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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES – SPRING STREET

SALVADOR OCHOA, individually, and on behalf of all other similarly situated current and former employees of Defendants

Plaintiff,

vs.

CKE RESTAURANTS HOLDINGS, INC., a Delaware Corporation; CARL'S JR. RESTAURANTS LLC, a Delaware Corporation; CARL'S JR. FUNDING LLC, a Delaware Corporation; and DOES 1 through 50, inclusive,

Defendants.

HERMELINDA AGUILAR, individually and on behalf of all others similarly situated,

Plaintiff,

v.

CKE RESTAURANTS HOLDINGS, INC., a Delaware Corporation; CARL'S JR. RESTAURANTS LLC, a Delaware Corporation; CARL'S JR. FUNDING LLC, a Delaware Corporation; and DOES 1 through 50, inclusive,

Defendants.

Case No: BC623041
Consolidated with: BC686601

CLASS ACTION

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT

Assigned for all purposes to:
Hon. Amy Hogue, Dept. 7

Date: December 14, 2021
Time: 10:00 a.m.
Dept.: 7

Kevin Mahoney (SBN: 235367)
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Katherine J. Odenbreit SBN: 184619)
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Attorneys for Plaintiff Hermelinda Aguilar, individually and on behalf of all others similarly situated

TO THE HONORABLE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on December 14, 2021, at 10:00 a.m. in Department 7 of this Court, located at 312 N. Spring Street, Los Angeles, California 90012, Plaintiffs, SALVADOR OCHOA and HERMELINDA AGUILAR ("Plaintiffs"), will move the Court for an Order granting preliminary approval of the proposed class action settlement between Plaintiff and Defendants CKE RESTAURANTS HOLDINGS, INC., CARL'S JR. RESTAURANTS LLC, and CARL'S JR. FUNDING LLC ("Defendants") collectively referred to as "the Parties," which is memorialized in the Parties' Stipulation and Settlement of Class and PAGA Claims ("Settlement Agreement").[1]

Plaintiffs will further move the Court for an order in the form attached as Exhibit 3 to the Settlement Agreement:

1. Certifying a Class for settlement purposes only;
2. Approving the Settlement Agreement;
3. Appointing Plaintiffs as Class Representatives for settlement purposes;
4. Appointing Plaintiff's Counsel, Kevin Mahoney and Katherine J. Odenbreit of Mahoney Law Group, APC and Farzad Rastegar and Douglas Perlman of Rastegar Law Group, APC, as Class Counsel for settlement purposes;
5. Approving the payment of reasonable Incentive Awards;
6. Approving the proposed Settlement Class Notice ("Notice") to be mailed to the Class Members;
7. Approving the opt out and objection procedures provided in the Settlement Agreement and set forth in the Notice;
8. Appointing Phoenix Settlement Administrators as Settlement Administrator;
9. Directing Defendants to furnish the Settlement Administrator, within forty-five (45) days after the Court grants preliminary approval of the Settlement, a list setting forth the Class

[1] This memorandum incorporates by reference the definitions in the Settlement Agreement and the terms used herein shall have the same meaning as set forth in the Settlement Agreement.

Members' names, social security numbers, last-known addresses, telephone numbers, starting and ending dates of employment, and number of shifts worked during the Class Period ("Class List"); and

10. Setting a Final Approval Hearing pursuant to the Court's availability, in Department 7 of the above-entitled Court.

This motion will be based upon this notice, the attached memorandum of points and authorities, declarations of Katherine J. Odenbreit, Kevin Mahoney, Douglas Perlman, the records and files in this action, and any further evidence or argument that the Court may properly receive at or before the hearing.

Dated: Sept. 13, 2021

MAHONEY LAW GROUP, APC

By: 

Kevin Mahoney, Esq.
Katherine J. Odenbreit, Esq.
Attorneys for Plaintiff, HERMELINDA AGUILAR, on behalf of herself and all others similarly situated

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is a putative wage and hour class action for violations of the California Labor Code and applicable IWC Wage orders brought by Plaintiffs Salvador Ochoa and Hermelinda Aguilar ("Plaintiffs," "Ochoa," or "Aguilar") against Defendants CKE Restaurants Holdings, Inc., Carl's Jr. Restaurants, LLC, and Carl's Jr. Funding, LLC (collectively "Defendants" or "Carl's Jr."), and on behalf of all hourly, non-exempt employees who worked for Defendants at a corporate-owned Carl's Jr. restaurant location in California. Named Plaintiff Ochoa originally filed a Class Action Complaint against Defendants on June 8, 2016 (BC623041). Named Plaintiff Aguilar filed her Class Action Complaint on December 12, 2017 (BC686601). Plaintiffs jointly filed the currently operative Consolidated Class Action Complaint on June 27, 2019 ("Consolidated Complaint"). (Declaration of Katherine J. Odenbreit ("Odenbreit Dec."), ¶¶ 4, 7.)

Plaintiffs filed their Motion for Class Certification ("Cert. Motion") on July 22, 2019, on behalf of, at that time, over 40,000 current and former hourly, non-exempt employees who worked for Defendants at a corporate-owned Carl's Jr. restaurant in California between June 8, 2012 to the present. (Odenbreit Dec., ¶ 5.) Shortly following Plaintiffs' submission of the Cert. Motion, the Parties agreed to participate in mediation, whereupon the Parties stipulated to stay the case, the Opposition, and the Class Certification Hearing pending mediation. (Odenbreit Dec., ¶ 5.) The Cert. Motion was filed after completing formal and informal pre-class certification discovery, including the exchange of voluminous written discovery, the production of a representative sample of time punch and payroll data, and the production of class member contact data. The Parties also completed the deposition of Plaintiffs and two depositions of Defendants' Person Most Qualified ("PMQ") witness. (Odenbreit Dec., ¶ 5.)

