Raul Perez (SBN 174687)
Raul.Perez@capstonelawyers.com
Melissa Grant (SBN 205633)
Melissa.Grant@capstonelawyers.com
Arnab Banerjee (SBN 252618)
Arnab.Banerjee@capstonelawyers.com
Capstone Law APC
1840 Century Park East, Suite 450
Los Angeles, California 90067
Telephone: (310) 556-4811
Facsimile: (310) 943-0396

Attorneys for Plaintiff Adam Jones

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiff,

v.

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

Defendants.

Case No. CV13-5206-FMO (AJWx)

Assigned to the Hon. Fernando M. Olguin

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

Date: February 11, 2016
Time: 10:00 a.m.
Place: Courtroom 22

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

PLEASE TAKE NOTICE that on February 11, 2016 at 10:00 a.m., or as soon thereafter as counsel may be heard, in Courtroom 22 of the above-captioned court, located at 312 North Spring Street Los Angeles, California 90012, the Honorable Fernando M. Olguin presiding, Plaintiff Adam Jones will, and hereby does, move this Court to:

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

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

3. Conditionally certify the proposed settlement class;

4. Approve distribution of the proposed Notice of Class Action Settlement and Request Exclusion Form to the settlement class;

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

6. Appoint Capstone Law APC as class counsel;

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

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

This Renewed Motion is based upon: (1) this Notice of Renewed Motion and Renewed Motion; (2) the Memorandum of Points and Authorities in Support of Renewed Motion for Preliminary Approval of Class Action Settlement; (3) the Declarations of Raul Perez, Adam Jones, and Brooke Johnson; (4) the Joint Stipulation Re: Class Action Settlement and Amendment to the Joint Stipulation Re: Class Action Settlement; (5) the Notice of Class Action Settlement and Request Exclusion Form; (6) the [Proposed] Order Granting Preliminary Approval of Class Action Settlement; (7) the records, pleadings, and papers filed in this action; and (8) upon such other documentary

and oral evidence or argument as may be presented to the Court at or prior to the hearing of this Motion. This Motion is unopposed by Defendant Bath & Body Works, Inc.

Dated: January 11, 2016

Respectfully submitted,

Capstone Law APC

By: _____

Raul Perez
Melissa Grant
Arnab Banerjee

Attorneys for Plaintiff Adam Jones

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I. INTRODUCTION

Plaintiff Adam Jones hereby renews his motion for preliminary approval of the Joint Stipulation Re: Class Action Settlement and Amendment to the Joint Stipulation Re: Class Action Settlement (collectively, "Settlement" or "Settlement Agreement").[1] If approved, the proposed Settlement will provide significant monetary relief for approximately 29,000 current and former employees of Defendant Bath & Body Works, LLC ("Defendant" or "BBW") (collectively with Plaintiff, the "Parties").

As directed by the Court,[2] this renewed motion addresses in detail: (1) conditional certification of the proposed Settlement Class; (2) Plaintiff's valuation of the claims for settlement purposes and the basis on which Plaintiff determined that the relief provided by the settlement is fair and reasonable; (3) the propriety of the tax allocation (25% to wages and 75% to non-wages); (4) the impact of this Settlement on the related matter titled *Shayna Broadstone et al v. Bath & Body Works, LLC*, 8:15-cv-01994-FMO-AJW (C.D. Cal. November 30, 2015) ("*Broadstone* Action"); (5) the justification for the proposed Second Amended Complaint; and (6) the cap on settlement administration costs.[3]

The basic terms of the Settlement provide for the following:

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

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

[2] On December 10, 2015, the Court denied Plaintiff's original motion for preliminary approval without prejudice. The Court directed Plaintiff to file a renewed motion with further elaboration on the points discussed above.

[3] Plaintiff separately addresses the propriety of the requested attorneys' fees and incentive awards in the concurrently filed Motion for Attorneys' Fees, Costs, and Class Representative Incentive Awards.

(2) The filing (for settlement purposes only) of a Second Amended Complaint to add Brooke Johnson as an additional Named Plaintiff and Class Representative in order to effectuate the settlement and release of all alleged PAGA claims. By stipulating to add Brooke Johnson as an additional PAGA representative, the Parties seek to moot any challenges to Plaintiff's standing to assert and settle PAGA claims.

(3) Monetary relief in the form of a **non-reversionary** Total Class Action Settlement Amount of $2,250,000. **Employer payroll taxes** will be paid **separately** from the Total Class Action Settlement Amount, an important concession by Defendant. The Total Class Action Settlement Amount includes:

(a) A Net Settlement Amount of approximately $1,409,500 (the Total Class Action Settlement Amount minus the requested attorneys' fees and costs, settlement administration costs, the payment to the California Labor and Workforce Development Agency ("LWDA"), and the requested class representative incentive awards), which will be allocated to participating Class Members on a pro-rata basis according to the number of weeks that each Class Member worked during the Class Period. **Because the Total Class Action Settlement Amount is non-reversionary, 100% of the Net Settlement Amount will be paid to all Class Members who do not submit Request for Exclusion Forms**[4];

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

(c) Settlement administration costs **not to exceed** $125,000, to be paid

[4] As the Court requested, the Parties have prepared a form (the Request for Exclusion Form) for Class Members to submit if they elect to opt out of the Settlement Class.

to the jointly selected class action settlement administrator, CPT Group, Inc. ("CPT");

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

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

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

Accordingly, Plaintiff respectfully requests that this Court grant preliminary approval of the Settlement Agreement.

II. FACTS AND PROCEDURE

A. Overview of the Litigation

On June 4, 2013, Plaintiff Adam Jones filed a representative action for civil penalties under PAGA in the Los Angeles County Superior Court, as a proxy for the State of California. On June 14, 2013, Plaintiff filed a First Amended Complaint, adding putative class claims on behalf of all other similarly situated Sales Associates employed by BBW in California from June 4, 2009 through the date of class certification. The

operative Complaint alleges claims for Defendant's failure to: (1) pay overtime wages, (2) pay minimum wages for work performed off-the-clock, (3) provide meal periods and rest breaks (and to pay required premiums), (4) pay terminated employees all wages due at the time of termination, (5) provide employees with accurate itemized wage statements, (6) violation of PAGA (including for failure to pay reporting time), and (7) violation of California Business & Professions Code section 17200, *et seq.* (including for failure to pay reporting time). (Declaration of Raul Perez ["Perez Decl."] ¶ 2.)

On July 18, 2013, Defendant removed the action to the United States District Court for the Central District of California. (Dkt. No. 1.) Defendant subsequently moved to dismiss all of Plaintiff's claims on the grounds that Plaintiff did not satisfy the pleading standards under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 548-49 (2007) and *Iqbal v. Ashcroft*, 556 U.S. 662, 666 (2009). (Dkt. No. 10-1.). Plaintiff opposed the motion to dismiss on August 15, 2013. (Dkt. No. 22.)

While the motion to dismiss was pending, the Court issued an order to show cause why the matter should not have been remanded for failure to satisfy the Class Action Fairness Act's amount in controversy requirement ("OSC"). (Dkt. No. 19.) Plaintiff responded to the OSC on August 12, 2015, and BBW responded the following day. (Dkt. Nos. 20, 21.) BBW also filed a notice of supplemental authority on August 29, 2013. (Dkt. No. 24.) On March 18, 2014, the Court issued an order remanding the Action to the state trial court. (Dkt. No. 42.) BBW appealed. Following full briefing by both parties, the Ninth Circuit reversed, finding that the Court had minimum diversity jurisdiction under CAFA. (Perez Decl. ¶ 4.)

