clPESTOTNIK LLP
Ross H. Hyslop (149358)
501 W. Broadway, Suite 1025
San Diego, California 92101
Tel: 619.237.3000
Fax: 619.342.8020

Attorneys for Plaintiff Vanessa Bulcao, on behalf of herself, the proposed class(es), all others similarly situated, and on behalf of the general public

THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

VANESSA BULCAO, an individual, on behalf of herself, the proposed class(es), all others similarly situated, and on behalf of the general public

Plaintiff,

v.

TAYLOR MADE GOLF COMPANY, INC. (d/b/a TaylorMade-adidas Golf Company), a Delaware corporation; and DOES 1 through 10, inclusive,

Defendants.

Case No. 37-2015-00028124-CU-OE-CTL

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF VANESSA BULCAO'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

[IMAGED FILE]

[CCP § 382 & CRC Rule 3.769]

Date: December 16, 2016
Time: 1:30 p.m.
Judge: Hon. Timothy Taylor
Dept: 72
Trial Date: Not Set

Unlimited Civil Case

Complaint Filed: August 19, 2015
Amended Complaint Filed: March 7, 2016

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I. INTRODUCTION AND BACKGROUND

Plaintiff Vanessa Bulcao ("Plaintiff") respectfully submits this memorandum of points and authorities in support of her motion for preliminary approval of a proposed class action wage and hour settlement with Defendant Taylor Made Golf Company, Inc. d/b/a TaylorMade-adidas Golf Company ("TMaG").

TMaG is a golf club, golf equipment, and golf accessory company headquartered in San Diego, California. (Hyslop Dec., ¶ 6.) From February 11, 2015 to May 19, 2015, Plaintiff was employed by TMaG employee as a non-exempt executive assistant. (*Id*.) In August 2015, she filed a putative class action wage and hour lawsuit against TMaG, on behalf of all non-exempt employees like her. (*Id*.) Among other things, her lawsuit claimed that TMaG had implemented and maintained non-compliant meal and rest period policies and procedures, had not paid "premium pay" to its employees when it was earned, had not paid earned premium pay to employees upon termination of employment, presented employees with general releases upon termination even though earned premium pay had not been paid, and therefore owed restitution, premium wages, and various statutory penalties. (*Id*. at ¶¶ 7-9.)

Plaintiff and TMaG (collectively, "the Parties") have provisionally resolved the litigation, the terms of which are subject to Court approval and memorialized in a Stipulation of Settlement attached to the concurrently filed Declaration of Ross H. Hyslop ("Hyslop Dec."), counsel for Plaintiff and the proposed class. (*Id*. at ¶ 3.) Given the terms of the proposed settlement, and the facts, circumstances, allegations, and defenses in this case, and the inherent risks of the litigation process, including the real risk that continued litigation could result in no money for the proposed class, the proposed settlement is fair, adequate and reasonable. Nevertheless, the court *need not* actually make that finding on a preliminary approval motion – all that is required at this stage is that the proposed settlement be within the range of possible approval, justifying notice to and consideration by the proposed class. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235.

II. OVERVIEW OF MEDIATION AND PROPOSED SETTLEMENT

The Parties met with Judge Steven R. Denton (Ret.) for an all-day mediation on October 3,

2016, but they were unable to reach an agreement. (Hyslop Dec., ¶ 36 and Exhibit A.) However, the Parties agreed that Judge Denton would develop a "mediator's proposal." (*Id.*) On October 4, 2016, Judge Denton (Ret.) issued his "mediator's proposal," with an acceptance/rejection deadline of noon on October 7, 2016. (*Id.* at ¶ 37.) Both Parties ultimately accepted the mediator's proposal, and then proceeded to formally document the proposed settlement. (*Id.*)

For purposes of settlement, TMaG will stipulate to certification of the following Class: All persons who are or have been employed by TMaG as non-exempt employees (i.e., salaried non-exempt and/or hourly) in the State of California at any time from August 11, 2011 through December 16, 2016 (the "Class Period"). (Hyslop Dec., ¶ 38; Exhibit A). According to TMaG, as of August 25, 2016 **the putative class contains appropriately 685 employees**, consisting of 304 current and 381 former employees. (*Id.* at ¶ 40.) If approved, TMaG will update these numbers for the administrator. (*Id.*)

Under the proposed settlement, TMaG will create a "Settlement Fund" with a maximum possible value of $875,000, plus its portion of any payroll taxes in connection with the wage payments to participating class members. (Hyslop Dec., ¶¶ 38(b), 41; Exhibit A). The proposed Settlement Fund submitted for approval will include:

- a guaranteed payment of $577,500 – *i.e.*, the Net Settlement Fund – to those members of the Settlement Class who submit valid and timely claim forms;
- an attorneys' fees award to Class Counsel of up to $262,500 (*i.e.*, 30% of the settlement fund, which was proposed by Judge Denton (Ret.), in his "mediator's proposal");
- litigation costs payable to Class Counsel of up to $15,000;
- a Class Representative's incentive award payable to Plaintiff Bulcao of up to $5,000;
- a payment to the Labor and Workforce Development Agency for Plaintiff's PAGA claims under California Labor Code §§ 2699 *et seq.* in an amount not to exceed $5,000; and
- claims administration expenses of up to $10,000.

