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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

RANDY KUNSMAN, on behalf of himself and all "aggrieved employees" pursuant to Labor Code § 2698 et seq.

Plaintiff,

v.

PUNCH BOWL SACRAMENTO, LLC, a Delaware limited liability company; PUNCH BOWL RANCHO CUCAMONGA, LLC, a Delaware limited liability company; PUNCH BOWL SAN DIEGO, LLC, a Delaware limited liability company, and DOES 1 through 10, inclusive,

Defendants.

Case No. 34-2018-00243175

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION: (1) PROVISIONALLY CERTIFYING SETTLEMENT CLASS; (2) PRELIMINARILY APPROVING CLASS SETTLEMENT; (3) DIRECTING DISTRIBUTION OF NOTICE OF SETTLEMENT TO THE CLASS; (4) APPOINTING CLASS COUNSEL AND CLASS REPRESENTATIVE; AND (5) SETTING A HEARING FOR FINAL APPROVAL OF CLASS SETTLEMENT

Date: August 30, 2019
Time: 2 p.m.
Judge: David I. Brown
Dept.: 53
Complaint filed: October 23, 2018

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I. INTRODUCTION

Pursuant to California Rules of Court, Rule 3.769(d) and (e), Plaintiffs Randy Kunsman and Brianna Guiher (hereinafter collectively referred to as the "Plaintiffs" or the "Class Representatives") respectfully request that this Court (1) grant preliminary approval of the settlement as set forth in the Parties' Class Action Settlement and Compromise Agreement (the "Agreement"); (2) grant preliminary certification of the proposed class for settlement purposes only; (3) authorize the parties to provide notice to the class in the manner set forth in the Agreement; (4) appoint Plaintiffs' counsel as Class Counsel; and (5) schedule a final approval hearing.

The instant settlement is significant because it provides class members significant value for the claims asserted without the need for protracted litigation. In this motion Plaintiffs seek approval of the settlement for a class of approximately 1289 current and formerly hourly or nonexempt employees of Defendants who worked for them in California from October 23, 2014 through July 4, 2019 (the "Class Period")(these employees are referred to as the "Class Members"). Key components of the Agreement are as follows:

- Defendants will pay the full amount of the non-reversionary gross settlement amount of $950,000 (the "Settlement Sum");
- Notice to Class Members will provide information regarding the settlement as well as allow individuals an opportunity to opt-out of the settlement;
- Participating Class Members are not subject to a general release or Civ. Code §1542 waiver and are only subject to a release for the wage and hour claims in this action only;
- The net Settlement Sum of $560,500 is made available for direct payment to the approximately 1289 class members, which equates to an average $424.83 per employee. This amount will be distributed by check pro rata based on the workweeks each employee worked for Defendants without any affirmative action being necessary on the part of the class member (like a submission of a claim form). Any uncashed checks will be distributed to the California Women's Law Center, a *cy pres* recipient jointly selected by the parties;
- A maximum amount of $332,500 will be requested by Class Counsel to compensate them for their fees and up to $12,000 for their costs incurred during the litigation of these claims;
- The Claims Administration costs expected not to exceed $20,000 will be allocated from the gross settlement fund; a maximum of $10,000 will be requested as a service award to each Class Representative.

The Settlement is the result of the significant efforts of the Plaintiffs and their counsel, including a thorough analysis of extensive informal discovery. After an in-depth investigation of the claims, potential defenses, and potential damages related to the allegations asserted, the parties engaged in a full-day mediation with class action mediator Lisa Klerman, Esq. With the benefit of her substantial

experience in wage and hour class actions and her neutral input, the parties were able to negotiate the terms of the Settlement.

