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12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF SACRAMENTO

14 LILA BURNS, Individually and on behalf of
15 all similarly-situated employees of Defendants
16 in the State of California,

17 Plaintiffs,

18 v.

19 DRIVELINE RETAIL MERCHANDISING,
20 INC., a Corporation, and DOES 1 through 50,
21 inclusive,

22 Defendants.

Case No.: 34-2018-00246691

Unlimited Civil - Amount Demanded
Exceeds \$25,000.00

**PLANTIFF’S MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
MOTION FOR ORDER 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**

IMAGED FILE

CLASS ACTION [CCP § 382]

Date: October 17, 2019
Time: 2:00 p.m.
Judge: David I. Brown
Dept.: 53

Trial Date: None set
Complaint filed: December 17, 2018

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I. INTRODUCTION

Pursuant to California Rules of Court, Rule 3.769(d) and (e), Plaintiff Lila Burns (hereinafter “Plaintiff”), on behalf of herself and all others similarly situated, respectfully requests that this Court grant preliminary approval for the proposed Stipulated Settlement Agreement and Release of Claims Agreement (“Agreement”) attached as Exhibit 1 to Declaration of Brian R. Short filed in support of instant motion (“Short Decl.”). In particular, Plaintiff respectfully requests that the Court: (1) grant preliminary approval for the settlement; (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 Plaintiff’s Counsel as Class Counsel; and (5) schedule a final approval hearing.

Defendant Driveline Retail Merchandising Inc. (“Driveline” or “Defendant”) has agreed not to oppose this Motion or the relief requested herein.

This settlement is an important win for the absent Class Members, as it provides true value to each and every one of them for their claims, without the need for protracted and risky litigation. The key components of the Agreement are as follows:

- The class consists of 1,470 merchandisers who worked for Driveline at any time, within the State of California, from August 28, 2015 through the date the Court issues a Preliminary Approval Order;
- Defendant will pay the full amount of the non-reversionary gross settlement amount of \$1,280,000.00 (“the Gross Fund Value Amount.”);
- 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 Fund Value Amount of \$804,583.44 is made available for direct payment to the approximately 1,470 class members, which equates to an average payment of \$547.33 per employee. This amount will be distributed pro rata based on the wages earned by each employee within the Class Period 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 Legal Aid at Work, a *cy pres* recipient jointly selected by the parties;
- A maximum amount of \$426,666.67 will be requested by Class Counsel to compensate them for their fees and up to \$20,000 for their costs incurred during the litigation of these claims;
- The Claims Administration costs expected not to exceed \$10,000 will be allocated from the Gross Fund Value Amount fund; a maximum of \$7,500 will be requested as a service award to the Class Representative; and
- A payment of \$11,250 to the California Labor Workforce and Development Agency which represents 75% of the total \$15,000 allocated for PAGA penalties.

1 As set forth in detail below, this settlement will provide tangible and valuable prospective relief.
2 In addition to the significant monetary recovery to class members, Defendant has agreed to undertake a
3 review its payroll policies to ensure compliance with California law going forward. This settlement is the
4 result of the significant efforts of Plaintiff and her Counselors, including an exhaustive analysis of the case
5 prior to filing and a detailed and thorough analysis of the informal discovery provided by the Defendant
6 once the case was filed. After an in-depth analysis of the claims, potential defenses, and potential damages
7 related to the allegations asserted, the parties engaged in a full-day mediation with class action mediator
8 Steve Rottman. With the benefit of Mr. Rottman’s substantial experience in wage and hour class actions,
9 along with his neutral input and the subsequent mediator’s proposal, the parties were able to negotiate the
10 terms of this settlement.

11 As set forth in more detail below, preliminary approval of a class action settlement is appropriate
12 so long as the proposed settlement is “within the range of possible approval” based on a finding that the
13 terms are fair, reasonable and adequate. West's Manual for Complex Litigation (Federal Judicial Center
14 4th ed. 2008) § 21.632. [“Manual for Complex Litigation”]; See also, Newberg on Class
15 Actions, Class Actions in State Courts, Preliminary Approval (4th ed. 2002) § 13:64. This settlement
16 certainly qualifies under this standard, and Plaintiff posits that the Court will find this outcome is an
17 excellent result for the absent Class Members. Accordingly, Plaintiff respectfully requests that the Court
18 grant preliminary approval for this settlement, authorize the dissemination of the Notice to the Class
19 Members, appoint Plaintiff’s Counsel as Class Counsel, and schedule a final fairness hearing.

