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8  
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF ORANGE  
10 COMPLEX CIVIL DIVISION

11  
12 Heather Turman and Kimberly Dang,  
individually, on behalf of all others  
13 similarly situated, and on behalf of the  
general public, and Shannon Payne, Lonnie  
14 Finley, Joshua Allen, JW Perkins, and  
Kelliane Ryan, individually,

15  
16 Plaintiffs,

17 vs.

18 Koji's Japan Incorporated dba Koji's  
Shabu Shabu and Koji's Sushi & Shabu  
19 Shabu, Arthur J. Parent, Jr., and DOES 1  
through 50 inclusive,

20 Defendants.

CASE NO.: 30-2010-00425532-CU-OE-CXC

**PLAINTIFFS' MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF UNOPPOSED MOTION  
FOR PRELIMINARY APPROVAL OF  
CLASS ACTION SETTLEMENT**

**Hon. William D. Cluster**

**Dept. CX104**

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1 **I. INTRODUCTION**

2 The Court needs no introduction to this case. It started as an ordinary case on behalf of a small  
3 group of low-wage restaurant workers at Koji’s Japan, Inc. Koji’s had two sushi restaurants in Orange  
4 County and Hollywood. The workers sought unpaid minimum wages, overtime, meal and rest period  
5 premiums, withheld tip compensation, plus interest and penalties. The restaurants closed in 2012, the  
6 company and its owner filed for bankruptcy in 2015, but Plaintiffs and undersigned counsel never  
7 relented in trying to collect from the restaurants’ owner, Arthur J. Parent, Jr. Now, there are over 2,600  
8 docket entries, dozens of contested motions decided, multiple phases of trial and appeals – with  
9 Plaintiffs’ counsel having fought for the workers for nearly a decade, obtaining an important published  
10 precedent making owners like Parent personally liable for wage violations, *Turman v. Super. Ct.*, 17  
11 Cal.App.5th 969 (2017). This settlement recovers millions directly from Parent, at a time when the class  
12 members most need cash – and with Parent himself testifying that he is on the verge of insolvency.

13 The non-reversionary Settlement requires Parent to pay a gross \$2.2 million plus the employer’s  
14 share of payroll taxes to 378<sup>1</sup> Class Members who worked long ago at Koji’s – paying thousands each,  
15 on average, to workers. The settlement pays just a fraction of counsel’s incurred fees, but will resolve  
16 the entire case. The Court should readily approve.

17 **II. FACTUAL AND PROCEDURAL BACKGROUND**

18 Plaintiffs first filed the complaint on November 16, 2010. (Dkt. 2). Over the course of litigation,  
19 Plaintiffs amended their complaint five times. Plaintiffs’ operative Fifth Amended Complaint (Dkt.  
20 1378), filed October 23, 2015, alleges a host of Labor Code and Wage Order violations, including under  
21 the Labor Code Private Attorneys General Act (PAGA), along with violations of Business and  
22 Professions Code § 17200, *et seq.*, and the federal Fair Labor Standards Act (FLSA). As noted above,  
23 the matter has been subject to the most vigorous litigation, with (*e.g.*) numerous motions to compel and  
24 to quash and for protective orders and for sanctions, motions for class certification, motions to dismiss  
25 and for summary judgment, trial motions (the first two phases of trial having already occurred), and

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26 <sup>1</sup> The 379-person Class List referenced in the settlement was corrected to omit two non-class members  
27 and add a missing member. The parties will continue to confer to ensure the Class List’s accuracy.

1 appeals and writs. Counsel’s efforts have amounted to approximately 6,000 hours of attorneys’ time  
2 (approximately \$2.6 million in outstanding fees), and over \$160,000 in out-of-pocket costs. Declaration  
3 of Bryan J. Schwartz In Support of Preliminary Approval (Schwartz Dec.) ¶3.

4 In 2012, Defendant Parent, the owner of Defendant Koji’s Japan Inc., closed both Koji’s  
5 restaurants, and filed for bankruptcy on the eve of trial. In 2015, after a bench trial on joint employer  
6 liability, the trial court found Parent to be a joint employer under the FLSA but not under California  
7 law. After a writ, the California Court of Appeal reversed, ruling that “Parent’s status as a sole  
8 shareholder and president of Koji’s cannot insulate him, or any other sole owner of a closely held  
9 corporation, from liability as a joint employer if his actions meet any one of the three definitions set  
10 forth in *Martinez [v. Combs (2010) 49 Cal.4th 35]*.” See *Turman*, 17 Cal.App.5th at 986. This Court  
11 later issued a Revised Statement of Decision finding Parent to be a joint employer under California law.