II. SUMMARY OF ARGUMENT

Pursuant to California Rules of Court, Rule 3.769, the settlement of class actions requires the court's approval. Here, Plaintiffs seek only preliminary approval of this settlement. Because the eventual final approval hearing will provide an opportunity to review the settlement following the notice process, preliminary approval of a class action settlement is appropriate so long as the proposed settlement is "within the range of possible approval." In re General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1124 (7th Cir. 1979) (quoting and following the Manual for Complex Litigation); Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 855 F. Supp. 825, 827 (E.D. N.C. 1994); Holden v. Burlington Northern, Inc., 665 F. Supp. 1398, 1402 (D. Minn. 1987). Because parties seeking preliminary approval are simply requesting the opportunity to allow absent and previously uninvolved class members to respond to the settlement, preliminary approval "is at most a determination that there is what might be termed 'probable cause' to submit the proposal to class members and hold a full-scale hearing as to its fairness." In re Traffic Exec. Assoc.-Eastern R.R., 627 F.2d 631, 634 (2d Cir. 1980). In approving a class settlement, courts must have sufficient information to assure themselves that the terms of the Settlement are fair, reasonable and adequate. Moreover, courts must understand the amount in controversy and the realistic range of outcomes of the litigation. Kullar v. Foot Locker, Inc., 168 Cal. App. 4th 116, 120 (2009).

Because, as set forth below, the instant settlement was reached through informed, arms-length bargaining between skilled counsel, it is clear that the parties have met this threshold. As such, the parties respectfully request that the Court grant preliminary approval for the settlement, authorize notice to the class members, and schedule a final fairness hearing.

III. FACTS AND PERTINENT PROCEDURAL BACKGROUND

Defendant PBS Brand Co., LLC is a corporation based in Glendale, Colorado that manages and operates Punch Bowl restaurants throughout California, including Punch Bowl SanDiego, LLC, Punch Bowl Sacramento, LLC, and Punch Bowl Rancho Cucamonga, LLC. Plaintiff Randy Kunsman was employed by Defendant Punch Bowl Sacramento, LLC, as a non-exempt employee between November 2017 and July 2018. Plaintiff Brianna Guiher worked for Defendant Punch Bowl SanDiego, LLC, as a

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server from approximately May 2018 to July 2018, when she was terminated for exercising her rights afforded under the California Labor Code. Plaintiffs Brianna Guiher and Randy Kunsman ("Plaintiffs") allege their former employers, Defendants Punch Bowl SanDiego, LLC, Punch Bowl Rancho Cucamonga, LLC, Punch Bowl Sacramento, LLC, and PBS Brand Co., LLC, and (collectively referred to as the "Defendants" or "Punch Bowl") failed to provide legally compliant rest periods and meal periods, failed to provide accurately itemized wage statements, and failed to timely pay wages due and owing upon termination of employment. In addition to these claims, Plaintiff Guiher alleges Punch Bowl implemented unlawful tip-pooling and sharing practices, failed to pay failed to pay for all hours worked and failed to pay mandated reporting time. Plaintiffs allege these claims on behalf of all Class Members during the Class Period

On October 23, 2018, Plaintiff Randy Kunsman filed his representative action complaint pursuant to the Private Attorneys General Act, Labor Code sections 2698 *et seq.,* ("PAGA") against Defendants Punch Bowl Sacramento, LLC, Punch Bowl San Diego, LLC, and Punch Bowl Rancho Cucamonga, LLC, for civil penalties pursuant to Labor Code § 2699(f) for violations of Labor Code Sections 201-203, 226(a), 226.7, and 512 (the "Kunsman Action").

On January 15, 2019, Plaintiff Brianna Guiher filed her class action lawsuit against Punch Bowl SanDiego, LLC and PBS Brand Co, LLC alleging nine causes of action: 1) Failure to Pay Minimum and Regular Wages; 2) Failure to Authorize and Permit Rest Periods; 3) Failure to Authorize and Permit Meal Periods; 4) Failure to Pay Reporting Time; 5) Unlawful Tip-Polling; 6) Failure to Provide Itemized Wage Statement; 7) Failure to Pay Wages Upon Separation; 8) Retaliation; and 9) Violations of the Unfair Competition Law in San Diego Superior Court Case No. 37-2019-00002512-CU-OE-CTL (the "Guhier Action")).[1] Plaintiff amended her complaint on February 13, 2019 by adding claims for PAGA penalties after the administrative exhaustion period had expired.

Subsequently, on or about July 25, 2019, pursuant to a stipulation between the Parties, Kunsman sought to amend his complaint to include Plaintiff Guiher and the claims alleged in her lawsuit. That stipulation is still pending before the Court, but the Parties anticipate it will be signed before this hearing.

After filing of the actions, Defendants, through their counsel, approached Plaintiffs' counsel to

[1] See the operative complaint in the Guiher Action attached as Exhibit1 to the Declaration of Brian R. Short ("Short Decl.")