20 **II. SUMMARY OF ARGUMENT**

21 Pursuant to California Rules of Court, Rule 3.769, the settlement of class actions requires the
22 court’s approval. Here, Plaintiff seeks only preliminary approval of this settlement. Because the eventual
23 final approval hearing will provide an opportunity to review the settlement following the notice process,
24 preliminary approval of a class action settlement is appropriate so long as the proposed settlement is
25 “within the range of possible approval.” In re *General Motors Corp. Engine Interchange Litig.*, 594 F.2d
26 1106, 1124 (7th Cir. 1979) (quoting and following the Manual for Complex Litigation); *Horton v. Merrill*
27 *Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 827 (E.D. N.C. 1994); *Holden v. Burlington*
28 *Northern, Inc.*, 665 F. Supp. 1398, 1402 (D. Minn. 1987). Because parties seeking preliminary approval

1 are simply requesting the opportunity to allow absent and previously uninvolved class members to respond
2 to the settlement, preliminary approval “is at most a determination that there is what might be termed
3 ‘probable cause’ to submit the proposal to class members and hold a full-scale hearing as to its fairness.”
4 *In re Traffic Exec. Assoc.-Eastern R.R.*, 627 F.2d 631, 634 (2d Cir. 1980). In approving a class settlement,
5 courts must have sufficient information to assure themselves that the terms of the Settlement are fair,
6 reasonable and adequate. Moreover, courts must understand the amount in controversy and the realistic
7 range of outcomes of the litigation. *Kullar v. Foot Locker, Inc.*, 168 Cal. App. 4th 116, 120 (2009).

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

13 **III.FACTS AND PERTINENT PROCEDURAL BACKGROUND**

14 Driveline is a nation-wide corporation that provides in-store marketing and merchandising
15 services to consumer products companies by setting up displays of their products in retail locations.
16 Plaintiff Lila Burns is a former Driveline employee who worked as an hourly paid merchandiser from
17 approximately 2014 to November 11, 2018. As a merchandiser, Plaintiff worked long and physically
18 taxing hours setting up displays of products and promotional materials in third-party retail stores such as
19 the Dollar Store, and similar retailers.

20 On December 17, 2018, Plaintiff filed her class action against Driveline alleging eight causes of
21 action: 1) Failure to Pay Minimum and Regular Wages; 2) Failure to Pay Overtime Wages; 3) Failure to
22 Authorize and Permit Rest Periods; 4) Failure to Authorize and Permit Meal Periods; 5) Failure to Pay
23 Indemnify/Reimburse Expenses; 6) Failure to Provide Itemized Wage Statement; 7) Failure to Pay Wages
24 Upon Separation; and 8) Violations of the Unfair Competition. Plaintiff amended her complaint on
25 January 17, 2019 by adding claims for PAGA penalties after the administrative exhaustion period had
26 expired. Thereafter, Plaintiff served upon Defendant her first set of discovery requests seeking standard
27 class information pertaining to the merits of her claims, defendant’s potential affirmative defenses as well
28 as information necessary for Plaintiff to seek certification of the class including commonality of facts,

1 numerosity, and typicality of Plaintiff’s claims.

2 Subsequently, Defendant, through its counsel [“Defense Counsel”] approached Plaintiff’s
3 counsel to discuss the merits of the case, the deadline of the pending discovery and to suggest that the
4 parties consider engaging in mediation. During the pre-mediation discussions that ensued, Plaintiff’s
5 counsel requested, and Defendant agreed to provide, a set of targeted informal discovery in lieu of formal
6 discovery that would allow a thorough evaluation of the claims and defenses at mediation.

7 Through numerous conversations and emails, the Parties’ attorneys were able to narrow the scope
8 of the contested matters and rationally evaluate the merits and defenses which could be presented at the
9 mediation. During these discussions, the parties agreed to use experienced wage and hour mediator Steve
10 Rottman and mutually agreed upon a mediation date. Defendant also agreed to provide its documents the
11 month before in order to aid Plaintiff’s Counsel in their analysis of the claims and defenses. The parties
12 agreed to informally postpone the deadline for Defendant’s response to Plaintiff’s formal discovery until
13 after mediation, and to likewise extend all upcoming Court appearances.

