-tax net amount that each eligible Class Member will receive is approximately $430. (Harris Decl. ¶ 10.)

B. Tax Implications.

Payments from the Claim Pool shall be subject to the withholding of all applicable local, state, and federal income, employment, and payroll taxes. One-third (33.33%) of each individual payment to Eligible Class Members constitutes wages in the form of back pay and will be subject to tax withholding

(and each Eligible Class Member will be issued an IRS Form W-2 for such payment to him or her), and two-thirds (66.66%) of each individual payment to eligible Class Members constitutes interest, penalties and other non-wage payments and will not be subject to tax withholding by Defendant (and each Eligible Class Member will be issued an IRS Form 1099 for such payment to him or her). (Harris Decl. Ex. 1 at 13:25 – 14:3.)

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

The parties have stipulated to the appointment of David Harris of the North Bay Law Group and James Rush of the Law Offices of James D. Rush as Class Counsel. (Harris Decl. ¶¶ 2-4.) The qualifications of Class Counsel are set forth in the accompanying Harris Declaration. (Harris Decl. ¶¶ 2–4.) The parties have obtained quotes from various respectable companies for the administration of the class action settlement. After reviewing the quotes the parties recommend Phoenix Settlement Administrators manage the administration of this settlement. (Harris Decl. ¶ 11.)

D. Attorneys' Fees and Costs.

The Settlement provides that Class Counsel's attorneys' fees and costs shall be paid from the $729,700 settlement amount, in an amount to be approved and ordered by the Court after consideration of Class Counsel's application for attorney's fees and costs. (Harris Decl. Ex. 1 at 13:14-18.) Defendant has agreed not object to an award to Class Counsel of fees in an amount up to 33.33% and an award of actual litigation costs incurred by Class Counsel up to $15,000. (Id.) The Class Notice provides that Class Counsel may request up to this amount in fees and an additional amount in actual costs incurred and that Class Members will have an opportunity to object. (Harris Decl. ¶ 12, Ex. 4.) Class Counsel will file a motion seeking an award of fees and costs, which will be filed on or before the date the class notice is sent out to Class Members by the Claims Administrator. (Id.) Accordingly, compensation for Class Counsel will be left entirely to the determination of the Court.

E. Class Notice, Claim Form, and Request for Exclusion.

"[A] trial court has virtually complete discretion as to the manner of giving notice to class members." Chavez v. Netflix, Inc., 162 Cal. App. 4th 43, 57 (2008) (internal citation omitted). Notice to Class Members herein will be by first-class mail, postage prepaid, and will include the Class Notice and Claim Form (hereinafter collectively the "Notice Packet"). Specifically, the Notice Packet describes

the nature of the action, the definition of the Class, and the class-wide claims being settled; it explains that Class Members may enter an appearance through an attorney and that the Court will exclude those Class Members requesting exclusion; and it will specify the time requirements and manner of requesting exclusion, as well as the binding effect of a class-wide judgment. (Harris Decl. ¶ 12, Exs. 4 & 5.) Furthermore, the Notice Packet informs Class Members of their right to object to any aspect of it, including the attorneys' fees and costs to be sought by Class Counsel. (Harris Decl. ¶ 12, Exs. 4 & 5.)

Each Class Member will have forty-five days from the date of mailing to submit a Claim Form or to request exclusion (*i.e.* submit an Opt-Out Request). (Harris Decl. Ex. 1 at 9:21 – 10:26). Plaintiff contends that the proposed mailing is the best means of giving notice under the circumstances and will likely give actual notice to the overwhelming majority of the Class Members.

