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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ADAM JONES, individually as an aggrieved employee and on behalf of others similarly situated,

Plaintiff,

v.

BATH & BODY WORKS, INC., a Delaware corporation; BATH & BODY WORKS DIRECT, INC., a Delaware corporation; BATH & BODY WORKS, LLC, a Delaware limited liability company; TURI ANN NYBO, an individual; and DOES 1 through 100, inclusive,

Defendants.

Case No. CV13-5206-FMO (AJWx)

Assigned to the Hon. Fernando M. Olguin

NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES

Date: December 10, 2015
Time: 10:00 a.m.
Place: Courtroom 22

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

PLEASE TAKE NOTICE that on December 10, 2015 at 10:00 a.m., or as soon thereafter as counsel may be heard, in Courtroom 22 of the above-captioned court, located at 312 North Spring Street Los Angeles, California 90012, the Honorable Fernando M. Olguin presiding, Plaintiff Adam Jones and proposed plaintiff Brooke Johnson will, and hereby do, move this Court to:

1. Preliminarily approve the settlement described in the Joint Stipulation Re: Class Action Settlement and Notice of Class Action Settlement (attached collectively as Exhibit 1 to the Declaration of Raul Perez);

2. Grant Plaintiff leave to file a Second Amended Complaint to add Brooke Johnson as an additional Named Plaintiff;

3. Conditionally certify the proposed settlement class;

4. Approve distribution of the proposed Notice of Class Action Settlement to the settlement class;

5. Appoint Adam Jones and Brooke Johnson as the class representatives;

6. Appoint Capstone Law APC as class counsel;

7. Appoint CPT Group, Inc. as the claims administrator; and

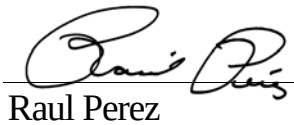
8. Set a hearing date for final approval of the settlement.

This Motion is based upon: (1) this Notice of Motion and Motion; (2) the Memorandum of Points and Authorities in Support of Motion for Preliminary Approval of Class Action Settlement; (3) the Declaration of Raul Perez; (4) the Joint Stipulation Re: Class Action Settlement; (5) the Notice of Class Action Settlement; (6) the [Proposed] Order Granting Preliminary Approval of Class Action Settlement; (7) the records, pleadings, and papers filed in this action; and (8) upon such other documentary and oral evidence or argument as may be presented to the Court at or prior to the hearing of this Motion. This Motion is unopposed.

Dated: November 6, 2015

Respectfully submitted,

Capstone Law APC

By: 

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Adam Jones and proposed plaintiff Brooke Johnson[1] (where applicable, "Plaintiffs") seek preliminary approval of the Joint Stipulation Re: Class Action Settlement,[2] which, if approved, would provide significant monetary relief for approximately 29,000 current and former employees of Defendant Bath & Body Works, LLC ("Defendant" or "BBW") (collectively with Plaintiffs, the "Parties").

The basic terms of the Settlement provide for the following:

(1) Conditional certification of a Settlement Class defined as all current and former non-exempt employees of Defendant who are currently working and/or who have worked as a Sales Associate in California during the period from June 4, 2009 to September 30, 2015; and

(2) Monetary relief in the form of a **non-reversionary** Total Class Action Settlement Amount of $2,250,000. The Total Class Action Settlement Amount includes:

(a) A Net Settlement Amount of approximately $1,413,250 (the Total Class Action Settlement Amount minus the requested attorneys' fees and costs, settlement administration costs, the payment to the California Labor and Workforce Development Agency ("LWDA"), and the requested class representative incentive awards), which will be allocated to participating Class Members on a pro-rata basis according to the number of weeks that each Class Member worked during the Class Period. **Because the Total Class Action Settlement Amount is non-reversionary, 100% of the Net**

[1] Plaintiff Jones seeks leave to file the proposed Second Amended Complaint to, *inter alia*, add Plaintiff Johnson is an additional Named Plaintiff.

[2] Hereinafter, "Settlement" or "Settlement Agreement." Unless indicated otherwise, all capitalized terms used herein have the same meaning as those defined by the Settlement Agreement.

Settlement Amount will be paid to all Class Members who do not opt out of the Settlement Class;

(b) Attorneys' fees and costs of $675,000 and $20,000, respectively, to Capstone Law APC ("Plaintiff's Counsel");

(c) Settlement administration costs, currently at $125,000, to be paid to the jointly selected class action settlement administrator, CPT Group, Inc. ("CPT");

(d) A $7,500 payment to the California Labor Workforce Development Agency ("LWDA") pursuant to the Labor Code Private Attorneys General Act ("PAGA"); and

(e) Class representative incentive awards of $8,000 to Adam Jones and $5,000 to Brooke Johnson.

An objective evaluation of the Settlement confirms that the relief negotiated on the class' behalf is fair, reasonable, and valuable. The Parties negotiated the Settlement at arm's length with guidance from John B. Bates, Esq., of JAMS, a respected class action mediator, and the Settlement provides relief to Class Members comparable to that which they might have hoped to win at trial—**and without the need to submit claims for payment**. The relief offered by the Settlement is particularly notable when viewed against the difficulties encountered by plaintiffs pursuing wage and hour cases (*see infra*). Indeed, the proposed relief is arguably superior to the relief that the class might have obtained after additional costly litigation because by settling now, rather than proceeding to trial, Class Members will not have to wait (possibly years) for relief, nor will they have to bear the risk of class certification being denied or of Defendant prevailing at trial.