Defendants took the depositions of declarants who submitted declarations in support of Plaintiffs' Cert. Motion, which was the last formal discovery in the case prior to the Covid-19 Pandemic. Thereafter, the litigation was stayed until Defendants filed their Opposition to

Plaintiffs' Cert. Motion on August 17, 2020. Subsequent to the filing of Defendants' Opposition to Plaintiffs' Cert. Motion, Plaintiff deposed 11 of Defendant's 200+ declarants who submitted statements in support of Defendants' Opposition.[2] (Odenbreit Dec., ¶ 16.)

The Parties participated in three (3) separate mediation sessions with two (2) highly-regarded mediators. (Odenbreit Dec., ¶ 6.) The certification motion briefing was modified in order to allow the Parties to complete mediation. (Odenbreit Dec., ¶ 5.) During the mediation process, Plaintiffs also learned there was a settlement between Defendants and plaintiffs in a CKE manager class action pending in the Santa Barbara Superior Court which had an impact on the potential value of this case ("Manager Class Settlement"). (Odenbreit Dec., ¶ 18.) Ultimately, the Parties reached this settlement at the final mediation session with mediator Mark Rudy. (Odenbreit Dec., ¶ 19.)

II. PROPOSED SETTLEMENT TERMS

The Gross Settlement Amount ("GSA") is nine million eight hundred seventy-two thousand dollars ($9,872,000). A summary of the terms of the Settlement are set forth in the Declaration of Katherine J. Odenbreit. (Odenbreit Dec., ¶ 6(b).)

By way of a brief summary, Plaintiffs are pursuing the following theories of liability and damages: 1. Premium wages for all late, short, or missing meal periods where Defendants failed to provide compliant meal periods; 2. Premium wages for meal breaks not properly waived by agreement; 3. Premium wages for rest breaks due to Defendants' failure to authorize and permit completely off-duty rest breaks from the start of the Class Period to December 31, 2018, during which time Defendants continued to exercise control over Class Members by forbidding them to leave the premises during their ten minute rest breaks; 5. Unpaid wages for time spent maintaining employer mandated uniforms; 6. Reimbursement to Class Members by way of a failure to reimburse necessary expenses incurred and unpaid time expended by Class Members in maintaining their uniforms; and 7. Restitution to Class Members under an Unfair Business Practice theory, §§ 17200 *et seq.* for the banking fees incurred by Class Members on the debit

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[2] Plaintiffs sought a sample of 25 depositions, however, Defendant represented they could not reach 14 of the declarants and they would need to be subpoenaed. Plaintiffs managed to serve a few subpoenas and 2 of the declarants failed to show for the deposition. The remaining were unable to be served. (Odenbreit Dec., ¶17.)

pay cards issued by Defendants to pay biweekly wages. The Class definition is: "All hourly, non-exempt employees who worked for Defendants at a corporate-owned Carl's Jr. restaurant in California at any time since June 8, 2012 to July 17, 2021." (Odenbreit Dec., Ex. 1, p. 3:1-6, ¶ 7(a).)

Defendants deny all of Plaintiffs' allegations and mounted an aggressive opposition to Plaintiffs' Cert. Motion.

III. MEDIATION AND ANALYSIS OF CASE STRENGTHS AND WEAKNESSES

During the litigation and prior to mediation, Plaintiffs' counsel conducted extensive formal discovery, conducted depositions of Defendants' witnesses and putative class members and engaged renowned experts. (Odenbreit Dec., ¶19.) Plaintiffs received contact information and class data for nearly 800 putative class members. (Odenbreit Dec., ¶ 20.) Plaintiffs obtained time records, pay records and POS data for a significant number of putative class members. (Odenbreit Dec., ¶ 20.) Plaintiffs' counsel also conducted a full and complete legal analysis of the claims at issue. This included an investigation of the law and facts relating to the claims asserted in the litigation, and Plaintiffs' counsel have concluded, taking into account the sharply contested issues involved, the expense and time necessary to pursue the litigation through trial and any appeals, the risks and costs of further prosecution of the litigation, the risk of an adverse outcome, the uncertainties of complex litigation, and the substantial benefits to be received by the Plaintiffs and the members of the Settlement Class pursuant to this Agreement, that a settlement with Defendants, terms and conditions set forth herein is fair, reasonable, adequate, and in the best interests of the Settlement Class. (Odenbreit Dec., ¶¶ 20, 21.)

Defendants maintain that they have available legal and factual grounds for defending and defeating this action. Defendants, in their responsive pleadings, asserted a multitude of affirmative defenses each of which are still claimed as valid defenses and aggressively opposed the Cert. Motion. Defendants would vigorously pursue these defenses at trial. Defendants believe that Plaintiffs could not prevail at trial. (Odenbreit Dec., ¶ 22.)

