James R. Hawkins, Esq. (SBN 192925)
james@jameshawkinsaplc.com
Malte L. L. Farnaes, Esq. (SBN 222608)
malte@jameshawkinsaplc.com
Christina M. Lucio, Esq. (SBN 253677)
christina@jameshawkinsaplc.com
9880 Research Drive, Suite 200
Irvine, CA 92618
Tel: (949) 387-7200
Fax: (949) 387-6676

Attorneys for Plaintiffs HOLLY ATTIA, ROSHANAK BASTI, NILOOFAR ESHAGHBEIGI, MICHELLE GIRARD, ELISE KELLEY, KIM MARCONI, XUAN HIEN NGUYEN, ISABEL ROMERO, and DAVID TOLBERT, on behalf of themselves and all others similarly situated

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HOLLY ATTIA, ROSHANAK BASTI, NILOOFAR ESHAGHBEIGL, MICHELLE GIRARD, ELISE KELLEY, KIM MARCONI, ISABEL ROMERO, DAVID TOLBERT, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

THE NEIMAN MARCUS GROUP, INC., a Texas corporation; and DOES 1 through 100, inclusive,

Defendants.

Case No.: 8:16-cv-00504 DOC (FFM)

[The Honorable David O. Carter]

MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Date: August 27, 2018
Time: 8:30 a.m.
Courtroom: 9D

Action Filed: December 31, 2015
Removed: March 17, 2016

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

Federal Rules of Civil Procedure

I. INTRODUCTION

Plaintiffs HOLLY ATTIA, ROSHANAK BASTI, NILOOFAR ESHAGHBEIGI, MICHELLE GIRARD, ELISE KELLEY, KIM MARCONI, ISABEL ROMERO, DAVID TOLBERT, and XUAN HIEN NGUYEN,[1] on behalf of themselves and all others similarly situated, bring this motion to seek preliminary approval and conditional certification of a non-reversionary wage and hour class action settlement of $4,400,000 ("Gross Settlement Amount" or "GSA") by and between the Parties to this civil action (the "Action"). The Joint Stipulation of Class Action Settlement ("Settlement") entered into by the parties provides certain and substantial relief to the estimated 2,086 persons employed by Defendant The Neiman Marcus Group LLC (erroneously named The Neiman Marcus Group, Inc.) ("Defendant" or "NMG") in its full-line California stores and who were compensated in full or in part on a commission or piece rate basis during the Class Period (May 1, 2014 to the date of preliminary approval) or Expense Reimbursement Subclass Period (December 31, 2011 to the date of preliminary approval). Declaration of James R. Hawkins ("Hawkins Decl.") ¶ 19. Note, that as of the filing of this Motion, Plaintiffs Marconi and Tolbert have not signed the Settlement Agreement as they have requested additional time for review. Plaintiffs have proceeded with the filing of this motion with the signatures of the other seven representatives and will seek to supplement the record to include Marconi's and Tolbert's signatures should they later sign the Agreement.

An objective evaluation of the Settlement confirms that the relief negotiated on behalf of the Class/Subclass is fair, reasonable, and valuable. The Parties negotiated the Settlement at arm's length with the guidance of David Rotman, a highly respected and experienced wage and hour class action mediator, over the course of three mediation sessions. The proposed relief provides certain and valuable

[1] The proposed Second Amended Complaint provides for the addition of Plaintiff Nguyen to the *Attia Action* and for the correction of the name of the proper defendant.

relief to the Class/Subclass in the near future without requiring the Class/Subclass to wait possibly years and bear the risk of class certification being denied or of Defendant prevailing at trial.

As discussed in detail below, Plaintiffs seek approval of the proposed settlement as fair, reasonable and adequate and ask the Court to set dates for providing notice of settlement, requests for exclusion or objection, a final approval and fee hearing date, along with a briefing schedule.

II. THE PARTIES, THE CLASS, AND THE SUBCLASS

A. Plaintiffs

Plaintiffs worked as retail sales associates for Defendant in its full-line stores in California. Specifically, all Plaintiffs worked at the store in Newport Beach, California during the period between December 31, 2011 and October 2015. Ms. Girard also worked at the Beverly Hills, California store during her employment. Plaintiffs were compensated in full or in part on a commission or piece rate basis, and are part of the putative Class and Subclass. Hawkins Decl. ¶ 17.

B. Defendant

NMG is a Delaware limited liability company, with its headquarters in Dallas, Texas. NMG is a luxury retailer that offers upscale apparel, accessories, jewelry, beauty and decorative home products in seven full-line stores in California: Beverly Hills, Newport Beach, Palo Alto, San Diego, San Francisco, Topanga and Walnut Creek. Hawkins Decl. ¶ 18.

C. The Settlement Class and Subclass

Plaintiffs seek conditional certification of a Class defined as "All persons currently or formerly employed by The Neiman Marcus Group LLC ("NMG") at Defendant's full-line department stores in California as employees who were compensated in full or in part on a commission or piece rate basis, at any time during the period from May 1, 2014 through the date of preliminary approval" (the "Class" or "Settlement Class"). The Settlement Class is estimated to include 1,620

individuals. Hawkins Decl. ¶ 19(a).

Plaintiffs also seek conditional certification of an Expense Reimbursement Subclass defined as: "All persons currently or formerly employed by NMG at Defendant's full-line department stores in California as employees who were compensated in full or in part on a commission or piece rate basis, at any time during the period from December 31, 2011 through the date of preliminary approval." ("The Expense Reimbursement Subclass.") The Expense Reimbursement Subclass is estimated to include 2,086 individuals. Hawkins Decl. ¶ 19(b).

The membership of the two classes is coextensive, except the Expense Reimbursement Subclass dates back to December 13, 2011. There are an estimated 2,086 unique members of the Class and Subclass combined. Hawkins Decl. ¶ 20.