As discussed below, the proposed Settlement satisfies all criteria for preliminary settlement approval and falls within the range of reasonableness. Moreover, the proposed settlement class is appropriate for provisional certification. Accordingly, Plaintiff respectfully requests that this Court grant preliminary approval of the Settlement

Agreement.

II. FACTS AND PROCEDURE

A. Overview of the Litigation

Plaintiff Adam Jones was employed as a Sales Associate (a non-exempt position) at a BBW store in Pleasanton, California from approximately October 2010 to May 2012. Proposed plaintiff Brooke Johnson was employed as an hourly-paid, non-exempt seasonal Sales Associate from approximately October 2014 to January 2015 at a Bath & Body Works retail store in Chico, California. Johnson seeks to be added as an additional class representative through the filing of the Second Amended Complaint. Like all other Sales Associates, Jones and Johnson were subject to BBW's uniform labor policies and practices. Jones alleges that these policies and practices violate the California Labor Code by, *inter alia*, failing to relieve Class Members to take meal and rest periods as required by law, underpaying Class Members for overtime hours worked, requiring Class Members to work off-the-clock during security inspections and to compensate for inadequate staffing and unrealistic productivity quotas/tight budgetary constraints, and failing to pay minimum wages and reporting time, including for call-in shifts.

On June 4, 2013, Plaintiff Jones filed a representative action for civil penalties under PAGA in Los Angeles County Superior Court, as a proxy for the State of California. On June 14, 2013, Plaintiff Jones filed a First Amended Complaint, adding putative class claims on behalf of all other similarly situated Sales Associates employed by BBW in California from June 4, 2009 through the date of class certification. The operative Complaint alleges claims for Defendant's failure to: (1) pay overtime wages, (2) pay minimum wages for work performed off-the-clock, (3) provide meal periods and rest breaks (and to pay required premiums), (4) pay terminated employees all wages due at the time of termination, (5) provide employees with accurate itemized wage statements, (6) violation of PAGA (including for failure to pay reporting time), and (7) violation of California Business & Professions Code section 17200, *et seq.* (including for failure to pay reporting time).

On July 18, 2013, Defendant removed the action to the United States District Court for the Central District of California. On August 5, 2013, the Court ordered BBW to show cause ("OSC") why the matter should not have been remanded for failure to satisfy the Class Action Fairness Act's amount in controversy requirement. BBW responded to the OSC on August 13, 2013, and filed a notice of supplemental authority on August 29, 2013. On March 18, 2014, the Court issued an order remanding the Action to the Los Angeles County Superior Court. BBW appealed to the Ninth Circuit, which subsequently found that the Court had jurisdiction under CAFA.

On or about June 2, 2015, Class Counsel sent a letter to the LWDA, advising the LWDA that proposed plaintiff Johnson intended to seek civil penalties pursuant to PAGA on behalf of herself and other "aggrieved employees" pursuant to Labor Code § 2698 *et seq*. On or about October 20, 2015, Johnson sent an amended letter to the LWDA.

B. Plaintiff's Counsel Actively Engaged in the Discovery Process

Beginning shortly after the action was filed and continuing over the next few years, Plaintiff's Counsel thoroughly investigated and researched the claims in controversy, their defenses, and the developing body of law. The investigation included the exchange of information pursuant to formal and informal discovery methods, including document requests and interrogatories. In response to this discovery, Plaintiff Jones received, among other things, the following information and evidence with which to properly evaluate the claims: (1) Class Member demographic information (*e.g.*, information bearing on the class size); (2) Class Member contact information; (3) operating procedures and policy manuals regarding, e.g., meal and rest period policies, security inspections, reporting time and call-in shifts policies and practices, timekeeping and compensation policies, etc.; and (4) a representative sample of Class Members' time and payroll records. Using this information, Plaintiff's Counsel were able to determine (or estimate), *inter alia*, the average hourly rate of pay for Class Members, the total approximate number of Class Members who worked during the Class Period and

applicable PAGA statute of limitations period, and the total number of former employees during the Class Period and applicable PAGA statute of limitations period ("PAGA Period"), the total number of shifts during the Class Period, and the total number of pay periods during the PAGA Period. (Declaration of Raul Perez ["Perez Decl."] ¶ 6.)

After Defendant produced Class Member contact information, Plaintiff's Counsel interviewed Class Members to determine the extent and frequency of Labor Code violations and to learn more about their day-to-day circumstances giving rise to the alleged violations, including for call-in shifts. (Perez Decl. ¶ 7.) Plaintiff's Counsel also took the deposition of BBW's corporate designee pursuant to Rule 30(b)(6). (*Id.*) Plaintiff's Counsel also defended Mr. Jones' deposition.