IV. CERTIFICATION FOR SETTLEMENT PURPOSES ONLY IS APPROPRIATE

A. The Court Should Conditionally Certify the Settlement Class Because It Meets All the Requirements for Certification for Settlement Purposes under Code Civ. Proc., § 382

Under well-established, relevant case law interpreting Code of Civil Procedure section 382,[3] class certification is warranted where there are numerous class members, an ascertainable class with a well-defined community of interest among its members, and where a "class action proceeding is superior to other means for a fair and efficient adjudication of the litigation."[4] The certification question simply asks whether the theory of recovery advanced by the plaintiff is likely to prove amenable to class treatment. (*See e.g., Jaimez v. Daiohs USA, Inc.* (2010) 181 Cal.App.4th 1286, 1298.) In ruling on certification, a trial court's task is to determine "whether ... the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." (*Ibid.)* Thus, "[t]he relevant comparison lies between the costs and benefits of adjudicating plaintiffs' claims in a class action and the costs and benefits of proceeding by numerous separate actions" (See, e.g., *Ibid.*)

In reviewing proposed class action settlements prior to certification, trial courts have been instructed to consider settlements more favorably than when certification has been contested: "[I]t is also well established that trial courts should use different standards to determine the propriety of a settlement class, as opposed to a litigation class certification. Specifically, a lesser standard of scrutiny is used for settlement cases." (*Global Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal.App.4th 836, 859, citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1807 n. 19.)

As the court noted in *Dunk*, although certification requirements are intended "to protect the interests of the non-representative class members," that concern is "protected by the trial court's fairness review of the settlement." (*Dunk, supra*, 48 Cal.App.4th at p. 1807 n.19.) Certification of a

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[3] Code Civ. Proc., § 382, which is the statutory basis for the maintenance of class actions under California law, states in relevant part, "[W]hen the question is one of a common or general interest, of 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."

[4] *See, e.g., Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326, 332.

settlement class is a regular feature of class action litigation and an approved procedure which ought to be followed in this case. (*See Newberg on Class Actions* (3d ed. 1991) § 11.27, pp. 11-40 to 11-56; and *Manual for Complex Litigation,* 2d (1993) § 30.45.) In view of these standards, and as shown below, the Settlement Class in this case should be certified for purposes of settlement.[5] (Code Civ. Proc., § 382; Cal. Rules of Court, rule 3.769(c).

A. The Members of the Settlement Class Are Both Objectively Ascertainable and Sufficiently Numerous

"Ascertainability" is a due process requirement that ensures notice can be given to putative class members who will be bound by the judgment and as to whom it will have res judicata effect. The determination is made by examining (1) the class definition, (2) the size of the class and (3) the means available to identify class members.[6] The legal standard for ascertainment of a class is clear and unambiguous: a class is ascertainable when it may be readily identified without unreasonable expense or time by reference to official records. *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932. The numerosity analysis is limited to how many individuals fall within the class definition and whether their joinder is impracticable, not how many "net" class members there might be after considering affirmative defenses. *Hendershot v. Ready to Roll Transportation, Inc.* (2014) 228 Cal.App.4th 1213, 1223.

In this case, there are approximately thirty-one thousand eight hundred twenty-two (31,822) Class Members, all of whom worked as non-exempt employees at Carl's Jr. corporate-owned restaurants in California, and whom may be identified by reference to Defendants' employment records. (Odenbreit Dec., Ex. A, p. 10, ¶ 48.) A class of such size is sufficiently large to benefit from the legal, economic and logistical efficiency derived from class treatment, while not so large as to present manageability issues. To facilitate the administration of the Settlement, Defendants have agreed to share Class Members' information from their records with the Settlement Administrator. Accordingly, the Settlement Class is not only

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[5] For purposes of the Settlement, the parties stipulated that class certification is appropriate. (Odenbreit Decl., Ex. A, p. 8, ¶ 44.)

[6] *Sotelo v. MediaNews Group, Inc.* (2012) 207 Cal.App.4th 639, 647–648; *Reyes v. San Diego County Bd. of Supervisors* (1987) 196 Cal.App.3d 1263, 1271.

ascertainable, but also sufficiently numerous.

B. Common Questions Predominate Over Any Individualized Questions of Fact or Law

A question of law or fact is "common" to the members of a class if it may be resolved through common proof. (*See*, *Jaimez*, *supra*, 181 Cal.App.4th at p. 1305.) As for predominance, it "is a comparative concept, and 'the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate.'" (*Sav-On Drug Stores, Inc.*, *supra*, 34 Cal.4th at p. 334, quoting *Reyes v. San Diego County Bd. of Supervisors* (1987) 196 Cal.App.3d 1263, 1278.) Thus, "[i]ndividual issues do not render class certification inappropriate so long as such issues may effectively be managed." (*Ibid.*) This is especially so where the key difference between class members solely concerns their damages. (*See Ibid.*)

1. Common Issues Predominate the Meal Period and Rest Period Claims

Employers who fail to provide meal periods and rest periods as required by the Wage Orders must pay "one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided." Lab. Code, § 226.7,(b); IWC Wage Order 5-2001 §§ 11(B) and 12(B). In these circumstances, the employee is "immediately" entitled to the premium wage, without any demand or claim to the employer, in a manner "akin to an employee's immediate entitlement to payment of wages or for overtime." *Safeway, Inc. v. Superior Court* (2015) 238 Cal.App.4th 1138, 1155 (emphasis added); citing *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1108.

