

1 **HUNTER PYLE, SBN 191125**
2 **PAMELA KONG, SBN 220912**
3 SUNDEEN SALINAS & PYLE
4 1330 Broadway, Suite 1830
5 Oakland, California 94612
6 Telephone: (510) 663-9240
7 Facsimile: (510) 663-9241

8 **AARON KAUFMANN, ESQ., SBN 148580**
9 **DAVID POGREL, ESQ., SBN 203787**
10 HINTON, ALFERT & SUMNER
11 1646 North California Blvd., Suite 600
12 Walnut Creek, CA 94596-4113
13 Telephone: (925) 932-6006
14 Facsimile: (925) 932-3412

15 *Attorneys for Plaintiff*

16 **DAVID S. BRADSHAW, SBN 44888**
17 **CARY G. PALMER, SBN 186601**
18 **NATHAN W. AUSTIN, SBN 219672**
19 JACKSON LEWIS LLP
20 801 K Street, Suite 2300
21 Sacramento, CA 95814
22 Telephone: (916) 341-0404
23 Facsimile: (916) 341-0141

24 *Attorneys for Defendant*

25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000

JANNIKA SCHAKOW, on behalf of herself,
and all others similarly situated,

Plaintiffs,

v.

LERNER NEW YORK, INC. dba NEW YORK
& COMPANY; NEW YORK & COMPANY,
INC., dba NEW YORK & COMPANY; and
DOES 1-10, inclusive,

Defendants.

Case No. C-08 01145

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
JOINT MOTION FOR PRELIMINARY
APPROVAL OF CLASS SETTLEMENT**

Date: May 28, 2009
Time: 9:00 a.m.
Dept.: 6
Judge: Hon. David Flynn __

1 Plaintiff JANNIKA SCHAKOW (“Plaintiff” or “Class Representative”) and Defendant
2 LERNER NEW YORK, INC. dba NEW YORK & COMPANY (“NY& CO”) submit the following
3 memorandum of points and authorities in support of their joint motion for preliminary approval of
4 class settlement:

5 **I. INTRODUCTION**

6 This motion seeks provisional certification of a settlement class (“Class”) of approximately
7 8,111 current and former NY&CO employees, and preliminary approval of a claims-made
8 settlement reached in this case (“Settlement”).

9 The parties reached this Settlement through arm’s-length bargaining, after sufficient
10 investigation and discovery, and two full days of mediation. The main elements of the Settlement
11 are as follows:

- 12 1. The settlement class consists of Assistant Sales Managers (“ASMs”), Co-Sales
13 Managers (“CSMs”), Junior Management Associates (“JMAs”), and Sales
14 Associates (“Associates”) (collectively “Class Members”) who worked for NY&
15 CO in California from April 29, 2004, through December 31, 2008 (“Class Period”);
- 16 2. NY&CO will pay up to a maximum of \$850,000 (“Settlement Fund”), depending on
17 the actual number of valid and timely claims actually submitted by Class Members;
- 18 3. The Settlement Fund includes administration costs, attorneys’ fees to Class Counsel
19 herein (Class Counsel will seek attorneys’ fees in the amount of up to 30% percent
20 of the Settlement Fund, or \$255,000), and case costs (Class Counsel will seek costs
21 in an amount not to exceed \$30,000);
- 22 4. Named plaintiff Jannika Schakow will seek \$10,000 from the Settlement Fund as a
23 Class Representative Enhancement;
- 24 5. The remainder of the Settlement Fund, after deduction of attorneys’ fees, case costs,
25 settlement administration costs, and Plaintiffs’ Class Representative Enhancements
26 (“Net Settlement Fund”), will be distributed to Class Members who submit valid
27 and timely Claim Forms;
- 28 6. Regardless of the number of claims made by Class Members, a minimum of sixty-

1 five percent (65%) of the Net Settlement Fund will be paid to the Class; and

2 7. One-third (33.33%) of each Class Member’s Claim Amount shall be designated as
3 wages, one-third (33.33%) as penalties, and one-third (33.33%) as interest.

4 Additionally, NY&CO shall pay its share of payroll taxes (in addition to the
5 Settlement Sum) and the Settlement Administrator will issue all W-2s and 1099s, as
6 required by law.

7 For purposes of this Settlement only, all parties agree that the Class satisfies each of the
8 requirements of Code of Civil Procedure section 382. Furthermore, the Settlement is fair,
9 reasonable, and confers a substantial benefit upon the Class Members. Accordingly, pursuant to
10 California Rule of Court 3.769, Plaintiff requests that the Court grant preliminary approval of the
11 Settlement, certify the Class for settlement purposes, set the deadline for filing objections to the
12 Settlement, schedule a final approval hearing, and approve the proposed Notice, Claim Form, and
13 Reminder Postcard.¹

14 **II. CASE BACKGROUND**

15 **A. Factual and Legal Background**

16 **1. Plaintiff’s Allegations**

17 NY&CO is a national retailer based in New York City. During the Class Period it has
18 operated approximately 56 stores in California. Prior to this lawsuit, NY&CO’s meal and rest
19 break policies were not posted in its stores. Nor were NY&CO’s California Meal and Rest Period
20 Guidelines set forth in the employee handbook that it provided to Class Members.

21 In addition, NY&CO’s staffing policies and store hours made it difficult, and often
22 impossible, for Class Members to take their legally required meal and rest breaks. NY&CO has a
23 policy and practice that (1) there must be a minimum of two employees on-duty and in a store at all
24 times and (2) at least one of these employees must be a manager (either an ASM, CSM or Store
25 Sales Leader). No employees, including managers, can be alone in a store at any time.

26
27 ¹ The Joint Stipulation of Settlement and Release between Plaintiff and Defendant (“Settlement”),
28 which includes the proposed Notice as an exhibit, is attached as Exhibit 1 to the Declaration of
Hunter Pyle (“Pyle Decl.”) filed herewith.

1 Until recently, NY&CO has also had a policy and practice of minimally staffing its stores.
2 As a result, Class Members were often scheduled to work with one other employee, or as the only
3 manager on duty, and thus unable to take meal and rest breaks. Plaintiff further contends that
4 additional meal and break periods were regularly not provided to Class Members even aside from
5 the above policies.

6 Plaintiff Jannika Schakow worked for NY&CO during two separate time periods in two
7 different positions. First, she worked as a Sales Associate in NY&CO's Riverside, California store
8 from May 2005 to July 2005. Subsequently, she worked as an ASM in NY&CO's Concord,
9 California store from October 14, 2007 to February 4, 2008.

10 During the time that she worked for NY&CO, Plaintiff was repeatedly denied meal and rest
11 breaks. Initially, Plaintiff complained to her Store Manager about this situation. When her Store
12 Manager refused to do anything about it, Plaintiff spoke with her District Sales Leader. Plaintiff's
13 complaints eventually reached the Regional Sales Manager. However, despite Plaintiff's efforts,
14 NY&CO maintained that its conduct was lawful and continued to deny her meal and rest breaks.
15 Additionally, NY&CO continued to fail to pay her an additional hour of pay for these missed
16 breaks.

17 Subsequently, Plaintiff filed this class action to challenge NY&CO's meal break, rest break,
18 and itemized wage statement policies on the grounds that they resulted in unlawful failure to
19 provide employees' meal and rest breaks and the furnishing of inadequate wage statements.

20 During the course of discovery in this lawsuit, Plaintiff learned that just months after this
21 case was filed, NY&CO implemented several significant changes to its staffing policies and trained
22 its managers and associates on the proper provision of meal periods to non-exempt employees.
23 Specifically, NY&CO increased the "base allocation" – which is the labor budget for each store -
24 from 190 to 200 hours per week at the majority of its California stores.² The stated purpose of this
25 increase was "to support ongoing compliance with State rules and regulations."³ NY&CO also for

26 _____
27 ² Deposition of designated Person Most Knowledgeable Kenneth Johnson ("Johnson Depo.") (Pyle
Decl., Exh. 2) at 139:21-140:23.