Overall, Plaintiff's Counsel performed an extensive investigation into the claims at issue, which included: (1) determining the suitability of the putative class representatives, through interviews, background investigations, and analyses of employment files and related records; (2) researching wage-and-hour class actions involving similar claims; (3) engaging in the discovery process by (i) propounding interrogatories and document requests, (ii) responding to Defendant's interrogatories and document requests, and (iii) reviewing documents produced by Defendant and analyzing a representative sample of time and payroll records; (4) interviewing putative Class Members to acquire information about potential claims, identify additional witnesses, obtain documents, solicit testimony in support of Plaintiff's upcoming Motion for Class Certification; (5) obtaining and analyzing Defendant's wage-and-hour policies and procedures; (6) deposing Defendant's 30(b)(6) witness; (7) researching the latest case law developments bearing on the theories of liability, including liability for call-in shifts; (8) meet and conferring in person with Defendant's counsel about Plaintiff's theories of liability for certification; (9) researching settlements in similar cases; (10) conducting discounted valuation analyses of claims; (11) participating in mediation and preparing related memoranda; (12) negotiating the terms of this Settlement; (13) finalizing the

Joint Stipulation Re: Class Action Settlement; and (14) and drafting preliminary and final approval papers. The sizeable document and data exchanges allowed Plaintiff's Counsel to assess the strengths and weaknesses of the claims against Defendant and the benefits of the proposed Settlement. (Perez Decl. ¶ 8.)

C. The Parties Settled Shortly After Mediation

On May 14, 2015, the Parties participated in mediation with John B. Bates, Esq., of JAMS, a respected mediator of wage-and-hour class actions. Mr. Bates was particularly helpful in managing the Parties' expectations and providing a useful, neutral analysis of the issues and risks to both sides, and assisted the Parties in narrowing the gap between their respective valuations of the claims at issue. Following arm's-length negotiations during and extensive negotiations after mediation between counsel, the Parties were eventually able to reach a compromise of the claims. That compromise is set forth in complete and final form in the Settlement Agreement. At all times, the Parties' negotiations were adversarial and non-collusive. The Settlement therefore constitutes a fair, adequate, and reasonable compromise of the claims at issue. (Perez Decl. ¶ 9.)

D. The Proposed Settlement Fully Resolves The Claims

1. Composition of the Settlement Class

The proposed Settlement Class consists of all current and former non-exempt employees of Defendant who are currently working and/or who have worked as a Sales Associate in California during the period from June 4, 2009 to September 30, 2015. (Settlement Agreement, pp. 1:28, 2:1-6.)

2. Settlement Consideration

The Parties have agreed to settle the underlying class claims in exchange for the Total Class Action Settlement Amount of $2,250,000. The Total Class Action Settlement Amount includes: (1) settlement payments to all Class Members who do not opt out; (2) $675,000 in attorneys' fees and $20,000 in litigation costs/expenses to Plaintiff's Counsel; (3) a $7,500 payment to the LWDA; (4) settlement administration

costs of approximately $125,000; and (5) Class Representative incentive awards of $8,000 to Adam Jones and $5,000 to Brooke Johnson. (Settlement Agreement, pp. 11:11-13:11.)

Subject to the Court approving attorneys' fees and costs, the payment to the LWDA, settlement administration costs, and the Class Representative incentive awards, the Net Settlement Amount will distributed to all Class Members who do not opt out. **Because the Total Class Action Settlement Amount is non-reversionary, 100% of the Net Settlement Amount will be paid to Class Members, and without the need to submit claims for payment**. (*Id.* at p. 14:4-6.)

3. Formula for Calculating Settlement Payments

Each Class Member's share of the Net Settlement Amount will be proportional to the number of weeks he or she worked during the Class Period. (Settlement Agreement, pp. 13:12-14:3.) The Settlement Administrator will calculate Individual Settlement Payments as follows:

- Defendant will calculate the total number of Workweeks worked by each Class Member during the Class Period and the aggregate total number of Workweeks worked by all Class Members during the Class Period.
- To determine each Class Member's estimated settlement payment, the Settlement Administrator will use the following formula: The Net Settlement Amount will be divided by the aggregate total number of workweeks, resulting in a dollar value per workweek. Each Class Member's settlement payment will be calculated by multiplying each individual Class Member's total number of workweeks by the dollar value assigned to each workweek.
- The settlement payment will be reduced by any required deductions for each participating Class Members as specifically set forth herein, including employee-side tax withholdings or deductions.
- The entire Net Settlement Amount will be disbursed to all Class Members

who do not submit timely and valid Requests for Exclusion. (*Id.*)

4. Release by the Settlement Class

In exchange for the Total Class Action Settlement Amount, Class Members who do not opt out will agree to release the Released Claims. (Settlement Agreement, pp. 9:25-10:18.) The Released Claims are those that accrued during the period from June 4, 2009 to September 30, 2015. (*Id.*)

III. ARGUMENT

A. The Proposed Class Action Settlement Should Receive Preliminary Approval

1. Courts Review Class Action Settlements to Ensure That the Terms Are Fair, Adequate, and Reasonable

Class action settlements must be approved by the court and notice of the settlement must be provided to the class before the action can be dismissed. Fed. R. Civ. P. 23(e)(1)(A). To protect absent class members' due process rights, approval of class action settlements involves three steps:

1. Preliminary approval of the proposed settlement, including (if the class has not already been certified) conditional certification of the class for settlement purposes;
2. Notice to the class providing them an opportunity to exclude themselves; and
3. A final fairness hearing concerning the fairness, adequacy, and reasonableness of the settlement.

See Fed. R. Civ. P. 23(e)(2); Manual for Complex Litigation § 21.632 (4th ed. 2004).

At preliminary approval, the Court first determines whether a class exists. *Stanton v. Boeing Company*, 327 F.3d 938, 952 (9th Cir. 2003). Then, the Court evaluates whether the settlement is within the "range of reasonableness," and whether notice to the class and the scheduling of a final approval hearing should be ordered. *See*,

generally, 3 Conte & Newberg, *Newberg on Class Actions*, section 7.20 (4th ed. 2002) § 11.25. "Whether a settlement is fundamentally fair within the meaning of Rule 23(e) is different from the question whether the settlement is perfect in the estimation of the reviewing court." *Lane v. Facebook, Inc*., 696 F.3d 811, 819 (9th Cir. 2012).