12 The class has twice been certified – once on May 6, 2013 omitting Parent as a joint employer  
13 (Dkt. 346), and then again on February 20, 2018, on remand from the Court of Appeal. (Dkt. 2116).  
14 The class was certified by the Court to include “all persons who were employed by Defendants as  
15 servers, hosts/hostesses, floor managers, sushi chefs, assistant general managers, bussers, dishwashers,  
16 bartenders, kitchen helpers, and ‘barbacks,’ at any time from November 16, 2006, to present.” Class  
17 Members share common questions of law and fact and allege they were similarly subjected to minimum  
18 wage, overtime, tip deductions, meal and rest period, and other violations throughout the class period.

19 Plaintiffs moved for summary judgment a year ago, in April 2019, and Defendants conducted  
20 additional discovery and then opposed in early 2020. The dispositive motion was set for hearing as the  
21 parties engaged in settlement negotiations. The parties have had multiple prior mandatory settlement  
22 conferences and private mediations. The most recent mediation was in early 2019, with well-known  
23 wage/hour mediator Steve Pearl, and the parties were in negotiations through Mr. Pearl and bilaterally  
24 for over a year thereafter, before the comprehensive Memorandum of Understanding was finally  
25 executed March 18, 2020. (Schwartz Dec. ¶4). More than a month of additional negotiations preceded  
26 the full execution of the long-form Settlement on April 23, 2020, presented now for approval. (Schwartz  
27 Dec., Exh. 1). Obviously, the parties are well-positioned to evaluate the case and reach a fair settlement.

1 **III. SUMMARY OF SETTLEMENT TERMS**

2 **A. The Class Members and Aggrieved Employees**

3 There are 378 class members from Koji’s non-exempt positions. (Exh. C to Exh. 1). The PAGA  
4 aggrieved members worked in the last year before the case was filed. (Exh. A to Exh. 1).

5 **B. The Terms of the Settlement**

6 The Settlement consists of a Gross Settlement Fund of \$2,200,000. (Exh. 1 ¶ 29). If more than  
7 10% of Class Members opt-out affirmatively, Defendants can void the deal, but otherwise, the  
8 Settlement is entirely non-reversionary. (Exh. 1 ¶¶ 29, 35(c)). This common fund does not include the  
9 employer’s share of payroll taxes, which Defendants will pay in addition. (Exh. 1 ¶ 29). From the \$2.2  
10 million common fund, the settlement calls for:

- 11 • attorneys’ fees, not to exceed \$1,040,000, an amount approximately 40% of the claimed, as-yet  
unpaid lodestar (Exh. 1 ¶ 29(a); Schwartz Dec. ¶¶ 3, 10);
- 12 • actual litigation costs, not to exceed \$160,000 (Exh. 1 ¶ 29(a); Schwartz Dec. ¶ 10);
- 13 • administrative costs, not to exceed \$20,000, to be paid to Rust Consulting, Inc., a Settlement  
14 Administrator experienced in administering wage and hour class action settlements, which the  
15 Parties selected after bidding from several administrators (Exh. 1 ¶ 29(b); Schwartz Dec. ¶ 16);
- 16 • service awards for the seven named Plaintiffs and six declarants, not to exceed \$100,000 in total  
17 (Exh. 1 ¶ 29(c); Schwartz Dec. ¶ 13-14); and,
- 18 • a PAGA Allocation of \$50,000 total, with \$37,500 (75%) to be distributed to California’s Labor  
Workforce Development Agency (“LWDA”) (Exh. 1 ¶ 29(d); Schwartz Dec. ¶ 17).

19 After attorneys’ fees and costs, settlement administrator costs, service awards, and the PAGA  
20 allocation, a Net Settlement Fund of approximately \$830,000 will be available to the 378 identified  
21 Class Members, for an average net distribution of \$2,196 per Class Member. (Schwartz Dec. ¶ 10). This  
22 equates to an *average net payment of an additional 2+ hours of the average base wage rate for every*  
23 *shift more than five hours*, using Plaintiffs’ expert analysis from summary judgment. *See* Dkt. 2498,  
24 *Breshears Report*, at notes 7, 11. However, if, for example, 125 of the Class Members actually cash  
25 their checks (because of the transient nature of the restaurant worker class), then the net payment from  
26 the non-reversionary fund will average \$6,640/each, a staggering *761+ hours per person* average, at

1 the typical base wage rate. (Schwartz Dec. ¶10). The distribution will be done fairly, based on the  
2 number of shifts each Class Member worked for Defendant during the statutory period. (Exh. 1 ¶ 29(e)).  
3 These amounts do not include the additional \$12,500 allocated to disburse among aggrieved employees  
4 for PAGA penalties based on PAGA period shifts worked. (Exhibit A to Exh. 1, Exh. 1 ¶ 29(d)-(e)).