28 ³ Johnson Depo. (Pyle Decl., Exh 2) at 138:22-139:17, Exh. 18 at 1523.

1 the first time trained its California employees regarding the laws that required meal and rest breaks.
2 Finally, specific meal and rest period guidelines – contained in a handbook that was largely
3 inaccessible to many Class Members before this lawsuit – were updated with California-specific
4 rules and made available through NY&CO’s intranet in August 2008.⁴ The timing of these
5 changes strongly suggests that Plaintiff’s lawsuit was their catalyst. Plaintiff therefore contends
6 that Class Members who still work for NY&CO have received a substantial benefit separate and
7 apart from this proposed settlement.

8 **2. Defendant’s Allegations**

9 At all pertinent times, Defendant has maintained lawful meal period and rest break policies.
10 Employees were informed of these policies in various ways, and copies of the California Industrial
11 Welfare Commission’s Order setting forth California law were posted in the Defendant’s
12 California stores. Moreover, the fact that many employees took their meal periods and rest breaks
13 demonstrates that employees were informed of their right to take these breaks.

14 Moreover, Plaintiff’s claims are not suitable for class certification because Defendant’s
15 obligation under California law is only to “provide” meal periods and “authorize and permit”
16 employees to take rest breaks. While the legal standard governing the provision of meal periods
17 and rest breaks is under review by the California Supreme Court, the vast majority of recent state
18 and federal court decisions (interpreting California law) have concluded that employers do not
19 have to require employees to take their meal periods and rest breaks, but only provide them with
20 the opportunity to do so. These courts also have concluded that class certification is not
21 appropriate because the “provide” standard necessarily requires an individual inquiry into each
22 “missed” meal period and rest break to determine if the employee was prevented from taking the
23 break or voluntarily elected not to take the break.

24 Given the unsettled state of the law, Plaintiff will not be able to recover “waiting time
25 penalties” under Labor Code section 203 because there is a good faith dispute as to whether
26 Defendant was obligated to require its employees to take meal periods and rest breaks.

27 Plaintiff’s claim for penalties under Labor Code section 226 for allegedly inadequate

28 ⁴ Johnson Depo. (Pyle Decl., Exh 2) at 97:23-98:8.

1 itemized wage statements must fail because Plaintiff cannot demonstrate injury or damage on
2 account of any errors or omissions in the wage statements.

3 Plaintiff's cause of action for violation of Business and Professions Code section 17200 is
4 based on the same Labor Code violations as the underlying meal period and rest break claims, and
5 such claims are without merit for the same reasons as Plaintiff's meal period and rest break claims.

6 **B. Procedural History**

7 Plaintiff filed this class action suit on April 29, 2008. The Complaint avers that NY&CO's
8 meal and rest break policies violate California law, and seeks recovery of the unpaid meal and rest
9 period wages, related interest, penalties, and attorneys' fees and costs.⁵ The Complaint also claims
10 that NY&CO is violating California's itemized wage statement statute, Labor Code section 226, by
11 failing to list hours worked and pay rates on employees' wage statements.⁶

12 After litigation commenced, Plaintiff propounded formal discovery consisting of document
13 requests, interrogatories, and requests for admission. NY&CO objected to much of this discovery
14 on the grounds that it violated the Class Members' right to privacy, and was both premature and
15 irrelevant prior to a ruling on class certification. After the parties met and conferred, NY&CO
16 produced a variety of responsive documents including all of its meal and rest period policies and
17 several other categories of responsive documents. NY&CO also produced a sample of Class data,
18 including time records, to allow Plaintiff and her counsel to evaluate the case for mediation, as
19 described below.⁷

20 _____
21 ⁵ California law prohibits an employer from employing a non-exempt employee for more than five
22 hours per day without providing a 30-minute meal period. Cal. Labor Code § 512(a); Cal. Code
23 Regs. Tit. 8, § 11070(11). During this break, the employer must relieve the employee of all duty.
24 Cal. Labor Code § 226.7; Cal. Code Regs. Tit. 8, § 11070(11). In addition to 30-minute off-duty
25 meal breaks, employers in California must authorize and permit 10 minute off-duty rest breaks to
26 employees who work more than three and one-half hours. Cal. Code Regs. Tit. 8, § 11070.
Employers who fail to provide such meal and rest periods are required to pay premium pay of one
hour for each day a meal period is missed and an additional hour for any missed rest periods. Cal.
Labor Code § 226.7; Murphy v. Kenneth Cole Productions, Inc., 40 Cal. 4th 1094 (2007); Division
of Labor Standards Enforcement, Enforcement Policies and Procedures Manual, § 45.2.8 (meal and
rest period premiums are separate).

27 ⁶ Pyle Decl., ¶ 13.

28 ⁷ Pyle Decl., ¶ 14.

1 Plaintiff also took two depositions. First, she deposed Michelle Ghelfi, Plaintiff's district
2 manager. Second, she deposed NY&CO's Person Most Knowledgeable regarding meal period,
3 rest period, and staffing policies. The topics covered in this PMK deposition included:

- 4 ■ NY&CO's California operations
- 5 ■ NY&CO's creation, implementation, and enforcement of meal period and rest break
6 policies and procedures in California during the Class Period;
- 7 ■ NY&CO's provision of training of Class Members their supervisors regarding the
8 implementation, and enforcement of meal period and rest break policies and procedures in
9 California during the Class Period
- 10 ■ Audits, complaints, or investigations regarding NY&CO's meal or rest break policy or
11 practice; and
- 12 ■ NY&CO's time keeping system and time keeping records, and policies and procedures
13 regarding time keeping as applied or communicated to Class Members.⁸

12 In preparation for mediation and in the context of meeting and conferring over document
13 production, Plaintiff requested, and NY&CO provided, a sample of data regarding class size,
14 compensation levels, work schedules, and time records showing when meal and rest periods were
15 taken by Class Members. These records showed, among other things, how often the sampled
16 employees were working as the only manager on duty or as one of only two employees on duty.
17 They also showed whether the sampled Class Members punched out for meal and rest periods, and
18 pay rates for the class positions at issue.

19 Plaintiff then retained Hemming Morse, a forensic accounting firm, to analyze NY&CO's
20 data. Hemming Morse reviewed the sample data and provided Plaintiff with an accurate estimate
21 of NY&CO's potential exposure for missed and rest breaks and waiting time penalties if Plaintiff
22 were to prevail on a classwide basis on all claims. Hemming Morse then created detailed analyses
23 of the potential damages in this case.

24 Plaintiff provided Hemming Morse's analysis to NY&CO and the mediator, and further
25 provided computations of potential exposure for itemized wage statement violations and various
26

27
28 ⁸ Pyle Decl., ¶ 15.

1 potential subclass outcomes.⁹

2 On December 11, 2008, the parties mediated this case with David Rotman of Gregorio
3 Haldeman Piazza Rotman Frank & Feder in San Francisco. After a full day of mediation the
4 parties entered into a Memorandum of Understanding memorializing the major points of the
5 settlement presented here.¹⁰ The parties then met and conferred further over the next several weeks
6 regarding the details of the settlement set forth in the Joint Stipulation of Settlement.¹¹

7 On February 25, 2009, NY&CO's counsel informed Plaintiff's counsel that the number of
8 Class Members was 8,097, not 5,232, as the parties had believed at the time of the first mediation.
9 Subsequently, NY&CO's counsel informed Plaintiff's counsel that the number of Class Members
10 was 8,111.¹²

11 In light of this increase in the number of Class Members, Plaintiff's counsel requested that
12 NY&CO contribute more money to the overall settlement fund in this case. Defendant objected on
13 the ground that Defendant's alleged exposure for meal and rest break violations depends on the
14 number of shifts worked during the class period, not on the number of employees who worked
15 those shifts; according to Defendant, a larger class only means that more employees worked same
16 number of shifts. However, Defendant agreed to mediate the matter. On May 4, 2009, the parties
17 returned to Mr. Rotman for a second full day of mediation. At that second day of mediation,
18 NY&CO agreed to increase the floor of the settlement from 50% of the Net Settlement Fund to
19 65%. This increase will likely result in an additional \$80,000 being distributed to the Class.¹³

20 **III. SETTLEMENT TERMS**

21 The proposed settlement resolves all claims of the Plaintiff and the proposed Class against
22 NY&CO involving missed meal and rest periods, itemized pay statement and waiting time
23

24 ⁹ The history of the meeting and conferring over the damages data, and Plaintiff's analysis of
25 NY&CO's potential exposure are set forth at Pogrel Decl. ¶¶ 5-6.