D. The *Monjazeb* Settlement

In or about 2014, NMG entered into an agreement to settle certain wage and hour claims, asserted in the action entitled *Monjazeb v. The Neiman Marcus Group, Inc.,* San Francisco Superior Court case no. CGC 10 502877, on behalf of "all non-exempt (hourly paid) employees of Neiman Marcus, and all commission sales associates of Neiman Marcus throughout the State of California, including but not limited to those working or who worked in the full-line retail stores, outlet stores ("Last Call" stores), "The Cusp" retail store, and the Service Center, at any time from August 20, 2006 through April 30, 2014" for a maximum settlement amount of $3,500,000.00. Hawkins Decl. ¶ 21, Ex. 2. As relevant here, by operation of the *Monjazeb* settlement agreement and final judgment, Plaintiffs and the members of the putative Class and Subclass released all claims asserted in this action for the period including and prior to April 30, 2014, except claims arising under Labor Code section 2802 for unpaid business expenses. Id.

III. PROCEDURAL AND LITIGATION HISTORY

On December 31, 2015, Plaintiffs Attia, Basti, Eshaghbeigi, Girard, Kelley, Marconi, Romero, and Tolbert, on behalf of themselves and all others similarly

situated, filed their class action complaint in the Superior Court of the State of California, County of Orange, against Defendant NMG, titled *Attia, et al. v. The Neiman Marcus Group, Inc.*, Case No. 30-2015-00827743-CU-OE-CXC. The class action complaint asserted causes of action for: (1) failure to pay hourly wages and overtime wages; (2) failure to pay minimum wages, (3) failure to provide rest periods and meal periods or compensation in lieu thereof, (4) failure to indemnify necessary expenses, (5) failure to timely pay wages due at separation, (6) knowing and intentional failure to comply with itemized employee wage statement provisions, and (7) violations of the Unfair Competition Law. Hawkins Decl. ¶ 2. On February 11, 2016, Plaintiffs filed a first amended complaint ("FAC") to add a claim under the Private Attorneys' General Act of 2004, Labor Code § 2698 *et seq.* Id., ¶ 3. On March 17, 2016, NMG filed its answer to the FAC. Id., ¶ 4. NMG denied and continues to deny any liability and wrongdoing of any kind associated with the claims in the Action, and further denies that this Action is appropriate for class treatment for any purpose other than this Settlement. Id. NMG removed the *Attia* Action to this Court on March 17, 2016. (Doc. No. 1.[2])

On June 1, 2016, Plaintiff Nguyen filed a PAGA-only action in the Superior Court for the County of Orange, entitled *Nguyen v. The Neiman Marcus Group, Inc.*, Case No. 30-2016-00855622-CU-OE-CXC, asserting wage and hour claims against NMG as to aggrieved employees consisting of non-exempt employees working in sales. Hawkins Decl. ¶ 6. NMG filed a motion to dismiss or stay the *Nguyen* action pending completion of the *Attia* action, based on its contention that the *Nguyen* action alleged substantially identical claims on behalf of the same class covered in the *Attia* action. The Superior Court granted the motion. Id.

Defendant filed a motion to compel arbitration in the *Attia* action on April 20, 2016. The matter was fully briefed and the Court granted that motion ton June 27, 2016. (Doc. No. 16.) On September 8, 2016, Plaintiffs filed a motion

[2] All references are to the docket in this action unless otherwise indicated.

for reconsideration of the Order on the motion to compel arbitration. (Doc. No. 17.) On October 18, 2016, the Court granted Plaintiffs' motion. (Doc. No. 25.) On November 16, 2016, NMG filed a notice of appeal to the Ninth Circuit Court of Appeals from the order granting Plaintiffs' motion for reconsideration. (Doc. No. 28.) On April 10, 2017, the Ninth Circuit granted Defendant's unopposed motion to stay the appeal pending the United States Supreme Court's decision in *Ernst & Young v. Morris*, docket no. 16-300.

The parties had their initial Scheduling Conference on November 28, 2016, and thereafter this Court issued a Scheduling Order Regulating Discovery and Other Pre-Trial Proceedings on November 29, 2016. (Doc. No. 26, 33.) On December 14, 2016, the Court issued an order appointing Hon. James L. Smith (Ret.) as Special Master in the action. (Doc. No. 35.)

On February 14, 2017, the parties engaged in a full-day private mediation with respected wage and hour mediator David Rotman in San Francisco. Hawkins Decl. ¶ 27(a). The parties did not reach a settlement at mediation, but agreed to continue discussions with the assistance of Mr. Rotman. Id.

On March 23, 2017, Plaintiffs filed a motion for leave to file a Second Amended Complaint ("SAC") in the action. (Doc. No. 43.). On April 24, 2017, the Court issued an order denying that motion. (Doc. No. 54.)

On April 14, 2017, Plaintiffs filed their Motion for Class Certification seeking to certify a class of: "All individuals employed at Defendant's full-line department stores in California who were paid a draw versus commission from May 1, 2014 through the time of trial." (Doc. No. 49.) Defendant opposed the motion on June 13, 2017. (Doc No. 55.) On June 20, 2017, Plaintiffs filed their reply. (Doc. No. 59.) On the same date, the Court issued an order to show cause why the case should not be stayed pending the Supreme Court's decision in *Morris*. (Doc. No. 58.) The parties subsequently stipulated to stay the case pending the Supreme Court's ruling. (Doc. No. 60.)