(Hyslop Dec., ¶ 41)

All Settlement Class Members will have the right to object and the right to opt out. (Hyslop Dec., ¶¶ 70, 71) If the opt-outs exceed 10%, TMaG has the right to void the settlement entirely. (Hyslop Dec., Exhibit A [¶14m]).

Through this motion, Plaintiff seeks preliminary approval of this proposed settlement, authorization for the issuance of notice to the Class, and entry of the concurrently submitted (proposed) Preliminary Approval Order.

III. DISCUSSION

A. Standards Applicable to Review and Consideration of Class Action Settlements

Generally speaking, settlements are favored because they create efficiency, reduce costs, reduce risks, save resources, and minimize court congestion. *Consumer Advocacy Croup, Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4th 46, 60; *Neary v. Regents of University of California* (1992) 3 Cal.4th 273, 277-78. Courts should give due regard to what is otherwise a private consensual agreement between the parties. *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 723. While class action settlement agreements must be approved by trial courts, courts are vested with broad discretion to make the determination that a proposed settlement, taken as a whole, is fair, adequate and reasonable. *Microsoft, supra*, 135 Cal.App.4th at 723; CRC 3.769(a). *See also*, *Dunk v. Ford Motor Company* (1996) 48 Cal.App.4th 1794, 1800. The public interest, and the interests of the proposed class, may indeed be served by each side giving ground in the interest of avoiding litigation. *Wershba*, *supra*, 91 Cal.App.4th at 250.

The court's discretion in reviewing a proposed class settlement includes examination of numerous non-exclusive relevant factors, and the court is free to engage in a balancing and weighing of factors depending on the circumstances of the case. *Microsoft*, *supra*, 135 Cal.App.4th at 723; *Wershba*, *supra*, 91 Cal.App.4th at 245. Although the court need not actually make such findings at the *preliminary* approval stage, the court may – in its assessment of fairness, adequacy and reasonableness – consider several factors when considering *final* approval:

- Strength of plaintiffs' case;
- Risk, expense, complexity and likely duration of further litigation as a class action;

- Risk of maintaining class status throughout the trial;
- Gross amount of the settlement;
- Extent of discovery and investigation completed;
- Stage of the proceedings;
- Experience and views of counsel;
- Presence of a governmental participant; and
- Reaction of the class to the proposed settlement.

The trial court operates under a *presumption* of fairness when the settlement is the result of: (a) arm's length negotiations; (b) investigation and discovery that are sufficient to permit counsel and the court to act intelligently; and (c) counsel are experienced in similar litigation. *Microsoft*, *supra*, 135 Cal.App.4th at 723; *Dunk*, *supra*, 48 Cal.App.4th at 1802. Here, all of the "presumption" factors are met, as explained below and in detail in the Hyslop Dec. On final approval, the presumption of fairness is further bolstered where the percentage of objectors is small. *Microsoft*, *supra*, 135 Cal.App.4th at 723; *Dunk*, *supra*, 48 Cal.App.4th at 1802.

Ultimately, the trial court's determination requires a reasoned judgment that is an amalgam of delicate balancing, gross approximations, and rough justice. *Microsoft*, *supra*, 135 Cal.App.4th at 723; *Dunk*, *supra*, 48 Cal.App.4th at 1801. On appeal, when assessing the fairness of a settlement, great weight is accorded to the trial judge's views since that judge is on the firing line and can evaluate the action accordingly. *Microsoft*, *supra*, 135 Cal.App.4th at 723; *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1145.

Here, a settlement has been reached before class certification, but the parties request conditional certification for purposes of class settlement; as such, Plaintiff recognizes that this motion needs to explain why the class should be certified. Nevertheless, even the Supreme Court has concluded that stipulated certifications for purpose of settlement are acceptable when certification requirements are met. *Amchem Products, Inc. v. Windsor* (1997) 521 U.S. 591, 619.

B. <u>Provisional Certification for Settlement Purposes Is Warranted</u>

The standards for class certification are well known: "The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a

well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives." *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021. The "community of interest" requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. *Id*. For the "predominance" inquiry, the key question is "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." *Id*. (quotations omitted). "The answer hinges on 'whether the *theory of recovery* advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment." *Id*. (quotations omitted; emphasis added). A class action can be maintained where "the defendant's liability can be determined by facts common to all members of the class … ." *Id*. at 1022 (quotations omitted; emphasis added).

Thus, under *Brinker* and many other authorities, Plaintiffs need only articulate a theory of recovery *susceptible* to common resolution. *See*, *e.g.*, *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 726; *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327. *See also*, *Williams v. Superior Court* (2013) 221 Cal.App.4th 1353, 1370 (allegedly unlawful practice may create commonality even if the practice affects class members differently).