Plaintiffs allege that, throughout the Class Period, Defendants have implemented a set of common policies and practices by understaffing restaurants resulting in missed, late and short meal periods. Plaintiffs further allege Plaintiffs and class members did not waive meal periods for shifts lasting no longer than 6 hours. (Odenbreit Dec., ¶ 10.) These practices were applicable to Plaintiffs and putative class members. (Odenbreit Dec., ¶¶ 10, 11, 38.) With regard to the Rest Period Subclass, Defendants revised their rest break policy at the end of 2018 omitting the language requiring employees to remain on the premises for rest breaks. (Odenbreit Dec., ¶12.) Plaintiffs' analysis and testimony secured by Plaintiffs supports the

contention a common policy and practice was applicable to the class. (Odenbreit Dec., ¶¶ 10-12.)

Plaintiffs allege Defendants engaged in a practice of consciously failing to pay premiums for meal and rest periods. While there were some premiums paid by Defendants for missed meal and rest breaks, that figure was relatively low. (Odenbreit Dec., ¶ 12.). Defendants argued there was not uniform policy or practice, requiring individualized inquiries that would preclude class certification. Defendants also argued that the records relied upon by Plaintiffs do not conclusively show whether Defendants actually failed to provide a meal period or whether a Class Member chose to skip them or take them late even though they were provided.

2. Deficient Waiver Meal Period Subclass

Cal. Lab. Code § 512(a) dictates that "if the total work period per day of the employee is no more than six hours, the meal period may be waived by ***mutual consent*** of both the employer and employee." (emphasis added). Defendants' written policy provides that employees may only waive meal periods for shifts between five (5) and six (6) hours by an election in writing. As such, Plaintiffs contend that through Defendants' own company-wide ***written*** policy, Defendants expressly do not provide consent to any purported meal period waiver not executed in writing. (Odenbreit Dec., ¶11.) Thus, with respect to Deficient Waiver Meal Period Class Members, being those employees who did not execute any written meal period waiver for the one meal period prescribed in a 5–6-hour shift, there legally cannot exist the requisite ***mutual*** consent required by Lab. Code, § 512,(a), whether or not any purported oral agreement to waive such meal period transpired. Defendants contend that the questions of why a meal period was absent, late or short remained a necessary predicate to liability that could not be resolved class-wide. The issue of whether or not a written waiver is required for an effective meal break waiver is a common issue.

3. Rest Periods

As to the Rest Break Subclass, Plaintiffs are pursuing liability for rest breaks that were deficiently provided as a matter of law from June 8, 2012 to December 31, 2018. The theory of recovery derives from Defendants' failure to permit and authorize ***completely off-duty*** rest breaks, due to Defendants' express policy of prohibiting Class Members from leaving the premises during their ten-minute rest breaks. (Odenbreit Dec., ¶12.) Therefore, whether or not this policy denied Plaintiffs and class members of off-duty rest breaks is a common issue. Defendants argued that they had a policy and practice to provide duty-free rest breaks and there is evidence that Class Members were permitted to and did leave restaurants during rest breaks. As set forth above, common issues predominate with regard to Plaintiffs' meal and rest period claims.

4. Plaintiffs' Claims Related to Pay Card Fees

Defendants provided the option to employees to receive their wages through a debit Pay Card. (Odenbreit Dec., ¶ 13.) Plaintiffs allege Defendants initially set up all new employees to receive wages through the pay card and only after an employee expressly informed Defendants they wanted either direct deposit or a paycheck would that change. (Odenbreit Dec., ¶ 13.) Plaintiffs allege these policies result in an unlawful discount to employee wages in violation of Lab. Code, § 212. Section 212 states:

> "(a) No person, or agent or officer thereof, shall issue in payment of wages due, or to become due, or as an advance on wages to be earned:
> (1) Any order, check, draft, note, memorandum, or other acknowledgment of indebtedness, ***unless it is negotiable and payable in cash, on demand, without discount, at some established place of business in the state, the name and address of which must appear on the instrument***, and at the time of its issuance and for a reasonable time thereafter, which must be at least 30 days, the maker or drawer has sufficient funds in, or credit, arrangement, or understanding with the drawee for its payment." (emphasis added)"

The DLSE has instructed California employers that if they are to utilize pay cards to pay employees' wages, certain conditions must be met to avoid violation of Labor Code § 212, including: (1) a place of business must be provided whereby the employee has the ability

to receive the entire amount of wages, (2) without incurring any fees, and (3) the employees must be provided with an alternative choice. The locations where employees can go to receive full payment of wages must be listed on the payment instrument (i.e. the card). The important public policy at issue is full, prompt payment of all wages without discounts (i.e. fees).

Plaintiffs allege there is no method or instruction provided to the employees on where they can go to receive full payment without incurring any fees. (Odenbreit Dec., ¶¶ 13-14.) Defendants argued there were no Labor Code violations because Class Members were informed of the program's services and procedures, and pay cards were optional. Common issues predominate as to whether Defendants did mandate use of pay cards, at least for the first pay period, and whether this practice resulted in damages to the class.

5. Defendants' Failure to Pay for Uniform Maintenance and Time Worked Maintaining Uniforms

When uniforms are required by the employer to be worn by the employee as a condition of employment, such uniforms shall be provided and maintained by the employer. (IWC Wage Order 5-2001, Sect. 9(A).) Defendants admit that they do not provide any kind of allowance for the maintenance and cleaning of the shirts, aprons or hats. (Odenbreit Dec., ¶¶ 15-16.) Defendants, on the other hand, argued they were not required to reimburse Class Members for uniform-related maintenance and cleaning expenses because they required minimal care. Whether or not the time spent laundering employer mandated uniforms and an employer's obligation to reimburse employees for uniform maintenance are common issues.