5 Class Members will receive notice by mail, email, and text message (where emails and phone  
6 numbers are available) and have an opportunity to object to or opt out of the settlement. (Schwartz Dec.  
7 ¶20-21; Exh. 1 ¶ 33-36). Class Members will have an opportunity to challenge their allocations based  
8 upon their shifts worked, using an easy Dispute Form. (Exh. 1 ¶34, and Exh. D).

9 If this Court finally approves the settlement, each participating Class Member will then be sent  
10 his or her share of the Net Settlement Fund. (Exh. 1 ¶38). The allocations of any Class Members who  
11 do not participate in the settlement will be allocated *pro rata* to the participating Class Members at the  
12 time of settlement disbursement. Assuming more than \$10,000 of the initial class payments are  
13 uncashed, there will be a second distribution to those class members who cashed their checks. (Exh. 1  
14 ¶ 38(c)). If less than \$10,000 of the initial class payments are uncashed, or any of the second checks are  
15 uncashed, any checks that remain uncashed after 90 days will be voided and the amount will be allocated  
16 50/50 to Wage Justice Center and Legal Aid at Work, leading providers of free legal services to workers  
17 with wage and other employment claims in California. (*Id.*; Schwartz Dec. ¶18).

18 Parent must pay the first \$1.2 million into the administrator's Qualified Settlement Fund now  
19 and will not receive it back unless the settlement is conclusively rejected. (Exh. 1 ¶37(a)). He pays the  
20 remaining \$1 million plus the employers' share of payroll taxes not later than November 4, 2020, but  
21 in any event by the date of final approval. (Exh. 1 ¶37(b)).

22 When the judgment becomes final, the named Plaintiffs and each of the Settlement Class  
23 Members will release wage and hour claims that relate to the claims asserted in the lawsuit. (Exh. 1 ¶  
24 20, 28(d)). Only the named Plaintiffs are required to execute a full, general release of all claims, and  
25 their enhancement payments are consideration also for this general release. (Exh. 1 ¶ 28(d)).

26 **IV. THE COURT SHOULD GRANT PRELIMINARY APPROVAL.**

27 **A. The Legal Standard Favors this Settlement.**

1 Settlements “are the preferred means of dispute resolution . . . in complex action litigation.”  
2 (*7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1151). The  
3 Court has broad discretion to approve a settlement the Court determines is “fair, adequate, and  
4 reasonable” in light of the circumstances of the case. (*Munoz v. BCI Coca-Cola Bottling Co. of Los*  
5 *Angeles* (2010) 186 Cal.App.4th 399, 407). To grant preliminary approval, the Court must merely find  
6 the settlement falls within the range of possible final approval. (*Wershba v. Apple Comp., Inc.* (2001)  
7 91 Cal.App.4th 224, 234-35). In evaluating a settlement, courts consider:

8 . . .the strength of plaintiffs’ case, the risk, expense, complexity and likely duration of further  
9 litigation, the risk of maintaining class action status through trial, the amount offered in  
10 settlement, the extent of discovery completed and the stage of the proceedings, the experience  
11 and views of counsel, [and] the presence of a governmental participant.

12 (*Kullar v. Foot Locker Retail, Inc.* (2010) 168 Cal.App.4th 116, 128).

13 The Court gives “due regard . . . to what is otherwise a private consensual agreement between the  
14 parties. (*In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 723 (citations and quotations omitted)).

15 Such regard limits its inquiry to the extent necessary to reach a reasoned judgment that the  
16 agreement is not the product of fraud or overreaching by, or collusion between, the negotiating  
17 parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all  
18 concerned. The trial court operates under a presumption of fairness when the settlement is the  
19 result of arm’s-length negotiation, investigation and discovery that are sufficient to permit  
20 counsel and the court to act intelligently, counsel are experienced in similar litigation, and the  
21 percentage of objectors is small. Ultimately, the court’s determination is simply an amalgam of  
22 delicate balancing, gross approximations and rough justice. *Id.*

23 At preliminary approval, the Court compares the settlement to “the realistic range of outcomes  
24 of the litigation,” not the theoretical maximum case value. *Munoz*, 186 Cal.App.4th at 408-09.