On September 5, 2017, the parties engaged in a second full day of mediation with Mr. Rotman. Hawkins Decl. ¶ 27(b). The case did not settle at mediation, but the parties continued settlement efforts with the mediator's assistance. Id. Despite such continued discussions, the parties were unable to reach an agreement, but agreed to a third day of mediation with Mr. Rotman. Id. The parties attended a third day of mediation with Mr. Rotman on December 1, 2017. Id., ¶ 27(c). After the mediation, the parties continued negotiations and Mr. Rotman issued a mediator's proposal for resolution of the action. Id. The Settlement is the product of such mediator's proposal, and extensive arm's length negotiations between the parties to finalize the terms of the long-form Settlement Agreement. The material terms were realized only after extensive negotiations consisting of numerous telephone conferences and e-mail exchanges between counsel for the parties. Id. ¶ 27(c).

In conjunction with the Settlement Agreement, the parties stipulated to file a Second Amended Complaint to, *inter alia*, correct the name of the Defendant, and add Ms. Nguyen as a Plaintiff in the *Attia* action. A true and correct copy of the proposed Second Amended Complaint is attached as Exhibit A to the Settlement Agreement and incorporated herein by reference. Hawkins Decl. ¶ 29.

IV. INVESTIGATION AND DISCOVERY

Plaintiffs' counsel conducted a lengthy and thorough investigation into the merits of Plaintiffs' class action claims and Defendants' asserted defenses prior to entering into the Settlement Agreement. Hawkins Decl. ¶¶ 22, 42. Plaintiffs' counsel reviewed several thousand pages of documents and records produced by the Plaintiffs in support of their claims, including handbooks, compensation policies and plans, payroll records, wage statements, and emails. The documents were reviewed, summarized, and discussed in detail with Plaintiffs before preparing the Complaint. Id. ¶ 22(a).

The parties exchanged their initial FRCP disclosures on December 7, 2016 pursuant to Rule 26 identifying, among other things, witnesses and documents

with information relevant to Plaintiffs and the class claims. Id., ¶ 22(b).

On November 30, 2016, Plaintiffs served their first set of discovery requests, including interrogatories and requests for production of documents. Id., ¶ 22(c). On December 27, 2016, Plaintiffs served Defendant with a Rule 30(b)(6) deposition notice. Id., ¶ 22(d). On January 12, 2017, Plaintiffs served a second set of requests for production and an amended Rule 30(b)(6) notice. Id., ¶ 22(e). On February 9, 2017, Plaintiffs served a third set of written discovery requests, including requests for admissions and interrogatories. Id., ¶ 22(f). Plaintiffs sent out a second set of requests for admissions on or about March 29, 2017. Id., ¶ 22(g). Defendants produced over forty thousand pages of documents in response to Plaintiffs' requests for production, including handbooks, meal period waivers, tracking forms, timekeeping adjustment records, schedules, store and class information, policies, payroll records, wage statements, time records, commission reports, and the class list. Id., ¶ 22(h). The documents and discovery responses were reviewed and summarized. The parties met and conferred extensively, by phone and by email, to discuss the documents produced and ensure that the relevant information and documentation was provided. Id., ¶ 22(i).

In addition to the extensive written discovery, Plaintiffs' counsel took the Rule 30(b)(6) deposition of Nina Kern, Vice President of Associate Relations for NMG. Hawkins Decl., ¶ 22(j). Plaintiffs' counsel also took the depositions of Human Resources Manager Teresa Cutright and Vice President and General Manager Leyla Vokhshoori. Id., ¶ 22(k).

In addition to the investigation and formal discovery described above, the parties exchanged documents and information to prepare for mediation. NMG produced additional data allowing the parties to analyze and calculate alleged damages. Hawkins Decl. ¶ 23. Plaintiffs also worked closely with counsel to provide information to prepare for mediation. Id. Plaintiffs retained expert consultants to manage and analyze NMG's time and pay data and assist with the preparation of a

model of potential exposure to damages. This involved formatting, integrating, and analyzing multiple datasets, representing nearly 380,000 shifts. Id. This data was used to prepare a comprehensive mediation brief and damages analysis, for the claims and the classes Plaintiffs sought to represent, including calculations of the alleged amount of unpaid regular and overtime wages, unreimbursed expenses, meal and rest period violations, premium pay, and statutory and civil penalties. Id.

V. SETTLEMENT

The parties reached the Settlement only after extensive investigation, research, discovery, damages analysis, and three days of mediation and several months of subsequent arm's length negotiations with the assistance of mediator David Rotman, to finalize the long form settlement agreement. The proposed Settlement is memorialized in the Joint Stipulation of Class Action Settlement, Exhibit 1 to the Hawkins Declaration. Hawkins Decl. ¶¶22-27, Ex. 1.

VI. SUMMARY OF PROPOSED SETTLEMENT

A. Terms of the Settlement

The Parties have agreed (subject to approval of this Court), that the class claims be settled and compromised for the Gross Settlement Amount ("GSA") of $4,400,000.00, no part of which may revert to Defendant, and which sum includes (a) Settlement Class/Subclass Members' Individual Settlement Payments; (b) Class Representative Enhancement Payments of $7,000 each to Plaintiffs Attia, Eshaghbeigi, Girard, Kelley, Nguyen, and Romero, and $5,000 each to Plaintiffs Basti, Marconi, and Tolbert, in consideration for their services in this action; (c) payment of $640,000 to the Labor and Workforce Development Agency for PAGA penalties, with 75% ($480,000) being paid to the LWDA and 25% ($160,000) for pro rata distribution to the participating Settlement Class Members; (d) Settlement Administrator expenses to CPT Group, Inc. of up to $35,000, to provide notice of the Settlement to the Class and for settlement administration services; (e) attorneys' fees of up to $1,466,666.67 (33.33% of GSA) to compensate Class Counsel for work

performed and all work remaining to be performed in documenting and administrating the settlement and securing final Court approval; and (f) Counsel's litigation costs of up to $140,000.00. Hawkins Decl. ¶30. In addition to the GSA, NMG will separately pay the employer's share of payroll taxes. *Id.*

After all Court-approved deductions, the remaining Net Settlement Amount ("NSA") estimated at $2,221,332.33 (of which $39,600 is allocated to the Expense Reimbursement Subclass Allocation), will be distributed to all Settlement Class/Subclass Members in Individual Settlement Payments based proportionately on the number of weeks each Class/Subclass Member was employed by NMG during the respective class and subclass periods in relation to the total number of weeks Settlement Class/Subclass members were employed by NMG during the class and subclass periods. Hawkins Decl. ¶¶ 30, 35-37.