On or about June 2, 2015, Class Counsel sent a letter to the LWDA, advising the LWDA that proposed plaintiff Johnson intended to seek civil penalties pursuant to PAGA on behalf of herself and other "aggrieved employees." On or about October 20, 2015, Johnson sent an amended letter to the LWDA. (Perez Decl. ¶ 5.)

B. The Parties Actively Engaged in the Discovery Process and Were Able to Obviate the Need for Discovery Motion Practice Via A Series of Lengthy In-Person Meetings and Conferences

Beginning shortly after the action was filed and continuing over the next few years, Plaintiff's Counsel thoroughly investigated and researched the claims in controversy, their defenses, and the developing body of law. The investigation included the exchange of information pursuant to formal and informal discovery methods, including a set of document requests (80 total requests) and two sets of interrogatories (14 total interrogatories). In response to this discovery, Plaintiff received, among other things, the following information and evidence with which to properly evaluate the claims: (1) Class Member demographic information (*e.g.*, information bearing on the class size); (2) Class Member contact information; (3) operating procedures and policy manuals regarding, *inter alia*, meal and rest period policies, security inspections, reporting time and call-in shifts, timekeeping and compensation policies, etc.;[5] and (4) a representative sample of Class Members' time and payroll records. Overall, more than 2,000 documents were produced that had to be carefully analyzed. Using this information, Plaintiff's Counsel were able to determine (or estimate), *inter alia*, the average hourly rate of pay for Class Members, the total approximate number of Class Members who worked during the Class Period and applicable PAGA statute of limitations period, the total number of former employees during the Class Period and applicable PAGA statute of limitations period ("PAGA Period"), the total number of shifts during the Class Period, and the total number of pay periods during the PAGA Period. Plaintiff's Counsel also subpoenaed Defendant's alarm records and video recordings to investigate its claim that bag checks were conducted on-the-clock. (Perez Decl. ¶ 6.)

[5] These written policy materials were produced confidentially. If the Court desires to review the written policy materials, Defendant would request that they be produced under seal for an in camera review.

Following Defendant's production of Class Member contact information, Plaintiff's Counsel reached out to over 300 hundred Class Members, and were able to conduct in-depth interviews of approximately twenty-five regarding the extent and frequency of Labor Code violations and the day-to-day circumstances that gave rise to the alleged violations, including for call-in shifts. This extensive outreach was conducted to prepare for the filing of the certification motion, as well as to value the claims for settlement discussions. Plaintiff's Counsel also took the deposition of BBW's Rule 30(b)(6) witness covering approximately 29 categories. (Perez Decl. ¶ 7.)

In addition to conducting their own formal and informal investigation into the claims, Plaintiff responded to Defendant's discovery requests, consisting of document requests (49 total requests) and interrogatories (16 total interrogatories). Additionally, Plaintiff was deposed on May 6, 2015. (Perez Decl. ¶ 8.)

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

in mediation and preparing related memoranda; (12) negotiating the terms of this Settlement; (13) finalizing the settlement; and (14) and drafting preliminary and final approval papers. The sizeable document and data exchanges allowed Plaintiff's Counsel to assess the strengths and weaknesses of the claims against Defendant and the benefits of the proposed Settlement. (Perez Decl. ¶ 9.)

The above information and evidence were not easily obtained. Plaintiff's Counsel doggedly pursued discovery, and only after engaging in a series of lengthy meetings and conferences with counsel for Defendant were they given access to this information and evidence. These lengthy meet-and-confer sessions, all designed to avoid burdening the Court with motion practice (as encouraged by the local rules), did not involve just a series of exchanges via email and telephone, but also several in-person meetings between the parties' respective counsel. For example, the Parties participated in two, in-person discovery conferences regarding Plaintiff's document requests, after which Defendant agreed to produce Class Member contact information, a sample of time and wage records, company-wide policies, exemplar wage statements, and alarm records. (Perez Decl. ¶ 10.)

The Parties likewise participated in an in-person conference regarding the disputed scope of Defendant's 30(b)(6) witness deposition, as well as another in-person meeting regarding the number of total shifts worked by all Class Members (including call-in shifts). By engaging in these multiple meetings and conferences, the Parties were able to obviate the need for multiple rounds of discovery motion practice. As such, the fact that the docket has minimal motion practice once the pleadings were at issue is a credit to the extraordinary efforts by both Parties to faithfully comply with the letter and spirit of the local rules which encourages a high level of cooperation to avoid contentious motion practice, and ultimately results in efficient litigation. (Perez Decl. ¶ 11.)

C. The Parties Settled Shortly After Mediation

While Plaintiff was preparing his motion for class certification, the Parties agreed to initiate settlement discussions. On May 14, 2015, the Parties participated in mediation

with John B. Bates, Esq., of JAMS, a respected mediator of wage-and-hour class actions. Mr. Bates was particularly helpful in managing the Parties' expectations and providing a useful, neutral analysis of the issues and risks to both sides, and assisted the Parties in narrowing the gap between their respective valuations of the claims at issue. Following arm's-length negotiations during and after mediation, the Parties were eventually able to reach a compromise of the claims. That compromise is set forth in complete and final form in the Settlement Agreement. At all times, the Parties' negotiations were adversarial and non-collusive. The Settlement therefore constitutes a fair, adequate, and reasonable compromise of the claims at issue. (Perez Decl. ¶ 12.)

D. The Proposed Settlement Fully Resolves The Claims

1. Composition of the Settlement Class

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

2. Settlement Consideration

The Parties have agreed to settle the underlying class claims in exchange for the Total Class Action Settlement Amount of $2,250,000. The Total Class Action Settlement Amount includes: (1) settlement payments to all Class Members who do not opt out; (2) $675,000 in attorneys' fees and up to $20,000 in litigation costs/expenses to Plaintiff's Counsel; (3) a $7,500 payment to the LWDA; (4) settlement administration costs not to exceed $125,000; and (5) Class Representative incentive awards of $8,000 to Adam Jones and $5,000 to Brooke Johnson. (Settlement Agreement, pp. 11:11-13:11.) **Defendant will be separately responsible for paying employer payroll taxes**.

Subject to the Court approving attorneys' fees and costs, the payment to the LWDA, settlement administration costs, and the Class Representative incentive awards, the Net Settlement Amount will distributed to all Class Members who do not opt out. **Because the Total Class Action Settlement Amount is non-reversionary, 100% of**

the Net Settlement Amount will be paid to Class Members, and without the need to submit claims for payment. (*Id.* at p. 14:4-6.)

Given that there are approximately 29,000 Class Members, the average net recovery is approximately $50. This average net recovery is comparable to other court-approved wage and hour settlements for substantially similar claims, including one settlement approved by this District Court approximately six months ago *Hightower v. JPMorgan Chase Bank, N.A.*, Case No. 2:11-cv-01802-PSG-PLA (C.D. Cal. Aug. 4, 2015) (average net recovery of approximately $50).

In *Hightower v. JPMorgan Chase Bank*, the parties negotiated a $12 million gross settlement fund for approximately 150,000 class members. Following deductions for attorneys' fees (30% of the gross fund) and litigation costs, a payment to the LWDA, plaintiffs' incentive awards, and administration costs, a net settlement fund of approximately $7.4 million was specifically allocated to class members, resulting in an average net payment of approximately $50. The settlement generally released claims under the labor codes of multiple states, including all claims under the California labor code for "all state and local wage and hour claims and related or derivative claims (including, for Settlement Class Members who worked in California, a waiver under California Civil Code Section 1542 for claims that were alleged or that reasonably could have arisen out of the same facts alleged in the Fourth Amended Complaint) during the relevant Covered Period." *Hightower v. JPMorgan Chase Bank, N.A.*, Case No. 2:11-cv-01802-PSG-PLA (C.D. Cal. Aug. 4, 2015); *see also Doty v. Costco Wholesale Corp.*, Case No. 2:05-cv-03241-FMC-JWJ (C.D. Cal. May 14, 2007) (average net recovery of approximately $65); *Sorenson v. PetSmart, Inc.*, Case No. 2:06-CV-02674-JAM-DAD (E.D. Cal. Dec. 17, 2008) (average net recovery of approximately $60); *Lim v. Victoria's Secret Stores, Inc.*, Case No. 04CC00213 (Orange County Super. Ct. Jan. 20, 2006) (average net recovery of approximately $35); and *Gomez v. Amadeus Salon, Inc.*, Case No. BC392297 (L.A. Super. Ct. July 23, 2010) (average net recovery of approximately $20).