14 In June 2019, the parties focused their discussions towards topics of particular importance for
15 settlement purposes in anticipation of the August mediation date, and with the knowledge that Plaintiff’s
16 Counsel would have extensive documentation to sift through in order to prepare its brief and arguments
17 regarding damages. Defense Counsel began forwarding document productions in July 2019, consisting of
18 wage statements and corresponding distributed pay stubs as well as statistical information regarding the
19 total number of current/former class members. In addition, Defendant produced copies of relevant
20 documents pertaining to compensation policies, expense reimbursement policies, sick pay policies, sick
21 leave policies or procedures in place during the class period, and an indication of the time periods in which
22 they were in effect. After Plaintiff’s Counsel conducted an initial review of the documents, the parties
23 exchanged numerous email correspondence and participated in multiple phone calls to clarify details
24 within the production and discuss the underlying merits of the claims and affirmative defenses.

25 Furthermore, Plaintiff’s Counsel considered additional documentation provided by the named
26 Plaintiff, which included copies of original wage statements, time entries, and policies received during her
27 employment. After a thorough review of the relevant case law, the significant amount of documents and
28 records provided by Defendant, and information provided by the named Plaintiff prior to mediation,

1 Plaintiff also prepared a comprehensive damage analysis in order to assess the potential damages as well
2 as the risks involved with the probable outcomes in this litigation.

3 On August 13, 2019, the parties engaged in a full-day mediation with Mr. Steve Rottman in Irvine,
4 California. Mr. Rottman is a highly experienced neutral in wage and hour class and PAGA actions and
5 was able to lend this significant experience to the parties in their efforts to mediate the case.¹ Although
6 the Parties had previously had multiple discussions and shared emails with respect to the strength of certain
7 claims, Defendant vehemently denied that any act or omission on its part created any liability to the Class
8 Members for any of the claims alleged. Conversely, Plaintiff firmly believes in the merits of her claims
9 and the strong potential that the class could be certified. Yet, in spite of each party's firm belief in their
10 respective legal positions, after a full day of negotiations and information exchanges conducted through
11 the mediator, the Parties have concluded that further litigation would be protracted and expensive, the
12 results of which are uncertain and risky, and reached an agreement to settle this matter upon the terms and
13 conditions set forth in the Agreement for which they now seek preliminary approval.

14 **IV. THE PROPOSED SETTLEMENT**

15 The proposed settlement calls for the certification of the following settlement class:

16 ***All current and former employees who worked as retail merchandisers (or***
17 ***otherwise similar job duties and/or title) for Defendant within the State of***
18 ***California at any time from August 28, 2015 through the date the court***
enters an order granting preliminary approval or 30 days after the motion
for preliminary approval is filed, whichever date is earlier.

19 The class is estimated to consist of approximately 1,470 current and former employees of
20 Defendant in California. The identification of the defined settlement class is easily determined based on
21 a review of the Defendant's personnel records. (Agreement Sec. 5.03 (a)).

22 The Agreement provides for an individualized notice to each Class Member. The proposed notice
23 will be sent via first-class mail, postage pre-paid, and it will advise Class Members about the lawsuit and
24 settlement within 14-days of preliminary approval. (Agreement Sec. 5.03 (b)). The Agreement provides
25 for a multi-layer address verification procedure that will ensure Class Members receive the notice even
26 if they have moved since leaving their employment with Defendant. (Agreement Sec. 5.03 (b)). These
27 additional address verification measures are intended to guarantee that the maximum number of Class
28

¹ More information about Steve Rottman and his background may be found at <http://www.steverottman.com/biography.html>.

1 Members will be informed of the settlement and to ensure Class Member settlement funds are received
2 in a timely manner. Additionally, the proposed notice will provide Class Members with information,
3 including the anticipated individual settlement payment and methodology for computation of that sum so
4 that they will know how settlement payments will be computed. (See Class Notice attached to Short Decl.
5 ¶ 2 Ex. A). For ease of reference, the parties have also negotiated to make the pleadings and documents
6 filed in this case available to class members via a dedicated website hosted by the claims administrator.

7 Class Members who wish to participate in the settlement will not need to take any affirmative
8 action or submit a claim form. Instead, their individual settlement checks will be mailed to their best
9 available address after the multi-layer address-verification procedures are carried out by the Claims
10 Administrator. (Agreement Sec. 5.06 (b)(5)). Any individuals who do not cash their settlement checks
11 within 90 days of issuance will be sent a reminder postcard and permitted an opportunity to have the check
12 reissued if lost, stolen or misplaced. (Agreement Sec. 5.06 (d)(5)). Thereafter, individuals will have an
13 additional 30 days, for a total of 120 days, in which to cash their settlement checks. Id. If the checks
14 remain uncashed after the 120-day period, the Claims Administrator will deposit the funds with a mutually
15 agreed upon and Court approved *cy pres* recipient Legal Aid at Work, which represents low wage workers
16 who are the victims of wage violations like the allegations presented in this action.