26 ¹⁰ Pyle Decl. ¶ 16.

27 ¹¹ Pyle Decl. ¶ 17.

28 ¹² Pyle Decl. ¶ 18.

¹³ Pyle Decl. ¶ 19.

1 penalties. A summary of the settlement is as follows:

2 **A. Class**

3 The proposed “Class” is defined as NY&CO’s Assistant Sales Managers (“ASMs”), Co-
4 Sales Managers (“CSMs”), Junior Management Associates (“JMAs”), and Sales Associates
5 (“Associates”) (collectively “Class Members”) employed in the State of California between April
6 29, 2004 and December 31, 2008 (“Class Period”).

7 **B. Settlement Amount**

8 NY&CO has agreed to pay up to \$850,000 (“Settlement Fund”) to settle this Action, and
9 will in addition pay the employer’s share of payroll taxes arising from wage payments to Class
10 Members. As explained below, Plaintiff further requests (a) a \$10,000 Class Representative
11 Participation Award for Ms. Schakow; (b) up to thirty percent (30%) of the Settlement Fund for
12 Class Counsel’s attorneys fees, plus up to \$30,000 for actual litigation costs, and (c) payment for
13 all settlement administration costs, which will likely be \$66,500. Once these deductions are made,
14 the balance of the Settlement Amount, approximately \$520,000¹⁴, plus any interest accrued, will be
15 available for distribution to Class Members who file valid and timely claim forms (the “Net
16 Settlement Fund”).

17 The parties have also agreed that a minimum of 65% of the Net Settlement Fund will be
18 distributed to the Class regardless of how many Class Members submit claims.

19 This Settlement Fund is in addition to the non-monetary benefits that Class Members who
20 still work for NY&CO have already received. These benefits include the newly-enacted staffing
21 policies and trainings at NY&CO that are designed to ensure that eligible employees receive meal
22 and rest breaks.

23 **C. Attorneys’ Fees and Costs**

24 Pursuant to the parties’ agreement and subject to Court approval, Class Counsel’s fee and

25
26 ¹⁴ This exact amount of the Net Settlement Fund will depend on this Court’s final approval of
27 Plaintiff’s counsels’ request for attorneys’ fees and litigation costs, Plaintiff’s class representative
28 service fee, and administration costs actually incurred. The \$520,000 estimate assumes attorneys’
fees of 27% (\$229,500), litigation costs of \$25,000, service fee of \$10,000 and administration costs
of \$66,500.

1 costs award shall be disbursed from the Settlement Fund. The Joint Stipulation of Settlement
2 provides for fees and costs in an amount not to exceed 30 percent of the Settlement Fund
3 (\$255,000.00), plus actual litigation expenses. Plaintiff’s counsel understands that this Court does
4 not preliminarily approve a specific attorneys’ fee request at this point in the litigation, and on that
5 basis counsel will submit their fee request in conjunction with a motion for final approval of the
6 Settlement. Plaintiff’s final fee request will be based, in part, upon counsels’ lodestar at the time
7 of final approval. At this time, Plaintiff’s counsel does not anticipate requesting the maximum
8 30% fee, but will likely request between 25% and 28% of the Settlement Fund.

9 Plaintiff has also incurred \$26,544.45 in out of pocket costs to date, and expects to incur a
10 small amount of costs through the final approval process.¹⁵ As such, the actual amount paid in
11 costs will likely be below the maximum \$30,000. Plaintiff’s counsel will submit their request for
12 litigation costs in conjunction with a motion for final approval of the Settlement when all costs can
13 be accounted.

14 **D. Payment to Class Representative**

15 The Settlement Agreement provides for an additional amount, not to exceed \$10,000, to be
16 paid to Plaintiff for her services as Class Representative. This payment will be deducted from the
17 Settlement Fund.

18 With this motion, Plaintiff requests that the Court preliminarily approve a Class
19 Representative Payment of \$10,000 for her contributions to the prosecution of the action for the
20 benefit of the Class and risks incurred, as described below and in Plaintiff’s accompanying
21 declaration.¹⁶

22 **E. Tax Treatment**

23 The wage portion of Class Member Awards will be subject to payroll taxes and withholding
24 of all state and federal taxes. Settlement payments for interest and penalties will not be subject to
25 payroll taxes or withholding, but Forms 1099 will be issued with respect to these payments.
26

27 ¹⁵ Pogrel Decl. ¶ 22.

28 ¹⁶ Declaration of Jannika Schakow (“Schakow Decl.”), ¶¶ 2-11, filed herewith.

1 **F. Calculation of Class Members' Individual Settlement Awards / Tax Treatment**

2 Assuming the Court approves Plaintiff's requested service awards and Class Counsel's
3 attorneys' fees and expenses, and after deducting the costs of settlement administration, a Net
4 Settlement Fund of approximately \$520,000, plus interest accrued (if any), will be available for
5 distribution to Class Members who file valid and timely Claim Forms with the Settlement
6 Administrator ("Participating Class Members"). Settlement Agreement (Pyle Decl., Exh. 1) ¶
7 20(c)(i).

8 In order to figure out each Class Member's individual claim amount, each Class Member
9 will be assigned an Individual Percentage. This Individual Percentage will be calculated by
10 dividing the wages earned by the individual Class Member by the total wages earned by all Class
11 Members during the Class Period. The Individual Percentage will then be multiplied by the Net
12 Settlement Fund to arrive at the Class Member's Settlement Award ("Settlement Award").
13 Settlement Agreement (Pyle Decl., Exh. 1) ¶ 20(c)(i). The Individual Percentage will be
14 determined from NY&CO's records of individual and total Class Member earnings. Settlement
15 Agreement (Pyle Decl., Exh. 1) ¶ 20(c).

16 The Settlement Agreement further provides that one third (1/3) of each Settlement Award
17 will be considered back wages, reportable as such to the applicable taxing authorities, one third
18 (1/3) considered interest reported via tax form 1099 INT, and one third (1/3) considered penalties
19 reported via tax form 1099 MISC. Settlement Agreement (Pyle Decl., Exh. 1) ¶ 20(c)(ii). Class
20 Member payments will be reduced by payroll tax deduction amounts required by law. The
21 Administrator will make the required withholdings and payment to the applicable tax authorities.
22 NY&CO will separately pay the employer's share of payroll taxes due on the wage portion of the
23 settlement payments. Settlement Agreement (Pyle Decl., Exh. 1) ¶ 19.

24 **G. Administration of Notice, Opt-Out, and Objections Process, and Costs of**
25 **Administration**

26 The settlement administration costs will be paid out of the Settlement Fund upon the
27 Court's final approval of the settlement, after the Settlement Fund is transferred to the Settlement
28 Administrator. Settlement Agreement (Pyle Decl., Exh. 1) ¶ 24. The parties propose using

1 Rosenthal & Co. (“Rosenthal”), an experienced claims administrator, to serve as the Settlement
2 Administrator.¹⁷ Individual notice will be mailed to all Class Members, whose names and last-
3 known addresses NY&CO will provide to the Settlement Administrator. The notice will inform
4 each Class Member of the terms of the settlement, the approximate amount of pay out from the
5 Settlement Fund he or she will receive upon submission of a valid and timely claim, and of his or
6 her right to object and/or opt-out of the settlement. A follow-up reminder postcard will be mailed
7 to Class Members who do not file claims by a specified date, and will include a duplicate claim
8 form to increase the likelihood of a high claim rate.