### 25 **B. The Settlement is Presumptively Fair, Based on Arm’s-Length Negotiations.**

26 As the Court is well aware in this matter, the case has been contentiously litigated for nearly a  
27 decade, resulting in extensive motion practice, multiple phases of trial, writs and appeals, adding up  
28 to a staggering 2,613 docket entries, prior to this Motion. (Schwartz Dec. ¶¶2-3). The Settlement,  
reached with the assistance of a respected mediator (Mr. Pearl), is the result of extensive arm’s-length  
negotiations between highly experienced attorneys specializing in wage and hour class action litigation  
in general, with great familiarity with the legal and factual issues of this particular case. (*Id.* at ¶4).

1 Plaintiffs’ counsel supports the settlement as fair, adequate, and reasonable. (*Id.* at ¶6). Under the  
2 circumstances, the proposed settlement is presumptively fair. (*Id.* at ¶6-12).

3 **C. Risks of Further, Complex Litigation, Appeal, and Delay Are Substantial.**

4 Prior to the most recent settlement discussions, Plaintiffs’ summary judgment motion was  
5 pending. Defendants’ opposition to summary judgment, raising new challenges, prompted Plaintiffs to  
6 plan to withdraw the summary judgment motion and reopen the discovery process before potentially  
7 refiling. Nearly a decade of litigation highs and lows showed that the path of litigation contains, even  
8 now, almost limitless hurdles, providing a strong incentive for the parties to settle. Parent’s tenuous  
9 solvency and economic uncertainty generally provide additional settlement incentives.

10 **1. Economic Uncertainty Favors this Settlement.**

11 The Court will need little briefing on the current pandemic and its devastating impact on the  
12 economy, which threatens the viability of many businesses – including those in the printing industry,  
13 which is Parent’s core business and which would help him pay for a judgment. (Parent Dec. ¶¶3-5). The  
14 Court should consider the economic climate and Defendant’s financial uncertainty in approving this  
15 settlement. *See, e.g., Lane v. Facebook, Inc.* (9th Cir. 2012) 696 F.3d 811, 823 (rejecting objector’s  
16 challenge to class action settlement where the lower court “meaningfully accounted for potential value  
17 of members’ claims . . . and noted risks of bringing such claims to trial, and evidence indicated that one  
18 of defendants that could be subject to liability under [a particular theory] was on verge of bankruptcy.”);  
19 *Torrise v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370, 1376 (“Here one factor predominates to  
20 make clear that the district court acted within its discretion [approving the class settlement]. That factor  
21 is [the defendant’s] financial condition.”). For years, the Court has queried whether Parent would be  
22 able to pay a multi-million-dollar judgment close to full relief, urging the parties to consider settlement.  
23 Now, sure money is worth more to Class Members than any time in recent memory.

24 Class Counsel has secured a payment procedure to ensure that Defendants will adhere to the  
25 terms of the Settlement. Parent will pay a first installment in the amount of \$1.2 million even before the  
26 preliminary approval hearing – and he will motivated to pay the last \$1 million, because he does not get  
27 back the first tranche unless the settlement is utterly rejected. (Exh. 1 ¶37). Parent has provided a  
28 declaration of his financial condition and will cooperate in explaining further as needed. (*Id.* at ¶41).



1 many years down the road. *Wershba*, 91 Cal.App.4th at 246; *7-Eleven*, 85 Cal.App.4th at 1150-115.  
2 Here, the recovery amount is favorable. The \$2.2 million *exceeds* the approximately \$2.1 million lost  
3 wages and premiums (before interest and penalties) of all 378 class members, even assuming (among  
4 other very favorable assumptions for the class members) that every time a class member worked 3.5  
5 hours or more, he/she was owed at least one premium for a missed rest period. Dkt. 2498, Breshears  
6 Report, at p. 5 and n. 12. Adding in all penalties and interest (apart from PAGA), the total exposure  
7 including all favorable assumptions for the entire class is \$5.1 million – such that the \$2.2 million  
8 recovery is nearly 43% of the best-day possible recovery. *Id.* The net recovery of \$830,000 after all  
9 fees and costs is nearly 40% of the best-day recovery for all class members’ wage loss, and more than  
10 16% of the best-day outcome with interest and non-PAGA penalties. The Court should compare this  
11 with other approved wage and hour class settlements, taking into account that the recovery is from *an*  
12 *individual Defendant currently teetering on the edge of insolvency*. See, e.g., *Ma v. Covidien Holding,*  
13 *Inc.* (C.D. Cal. Jan. 31, 2014) 2014 WL 360196, \*5 (Carter, J.) (“9.1% of the total value of the action  
14 [was] ‘within the range of reasonableness.’”); *Harris v. Vector Marketing* (N.D. Cal. Feb. 6, 2012)  
15 2012 WL 381202, \*2 (Chen, J.) (approving settlement of 15.7% of the total maximum verdict value,  
16 with \$57 or \$75/person net recovery). Here, the recovery is superior.