The law favors the compromise and settlement of class action suits. *See Churchill Village, LLC v. Gen. Elec*., 361 F.3d 566, 576 (9th Cir. 2004); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) (endorsing the trial court's "proper deference to the private consensual decision of the parties" when approving a settlement). "Litigation settlements offer parties and their counsel relief from the burdens and uncertainties inherent in trial. . . . The economics of litigation are such that pre-trial settlement may be more advantageous for both sides than expending the time and resources inevitably consumed in the trial process." *Franklin v. Kaypro*, 884 F.2d 1222, 1225 (9th Cir. 1989). Thus, the Court must determine whether a settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(1).

To make this determination at preliminary approval, the Court may consider some or all of the following factors: (i) the extent of discovery completed, and the stage of proceedings; (ii) the strength of the case and the risk, expense, complexity and likely duration of further litigation; (iii) the risk of maintaining class action status throughout trial; the amount offered in settlement; and (iv) the experience and views of counsel. *See Stanton*, 327 F.3d at 959 (citing *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003)). "Under certain circumstances, one factor alone may prove determinative in finding sufficient grounds for court approval." *Nat'l Rural Telecom. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525-526 (C.D. Cal. 2004) (*citing Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993)).

At the preliminary approval stage, the Court need only review the Parties' proposed settlement to determine whether it is within the permissible "range of possible judicial approval" and thus, whether the notice to the class and the scheduling of the formal fairness hearing is appropriate. Newberg, § 11:25.

2. The Settlement Was Negotiated after Plaintiff's Counsel Conducted a Thorough Investigation of the Factual and Legal Issues

As set forth in greater detail above, based on their analysis of documents produced by Defendant, including a representative sample of time and payroll records, testimony provided by Defendant's Rule 30(b)(6) witness, and information provided by Class Members during interviews, Plaintiff's Counsel were able to realistically assess the value of the claims and intelligently engage defense counsel in settlement discussions that resulted in the proposed settlement now before the Court. (Perez Decl. ¶¶ 6-8.)

By engaging in a thorough investigation and evaluation of the claims, Plaintiff's Counsel can knowledgeably opine that the Settlement, for the consideration and on the terms set forth in the Settlement Agreement, is fair, reasonable, and adequate, and is in the best interests of Class Members in light of all known facts and circumstances, including the risk of significant delay and uncertainty associated with litigation and various defenses asserted by Defendant.

3. The Settlement Was Reached through Arm's-Length Bargaining in Which All Parties Were Represented by Experienced Counsel

Courts presume the absence of fraud or collusion in the negotiation of a settlement, unless evidence to the contrary is offered; thus, there is a presumption that settlement negotiations are conducted in good faith. *Newberg on Class Actions* (4th ed. 2002), § 11.51. Here, the Parties participated in mediation with Mr. John Bates, a respected mediator of wage and hour class actions. Mr. Bates helped to manage the Parties' expectations and provided a useful, neutral analysis of the issues and risks to both sides, that ultimately resulted in a settlement post-mediation after extensive negotiations between counsel. *In re Apple Computer, Inc. Derivative Litig.*, No. C 06-4128 JF (HRL), 2008 U.S. Dist. LEXIS 108195 (N.D. Cal. Nov. 5, 2008) (mediator's participation weighs considerably against any inference of a collusive settlement), *In re*

Atmel Corp. Derivative Litig., No. C 06-4592 JF (HRL), 2010 U.S. Dist. LEXIS 145551 (N.D. Cal. June 25, 2008) (same); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (a "mediator's involvement in pre-certification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure.") At all times, the Parties' negotiations were adversarial and non-collusive.

The Parties were represented by experienced class action counsel throughout the negotiations resulting in this Settlement. Plaintiff was represented by Capstone Law APC ("Capstone"). Capstone, which seeks appointment as Class Counsel, employs seasoned class action attorneys who regularly litigate wage and hour claims through certification and on the merits, and have considerable experience settling wage and hour class actions. (Perez Decl. ¶¶ 10-14.)

Defendant was represented by Ogletree, Deakins, Nash, Smoak & Stewart, P.C., a nationally respected defense firm.

4. The Proposed Settlement Is Reasonable Given the Strengths of The Claims and the Risks and Expense of Litigation

Plaintiff's Counsel evaluated the claims in light of the risks of continued litigation in order to determine a reasonable range of class relief. Although Plaintiff's Counsel believe the class claims have merit, Plaintiff's Counsel also recognize that if the litigation had continued, there may have been significant legal and factual hurdles that could have prevented the Class from obtaining any recovery. To be sure, a number of cases have found wage and hours actions to be especially amenable to class resolution.[3]

[3] *See Brinker Restaurant Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 1033 (2012) ("Claims alleging that a uniform policy consistently applied to a group of employees is in violation of the wage and hour laws are of the sort routinely, and properly, found suitable for class treatment . . . The theory of liability – that [the employer] has a uniform policy, and that that policy, measured against wage order requirements, allegedly violates the law - is by its nature a common question eminently suited for class treatment."). Litigation of wage and hour claims on class-wide bases (1) encourages the vigorous enforcement of wage laws (*Smith v. Super. Ct.*, 39 Cal. 4th 77, 82 (2006)); (2) "eliminates the possibility of repetitious litigation" (*Sav-on Drug Stores, Inc. v. Super. Ct. (Rocher)*, 34 Cal. 4th 319, 340 (2004)); (3) affords small claimants a method of obtaining redress (*id.*); (4) "deter[s] and redress[es] alleged wrongdoing" (*Jaimez v.*