3. Formula for Calculating Settlement Payments

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

- Defendant will calculate the total number of Workweeks worked by each Class Member during the Class Period and the aggregate total number of Workweeks worked by all Class Members during the Class Period.
- To determine each Class Member's estimated settlement payment, the Settlement Administrator will use the following formula: The Net Settlement Amount will be divided by the aggregate total number of workweeks, resulting in a dollar value per workweek. Each Class Member's settlement payment will be calculated by multiplying each individual Class Member's total number of workweeks by the dollar value assigned to each workweek.
- The settlement payment will be reduced by any required deductions for each participating Class Members as specifically set forth herein, including employee-side tax withholdings or deductions.
- The entire Net Settlement Amount will be disbursed to all Class Members who do not submit timely and valid Request for Exclusion Forms.

(*Id.*)

4. Release by the Settlement Class

In exchange for the Total Class Action Settlement Amount, Class Members who do not opt out will agree to release the Released Claims. (Settlement Agreement, pp. 9:25-10:18.) The Released Claims are:

> All wage and hour claims, rights, demands, liabilities, and causes of action of every nature and description related to the claims asserted

> or encompassed in the Action, as amended, against Defendant, including without limitation statutory, constitutional, contractual or common law claims for wages, damages, unpaid costs, penalties, liquidated damages, punitive damages, interest, attorneys' fees, litigation costs, restitution, equitable relief, or any other relief, including claims based on the following categories of allegations during the Class Period: (i) all claims for unpaid wages, overtime wages, penalties, premium pay, or reporting time pay, including for call-in shifts; (ii) all claims for meal and rest break violations; (iii) all claims for unpaid minimum wages, including for call-in time; (iv) all claims for the failure to timely pay wages upon termination; (v) all claims for the failure to timely pay wages during employment; (vi) all claims for wage statement violations; and (vii) all claims asserted through California Business & Professions Code §§ 17200 *et seq*., and California Labor Code §§ 2698 *et seq*. based on the preceding claims.

(Settlement Agreement p. 10:2-18.)

The Released Claims are those that accrued during the period from June 4, 2009 to September 30, 2015. (*Id.*) To the extent there is overlap between the Released Claims and the claims alleged in the *Broadstone* Action, particularly with respect to claims for reporting-time/call-in pay and derivative claims, such claims will be released by the proposed Settlement, but solely as to the period from June 4, 2009 and September 30, 2015. Plaintiff wishes to underscore that the *Broadstone* Action was filed after the Parties had settled the Released Claims following exhaustive discovery and arm's-length settlement negotiations.

5. Proposed Second Amended Complaint

For settlement purposes only, the Parties have stipulated to the filing of a Second Amended Complaint to add Brooke Johnson as an additional Named Plaintiff and PAGA representative. The purpose of the Second Amended Complaint is to effectuate the settlement and release of all alleged PAGA claims, as Defendant had previously challenged Plaintiff's standing to recover civil penalties under PAGA (and had the litigation continued, would have moved to dismiss the PAGA claims on that basis). By adding Brooke Johnson as an additional PAGA representative, the Parties seek to moot

any similar challenges to Plaintiff's standing to assert and settle PAGA claims.[6]

III. ARGUMENT

A. Conditional Class Certification Is Appropriate for Settlement Purposes

A party seeking to certify a class must demonstrate that it has met all four requirements of Federal Rule of Civil Procedure 23(a),[7] and at least one of the requirements of Rule 23(b)—in this case, Rule 23(b)(3). *See Zinser v. Accufix Research Inst.*, 253 F.3d 1180, 1186 (9th Cir. 2001). When, as here, workplace violations are at issue, "the key question for class certification is whether there is a consistent employer practice [or policy] that could be a basis for consistent liability." *Kamar v. Radio Shack Corp.*, 254 F.R.D. 387, 399 (C.D. Cal. 2008). Indeed, class certification is proper when the plaintiff provides substantial evidence of a company-wide policy on which her theory of liability is based, even if in practice that policy's implementation varied. *See In re Taco Bell Wage & Hour Actions*, 2012 U.S. Dist. LEXIS 168219, at *19 (E.D. Cal. 2012) (certifying meal period class where uniform policy was undisputed but defendant argued "as a matter of practice, the policy is carried out in a variety of ways") (*aff'd de novo*, 2013 U.S. Dist. LEXIS 380 (E.D. Cal. 2013)).

Moreover, "it is the plaintiff's theory that matters at the class certification stage, not whether the theory will ultimately succeed on the merits." *Alonzo v. Maximus, Inc.*, 275 F.R.D. 513, 525 (C.D. Cal. 2011) (citations omitted). Indeed, the Supreme Court in

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[6] Although the Court inquired as to whether Brooke Johnson could serve as a PAGA representative given that she worked for BBW for only a few months, PAGA makes clear that the private attorney general need only be aggrieved, satisfy the administrative pre-requisites to filing suit, and file suit within one year of her employment. *See* Lab. Code § 2699.3. All such pre-requisites are satisfied here, and the fact Ms. Johnson only worked for three months is irrelevant.

[7] Rule 23(a) provides that, to certify a class, Plaintiffs must demonstrate that "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class."

Wal-Mart Stores, Inc. v. Dukes repeatedly stated that Rule 23's commonality analysis depends on whether Dukes' "basic theory of their case" as to Wal-Mart's alleged policy and practice of discriminatory treatment of women "can be proved on a classwide basis." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548, 2554-55 (2011). Moreover, the fact that class members may have been affected by a defendants' uniform policies/practices to varying degrees or have suffered varying damages *is not a bar* to certification. *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) ("the presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3).")

B. Plaintiff's Claims Present Predominant Questions of Law and Fact

For a class to be certified, there must be questions of law or fact common to the class. Fed. R. Civ. P. 23(a)(2). Rule 23(b)(3) also requires that the common questions of law or fact predominate over any individual questions. Thus, the Rule 23(a)(2) commonality inquiry and the Rule 23(b)(3) predominance inquiry overlap. *In re Autozone, Inc.*, 289 F.R.D. 526, 533 n.10 (N.D. Cal. 2012). Here, each of Plaintiff's theories of liability presents common legal and factual questions that predominate over any individual issues.

1. Plaintiff's Untimely Meal Period Claim Presents Predominant Common Issues of Law and Fact

Plaintiff alleged that Defendant violated California law by maintaining a policy that did not provide for timely meal periods. California law provides that "[a]n employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee." Cal. Lab. Code § 512(a); Wage Order No. 7, sec. 11(A). *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal. 4th 1004 (2012) held that the first meal break must be provided "no later than the end of an employee's fifth hour of work." *Brinker*, 53 Cal. 4th at 1041. And an employer who

fails to provide compliant meal breaks must pay the employee an additional hour of compensation at the employee's regular rate of pay. Cal. Lab. Code § 226.7(c); Wage Order No. 7, sec. 11(D).