17 **E. The Manner of Distribution is Fair.**

18 Using the number of shifts worked is fairer, in the context of restaurant workers, than, for  
19 example, work weeks. The notice process gives ample time – 45 days from the date Class Notice is  
20 mailed to Class members – for Class Members to decide whether to participate. (Exh. 1 ¶13, 33-36).

21 **F. The LWDA has Taken No Action Regarding This Case.**

22 Plaintiffs administratively exhausted their PAGA claims with the LWDA on November 16,  
23 2010 (amended Jan. 10, 2011 and Jan. 16, 2014). (Schwartz Dec. ¶17). The LWDA responded on  
24 February 19, 2014 that it would not investigate. (*Id.*). Plaintiffs will submit the Settlement to the LWDA  
25 for review pursuant to Labor Code §2699(1)(2), upon filing this preliminary approval motion. Despite  
26 the LWDA’s non-intervention, Plaintiffs obtained some PAGA recovery, which shall be shared with  
27 the State, favoring approval. See *Ontiveros v. Zamora* (E.D. Cal. Oct. 8, 2014) 303 F.R.D. 356, 371.



1 plus 1,000 each for declarants (exclusive of named Plaintiffs), totaling \$6,000. (Schwartz Dec. ¶13).  
2 All named Plaintiffs provided general releases of their claims, unlike others. (Exh. 1 ¶ 28(d)).

3 “[I]t is established that named plaintiffs are eligible for reasonable incentive payments to  
4 compensate them for the expense or risk they have incurred in conferring a benefit on other members  
5 of the class.” *Munoz*, 186 Cal.App.4th at 412. The named Plaintiffs cooperated extensively with counsel  
6 to represent Class Members. (Turman Dec. ¶4; Dang Dec. ¶4; Allen Dec. ¶4; Payne Dec. ¶4; Finley  
7 Dec. ¶4; Perkins Dec. ¶4; Ryan Dec. ¶4). Filed contemporaneously herewith, Plaintiffs’ declarations  
8 detail the hours they spent speaking to counsel about their claims, gathering evidence and providing  
9 counsel with supporting documentation, reviewing pleadings, responding to discovery, attending  
10 mediations and settlement conferences, being deposed, testifying at trial, reviewing the Settlement  
11 Agreement submitted for this Court’s approval, and in other ways advancing the Class Members’  
12 interests. (*Id.*) The declarants (exclusive of named Plaintiffs) also helped advance the Class’ interests  
13 and thus should be compensated for their efforts. These payments recognize the time and effort the  
14 named Plaintiffs and declarants invested in assisting Counsel with the investigation, prosecution, and  
15 settlement of the case, and Plaintiffs’ acceptance of the risk of an adverse result. (Schwartz Dec. ¶13-  
16 14). Counsel believes the enhancements, ranging from \$1,000 to \$25,000 depending on the level of time  
17 and effort expended on behalf of the Class (hundreds of hours, in the cases of Turman and Allen), are  
18 the minimum that would viably promote the public policy interest of encouraging those with wage/hour  
19 claims to assert them, despite associated fears. *Id.*; see *Gentry v. Sup. Ct.*, 42 Cal.4th 443, 459-61 (2007),  
*abrogated on other grounds* (employees often fear retaliation for pursuing claims against employers).

20 There are few published California opinions on the appropriate size of service awards, so the  
21 Court should consider federal cases. See, e.g., *Cellphone Termination Fee Cases* (2010) 186  
22 Cal.App.4th 1380, 1392 (“California courts may look to federal authority for guidance on matters  
23 involving class action procedures.”). Service awards of \$25,000 are given in federal cases where, as  
24 here, class representatives make extensive efforts and/or where the result for the class is excellent. See,  
25 e.g., *Boyd, et al. v. Bank of Am. Corp.* (C.D. Cal. Jan. 19, 2016) 13-cv-00561-DOC, Dkt. 397 (approving  
26 \$25,000 service award payment to each class representative in wage and hour class action); *Glass v.*  
27 *UBS Fin. Servs., Inc.* (N.D. Cal. Jan. 26, 2007) 2007 WL 221862 at \*16-17 (approving \$25,000

1 enhancement to each of four named plaintiffs in wage and hour case); *Lazarin v. Pro Unlimited, Inc.*  
2 (N.D. Cal. July 11, 2013) 2013 WL 3541217, at \*10 (approving three \$25,000 enhancement awards  
3 in FLSA settlement of \$1.25 million, or 6% of fund).

