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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGLES – CENTRAL CIVIL WEST

KYLE FRENCHER, on behalf of herself and others similarly situated.

PLAINTIFF,

vs.

PACIFICA OF THE VALLEY CORPORATION dba PACIFICA HOSPITAL OF THE VALLEY; and DOES 1 to 100, Inclusive.

DEFENDANTS.

Case No.: BC559056

Assigned for all Purposes to the Hon. Elihu M. Berle, Dept. 323

CLASS ACTION

PLAINTIFF'S PROPOSED TRIAL PLAN

[Filed and served concurrently with Plaintiff's Notice of Motion and Motion for Class Certification; Memorandum of Points and Authorities; Compendium of Evidence Volumes 1-3; Proposed Trial Plan; and [Proposed] Order]

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I. INTRODUCTION

Plaintiff Kyle Frencher hereby submits this proposed trial plan as a demonstration that trial of the claims in this case is eminently manageable. As set forth below, each of the central claims in this case canl be established through common evidence and primarily through analysis of objective payroll data. Individualized questions regarding the amount of the damages and restitution to be awarded once liability is determined can also be effectively managed. Accordingly, the Court should grant Plaintiff's motion for class certification and adopt the trial plan as outlined below.

II. PLAINTIFF'S BURDENS AT TRIAL

For each claim tried, Plaintiff will have to introduce sufficient evidence to demonstrate by a preponderance of the evidence that Defendant has violated the California Labor Code and Wage Order 5. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 546 ["The default standard of proof in civil cases is the preponderance of the evidence."]; see also Evid. Code § 115 ["Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence]; *People v. Super. Ct. (Kaufman)* (1974) 12 Cal.3d 421, 431 [applying preponderance standard to UCL action].) The amount of damages, and the amount of restitution to be awarded pursuant to the Unfair Competition Law ("UCL"),[1] however, need not be established with precision. Such amounts need only be supported by evidence that is "sufficiently reliable to permit a just determination of the defendant's liability within recognized standards of admissible and probative evidence." (3 A. Conte & H. Newberg, *Newberg on Class Actions* (4th ed. 2002) § 10.2, p. 477; see also *Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 700 ["The amount of restitution awarded under the False Advertising and Unfair Competition Laws and the CRLA must be supported by substantial evidence."[2]]; *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727-728 [when an employer fails to keep accurate records of employees compensable hours "an employee has carried out his burden if he

[1] Unpaid wages constitute a basis for restitution pursuant to the UCL. (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 177.)

[2] Substantial evidence" is evidence "of ponderable legal significance" that is "reasonable in nature, credible and of solid value." (*JKH Enterprises, Inc. v. Dep't of Indus. Relations* (2006) 142 Cal.App.4th 1046, 1057.) Inferences that are the product of logic and reason constitute substantial evidence. (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.) Expert opinion that is based on conclusions or assumptions supported by evidence in the record also constitutes substantial evidence. (*Id.*; see also *Kuhn v. Dep't of Gen. Servs.* (1995) 22 Cal.App.4th 1627, 1633.)

proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative he reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate."].)

III. PLAINTIFF'S PROPOSED TRIAL PLAN AND EVIDENCE

Plaintiff outlines below the manner in which she can satisfy her burden at trial, including descriptions of the evidence she may submit.

A. Unpaid Minimum Wage Claim and Auto-Deduction of Meal Breaks

The Labor Code requires employers to compensate employees for all hours worked. (*Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 324 ["California's labor statutes reflect a strong public policy in favor of full payment of wages for all hours worked."].) The reason for the work is immaterial. (29 C.F.R. § 785.11.) As long as the employer knows or has reason to know that the employees are continuing to work, that time is compensable. (*Morillion vs. Royal Packing Co.* (2000) 22 Cal.4th 575, 585.)

Defendant was required by law to keep accurate records showing all hours worked by employees. (Lab. Code §226, subd. (a), 1174, subd. (d); Wage Order 5, subd. 7(A), (C).) Since Defendant required the employees to clock in at the beginning of work and clock out at end of work and supervisors reviewed the times for accuracy prior to rounding or auto-deduction, Defendant has kept accurate records establishing the amount of unpaid work performed by class members.

Defendant Representatives will be called to support all issues affecting liability and damages, including timekeeping systems, calculation of worked hours as well as payment of wages. Additionally, deposition excerpts will be utilized for unavailable witnesses and defendant parties as well as usage of the class members' timecards and paystubs. As such, the amount of the unpaid time can be determined by comparing the worked hours based on the employees' timecards to the paid hours according to Defendant's records. Plaintiff's counsel will offer testimony of an expert familiar with wage and hour class action cases to testify as to the analysis and/or interpretation of the timecards

and the provided compensation.

As such, even though the desired level of precision and confidence has to be only a 95% confidence interval for most purposes, there will be 100% confidence interval in the pending action. (*In re Estate of Marcos Human Rights Litigation* (D. Haw. 1995) 910 F.Supp. 1460, 1465, fn. 7 *aff'd sub nom. Hilao v. Estate of Marcos* (9th Cir. 1996) 103 F.3d 767 ["A 95% confidence level certainly meets any due process or confrontation claim made by the defendant."].)