Plaintiff's operative complaint alleges seven causes of action:

- meal period violations (Labor Code §§ 226.7, 512; 8 C.C.R. § 11010);
- rest break violations (Labor Code § 226.7; 8 C.C.R. § 11010);
- failure to properly itemize pay stubs (Labor Code § 226(a));
- failure to pay all wages due on termination (Labor Code § 203);
- improperly obtained wage/general releases (Labor Code § 206.5);
- unfair competition (Business & Professions Code § 17200 *et seq*.); and
- PAGA violations (Labor Code § 2699 *et seq*.).

(Hyslop Dec., ¶ 8).

TMaG's alleged liability is primarily based on Plaintiff's allegations that TMaG:

- established and maintained non-compliant meal period and rest break policies;
- did not pay meal period/rest break premiums to employees when otherwise due;
- did not include earned meal/rest premiums in its wage statements;
- did not include meal/rest premiums in the final wages paid to departing employees;
- presented employees with wage releases without paying premium pay.

(Hyslop Dec., ¶ 9).

California's meal period and rest break rules are contained in wage orders issued by the IWC "on an industry-by-industry basis." *Bradley v. Networkers International, LLC* (2012) 211 Cal.App.4th 1129, 1149; *Brinker*, *supra*, 53 Cal.4th at 1026–1027. TMaG is subject to IWC Wage Order No. 1-2001 (8 C.C.R. § 11010).

1. Plaintiff's Meal Period Claim

California's meal period rules require that "[n]o employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes … ." *See*, *e.g.*, 8 C.C.R. § 11010(11)(A); Labor Code § 512(a). What this means is that, absent waiver, "an employer's obligation is to provide a first meal period after no more than five hours of work and a second meal period after no more than 10 hours of work." *Brinker*, *supra*, 53 Cal.4th at 1049. Thus, California law requires that a meal break be provided *during* the first five hours of an employee's shift. *Brinker*, *supra*, 53 Cal.4th at 1048–1049.

As stated in its Employee Handbook, TMaG's meal period policy (which was in effect during the Class Period until March 2016) said:

> [N]on-exempt Employees are entitled to a meal period of not less than thirty (30) minutes for **time worked of five (5) hours or more**. … Non-exempt Employees are entitled to a second meal period of not less than thirty (30) minutes for a work period of more than ten (10) hours per day. [Emphasis added.]

(Hyslop Dec., ¶ 10(a)).

Plaintiff therefore contended that TMaG had established and maintained a facially invalid meal period policy, insofar as employees were "provided" their meal periods under the policy *after* completing five hours of work. *Id*. at ¶ 11(a). Plaintiff contended that the allegedly unlawful nature of TMaG's policy supported *both* certification and liability. *Brinker*, *supra*, 53 Cal.4th at

1040, expressly acknowledged this theory of *liability*, saying: "The theory of **liability** – that Brinker 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."

Under 8 C.C.R. § 11010(11)(D) and Labor Code § 512(a), the "remedy" for such a violation is an "additional hour of pay." *United Parcel Serv., Inc. v. Superior Court* (2011) 196 Cal.App.4th 57, 70. The "additional hour of pay" remedy constitutes a "premium wage intended to compensate employees," as opposed to a penalty. *Murphy v. Kenneth Cole Prods., Inc.* (2007) 40 Cal.4th 1094, 1114. Such remedies are considered "liquidated" in nature (i.e., statutory) per Labor Code § 226.7. *Brewer v. Premier Golf Properties* (2008) 168 Cal.App.4th 1243, 1254; *Murphy*, *supra*, 40 Cal.4th at 1112.

Since all non-exempt TMaG employees were governed by this same uniform policy, Plaintiff contended that such a claim was subject to certification under *Brinker*, *supra*, 53 Cal.4th at 1040, and other authorities. *See*, *e.g.*, *Faulkinbury v. Boyd & Associates* (2013) 216 Cal.App.4th 220, 235; *Benton v. Telecom Network Specialists, Inc*. (2013) 220 Cal.App.4th 701, 726-727; *Bradley*, *supra*, 211 Cal.App.4th at 1153; *Safeway, Inc. v. Superior Court* (2015) 238 Cal.App.4th 1138, 1159. While TMaG conceded that it had never paid any meal period or rest break premiums (except for a small segment of its retail salesforce), and acknowledged that it had no policies, procedures, and/or practices for such premiums, it contended that no violations had ever occurred and therefore that no premium pay obligations had ever been triggered. Plaintiff claimed otherwise.

TMaG also conceded that its meal period policy applied uniformly to all of its non-exempt employees, and conceded it was designed for consistent application. Under *Brinker*, *supra*, 53 Cal.4th at 1040, the existence of a uniform policy consistently applied is enough for certification, particularly on a stipulated basis. "[B]y its nature [it is] a common question eminently suited for class treatment." *Ibid*. As such, it should be certified by stipulation.