However, some courts have gone the other way, finding that some of the very claims at issue here—meal period, rest period, and off-the-clock violations—were not suitable for class adjudication because they raised too many individualized issues. *See Duran v. U.S. Bank National Association*, 59 Cal. 4th 1, 31 (2014) (reversing a verdict from a class trial); *Augustus v. ABM Security Services, Inc.*, 233 Cal. App. 4th 1065 (2014) (finding that the trial court erred in granting summary adjudication and summary judgment to security guards who were on call during rest breaks because neither the Labor Code nor the applicable wage order mandated that employees be relieved of all duties during rest breaks); *Ali v. U.S.A. Cab Ltd.*, 176 Cal. App. 4th 1333, 1341 (2009) (affirming denial of certification because employees' declarations attesting to having taken meal and rest breaks demonstrated that individualized inquiries were required to show harm); *Campbell v. Best Buy Stores, L.P.*, 2013 U.S. Dist. LEXIS 137792, at *30-41 (C.D. Cal. Sept. 20, 2013) (following *Brinker* and denying certification of proposed off-the-clock and rest and meal break classes due to lack of uniform policy); *Jimenez v. Allstate Ins. Co.*, 2012 U.S. Dist. LEXIS 65328 (C.D. Cal. Apr. 18, 2012) (denying motion to certify meal and rest break classes based on employer's practice of understaffing and overworking employees); *Gonzalez v. Officemax N. Am.*, 2012 U.S. Dist. LEXIS 163853 (C.D. Cal. Nov. 5, 2012) (same); *Brown v. Fed. Express Corp.*, 249 F.R.D. 580, 587-88 (C.D. Cal. 2008) (denying certification of driver meal and rest period claims based on the predominance of individual issues); *Kenny v. Supercuts, Inc.*, 252 F.R.D. 641, 645 (N.D. Cal. 2008) (denying certification on meal periods claim); *Blackwell v.*

Daiohs USA, Inc., 181 Cal. App. 4th 1286, 1298 (2010)); (5) "avoid[s] windfalls to defendants" (*Brinker*, 53 Cal. 4th at 1054); (6) avoids "inconsistent or varying adjudications" (*Aguiar v. Cintas Corp. No. 2*, 144 Cal. App. 4th 121, 129 (2006)); and (7) alleviates the concerns of employees about retaliation (*Gentry v. Super. Ct. (Circuit City Stores)*, 42 Cal. 4th 443, 462-63 (2007); *Jaimez v. Daiohs USA, Inc.*, 181 Cal. App. 4th at 1308). These policies are so strongly favored that "class certifications should not be denied [in wage and hour cases] so long as the absent class members' rights are adequately protected." *Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462, 474 (1981); *see also Sav-On, supra*, 34 Cal. 4th 319 (upholding certification of an overtime class action based on a showing that all plaintiffs performed jobs that were highly standardized, and as a result, class members performed essentially the same tasks, most of which were non-exempt as a matter of law).

Skywest Airlines, Inc., 245 F.R.D. 453, 467-68 (S.D. Cal. 2007) (declining to certify class action because individual issues predominated when different employee stations provided different practices with respect to meal periods).

Some courts have denied certification even when an employer's policies are unlawful on their face. For instance, in *Ordonez v. Radio Shack, Inc*., 2013 U.S. Dist. LEXIS 7868, *35-41 (C.D. Cal. Jan. 17, 2013), the court denied certification even though the plaintiff submitted evidence of a facially unlawful policy regarding rest breaks. The *Ordonez* court concluded that the predominance and superiority elements were not met based on the employer's presentation of anecdotal evidence of lawful compliance notwithstanding the unlawful policy. *Id*. at *38-40.

The prospect for certifying the reporting time and minimum wage claim for on-call shifts is also uncertain. In *Casas v. Victoria's Secret Stores, LLC, et al*. (CV 15-64120GW (VBKx), the Honorable George H. Wu of the Central District Court granted Defendant's motion to dismiss, holding that "report to work" as used in Wage Order No. 5 meant "physically showing up to work." (See Doc. #48, filed 2/5/15). Thus, Victoria Secret's on-call scheduling policy—which requires an employee to call in to work two hours in advance of their shift during which he or she may be told on the call to not work the scheduled shift—did not give rise to reporting time penalties because employees do not physically show up to work (in a second order, the Court found that the time employees spent calling in for shift-scheduling is compensable, and therefore denied Victoria's Secret's motion to dismiss the minimum wage claim). The *Casas* decision was appealed.

As the above examples illustrate, the prospect of certifying a wage and hour action is always uncertain, especially for untested theories of liability, and the risk of being denied class certification militates in favor of settlement. A denial of class certification effectively forecloses continued litigation, as neither the individual nor his or her attorney will have any incentive to proceed with an individual case when such small claims are at stake. *See In re Baycol Cases I & II*, 51 Cal. 4th 751, 758 (2011)

(explaining that a dismissal of class claims is effectively the "death knell" of the case, despite survival of individual claims). In other words, for cases where individual damages are relatively small, denial of class certification results in a near-complete loss for Plaintiffs as well as no recovery for the employees, who are shut out of the action. Thus, if the putative Class had not been certified, the value of the case would have been reduced to a fraction of the value of this Settlement; indeed, Defendant would have likely offered no money to settle the class-wide claims if certification had been denied.