B. 2nd Meal Break Violations

Labor Code section 512 states in relevant part:

> An 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…An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes…

(Lab. Code § 512; Wage Order 5, subd. 11.) Accordingly, California law requires a 30-minute, uninterrupted, duty-free meal period for every five hours of work, including a second meal period when an employee works 10 hours. (*Bono Enter., Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968, 979; see also Wage Order 5, subd. (11)(A), (B); Lab. Code §226.7(a).)

Defendant Representatives will be called to support all issues affecting liability and damages. As stated in the motion, Defendant admits that employees who work over 10 hours are entitled to second meal breaks however Defendant never informed the employees and never provided the employees with the opportunity to take second meal breaks. Since Defendant required the employees to clock in and out at the beginning and end of the shift, as well as the fact that Defendant has admitted that the Class Members' Time Card Report accurately reflects the daily worked hours, Plaintiff will utilize the Class Members' Time Card Report to determine and identify the class members that have worked more than 10 hours per day without receiving 2nd meal breaks. Plaintiff's counsel will offer testimony of an expert familiar with wage and hour class action cases to testify as to the analysis and/or interpretation of the timecards and the provided compensation.

C. 3rd Rest Break Violation

California law states that "[e]very employer shall authorize and permit all employees to take

rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. … If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the rest period is not provided." (Wage Order 5, subd. 12; see Lab. Code § 226.7.) Under California law, "[e]mployees are entitled to 10 minutes' rest for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on." (*Brinker v. Superior Court* (2012) 53 Cal.4th 1004, 1029; Lab. Code §226.7; see Wage Order 5, subd. 12.) Rest periods must be in the middle of each work period. (Wage Order 5, subd. 12.)

Defendant Representatives will be called to support all issues affecting liability and damages. As stated in the motion, Defendant admits that it believed that the employees were entitled to 3rd rest breaks after working more than 12 hours. Since Defendant required the employees to clock in and out at the beginning and end of the shift, as well as the fact that Defendant has admitted that the Class Members' Time Card Report accurately reflects the daily worked hours, Plaintiff will utilize the Class Members' Time Card Report to determine and identify the class members that have worked more than 10 hours per day and that were entitled to 3rd rest breaks but never received it. Plaintiff's counsel will offer testimony of an expert familiar with wage and hour class action cases to testify as to the analysis and/or interpretation of the timecards and the provided compensation.

D. Wage Statement Class

Pursuant to Labor Code section 226(a) and the Wage Order, Plaintiff and the class members were entitled to receive, semimonthly or at the time of each payment of wages, accurate itemized statements showing: a) gross wages earned; b) the total hours worked by the employee; and c) net wages earned. Defendant failed to provide Class Members with accurate itemized statements in accordance with Section 226(a) due to its policies and procedures of not compensating the employees for all of their regular hours, auto deduction of meal breaks as well as failing to provide premium wages for missed 2nd meal breaks as well as missed 3rd rest breaks.

As such, Plaintiffs satisfy common issues of fact and law for this cause of action.

While Plaintiff believes that there is no need to for any sampling since the employees' timecards will reflect all necessary information, Plaintiff believes that a sampling protocol would also be sufficient. Plaintiff is willing to meet and confer with Defendant and its experts to come to agreement on reasonable variations of the proposed protocol, specifically with regard to sample size, potential sample stratification, sample selection methods, and any other related statistical issue. In the event that the parties are unable to agree to those matters, the Court could either (1) appoint a statistician to select the sample after hearing the parties' respective positions; or (2) determine the size and procedure of the sample after affording the parties an opportunity to present their respective evidence regarding sample size and sample selection procedures. (See *Long v. Trans World Airlines, Inc.* (N.D. Ill. 1991) 761 F.Supp. 1320, 1330 [directing parties to meet and confer regarding sample size and sample selection issues, with any remaining disputes submitted to the court by way of affidavit].) In any event, there is substantial authority supporting the use of sampling in the event it becomes necessary.

E. Final Wage Class

Plaintiff alleges that Defendant failed to pay all final wages within the time frames set forth in Labor Code sections 201 or 202. Section 203 provides that if "an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.5, 202, and 205.5**,** any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefore is commenced; but the wage shall not continue for more than 30 days." (See *Murphy v. Kenneth Cole Prod., Inc.* (2007) 40 Cal.4th 1094 [damages for missed meal and rest periods constitute "wages" under Section 203]; see also *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7 ["As used in section 203, 'wilful' merely means that the employer intentionally failed or refused to perform an act *which was required to be done*."].) Plaintiffs' Section 203 claims derive from their minimum wages, auto deduction of meal breaks, and missed 2nd meal and 3rd rest break claims. Defendant's failure to compensate Class Members with their wages at the time of separation is a question of common law and fact that applies to all payment class members. This centralized

practice was in clear violation of Labor Code sections 201 and 202. Thus, to the extent that any of these predicate claims are certified, so, too, should Plaintiffs' Section 203 claims.