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discuss the merits of the claims as well as to discuss the benefits of early mediation and potential global resolution of both actions. Several in-depth conversations between the parties' counsel were able to narrow the scope of contested matters and permit the parties to further evaluate the merits and defenses which could be presented at the mediation. During these discussions, the parties agreed to engage in early mediation in order to broach the possibility of informal resolution and avoid the expenditure of excessive funds in litigation.

Prior to reaching this Agreement, and in connection with the mediation at the request of Plaintiffs' counsel, Defendants provided Plaintiffs and their counsel with significant informal discovery, including their policies concerning time keeping, compensation, meal and rest periods, tip-sharing, and a statistically significant sampling of pay and corresponding time records during the relevant time period. (See Declaration of Brian R. Short "Short Decl." ¶¶ 10, 11). Additionally, Plaintiffs considered additional documentation provided by the named Plaintiffs, which included copies of original wage statements and policies received during their employment. After a thorough review of the relevant case law, the significant amount of documents and records provided by Defendants, and information provided by the named Plaintiffs prior to mediation, Plaintiffs also prepared a comprehensive damages analysis in order to assess the potential damages as well as the risks involved with the probable outcomes in this litigation. (Short Decl. ¶¶ 15, 16).

IV. THE PROPOSED SETTLEMENT

After an exchange of informal discovery, the parties attended a lengthy mediation session with mediator Lisa Klerman, Esq. on May 6, 2019. Ms. Klerman is a highly experienced mediator who is thoroughly familiar with mediating employment class actions. More information about Ms. Klerman significant experience and qualifications is available at www.lisaklerman.com. After a full day of negotiations and information exchanges conducted through the mediator, including an exchange and comparison of each parties' damage analysis, the Parties reached a settlement for which they now seek preliminary approval. (Declaration of Daniel F. Gaines "Gaines Decl." ¶ 6) and Exhibit A to the Gaines Dec.; Short Decl. ¶ 17). The proposed settlement calls for the certification of the following settlement class:

> *All persons employed by Defendants Punch Bowl SanDiego, LLC, Punch Bowl Rancho Cucamonga, LLC, Punch Bowl Sacramento, LLC, and/or PBS Brand Co., LLC, in*

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California as a non-exempt employee from October 23, 2014 through July 4, 2019. (the "Settlement Class")

The class is estimated to consist of approximately 1289 current and former employees. The identification of the defined Settlement Class is easily determined based on a review of the Defendants' personnel records.

The Agreement provides for an individualized notice to each class member (the "Class Notice"). The proposed Class Notice will be sent via first-class mail, postage pre-paid, and it will advise class members about the lawsuit and settlement. (Agreement, Sec. 7 (b) and (h)). The Agreement provides for a multi-layer address verification procedure that will ensure class members receive the notice even if they have moved since leaving their employment with Defendants. (Agreement, Sec. 7 (h)). These additional address verification measures are intended to guarantee that the maximum number of class members will be informed of the Agreement and to ensure class member settlement funds are received in a timely manner. Additionally, the proposed Class Notice will provide class members with information, including the anticipated individual settlement payment and methodology for computation of that sum so that they will know how settlement payments will be computed. (See Class Notice attached to Gaines Decl. as Ex. A to Exhibit A (the Agreement) p. 5).

Class Members who wish to participate in the settlement will not need to take any affirmative action or submit a claim form. Instead, their individual settlement checks will be mailed to their best available address after the multi-layer address-verification procedures are carried out by the Claims Administrator. (Agreement, Sec. 7 h). Any individual will one hundred eighty (180) days to cash his/her respective settlement checks under this Agreement. (Agreement, Sec. 7 n). If the checks remain uncashed after the 180-day period, the class members' settlement funds the Settlement Administrator will deposit the funds with the California Women's Law Center, a *cy pres* recipient jointly selected by the parties. Id.

Per the Agreement, Defendants will pay the non-reversionary sum of $950,000. Of this amount and subject to this Court's approval Plaintiffs' counsel will request $332,500 for attorney's fees an amount not to exceed $12,000 for reimbursement of advanced litigation costs, an amount not to exceed $10,000 for each Class Representative as a service award, an amount not to exceed approximately $20,000 for the cost of claims administration, and $10,000 for PAGA penalties – 75% of which ($7,500) shall be paid to the LWDA and 25% of which ($2,500) shall be distributed to class members.