According to BBW's meal period scheduling policies, Class Members who worked shifts greater than 8 hours but less than 10 hours were scheduled to take meal periods *after* the 5th hour of their shifts but before the 5.5 hour mark. (Associate Pay & Scheduling, CA Requirements, Bates No. BBWJONES00001213.) Further, the corporate designee confirmed that the policy was uniformly applied to all Sales Associates during the entire Class Period. Plaintiff thus maintains that BBW implemented a facially illegal meal period policy. This is a theory of liability suitable for conditional certification.[8] BBW's meal period policy thus raises two predominant common legal questions amenable for class-wide certification:

- Did BBW's policy fail to provide timely meal periods to the putative class members?
- If so, did BBW pay employees the required meal period premium (i.e. an additional hour of compensation) for meal period violations?

2. Plaintiff's Understaffing Theory for Meal and Rest Period Violations Presents Predominant Common Issues of Law and Fact

It is well-settled that an employer is liable for failing to provide meal periods if

[8] This meal period theory is readily conditionally certifiable for the simple reason that whether Defendant's meal period policy or lack thereof authorizing and permitting timely breaks violates the law "is by its nature a common question eminently suited for class treatment." *Brinker*, 53 Cal. 4th at 1033; *see also Faulkinbury v. Boyd & Assocs., Inc.*, 216 Cal. App. 220, 237 (2013) ("[Defendant] Boyd's liability, if any, would arise upon a finding that its uniform rest break policy, or lack of policy, was unlawful."); *Benton v. Telecom Network Specialists, Inc.*, 200 Cal. App. 4th 701 (2013) *reh'g denied* (Nov. 1, 2013) (reversing denial of class certification and remanding where plaintiffs alleged employer had failed to adopt any policy authorizing and permitting meal and rest breaks); *Bradley v. Networkers Int'l.*, LLC, 211 Cal. App. 4th 1129, 1153-54 (2012), as modified on denial of reh'g (Jan. 8, 2013), rev. denied (Mar. 20, 2012) (same).

the employer in any way discouraged employees from taking their required meal periods. As the California Supreme Court held in *Brinker, Ct.*, 53 Cal. 4th at 1040:

> An employer's duty with respect to meal breaks under both section 512, subdivision (a) and Wage Order No. [7] is an obligation to provide a meal period to its employees. The employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and **does not impede or discourage them from doing so.**

(emphasis added); *see also Cicairos v. Summit Logistics*, Inc., 133 Cal. App. 4th 949, 962-63 (2005); *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal. 4th 1094, 1104 (2007) ("An employee forced to forgo his or her meal period ... loses a benefit to which the law entitles him or her.")

Additionally, Labor Code section 226.7 and Wage Order Wage Order No. 7(12)(A) require an employer to "authorize and permit" each employee to take a rest period of ten minutes during each four hour period or major fraction thereof. If the employer fails to provide an employee with rest periods in accordance with California law, the employer must pay the employee a full additional hour of compensation. Cal. Lab. Code § 226.7(b).

In *Brinker,* the California Supreme Court held that a violation occurs when an employer pressures, encourages, or incentivizes an employee to skip breaks or take short breaks. Indeed, "the wage orders and governing statute do not countenance an employer's exerting coercion against the taking of, creating incentives to forego, or otherwise encouraging the skipping of legally protected breaks." *Id.* at 1036.

Here, Plaintiff alleged that BBW's emphasis on customer service, coupled with chronic understaffing due to strict labor budgets, pressured and coerced employees to take non-compliant meal and rest periods, which went uncompensated. Specifically, non-exempt employees were unable to take meal and rest periods because BBW maintained strict labor-budget hour "forecasting" and strict sales goals employees were expected to obtain. (Workforce Management Handbook, Bates No. BBWJONES00001064.)

Plaintiff's meal and rest period claims under this theory are readily certifiable. Even before *Brinker,* class certification rules were not as demanding as employers typically represent. "Predominance is a comparative concept,' and 'the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate.' [Citations.]" *Sav-On Drug Stores, Inc. v. Super. Ct.*, 34 Cal. 4th 319, 334 (2004) ("*Sav-On"*) (citation omitted). Thus, "[a] class action can be maintained even if each class member must at some point individually show his or her eligibility for recovery or the amount of his or her damages, so long as each class member would not be required to litigate substantial and numerous factually unique questions to determine his or her individual right to recover." *Acree v. General Motors Acceptance Corp.*, 92 Cal. App. 4th 385, 397 (2001), fn. omitted.

Accordingly, Plaintiff's meal and rest period theory of liability yields the following predominant, common questions of fact and law:

- Did Defendant maintain and implement a uniform meal period policy that, *in practice*, did not provide meal periods?
- Did Defendant maintain and implement a uniform rest break policy that, *in practice*, did not "authorize and permit" such breaks?
- Did Defendant fail to pay premiums whenever it failed to provide and/or "authorize and permit" meal and rest periods?

Common evidence—in the form of Defendant's written policies, corporate representative testimony, and class member declarations—would answer the predominant common questions and would show that the combined effect of Defendant's meal and rest period policies was that it did not provide and/or "authorize and permit" Class Members to take compliant breaks.

The certifiability of this theory of liability has been further confirmed by post-*Brinker* decisions. *See e.g. Paige v. Consumer Programs, Inc.*, Order Granting in Part Plaintiffs' Amended Motion for Class Certification, Case No. CV-07-2498-MWF (RCx), Dkt. No. 75 (C.D. Cal. July 16, 2012). In *Paige*, the district court held that:

> "The California Supreme Court in *Brinker* allowed for the possibility that meal and rest break claims could predominately feature questions of general interest. The *Brinker* Court ultimately held that, under California law, 'an employer's obligation is to relieve its employee of all duty, with the employee thereafter at liberty to use the meal period for whatever purpose he or she desires.' *Brinker*, 53 Cal. 4th at 1017. The employer's duty is not to ensure that no work takes place during a given period, but to provide what is a substantively meaningful break."

Id. at 2-3.

In *Paige*, plaintiffs' meal and rest period claims "alleged the existence of various uniform policies that were consistently applied to purported class members, effectively denying them the ability to take sufficient rest and meal breaks." *Id.* at 3. The *Paige* court found that "taken together, these policies allegedly resulted in working conditions, consistent across [defendant's] establishments, in which [defendant] did not 'relinquish control' of purported class members." *Id.* The court in *Paige* granted certification based on a these uniform meal and rest break policies. *Id.* at 4.

Similarly, in *Ortega v. J.B. Hunt Transport Inc.*, Order Denying Defendant's Motion for Decertification of the Class, Case No. CV 07-8336-MWF (FMOx), Dkt. No. 77 (C.D. Cal. Dec. 18, 2012), the district court denied defendant's motion for decertification finding:

> Although the court in *Brinker* indeed held that an employer's obligation to provide a break period does not include an obligation to ensure the break is actually taken, this conclusion does not necessarily preclude a finding of predominance or commonality. *Brinker*, 53 Cal. 4th at 1017. Rather, the *Brinker* court explained that where it is alleged with factual support that common, uniform policies consistently applied resulted in the purported violations, class treatment may be appropriate. *Id.* at 1033. Additionally, the Brinker court observed that an "employer may not undermine a formal policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks." *Id.* at 1040. Because the plaintiffs in *Brinker* alleged such a uniform policy with regard to rest breaks, the *Brinker* court determined that rest break claims could proceed on a class-wide basis. *Id.* at 1033."

The *Ortega* court went on to state that even under the rigorous commonality analysis required under *Wal-Mart Stores, Inc. v. Dukes,*131 S. Ct. 2541 (2011), the question whether defendant's common policies failed to provide rest breaks is common

to all potential class members. *Id.* at 4.