9 The parties gathered administration cost estimates and fixed-price quotes from three
10 different settlement administration companies before deciding on Rosenthal.¹⁸ Rosenthal’s cost
11 estimate was competitive with the other two and the company has an excellent reputation for
12 reliability in the community generally and with counsel for the parties here. In finalizing its bid,
13 Rosenthal has provided a price quote under which costs of administration will be “capped” at
14 \$66,500.¹⁹

15 **H. Distribution of Settlement**

16 After payment of the Class Counsel fees and costs and Class Representative Participation
17 award, there will be approximately \$520,000²⁰ for distribution to the Class Members (the “Net
18 Settlement Fund”). The Settlement Administrator will send checks to Participating Class
19 Members.

20 **I. Unclaimed and Undistributed Settlement Payments**

21 Should any Class Member opt-out of the case or not file a timely and valid Claim Form, her
22 or his settlement award amount will not be paid out to the other Class Members , except that if the
23 total amount claimed by Participating Class Members is less that sixty-five (65%) of the Net
24

25 ¹⁷ Rosenthal & Co.’s qualifications are detailed in ¶¶ 3-4 and Exhibit A to the Declaration of Dan
26 Rosenthal, filed concurrently herewith (“Rosenthal Decl.).

27 ¹⁸ Pogrel Decl. ¶¶ 14-16.

28 ¹⁹ See Rosenthal Decl. ¶ 5, and Exhibit B thereto.

²⁰ See footnote 14 for assumptions used to calculate the estimated \$520,000 Net Settlement Fund.

1 Settlement Fund, any unclaimed amounts up to the sixty-five percent (65%) level will be
2 redistributed pro rata to Participating Class Members. By way of example, if the Net Settlement
3 Fund equals \$520,000, a minimum of \$338,000 will be paid to Participating Class Members and no
4 more than \$182,000 can revert to NY&CO. To further illustrate, if only \$175,000 worth of claims
5 are filed on a \$520,000 Net Settlement Fund, an additional \$163,000 will be distributed pro-rata to
6 Participating Class Members to bring the aggregate payout to the \$338,000 threshold.

7 The aggregate amount of any checks that are sent to, but not cashed by, Participating Class
8 Members within 90 days shall be paid to the Food Bank of Contra Costa and Solano. Settlement
9 Agreement (Pyle Decl., Exh. 1) ¶ 20(c).

10 **J. Scope of Release Provisions**

11 The release provisions contemplated by the proposed settlement correspond to the operative
12 Complaint, releasing claims for meal and rest period pay, waiting time penalties, itemized pay
13 statement penalties and Unfair Competition Law claims based on NY&CO's failure to provide
14 meal and rest periods. Settlement Agreement (Pyle Decl., Exh. 1) ¶ 32. In addition, Plaintiff will
15 execute a general release waiving all known and unknown claims against NY&CO.

16 **IV. CLASS ACTION SETTLEMENT APPROVAL PROCEDURE**

17 A class action may not be dismissed, compromised or settled without approval of the Court.
18 See Civ. Code § 1781(f); Rule of Court 3.769; Fed. Rule Civ. Proc. 23(e).²¹ Proper review and
19 approval of a class action settlement requires three steps: (1) preliminary approval of the proposed
20 settlement after submission of a written motion for preliminary approval, the proposed class
21 settlement, and the proposed class notice; (2) dissemination of mailed and/or published notice of
22 the settlement to all Class members; and (3) a formal fairness hearing, or final settlement approval
23 hearing, at which Class members may be heard regarding the settlement, and at which evidence
24 and argument concerning the fairness, adequacy, and reasonableness of the settlement is presented.
25 Rule of Court 3.769; Manual for Complex Litigation (4th ed. 2004), § 21.61. This procedure

26
27 ²¹ California courts may seek guidance from federal law regarding class certification issues. See
28 Vasquez v. Super. Ct., 4 Cal. 3d 800, 821 (1971); Green v. Obledo, 29 Cal. 3d 126, 145-146
(1981).

1 serves class members’ procedural due process rights and the Court’s role as the guardian of class
2 members’ interests. See 4 Newberg on Class Actions (4th ed. 2002) § 11.22, et seq.

3 The decision to approve or reject a proposed settlement is committed to the sound
4 discretion of the court. See Wershba v. Apple Computer, Inc., 91 Cal. App. 4th 224, 234-35
5 (2001). A decision approving a class action settlement may be reversed only upon a strong
6 showing of clear abuse of discretion. See Hanlon v. Chrysler Corp., 150 F.3d 1011, 1027 (9th Cir.
7 1998).

8 Plaintiff requests that this Court take the first step in the settlement approval process, and
9 grant preliminary and conditional approval of the proposed settlement. The Court’s preliminary
10 evaluation of the Settlement is to determine whether it is within the “range of reasonableness,” and
11 whether notice to the Class of the terms and conditions of the settlement, and the scheduling of a
12 formal fairness hearing, are worthwhile. See 4 Newberg, § 11.25. The settlement provides
13 substantial monetary relief that is fair, reasonable, and adequate, and the litigation has already
14 caused NY&CO to revise its meal and rest period policies and practices to the benefit of current
15 employees. This settlement therefore supports preliminary approval.

16 Plaintiff further requests that the Court provisionally and conditionally certify the proposed
17 Class at this time. The proposed Class is as defined above. There are approximately 8,111
18 members in the proposed Class.²²

19 Provisional and conditional class certification is appropriate at the preliminary approval
20 stage where, as here, the proposed Class as it is defined in the parties’ Settlement Agreement has
21 not previously been certified by the Court, and the requirements for certification are met. See 4
22 Newberg, § 11.22 et seq. The practical purpose of provisional and conditional class certification is
23 to facilitate distribution to the class notice of the terms of the proposed settlement and the date and
24 time of the final approval hearing. See Rule of Court 3.769; Manual for Complex Litigation, §
25 21.632. The additional rulings sought on this motion – approving the form, content and
26 distribution of the Notice of Settlement, Claim Form, Reminder Notice, and scheduling a formal
27 fairness hearing – facilitate the settlement approval process, and are also typically made at the

28 ²² See Pogrel Decl. ¶ 9.

1 preliminary approval stage. See Rule of Court 3.769. The Court may grant such relief upon
2 motion by either settling party, and may conduct any necessary hearing in court or in chambers, at
3 its discretion. See Rule of Court 3.769(d). See also Manual For Complex Litigation, § 21.632.

4 The following schedule sets forth a proposed sequence for the relevant dates and deadlines.
5 This schedule is also stated in the proposed Order lodged herewith.

6 20 days after Preliminary 7 Approval of Settlement	8 NY&CO to provide the Settlement Administrator the 9 most recent names, mailing addresses, and 10 compensation information it has for the Class 11 Members.
12 35 days after Preliminary 13 Approval of Settlement	14 Mailing of Class Notice and Claim Form by 15 Settlement Administrator.
16 30 days after mailing of Class 17 Notice	18 Mailing of Reminder Postcard by Settlement 19 Administrator.
20 60 days after mailing of Class 21 Notice	22 Last day for Class Members to submit a Timely and Valid Claim Form, Election Not to Participate, or written objections.
23 [5 court days before final 24 approval hearing]	25 Last day for filing and service of papers in support of 26 final settlement approval and requests for attorneys' 27 fees and expenses.
28 [As determined by the Court]	Final settlement approval hearing.
15 days after "Final Approval" (as defined in the Settlement Agreement) or November 4 , 2009, whichever is earlier	NY&CO to transfer Settlement Fund to Claims Administrator
20 days after "Final Approval" (as defined in the Settlement Agreement)	NY&CO to pay Class Representative Participation award to Plaintiff and pay Class Counsel fees and costs.
20 days after "Final Approval" (as defined in the Settlement Agreement):	Claims Administrator to mail individual settlement checks to Plaintiff and Class Members.