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In order to provide an equitable distribution of the settlement funds, each Class Member will receive a payment equal to the number of workweeks by that class member in proportion to the total number of workweeks worked by all Class Members during the class period. (Agreement, Sec. 7c). Once all of the components of the Settlement Sum are accounted for, the settlement makes on average, approximately $424.83 available for direct payments to participating class members on a non-reversionary basis, assuming 100% participation of all putative class members. If less than 100% of class members participate in the settlement, the participating class members' portion will increase pro-rata based on their original settlement share such that the full amount of the settlement is completely distributed. Id. Payments to participating claimants will be made within 30 calendar days after the Final Effective Date if there are no objectors to the settlement. (Agreement, Sec. 7 m).

Upon the Effective Date of the Judgment, all Class Members will be deemed to have, and by operation of the Judgment will have, released all Released Claims as defined in the Agreement (Agreement, Sec. 4 c). This release is specifically tailored to be as narrow as possible and is limited to the release of wage and hour claims based on the facts alleged in the operative complaint. Id. Class members who do not wish to be a part of the Settlement Class and do not wish to be subject to the Judgment may request exclusion from the class action settlement. Those class members who submit a request to be excluded from the class action settlement will not be subject to the Judgment and will be deemed to have never participated in this action. (Agreement, Sec. 7 b). All Class Members who do not timely request exclusion will become members of the Settlement Class and will be subject to the Judgment and its associated release regardless of whether they become participating claimants by cashing their settlement checks. (Agreement, Sec. 7 h (a)).

In addition to making payments to participating claimants, and subject to Court approval, Defendants will pay up to $332,500 for attorney's fees and up to $12,000 for reimbursement of litigation costs to Class Counsel. These payments will reimburse Plaintiffs and their counsel for all attorneys' fees, costs and other litigation expenses incurred in this case. (Agreement, Sec. 3. d). As will be set forth in further detail in Plaintiffs' Motion for Approval of Attorney's Fees and Costs, which will be submitted to be heard in conjunction with the Motion for Final Approval, this maximum attorney fee payment represents a reasonable reimbursement for the Plaintiffs attorneys' lodestar accrued during the litigation

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of the action and recognizes the significant efforts of experienced counsel who obtained this significant result for the class members at the expense of other guaranteed potential hourly work. (Gaines Decl. ¶ 8; Short Decl. ¶¶ 26-27). This payment will be paid after the judgment becomes final along with payments made to settlement class members.

Under the terms of the Agreement, the cost of the professional claims administration fees, including the cost of mailing the notice, reminder postcards and settlement payments, will be allocated from the Settlement Sum. Class Counsel has received estimates for $15,000, which is below the $20,000 allocated amount in the Agreement. The excess allotted funds will be used to carry out any potential difficulties in the claims administration process and any unused portion will be reallocated wholly to the class in order to increase Class Members' settlement share. (Agreement Sec. 3 b). Finally, as the Class Representatives' compensation for their unique efforts, the significant risks undertaken by bringing about this litigation in the internet age when it may easily be discovered by other employers and used as an "unstated" excuse to refuse to hire them, and in exchange for a much broader general release pursuant to California Civil Code section 1542, Defendants will pay each of the Plaintiffs a service award in the amount of up to $10,000. (Agreement at Sec. 3 a) (Gaines Decl. ¶ 9; Short Decl. ¶¶ 28-30).

Plaintiffs have attached the Agreement as Exhibit A to the Gaines Decl. and the Class Notice as Exhibit A to the Agreement in support of this Motion for Preliminary Approval.

V. ARGUMENT

California Rules of Court 3.769(c)-(e) authorize courts to grant conditional certification of settlement classes and provide preliminary approval of class action settlements if, as is the case here, the proposed settlement and class notice have been lodged with the Court. When considering whether to grant such certification, courts apply a "lesser standard of scrutiny" in the context of a stipulated settlement than they do for a contested motion for class certification in the course of litigation. Dunk v. Ford Motor Co., 48 Cal. App. 4th 1794, 1807 fn. 19 (1996).