This case falls squarely in line with the *Paige* and *Ortega* decisions. Here, Plaintiff alleges uniform policies, which when taken together, resulted in noncompliant meal and rest periods. Because the impact of these policies predominantly features common questions of general interest, conditional class certification for settlement purposes is appropriate.

3. Plaintiff's Off-the-Clock Claim Presents Predominant Common Issues of Law and Fact

Plaintiff alleged that class members were subject to a uniform practice at the local level of requiring them to undergo security bag checks every time they left the store. (Loss Prevention policy 9/25/10, Bates No. BBWJONES00001042.). Although the policy states that security bag checks should be conducted on the clock, BBW's practice is in direct contravention. Plaintiff and Class Members alike attest that these mandatory security bag checks occur off-the-clock, in fact, so as not to exceed their scheduled shifts and the budgeted labor hours for the store.

There is no doubt that the off-the-clock claim based on security searches is certifiable for settlement purposes. Indeed, where a plaintiff "provided substantial evidence of the existence of a company-wide policy whereby employees are subject to inspections, and not compensated for the time spent on those inspections," that policy, and the reasonable inferences that can be drawn from it, demonstrate that common questions will predominate the off-the-clock claims. *Kurihara v. Best Buy Co.*, Case No. C 06-01884 MHP, 2007 WL 2501698 (N.D. Cal. 2007); *see also Otsuka v. Polo Ralph Lauren Corp.*, 251 F.R.D. 439, 447-49 (N.D. Cal 2008) (certifying off-the-clock claim for uncompensated time spent waiting off-the-clock for loss prevention inspections); *Cervantes v. Celestica Corp.*, 253 F.R.D. 562, 576-77 (C.D. Cal. 2008) (certifying off-the-clock claim for unpaid time spent in a security line).

BBW also required many Class Members to work "call-in" shifts by contacting their supervisors by phone during their off-time to determine whether they would need to

report to work. (Call-In Shifts, Bates No. BBWJONES00002000, "Call-in shifts are utilized as an efficient means of scheduling the right number of Associates to cover high-volume shifts. An Associate scheduled for a call-in shift is actually off that day, but must be available to work during that time if needed.") Plaintiff alleges that Class Members should have been compensated for this "call-in" time because they were under BBW's control. Accordingly, this theory of liability yields the following predominant, common questions of fact and law:

- Did Defendant maintain and implement uniform policies requiring class members to "call-in" for on-call shifts?
- Did Defendant fail to compensate class members for the time spent calling-in?

4. Plaintiff's Reporting-Time Claim Presents Predominant Common Issues of Law and Fact

Plaintiff alleges that BBW violated California Labor Code section 1198[9] and California Code of Regulations, Title 8, section 11070(5) because it failed to pay Class Members reporting-time pay when they reported for work and/or called-in for work (as in the case of "call-in" shifts) and were not put to work, or were put to work for less than half their usual or scheduled day's work. California Code of Regulations, Title 8, section 11070(5)(A), provides that "[e]ach workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee's regular rate of pay, which shall not be less than the

[9] California Labor Code section 1198 makes it illegal to employ an employee under conditions of labor that are prohibited by the applicable wage order. California Labor Code section 1198 requires that ". . . the standard conditions of labor fixed by the commission shall be the . . . standard conditions of labor for employees. The employment of any employee . . . under conditions of labor prohibited by the order is unlawful."

minimum wage." Plaintiff alleges, among other things, that he would report to work based on the schedule that Defendant had provided him, but when he arrived for work, he would be sent home either immediately or before having worked half of his scheduled shift. When this occurred, Defendants did not pay him for at least half of his scheduled shift. This theory thus wages a predominant common question of fact and law: Did Defendant maintain a custom and practice of failing to pay reporting time pay?

5. Adam Jones and Brooke Johnson Will Adequately Represent the Interests of the Proposed Settlement Class

The final Rule 23(a) requirement asks whether "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement is satisfied if: (1) the proposed representative Plaintiffs do not have conflicts of interest with the proposed class, and (2) Plaintiffs are represented by qualified and competent counsel. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998).

The Rule 23(a) adequacy requirement is met here as Adam Jones and Brooke Johnson have and will represent putative Class Members with a focus and zeal true to the fiduciary obligation that they have undertaken. Plaintiff's Counsel also satisfy the Rule 23(a)(4) adequacy-of-counsel requirement. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998) ("will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?"). The attorneys at Capstone Law have successfully certified numerous class actions by way of contested motion in state and federal court, and have negotiated settlements totaling over 90 millions of dollars on behalf of hundreds of thousands of class members. (*See* Perez Decl. ¶¶ 13-17.)

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

Resolving all Class Members' claims through a single class action is superior to a series of individual lawsuits. "From either a judicial or litigant viewpoint, there is no advantage in individual members controlling the prosecution of separate actions. There would be less litigation or settlement leverage, significantly reduced resources and no

greater prospect for recovery." *Hanlon*, 150 F.3d at 1023. Indeed, the terms of the Settlement negotiated on behalf of the Class demonstrates the advantages of a collective bargaining and resolution process.

Addressing the allegations through a class action is superior to individual litigation or any alternative methods that may exist. This action was filed precisely because Plaintiff believed those alternatives, such as filing complaints with the LWDA, would have proven ineffective in addressing the problem on a class-wide basis. Additionally, although the value of the claims is not insignificant, the amount in controversy is not nearly enough to incentivize individual action. *See Wolin v. Jaguar Land Rover N. Am.*, 617 F.3d 1168, 1175 (9th Cir. 2010) ("Where recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis, this [superiority] factor weighs in favor of class certification."). As the class action device provides the superior means to effectively and efficiently resolve this controversy, and as the other requirements of Rule 23 are each satisfied, certification of the Settlement Class proposed by the Parties is appropriate.

C. The Proposed Class Action Settlement Should Receive Preliminary Approval

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

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

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

3. A final fairness hearing concerning the fairness, adequacy, and reasonableness of the settlement.

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

At preliminary approval, the Court first determines whether a class exists. *Stanton v. Boeing Company*, 327 F.3d 938, 952 (9th Cir. 2003). Then, the Court evaluates whether the settlement is within the "range of reasonableness," and whether notice to the class and the scheduling of a final approval hearing should be ordered. *See, generally*, 3 Conte & Newberg, *Newberg on Class Actions*, section 7.20 (4th ed. 2002) § 11.25. "Whether a settlement is fundamentally fair within the meaning of Rule 23(e) is different from the question whether the settlement is perfect in the estimation of the reviewing court." *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012).

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

To make this determination at preliminary approval, the Court may consider some or all of the following factors: (i) the extent of discovery completed, and the stage of proceedings; (ii) the strength of the case and the risk, expense, complexity and likely duration of further litigation; (iii) the risk of maintaining class action status throughout trial; the amount offered in settlement; and (iv) the experience and views of counsel. *See Stanton*, 327 F.3d at 959 (citing *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003)). "Under certain circumstances, one factor alone may prove determinative in finding

sufficient grounds for court approval." *Nat'l Rural Telecom. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525-526 (C.D. Cal. 2004) (*citing Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993)).

At this stage, the court may grant preliminary approval of a settlement and direct notice to the class if the settlement: (1) appears to be the product of serious, informed, non-collusive negotiations; (2) falls within the range of possible approval; (3) does not improperly grant preferential treatment to class representatives or segments of the class; and (4) has no obvious deficiencies. *See Harris v. Vector Mktg. Corp.*, 2011 WL 1627973, * 7 (N.D. Cal. 2011); *Alvarado v. Nederend*, 2011 WL 90228, *5 (E.D. Cal. 2011) (same). "Closer scrutiny is reserved for the final approval hearing." *Harris*, 2011 WL 1627973, at *7; *see In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (setting forth eight factors to be examined by the court in determining final approval of settlement).