F. Plaintiffs' Class Representative Enhancement Award.

The Settlement provides for an additional payment in the amount of up to $5,000 to each named Plaintiff on account of the services that they have rendered to the Class Members in bringing this litigation and on account of the time that they have devoted in support of thereof. (Harris Decl. Ex. 1 at 2:4-6). Attached as Exhibits 6 and 7 to the Harris Declaration are declarations from Plaintiffs McQueen and Trevino, which set forth the efforts and services Plantiffs provided to their fellow Class Members in securing this very favorable settlement. Enhancement awards "are not uncommon and can serve an important function in promoting class action settlements." Sheppard v. Consol. Edison Co. of N.Y., Inc., 2002 U.S. Dist. LEXIS 16314 at *16 (E.D.N.Y. filed Aug. 1, 2002). "Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." In re S. Ohio Corr. Facility, 175 F.R.D. 270, 272 (S.D. Ohio 1997), *rev'd on other grounds,* 191 F.3d 453 (6th Cir. 1999). It is appropriate to provide a payment to class representatives for his or her services to the class. Van Vraken v. Atlantic Richfield Co., 901 F. Supp. 294, 299 (N.D. Cal. 1995); Wang v. Chinese Daily News, Inc., 231 F.R.D. 602, 614 (C.D. Cal. 2005) ("Proceeding by means of a class action avoids subjecting each employee to the risks associated with challenging an employer"); Bogosian v. Gulf Oil Corp., 621 F. Supp. 27, 32 (E.D. Pa. 1985); St. Marie v. Eastern R.R. Ass'n., 72 F.R.D. 443, 449 (S.D.N.Y. 1976) ("The risks entailed in suing one's employer are such that the few hardy souls who come forward should be permitted to speak

for others when the vocal ones are otherwise fully qualified"), *rev'd on other grounds*, St. Marie v. Eastern R.R. Ass'n., 650 F.2d 395 (2d Cir. 1981).

Plaintiffs' incentive awards of $5,000 each shall be in addition to whatever portion of the settlement fund they are entitled to receive. In light of their willingness to come forward with this action on behalf of the Class, and in light of their efforts in advancing the litigation, these proposed payments are entirely reasonable. Plaintiffs obtained the services of counsel, provided documentation and information relevant to the claims, participated in both formal and informal discovery, both Plaintiffs participated in all-day depositions, were actively involved in both pre and post-mediation activities and both named Plaintiffs took part in the all-day mediation in downtown San Francisco with Mr. Krivis. (See generally Harris Decl, Exs. 6 & 7.) In doing so, the named Plaintiffs have successfully brought and maintained claims that may have never been brought. See Crab Addision, Inc. v. Superior Court, 169 Cal. App. 4th 958, 971 (2008) ("Current employees suing their employers run a greater risk of retaliation. . . . For them, individual litigation may not be a viable option . . . . [In addition], employees may be unaware of the violation of their rights and their right to sue."). The named Plaintiffs should be compensated accordingly for their efforts on behalf of the Class.

G. Releases.

The Settlement provides for a limited release of only those claims asserted in the operative Complaint. Specifically, the Settlement provides that Plaintiffs and those Class Members who do not opt out of the Settlement will be deemed to release "Class Members' Released Parties" from "Class Members' Released Claims." Specifically, the Claim Form sets forth the following limited release:

> Upon receipt of my share of the Settlement Amount, I hereby release and discharge Defendant Odd Fellows Home of California and its former and present parents, subsidiaries, and affiliates, and their current and former officers, directors, employees, partners, shareholders and agents, and the predecessors and successors, assigns, and legal representatives of all such entities and individuals ("Class Members' Released Parties"), from the claims below arising during the period from May 24, 2010, through May 29, 2015 ("Class Members' Released Period"). The claims released by the Class Members include, but are not limited to, statutory, constitutional, contractual or common law claims for wages, damages, unpaid costs, penalties, liquidated damages, punitive damages, interest, attorneys' fees, litigation costs, restitution, or equitable relief, for the following categories of allegations: (a) all claims for failure to pay wages for hours worked, including overtime and double time pay; (b) all claims for failure to pay the minimum wage in accordance with applicable law; (c) all claims for the failure to provide meal and/or rest periods in accordance with applicable law, including payments for

> missed meal and/or rest periods and alleged non-payment of wages or premium pay for meal periods and rest periods worked and not taken; (d) all claims for the unlawful and/or fraudulent deductions of wages from employees as a result of Odd Fellows payroll and timekeeping policies and procedures; and (e) any and all claims for recordkeeping or pay stub violations, waiting time penalties and all other civil and statutory penalties related to the above-referenced claims, including those recoverable under the PAGA, the California Unfair Competition Act, and in particular, California Bus. & Prof. Code §§ 17200 *et seq.*, California Code of Civil Procedure § 1021.5; and any other provision of the California Labor Code or any applicable California Industrial Welfare Commission Wage Orders, in all of their iterations ("Class Members' Released Claims").

Harris Decl., Ex. 5.

V. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE.