More generally, it is axiomatic that California law strongly favors and encourages settlements. Stambaugh v. Super. Ct., 62 Cal. App. 3d 231, 236 (1976); Ferguson v. Lieff, Cabraser, Heimann & Bernstein, 30 Cal. 4th 1037, 1054 (2003) (Kennard, J., concurring and dissenting) ("[p]ublic policy favoring settlement is especially weighty for class actions"); see also Franklin v. Kaypro Corp., 884 F.2d

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1222, 1229 (9th Cir. 1989) ("it hardly seems necessary to point out that there is an overriding public interest in settling and quieting litigation. This is particularly true in class action suits.") (quoting Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 950 (9th Cir. 1976)).

The trial court has broad discretion to determine whether a class action settlement is fair. It should consider factors such as the strength of plaintiff's 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. Nordstrom Com. Cases, 186 Cal. App. 4th 576, 581 (2010). The trial court must determine that the settlement "was not the product of fraud, overreaching or collusion, and that the settlement is fair, reasonable and adequate to all concerned." Id. Against the backdrop of this strong public policy favoring settlements, court approval of class action settlements is a two-step process: "First, counsel submit the proposed terms of the settlement and the court makes a preliminary fairness evaluation….If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval, the court should direct that notice under Rule 23(e) be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement." Newberg & Conte, Newberg on Class Actions § 11.25 (4th ed. 2002) at pp. 38-39 (quoting Manual for Complex Litigation § 30.41 (3d ed. 1995)).

The Class Members are easily ascertainable from Defendants' employment records with similar potential claims as the Plaintiffs based on the positions and classification of each Class Member. See Sevidal v. Target Corp., 189 Cal. App. 4th 905, 918 (2010). Because the claims of Plaintiffs and the absent Class Members are similar and individual resolution of each Class Member's claims cannot be efficiently adjudicated, a class action is the superior method of resolving these claims.

Precisely because Class Members will subsequently receive notice and have an opportunity to be heard at the final approval/fairness hearing, the Court need not pass final judgment on the Settlement at this juncture. Instead, preliminary approval is appropriate so long as the proposed settlement falls

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"within the range of possible approval." Id. See also In re General Motors Corp., supra, 594 F.2d at p. 1124; Holden v. Burlington Northern, supra, 665 F. Supp. at p. 1402; In re Montgomery County Real Estate Antitrust Litig., 83 F.R.D. 305, 313 (D. Md. 1979).

A. This Case Presents No Deficiencies Suggesting Unfairness.

The proposed settlement was the product of arms-length negotiations, including a mediation session before an experienced neutral mediator. (Gaines Decl. ¶ 6; Short Decl. ¶ 17). Fairness is presumed if the settlement follows a formal mediation, especially where the mediator is a respected member of the legal community. Dunk v. Ford, supra, 48 Cal. App. 4th at 1802-03. More specifically, as the Settlement itself reveals, there is no preferential treatment for any segment of the class. In addition, the Settlement was reached after investigation and analysis of voluminous documents provided by Defendants and the named Plaintiffs including pay records, corresponding detailed time records, and meal period and rest period policies. (Gaines Decl. ¶ 7; Short Decl. ¶¶ 14-15). Based in large part on this analysis, Plaintiffs agreed to the terms of the Settlement. Gaines Decl. ¶ 7; Short Decl. ¶¶ 15-16). Furthermore, pursuant to California Rule of Court, Rule 3.769(b), the parties have disclosed the agreed upon and proposed attorney fee award and the amount of reimbursable costs, which is well within the range of reasonableness for matters of this nature. As the Court is already aware, Class Counsel are experienced in this type of litigation, and they have (and hereby do) represent that this settlement is fair and reasonable. (Gaines Decl. ¶¶ 5-7; Short Decl. ¶¶ 3-7).