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

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

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

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

Courts presume the absence of fraud or collusion in the negotiation of a settlement, unless evidence to the contrary is offered; thus, there is a presumption that settlement negotiations are conducted in good faith. *Newberg on Class Actions* (4th ed. 2002), § 11.51. Here, the Parties participated in mediation with Mr. John Bates, a respected mediator of wage and hour class actions. Mr. Bates helped to manage the Parties' expectations and provided a useful, neutral analysis of the issues and risks to both sides, that ultimately resulted in a settlement post-mediation after extensive negotiations between counsel. *In re Apple Computer, Inc. Derivative Litig.*, No. C 06-4128 JF (HRL), 2008 U.S. Dist. LEXIS 108195 (N.D. Cal. Nov. 5, 2008) (mediator's participation weighs considerably against any inference of a collusive settlement), *In re Atmel Corp. Derivative Litig.*, No. C 06-4592 JF (HRL), 2010 U.S. Dist. LEXIS 145551 (N.D. Cal. June 25, 2008) (same); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (a "mediator's involvement in pre-certification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure.") At all times, the Parties' negotiations were adversarial and non-collusive.

The Parties were represented by experienced class action counsel throughout the negotiations resulting in this Settlement. Plaintiff was represented by Capstone Law APC ("Capstone"). Capstone, which seeks appointment as Class Counsel, employs seasoned class action attorneys who regularly litigate wage and hour claims through certification and on the merits, and have considerable experience settling wage and hour class actions. (Perez Decl. ¶¶ 13-17.)

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

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

As explained in detail below, the Total Class Action Settlement Amount is fair and reasonable in light of the nature and magnitude of the claims being settled and the various potential impediments to recovery. Plaintiff's Counsel determined an appropriate range of recovery for settlement purposes by offsetting BBW's maximum theoretical liability by: (i) the strength of BBW's defenses on the merits, as most of its actual written labor policies are—on their face—compliant with California law; (ii) the risk of class certification being denied; (iii) the risk of losing on any of a number of dispositive motions that could have been brought between certification and trial (e.g., motions to decertify the class, motions for summary judgment, and/or motions in limine) that might have eliminated all or some of Plaintiff's claims; (iv) the risk of losing at trial; (v) the chances of a favorable verdict being reversed on appeal; and (vi) the difficulties attendant to collecting on a judgment.

After taking into account the aggregate value of the claims, and discounting by the above risks of continued litigation, Plaintiff valued his claims, for settlement purposes, at between $1,600,000 and $3,200,000. It must be underscored, however, that the reasonableness of a settlement is not dependent upon its actual value approaching the potential recovery plaintiff's might have received if they had succeeded at trial. Indeed, "[t]he determination whether a settlement is reasonable does not involve the use of a 'mathematical equation yielding a particularized sum.'" *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005), *quoting In re Michael Milken and Assoc. Sec. Litig.*, 150 F.R.D. 57, 66 (S.D.N.Y. 1993).[10]

[10] Federal district courts recognize that there is an inherent "range of reasonableness" in determining whether to approve a settlement "which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Id.* at 188, *quoting Newman v. Stein*, 464 F. 2d 689, 693 (2d Cir. 1972). *See In re Omnivision Tech., Inc.*, 559 F. Supp. 2d 1036 (N.D. Cal. 2008); *see also Nat'l Rural Telecomm. Coop. v. Directv, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) ("well settled law that a proposed settlement may

The analysis that follows is based on information obtained from interviews with Class Members as well as evidence and data produced by BBW, including: (1) time and payroll records relating to a representative sample of the Settlement Class; (2) policies relevant to the claims at issue (including bag check policies, meal and rest break policies, call-in policies, and timekeeping policies); (3) employee handbooks; (4) employee training materials; and (5) Plaintiff's time and pay records.

Claims	Range of Value for Settlement Purposes	
Meal & Rest Periods Premiums	$100,000	$200,000
Unpaid Wages & Overtime ("Off-the-Clock")	$250,000	$500,000
Reporting Time Pay	$100,000	$200,000
Simple Interest for Unpaid Wages & Premiums[11]	$150,000	$300,000
Wage Statement / Waiting-Time / PAGA Penalties	$1,000,000	$2,000,000
Total	**$1,600,000**	**$3,200,000**

Meal and Rest Period Claims

For the reasons discussed above, Plaintiff alleges that BBW failed to provide Class Members with compliant meal and rest periods. BBW's maximum theoretical exposure for meal period violations could be calculated by taking the product of the total number of shifts worked by all Class Members during the Class Period (≈ 1.5 million),

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be acceptable even though it amounts to only a fraction of the potential recovery"); *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 460 (S.D.N.Y. 2004) ("settlement amount's ratio to the maximum potential recovery need not be the sole, or even dominant, consideration when assessing settlement's fairness"); *In re IKON Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 184 (E.D. Pa. 2000) ("the fact that a proposed settlement constitutes a relatively small percentage of the most optimistic estimate does not, in itself, weigh against the settlement; rather the percentage should be considered in light of strength of the claims"); *Officers for Justice v. Civil Serv. Comm.*, 688 F. 2d 615, 628 (C.A. Cal. 1982) (it is "the complete package, taken as a whole rather than the individual component parts, that must be examined for overall fairness").

[11] Simple interest was estimated for the unpaid wages and premiums claims by taking the product of: (1) the aggregate settlement value of the claims ($450,000 and $900,000); (ii) 10% legal interest; and (iii) 6.3 years of interest (i.e., June 4, 2009 to September 30, 2015). Damages associated with the first year of the Class Period earned 6.3 years of interest, the second year of the Class Period earned 5.3 years of interest, and so forth.

the percentage of shifts that qualified for meal periods (≈ 30%), the percentage of all shifts with meal period violations (based on Plaintiff's Counsel's review of a representative sample of employee time records and information obtained from interviews with Class Members, ≈ 20%) and the average hourly rate of pay (≈ $8.60). Likewise, BBW's maximum potential for rest period violations could be calculated by taking the product of the total number of shifts worked by all Class Members during the Class Period (≈ 1.5 million), the percentage of shifts that qualified for rest periods (≈ 70%), the percentage of all shifts with rest period violations (≈ between 20% and 25%), and the average hourly rate of pay (≈ $8.60). After determining BBW's maximum theoretical exposure for the meal and rest period claims, Plaintiff then discounted those values to account for the (arguable) strength of BBW's defenses to the claims, and the risks of certification.

With respect to the defenses, BBW would have argued that it automatically paid premiums whenever its automated payroll system registered a break violation (thus significantly limiting its liability for the estimated 20% of shifts with meal period violations), and that it requires all employees to report whether they were provided with their meal and rest periods (i.e., either certifying that they were provided their meal and rest periods, or advising management that they were not, in which case they were paid a premium).[12] According to BBW, about 98% of shifts eligible for meal periods resulted either in a compliant meal period or a certification that the opportunity to take a meal

[12] The clock-out device contains a certification screen that must be completed before Class Members may complete their daily time records. Different certifications are triggered depending on the length of the shift. For example, shifts of 3.5 hours ask only about the opportunity to take a rest period, shifts of 3.5 to 5 hours ask about the opportunity to take a meal period and a rest period Sales Associates must click a button to answer either "yes" or "no" in response. Directly underneath the buttons, at the bottom of the certification screen, reads: "It is your responsibility to take meal and rest periods required of you. I agree that if I am denied the opportunity to take a meal or rest period allowed or required by law, I will immediately alert my District Manager or the Ethic Hotline (1-888-884-7218) to correct the situation. No retaliation will occur for reporting meal or rest period violations." As a result of this process, every single Class Member answered whether he or she had the opportunity to take meal and rest periods.

period was provided. About 95% of these shifts were certified as having the opportunity to take a meal period. BBW also estimates that since 2010, it has paid over $500,000 in meal and rest period premiums (≈ $430,000 in meal period premiums / ≈ $90,000 in rest period premiums).