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

> The trial court must determine whether a class action settlement is fair and reasonable, and has broad discretion to do so. That discretion is to be exercised through the application of several well-recognized factors. The list, which "'is not exhaustive and should be tailored to each case,'" includes "'the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.'" (Kullar, *supra*, 168 Cal. App. 4th at p. 128, quoting Dunk, *supra*, 48 Cal. App. 4th at p. 1801.) """The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement."""" (Kullar, *supra*, 168 Cal. App. 4th at p. 130.)

Clark v. American Residential Servs. LLC, 175 Cal. App. 4th 785, 799 (2009). See also Chavez, 162 Cal. App. 4th at 52. An evaluation of a proposed settlement also requires "an understanding of the amount in controversy and the realistic range of outcomes of the litigation." Clark, 175 Cal. App. 4th at 801 (citing Kullar v. Foot Locker Retail, Inc., 168 Cal. App. 4th 116, 120 (2008)).

Settlement is an extremely attractive option for Plaintiffs and Defendant, given the reasonable arguments that can be made by both sides. Plaintiffs contend that Defendant violated the California Labor Code by failing to provide Class Members with proper and timely overtime wages. Further, Plaintiff contends that Defendant failed to properly provide the ten-minute rest periods and thirty-minute meal periods mandated by sections 226.7 and 512 of the California Labor Code. Accordingly, Plaintiffs contend that Defendant's employees are entitled to "one additional hour of pay at [their] regular rate of compensation for each work day that [a] meal or rest period [w]as not provided." Cal. Lab. Code

§ 226.7(b). In addition, Plaintiffs contend that Defendant willfully failed to pay in a timely fashion those Class Members whose employment with Defendant had been terminated. Accordingly, Plaintiff contends that those employees are entitled to the "waiting time penalties" specified by section 203 of the California Labor Code. Finally, Plaintiffs also contend that Defendant failed to issue pay stubs that contain all of the information required by the California Labor Code. Defendant vigorously disputes all of Plaintiffs' contentions.

Settlement is an attractive option with respect to Plaintiffs' unpaid-overtime and meal-and-rest-break claims. Based on a review of materials produced by Defendant and on discussions with Defendant's counsel, Plaintiffs' counsel acknowledges that some may argue that any unpaid overtime and the number of meal and/or rest breaks missed by any given Class Member may require a rather individualized inquiry, with a result that class certification might be denied on this claim.[2] Furthermore, Defendant argues that there is no common policy or procedure to support a claim for the failure to provide rest and meal breaks. (Harris Decl. ¶ 20.) Indeed, Defendant argues that it's only common policy regarding meal and rest breaks is that non-exempt, hourly employees are permitted to take them, which policy Defendant contends is articulated in its written break policy. (Harris Decl. ¶ 20.) Defendant argues that, in light of its purported compliant written break policy, Plaintiffs would be unable to secure class certification for the meal and rest break claims. S*ee* Washington v. Joe's Crab Shack, 271 F.R.D. 629, 641 (N.D. Cal. 2010) (denying certification of rest break claims where written policy was fully compliant with the law and individualized inquiries would be required to determine whether and when rest breaks were missed).

Defendant also argues that, due to the nature of Defendant's business, there are disparate break practices resulting from a variety of factors, including the facility where the employee worked, the job

[2] It is submitted that the United States Supreme Court's ruling in Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2011 U.S. Dist. LEXIS 4567 (June 20, 2011), may now make it more difficult to certify classes seeking both injunctive relief and monetary relief. Id. at *38. In this action, Plaintiffs seek monetary relief under the California Labor Code and also injunctive relief under section 17200 of the California Business and Professions Code. (See generally June 28, 2011, First Am. Compl.) According to Wal-Mart Stores, Inc., any putative class action seeking both injunctive relief and monetary relief is now required to demonstrate that questions of law and fact common to class members predominate over any questions affecting only individual class members. Id. at *44–45. Although the California Code of Civil Procedure applies here, California courts often look to the Federal Rules of Civil Procedure for guidance. Accordingly, the risk of maintaining this case as a class action through trial has increased as a result of Wal-Mart Store, Inc.