C. Plaintiffs' Claims Are Typical of the Class

To maintain a class action, the representative plaintiff must be a party whose claims or defenses are typical of the claims or defenses of the class. *See e.g. Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* (1975) 48 Cal.App.3d 134. Typicality refers to the nature of the claim of the class representative, not the specific facts from which the claim arose. *Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502. The purpose of this requirement is to ensure that the representative plaintiff has interests that are reasonably co-extensive with those of absent class members. (*See Ibid.*) "The test of typicality 'is whether other members have the same or similar injury, whether the action is

based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct."[7] In light of these standards, Plaintiffs' claims are typical of Class Members.

Here, both Plaintiffs Ochoa and Aguilar worked as non-exempt employees in Carl's Jr. corporate-owned restaurants in California during the relevant time period. Plaintiffs' claims are typical of those of the putative Class based on their extensive employment with Defendants while subject to the same common policies and practices set forth herein. (Odenbreit Dec., ¶¶ 38, 39.)

D. Plaintiffs and Their Counsel Will Adequately Represent the Class

The class representative, through qualified counsel, must be capable of "vigorously and tenaciously" protecting the interests of the class members. *Simons v. Horowitz* (1984) 151 Cal.App.3d 834, 846. The adequacy requirement is met where (1) The prospective class representative must file a declaration stating that he or she desires to represent the class and understands the fiduciary obligations of serving as class representative (*Jones v. Farmers Ins. Exchange* (2013) 221 Cal.App.4th 986, 998), (2) the plaintiff is represented by counsel qualified to conduct the litigation and (3) the plaintiff's interest in the litigation is not antagonistic to class members' interests.[8] In this case, Plaintiffs have diligently pursued this action for more than five (5) years. Plaintiffs have no conflicts with the putative Class. (Odenbreit Dec., ¶ 38.)

Class counsel consists of two (2) law firms with extensive experience litigating wage and hour class actions; (Odenbreit Dec., ¶¶ 40-49; Declaration of Kevin Mahoney ("Mahoney Dec."), ¶¶ 4-10; Declaration of Douglas Perlman ("Perlman Dec."). ¶¶ 38-46.) As such, this Court should appoint Plaintiffs as Class Representatives for the Class and appoint Plaintiffs' Counsel as Class Counsel. For the foregoing reasons, certification of the class for settlement purposes is appropriate.

V. THE TWO-STEP SETTLEMENT APPROVAL PROCESS

Any settlement of class litigation must be reviewed and approved by the Court pursuant to a two-step analysis: (1) an early (preliminary) review by the Trial Court, and (2) a final review after notice has been distributed to the Class Members for their comment or objections. (*See The Manual for Complex Litigation Second* at §30.44 (1985).)

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[7] *Ibid..*, quoting *Schwartz v. Harp* (C.D. Cal. 1985) 108 F.R.D. 279, 282.
[8] *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 451.

Thus, the preliminary approval by the trial court is simply a conditional finding that the settlement appears to be within the range of acceptable settlements. As Professor Newberg comments, "The strength of the findings made by a judge at a preliminary hearing or conference concerning a tentative settlement proposal may vary. The court may find that the settlement proposal contains some merit, is within the range of reasonableness required for a settlement offer or is presumptively valid subject only to any objections that may be raised at a final hearing." *Newberg on Class Actions*, 3rd Ed., 11.26.

The details and specific terms of the recovery for each Class Member are set forth in the Settlement Agreement. (Odenbreit Dec., Ex. A). The Settlement for each participating Class Member is fair, reasonable, and adequate, given the inherent risk of litigation, the risk of not obtaining class certification, the risk relative to trial, future appeals surrounding class certification or summary judgment and the costs of litigation. (Odenbreit Decl., ¶ 51).

A. The Proposed Settlement Is a Fair, Adequate, and Reasonable Compromise of Disputed Wage Claims in View of the Parties' Respective Risks

California courts favor settlement. (See, e.g., *Stambaugh v. Superior Court* (1976) 62 Cal.App.3d 231, 236.) Unlike most settlements, class action settlements involve a court approval process that exists to prevent fraud, collusion, and unfairness to absent class members. *Malibu Outrigger Bd. of Governors v. Superior Court* (1980) 103 Cal.App.3d 573, 578–579. The trial court is called upon to assess whether a proposed settlement is fair, reasonable and adequate, in order to meet its obligation as a fiduciary of the absent class members.[9] The trial court's role is to "prevent fraud, collusion or unfairness to the class" and to safeguard the rights of class members, including the representative plaintiff(s) in the event these rights were not given enough regard by the negotiating parties. *Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4th 46, 60.

To evaluate a settlement, the trial court must receive "basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise"

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[9] *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1151 [*citing to Dunk, supra*, 48 Cal.App.4th at p. 1801–1802.]

giving considerable weight to the competency and integrity of counsel and the involvement of a neutral mediator. *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133.

Essentially, when the settlement is a product of negotiation between competently represented parties, and with the assistance of a reputable professional neutral, there is a presumption of fairness, absent specific concerns regarding the reasonableness of the resulting agreement. Plaintiffs have provided a full analysis of the potential value of the claims and the reasonable potential value. (Odenbreit Dec., ¶¶23-34.) Given the above and further reasons discussed below, this Court should preliminarily approve the Settlement, allow the Parties to give notice to the Class as proposed, and schedule a fairness and final approval hearing.