B. The Proposed Notice is More Than Adequate.

Pursuant to California Rule of Court 3.769(f), the proposed form of the Class Notice is more than adequate. Reviewing proposed class notices, courts have held that the method and the content of the notice should be designed to fairly apprise class members of the terms of the proposed settlement and the options available to them. Cho v. Seagate Technology Holdings, Inc., 177 Cal. App. 4th 734,746 (2009); Cartt v. Super. Ct., 50 Cal. App. 3d 960, 974 (1975). Here, the proposed form of the Class Notice will be sent via first class mail to the last known address of each Class Member, and prior to this mailing, the Claims Administrator will consult the U.S. Postal Service's National Change of Address Database service and a further skip trace service in order to update any addresses for any returned notices. White v. Nat'l

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Football League, 41 F.3d 402, 408-09 (8th Cir. 1994) (abrogated on other grounds). (Agreement, Sec. 7 e). Under the instant Agreement, the Claims Administrator will immediately forward any notices returned with forwarding addresses, and it will conduct additional address verification measures through the use of a secondary credit agency search for any notices returned without forwarding addresses. (Agreement, Sec. 7 h). The notice will provide details on the settlement and the options available to Class Members. In particular, it will inform each Class Member of her or his options to not take any action and automatically receive their individual settlement payment, to be excluded from the class action settlement or to object to it. (Exhibit A to Exhibit A of the Gaines Decl.)

C. The Maximum Allowable Attorney's Fees Request is Reasonable

Although Plaintiffs' counsel will submit a more detailed analysis of the attorneys' fees which they will request in conjunction with the Motion for Final Approval, Plaintiffs' counsel will be requesting fees in an amount not to exceed $332,500. This amount is very reasonable considering the significant value conferred on the Class Members early on in the litigation of this case and considering the novel and complex issues existing in this case and therefore merits preliminary approval. Plaintiffs' respective counsel began working on this case in August 2018 and performed a thorough investigation and analysis of the claims prior to submitting the requisite notice letter to the Labor Workforce and Development Agency. (Short Decl.¶ 9). Prior to mediation, Plaintiffs' counsel engaged in a thorough analysis of the claims including conducting interviews with the Plaintiffs and the examination of voluminous documents, including pay records, schedules, handbooks, other documents related to this litigation. (Short Decl.¶¶ 14-15). Additionally, Plaintiffs' counsel examined various case law in order to fully analyze the various theories of recovery based on the information to date. The requested fees are reasonable under the preferred common-fund theory which bases recovery of attorney's fees as a percentage of any Gross Settlement Fund obtained on behalf of the class. Lafitte v. Robert Half International, Inc., 1 Cal.5th 480 (2016). Therefore, the maximum allowable attorney's fees permissible under the Settlement of $332,500 are fair and reasonable at this stage of the proceedings and merits preliminary approval.

D. Liability Is Contested and the Settlement Provides for Reasonable, Fair and Adequate Relief and it is Within the Realistic Range of Outcomes of Litigation

In approving a class action settlement, courts must have sufficient information to assure

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themselves that the terms of the agreement are fair, reasonable and adequate. Moreover, courts must understand the amount in controversy and the realistic range of outcomes of the litigations. Kullar, 168 Cal. App. 4th 116; Clark v. Am. Residential Serv. LLC, 175 Cal. App. 4th 785, 806 (2009). In reaching the Agreement, counsel on both sides relied on their respective substantial litigation experience in similar employment class actions, and thorough analysis of the legal and factual issues presented in this case. (See, generally, Gaines Decl. and Short Decl.). Information obtained through informal discovery process led to Plaintiffs' counsel's assessment of the strengths and weaknesses of the case and the benefits of the Settlement.

In preparation for mediation, Class Counsel reviewed documents including pay records and time records for putative class members and the policies contained within the various policies governing the Class Members' employment during the class period. Based on these policies, Class Counsel reviewed and analyzed these pay and time records to perform a comprehensive damage analysis based on the numerous theories of liabilities. (Short Decl. 15-16¶). This is information that requires a comprehensive understanding of the recent case law and is not generally known to the average wage and hour practitioner.

A statistically significant representative sample of Defendants' pay and time records were examined to obtain estimated damages for class members. (Short Decl. ¶ 15). Plaintiffs initial pay records and the corresponding timekeeping records confirmed that a significant number of individuals who worked shifts greater than 6 hours were not provided with complaint 30-minute uninterrupted meal periods and paid meal period premiums as required by the Labor Code. The statistical analysis revealed 25% of the total number of shifts within the Class Period was affected by the Defendants' unlawful meal period practices. (Short Decl. 16¶). Additionally, the review of Defendants' policies and employee handbooks evidences Punch Bowl's written policy requiring Plaintiffs and Class Members to remain on-site during their rest periods in violation of the California law. Plaintiffs also confirmed that Class Members were not paid timely upon separation of employment. Id.