title, nature of the work, location within the facilities, management styles and/or employee preferences. (Harris Decl. ¶ 20.) Defendant argues that, when faced with similar facts, courts have denied class certification because employees' breaks, in practice, are not uniform. See, e.g., Hughes v. WinCo Foods, 2012 WL 34483 at *5–6 (C.D. Cal. Jan. 4, 2012) ("[T]he decision-making with respect to when employees may take meal and rest breaks is diverse. It varies from store to store, and from department-to-department within the same store. There is simply no manner in which the timing of such breaks can be proven reliably with evidence of 'a single stroke.'"). Defendant argues that Plaintiffs cannot meet their burden to certify the class action because a highly individualized inquiry would have to be made to determine whether a particular missed break was the personal choice of the employee, or was somehow mandated by Defendant. (Harris Decl. ¶ 20.) Under Brinker Restaurant Corp. v. Superior Court, 53 Cal. 4th 1004, 1040–41 (2012), the key inquiry is whether the non-exempt employee had a reasonable opportunity to take an uninterrupted break. This inquiry, Defendant contends, will necessarily involve an evaluation of the individual facts and details of each job assignment worked by each non-exempt employee, whether breaks were taken in accordance with Defendant's policy, and, if not, why they were not taken. In light of the reasonable arguments that can be made by both sides, compromise of the overtime, meal and rest break claims is appropriate. Similarly, as Plaintiff's minimum wage and overtime claims are directly related to Plaintiffs' ability to demonstrate and certify a meal break claim on a class-wide basis, the same challenges and factors that prevent Plaintiff from certifying a meal break class are present for the minimum wage and overtime claims.

Settlement is also an attractive option with respect to Plaintiff's section-203 claim. For example, Defendant contends that no damages are owed for the alleged "untimely" payment of wages because its behavior was not "willful," which is a requirement under section 203. See Cal. Lab. Code § 203(a). Defendant could likewise assert that section 203, as with all penalty statutes, is strongly disfavored and must be narrowly construed. See Hale v. Morgan, 22 Cal. 3d 388, 405 (1978). The same could be said with respect to Plaintiff's pay-stub claim under section 226 of the Labor Code. With respect to Plaintiff's pay-stub claim, Plaintiffs' counsel is aware that Defendant has arguable defenses with respect to whether such violations merit awarding employees statutory amount, namely, that such violations are purely technical in nature, that Defendant substantially complied with section 226, that none of

Defendant's employees was actually injured by Defendant's alleged violation, and that Defendant's alleged violation was neither knowing nor intentional. Cf., e.g., Milligan v. American Airlines, 327 Fed. Appx. 694 (9th Cir 2009).

Furthermore, it is far from settled whether the failure to pay overtime wages or wages on account of foregone meal and rest breaks results in continuing-wages liability. See Hon. Ming W. Chin, et al., California Practice Guide: Employment Litigation ¶ 11:1464.1 (The Rutter Group 2008) ("Employers may argue that because 'wages' and overtime pay have different sources, Lab. C. § 203's waiting time penalties for 'wages' do *not* apply to overtime pay [See Earley v. Sup. Ct. (Washington Mut. Bank, F.A.) (2000) 79 CA4th 1420, 1430, 95 CR2d 57, 63—'An employee's right to wages and overtime compensation clearly have different sources'; see also Wilcox v. Birtwhistle (1999) 21 C4th 973, 979, 90 CR2d 260, 264—words and phrases given a particular meaning in one part of a statute must be given same meaning in other parts of the statute; Mamika v. Barca (1998) 68 CA4th 487, 493, 80 CR2d 175, 178—penalty of continued 'wages' for late payment is computed by reference to daily straight-time pay (not overtime)].") (emphasis in original). Cf. Barnhill v. Robert Saunders & Co., 125 Cal. App. 3d 1, 7 (1981) (explaining that liability under section 203 is improper where an employer had deducted a set off from an employee's final paycheck at a time when the law governing the propriety of setoffs from employees' paychecks was unclear). Insofar as it does not result in continuing-wages liability, the extent of Defendant's liability may be reduced.

Furthermore, as a class action, this case presents a clear risk of lengthy and expensive litigation. It would probably be another one to two years before this case went to trial so that, *inter alia*, the parties could properly complete class discovery, Plaintiffs could file a motion for certification, and the parties could file cross-motions for summary judgment. That said, the parties have, in fact, conducted extensive discovery and analysis of the claims. Defendant has provided Plaintiffs with relevant information regarding the employment records of Plaintiffs and a statistically-significant sample of the entire Class. Nevertheless, the law makes clear that exhaustive, protracted, and costly discovery need not be conducted in a class action before a settlement can be reached. 7-Eleven Owners for Fair Franchising, 85 Cal. App. 4th 1135, 1150 (2000). "In the context of class action settlements, 'formal discovery is not a necessary ticket to the bargaining table' where the parties have sufficient information to make an

informed decision about settlement . . . . '[N]otwithstanding the status of discovery, Plaintiffs' negotiators had access to a plethora of information regarding the facts of their case.'" Linney v. Cellular Alaska P'ship, 151 F.3d 1234, 1239–40 (9th Cir. 1998) (citations omitted). Here, there was more than sufficient investigation and discovery conducted to permit counsel to enter into the Settlement.