2. <u>Plaintiff's Rest Period Claim</u>

TMaG's rest break policy, which was in effect during the Class Period until March 2016,

provided: "Non-exempt Employees are entitled to a minimum ten (10) minute rest period per every four hours of time worked." (Hyslop Decl., ¶ 10(b).) The applicable rest break rules are also contained in IWC Wage Orders. *Bradley*, *supra*, 211 Cal.App.4th at 1149; *Brinker*, *supra*, 53 Cal.4th 1004 1026–1027. The Wage Order applicable here says: "Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours *or major fraction thereof*." (Emphasis added) *See also*, Labor Code § 226.7(b).

Brinker, *supra*, held that the Wage Orders require employers to provide "10 minutes rest for shifts from three and one-half to six hours in length, 20 minutes for shifts more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on." *Brinker*, *supra*, 53 Cal.4th at 1029; *e.g.* 8 C.C.R. § 11010(12)(A). *See also*, *Rodriguez v. E.M.E., Inc.* (2016) 246 Cal.App.4th 1027, 1037. As with meal breaks, employers are required to pay one hour of compensation at the regular rate "for each workday that the rest period is not provided." *See*, *e.g.*, 8 C.C.R. § 11010(12)(B); Labor Code § 226.7(c).

Plaintiff claimed that TMaG's rest break policy failed to comply with California law, because – as in *Brinker* – it did not "authorize and permit" rest breaks for each four hours worked, *or "major fraction" thereof*, and did not provide for a third rest break in shifts exceeding 10 hours. (Hyslop Dec., ¶ 11(b).) Stated differently, Plaintiff claimed TMaG's policy only "authorized and permitted" rest breaks for complete (i.e., non-fractional) four hour increments (i.e., for four hours of work, eight hours of work, twelve hours of work, etc.). *Id.* As with the meal period claim, such a uniform policy consistently applied also warrants certification here. *Brinker*, *supra*, 53 Cal.4th at 1040.

3. <u>Plaintiff's Paystub Claim</u>

California Labor Code § 226(a) requires an employer to furnish its employees with an accurate itemized statement in writing showing, among other things, (a) gross wages earned and (b) net wages earned. Section 226(e)(1) provides the remedy for violations, saying: "An employee suffering injury as a result of a knowing and intentional failure by an employer to

comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars ($4,000), and is entitled to an award of costs and reasonable attorney's fees."

Plaintiff claimed that, due to TMaG's acknowledged failure to pay premium pay under any circumstances (except for certain retail store employees), TMaG had issued inaccurate pay stubs under subsections (a)(1) and (a)(5) of California Labor Code § 226. (Hyslop Dec., ¶ 9(c)). Stated differently, Plaintiff claimed that – by omitting *earned* but unpaid premium pay – the paystubs did not state, properly itemize, or accurately reflect the gross or net wages *earned*. While this claim is "derivative" in the sense that it would require Plaintiff to prove premium pay was owed for meal and/or rest period violations, it is certainly subject to certification for settlement purposes under *Safeway*, *supra*, 238 Cal.App.4th at 1159 (plaintiffs "demonstrated that the existence of the practice [i.e., not paying premium pay] and the fact of damage were matters suitable for class treatment"). *See also*, *e.g.*, *Jaimez v. DAIOHS USA, Inc.* (2010) 181 Cal.App.4th 1286, 1305–1306; *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 956, 961.

4. <u>Plaintiff's Termination Pay Claim</u>

For involuntarily terminated employees, Labor Code § 201(a) requires that earned but unpaid wages be paid "immediately." For voluntary separations, Labor Code § 202(a) requires payment "within 72 hours," unless the employee has given advance notice. If an employer "willfully fails" to pay wages due to an employee who is discharged or quits, Labor Code § 203 permits assessment of a "waiting time penalty" equal to the employee's daily wages for each day, not exceeding 30 days, that the wages are unpaid. *Mamika v. Barca* (1998) 68 Cal.App.4th 487, 493; *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 377-78. Labor Code §§ 201, 202 and 203 implement California's fundamental public policy regarding prompt payment of wages. *Smith v. Superior Court* (2006) 39 Cal.4th 77, 82; *Smith v. Rae–Venter Law Group* (2002) 29 Cal.4th 345, 360.

On this claim, Plaintiff asserted TMaG did not pay "premium pay" – as part of the final paycheck – that had been earned by voluntarily and/or involuntarily terminated employees but

remained unpaid. (Hyslop Dec., ¶ 9(c)). Again, this is a derivative claim that requires proof that employees actually *earned* premium pay. But as with the paystub claim, it is also subject to certification for settlement purposes under *Safeway*, *supra*, 238 Cal.App.4th at 1159, and *Jaimez*, *supra*, 181 Cal.App.4th at 1305–1306, among other authorities.