23 **V. THE PROPOSED SETTLEMENT IS MORE THAN ADEQUATE FOR**
24 **PRELIMINARY APPROVAL**

25 At the preliminary approval stage, the court has broad powers to determine whether the
26 proposed settlement is fair under the circumstances of the case. See Wershba, 91 Cal. App. 4th at
27 234-35; Mallick v. Super. Ct., 89 Cal. App. 3d 434, 438 (1979). Preliminary approval is warranted
28 if the settlement falls within "the range of reasonableness." See North County Contractor's Assn.,

1 Inc. v. Touchstone Ins. Services, 27 Cal. App. 4th 1085, 1089-1090 (1994); In re Traffic Exec.
2 Assn.-Eastern Railroads, 627 F.2d 631, 633 634 (2d. Cir. 1980). See also 4 Newberg, § 11.25.

3 For preliminary approval, the court makes an “initial evaluation” of the fairness of the
4 proposed settlement on the basis of written submissions and informal presentation from the
5 settling parties. See Manual for Complex Litigation, § 21.632.²³ To make the fairness
6 determination, the court must consider several factors, including “the strength of plaintiff’s case,
7 the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class
8 action status through trial, the amount offered in settlement, the extent of discovery completed and
9 the stage of the proceedings, [and] the experience and views of counsel....” Kullar v. Foot Locker
10 Retail Inc., 168 Cal. App. 4th 116, 128 (2008) (quoting Dunk v. Ford Motor Co., 48 Cal. App. 4th
11 1794, 1801 (1996)). The court may consider other factors as well when balancing and weighing
12 the circumstances of each case with the settlement terms proposed. See Wershba, 91 Cal. App. 4th
13 at 245. The court must ensure that “the agreement is not the product of fraud or overreaching by,
14 or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair,
15 reasonable and adequate to all concerned.” Hanlon, 150 F.3d at 1027.

16 The California standard for approval of class settlements is similar to the federal standard:
17 the settlement should be fair, reasonable, and adequate for class members overall. Dunk, 48 Cal.
18 App. 4th at 1801. A presumption of fairness exists where: (1) the settlement is reached through
19 arm’s-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the
20 court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of
21 objectors is small. Id. at 1802.

22 The Court should review these factors and, in its final analysis, ensure that the proposed

23 ²³ The Manual for Complex Litigation summarizes the preliminary approval criteria as follows:

25 The judge should make a preliminary determination that the proposed class satisfies
26 the [class certification] criteria...The judge must make a preliminary determination
27 on the fairness, reasonableness, and adequacy of the settlement terms and must
28 direct preparation of the notice of the certification, proposed settlement, and the date
of the final fairness hearing.

§ 21.632; See also 4 Newberg, § 11.25.

1 settlement represents a reasonable compromise given the magnitude and apparent merit of the
2 claims being released, discounted by the risks and expenses of attempting to establish and collect
3 on those claims by pursuing the litigation. Kullar, 168 Cal. App. 4th at 129. The information that
4 the Court needs to perform this analysis is contained herein and in the accompanying Declaration
5 of David Pogrel.

6 **A. The Settlement Is Within the Range of Reasonableness**

7 The Settlement results in a substantial benefit to all Class Members: up to \$850,000 in
8 total, including attorneys' fees and costs, Plaintiff's service award and the costs of settlement
9 administration. Furthermore, if this Court approves the settlement and anticipated fees and costs,
10 approximately \$520,000 will be available to the individual Class Members upon filing of claims.
11 This is an eminently reasonable amount given the difficulty of the claims and the degree of risk
12 involved in further litigation, as explained further below. Also, because a variety of outcomes
13 would be possible here, the potential damages that could be awarded varies greatly between zero
14 and maximum value.²⁴ Finally, currently employed Class Members have already enjoyed
15 substantial benefits in the form of changes in NY&CO policies and trainings designed to ensure
16 meal and rest period compliance. Accordingly, the Settlement provides meaningful relief for
17 disputed meal and rest period violations, itemized pay statement penalties, and related claims that
18 makes it well within the range of reasonableness.²⁵

19 **B. The Settlement Is the Product of Non-Collusive, Arms' Length, Informed Negotiations**
20 **following Discovery and Investigation**

21 California courts recognize that "a presumption of fairness exists where . . . [a] settlement is
22 reached through arm's-length bargaining." Wershba, 91 Cal. App. 4th at 245. Here, the
23 Settlement was reached after a reasonable exchange of damages and liability information and frank
24

25
26 ²⁴ Plaintiff's claim-by-claim analysis of NY&CO's potential exposure, including analysis of a
27 possible subclass, is set forth at Pogrel Decl. ¶¶ 11-12.
28

1 discussion between counsel regarding the value of the case, and two days of mediation with a
2 highly-skilled and experienced mediator.

3 Furthermore, as set forth above, after learning of additional Class Members, Plaintiff's
4 counsel negotiated with NY&CO's counsel for changes to the Settlement that will significantly
5 benefit the Class. In reaching settlement, counsel on both sides relied on their respective
6 substantial litigation experiences in similar employment class actions, and thorough analysis of the
7 legal and factual issues presented in this case.

8 Class Counsel's factual investigation and evaluation of this case consisted of gathering
9 information and documents from Plaintiff, representing Plaintiff in a related unemployment
10 insurance appeal hearing, conducting the above-referenced discovery (including taking the
11 deposition of one PMK and Plaintiff's District Manager), obtaining sample data from NY&CO for
12 purposes of settlement, retaining Hemming Morse to analyze the data and extrapolate to potential
13 classwide exposure, and performing other, less complex, damages estimates independent of the
14 expert forensic accountants. Information gleaned from this investigation informed Plaintiff and
15 Class Counsel's assessment of the strengths and weaknesses of the case and the benefits of the
16 Settlement at this juncture of the litigation.

17 **C. NY&CO Contests Liability and Further Litigation Would Be Costly and Time**
18 **Consuming**

19 The reasonableness of the proposed settlement is underscored by the fact that NY&CO has
20 legal and factual grounds available to defend this action. Plaintiff believes that NY&CO would
21 have mounted a vigorous defense during further litigation. While Class Counsel is confident that
22 the meal, rest period, and pay statement policies and practices did not comply with California law,
23 continued litigation would be costly, time consuming, and not certain in outcome. Class Counsel
24 would still have to litigate class certification, establish class-wide liability, and then prove up
25 various issues regarding damages and penalties. Such efforts would likely take many months, if
26 not years, and necessitate expert witness testimony. By contrast, the Settlement ensures timely
27 relief and substantial recovery of the wages Plaintiff contends are owed to the Class in addition to
28 the changed practices already implemented by NY&CO.