In this case, the Parties attended three (3) mediation sessions with two (2) highly regarded and experienced mediators, Retired Judge Peter D. Lichtman, and Mark Rudy, Esq., both with extensive backgrounds in wage and hour class action litigation and mediation. (Odenbreit Dec., ¶ 6.) There was significant information and documentation exchanged formally and informally between the Parties. (Odenbreit Dec., ¶¶ 5, 17, 20-21, 53.) During mediation the Parties extensively discussed their respective legal and factual positions, and the realistic outcome of class certification and liability. (Odenbreit Dec., ¶ 6.) There are no conflicts of interest in the treatment between class members. All Settlement Class Members will be paid in direct proportion to the number of workweeks they worked for Defendants (Odenbreit Dec., Ex. A, pp. 10-11, ¶ 52.)[10] The purpose for this type of distribution is that, to the extent violations exist, those employees who worked more workweeks would be exposed to more violations than those who worked fewer workweeks for the employer.

The Court must also take into account the potential risks if litigation were to proceed, including difficulties in calculating damages, unsettled or unclear law and difficulties in securing witnesses for trial. (*Mora v. Cal West Ag Services, Inc.* (E.D. Cal., May 13, 2019, No. 115CV01490LJOEPG) 2019 WL 2084725, at *5.) Further, the Court also must consider whether

[10] The number of workweeks excludes any workweeks worked by any member of the settlement class and subclasses in the Manager Class Settlement, which was finally approved by the Santa Barbara Superior Court on September 8, 2021.

an action is anticipated to continue with vigorous litigation and lengthy challenges regarding the merits of the claims and that a defendant may prevail on their defenses. *Ibid.*

As set forth in Section I above and the Declaration of Katherine J. Odenbreit, substantial investigation and discovery was conducted in this action which permitted Class Counsel and Plaintiffs to fully evaluate the potential liability and reasonableness of the Settlement, potential risks of continued litigation and Defendants' defenses to the action. (Odenbreit Dec., ¶¶17, 20-22.) In light of the above, there are no questions or factors which rebut the presumption of fairness given to proposed settlements achieved in this or similar fashion.

1. The Settlement Is Fair, Reasonable and In the Best Interests of the Class

To evaluate a settlement, the trial court must receive "basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise." *Kullar*, *supra*, 168 Cal.App.4th 116. However, *Kullar* does not require an explicit statement of the maximum amount the plaintiff class could recover if it prevailed on all claims. *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 409. Fairness of a settlement is not conditioned upon Plaintiffs having obtained the maximum amount Plaintiffs could have been awarded at trial, but rather, whether the settlement is reasonable under the totality of the relevant circumstances. *Wershba, Id.* at p. 250 (As the 9th Circuit noted in *Linney v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242: "It is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlement. The proposed settlement is not judged against a hypothetical or speculative measure of what might have been achieved by the negotiators.")

The most important factor is the strength of the plaintiff's case on the merits. *Kullar*, *supra*, 168 Cal.App.4th 116. "The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Officers for Justice v. Civil Service Com'n of City and County of San Francisco* (9th Cir.

1982) 688 F.2d 615, 628. Estimates of a fair settlement must account for factors such as risk of losing at trial, expense of litigating the case and delay in recovery for the class. *In re Toys R Us-Delaware, Inc.--Fair and Accurate Credit Transactions Act (FACTA) Litigation* (C.D. Cal. 2014) 295 F.R.D. 438, 453.

The GSA in the amount of nine million, eight hundred seventy-two thousand dollars ($9,872,000.00) represents approximately thirty-eight percent (38%) of the reasonable potential recovery value of class claims estimated by Plaintiffs to be approximately thirty-seven million seven hundred five thousand twenty-three dollars and sixty cents ($37,705,023.60). (Odenbreit Dec., ¶¶23-34.) While the potential value of this case is high, Plaintiffs' claims would likely prove challenging to establish on a class-wide basis at trial and some claims could be subject to summary judgment/adjudication. (Odenbreit Dec., ¶¶22, 24-30, 32-34.) The Settlement represents a reasonable compromise given not only the potential commitment of time and costs that would be necessary to proceed with this case through certification and trial, as well as the risk of adverse rulings or verdicts thereon, but also in consideration of factors specific to this case. This case contains allegations that hinge on a single finding or ruling to determine their success. (Odenbreit Dec., ¶¶26, 28, 29, 30(c).)

Based upon the analysis and conclusions of Plaintiffs' counsel, their experts, review of Defendants' documents and records, and frank, candid discussions with experienced mediators, Plaintiffs assess the value of the proposed settlement as fair, reasonable and in the best interests of the proposed Class. (Odenbreit Dec., 51; Mahoney Dec., ¶11; Perlman Dec., ¶¶ 47-48.)