Following Final Approval and the Effective Date of the Settlement, each Class/Subclass Member who did not submit a timely request to be excluded will be mailed a payment for his or her proportionate share of the NSA/Subclass Allocation without the need to submit a claim form. Hawkins Decl. ¶ 38.

The non-reversionary nature of the Settlement guarantees that any amounts not distributed to the Settlement Administrator for administration costs, to Class Counsel for fees and costs, or to Class Representatives for Enhancement Payments, will be reallocated to the Net Settlement Amount and distributed among the Participating Class Members. Hawkins Decl. ¶ 31. In other words, no portion of the Settlement will revert to Defendants under any circumstances. Id. To the extent there are any uncashed or undeliverable Settlement Payment checks 120 calendar days after issuance, such uncashed/undeliverable amounts will be sent to *cy pres* recipient Boys & Girls Clubs of America, to be distributed equally across the local chapters of the Boys and Girls Club for the counties of Los Angeles, San Diego, Newport Beach, Contra Costa, Peninsula, and San Francisco. Id., ¶ 41.

B. Settlement Administration and Notice to the Class

The proposed Settlement Administrator, CPT Group, Inc., has extensive experience in the settlement administration of wage-hour class actions like this one, having administered many class action settlements. See www.cptgroup.com. The settlement administration costs are estimated to be less than $35,000. Hawkins Decl., ¶ 30(f). CPT Group will conduct a search of the National Change of Address database to update Class/Subclass Member addresses, and will mail to each Class/Subclass Member identified on the Class List prepared by Defendant a Notice of Class Action Settlement ("Notice"), Change of Address Form, and pre-printed return envelope (collectively "Notice Packet"). Hawkins Decl. ¶ 32; Ex. 1, Settlement Agreement, Exhibit B – Notice, Exhibit C - Change of Address Form.

The content of the proposed Notice fully complies with due process and Federal Rule of Civil Procedure 23. The Notice provides Class/Subclass Members with specifics concerning (1) how to exercise their rights and make informed decisions regarding whether or not to participate in the Settlement; (2) how individual recoveries will be determined and the amount of their estimated individual Settlement Payment; (3) that no claim form will be required to receive the Settlement Payment; (4) the amounts requested for attorney's fees, costs, class representative enhancement payments, and administrator costs; (5) that a current address must be kept on file with the administrator to receive their payment; (6) how to object to the settlement and the deadline to do so; (7) how to request exclusion from the settlement and the deadline to do so; (8) the claims they will be releasing if they choose to remain in the Settlement Class/Subclass; (9) the date, time, and place of the Final Approval hearing, and how to appear at the hearing; (10) the toll-free telephone and fax numbers of the Settlement Administrator, and where they may view relevant documents concerning the lawsuit and settlement. Hawkins Decl., ¶ 33; Ex. 1, Ex. B - Notice. The proposed Notice is more than adequate to put Class/Subclass Members on notice of the Settlement Agreement. *See, e.g., Mendoza v. Tucscon School Dist. No. 1*, 623 F.2d 1338, 1351 (9th Cir. 1980) ("very general description of

the…settlement" satisfies standards).

The formula for calculating individual Settlement Payments, based on the number of weeks each Class/Subclass Member was employed as a Class/Subclass Member during the Class and Subclass Period, provides a fair and adequate method of distribution of the Settlement proceeds to Class Members. This information is readily available from Defendant's records, and the Settlement Administrator can apply the formula in a fair and transparent manner. This method represents the fairest method of distribution to Class Members and does not grant preferential treatment to any Members. Hawkins Decl. ¶ 35.

C. Released Claims.

Class Members who do not submit a complete, valid and timely Request for Exclusion release the following Released Claims against the Released Parties:

> all applicable wage and hour claims, rights, demands, liabilities, penalties, fines, debts and causes of action of every nature and description, whether known or unknown, arising from or related to the claims asserted in the Action or that could have been asserted in the Plaintiffs' Second Amended Complaint to be filed pursuant to this Settlement based on the facts and circumstances alleged therein, including claims based on California Labor Code sections 201, 202, 203, 204, 218.5, 218.6, 221-224, 226, 226.3, 226.7, 510, 512, 558, 1174, 1194, 1197, 2698 et seq., 2802, California Code of Regulations, Title 8 Section 11000 et seq., the applicable Industrial Welfare Commission (IWC) Wage Orders, Business & Professions Code section 17200-17208 or any related damages, penalties, restitution, disgorgement, interest or attorneys' fees.

Members of the Expense Reimbursement Subclass who do not opt out also release the following Released Subclass Claims:

> all applicable wage and hour claims, rights, demands, liabilities, penalties, fines, debts and causes of action of every nature and description, whether known or unknown, arising from or related to the claims asserted in the Action or that could have been asserted in the Plaintiffs' Second Amended Complaint to be filed pursuant to this Settlement based on allegations of failure to reimburse for incurred business expenses, including claims based on California Labor Code sections 2802, 2698, *et seq*., Business &

Professions Code section 17200-17208 or any related damages, penalties, restitution, disgorgement, interest or attorneys' fees.

In addition to the Released Claims above, Class/Subclass Members also release Defendants from all known or unknown claims concerning the Released Claims and/or Released Subclass Claims as set forth in paragraph 72 of the Settlement Agreement. As part of the Settlement, the Named Plaintiffs are executing a general release, including of all unknown claims, except as expressly reserved in paragraph 71 of the Settlement Agreement. Hawkins Decl. ¶ 39.