Finally, early resolutions save time and money that would otherwise go to litigation. Parties' resources, as well as the Court's, will be further taxed by continued litigation. And if this action had settled following additional litigation, the settlement amount would likely have taken into account the additional costs incurred, and there may have been less available for Class Members. Cost savings is one reason why California policy strongly favors early settlement. *See Neary v. Regents of University of California*, 3 Cal. 4th 273, 277 (1992) (explaining the high value placed on settlements and observing that "[s]ettlement is perhaps most efficient the earlier the settlement comes in the litigation continuum."). This concern also supports settlement.

In summary, although Plaintiff and Plaintiff's Counsel maintain a belief in the underlying merits of the claims, they also acknowledge the significant challenges posed by continued litigation through certification and/or at the merits stage. Accordingly, when balanced against the risk and expense of continued litigation, the settlement is fair, adequate, and reasonable. *Linney v. Cellular Alaska P'ship,* 151 F.3d 1234, 1242 (9th Cir. 1998) ("the very essence of a settlement is compromise, a yielding of absolutes and an abandoning of highest hopes").

B. The Proposed PAGA Settlement Is Reasonable

Pursuant to the Settlement Agreement, $7,500 from the Total Class Action Settlement Amount will be paid directly to the LWDA in satisfaction of Plaintiff's PAGA claims. (Settlement Agreement, pp. 11:23-12:1.) This result was reached after good-faith negotiation between the parties. Where PAGA penalties are negotiated in

good faith and "there is no indication that [the] amount was the result of self-interest at the expense of other Class Members," such amounts are generally considered reasonable. *Hopson v. Hanesbrands Inc.*, Case No. 08-00844, 2009 U.S. Dist. LEXIS 33900, at *24 (N.D. Cal. Apr. 3, 2009); *see, e.g.*, *Nordstrom Com. Cases*, 186 Cal. App. 4th 576, 579 (2010) ("[T]rial court did not abuse its discretion in approving a settlement which does not allocate any damages to the PAGA claims.").

C. The Proposed Class Representative Enhancement Payments Are Reasonable

At final approval, Plaintiffs will request Court-approval of Class Representative incentive awards of $8,000 to Adam Jones and $5,000 to Brooke Johnson. Payments to named plaintiffs for their services as class representatives are customary and generally approved. *See Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 300 (N.D. Cal. 1995); *Cellphone Termination Fee Cases*, 186 Cal. App. 4th 1380, 1393 (2010); *Bell v. Farmers Ins. Exchange*, 115 Cal. App. 4th 715, 726 (2004) (upholding "service payments" to named plaintiffs for their efforts in bringing the case); *Stevens v. Safeway, Inc.*, Case No. 05-01988, 2008 U.S. Dist. LEXIS 17119 (C.D. Cal. Feb. 25, 2008) ($20,000 and $10,000 to two class representatives); *In Re Janney Montgomery Scott LLC Financial Consultant Litig.*, Case No. 06-3202, 2009 U.S. Dist. LEXIS 60790 (E.D. Pa. July 16, 2009) ($20,000 each to three class representatives). The incentive award should be approved so long as it is not so high [as] to create a conflict of interest between the representative and class members, or be divorced from the actual value the representative provided to the action. *Rodriguez v.* West, 463 F.3d at 959-61.

Adam Jones (1) assisted Plaintiff's Counsel with the preparation of the initial complaint; (2) reviewed his personal files to provide Plaintiff's Counsel with material evidence regarding the claims, (3) assisted Plaintiff's Counsel in marshalling the evidence necessary to prosecute the claims on behalf of the Class, and (4) regularly sought reports on the status of the case. Additionally, Mr. Jones was deposed on May 6, 2015. Prior to his deposition, Mr. Jones met with Plaintiff's Counsel to prepare and

learn more about the deposition process.

Mr. Jones has also agreed to generally release all claims he may have against Defendant. This general release is considerably broader than the separate, narrower releases required of Class Members. *See Schaffer*, 2012 U.S. Dist. LEXIS 189830, at *64 ("[C]lass representatives released their actual damages claims as part of the Settlement. This ["personal benefit"] factor, therefore weighs in favor of approving the incentive awards.").

Although not original an original Plaintiff, Brooke Johnson expressed a willingness to and did assist Plaintiff's Counsel in their prosecution of class' and PAGA claims, volunteering to serve as an additional Class Representative to ensure that all members of the proposed Settlement Class are well represented. Her willingness to serve as additional class representative, and her agreement to provide BBW with a general release of claims, entitles her to an incentive award of $5,000.

D. The Negotiated Attorneys' Fees and Costs Are Reasonable

At final approval, Plaintiffs will seek Court-approval of the negotiated attorneys' fees in the amount of one-third of the common fund, or $675,000, and litigation costs not to exceed $20,000. (Settlement Agreement, p. 12:2-20.) This request for attorneys' fees in the amount of one-third of the common fund is reasonable under California law. The "In diversity actions, federal courts look to state law in determining whether a party has a right to attorneys' fees and how to calculate those fees." *Mangold v. Calif. Public Utilities Comm'n*, 67 F.3d 1470, 1478 (9th Cir. 1995). The state law governing the underlying claims in a diversity action "also governs the award of fees." *Vizcaino v. Microsoft Corp*., 290 F.3d 1043, 1047 (9th Cir. 2002). Because Plaintiffs brought the claims under the California Labor Code and California Business & Professions Code section 17200, California law governs.