Regarding certification, while the above demonstrates that these claims are certifiable, on a *contested* motion, there is no guarantee that Plaintiff would have prevailed, as a number of courts have found that certain of Plaintiff's theories for meal and rest period violations are not susceptible to common proof. *See Duran v. U.S. Bank National Association*, 59 Cal. 4th 1, 31 (2014) (reversing a verdict from a class trial); *Augustus v. ABM Security Services, Inc.*, 233 Cal. App. 4th 1065 (2014) (finding that the trial court erred in granting summary adjudication and summary judgment to security guards who were on call during rest breaks because neither the Labor Code nor the applicable wage order mandated that employees be relieved of all duties during rest breaks); *Tien v. Tenet Healthcare Corp.*, 209 Cal. App. 4th 1077, 1088 (2012) ("[T]he reason, if any, that employees might not take their breaks were predominantly individualized questions of fact not susceptible to class treatment."); *Ali v. U.S.A. Cab Ltd.*, 176 Cal. App. 4th 1333, 1341 (2009) (affirming denial of certification because employees' declarations attesting to having taken meal and rest breaks demonstrated that individualized inquiries were required to show harm); *Campbell v. Best Buy Stores, L.P.*, 2013 U.S. Dist. LEXIS 137792, at *30-41 (C.D. Cal. Sept. 20, 2013) (following *Brinker* and denying certification of proposed off-the-clock and rest and meal break classes due to lack of uniform policy); *Jimenez v. Allstate Ins. Co.*, 2012 U.S. Dist. LEXIS 65328 (C.D. Cal. Apr. 18, 2012) (denying motion to certify meal and rest break classes based on employer's practice of understaffing and overworking employees); *Brown v. Fed. Express Corp.*, 249 F.R.D. 580, 587-88 (C.D. Cal. 2008) (denying certification of driver meal and rest period claims based on the predominance of individual issues).

After accounting for the risks of continued litigation, Plaintiff valued the meal and rest period claims for settlement purposes at between $100,000 and $200,000.

Unpaid Minimum Wage and Overtime Claims ("Off-the-Clock")

Plaintiff's claims for unpaid minimum and overtime wages are based on the following factual allegations:

- BBW should have paid Class Members minimum wages for time spent contacting their supervisors during their off-time in order to determine whether they would be asked to report for work (the "call-in" shifts). BBW's maximum theoretical exposure could be calculated by taking the product of the total number of "call-in" shifts scheduled during the Class Period (≈ 1.04 million), the duration of the calls (between ≈ 5 and 15 minutes), and the average hourly rate of pay (≈ $8.60).
- BBW in practice regularly subjected Class Members to off-the-clock security bag checks before they left store premises. BBW's maximum theoretical exposure could be calculated by taking the product of the total number of shifts worked by all Class Members during the Class Period (≈ 1.5 million), the average hourly and overtime rates of pay (≈ $8.60, $12.90), the average duration of security bag checks (≈ 1-2 minutes), and the percentage of Class Members (based on interview with Class Members) who were subjected to off-the-clock bag checks (between ≈ 2% and 5%)

To determine an appropriate range of recovery for settlement purposes, Plaintiff discounted BBW's maximum theoretical exposure to account for its foreseeable defenses and the risks associated with certification. With respect to its defenses, BBW would have argued that its actual policies require supervisors to pay Class Members for all time worked, including time spent during security bag-checks. *See Brinker,* 53 Cal. 4th at 1051-1052 (company records showing that "employees are clocked out creates a presumption they are doing no work, a presumption that [those seeking certification] have the burden to rebut."). Any deviation from these policies would have occurred

only at the local level, and would not be amenable (BBW would argue) to certification. *See also Cortez v. Best Buy Stores, LP*, 2012 WL 255345, *9-10 (C.D. Cal. Jan. 25, 2012) ("Allegations based primarily on individual, oral communications [from individual managers] are not proper for class treatment….Absent class-wide proof of uniformity, each conversation would be subject to separate proof.")

BBW would also have argued that all "call-in" time was per se *de minimis* and non-compensable. Under the *de minimis* doctrine, work time that is insubstantial, or that cannot be administratively recorded for payroll purposes, may be disregarded. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946) ("a few seconds or minutes of work beyond the scheduled working hours [are mere] trifles [and] may be disregarded"); *Rutti v. Lojack Corporation*, 596 F.3d 1046, 1057 (9th Cir. 2010); *Lindow v. U.S.*, 738 F.2d 1057, 1063 (1984) (denying overtime pay to employees for frequent seven-to-eight minute pre-shift reviews of a log book and exchange of information with their co-workers because of the administrative difficulty of recording the time and the irregularity of the additional pre-shift work).

After accounting for the risks of continued litigation with respect to the preceding theories, Plaintiff valued the off-the-clock claim for settlement purposes at between $250,000 and $500,000.

Reporting Time Claim

Plaintiff alleges that BBW failed to pay Class Members reporting-time pay when they reported for work and were either (i) put to work for less than half their usual or scheduled day's work, or (ii) not put to work. California Code of Regulations, Title 8, section 11070(5)(A), provides that "[e]ach workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee's regular rate of pay, which shall not be less than the minimum wage."

Plaintiff assessed the settlement value of the reporting-time/call-in claim based on a combination of demographic data provided by BBW and information provided by Class Members, including the total number of shifts worked during the Class Period (≈ 1.5 million) and the total number of call-in shifts scheduled during the Class Period (≈ 1.04 million). Plaintiff then discounted this value to account for the strength of BBW's defenses and the risk of continued litigation (*see infra*).

For example, with respect to the allegation that BBW owes reporting time pay to all Class Members who physically reported for work but who were put to work for less than half their usual or scheduled shift, BBW would have argued that its official policy is to pay reporting time in every instance where it is due, and any instances of reporting-time pay not having been paid to Class Members are rare deviations from that policy.[13] Likewise, BBW would have argued that its automated payroll system was specifically programmed to automatically adjust associates' hours worked to no less than two hours. (*Id.*)

As for the call-in theory for reporting-time pay (i.e., Class Members who reported to work by phone and who were not put to work that day), BBW would have argued that the plain meaning of California Code of Regulations, Title 8, section 11070(5)(A) is that "report for work" means to "present oneself for work." In this context, BBW would have argued that various dictionaries agree that the verb "report" means, at least, "to present oneself." The Random House College Dictionary 1119 (Jess Stein ed., Random House, Inc. 1982) (1968) (defining "report" to mean, among other things, "to present oneself duly, as at a place"); Webster's New World Dictionary, Third College Edition

[13] "The minimum reporting time pay for any shift is two hours; the maximum reporting time pay is four hours. Store associates shouldn't be scheduled for less than two-hour shifts. For example, if an associate shows up for a shift scheduled for four hours and only works for one hour, she or he will still be paid for two hours. Every effort should be made to have associates work at least the two-hour minimum by replenishing stock, processing freight, cleaning, etc. If an associate leaves early due to illness or another personal reason and hasn't worked a minimum of two hours, she or he will be automatically paid for two hours."