17 Defendant has agreed to pay \$1,280,000.00 to settle this matter on a class-wide basis, which is
18 the total and all-inclusive maximum amount Defendant shall be obligated to pay under the settlement
19 embodied by this Agreement, exclusive of employer-side payroll taxes. The settlement sum includes
20 Class Counsel's attorney's fees of not more than Four Hundred Twenty Six Thousand and Six Hundred
21 and Sixty Six Dollars and Sixty Seven Cents (\$426,666.67) and litigation costs not to exceed Twenty
22 Thousand Dollars (\$20,000.00), a Service Award for Representative Plaintiff of not more than Seven
23 Thousand and Five Hundred Dollars (\$7,500.00), a PAGA penalty payment of Fifteen Thousand Dollars
24 (\$15,000.00), which includes the payment of Eleven Thousand Two Hundred Fifty Dollars (\$11,250.00)
25 to the LWDA, the Claims Administration Costs anticipated to be not more than Ten Thousand Dollars
26 (\$10,000.00).

27 In order to provide an equitable distribution of the settlement funds, each settlement Class
28 Member will receive a payment equal to their pro rata amount of wages earned during the Class Period as

1 compared to the total amount of wages paid to all Class Members during the same period. (Agreement
2 Sec. 5.06 (c)(1)). Using this formulation, the settlement results in an (approximately) \$547.33 payment
3 to each and every Class Member on a non-reversionary basis, assuming 100% participation of all 1,470
4 individuals. If less than 100% of Class Members participate in the settlement, the participating Class
5 Members' portion will increase pro rata until the settlement fund is fully exhausted. *Id.* Importantly,
6 Defendant has also agreed to pay employer payroll side taxes separate and apart from this settlement fund,
7 as well as conduct a thorough investigation into its internal corporate policies to ensure compliance with
8 California wage and hour law going forward. (Agreement Sec. 5.06 (c)(1)(ii), (5.06(b)(6)). This additional
9 prospective relief is additional valuable consideration that, although difficult to value in numeric terms,
10 significantly advances the interests of current employees and weighs heavily in favor of the reasonable
11 nature of the settlement's terms.

12 Upon the Effective Date of the Judgment, all settlement Class Members will be deemed to have,
13 and by operation of the Judgment will have, released all Released Claims as defined in the agreement.
14 This release is specifically tailored to be as narrow as possible and is limited to the release of wage and
15 hour claims based on the facts alleged in the operative complaint. *Id.* Class members who do not wish to
16 be a part of the settlement Class and do not wish to be subject to the Judgment may request exclusion from
17 the class action settlement. Those Class Members who submit a request to be excluded from the class
18 action settlement will not be subject to the Judgment and will be deemed to have never participated in this
19 action. (Agreement Sec. 5.04 (a)). Class Members are also permitted to object to the settlement terms if
20 desired. (Agreement Sec. 5.04 (b)). All Class Members who do not timely request exclusion will become
21 members of the settlement Class and will be subject to the Judgment and its associated release regardless
22 of whether they become Participating Claimants by cashing their settlement checks. *Id.*

23 In addition to making payments to Participating Claimants, and subject to Court approval,
24 Defendant will pay up to \$426,666.67 for attorney's fees and up to \$20,000 for reimbursement of litigation
25 costs to Plaintiff's Counsel. These payments will reimburse Ms. Burns and her attorneys for all attorney's
26 fees, costs and other litigation expenses incurred in this case. (Agreement Sec. 5.06 (b)(1)). As will be set
27 forth in further detail in Plaintiff's Motion for Approval of Attorney's Fees and Costs, which will be
28 submitted to be heard in conjunction with the Motion for Final Approval, this maximum attorney fee

1 payment represents a reasonable reimbursement for the Plaintiff's attorney's lodestar accrued during the
2 litigation of the action and recognizes the significant efforts of experienced Counsel who obtained this
3 significant result for the Class Members at the expense of other guaranteed potential hourly work. (Short
4 Decl. ¶¶ 3-8; Rubel Decl. ¶¶ 11-13). This payment will be paid after the judgment becomes final along
5 with payments made to settlement Class Members.