With the assistance of an expert, Plaintiffs utilized the statistical sampling to determine the total number of the average rate of pay per employee; the average number and length of days worked; the total number of shifts greater than 3.5 hours in duration; the total number of shifts affected by non-complaint meal and rest periods; and the total number of pay periods worked by Class Members during the Class

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period. During mediation, Defendants also provided Plaintiff some of their calculations, which Plaintiffs cross-checked against their own computations for accuracy. Based upon an extensive review of the pay and time records, with the assistance of an expert, Plaintiffs' counsel calculated Class Member's claims for Defendants' failure to provide complaint meal periods totaled $358,468. Total unpaid wages as a result of Defendants' failure to relive their employees of all duties and relinquish any control over how the employees spend their period time was a maximum of $1,025,772 (assuming 100% violation rates). However, during mediation, Defendants indicated with supporting evidence that while employees were required to clock-out for rest periods, they were still paid for this time. As a result, this claim was discounted accordingly. Damages for failure to provide wage statements, which are largely derivative of other claims, totaled $1,838,950. Waiting time penalties, which are also largely derivative of other claims, totaled to additional $2,233,400. (Short Decl. ¶ 16). Finally, PAGA penalties totaled $1,897,300. Many of these theories of recovery are duplicative of other theories and, therefore, cannot be stacked. Likewise, much of the calculated damages is subject to a finding of willful misconduct of the Defendants and/or is discretionary in nature. After consideration of the above risks and potential recover after protracted litigation, the Settlement provides each Class Member an average expected recovery of $424.83. This is a good recovery considering the early resolution of these claims, the inherent risks involved with certifying a class action of this nature, and the fact that the likelihood of recovery of damages depended strongly upon theories which would result in an "all or nothing" recovery. (Short Decl. ¶¶ 20, 32-33).

While Plaintiffs' counsel believe that these causes of actions could be certified, there is an inherent risk associated with attempting to certify a class based on claims for legally noncompliant meal and rest periods. Indeed, Defendants strongly disputed Plaintiffs' meal and rest period claims altogether. First, Defendants refused to give any value to Plaintiffs' claims for unlawful rest periods. Defendants argued that although the California Supreme Court held in *Augustus v. ABM Securities Inc.* 2 Cal.5th 257, 272 (2016) that employees cannot be required to remain on-call during rest periods, it did not expressly say employers must allow their employees to leave the employer's premises during rest periods. On that account Defendants believe their rest period policies and practices were in compliance with the California law and, therefore gave "zero" value to Plaintiffs' rest period claim. (Short Decl. ¶ 18). Defendants further contended that while their timekeeping records reflected missed and short meal periods, it was Class

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Members' choice to forgo their meal periods and/or shorten them. Defendants claim it is a regular practice of employees in the service industry to work through their periods in order to earn extra tips during that time. This defense meant that certification of a meal period claim could lead to a predominance of individualized issues concerning activities of each Class Member for the time prior to and after each shift. (Short Decl. ¶ 18).

Defendants also maintained that the wage statement claims were a derivative of the other causes of actions, which they believed to be unsubstantiated. Although Plaintiffs stood by their claims, they nevertheless understood that there is a chance that Defendants may prevail on their defenses or be successful in preventing certification, and these risks were taken into account by the parties at mediation.

Plaintiffs also made claims for PAGA civil penalties; however, Plaintiffs were forced to consider that PAGA penalties are discretionary in nature and an award of significant penalties seemed uncertain based on Defendants' belief that Class Members were properly compensated and the amount of unpaid wages per Class Member may not support imposition of significant penalties. (Short Decl. ¶ 19). With respect to Plaintiffs' claim for waiting time penalties (Labor Code sections 201-203), Defendants believed that they could present a good faith dispute that would preclude the imposition of waiting time penalties for formerly employed Class Members. Id. Considering these potentials, the parties agreed to characterize the settlement payments to the class as 10% for wages and 90% to penalties and interest. In observance of these risks, the parties agreed that $10,000 will be allocated as PAGA penalties, from which 75% ($7,500) will be allocated for payment to the LWDA. The remaining 25% ($2,500) will be distributed pro rata among the participating Class Members. (Agreement, Sec. 3 c).