1139 (Victoria Neufeldt ed., Simon & Schuster, Inc. 1988) (defining "report" to mean, among other things, "to present oneself or make one's presence known"); Merriam-Webster Online Dictionary, "Report," available at http://beta.merriam-webster.com/dictionary/report (last visited December 16, 2015) (defining "report" to mean, among other things, "to present oneself"). The verb "present," in turn, means "to come to show (oneself) before a person, in or at a place, etc." The Random House College Dictionary 1048 (Jess Steined., Random House, Inc. 1982); Dictionary.com, "Present," available at http://dictionary.reference.com/browse/present (last visited December 16, 2015) (same).

This aspect of the claim was also especially vulnerable to summary judgment. *See Casas v. Victoria's Secret Stores, LLC*, No. 2:14-cv-06412-GW-VBK (C.D. Cal. Dec. 1, 2015), Dkt. No. 33 ("The Court agrees with Plaintiffs, to an extent. [Defendant's] call-in scheduling policy is somewhat unfriendly to employees and disrespects their time. But the Wage Order's reporting-time provisions do not provide a remedy. Plaintiffs' second claim would be Dismissed With Prejudice").

After accounting for the risks of continued litigation with respect to both theories, Plaintiff valued the reporting time claim for settlement purposes at between $100,000 and $200,000.

Wage Statement Penalties / Waiting-Time Penalties / PAGA Penalties

Based on the forgoing allegations (i.e., the failure to pay Class Members minimum and overtime wages, premiums for all missed meal and rest periods, and reporting-time pay), Plaintiff alleges that BBW is liable for penalties under Labor Code sections 226 (wage statement violations), 203 (waiting-time penalties), and 2698, *et seq.* (PAGA). Although the formulae for calculating penalties under these sections are fairly straightforward, the analysis becomes more difficult for settlement purposes as the wage statement, waiting-time, and PAGA penalty claims are only as strong as the underlying predicate claims. After accounting for the risks of continued litigation as to each of these claims (*see below*), Plaintiff valued the penalty claims for settlement purposes at

between $1,000,000 and $2,000,000.

Wage Statement Penalties: Plaintiff alleges that BBW failed to properly itemize Class Member wage statements in violation of Labor Code section 226(a). Penalties for violations of 226(a) are assessed at the rate of $50 for the initial pay period in which a violation occurs and $100 per employee for each violation in a subsequent pay period, not to exceed an aggregate of $4,000 dollars per employee. Cal. Lab. Code § 226(e).

Plaintiff had to discount BBW's maximum exposure by the strength of its affirmative defenses and the risks of continued litigation. With respect to the affirmative defenses, defendants commonly argue that, without more, wage statement claims are nothing but technical violations for which Class Members suffer no injury. Before Section 226(e) was amended, the dispositive issue was whether "suffering injury" was satisfied by the deprivation of a legal right (i.e., an employer's provision of non-compliant wage statements), or by consequential damages caused by the non-compliant wage statements. Employers had frequently prevailed in arguing for the latter interpretation. Even after the enactment of section 226(e), some courts have held that this amendment merely clarifies existing law and have held that plaintiffs must demonstrate actual injury. *See Loud v. Eden Med. Ctr.*, 2013 U.S. Dist. LEXIS 122873, **36-53 (N.D. Cal. Aug. 28, 2013) (granting summary judgment on wage statement claim because plaintiff could not show injury due to defects and that incorrect wage information is not willful).

Waiting-Time Penalties: Plaintiff alleges that BBW is liable for waiting-time penalties. Under California law, all wages earned and unpaid at the time of discharge are due and payable immediately to the employee. Failure to pay an employee all wages and premium pay owed, including overtime premiums, reporting time pay, meal period/rest period premiums, may entitle an employee to waiting-time penalties. Labor Code §§ 201, 202. These penalties continue for up to 30 calendar days. *See* Labor Code § 203. Waiting time penalties are computed by multiplying the employee's daily wage rate by the specified number of days since the payment of the wages became due, not to

exceed 30 calendar days. *Id.*

Plaintiff had to discount BBW's maximum exposure for waiting-time penalties to account for the strength of its affirmative defenses and the risks of continued litigation. For example, BBW would have argued that such penalties are applicable only when the failure to pay wages at termination is "willful." *See* Lab. Code § 203; Cal. Code Regs., tit. 8, § 13520; *Amaral v. Cintas Corp. No. 2*, 163 App. 4th 1157, 1201 (2008) ("the fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist"). If the Court accepted this standard, Plaintiff would have encountered significant difficulty in proving that the failure to pay all wages was wilful rather than inadvertent.

PAGA Penalties: Plaintiff alleges that BBW is liable for PAGA penalties as a result of the underlying allegations. PAGA penalties are assessed as follows:

> If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation.

Lab. Code § 2699(f)(2).

Plaintiff discounted his valuation of BBW's liability for PAGA penalties to account for all of the foregoing defenses to the merits of the underlying predicate claims. Moreover, because PAGA penalties are discretionary, Plaintiff further discounted his assessment of PAGA penalties for purposes of settlement. *See* Lab. Code § 2699(e) ("In any action by an aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or (f), a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.").

The Total Class Action Settlement Amount is Fair and Reasonable Compensation for Plaintiff's Claims

As the above analysis demonstrates, Plaintiff objectively and knowledgably

balanced the strengths and weaknesses of his claims against the risk of continued litigation, and was able to determine a realistic range of settlement recovery at between $1,600,000 and $3,200,000. The actual settlement value of $2,250,000 falls within the range of reasonableness, and is thus fair, adequate and reasonable. Likewise, given the disproportionate amount of interest[14] and penalties to the relatively low amount of actual unpaid wages at stake in this action, the proposed tax allocation, 25% to wages and 75% to non-wages (e.g., interest and penalties), is fair and reasonable and consistent with Plaintiff's evaluation of the claims.

D. The Proposed Class Representative Incentive Awards Are Fair and Reasonable

Plaintiff separately addresses the propriety of the proposed incentive awards in the concurrently filed Motion for Preliminary Approval of Attorneys' Fees, Cost, and Incentive Awards.

E. The Negotiated Attorneys' Fees and Costs Are Reasonable

Plaintiff separately addresses the propriety of the negotiated attorneys' fees and costs in the concurrently filed Motion for Preliminary Approval of Attorneys' Fees, Cost, and Incentive Awards.

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

The proposed class settlement notice and claims administration procedure satisfy due process. Rule 23(c)(2) of the Federal Rules of Civil Procedure requires the Court to direct the litigants to provide Class Members with the "best notice practicable" under the circumstances, including "individual notice to all members who can be identified through reasonable effort." *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 173, 94 S. Ct.

[14] Due to the procedural history of this case, including a substantial amount of time spent for appellate review of preliminary jurisdictional issues, interest would comprise a larger proportion of the settlement than in other, more expeditiously litigated cases.

2140, 2150, 40 L. Ed. 2d 732, 746 (1974). Under Rule 23(c)(2), notice by mail provides such "individual notice to all members." *Id.* Where the names and addresses of Class Members are easily ascertainable, individual notice through the mail constitutes the "best notice practicable." *Id.* at 175.

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

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

The Settlement Administrator will mail the Class Notice to all Settlement Class Members via first class United States mail. (Settlement Agreement, p. 14:28-15:11.) In the event Notice Packets are returned as undeliverable, the Settlement Administrator will

attempt to locate a current address using, among other resources, a computer/SSN and "skip trace" search to obtain an updated address. (*Id.*) This method was negotiated by the Parties to maximize the Class Member response rate while ensuring cost effective administration of the Settlement.

IV. CONCLUSION

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

Dated: January 11, 2016

Respectfully submitted,

Capstone Law APC

By: _____

Raul Perez
Melissa Grant
Arnab Banerjee

Attorneys for Plaintiff Adam Jones