With the proposed settlement, participating Class Members will look to receive shares of a gross fund totaling $729,700, less the amount awarded to Class Counsel for fees and costs, costs of claims administration, an incentive award to the named Plaintiffs, and a payment to the LWDA pursuant to PAGA. This $729,700 gross fund is a substantial amount, particularly given actual amount of compensable damages that are the subject of the underlying violations. The Ninth Circuit opinion in Rodriguez v. West Publishing Corp., 563 F. 3d 948 (9th Cir. 2009), establishes that class settlements of this nature should focus on the recovery of *actual losses* rather than recovery of *penalties* (such as Plaintiff's claims under sections 203 and 226 of the Labor Code).[3] Viewed in that light, and assessing the general amount that shall be recovered by each Class Member, the Settlement is entirely reasonable and favorable.

Obviously, the reaction of Class Members to the proposed Settlement cannot be known until preliminary approval is granted, Notice Packets sent out, and responses to that notice received. That said, Class Counsel is of the view that the Settlement is reasonable for all involved. Again, Class Counsel has substantial experience in prosecuting class actions, including actions involving the application of state and federal wage-and-hour laws. (Harris Decl. ¶¶ 2–4.) While acknowledging that

[3] It is submitted that the decision in Rodriguez, an antitrust class-action lawsuit, supports the granting of preliminary approval in this case. In Rodriguez, as here, most of the potential damages were funds that are theoretically recoverable as penalties: in Rodriguez, threefold "treble damages," Rodriguez, 563 F. 3d at 964 (citing 15 U.S.C. § 15(a) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained . . . ."); here, penalties for violations of the California Labor Code. Rodriguez teaches that, in considering whether to approve an antitrust class-action settlement, a court can conclude that the settlement is "reasonable even though it evaluate[s] the monetary potion of the settlement *based only on an estimate of single damages* [rather than treble damages]." Id. at 955. See also id. at 964–66 ("This circuit has long deferred to the private consensual decision of the parties. See Hanlon, 150 F.3d 1027. Experienced counsel such as those representing all the parties in this case will certainly be aware of exposure to treble damages in an antitrust action."). Similarly, here, the Court may consider the Settlement based only on an estimate of the actual damages, putting the penalty aspects of the case to the side in the process. Given the uncertainty and the risks faced by the parties to the litigation, it is reasonable for this Court to give preliminary approval of the $729,700 settlement.

some persons might feel that Defendant should pay more and others might feel that Defendant is paying too much, the undersigned are of the opinion that the proposed Settlement represents a reasonable balancing of the various strengths and weaknesses borne by each of the parties. Considering the inherent risks, hazards, and expenses of carrying the case through trial, Class Counsel is of the opinion that the settlement is fair, reasonable, and adequate.

VI. Conclusion.

It is respectfully submitted that the $729,700 settlement with Defendant is fair, reasonable, and adequate. The Court should (1) conditionally certify the Settlement Class, (2) approve the Notice Packet and method of notice, (3) approve David S. Harris of the North Bay Law Group and James D. Rush as Class Counsel, (4) approve Plaintiffs as the Class Representatives, (5) appoint a Claims Administrator, and (6) approve the proposed mechanism for receiving and dealing with claims and notices of election to opt out of the settlement.

Dated: July 29, 2015

NORTH BAY LAW GROUP
LAW OFFICES OF JAMES RUSH

David S. Harris
James D. Rush
Attorneys for Plaintiffs

PROOF OF SERVICE

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

On July 29, 2015, I served the within document(s):

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

I caused such document to be delivered by hand in person to:

N/A

I caused such document to be delivered by e-mail or regular mail:

N/A

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

Mark Posard
Joel Glasser
GORDON & REES LLP
633 West Fifth Street, 52nd floor
Los Angeles, California 90071

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

Executed on July 29, 2015, at Mill Valley, California.

David S. Harris