1 In addition to factual disputes, NY&CO presented numerous legal defenses to the claims in
2 this litigation that, if successful, would have either reduced or eliminated recovery to the Class.
3 These defenses are described briefly below. While Plaintiff believes she would prevail on these
4 class and merits issues, she is obliged to bring this information to the Court’s attention for
5 evaluation of the settlement and attendant risks of further litigation. See, Kullar, 168 Cal. App. 4th
6 at 129 (Court bears the responsibility to ensure recovery is a reasonable compromise based on,
7 among other items, the risks of establishing the claims alleged).²⁶

8 Above all, NY&CO contends that none of Plaintiff’s claims are suitable for class
9 certification because individual issues predominate over common issues on the meal and rest
10 period claims because NY&CO’s obligation to provide meal and rest periods is only to make them
11 available, not actually ensure that workers receive them. At the time of settlement, Brinkley v.
12 Public Storage, 167 Cal. App. 4th 1278 (2008), review granted,²⁷ supported NY&CO’s position as
13 did a number of Federal District Court opinions on the issue.²⁸ While Plaintiff contends that
14 statutory language and the holding in Cicairos v. Summit Logistics, 133 Cal. App. 4th 949 (2005)
15 (“Cicairos”) support class certification²⁹ (because employers are obliged to ensure meal periods
16 and not prohibit rest periods), a denial of certification on the meal and rest break claims– which
17 would then impact the derivative penalty, interest, and other claims–would mean no recovery for
18 the Class unless they filed individual lawsuits for small damages or affirmatively joined with
19 Plaintiff here. Adding further to the uncertainty on the ensure/make available issue, there was risk
20 for both sides because this issue, along with other legal questions that could impact this case, is
21 currently under review by the California Supreme Court in Brinker Restaurant Corp. v. Sup. Ct.,

22 _____
23 ²⁶ Plaintiff’s analysis of the potential damages associated with each of her claims, including various
24 outcomes of alternate classes, and how those damages would be reduced if various combinations of
the defenses were successful, is presented in Pogrel Decl., ¶ 11.

25 ²⁷ Review granted on January 14, 2009.

26 ²⁸ See e.g., White v. Starbucks Corp. U.S. Dist. LEXIS 48922 (2007).

27 ²⁹ Bufile v. Dollar Financial Group, Inc., 162 Cal. App. 4th 1193 (2008), further supports Plaintiffs
28 position that this class should be certified, particularly for the subclass of employees who missed
their meal and/or rest periods because they were one of only two employees on duty or the only
manager on-duty.

1 165 Cal. App. 4th 25 (2008), review granted.

2 Other legal issues, including defenses raised by NY&CO, could also impact the merits of
3 Plaintiff's meal, rest, and related claims, whether pursued individually or certified for classwide
4 resolution.

5 NY&CO also claims that Plaintiff is limited to only one meal period premium for each day
6 worked, regardless of the number of meal and rest periods not provided. If NY&CO prevails on
7 this issue, it will effectively reduce the damages available to the Class by half. Plaintiff disputes
8 NY&CO's theory and contends that meal and rest period obligations are distinct from one another
9 and provide for separate premium wages. At this time, there is no guidance from the Appellate
10 Courts regarding this critical issue.

11 On the Labor Code section 203 (waiting time penalty) claim, which is derivative of
12 Plaintiff's primary meal and rest period allegations, Plaintiff would recover nothing for herself or
13 the Class if she is unsuccessful on the underlying claims. Even if Plaintiff is successful, NY&CO
14 has argued that it can prove its defense that, at the time it paid Class Members their wages, there
15 was a good faith dispute regarding whether meal and rest period pay was owed. See, Cal. Code
16 Regs. Tit. 8, § 13520 (good faith dispute, based in law or fact, precludes award of waiting time
17 penalties). As one example of its waiting time penalty defense, NY&CO claims that there is a
18 good faith dispute regarding its obligation to "provide" a meal and/or rest period as illustrated by
19 the conflicting opinions on the issue, as described above, and the fact that this issue is currently on
20 review in Brinker. Again, Plaintiff disputes any good faith defense but recognizes the risk that this
21 Court or a jury might ultimately disagree with her.

22 Plaintiff's cause of action for violation of Business and Professions Code § 17200 (the
23 "UCL") is based on the same Labor Code and Wage Order violations as the underlying meal and
24 rest period claims. If this Court were to rule against her on the predicate claims, the UCL claims
25 would also fall.

26 Plaintiff's final cause of action is for penalties for the Class under Labor Code section 226,
27 which requires employers to provide specific information on employees' itemized wage statements
28 or pay a penalty of up to \$4000 per aggrieved employee. See, Cal. Lab. Code § 226. The principal

1 legal dispute concerning Section 226 is how a plaintiff satisfies her obligation to prove “injury” on
2 an individual and/or classwide basis. See, Cal. Lab. Code § 226(e) (an employee “suffering injury”
3 is entitled to the penalty). Plaintiff’s position is that this claim should be certified, and that she will
4 prevail on the merits, because Class Members were injured by not knowing whether they were
5 properly paid for hours worked. See Wang v. Chinese Daily News, Inc., 435 F. Supp 2d 1042,
6 1051 (C.D. Cal 2006). NY&CO contends that individual issues predominate and that each
7 employee would be required to separately prove a higher level of injury to prevail. At the time of
8 settlement, the Brinkley decision, on which review has since been granted, arguably provided
9 support for this position and presented risk for Plaintiff and the Class despite a favorable holding in
10 the Wang case. See, Brinkley, 84 Cal. Rptr. 3d at 879-880, review granted.

11 NY&CO, represented by competent and experienced counsel, would undoubtedly have
12 raised all of the above arguments, and more, in continued litigation. Despite Plaintiff’s confidence
13 in her ability to prove all of her claims on a classwide basis, any one of the above defenses, if
14 decided in favor of NY&CO, could reduce or even eliminate any potential damages award.

15 **D. The Participation Payment to the Named Plaintiffs Is Reasonable**

16 The proposed Class Representative Participation award of \$10,000 to Plaintiff Schakow is
17 intended to recognize her initiative and efforts on behalf of the Class. This amount will be
18 deducted from the Settlement Fund.

19 Courts routinely approve incentive awards to compensate named plaintiffs for the services
20 they provide and the risks they incur during class action litigation. See Ingram v. The Coca-Cola
21 Co., 200 F.R.D. 685, 694 (N.D. Ga. 2001). See also Bell v. Farmers Ins. Exchange, 115 Cal. App.
22 4th 715, 726 (2004) (upholding “service payments” to named Plaintiffs for their efforts in bringing
23 the case); Manual for Complex Litigation, § 21.62, fn. 971 (noting that such awards “may
24 sometimes be warranted for time spent meeting with Class Members, monitoring cases, or
25 responding to discovery.”) In Ingram v. Coca-Cola, the court approved incentive awards of
26 \$300,000 to each named plaintiff in recognition of the services they provided to the class by
27 responding to discovery, participating in the mediation process, and incurring the risk in stepping
28 forward on behalf of the class. See 200 F.R.D. at 694. See also Van Vranken v. Atlantic Richfield

1 Co., 901 F. Supp. 294 (N.D. Cal. 1995) (approving \$50,000 participation award).

2 In the present case, Schakow came forward and initiated this action, on her own and on
3 behalf of the entire class, assisted counsel in investigating the case through numerous phone calls
4 and meetings, took time away from work to attend a deposition and mediation, and incurred
5 personal risks as the named plaintiff suing her former employer during the early stages of her
6 career.³⁰ The maximum \$10,000 payment fairly compensates her for the assistance she provided to
7 Class Counsel, services rendered to the Class, and risks incurred. The Class Representative
8 Participation award proposed here is therefore appropriate and justified as part of the overall
9 settlement.

10 **E. The Proposed Notice Is Reasonable**

11 In order to protect the rights of absent Class Members, the Court must provide the best
12 notice practicable of a potential class action settlement. See Phillips Petroleum Co. v. Shutts, 472
13 U.S. 797, 811-12 (1985); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 174-175 (1974). The
14 primary purpose of procedural due process is to provide affected parties with the right to be heard
15 at a meaningful time and in a meaningful manner. It does not guarantee any particular procedure
16 but rather requires only notice reasonably calculated to apprise interested parties of the pendency of
17 an action affecting their interests and an opportunity to present their objections. Ryan v. California
18 Interscholastic Federation - San Diego Section, 94 Cal. App. 4th 1048, 1072 (2001).