6 Under the terms of the settlement, the cost of the professional claims administration fees,
7 including the cost of mailing the notice, reminder postcards and settlement payments, will be allocated
8 from the settlement amount. Class Counsel received estimates for \$9,000.00 which is below the \$10,000
9 amount which has been allocated in the settlement agreement. The excess allotted funds will be used to
10 resolve any potential issues in the claims administration process and any unused portion will be reallocated
11 wholly to the class in order to increase Class Members' settlement share. (Agreement Sec. 5.06.e).

12 Finally, as to Ms. Burns' compensation for her unique efforts, the significant risks undertaken
13 by bringing about this litigation in the internet age when her lawsuit may easily be discovered by other
14 employers via Google and used as an "unstated" excuse to refuse to hire her, and in exchange for a much
15 broader general release pursuant to California Civil Code section 1542, Defendant will pay the
16 Representative Plaintiff a service award in the amount of up to \$7,500. (Agreement at Sec. 5.06 (b)(3);
17 Short Decl. ¶¶ 29-31).

18 Plaintiff has attached the settlement agreement at Exhibit 1 and the Notice as Exhibit 2 to the
19 Declaration of Plaintiff's Counsel Brian Short along with the Declaration of co-Plaintiff's Counsel Kira
20 M. Rubel in further support of this Motion for Preliminary Approval.

21 **V.LEGAL ARGUMENT**

22 **A. Conditional Certification Should Be Granted.**

23 Courts will grant certification if "the question is one of a common or general interest, of many
24 persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one
25 or more may sue or defend for the benefit of all." Cod. Civ. Proc. §382. Specifically, courts will approve
26 a class action if there is (a) an ascertainable class and (b) a well-defined community of interest with
27 common questions of law or fact. Id. The community of interest prong embodies three factors: (1)
28 predominant common questions of law or fact; (2) class representatives with claims or defenses typical of

1 the class; and (3) class representatives who can adequately represent the class." Id.

2 When considering whether to grant such certification, courts apply a "lesser standard of scrutiny"
3 in the context of a stipulated settlement than they do for a contested motion for class certification. *Dunk*
4 *v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1807 fn. 19 (1996). Here, Plaintiff handily surpasses her
5 certification burden in this settlement context. Moreover, California courts strongly favor settlement.
6 *Ferguson v. Lieff, Cabraser, Heimann & Bernstein*, 30 Cal. 4th 1037, 1054 (2003) (Kennard, J.,
7 concurring and dissenting) ("[p]ublic policy favoring settlement is especially weighty for class actions").
8 Based on this standard and the public policy in support of settlement, the proposed class should be certified
9 for settlement purposes.

10 As to the first prong, the class is readily ascertainable from the Defendant's own internal records.
11 To the extent a Class Member's information is outdated, the Class Administrator has reliable methods to
12 find updated information for those Class Members. As to the second prong, the very foundation of this
13 case presents common questions of law and fact as to all Class Members - whether Defendant is liable to
14 Class Members' for their unpaid wages, unreimbursed expenses, failure to provide meal and rest breaks,
15 improper wage statements, etc. Moreover, Ms. Burns' claims are 100% typical of the absent Class
16 Members, and she has no divergent or competing interests. Likewise, as set forth in the accompanying
17 declaration of Brian R. Short filed in support of the instant motion, Ms. Burns is adequate to represent the
18 class and has proven her adequacy through her vigilant and zealous participation in this case. In short, the
19 requirements for certification are met here and preliminary approval should be determined on a class wide
20 basis.

21 Plaintiff's Counsel also request that they be appointed as Class Counsel in this matter. As detailed
22 in the attached declaration of Brian Short and Kira M. Rubel, Plaintiff's Counsel have significant
23 experience in complex matters, have vigorously and exhaustively litigated this case, and are adequate to
24 represent this Class. (Short Decl. ¶¶ 3-8; Rubel Decl. ¶¶ 11-13).

24 **B. Preliminary Approval of the Settlement is Warranted Here.**

25 The purpose behind the preliminary approval process is for the Court to make an initial
26 determination of whether the settlement is fair, reasonable, adequate, and within the range of possible
27 approval. West's Manual for Complex Litigation (Federal Judicial Center 4th ed. 2008) § 21.632.
28 ["Manual for Complex Litigation"]; See also, Newberg on Class Actions, Class Actions in State

1 Courts, Preliminary Approval (4th ed. 2002) § 13:64. In making this determination, courts must
2 understand the amount in controversy and the realistic range of outcomes of the litigations. *Kullar*, 168
3 Cal. App. 4th 116; *Clark v. Am. Residential Serv. LLC*, 175 Cal. App. 4th 785, 806 (2009). There is no
4 doubt that this settlement meets this standard since it provides certainty and real value for the Class
5 Members in a case with complex legal issues.