VII. THE COURT SHOULD PRELIMINARILY APPROVE THE CLASS ACTION SETTLEMENT AND SET A FINAL FAIRNESS HEARING

Class action settlements are subject to court review and approval under the Federal Rules of Civil Procedure. A class action may not be dismissed, compromised, or settled without the approval of the Court. FRCP Rule 23(e). The decision to approve or reject a proposed settlement is committed to the Court's sound discretion. *Dunleavy v. Nadler*, 213 F.3d 454, 458 (9th Cir.2000), citing *Linney v. Cellular Alaska Partnership,* 151 F.3d 1234, 1238 (9th Cir. 1998).

This procedure safeguards Class Members' due process rights and enables the Court to fulfill its role as the guardian of class interests. *See* Alba Conte & Herbert Newberg, *4 Newberg on Class Actions* (2002) ("*Newberg*"), §§ 11.22, *et seq*. The purpose of the Court's preliminary evaluation of the proposed Settlement is to determine whether it is within the "range of reasonableness," and whether notice to the Class and a formal fairness hearing are appropriate. *See Newberg* § 11.25.

At this stage, the Court is not making a final determination on whether the settlement is fair, reasonable, and adequate, as is ultimately required by FRCP Rule 23(e). Rather, the Court need only decide whether the settlement "appears to fall within the range of possible approval." *Armstrong v. Bd. of Sch. Directors*, 616 F.2d 305, 314 (7th Cir. 1980), overruled on other grounds by *Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998); *see also Berry v. School Dist. of City of Benton Harbor*, 184 F.R.D. 93, 97 (W.D. Mich. 1998) (the court first must determine "whether the

proposed settlement is potentially approvable"); *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1384 (D. Md. 1983) (likening preliminary approval to a finding there is "probable cause" to submit the settlement to the class and to hold a full-scale final approval hearing); *Newberg* § 11.25. "The settlement need only be *potentially* fair, as the Court will make a final determination of its adequacy at the hearing on Final Approval." *Acosta v. Trans Union, LLC,* 243 F.R.D. 377, 386 (C.D. Cal. 2007) (emphasis in original).

Courts must give "proper deference" to settlement agreements, because "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between the negotiating parties, and the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1027 (9th Cir. 1988) (citations omitted.) There is a presumption of fairness "if the settlement is recommended by class counsel after arm's-length bargaining." *Wren v. RGIS Inventory Specialists*, 2011 WL 1230826, at *6 (N.D. Cal. Apr. 1, 2011). There is also "a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *In re Syncor ERISA Litig*., 516 F.3d 1095, 1101 (9th Cir. 2008).

Courts act within their discretion in approving settlements which are fair, not collusive, and take into account "all the normal perils of litigation as well as the additional uncertainties inherent in complex class actions." *In re Beef Industry Antitrust Litigation*, 607 F. 2d 167, 179 (5th Cir. 1979), *cert. den. sub nom. Iowa Beef Processors, Inc. v. Meat Price Investigators Ass'n*, 452 U.S. 905 (1981). Where a settlement is reached on terms agreeable to all Parties, a court should disapprove of the settlement "only with considerable circumspection." *Jamison v. Butcher & Sherrerd,* 68 F.R.D. 479, 481 (E.D. Pa. 1975).

The Court's determination of whether a proposed settlement is fair, adequate,

and reasonable is often said to require a balancing of several factors. These factors may include, among others: "the strength of plaintiff's case; the risk, expense, complexity, and the likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement. This list is not exclusive and different factors may predominate in different factual contexts." *Torrisi v. Tucson Elec. Power Co*., 8 F.3d 1370, 1376 (9th Cir. 1993) (citation and internal quotations omitted.) Applying these factors to this case, the proposed Settlement is "fair, adequate and reasonable."

A. Strength of Plaintiffs' Case and the Risk, Expense, Complexity and Likely Duration of Further Litigation.

While Plaintiffs believe in the merits of their case, they also recognize the inherent risks and uncertainty of litigation, including that the Class/Subclass could receive nothing, and understand the benefit of providing a significant settlement sum now. The specific risks include: (i) denial of certification; (ii) if class certification were granted, that Court may later decertify the Class; (iii) the possibility of the enforceability of the arbitration agreement and class action waiver; (iv) the possibility of a motion to strike or dismiss the PAGA claims; (v) the possibility of an unfavorable, or less favorable, result at trial; (vi) the possibility post-trial motions may result in an unfavorable, or less favorable, result at trial; and, (vii) the possibility of an unfavorable, or less favorable result on appeal, and the certainty that process would be protracted and expensive for both sides. Hawkins Decl. ¶ 46-47.

Plaintiffs' claims involve highly contested complex legal issues and fact-specific arguments which the Parties have intensively litigated since inception of the action. While Plaintiffs firmly believe in the strength of their claims, NMG has strong defenses to Plaintiff's claims, and those defenses create a possibility that the claims might not be certified or fail on the merits. Id., ¶ 49.

Plaintiffs alleged that Class members were required to work hours for which they were not compensated both on and off the clock, giving rise to minimum wage and overtime claims. In addition, among other things, Plaintiffs alleged that NMG: failed to pay at least minimum wage for each hour worked, including non-sales time like rest periods and hours when the store was closed to the public; failed to compensate commissioned employees for all time that employees were under NMG's control performing non-sales related activities or when employees were on rest breaks; made unlawful deductions from earned wages; failed to properly calculate and pay overtime compensation in accordance with California law; failed to provide legally compliant meal periods and rest breaks to all non-exempt sales associates; failed to provide accurate wage statements and maintain records; and failed to compensate necessary expenses. Hawkins Decl. ¶ 50.