While the Plaintiffs in this case certainly have their own strong opinions about the expected outcome, the Defendants share an equally strong and opposite opinion. The realities associated with these risks of protracted litigation and a potential appeal, even if successful at trial, was appropriately considered during the mediation and ultimately the decision to accept the instant settlement. Though it may be tempting for an advocate to insist that their position will ultimately prevail, Plaintiffs and their counsel cannot ignore the value of minimizing risk, particularly when an attractive alternative is available.

The Agreement calls for a non-reversionary distribution to Class Members based on the number of workweeks each Class Member worked during the Class Period. (Agreement, Sec. 7 c). This formula

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is equitable and justified as it reflects the relative amount of time worked by each Class Member and provides a fair and reasonable settlement based upon the claims asserted in the action. After all payments under the Settlement Sum have been disbursed, the unclaimed portion of the Settlement Sum will be distributed to the California Women's Law Center, a *cy pres* recipient jointly selected by the parties. (Agreement, Sec. 7 h).

A settlement at this time is in the best interests of the class as it provides each class member with a fair amount of payment compared to the cost and risk of proceeding to class certification and trial. In light of the uncertainty of the risks detailed above, the settlement sum of $950,000 is fair, adequate and within the range of reasonableness. (Short Decl. ¶ 22; Gaines Decl. ¶¶ 5-7).

E. Payment to the Named Plaintiffs for Their Service to the Settlement Class Is Reasonable and Routinely Awarded

In determining whether to make a service award, the criteria courts consider may include: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representatives; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation; and 5) the personal benefits (or lack thereof). In re Cellphone Fee Termination Cases, 186 Cal. App. 4th 1380, 1394 (2010). Service payments to representative plaintiffs in class action settlements are intended to recognize their level of risk, the time expended, and the efforts undertaken on behalf of the class. "Courts routinely approve incentive awards to compensate named plaintiffs for the services they provide and the risks they incurred during the course of the class action litigation." See Ingram v. The Coca-Cola Co., 200 F.R.D. 685, 694 (N.D. Ga. 2001). See also Manual § 30.42 n. 763 (noting that such awards "may sometimes be warranted for time spent meeting with class members or responding to discovery.") In the *Coca-Cola* case, supra, the Court approved incentive awards of $300,000 to each named plaintiff in recognition of the services they provided to the class by responding to discovery, participating in the mediation process and taking the risk of stepping forward on behalf of the class. See Ingram, 200 F.R.D. at 694; See also Van Vranken v. Atlantic Richfield Co., 901 F. Supp. 294 (N.D. Cal. 1995) (approving a $50,000 participation award). See also Clark, 175 Cal. App. 4th at 806. ("[T]he rationale for making enhancement awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class.")

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In this case, the parties agreed to pay the Plaintiffs service awards in the amount not to exceed $10,000 because of their extensive contribution during the case and the risks that they incurred by serving as a named representative in a public class action lawsuit. (Gaines Decl. ¶ 9; Short Decl. ¶¶ 28-30). They met with Class Counsel on numerous occasions, provided valuable factual resources, participated in settlement negotiations, attended and participated at the mediation and they will sign a much more comprehensive general release for any and all known and unknown claims by signing a § 1542 waiver ((Agreement, Sec. 5); Gaines Decl. ¶ 10; Short Decl. ¶ 30). In addition, Plaintiffs took risks that bringing this action against their former employer would result in difficulty in obtaining employment opportunities where a simple google search could reveal Plaintiffs' participation in this lawsuit. Accordingly, the service awards to the Plaintiffs as Class Representatives are appropriate and justified as part of the overall Settlement.

VI. CONCLUSION

For these reasons, Plaintiffs respectfully request pursuant to California Rules of Court, Rule 3.769(d) and (e) that the Court issue an order (1) granting preliminary certification of the settlement class for settlement purposes only; (2) granting preliminary approval for the proposed settlement; (3) authorizing the parties to provide the proposed notice to the class; (4) appointing Gaines & Gaines APLC and ShortLegal APC as Class Counsel and Plaintiffs Randal Kunsman and Brianna Guiher as Class Representatives; and (5) scheduling a final approval or fairness hearing approximately 105 days after the date for the hearing set for this motion or as soon thereafter as the Court is available.

Dated: August 8, 2019

Gaines & Gaines, APLC

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