6 The trial court has broad discretion in determining whether a proposed settlement is fair and
7 reasonable. When making this analysis, the court will consider factors such as: the strength of plaintiff's
8 case; the risk, expense, complexity and duration of continued litigation; the amount offered in settlement;
9 the extent of discovery completed and the stage of the proceedings; the experience of Counsel; and the
10 reaction of the Class Members to the proposed settlement. *Nordstrom Com. Cases*, 186 Cal. App. 4th 576,
11 581 (2010). The trial court will also consider whether the settlement was the product of fraud or collusion
12 between the parties. *Id.*

13 Looking at these factors, there can be no doubt this settlement is fair and reasonable. Although the
14 Representative Plaintiff certainly believes in the strength of her case, Defendant presented valid arguments
15 to the contrary at the full-day mediation before Mr. Rottman. The realities associated with the risks of
16 protracted litigation and a potential appeal, even if successful at trial, was appropriately considered during
17 the mediation and ultimately aided in Plaintiff's decision to accept the instant settlement. Moreover,
18 Defendant has claimed financial hardship to satisfy a judgment in this matter, particularly in the amount
19 estimated by Plaintiff's Counsel, which is why obtaining payment now for the Class Members is all the
20 more valuable. Plaintiff's Counsel analyzed this settlement amount very carefully and realized that
21 settling now for the amount offered meant a recovery for the Class Members rather than "going for broke"
22 by taking the case to trial and potentially obtaining an uncollectible judgment. Though it may be tempting
23 for an advocate to insist that their position will ultimately prevail, Plaintiff and her Counsel cannot ignore
24 the value of minimizing risk for the Class Members, particularly when an attractive alternative is available.
(Short Decl. ¶¶ 21-22; Rubel Decl. ¶¶ 16 and 18.)

25 This case also involves highly complex issues and required analysis of multiple nuanced legal
26 issues. The specifics of Plaintiff's job are unique and applying California law to this set of job
27 characteristics at trial would have been complicated and arduous, potentially requiring the input of
28 multiple experts who are well-versed in industry-specific issues. (Short Decl. ¶ 21.) Moreover, Plaintiff's

1 Counsel have already invested significant time and money in their prosecution of this case, and continuing
2 litigation would require a substantial amount more and would likely increase the risks that the allegations
3 would be subject to procedural and substantive challenges. In addition to the time and expense of what
4 would surely have been an extensive discovery battle, there would have been travel to conduct depositions,
5 including to Texas where Defendant’s headquarters are located, the retention of allegation-specific
6 experts, meetings with those experts, expert depositions, not to mention the vast amount of time Counsel
7 would have devoted to class certification and trial preparation. Although Class Counsel is happy to make
8 the investment on behalf of the Class, there is always a risk that well-funded Defendants will “out-spend”
9 its adversary, both from a time and money value. Alternatively, settling now and guaranteeing that the
10 Class Members will receive value for their claims vastly outweighs continued litigation. (Short Decl. ¶¶
21-22; Rubel Decl. ¶¶ 16 and 18.)

11 Importantly, the amount offered in settlement is fundamentally fair because it provides real and
12 immediate value to the Class Members. Assuming a claims rate of 100% and dividing equally among the
13 class, each Class Member would be entitled to \$547.33 to compensate them for their claims. However, in
14 an effort to make the payment more accurately reflect each Class Members’ potential damages, Plaintiff
15 requested, and Defendant agreed, to make the reward proportional with each Class Members’ wages
16 earned during the Class Period. In other words, the settlement of each Class Member’s claims for wage
17 and hour violations, failure to reimburse all expenses, failure to provide an accurate wage statement, *inter*
18 *alia*, will also accurately reflect the amount of time and effort each Class Member put into his or her job.
19 (Short Decl. ¶¶ 24; Rubel Decl. ¶ 17.)

20 Importantly, part of the settlement includes Defendant’s agreement to conduct a thorough review
21 of its internal policies to ensure compliance with California’s laws going forward. This benefit, insisted
22 upon by the Representative Plaintiff, will result in significant immediate and tangible proof to the Class
23 Members that their interests have been protected. In sum, this settlement is an ideal result for the Class
24 Members. (Short Decl. ¶ 23.)