The purpose of an attorneys' fee award in class action litigation is to reward counsel who took the risk of non-payment and invested in a case that achieved a substantial positive result for the class. *Ketchum v. Moses*, 24 Cal. 4th 1122, 1132-33

(2001) ("A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases.").

Thus, California courts routinely award attorneys' fees equalling one-third or more of the potential value of the common fund. *See, e.g., Laffitte v. Robert Half Internat. Inc.*, 231 Cal. App. 4th 860, 878 (2014) ("trial court's use of a percentage of 33 1/3 percent of the common fund is consistent with [] awards in other class action lawsuits"); *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66 n.11 (2008) ("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."). Theodore Eisenberg & Geoffrey P. Miller, Attorney Fees in Class Action Settlements: An Empirical Study, J. of Empirical Legal Studies, Vol. 1, Issue 1, 27-78, March 2004, at 35 (independent studies of class action litigation nationwide have come to a similar conclusion that a one-third fee is consistent with market rates).

E. Conditional Class Certification Is Appropriate for Settlement Purposes

1. The Proposed Class Meets the Requirements of Rule 23.

Before granting preliminary approval of the Settlement, the Court should determine that the proposed settlement class meets the requirements of Rule 23. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997); Manual for Complex Litigation, § 21.632. An analysis of the requirements of Rule 23(a) and 23(b)(3), commonly referred to as numerosity, commonality, typicality, adequacy, predominance, and superiority, shows that certification of this proposed settlement class is appropriate.

2. The Proposed Class Is Sufficiently Numerous and Ascertainable

The numerosity requirement is met where "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Generally, courts will find a

class sufficiently numerous if it consists of 40 or more members. *Vasquez v. Coast Valley Roofing, Inc.*, 670 F. Supp. 2d 1114, 1121 (E.D. Cal. 2009) (numerosity is presumed at a level of 40 members); *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) ("numerosity is presumed at a level of 40 members"); *Swanson v. American Consumer Industries*, 415 F.2d 1326, 1333 (7th Cir. 1969) (numerosity satisfied with class of 40 individuals); *Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 262 (S.D. Cal. 1998) (finding a purported class of forty members sufficient to satisfy numerosity); *Krzesniak v. Cendant Corp.*, No. C 05-05156 MEJ, 2007 U.S. Dist. LEXIS 47518, *19 (N.D. Cal. June 20, 2007) ("numerosity may be presumed when the class comprises forty or more members").

Here, the proposed Settlement Class consist of all current and former non-exempt employees of Defendant who are currently working and/or who have worked as a Sales Associate in California during the period from June 4, 2009 to September 30, 2015. Based on information produced by Defendant, approximately 29,000 individuals currently comprise the Settlement Class.

3. There are Questions of Law and Fact that Are Common to the Class

The second Rule 23(a) requirement is commonality, which is satisfied "if there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The "commonality requirement has been 'construed permissively,' and its requirements deemed minimal." *Estrella v. Freedom Fin'l Network*, 2010 U.S. Dist. LEXIS 61236 (N.D. Cal. 2010) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019-1020 (9th Cir. 1998). There are common questions of law among the Settlement Class. Additionally, the fact that Defendant employed a standard set of policies and procedures for their employees throughout all of their stores provides additional evidence of commonality.

4. Plaintiffs' Claims Are Typical of the Proposed Settlement Class

"Like the commonality requirement, the typicality requirement is 'permissive' and requires only that the representative's claims are 'reasonably co-extensive with those of absent class members; they need not be substantially identical.'" *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (quoting *Hanlon*, 150 F. 3d at 1020). "In determining whether typicality is met, the focus should be on the defendants' conduct and Plaintiffs' legal theory, not the injury caused to the plaintiff." *Lozano v. AT&T Wireless Services, Inc.*, 504 F.3d 718, 734 (9th Cir. 2007). Thus, typicality is "satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) (quoting *Marisol v. Giuliani*, 126 F.3d 372, 376 (2nd Cir. 1997)).

Plaintiffs' wage and hour claims are typical of the proposed Settlement Class because they arise from the same factual basis and are based on the same legal theories applicable to the other Class Members. Likewise, Plaintiffs' interests are entirely coextensive with the interests of the Class. Accordingly, Plaintiffs are typical of the Class Members they seek to represent.

5. Plaintiffs and Their Counsel Will Adequately Represent the Interests of the Proposed Settlement Class

The final Rule 23(a) requirement asks whether "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement is satisfied if: (1) the proposed representative Plaintiffs do not have conflicts of interest with the proposed class, and (2) Plaintiffs are represented by qualified and competent counsel. *Hanlon*, 150 F.3d at 1020.

The Rule 23(a) adequacy requirement is met here as Plaintiffs have and will represent putative Class Members with a focus and zeal true to the fiduciary obligation that they have undertaken. Plaintiff's Counsel also satisfy the Rule 23(a)(4) adequacy-of-counsel requirement. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir.