5. Plaintiff's Labor Code § 206.5(a) Claim

Plaintiff did not seek any monetary remedies under her cause of action for TMaG's alleged violation of California Labor Code § 206.5(a). Instead, she sought to invalidate any such releases already obtained by TMaG in violation of Section 206.5, which states that "[a] release required or executed in violation of the provisions of this section shall be null and void as between the employer and the employee." TMaG did not agree as part of the proposed settlement to invalidate previously obtained releases, but as noted above the Parties have agreed to a proposed plan of allocation which, if approved, would provide somewhat less money to those employees who signed releases. While it is not critical that this specific cause of action be certified for settlement purposes, it certainly can be, particularly since the Parties have provisionally agreed that even persons who signed releases will receive benefits under the proposed settlement.

6. Plaintiff's UCL Claim

Plaintiff's UCL claim effectively extends the statute of limitation for recovery of wages (*e.g.*, premium pay as referenced in *Murphy*, *supra*, 40 Cal.4th at 1114) for a period of four years under California Business & Professions Code § 17208, rather than the three year time period of C.C.P. § 338. *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 178-79. Plaintiff does not seek any unique or independent remedies under her UCL claim. Nevertheless, certification is warranted under *Safeway*, *supra*, 238 Cal.App.4th at 1159.

7. Plaintiff's PAGA Claim

An employee plaintiff suing under PAGA does so as the "proxy or agent of the state's labor law enforcement agencies." *Munoz v. Chipotle Mexican Grill, Inc.* (2015) 238 Cal.App.4th 291, 310. PAGA's "declared purpose is to supplement enforcement actions by public agencies, which lack adequate resources to bring all such actions themselves." *Ibid*. *See also*, *Arias v. Superior Court* (2009) 46 Cal.4th 969, 980–986; *Iskanian v. CLS Transp. Los Angeles, LLC*

(2014) 59 Cal.4th 348, 379. Penalties, attorneys' fees and costs are also available under Labor Code § 2699 *et seq*. (PAGA) for the Labor Code violations referenced herein. However, PAGA claims *need not be certified* like ordinary class action cases in order for Plaintiff to obtain penalties on behalf of other aggrieved employees. *Miranda v. Anderson Enterprises, Inc.* (2015) 241 Cal.App.4th 196, 201. But for the same reasons identified above – uniform meal, rest and premium pay policies consistently applied – Plaintiff's PAGA claim should also be certified.

C. Proposed Settlement Terms

As proposed, TMaG will create a "Settlement Fund" of $875,000, plus its portion of any payroll taxes. The proposed Settlement Fund submitted for approval will include:

- a *guaranteed* payment of $577,500 to the Settlement Class;
- an attorneys' fees award to Class Counsel up to $262,500;
- litigation costs payable to Class Counsel up to $15,000;
- a Class Representative's incentive award payable to Plaintiff up to $5,000;
- a PAGA payment to the LWDA up to $5,000; and
- settlement administration expenses up to $10,000.

See, Hyslop Dec., ¶¶ 38-41 and Exhibit A.

In addition, as set forth in the Hyslop Dec. and Exhibit A, the proposed settlement has the following characteristics:

- TMaG will pay its portion of any payroll taxes owed.
- TMaG is *required* to pay out the entire Net Settlement Fund.
- This is true common fund settlement, and not a claims made settlement (i.e., one in which the defendant only "funds" as much as necessary to satisfy those who submitted claims).
- TMaG's payment of $577,500 is guaranteed in the sense that, if fewer than all Class Members submit claims, any residue inures to the benefit of those who do.
- TMaG will not receive any reversion, except accrued interest upon close of settlement administration.
- Given that TMaG has changed several of its policies (likely in response to this

lawsuit), the proposed settlement does not mandate more changes.

- TMaG may only revoke the proposed settlement if the number of opt-outs exceeds 10%.
- Under the proposed plan of allocation:
    - Payments will be made to participating Class Members based on weeks of work for TMaG during the Class Period, such that employee with longer tenure during the Class Period will receive comparatively more money than those with shorter tenures.
    - Those Class Members who were comparatively more likely to experience meal and/or rest period violations (i.e., assembly, shipping, and regulated customer service) will receive larger shares (*i.e.*, a 25% bump).
    - Those Class Members who have already executed wage releases will receive smaller shares (*i.e.*, either 30% or 60% of normal, depending on whether the release signed specifically references this case).
    - The average payout per Class Member is calculated at $843 (*i.e.*, $577,500 ÷ 685 = $843.07), but those with longer tenures and in certain job categories (*i.e.*, assembly, shipping, and regulated customer service) will receive more money whereas those in other job categories (with more flexible schedules) and those who have already signed releases will receive less.
- Within thirty (30) days after entry of the Preliminary Approval Order as provided in the Stipulation of Settlement, the settlement administrator will send to each Class Member, via First Class regular U.S. mail using the most current mailing address information for Class Members as provided by TMaG to the Claims Administrator from TMaG's payroll data, a Notice of Pendency and Settlement of Class Action; Settlement Hearing; and Claim, Objection, and Exclusion Procedures ("Notice") (Exhibit 2 to Stipulation of Settlement), together with a Claim Form (Exhibit 3 to Stipulation of Settlement).
- Subject to court approval, the Parties have selected Phoenix Settlement

Administrators ("Phoenix") as the settlement administrator. TMaG will provide Phoenix with the most current contact information consisting of Class Member names, addresses, phone numbers, and social security numbers according to TMaG payroll records. Phoenix will then update that information through the NCOA database. For any returned Notice Packets, Phoenix will also perform a skip trace to locate such Class Member, if possible.