25 Finally, as to Counsel’s experience, Plaintiff’s attorneys boast more than 28 (years of experience
26 in class and complex actions and was utilized to reach this favorable result for the class. Mr. Short has
27 practiced complex class action litigation for more than 14 years and has been exclusively specializing in
28 class action and PAGA wage and hour employment litigation for the past 10 years while Ms. Rubel’s

1 background has spanned from securities fraud class actions, to consumer and employment class actions.
2 In addition, Associate Dorota James has represented employees in wage and hour class actions for more
3 than 10 years, both as an attorney and previously as a licensed paralegal. (Short Decl. ¶¶ 3-8; Rubel Decl.
4 ¶¶ 11-13). All attorneys representing the Class Members' interests spent considerable time and effort
5 analyzing these complex legal issues, pre and post filing, and developing novel legal arguments in an
6 effort to ensure that all possible arguments were presented as effectively as possible. (Short Decl. ¶¶ 10-
7 15; Rubel Decl. ¶ 14). Without their efforts, along with those of the Representative Plaintiff, the Class
8 Members would be without recourse.

9 Based on the foregoing, preliminary approval is appropriate here because the proposed settlement
10 certainly falls "within the range of possible approval." *Id.*; see also *In re General Motors Corp.*, supra,
11 594 F .2d at p. 1124. This settlement was reached by arm's length negotiations, using an experienced
12 neutral, and a thorough review of Defendant's relevant documents.

13 **C. The Proposed Notice is More than Adequate.**

14 California Rule of Court, Rule 3.769(f) sets forth the standard under which approval of the form
15 and contents of notice will be approved. Representative Plaintiff has fulfilled this standard since the Notice
16 contains "an explanation of the proposed settlement and procedures for Class Members to follow in filing
17 objections to it and in arranging to appear at the settlement hearing[.]" Cal. R. Ct., Rule 3.769(f). [See
18 generally, Exhibit 2]

19 The proposed Notice contains detailed information regarding how each Class Member may make
20 his or her claim, including the precise documents which may be provided in support. It also summarizes,
21 in detail and including deadlines and how a Class Member may object to or opt-out of the settlement.
22 [Exh. 2 to Short Decl.] The proposed Notice will be sent by first class mail to the mailing address for each
23 Class Member. Since the class consists of current and former employees of Defendant, Defendant's
24 records will be utilized to contact each Class Member at his/her last known mailing address. For any
25 mailings that are returned, the Claims administrator will perform a skip trace to ensure each Class Member
26 is apprised of his or her rights. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 618-620 (1997)
27 (individual mailing to each Class Member is considered adequate notice.) Moreover, the Notice provides
28 information on how class members may access court-filed documents via a dedicated website so that they
may easily review these documents without the need to pay and fees to the court's own system.

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1 **D. The Proposed Incentive Payments To The Representative Plaintiff Is Reasonable, Justified,**
2 **And Routinely Awarded.**

3 Service payments to representative plaintiffs in class action settlements are intended to recognize
4 the representative’s level of risk, time expended, and the efforts he or she undertook. *Clark v. American*
5 *Residential Services LLC*, 175 Cal.App.4th 785 (2009). “Courts routinely approve incentive awards to
6 compensate named plaintiffs for the services they provide and the risks they incurred during the course of
7 the class action litigation.” See *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001). See
8 also Manual § 30.42 n. 763 (noting that such awards “may sometimes be warranted for time spent meeting
9 with class members or responding to discovery.”) In the *Coca-Cola* case, supra, the Court approved
10 incentive awards of \$300,000 to each named plaintiff in recognition of the services they provided to the
11 class by responding to discovery, participating in the mediation process and taking the risk of stepping
12 forward on behalf of the class. See *Ingram*, 200 F.R.D. at 694; See also *Van Vranken v. Atlantic Richfield*
13 *Co.*, 901 F. Supp. 294 (N.D. Cal. 1995) (approving a \$50,000 participation award). See also *Clark*, 175
14 Cal. App. 4th at 806. (“[T]he rationale for making enhancement awards to named plaintiffs is that they
15 should be compensated for the expense or risk they have incurred in conferring a benefit on other members
16 of the class.”)