NMG presented arguments and defenses to all contentions made by Plaintiffs as to certification, liability, and damages. In addition to arguing that the issues raised by Plaintiffs required individualized inquiries not appropriate for class certification, NMG argued most significantly that Plaintiffs could not pursue claims on a class-wide basis because they, and the entire workforce, were subject to enforceable arbitration agreements including class action waivers. See, *Epic Systems Corp v. Lewis*, 138 S. Ct. 1612 (2018). Hawkins ¶ 47.

As to Plaintiffs' minimum wage and overtime and derivative claims, NMG contended that its sales employees are properly compensated for all regular and overtime hours worked, presented evidence that its policies and practices prohibit off-the-clock work and require all employees to accurately record all hours worked, and argued that Plaintiffs' interpretation of "sales activity" was factually incorrect and legally insupportable. NMG additionally argued that all activities that employees were engaged in were related closely enough to sales that all hours worked would be compensated with commissions, and that its compensation practices did not result in unlawful wage deductions. NMG also presented evidence that employees were given

some autonomy in scheduling appointments with clients during shifts and that when employees were on shift but not actively meeting with clients, there was sales work they were expected to, and did, perform. NMG argued that even if the more expansive view of "sales activities" were adopted, the individual experiences of employees varies too much for class treatment. Hawkins ¶ 51.

Plaintiffs further contended that rest periods should be separately compensated as non-productive time and that the failure to do so subjected NMG to rest period penalties. NMG argued, even if separate compensation were required (which it contested), this would not support imposition of the rest period premium pay penalty. NMG further argued that rest periods were specifically authorized and permitted, and that if an employee did not take a rest period then such time was productive time and did not need to be separately paid. Hawkins Decl. ¶ 52.

Plaintiffs also argued that meals and rest breaks were not provided to employees as a function of NMG's scheduling and staffing policies. NMG argued that the meal and rest period policies in place during the Class Period were lawful and that sales associates were provided training concerning California meal and rest break requirements. NMG further contended that if employees missed meal or rest breaks, it was a matter of personal choice as meal and rest breaks were always made available to Class members. Hawkins Decl. ¶ 53.

Plaintiffs' reimbursement claim largely related to alleged unpaid mileage. NMG contended that it is not necessary for sales associates to incur mileage expenditures in carrying out their job duties and provided evidence there was limited, if any, need for the use of personal vehicles, and that NMG provided courier services to use to conduct business. NMG also provided evidence that the Company policy in the relevant time period provided for reimbursement of business expenses and a procedure for submitting reimbursement requests; and to the extent a claim for reimbursement existed, it would have been paid if requested by a Class Member. Hawkins Decl. ¶ 54.

NMG also contended that a court would not award waiting time penalties under Labor Code § 203 in connection with Plaintiffs' claim for failure to timely pay wages at termination. Labor Code § 203 provides for an award of waiting time penalties only when an employer "willfully fails to pay" all wages owed at time of termination (Lab. Code § 203), and a "good faith dispute that any wages are due" will preclude imposition of waiting time penalties under Section 203. 8 Cal. Code Regs. § 13520. A "good faith dispute" exists when an employer presents a defense, based in law or fact, that would preclude recovery by the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist. Id. NMG argued that it properly paid employees all wages due during employment and upon termination and, to the extent any wages were unpaid at termination (which it denied), it asserted legal and factual defenses that would establish a good faith dispute, thereby precluding any award of penalties.

Proceeding with litigation would impose a significant risk of no recovery for the Class/Subclass. If Settlement were not achieved, continued litigation would take substantial time and possibly confer no benefit on Class Members. Indeed, in light of the United States Supreme Court's ruling in *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018), should this case continue the arbitration issue will be the subject of extensive additional motion practice and appeals. This is only one of many hurdles Plaintiffs will have to navigate to obtain class-wide relief. By contrast, the Settlement will yield a prompt, certain, and substantial recovery for Class Members, which also benefits the Parties and the Court. Hawkins Decl. ¶ 46-48, 70-72.

In light of these uncertainties, the Parties agreed to a compromise, non-reversionary settlement of $4,400,000. This recovery is certain and substantial for absent class members.

1. The Extent of Discovery and Stage of the Proceedings Support the Settlement.

As shown by the litigation and discovery histories, the parties have engaged in

sufficient investigation and discovery to support the Settlement. Hawkins Decl. ¶ 42. This litigation has reached the stage where the parties have a clear view of the strengths and weaknesses of their cases sufficient to support the Settlement. *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979).

With exhaustive discovery completed, thousands of documents reviewed and analyzed, a motion for class certification pending, pre-trial dates looming, and three days of mediation and focused follow-up with mediator Rotman, the procedural history of this case strongly supports settlement.

2. The Settlement is the Product of Serious, Informed, Non-Collusive Negotiations; Class Counsel are Experienced in Similar Litigation.

"In the Ninth Circuit, a Court affords a presumption of fairness to a settlement, if: '(1) the negotiations occurred at arm's length; (2) there was sufficient discovery to allow counsel to act and the Court to review their actions in an informed manner; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.'" *Rodriguez v. West Publishing Corp.*, No. CV-05-3222 R(MCx) 2007 U.S. Dist. LEXIS 74849 at 33 (C.D. Cal. Sept. 10, 2007). The first three factors are clearly met, and the fourth must be evaluated after preliminary approval and notice to the Class.

As to the first and second factors, based on the detailed history provided, there is no question that the proposed Settlement was a product of adversarial litigation reached through a compromise of disputed claims based on substantial exchange of information, exhaustive analysis, extensive investigation, three days of arm's-length negotiations before a respected mediator with expertise in the management and resolution of similar cases, and months of continued negotiations. Hawkins Decl. ¶ 22-28.