4 This case is distinguishable from *Clark v. Am. Residential Servs. LLC* (2009) 175 Cal. App. 4th  
5 785, 805 (disapproving enhancement award of \$25,000 that was 44x average class payment). Here, the  
6 largest requested service award of \$25,000 is roughly 11.4 times the average class member payment of  
7 approximately \$2,200; the smallest requested named plaintiffs' service award of \$5,000 is only about  
8 twice as much as the average class payment, and presumptively reasonable. *Munoz*, 186 Cal.App.4th at  
9 412. In *Clark*, the class representatives requesting \$25,000 each had represented a class in merely 18  
10 months of litigation, as compared to nearly a decade of dedication by Named Plaintiffs Turman and  
11 Allen here. While the *Clark* class representatives did participate in mediation and had their depositions  
12 taken, they did not provide declarations, participate in multiple mediations and settlement conferences,  
13 nor testify at trial, as Turman and Allen have. Turman Dec. ¶4-6; Allen Dec. ¶4-6. Furthermore, unlike  
14 the vague risks of retaliation and reputational harm alleged by the *Clark* class representatives, actual  
15 harm occurred here: Turman believes she was fired for raising concerns to Parent, and Allen was left  
16 unemployed when Parent closed Koji's after this lawsuit was filed. Turman Dec. ¶3; Allen Dec. ¶3.  
Counsel will justify the awards further, upon request, at final approval.

17 **J. The Attorneys' Fees and Costs are Justified.**

18 Class Counsel will seek reasonable fees of \$1,040,000 (Exh. 1 ¶ 29(a)), heavily discounted  
19 from counsel's unpaid lodestar. (Schwartz Dec. ¶15).<sup>2</sup> While a percentage-of-the-fund award can be  
20 applied in cases that involve a non-reversionary common fund, in "fee-shifting cases [such as here],  
21 in which the responsibility to pay attorney fees is statutorily or otherwise transferred from the  
22 prevailing plaintiff or class to the defendant, the primary method for establishing the amount of  
23 'reasonable' attorney fees is the lodestar method." (*Lealao v. Beneficial California, Inc.* (2000) 82  
24 Cal.App.4th 19, 26; *see also Serrano v. Priest* (1977) 20 Cal.3d 25, 49 n. 23 (describing the lodestar

25 \_\_\_\_\_  
26 <sup>2</sup> At the time of final approval, Class Counsel will submit an updated lodestar chart to assist the Court  
27 in evaluating the reasonableness of the fee request.

1 method as the “starting point of every fee award, once it is recognized that the court’s role in equity  
2 is to provide just compensation for the attorney. . . .”). The lodestar method assesses reasonableness  
3 by calculating “an attorney fee [] based on the hours worked and an hourly billing rate, sometimes  
4 adjusted by a . . . multiplier.” (*Laffitte v. Robert Half Int’l Inc* (2016) 1 Cal.5th 480, 487). “There is a  
5 strong presumption that the lodestar figure is reasonable.” (*Kerkeles v. City of San Jose* (2015) 243  
6 Cal.App.4th 88, 100). “The presumption may be overcome only in certain ‘rare’ and ‘exceptional’  
7 cases....” *Id.* The Court’s duty is “to compensate counsel at the prevailing rate in the community for  
8 similar work; no more, no less.” (*Id.*)

9 Class Counsel’s proposed attorneys’ fee award is presumptively reasonable, since it is less than  
10 half the documented lodestar. *See, e.g., McPhail v. First Command Fin. Planning, Inc.* (S.D. Cal. Mar.  
11 30, 2009) 2009 WL 839841, at \*8 (“[T]he proposed attorneys’ fee award [in a class action settlement]  
12 is less than Class Counsel’s lodestar calculation, buttressing the Court’s finding of  
13 reasonableness.”). Even after exercising billing discretion to reduce the bills, Class Counsel’s lodestar  
14 is estimated to be approximately \$2.6 million for the nearly 10 years that this case has been litigated –  
15 not including the additional hours counsel will spend through final approval and settlement  
16 administration (Schwartz Dec. ¶15) – meaning that the amount requested is approximately 0.4x the  
17 presumptively-reasonable amount. Multipliers of 2x are common in this type of litigation. *See, e.g., In*  
18 *re Vitamin Cases* (San Francisco Super. Ct. Apr. 12, 2004) 2004 WL 5137597, at \*14 (multiplier of  
19 1.99); *cf. Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1052-54 (surveying class fee  
20 awards; average lodestar multiplier was 3.32). Counsel’s fee request should give the Court no pause.