- Every Class Member has the right to object.
- Class Members have the right to be heard at the final approval hearing even if s/he does not submit or file a formal objection.
- Every Class Members has the right to opt out.
- Except in the event of uncashed checks, which will likely be nominal, the settlement does not provide for any *cy pres* distribution.
- Class Members will only provide limited releases (thereby preserving most common wage and hour claims, other than meal, rest and premium pay claims), and will not be providing general releases.
- The proposed settlement does not cover any claims *outside* the four corners of the operative (i.e., first amended) complaint.

(Hyslop Dec., ¶¶ 38-47, 65-71 and Exhibit A).

D. <u>The Presumption of Fairness Applies</u>

As noted, the trial court operates under a *presumption* of fairness when the settlement is the result of: (a) arm's length negotiations; (b) investigation and discovery that are sufficient to permit counsel and the court to act intelligently; and (c) counsel are experienced in similar litigation. *Microsoft*, *supra*, 135 Cal.App.4th at 723; *Dunk*, *supra*, 48 Cal.App.4th at 1802; *Cho v. Seagate Tech. Holdings, Inc.* (2009) 177 Cal.App.4th 734, 743. As explained below, all of those parameters are met here.

1. **<u>Sufficient Investigation and Discovery</u>**

The nature and extent of the investigation and discovery conducted before this proposed settlement was reached in discussed in detail in the Hyslop Dec., ¶¶ 17-27. By way of overview:

- Plaintiff conducted substantial deposition discovery of TMaG, included taking extensive, multi-day person most qualified ("PMQ") depositions, including deposing four TMaG employees on 16 detailed PMQ topics and subtopics. One of TMaG's key PMQ witnesses held the position of Vice President of Global Human Resources at TMaG, making her the highest ranking HR executive at the company and therefore ultimately responsible for the development, implementation, and/or enforcement of many of the same policies and procedures that Plaintiff alleges were improper and/or unlawful.
- Plaintiff's PMQ deposition notice also requested that TMaG produce documents in 36 specific categories. The vast majority of TMaG's document production in response to the PMQ deposition notice was completed well in advance of the taking of the depositions, which allowed for a sufficient amount of time to review and analyze the production, prepare relevant questions, and create/organize exhibits.
- Plaintiff also took the deposition of Jennie Jagoda (the lead HR representative of TMaG) in her personal (non-PMQ) capacity. Ms. Jagoda was directly involved in Plaintiff's termination and was also personally responsible for coordinating a rather massive reduction in force at TMaG (beginning approximately 2015) that resulted in the involuntary termination as many as 150 or more putative class members, many of whom signed general release agreements in exchange for additional compensation and/or benefits.
- Plaintiff also obtained substantial written discovery from TMaG, in multiple document productions. In response, TMaG produced almost 2,200 pages of documents. Plaintiff's written discovery included: (a) Form Interrogatories; (b) 8 Special Interrogatories; (c) 81 Requests for Production of Documents; and (d) 52 Requests for Admission.
- Included in TMaG's document productions were, among many other things, the following: (a) all of TMaG's employee handbooks covering the putative class period; (b) all of TMaG's policies and procedures relating to meal periods, rest

breaks, timekeeping, payment of wages, separation of employment, severance and release agreements, and others; (c) work, meal-period, and/or rest break schedules for hundreds of putative class members; (d) electronic time-keeping records; and (e) settlement and release agreements executed by over 60 class members.

- Plaintiff also initiated a stipulated "Belaire" notice process, which resulted in Plaintiff obtaining the names and addresses of over 100 former employees of TMaG. Class Counsel interviewed several former TMaG employees.
- In anticipation of settlement and mediation discussions, TMaG also informally produced thousands of additional pages of documents, data, and/or information, such as: (a) class member time records; (b) compensation information/data for putative class members, segregated by job category/classification; (c) class member headcount data, including headcounts by year for the various non-exempt personnel employed by TMaG in various job categories/classifications; (d) termination dates and job classification/category for terminated class members; and (e) identity of class members who had signed releases upon termination of employment.
- Class Counsel also conducted – and continuously refined and updated – substantial legal research on all case-related theories.
- TMaG took an all-day deposition of Plaintiff Vanessa Bulcao.
- TMaG also issued written discovery to Plaintiff, including: (a) 3 Special Interrogatories; and (b) 11 Requests for Production of Documents. Plaintiff responded to all of TMaG's written discovery responses, and produced all of the requested documents (almost 200 pages) in her possession, custody and control.
- TMaG obtained and produced to Plaintiff more than 50 detailed and varying declarations (from supervisors, co-workers, and employees that Plaintiff was seeking to represent) in support of TMaG's legal and factual defenses, contentions and positions.