As to the third factor, experienced counsel, operating at arm's-length, have weighed the strengths of the case and examined all of the issues and risks of litigation

and endorse the proposed Settlement. The view of the attorneys actively conducting the litigation "is entitled to significant weight" in deciding whether to approve the settlement. *Fisher Bros. v. Cambridge Lee Industries, Inc.* (E.D. Pa. 1985) 630 F.Supp. 482, 488; *Ellis v. Naval Air Rework Facility* (N.D. Cal. 1980) 87 F.R.D. 15, 18, *aff'd*. 661 F.2d 939 (9th Cir. 1981). "The recommendations of plaintiffs' counsel should be given a presumption of reasonableness" *In re Omnivision Technologies, Inc*., (N.D. Cal. 2007), 559 F. Supp. 2d 1036, 1043. Here, Class Counsel has significant experience in litigating minimum wage, rest and meal period and expense reimbursement cases, and other wage and hour class cases and have obtained certification in many such cases. Hawkins Decl. ¶ 43, 74. Likewise, Defendant's counsel of Jones Day, are also well experienced in wage and hour employment law and class actions.

Class Counsel, having prosecuted numerous wage and hour class actions are experienced and qualified to evaluate the Class claims and to evaluate the risks and potential outcome of further litigation and the propriety of settlement on a fully informed basis. Hawkins Decl. ¶ 74.

Counsel on both sides share the view this is a fair and reasonable settlement in light of the complexities of the case, the state of the law, and of the uncertainties of the outcome of litigation. The opinion of counsel in support of the proposed Settlement is based on a realistic assessment of the strengths and weaknesses of their respective cases, extensive legal and factual research, the substantial discovery detailed above, as well as consideration of the potential and pending law and motion resulting in potential dispositive rulings by the Court. The opinion of counsel is also based on an assessment of the risks of proceeding with the litigation through trial and, if a verdict were recovered, through appeal as compared to the value of a settlement at this time. Given the risks inherent in litigation and the defenses asserted, this Settlement is fair, adequate, and reasonable and in the best interests of the class, and should be preliminarily approved. Hawkins Decl. ¶ 45.

B. The Proposed Settlement is a Reasonable Compromise of Claims.

Plaintiffs' Counsel believes the proposed Settlement is in the best interest of the Class based on detailed knowledge of the factual and legal issues present in this action. Counsel considered, among other issues, the risks of an adverse class certification or summary judgment ruling, an appeal or reconsideration motion ruling on the individual arbitration issues, and the risks of trial and other perils of litigation that affect the value of the claims in reaching the proposed Settlement. Hawkins Decl. ¶ 46, 70-71.

The nature of Plaintiffs' claims is Section VI.A. herein. Plaintiffs and Plaintiffs' Counsel have given serious consideration to all facts and arguments they face in this matter, and have concluded that the terms and amount of the Settlement are fair and reasonable. The GSA constitutes 19.5% of the total realistic liability exposure that Plaintiffs' counsel estimated Defendants faced for the main thrust of Plaintiffs' claims – minimum wage and meal/rest period and derivative violations – duly considering Defendants' contentions and defenses. Hawkins Decl. ¶ 70. While Plaintiffs assert the class claims are suitable for class certification and adjudication as they believe they result from company-wide policies and practices which caused the Class/Subclass Members to endure common alleged violations, Defendants have denied and continue to deny that this matter is amenable to class certification for any purpose other than this Settlement. Hawkins Decl. ¶ 46, 47, 49. In addition, there is the very real possibility that any classwide relief could be defeated by NMG's arbitration agreements in light of *Epic Systems*. *Id.* See Hawkins Decl. ¶¶ 50-66, submitted herewith, for extensive discussion of valuation of claims.

Given these risks and the risk of losing at certification, trial, or on appeal, and the time and resource commitment it would entail, the Settlement amount is reasonably balanced with the strength of Plaintiffs' claims to provide a fair recovery on behalf of the class. *See, e.g., Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc.,* 221 F.R.D. 523, 528 (C.D. Cal. 2004) ("in balancing, "a proposed settlement is not to be

judged against a speculative measure of what might have been awarded in a judgment in favor of the class."") (citation omitted.)

As discussed above, NMG asserted multiple defenses and expressly denied and continues to deny any wrongdoing or legal liability arising out of any of the facts or conduct alleged in the Action. Plaintiffs' counsel analyzed the merits of the class and representative claims, and each one presented significant hurdles. The recovery of $4,400,000 confers substantial benefits to the class, considering the significant risks of further litigation, the potential the claims may be compelled to individual arbitration, the potential the class may not be certified, the risks of maintaining class action status through trial and after appeal, the potential that the representative claims would be unmanageable, the risk of an adverse ruling on summary judgment, the risk Plaintiffs would not prevail at trial, or would not obtain all damages claimed, the delay and duration of appeals. Hawkins Decl. ¶ 46.

A settlement is not judged solely against what might have been recovered had plaintiff prevailed at trial, nor does the settlement have to provide 100% of the damages sought to be fair and reasonable. *Linney v. Cellular Alaska Partnership*, 151 F. 3d 1234, 1242 (9th Cir. 1998). The adequacy of the amount recovered must be judged as "a yielding of absolutes. . . Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation . . ." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 624 (9th Cir. 1982) (citation omitted). "It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not . . . render the settlement inadequate or unfair." *Id.* at 628; see also *In re Omnivision Technologies, Inc.,* 2007 U.S. Dist LEXIS 95616, *21 (N.D. Cal. 2007), noting that certainty of recovery in settlement of 6% of maximum potential recovery after reduction for attorney's fees was higher than median percentage for recoveries in shareholder class action settlements, averaging 2.2%-3% from 2002 through 2006.) Accordingly, the proposed Settlement

is not to be judged against a speculative measure of what might have been achieved. *Linney v. Cellular Alaska Partnership*, 151 F. 3d 1234.