17 Here, the parties agreed to pay the Plaintiff service awards in an amount not to exceed \$7,500
18 because of her extensive contribution during the case, the valuable information she was able to provide
19 both prior to and at the mediation she attended, and the risks that she incurred by serving as a named
20 representative in a public class action lawsuit. Ms. Burns expended a significant amount of time, both pre
21 and post-filing, assisting with this litigation. Her assistance and copious and detailed record keeping
22 provided several items of evidence which were pivotal to proving her claims. Moreover, Ms. Burns’
23 documentation and detailed reprisal of events provided her attorneys with the details to craft a unique and
24 comprehensive complaint based on multiple theories of liability. Ultimately, it was Ms. Burns’ effort,
25 assistance, and bravery which achieved this result for her fellow Class Members. (Short Decl. ¶¶ 29-31;
26 Rubel Decl. ¶ 19.)

27 Prior to and throughout the litigation, the Representative Plaintiff repeatedly spoke with Counsel,
28 forwarded countless emails, poured over numerous documents, and aided her Counsel in litigating this
case. Moreover, Ms. Burns attended the full-day mediation in August 2019, taking time out of her busy

1 work schedule to support her fellow Class Members, which required her to fly to Irvine from Sacramento
2 and stay the night in order to attend. (Short Decl. ¶ 29; Rubel Decl. ¶ 19.)

3 Accordingly, Plaintiff’s Counsel has requested, and Defendant has agreed to pay, Ms. Burns
4 \$7,500 out of the settlement proceeds to reward her tremendous efforts which is reasonable and warranted
5 under the circumstances of the case. *In re Cellphone Fee Termination Cases*, 186 Cal. App. 4th 1380, 1394
6 (2010) (affirming the trial court’s award to each named plaintiff of \$10,000 as incentive payment.)

7 **E. The Maximum Requested Attorneys’ Fees are Reasonable.**

8 An award of attorney fees in class action litigation are tied to Counsel’s actual efforts to benefit
9 the class. *Mark v. Spencer*, 166 CA4th 219, 229 (2008); see also 33 Matthew Bender Practice Guide: CA
10 Pretrial Civil Procedure 33.31[2]. Accordingly, when class action litigation establishes a monetary fund
11 for the benefit of the Class Members, the preferred method of attributing attorneys fees is as a percentage
12 of the common fund created by the settlement. *Laffitte v. Robert Half Internat., Inc.*, 1 Cal. 5th 480, 503
13 (*Id.* at 506.

14 Counsel intends to request \$426,666.67 in attorneys’ fees and reimbursement for up to \$20,000 in
15 costs at the final approval hearing. As will be demonstrated at the final approval hearing and in Class
16 Counsel’s fee submission, their lodestar certainly supports this fee request, as does the tremendous result
17 obtained for the absent Class Members, when compared to the clear risk of continuing to litigate this case.
18 ShortLegal, APC and the Law Office of Kira M. Rubel, PLLC spent significant pre-litigation time and
19 resources ascertaining the viability of these claims, interviewing the Lead Plaintiff, reviewing her
20 documents, preparing and sending the LWDA letter, and drafting a comprehensive complaint which
21 accurately reflected this information. (Short Decl. ¶¶ 10-15; Rubel Decl. ¶¶ 4-7.) In addition, Class
22 Counsel undertook this case knowing that they may have to set aside other work where the client would
23 otherwise immediately pay the hourly-fees generally charged for legal services.

24 Once the case was on file, Counsel for Plaintiff drafted a first amended complaint and extensive
25 discovery requests. Thereafter, Plaintiff’s Counsel engaged in multiple phone conversations and email
26 exchanges with Defense Counsel, and ultimately, spent a tremendous amount of time reviewing and
27 analyzing Defendant’s documents, drafting the mediation brief, and attending the mediation. (Short Decl.
28 ¶¶ 9-15; Rubel Decl. ¶¶ 6-7, 14). Importantly, Class Counsels’ efforts will not stop here. To the contrary,

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they have a significant amount of work ahead of them in drafting the final papers, working with the Claims Administrator, and dealing with any other post-settlement issues that may arise.

As will be more fully demonstrated in their request for reasonable attorneys' fees and costs which will be made in anticipation of the final approval hearing, Plaintiff's Counsel believes the Court will find their request to be reasonable, appropriate and subject to approval. *Id.* at 503. (Short Decl. ¶ 28)

VI. CONCLUSION

For reasons stated above and pursuant to California Rules of Court, Rule 3.769(d) and (e), Plaintiff Lila Burns respectfully requests 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 including appointment of Plaintiff's Counsel as Class Counsel; (3) authorizing the parties to provide the proposed notice to the class; and (4) scheduling a final approval or fairness hearing on or about January 24, 2020 or as soon thereafter as the Court is available.

Dated: September 23, 2019

SHORTLEGAL, APC



By:

Brian R. Short, Esq.
Dorota James, Esq.