In sum, Plaintiff conducted an extensive investigation that involved both formal and informal discovery. Such was more than an adequate basis upon which to make important settlement decisions.

2. **Arms' Length Negotiations**

As explained in detail in the Hyslop Dec., ¶¶ 17-37, the negotiations between counsel were extensive, over a period of many months, and involved countless phone calls, several meetings, and an exchange of numerous back and forth letters in which each party explained their contentions, defenses, and claims – both factual and legal. Plaintiff prepared and provided to TMaG's counsel an exposure analysis and made a demand. But without the assistance of a skilled mediator having experience in wage and hour matters, the Parties were at loggerheads and unable to reach a resolution.

The Parties then conducted a mediation with the Honorable Steven R. Denton (Ret.). But the case did not even settle on the day of the mediation. Instead, the Parties agreed that Judge Denton would develop a "mediator's proposal," which either or both side(s) would be able to accept or reject. Ultimately, both Parties accepted Judge Denton's mediator's proposal, which capped months of negotiations and culminated in the settlement of which Plaintiff seeks preliminary approval. This was definitely an arms' length negotiation.

3. **Experienced Counsel**

As explained in detail in the Hyslop Dec., ¶¶ 99-101, lead counsel for Plaintiff: (a) has been practicing as a licensed lawyer in California for 26+ years; (b) is AV rated by Martindale Hubbell; (c) practiced as a partner in San Diego for over 10 years at an international law firm; (d) has long maintained a practice in employment and consumer class actions, and complex business litigation; and (e) has an extensive history in litigating complex employment and consumer class actions. In the opinion of Plaintiff's counsel, the settlement that Plaintiff proposes is fair, adequate and reasonable.

E. Other Settlement Considerations

While the "presumption" of fairness applies here, the Hyslop Dec. also discusses in detail many of the other *Dunk* factors – i.e., strength of plaintiff's case; risk, expense, complexity and

likely duration of further litigation as a class action; risk of maintaining class status throughout the trial; likelihood of success at trial and the range of potential recovery; that no major claims or types of relief have been omitted from the settlement; and the reasons for different treatment of segments of the class, among others. *See*, generally, Hyslop Dec. These factors should all be considered in the context, as stated in *Wershba*, *supra*, 91 Cal.App.4th at 250, that "[c]ompromise is inherent and necessary in the settlement process," and that even where the relief obtained is "substantially narrower" than might what have been achieved through trial and appeal, such is "no bar to a class settlement because the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation." *Id*. (quotations omitted). *See also*, *7-Eleven*, *supra*, 85 Cal.App.4th at 1151 ("voluntary conciliation and settlement are the preferred means of dispute resolution," especially "in complex class action litigation").

F. Attorneys' Fees and Costs

If the Court approves this settlement, the work by Plaintiff's counsel will create a common fund of $875,000. Of that common fund, $577,500 represents a *guaranteed* payment to participating Settlement Class Members. The proposed settlement provides that, at final approval, Class Counsel will seek attorneys' fees of $262,500 (representing 30% of the class recovery, as proposed by Judge Denton (Ret.) in his mediator's proposal) and costs not to exceed $15,000, which amount TMaG has agreed it will not oppose. Plaintiff Bulcao has expressly given written approval for this fee and cost award not only in Stipulation of Settlement but also in her concurrently filed declaration in support of preliminary approval. *See* Hyslop Dec., ¶ 97 and Exhibit A; and Bulcao Dec., ¶ 5.

Through November 30, 2016, Class Counsel has invested a total of 885.3 hours[1] into this matter, at hourly rates for attorneys ranging from $450 to $610, for a total lodestar to date of

[1] "By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker." *Kerkeles v. City of San Jose* (2016) 243 Cal.App.4th 88, 104 (citation and quotations omitted.)

$527,727, without application of any multiplier, as referenced in the chart below. (Hyslop Dec., ¶ 89-98.) The Hyslop Dec. provides extensive detail on: (a) the substantial amount of work that was done by Class Counsel to achieve the result, which was far from certain; (b) the risks faced by the Class, and the uncertainties of achieving a favorable result for the Class; (c) the efforts that TMaG undertook to deny the Class any recovery, including its aggressive campaign to actively solicit wage and general releases from Class Members; (d) the breakdown of time and costs; and (e) Class Counsel's significant experience and expertise in employment and class action litigation.

If approved, Plaintiff's request for an award of attorneys' fees in the amount of $262,500 would result in a *downward* adjustment of the lodestar, by approximately 50% (*i.e.*, a *negative* multiplier of .5). (Hyslop Dec., ¶ 98.) Even though more work remains, if approved this award of attorneys' fees would result (if applied only to the accrued hours through November 30, 2016 of 885.3) in an effective/blended hourly rate of $296.50/hour. *Id*.