21 Courts have recognized that the goal of fully compensating attorneys for vindicating public  
22 rights under wage laws entails requiring no proportionality between the damages obtained by the  
23 workers and the attorneys’ fees awarded. *See, e.g., Harman v. City & Cnty. of S.F.* (2007) 158  
24 Cal.App.4th 407, 421 (“There is no mathematical rule requiring proportionality between compensatory  
25 damages and attorney’s fees awards and courts have awarded attorney’s fees where plaintiffs recovered  
26 only nominal or minimal damages.”). To rule otherwise would have a chilling effect on the  
27 enforcement of the wage-and-hour laws through private litigation – particularly in cases with low-

1 wage workers, whose relatively small alleged wage claims are being vindicated against vigorous  
2 opposition, forcing Class Counsel through extremely contentious litigation.

3 In addition to fee-shifting statutes such as Labor Code §1194, PAGA, FLSA, and others,  
4 Plaintiffs seek fees pursuant to the fee-shifting Code Civ. Pro. §1021.5. As Plaintiffs will describe in  
5 their fee motion at final approval, §1021.5's application is clear, where counsel undertook to incur  
6 fees far exceeding the wages at stake, toward vindicating the rights of hundreds of low-income  
7 restaurant workers, doggedly fighting for nearly a decade to promote public policy goals, and winning  
8 an important appellate precedent holding individual business owners accountable for wage violations.

9 Class Counsel will also seek litigation costs of \$160,000 for unpaid, reasonable, out-of-pocket  
10 expenses incurred greater than this amount during this contentious litigation, including costs of  
11 investigation, expert testimony, many depositions, trial, as well as copying, mailing, and filing fees,  
12 etc. (Schwartz Dec. ¶15). Reimbursement for these expenses from the Settlement is appropriate for the  
13 same reason attorneys' fees should be paid out of the fund: all beneficiaries should bear their share of  
14 the costs of litigation. (*Laffitte*, 1 Cal.5th at 503).

15 **V. APPROVAL OF THE PAGA SETTLEMENT IS APPROPRIATE.**

16 The PAGA portion of a settlement must be reviewed and approved by the Court. Lab. C. §  
17 2699(1)(2). Neither the Act nor binding state court decisions squarely address the standard of review for  
18 PAGA claims. *See, e.g. Flores v. Starwood Hotels & Resorts Worldwide, Inc.* (C.D. Cal. 2017) 253 F.  
19 Supp. 3d, 1074, 1075 (“[N]either the California legislature, nor the California Supreme Court, nor the  
20 California Courts of Appeal, nor the [LWDA]” has definitively addressed the standard of review for  
21 PAGA). PAGA settlements must be considered in the context of “the overall settlement of the case”  
22 and need not allocate any portion of the recovery to PAGA penalties to warrant court approval.  
(*Nordstrom Com’n Cases* (2010) 186 Cal.App.4th 576, 589).

23 Here, the Settlement would have a deterrent effect on restaurant owners like Parent, who is  
24 paying millions out of his own pocket to resolve the Class claims, in addition to an allocation to the  
25 LWDA. The \$50,000 penalty allocation (about 2.3% of the Gross Settlement Amount of \$2,200,000)  
26 is meaningful, in the context of this settlement, and favorable compared with outcomes in other  
27

1 matters.<sup>3</sup> In *Nordstrom*, the trial court did not abuse its discretion by approving a settlement of a case  
2 which allocated \$0 to PAGA claims, where the terms of the settlement provided substantial relief. 186  
3 Cal.App.4th at 589; *accord Villacres v. ABM Indus. Inc.* (2010) 189 Cal.App.4th 562, 587.

4 Valuation of PAGA claims must be considered in light of the substantial risk of diminution in  
5 value of the penalties, because Courts have discretion to determine the amount of PAGA penalties to  
6 award. *See* Lab. C. § 2699(e); *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal. App .4th 1157 (PAGA  
7 penalties imposed may be subject to reduction by trial court; increased penalty “for subsequent  
8 violation” only triggered after employer has notice the activity is a violation). For example, after the  
9 much-publicized 2017 trial in *Sanchez v. McDonald’s*, plaintiffs won \$700,270 in PAGA penalties,  
10 which their expert had valued at \$41 million. *See* Exh. 2, at 24-25; Exh. 3 (June 12, 2017, *Daily Journal*  
11 article concluding “McDonald’s won” after PAGA trial). That the *McDonald’s* plaintiffs achieved less  
12 than two percent of claimed PAGA penalties, after a full PAGA trial, supports discounting the PAGA  
13 allocation here. *See also, e.g.,* Schwartz Dec., Exh. 4, *Parr v Golden State Overnight Delivery Svcs.*  
14 (Alam. Co. Super. Ct. July 10, 2014) 2014 WL 11199453, RG12-618103 (after multiple phases of trial,  
15 the complex division awarded approximately 6%, \$350,835 out of \$5,845,250 in PAGA penalties  
16 sought (minus \$25,000 already recovered in another case) – only \$81,458.75 went to the “employees  
17 affected by the Labor Code violation”). The PAGA allocation here is fair.