19 Preliminary approval of the Settlement will enable notice to go out to Class Members in the
20 manner best calculated to ensure that Class Members are alerted to the terms of the settlement. The
21 parties' proposed notice plan is as follows: The Settlement Administrator's fees and expenses,
22 including the cost of notice, will be paid out of the Settlement Fund. If the Court preliminarily
23 approves the settlement, within 20 days after such order is entered, NY&CO will provide the
24 Settlement Administrator with the names, most current mailing addresses, social security numbers,
25 and compensation information needed to calculate settlement shares (available from NY&CO's
26 records) for the Class Members.

27 _____
28 ³⁰ Schakow Decl., ¶¶ 2-12. In particular, Plaintiff runs the risk that a future prospective employer
will search for her name on the Internet and discover this lawsuit.

1 Within 35 days of preliminary approval, the Settlement Administrator will mail the court-
2 approved notice (“Notice”) and Claim Form, including instructions for how to opt-out or object, to
3 all identified Class Members via first-class regular U.S. Mail. The Notice will be sent to the
4 mailing address information provided by NY&CO from its employment records, unless modified
5 by any updated address information that the Settlement Administrator obtains in the course of
6 administration of the Settlement.

7 The Notice informs Class Members about the terms of the Settlement. The accompanying
8 Claim Form explains to each individual Class Member the estimated payment that he or she is
9 entitled to under the Settlement.³¹ The Notice informs Class Members that a final approval hearing
10 has been scheduled, and informs Class Members that they must file a valid and timely Claim Form
11 if they want to collect from the settlement. The Notice further explains that if Class Members wish
12 to object to the Settlement, they must file with the Court and serve on counsel for the parties either
13 a written statement objecting to the Settlement or a written notice of intention to appear and object
14 at the final approval hearing and informs them of the deadline for doing so. Finally, the Notice
15 informs Class Members of their right to opt out of the Settlement and the process for doing so by
16 submitting an executed statement of his or her election not to participate in the class action and
17 informs them of the deadline for doing so.

18 If a Notice is returned because of an incorrect address, the Settlement Administrator will
19 search for a more current address for the Class Member and re-mail the Notice and accompanying
20 papers to the Class Member. If the Notice is re-mailed, the Settlement Administrator will note for
21 its own records and notify Class Counsel and NY&CO’s Counsel of the date of each such re-
22 mailing.

23 The Settlement Administrator will mail a reminder postcard to all Class Members who have
24 not filed their claims by 30 days after the date that the Notices are mailed. This reminder postcard
25 will bolster the Notice, further encourage Class Members to collect their individual settlement
26 shares, and provide an additional layer of protection for Class Members who inadvertently

27 _____
28 ³¹ A copy of the proposed Notice is attached as Exh. A to the Joint Stipulation of Settlement (Pyle
Decl., Exh. 1).

1 misplaced their notice or had forgotten to file their claim.

2 Because the Class Members are NY&CO's current and former employees, notice in this
3 matter is simpler than in other types of class actions. The proposed notice plan, calling for first-
4 class mailed notice to all Class Members and a follow-up reminder postcard, meets the
5 constitutional standards and should be approved.

6 **VI. PROVISIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE**

7 California courts are authorized to adjudicate class-wide claims based on a common course
8 of conduct. Sav-On Drug Stores, Inc. v. Superior Court, 34 Cal. 4th 319, 331 (2004) (common
9 issues may be present when defendant's alleged wrongful acts are allegedly the same with regards
10 to each class member). California law and policy favor the fullest and most flexible use of the
11 class action procedure, so any doubt as to the appropriateness of certification should be resolved in
12 favor of certification. See Sav-On, 34 Cal. 4th at 339, 340; Vasquez, 4 Cal. 3d at 821; Richmond
13 v. Dart Industries, 29 Cal. 3d 462, 473-474 (1981).

14 Class certification is appropriate when (1) the class is ascertainable and (2) there is a well-
15 defined community of interest in the questions of law and fact involved affecting the parties to be
16 represented. Sav-On, 34 Cal. 4th at 326; Linder v. Thrifty Oil Co., 23 Cal. 4th 429,435 (2000).
17 The "community of interest" element embodies three factors: (1) predominant common questions
18 of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class
19 representatives who can adequately represent the class. Sav-On, 34 Cal. 4th at 326. Finally, the
20 court must determine that a class action proceeding is the superior means for the fair and efficient
21 adjudication of the litigation. Id. at 326; Dunk, 48 Cal. App. 4th at 1806. For settlement purposes,
22 each of these prerequisites must be met.³² See Wershba, 91 Cal. App. 4th at 237-38.

23 Here, each of the requirements for class certification is met. For settlement purposes only,
24 NY&CO does not oppose Plaintiffs' contentions regarding provisional certification of a Class.

25
26 _____
27 ³² State law class certification requirements under Code of Civil Procedure section 382 mirror the
28 federal law requirements under Federal Rule of Civil Procedure 23 of numerosity, typicality of the
class representative's claims, adequacy of representation, predominance of common issues, and
superiority. See Hanlon, 150 F.3d at 1019.

1 **A. The Proposed Class is Ascertainable**

2 Here, the members of the Class are readily ascertainable through NY&CO’s own records.
3 See Rose v. City of Hayward, 126 Cal. App. 3d 926, 932 (1981) (finding that “[c]lass members are
4 ‘ascertainable’ where they may be readily identified without unreasonable expense or time by
5 reference to official records.”). NY&CO has already compiled the necessary information to
6 identify the Class Members and can readily gather the compensation information, and last-known
7 addresses for its former employees. The ascertainability requirement is thus met.

8 **B. The Proposed Class is Sufficiently Numerous**

9 The numerosity requirement is met if the class is so large that joinder of all members would
10 be impracticable. See Gay v. Waiters’ & Dairy Lunchmen’s Union, 489 F. Supp. 282 (N.D. Cal.
11 1980), affd. 694 F.2d 531 (9th Cir. 1982). NY&CO’s records show that there will be
12 approximately 8,111 Class Members. Joinder of all of these individuals would be impracticable
13 and a classwide proceeding is preferable because this number is so large. Cf. Hebbard v. Colgrove,
14 28 Cal. App. 3d 1017, 1030 (1972) (certifying class with only 28 members); Rose, 126 Cal. App.
15 3d at 934 (class of 42 sufficiently numerous); B.W.I. Custom Kitchen v. Owens-Illinois, Inc., 191
16 Cal. App. 3d 1341, 1354 (1987) (ordering trial court to certify class involving “thousands of class
17 members”).

18 **C. The Commonality Requirement is Met**

19 The commonality requirement is met when there are questions of law and fact common to
20 the class. See Sav-On, 34 Cal. 4th at 326-27; Hanlon, 150 F.3d at 101. Commonality requires only
21 that common legal or factual questions predominate; the plaintiffs need not show that all issues in
22 the litigation are identical. See Sav-On, 34 Cal. 4th at 328, 332-33; Richmond, 29 Cal. 3d at 47.
23 NY&CO’s meal and rest period policies, staffing policies and the administration thereof are central
24 to the commonality inquiry. Cf. City of San Jose v. Superior Court, 12 Cal. 3d 447, 460 (1974);
25 Vasquez, 4 Cal. 3d at 810, 812-13.

26 Where, as here, the defendant employer’s conduct is uniformly directed at a class of
27 employees, the class-wide impact of the defendant’s policies satisfies the commonality
28 requirement. See Sav-On, 34 Cal. 4th at 331; Vasquez, 4 Cal. 3d at 810-11; Stephens v.

1 Montgomery Ward & Co., Inc., 193 Cal. App. 3d 411, 421 (1987). Furthermore, California courts
2 routinely certify class actions in the employment arena where, as here, an employer’s policy
3 regarding benefits or wages is applied across the board to all employees or certain categories of
4 employees. For example, class certification was deemed appropriate where a municipal employer
5 failed to include certain amounts (such as allowances to buy uniforms and ammunition) in
6 calculating police officers’ and firefighters’ “final compensation” for the purpose of computing
7 retirement benefits. Rose, 126 Cal. App. 3d 926. The court held that common questions of law
8 and fact predominated because one decisive issue pervading the litigation. Id. at 933.