2. The Proposed Allocation to the Settlement Class and PAGA Settlement Group Members is Fair and Reasonable

The proposed method of allocating the Individual Settlement Payments to Settlement Class Members and PAGA Settlement Members is fair and reasonable. As noted, the Parties agreed to allocate the Settlement between all Settlement Class Members based on the number of workweeks worked by the Settlement Class Member during the Class Period, in relation to the

total number of workweeks worked by all Settlement Class Members collectively during the Class Period. (Odenbreit Dec., Ex. A, pp. 10-11, ¶ 52.) Likewise, 25% of the PAGA Payment ($25,000.00) will be distributed to the PAGA Settlement Group Members based on the number of workweeks worked by the PAGA Settlement Group Member during the PAGA Period, in relation to the total number of workweeks worked by all PAGA Settlement Group Members collectively during the PAGA Period. (Odenbreit Dec., Ex. A, p. 12, ¶ 57.) This proposed method is fair and reasonable because each Settlement Class Member's and PAGA Group Member's actual potential recovery vary based on the number of workweeks he or she actually worked. A Class Member who worked a greater number of workweeks for Defendants will have a larger potential claim than other employees who worked a fewer number of workweeks during the relevant period. There is no reversion and there is no residual.

3. The Proposed Requested Attorneys' Fees, Costs Incentive Awards and Settlement Administration Costs Are Fair and Reasonable and Merit Preliminary Approval

Total value of the GSA is nine million eight hundred seventy-two thousand dollars ($9,872,000.00). All awarded Incentive Awards, Attorney Fee and Attorney Cost Awards, the LWDA Payment and Administration Costs will be deducted from the GSA leaving the Net Distribution Amount which will be distributed to Settlement Class Members.

a. Plaintiffs' Incentive Awards Are Reasonable: Courts routinely approve incentive awards to compensate named plaintiffs for the services they provide and the risks they incur during class action litigation, often in much higher amounts than that sought here.[11] These awards "are intended to compensate class representatives for work done on

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[11] *See, e.g., Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 726 (upholding "service payments" to named plaintiffs for their efforts in bringing the case); *Van Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F.Supp. 294 (approving $50,000 enhancement award). "Since without a named plaintiff there can be no class action, such compensation as may be necessary to induce him to participate in the suit could be thought the equivalent of the lawyers' non-legal but essential case-specific expenses, such as long-distance phone calls, which are reimbursable." (*Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804, fn. omitted, citing *Matter of Continental Illinois Securities Litigation* (7th Cir. 1992) 962 F.2d 566, 571.

behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, recognize that without the courage and actions of the representative plaintiffs, the class recovery would never have been achieved."[12]

Up to twenty thousand dollars ($20,000.00) total ($10,000.00 for each Plaintiff) is allocated toward Plaintiffs' Class Representative Incentive Awards, in recognition of their contributions to this action and service to the Class. This case has been litigated heavily for over five (5) years. Plaintiffs were subjected to multiple day depositions and consistently assisted counsel throughout the litigation. (Odenbreit Dec., ¶ 55; Perlman Dec., ¶¶ 37, 52.)

b. The Requested Attorneys' Fees and Costs Are Reasonable: The California Supreme Court removed any lingering doubt about the use of the percentage of the fund method to award attorney's fees in California Courts:

> "We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created. The recognized advantages of the percentage method—including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation (See pt. I, *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 48–49; *Rawlings v. Prudential-Bache Properties, Inc.* (6th Cir. 1993) 9 F.3d 513, 516)—convince us the percentage method is a valuable tool that should not be denied our trial courts." *Laffitte v. Robert Half Internat. Inc.* (2016) 1 Cal.5th 480, 503.

Thus, this Court may, and, as encouraged by the California Supreme Court, should, award attorney's fees to Class Counsel based upon the percentage of the fund methodology. "Empirical studies show that regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery." *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 47 n. 11 (quoting *Shaw v. Toshiba America Information Systems, Inc.* (E.D. Tex. 2000) 91 F.Supp.2d 942, 972).) This is also consistent

[12] *Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958–958; *Barrera v. Home Depot U.S.A., Inc.* (N.D. Cal., May 20, 2015, No. 12-CV-05199-LHK) 2015 WL 2437897, at *2). The Court should look to the risk, time, effort and benefit secured for the class in each case and not establish a "standard" enhancement. (*Mora, supra*, 2019 WL at p. at *10; *Barrerra, supra* at *2; *Munoz, supra*, 186 Cal.App.4th at p. 412,

with Plaintiff's counsels' experience in these types of cases. Up to thirty-five percent of the GSA or three million four hundred fifty-five thousand two hundred dollars ($3,455,200.00), is allocated for Class Counsel's attorneys' fees, plus costs of up to one hundred fifty thousand dollars ($150,000.00), is allocated toward compensating and reimbursing Plaintiffs' counsel for their representation of Plaintiffs and the Settlement Class. The requested fees are appropriate. Defendants have vigorously contested this case throughout the litigation. Defendants filed and Plaintiffs opposed a motion to strike the class allegations and a pre-emptive motion to deny certification. (Perlman Dec., ¶ 15.) Plaintiffs filed a Cert. Motion and in response, Defendants secured nearly a year to oppose, resulting in the submission of approximately two hundred (200) putative class member declarations. (Odenbreit Dec., ¶ 17; Perlman Dec., ¶ 53.) Additional motion practice was also contemplated by Plaintiffs in response to Defendants' opposition to the Cert. Motion. (Odenbreit Dec., ¶ 17.) At final approval, Class Counsel will submit to the Court evidence of the hours put in by the two (2) firms on this litigation. Mahoney Law Group, APC and Rastegar Law Group, APC are highly regarded and experienced litigators of wage and hour class actions.