18 **VI. THE PROPOSED NOTICE AND METHOD OF DISTRIBUTION ARE PROPER.**

19 The Court must approve the proposed notice to the class of the Settlement’s terms and fairness  
20 hearing. (*Wershba*, 91 Cal.App.4th at 234-35). Here, the proposed Class Notices fairly apprise the

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21  
22 <sup>3</sup> Here, the allocation of 2.3% of the Settlement is reasonable as compared to the allocation ratios  
23 approved for other class actions with PAGA components. *See, e.g., Vical v. Mistras Grp., Inc.* (N.D.  
24 Cal. Oct. 11, 2016) 2016 WL 5907869, at \*\*1, 3 (approving PAGA penalties worth 0.33% of gross  
25 settlement amount); *Rodriguez v. Kraft Foods Grp.* (E.D. Cal. Oct. 5, 2016) 2016 WL 5844378, at \*\*2,  
26 6 (approving PAGA penalties worth 0.43% of total settlement); *Alexander v. Fedex Ground Pkg. Sys.,*  
27 *Inc.* (N.D. Cal. Apr. 12, 2016) 2016 WL 1427358, at \*2 (0.7% PAGA allocation); *Vazquez v. USM Inc.*  
(N.D. Cal. Feb. 16, 2016) 2016 WL 612906, at \*1 (0.67%); *Davis v. Brown Shoe Co., Inc.* (E.D. Cal.  
Nov. 3, 2015) 2015 WL 6697929, at \*3 (0.33%); *Cruz v. Sky Chefs, Inc.* (N.D. Cal. Dec. 19, 2014) 2014  
WL7247065, at \*3 (0.57%); *Garcia v. Gordon Trucking Inc.* (ED. Cal. Oct. 31, 2012) 2012 WL  
5364575, at \*3, 7 (0.27%).

1 Class of the Settlement’s terms and the options to participate in, dispute the allocation regarding, object  
2 to, or opt out of the settlement, and includes disclosures required by California Rules of Court, Rule  
3 3.766. *See* Exh. B to Exh. 1 (a copy of the proposed notices).

4 California law vests courts with discretion to fashion a notice plan that provides a “reasonable  
5 chance of reaching a substantial percentage of the class[.]” *See Cartt v. Sup. Ct.* (1975) 50 Cal.App.3d  
6 960, 973-74; Cal. R. Ct. 3.766(f). Mailing, emailing, and text messaging the Notice (where possible)  
7 has the best chance of being effective, particularly in the era of COVID-19.

8 The proposed Settlement Administrator, Rust Consulting, Inc., is experienced in the field and  
9 was chosen after comparing bids from other well-known administrators. (Schwartz Dec. ¶16). The  
10 Court should approve Rust Consulting, Inc. and administration fees up to \$20,000. (*Id.*).

**VII. THE FINAL APPROVAL HEARING SHOULD BE SCHEDULED.**

11 Plaintiff requests that the Court schedule the Final Fairness Hearing within 90 days of this  
12 preliminary approval motion. CRC 3.769(e).

**VIII. CONCLUSION**

14 For the foregoing reasons, Plaintiffs submit that the settlement is fair, adequate, and reasonable.  
15 Plaintiffs and their counsel believe that the settlement is in the best interests of the Class. Under the  
16 applicable class action standards, Plaintiffs request that the Court grant this unopposed motion and:  
17 preliminarily approve the Settlement Agreement; name Rust Consulting, Inc. as Claims Administrator;  
18 authorize the mailing of Notice to the Settlement Class; and schedule a final approval hearing date.<sup>4</sup>

BRYAN SCHWARTZ LAW

20 DATE: May 4, 2020

/s/ Bryan Schwartz

Bryan Schwartz  
Counsel for Plaintiffs and the Class

26 \_\_\_\_\_  
27 <sup>4</sup> Plaintiffs and Bryan Schwartz Law were already named Class Representatives. Dkt. 2116.