In light of all the information provided above, the proposed Settlement reflects substantial recovery for the Class and is well within the "ballpark" of reasonableness and should be granted preliminary approval. Hawkins Decl. ¶ 71.

VIII. CLASS COUNSEL'S ATTORNEYS' FEES REQUEST AND CLASS REPRESENTATIVE PAYMENTS.

Class Counsel will file a motion requesting reimbursement of their litigation expenses of up to $140,000 and an award of fees not to exceed $1,466,666.67 (33.33% of GSA). The motion for attorneys' fees and costs will detail the hours expended and litigation expenses advanced.

Class representatives "are eligible for reasonable incentive payments. The district court must evaluate their awards individually, using 'relevant factors including the actions the plaintiff has taken to protect the interests of the class, the degree to which the class had benefitted from those actions, the amount of time and effort the plaintiff in pursuing the litigation.'" *Staton v. Boeing Corp.,* 327 F.3d 938, 977 (9th Cir. 2003) [citations and internal alterations omitted]. Accordingly, Class Counsel will request on behalf of Plaintiffs, $7,000 each to Plaintiffs Attia, Eshaghbeigi, Girard, Kelley, Nguyen, and Romero, and $5,000 each to Plaintiffs Basti, Marconi, and Tolbert for their time, effort, risks undertaken for the payment of costs in the event this action had been unsuccessful, possible retaliation by potential employers, and for a general release of all claims. The requested service payments are fair and reasonable because Plaintiffs were instrumental in achieving the settlement in this case. Plaintiffs invested a great deal of personal time and effort into the investigation, prosecution, and the settlement of the case, as will be set forth in their declarations to be filed in conjunction with the motion for final approval of class action settlement. Hawkins Decl.¶ 74. See, e.g., *Singer v. Becton Dickinson & Co.*, 2010 U.S. Dist. LEXIS 53416 at *24-26 (S.D. Cal. June 1, 2010) ("The $25,000

incentive award is ... well within the acceptable range awarded in similar cases."]; and *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995) (same).

IX. THE PROPOSED CLASS AND SUBCLASS SHOULD BE CONDITIONALLY CERTIFIED

A. All Rule 23(a) Prerequisites for Certification Are Present

The Court has the authority to certify a provisional settlement class at the time of preliminary approval. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). In determining whether a class should be certified, the court is bound to take the substantive allegations of the complaint as true. *See Blackie v. Barrack*, 524 F.23d 891, 901 n.17 (9th Cir. 1975). A proposed settlement class is still subject to the requirements of FRCP Rule 23(a) and (b) which are "designed to protect absentees by blocking unwarranted or overbroad class definitions." *Amchem*, 521 U.S. at 620. However, "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial." Id.

1. Rule 23(a)(1) —Numerosity

There are an estimated 2,086 putative Class/Subclass Members. Hawkins Decl., ¶ 20. This exceeds any standard for numerosity.

2. Rule 23(a)(2) —Commonality

The commonality preconditions of Rule 23(a)(2) are "construed permissively." See *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). Commonality does not require "that *every* question of law or fact must be common to the class; all that Rule 23(a)(2) requires is 'a single *significant* question of law or fact.'" *Abdullah v. U.S. Sec. Associates, Inc.*, 731 F.3d 952, 957 (9th Cir. 2013)(quoting *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012). Here, Plaintiffs allege Defendant applied uniform policies, including those on

compensation for hours worked, meals, rest breaks, and reimbursements, to all employees paid commissions in California. Hawkins Decl. ¶ 80.

3. Rule 23(a)(3) —Typicality

Under the Rule's "permissive standards," the representative Plaintiffs' claims are "typical" if they are "reasonably co-extensive with those of absent class members." *Hanlon*, 150 F.3d at 1020. Plaintiffs' claims arise from a common source—NMG's uniform employment practices including NMG's practice of short-staffing its retail stores and of not paying commissioned employees separately for non-productive time. Hawkins Decl. ¶ 81. Plaintiffs' claims are based on identical legal theories and aligned with those of the putative Class and Subclass. *See Ventura v. New York City Health and Hosp., Inc.,* 125 F.R.D. 595, 600 (S.D.N.Y. 1989).

4. Rule 23(a)(4)—Adequacy of Representation

Adequacy requirements are established on the basis that the proposed Class Representatives have no conflict of interest with other Class/Subclass Members and are represented by qualified counsel. *Hanlon*, 150 F.3d at 1020; Hawkins Decl., ¶ 75, 82. Plaintiffs' counsel is well-situated to assume the responsibilities of Class Counsel because they are experienced employment and class action litigators who are fully qualified to pursue the interests of the Class/Subclass. *Id*.

B. Rule 23(b)(3) —Predominance and Superiority

The predominance inquiry focuses on the relationship between the common and individual issues, testing whether the proposed classes are sufficiently cohesive to warrant adjudication by representation. *See Amchem Products, Inc.,* 521 U.S. at 623. Plaintiffs identified several questions of law and fact common to their claims and to those of the putative Class/Subclass and provide a justification for handling the dispute on a representative rather than individual basis. Hawkins Decl. ¶ 81. Class treatment is also the superior method for resolving all claims and would (1) accomplish judicial economy by avoiding multiple suits, and (2) protect the rights of persons who might not be able to present claims on an individual basis. *See generally*

Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983).

X. CONCLUSION

Plaintiffs respectfully request the Court preliminarily approve the proposed Settlement, and set a final approval hearing date and a hearing date for Plaintiffs' request for attorneys' fees, enhancement payments, and litigation costs.

Respectfully submitted,

Dated: July 24, 2018

JAMES HAWKINS APLC

/s/ James. R. Hawkins
James R. Hawkins, Esq.
Attorneys for Plaintiffs