9 Here, as in Rose, the decisive issue pervading the litigation is the legality of a uniform
10 policy and practice – that is, NY&CO’s meal and rest period policies, its common practice of
11 failing to provide such breaks, and its uniform wage statements. The scope of this case is narrowly
12 focused, limited to a class of former and current employees of NY&CO. Plaintiff and the Class
13 assert common claims for unpaid meal and rest periods, itemized pay statement and related
14 penalties stemming from NY&CO’s uniform meal and rest period policies, staffing policies and
15 practices, and the form of its itemized wage statements. These common factual and legal issues
16 predominate over any individual issues because Plaintiff and members of the Class will rely on
17 identical evidence to establish NY&CO’s liability. Because common issues predominate over any
18 possible individual issues NY&CO might raise, certification is appropriate. See Hicks v. Kaufman
19 & Broad Home Corp, 89 Cal. App. 4th 908, 916 (2001).

20 **D. The Typicality Requirement is Met**

21 Class representatives’ interests need not be identical to other class members; to be typical,
22 plaintiffs and class members need only be similarly situated. B.W.I. Custom Kitchen, 191 Cal.
23 App. 3d at 1347. The typicality requirement does not focus on the personal characteristics of the
24 representative plaintiff or her individual circumstances with respect to the class, but rather upon the
25 typicality of the proposed representative’s claims as they relate to the defendants’ conduct and
26 activities. See Classen v. Weller, 145 Cal. App. 3d 27, 46 (1983) (“The only requirements are that
27 common questions of law and fact predominate and that the class representative be similarly
28 situated” vis-à-vis the class) (emphasis in original). A representative plaintiff’s claim is typical if it

1 arises from the same event, practice or course of conduct that gives rise to the claims of other class
2 members, and if his or her claims are based on the same legal theory. Id.

3 Plaintiff meets the typicality requirement here because she, like thousands of other current
4 and former NY&CO employees, was not allowed to take her meal and rest periods, as required by
5 California law. Plaintiff's legal claims here are typical of those of the Class as a whole because
6 they arise under the same legal theory and the same NY&CO policies and practices.

7 **E. The Adequacy Requirement is Met**

8 Plaintiff can adequately represent the class where she is represented by qualified counsel
9 and has interests aligned with the class. McGhee v. Bank of America, 60 Cal. App. 3d 442, 450
10 (1976). Vigorous prosecution of class claims also supports a showing of adequacy. Social
11 Services Union, Local 535 v. County of Santa Clara, 609 F.2d 944, 946-7 (9th Cir. 1979); Kelley v.
12 SBC, Inc., 5 Wage & Hour Cas. 2d (BNA) 16 (N.D. Cal. 1998).

13 Plaintiff has shown herself to be a more than an adequate representative of the class, as she
14 shares interests with the Class and has pursued those interests vigorously. Plaintiff has devoted
15 time and effort to prosecuting the class claims, including: assisting counsel with investigating the
16 case and attending a deposition and mediation. The firms seeking to represent the Class are well
17 qualified to do so.³³ The adequacy of representation requirement is thus met.

18 The Settlement presents no conflicts, as Schakow and all of the Class Members will receive
19 a pro rata portion of the Settlement Fund based on their total wages during the covered period.
20 Thus, no settlement allocation questions are raised here. See Hanlon, 150 F.3d at 1020-1021.
21 Moreover, “[p]otential plaintiffs are not divided into conflicting discrete categories,” since they all
22 claim meal and rest period wages while employed for NY&CO in California. Id. at 1021. Finally,
23 any Class Member who wishes to opt out of the Settlement may do so. See Id. There is therefore
24 no conflict of interest between Schakow and the Class Members.

25 **F. Common Issues Predominate and Classwide Settlement is Superior to Other Available**
26 **Methods of Resolution**

27 Class certification is authorized where common questions of law and fact predominate over

28 ³³ Pyle Decl. ¶¶ 3-12, and Pogrel Decl. ¶¶ 17-22, setting forth counsel's qualifications.

1 individual questions, and where classwide treatment of a dispute is superior to individual
2 litigation.³⁴ See Sav-On, 34 Cal. 4th at 326; Richmond, 29 Cal. 3d at 469. The test is whether
3 proposed classes are sufficiently cohesive to warrant adjudication by representation. See Hanlon,
4 150 F.3d at 1022. The Class in this case is sufficiently cohesive, since all Class Members share a
5 “common nucleus of facts and potential legal remedies.” See id. Plaintiff and Class Members seek
6 meal and rest period pay under California law; common questions about NY&CO’s the legality of
7 NY&CO’s policies and practices and its “good faith” defense to waiting time penalties predominate
8 over individual questions; and the Class Members’ potential legal remedies are identical. Thus,
9 this Class may be certified for settlement purposes.

10 Furthermore, particularly in the settlement context, class resolution is superior to other
11 available methods for the fair and efficient adjudication of the controversy. See Hanlon, 150 F.3d
12 at 1023; Dunk, 48 Cal. App. 4th at 1807 fn.19. The superiority requirement involves a
13 “comparative evaluation of alternative mechanisms of dispute resolution.” Hanlon, 150 F.3d at
14 1023. Here, as in Hanlon, the alternative methods of resolution are individual claims for a
15 relatively small amount of damages. See id. These claims “would prove uneconomic for potential
16 plaintiffs” because “litigation costs would dwarf potential recovery.” Id. The class action device
17 can also conserve judicial resources by avoiding the waste and delay of repetitive proceedings and
18 prevent inconsistent adjudications of similar issues and claims. See NASDAQ Market-Markers
19 Antitrust Litig., 169 F.R.D. 493, 529 (S.D.N.Y. 1996) (noting that the relevant inquiry is not
20 individual versus class cases, but other methods for the group-wide adjudication of a controversy).
21 For this reason, in this case, as in Hanlon, a class action is the preferred method of resolution.

22 Class certification in this case will provide substantial benefits to the litigants and the
23 Court. The alternative to class certification here is the filing of thousands of individual cases. A
24 raft of individual cases would waste judicial resources and could lead to inconsistent adjudications
25 of similar issues and claims. Many Class Members with relatively small claims would likely
26

27 ³⁴ When assessing predominance and superiority, a court may consider that the class will be
28 certified for settlement purposes only, and that manageability of trial is therefore irrelevant. See
Amchem Products, Inc. v. Windsor, 521 U.S. 591, 620 (1997).

1 decide not to bother pursuing their claims at all. Aside from class treatment, a group-wide
2 adjudication of unlawful conduct is not available. Rather than having a multiplicity of
3 proceedings, all involving substantially the same issues and evidence, a class action allows these
4 matters to be resolved once on behalf of all claimants. For all these reasons, a Class should be
5 certified.

6 **VII. CONCLUSION**

7 The arm's-length settlement of this matter avoids significant litigation risk and makes an
8 \$850,000 Settlement Fund available to thousands of NY&CO's current and former employees.
9 For all of the reasons set forth above, the Court should certify the proposed Class, grant
10 preliminary approval, approve the proposed notice plan, and schedule a final approval hearing as
11 the Court's calendar permits.

12
13 Dated: _____, 2009

HUNTER PYLE
PAMELA KONG
SUNDEEN SALINAS & PYLE

AARON KAUFMANN
DAVID POGREL
HINTON, ALFERT & SUMNER

14
15
16
17
18 By: _____
19 Hunter Pyle
Attorneys for Plaintiff Jannika Schakow

20 Dated: _____, 2009

21 DAVID S. BRADSHAW
22 CARY G. PALMER
NATHAN W. AUSTIN
JACKSON LEWIS LLP

23
24 By: _____
25 David Bradshaw
Attorneys for Defendant Lerner New York, Inc..