1998) ("will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?"). The attorneys at Capstone Law has successfully certified numerous class actions by way of contested motion in state and federal court, and have negotiated settlements totaling over 90 millions of dollars on behalf of hundreds of thousands of class members. (*See* Perez Decl. ¶¶ 10-14.)

6. Common Issues Predominate Over Individual Issues

"In addition to meeting the conditions imposed by Rule 23(a), the parties seeking class certification must also show that the action is maintainable under Fed. R. Civ. P. 23(b)(1), (2) or (3)." *Hanlon*, 150 F.3d at 1022. The California statutes relating to each of Plaintiffs' claims apply with equal force and effect to all Class Members. Factually, Defendant's policies and practices apply class-wide and Defendant's liability can be determined by facts common to all members of the class. The wage and hour issues are both numerous and substantial, and a class action is the most advantageous method of dealing with the claims of the Settlement Class Members. *See Brinker Restaurant Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 1033 (2012) ("Claims alleging that uniform policy consistently applied to a group of employees is in violation of the wage and hour laws are of the sort routinely, and properly, found suitable for class treatment.").

Likewise, the fact that the Settlement affords all Class Members an equal opportunity to obtain compensation for identical claims via a standardized process provides further support for the conclusion that common issues of law and fact predominate and that the claims are amenable to class-wide resolution. *See Amchem Products, Inc. v. Windsor*, 521 U.S. at 619 (rejecting the Third Circuit's holding that the requirements of Rule 23 "must be satisfied without taking into account the settlement," and finding instead that "settlement is relevant to a class certification.")

7. Class Settlement Is Superior to Other Available Means of Resolution

Similarly, there can be little doubt that resolving all Class Members' claims through a single class action is superior to a series of individual lawsuits. "From either a

judicial or litigant viewpoint, there is no advantage in individual members controlling the prosecution of separate actions. There would be less litigation or settlement leverage, significantly reduced resources and no greater prospect for recovery." *Hanlon*, 150 F.3d at 1023. Indeed, the terms of the Settlement negotiated on behalf of the Class demonstrates the advantages of a collective bargaining and resolution process.

Addressing the allegations through a class action is superior to individual litigation or any alternative methods that may exist. This action was filed precisely because Plaintiff believed those alternatives, such as filing complaints with the LWDA, would have proven ineffective in addressing the problem on a class-wide basis. Additionally, although the value of the claims is not insignificant, the amount in controversy is not nearly enough to incentivize individual action. *See Wolin*, 617 F.3d at 1175 ("Where recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis, this [superiority] factor weighs in favor of class certification."). As the class action device provides the superior means to effectively and efficiently resolve this controversy, and as the other requirements of Rule 23 are each satisfied, certification of the Settlement Class proposed by the Parties is appropriate.

F. The Proposed Class Notice Adequately Informs Class Members About The Case And Proposed Settlement

The proposed class settlement notice and claims administration procedure satisfy due process. Rule 23(c)(2) of the Federal Rules of Civil Procedure requires the Court to direct the litigants to provide Class Members with the "best notice practicable" under the circumstances, including "individual notice to all members who can be identified through reasonable effort." *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 173, 94 S. Ct. 2140, 2150, 40 L. Ed. 2d 732, 746 (1974). Under Rule 23(c)(2), notice by mail provides such "individual notice to all members." *Id.* Where the names and addresses of Class Members are easily ascertainable, individual notice through the mail constitutes the "best notice practicable." *Id.* at 175.

The Notice of Class Action Settlement ("Class Notice") jointly drafted and

approved by the Parties, provides Settlement Class Members with all required information so that each member may make an informed decision regarding his or her participation in the Settlement. The Notice provides information regarding the nature of the lawsuit; a summary of the substance of the settlement terms; the class definition; the deadlines by which Class Members must submit Requests for Exclusion or objections; the date for the final approval hearing; the formula used to calculate settlement payments; a statement that the Court has preliminarily approved the settlement; a statement that Class Members will release the settled claims unless they opt out; and noticed of pending lawsuits with overlapping claims. Accordingly, the Notice satisfies the requirements of Rule 23(c)(2).

In summary, the Class Notice summarizes the proceedings and the terms and conditions of the Settlement in an informative and coherent manner, complying with the statement in *Manual for Complex Litigation*, *supra*, that "the notice should be accurate, objective, and understandable to Class Members . . . ." *Manual for Complex Litigation*, Third (Fed. Judicial Center 1995) ("Manual") § 30.211. The Notice Packet states that the Settlement does not constitute an admission of liability by Defendant, and that Final Approval has yet to be made. The Notice Packet thus complies with the standards of fairness, completeness, and neutrality required of a settlement class notice disseminated under authority of the Court. Rule 23(c)(2)and (e); *Manual* §§ 8.21, 8.39; *Manual* §§ 30.211, 30.212.

The Settlement Administrator will mail the Class Notice to all Settlement Class Members via first class United States mail. (Settlement Agreement, p. 14:28-15:11.) In the event Notice Packets are returned as undeliverable, the Settlement Administrator will attempt to locate a current address using, among other resources, a computer/SSN and "skip trace" search to obtain an updated address. (*Id.*) This method was negotiated by the Parties to maximize the Class Member response rate while ensuring cost effective administration of the Settlement.

IV. CONCLUSION

The Parties have negotiated a fair and reasonable settlement of claims. Having appropriately presented the materials and information necessary for preliminarily approval, Plaintiff requests that the Court preliminarily approve the settlement.

Dated: November 6, 2015

Respectfully submitted,

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By: _____

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