The costs spent in this case are not unusual or unreasonable for a case with a pending class certification motion. The majority of the expense consists of expert witness fees which were necessarily incurred to support Plaintiffs' Cert. Motion and proposed trial plan. (Odenbreit Dec., ¶ 57; Perlman Dec., ¶ 54.) As set forth above, the requested attorneys' fees and costs warrant preliminary approval.

c. The Costs of Settlement Administration Are Reasonable: The Settlement Administrator will be responsible for issuing to participating Settlement Class Members IRS Forms W-9 and 1099 for the amounts allocated as wages, penalties and interest. (Odenbreit Dec., Ex. A, p. 8, ¶ 36, pp. 15-20, ¶¶ 74-89.). The cost for the services provided by PSA of one hundred ten thousand dollars ($110,000.00) is reasonable given there are over thirty-one thousand (31,000) Settlement Class Members. (Odenbreit Dec., ¶ 58.) PSA is a well-known and regarded class settlement administrator with the necessary security protocols and

insurance in place to ensure privacy of class information and security of the qualified settlement funds. (Declaration of Michael E. Moore, Phoenix Settlement Administrators).

4. The Proposed Notice Meets the Requirements of California Rules of Court, Rule 3.766(d) and (e)

Notice requirements are set forth in California Rules of Court, rule 3.766. In determining the manner of the notice, the court must consider the interests of the class; the type of relief requested; the stake of the individual class members; the cost of notifying class members; the resources of the parties; the possible prejudice to class members who do not receive notice; and the res judicata effect on class members. Cal. Rules of Court, rule 3.766(e).

Here, the Parties have submitted a Proposed Notice for the Court's consideration. (Odenbreit Dec., Ex. A: Settlement Agreement, Ex. 2.)

The notice process provides a reasonable chance the notice will reach a substantial percentage of the class. *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974. Here, the proposed procedure includes safeguards, including, but not limited to, pre-mailing searches for address changes and the re-mailing of returned notices after skip traces are conducted. (Odenbreit Dec., Ex. A, pp. 15-16, ¶ 74.) Further, the Settlement Administrator will create a website where Class Members can go to find the Notice, instructions on how to request exclusion or object and other key case documents. (Odenbreit Dec., Ex. A, pp. 16-17, ¶ 77.) Finally, the Notice will be sent in both English and Spanish. (Odenbreit Dec., Ex. A, p. 16, ¶ 77.)

VI. A FINAL APPROVAL HEARING SHOULD BE SCHEDULED

The last step in the settlement approval process is the formal final approval hearing, at which the Court may hear all evidence and argument necessary to evaluate the proposed Settlement. At that hearing, proponents of the Settlement may explain and describe its terms and conditions and offer argument in support of Settlement approval. Settlement Class Members, or their counsel, may be heard in support of or in opposition to the Settlement Agreement. The Parties propose the final approval hearing be held 180 days following the Order granting preliminary approval, or as soon thereafter as can be heard by the Court.

Dated: Sept. 13, 2021

MAHONEY LAW GROUP, APC

By: 

Kevin Mahoney, Esq.
Katherine J. Odenbreit, Esq.
Attorneys for Plaintiff, HERMELINDA AGUILAR, on behalf of herself and all others similarly situated

PROOF OF SERVICE
Code of Civ. Proc. § 1013a, subd. (3)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 249 East Ocean Boulevard, Suite 814, Long Beach, California, 90802.

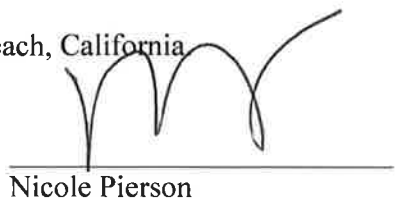
On **September 13, 2021,** I served true copies of the following document described as: **PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND PAGA SETTLEMENT** on the interested parties in this action, addressed as follows:

Tyler J. Woods, Esq. Gabriela M. Fuentes, Esq. **FISHER & PHILLIPS LLP** 2050 Main Street, Suite 1000 Irvine, CA 92614	Attorney for Defendants CKE RESTAURANTS HOLDINGS, INC., CARL'S JR. RESTAURANTS LLC., and CARL'S JR. FUNDING, LLC. Telephone: (949)798-2117 Email: twoods@fisherphillips.com gfuentes@fisherphillips.com
Farzad Rastegar, Esq. Douglas W. Perlman, Esq. Ryan Aliman, Esq. RASTEGAR LAW GROUP, A.P.C. 22760 Hawthorne Blvd., Ste. 200 Torrance, CA 90505	Attorney for Plaintiff SALVADOR OCHOA Telephone: (310) 961-9600 Facsimile: (310) 961-9094 Email: farzad@rastegarlawgroup.com douglas@rastegarlawgroup.com ryan@rastegarlawgroup.com
Luanne Sacks, Esq. Hope Anne Case, Esq. Robert Bader, Esq. **SACKS, RICKETTS, & CASE, LLP** 1900 Embarcadero Rd., Suite 111 Palo Alto, CA 94303	Co-Defense Counsel for CKE RESTAURANTS HOLDINGS, INC., CARL'S JR. RESTAURANTS LLC., and CARL'S JR. FUNDING, LLC. Telephone: (650) 494-4098 Email: lsacks@srclaw.com hcase@srclaw.com rbader@srclaw.com

☒ **By electronic service:** Based on a court order, I caused the document(s) to be sent to the persons at the electronic service addresses listed above by transmission through FILE & SERVE XPRESS.

☒ **State:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **September 13, 2021**, at Long Beach, California.



Nicole Pierson