Only a few months ago, the California Supreme Court issued an important opinion discussing the trial court's consideration and award of attorneys' fees in a wage and hour class action. In *Laffitte v. Robert Half Int'l Inc.* (2016) 1 Cal.5th 480, the defendant reached a wage and hour class action settlement that created a common fund of $19 million dollars, from which plaintiff and defendant both agreed that class counsel would request attorneys' fees of not more than $6,333,333.33 (representing one-third of the gross settlement amount). Based on between 4,263 and 4,463 attorney hours expended by plaintiff's counsel, the total lodestar (*i.e.*, reasonable hourly rates multiplied by number of hours reasonably expended) as calculated by counsel was between $2,968,620 and $3,118,620. Using such calculations not only equated to *blended* hourly rates of between $696.36 and $698.77, but a multiplier of 2.03 to 2.13 was also needed to be applied in order to reach the fee request.[2] Overruling the arguments of objectors, the trial court granted the request for a one-third share of the common fund.

[2] In *Goglin v. BMW of N. Am., LLC* (2016) 4 Cal.App.5th 462, 473-474, the Fourth District Court of Appeal, Division One, affirmed an attorneys' fee award in a Song-Beverly action – based on a contested motion for an award of fees – with an hourly rate of $575, despite that fact defense counsel were billing their clients at $275-300/hour. Plaintiff in *Goglin* had requested total attorney fees of $195,297.50 based on 313.5 hours of work, and the trial court – using the

The California Supreme Court affirmed the trial court's ruling, saying:

> [W]e clarify today that use of the percentage method to calculate a fee in a common fund case, where the award serves to spread the attorney fee among all the beneficiaries of the fund, does not in itself constitute an abuse of discretion. **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 – convince us the percentage method is a valuable tool that should not be denied our trial courts.

Laffitte, *supra*, 1 Cal.5th at 503 (emphasis added; citations omitted). *See also*, *Serrano v. Priest* (1977) 20 Cal.3d 25, 35 (when one who expends attorneys' fees creates a common fund from which others derive benefits, the passive beneficiaries may be required, on an equitable basis, to bear a fair share of the litigation costs).

Here, Plaintiff requests a 30% share of the common fund and will accept a .5 *negative* multiplier that results from the cap of $262,500 on fees. If approved, this would equate to an effective blended hourly rate of $296.50, which will be further reduced due to the additional time necessary to finalize the case.

A similar situation – where a plaintiff was seeking an award of attorneys' fees as a percentage of a common fund, but due to the agreed "cap" represented a significant downward multiplier when compared to the lodestar – was presented in *Roos v. Honeywell Int'l, Inc.* (2015) 241 Cal.App.4th 1472, 1495. The trial granted the request, and overruled certain objections. Finding no abuse of discretion, the court of appeal said:

> **In our view, a trial court acts appropriately – and it certainly does not abuse its discretion – when it accepts in a common-fund case a cap on fees, even a cap that is phrased in terms of a percentage of the recovery, when the application of the cap results in a lower award**

$575/hour rate – awarded attorney fees of $180,262.50. Although plaintiff had requested a rate of $625/hour, the trial court adopted $575/hour instead, because plaintiff's counsel had previously represented as part of a motion for a protective order that his rate was $575/hour. No multiplier was requested.

> **than would be authorized under the lodestar method.** The lodestar method is, after all, the primary means of calculating the reasonableness of attorney fees in California. When a court applies a cap to reduce this presumed reasonable amount, and thereby increases class relief, we cannot see how anyone is harmed, least of all the class members, including any objectors. Applying such a cap is consistent with and furthers the trial court's responsibilities to protect the class from having to pay excessive fees to class counsel.

Roos, *supra*, 241 Cal.App.4th at 1495 (emphasis added; citation omitted).

Thus, under *Laffitte*, *Serrano*, *Roos*, *Kerkeles* and *Goglin*, among other authorities, Plaintiff's request for preliminary approval of $262,500 in attorneys' fees and up to $15,000 in litigation costs is eminently reasonable and appropriate.

IV. CONCLUSION

Subject to final approval by the Court, Plaintiff seeks the following relief by this motion:

1. Preliminary approval of Plaintiff's proposed class action settlement with TMaG;
2. Conditional certification of the proposed class;
3. Appointment of Plaintiff Vanessa Bulcao as the Class Representative;
4. Appointment of Ross H. Hyslop and Pestotnik LLP as Class Counsel;
5. Approval of the form, content, and issuance of the proposed Class Notice;
6. Authority to engage Phoenix Settlement Administrators as administrator;
7. Scheduling of deadlines related to proposed final approval;
8. Setting a final approval hearing;
9. Provisional approval of Plaintiff's attorneys' fees and litigation costs; and
10. Entry of the proposed Preliminary Approval Order.

December 2, 2016 PESTOTNIK LLP

By: s/ Ross H. Hyslop
Ross H. Hyslop
Attorneys for Plaintiff Vanessa Bulcao, on behalf of herself, the proposed class(es), all others similarly situated, and on behalf of the general public