IV. STATISTICAL INFERENCE AND SAMPLING METHODS ARE PROPERLY EMPLOYED TO DETERMINE CLASS WIDE LIABILITY AND DAMAGES

A. Unpaid Wages May Properly Be Determined on an Aggregate Basis

The monetary sum to award a class is commonly determined on an aggregate basis for unpaid wages, meal break violations, as well as rest break violations. As stated in *Newberg on Class Actions*, "the ultimate goal in class actions is to determine the aggregate sum, which fairly represents the collective value of the claims of individual class members." (*Newberg*, § 10.2, p. 477.) "[A]ggregate proof of the defendant's monetary liability promotes the deterrence objectives of the substantive laws underlying the class actions and promotes the economic and judicial access for small claims objectives of [Code of Civil Procedure section 382/Federal Rules of Civil Procedure rule 23]." (*Id.* at § 10.5, p. 487.) California law, in fact, expressly authorizes aggregate awards—Code of Civil Procedure section 384 directs courts to determine the "total amount that will be payable to all class members, if all class members are paid the amount to which they are entitled pursuant to the judgment," after which a distribution is to be made. (Code Civ. Proc. § 384, subd. (b).) As such, calculating an aggregate award in the present case is entirely proper.

B. Statistical Methods, Including Sampling Class Members, May Be Employed

Statistical methods are commonplace in the courts today, particularly with regard to calculating the monetary amount to be awarded a class. (See *Cimino v. Raymark Industries, Inc.* (E.D. Tex. 1990) 751 F.Supp. 649, 661 *aff'd in part, vacated in part*, (5th Cir. 1998) 151 F.3d 297; *Newberg*, § 10.2, p. 478 [noting that "the use of statistics and representative samples are one such method" of determining damages in class actions on the basis of classwide, rather than individualized proof of damages].) As the Court of Appeal recognized in *Bell v. Farmers Insurance Exchange* (2004) 115 Cal.App.4th 715, there is "little basis in the decisional law for a skepticism regarding the appropriateness of the scientific methodology of inferential statistics as a technique for determining damages in an appropriate case." (*Bell*, 115 Cal.App.4th at p. 755.) As such, statistical sampling can be used in the present case. (*Williams v. Super. Ct.* (2013) 221 Cal.App.4th 1353, 1369 ["California law permits statistical sampling to determine damages."]; see also *Duran v. U.S. Bank Nat. Assn.* (2014) 59 Cal.4th

1, 33 [reaffirming openness "to the appropriate use of representative testimony, sampling, or other procedures employing statistical methodology"].)

The use of statistical analysis is particularly apt in the context of claims for unpaid work time.[3] For instance, in *Bell*, the Court of Appeal specifically affirmed the use of statistical sampling to calculate aggregate unpaid overtime wages, concluding that "the proof of aggregate damages for time-and-a-half overtime by statistical inference reflected a level of accuracy consistent with due process." (*Bell*, 115 Cal.App.4th at p. 755.) As in *Bell*, there is no reason to think in the present case that "if rough approximations and statistical estimates pass scrutiny for smaller groups, a scientific methodology based on a random sampling should [not] also qualify as a 'just and reasonable inference' of uncompensated hours worked in the case at bar." (*Id*. at p. 749 [discussing and citing *Donovan v. Hudson Stations, Inc.* (D.C. Kan. Oct 14. 1983, Nos. 77-2172 & 77-2173), 26 Wage & Hour Cas. (BNA) 795, 99 Lab.Cas.P. 34, 463, 1983 WL 2110; *Reich v. Waldbaum, Inc.* (S.D.N.Y. 1993) 883 F.Supp. 1037; and *McLaughlin v. DialAmerica Marketing, Inc.* (D.N.J. 1989) 716 F.Supp. 812].)

The fact that aggregate amounts might be less precise than the sum of individual determinations is beside the point. As an initial matter "the law tolerates more uncertainty with respect to damages than to the existence of liability." (*Duran*, 59 Cal.4th at p. 40; *accord Long*, 761 F.Supp. at p. 1327 [award in class actions "need not be 100 percent accurate"]; *Ries v. Arizona Beverages USA LLC* (N.D. Cal., Mar. 28, 2013, No. 10-01139 RS) 2013 WL 1287416, at *7 [amount of restitution to be awarded "need not be determined with exact precision"].) "The law requires only that some reasonable basis of computation be used, and the result reached can be a reasonable approximation." (*In re Cipro Cases I and II* (2004) 121 Cal.App.4th 402, 411-12 [quoting *Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 398].)

Moreover, "[i]f the total number of cases is large and the plaintiff population is representative of the range of persons likely to be injured by defendant's activity, mean damages for the

[3] See *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 687-88; *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 726-28; see also *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1189 ("One long-standing application of burden-shifting occurs in the wage-and-hour context").

aggregation—which is closely approximated by the sample average—should roughly equal this expected loss figure." (Robert G. Bone, *Statistical Adjudication: Rights, Justice and Utility in a World of Process Scarcity* (1993) 46 Va. L. Rev. 561, 608.) "From the viewpoint of defendants, even if there are relatively large errors, with numerous over- and under-awards, all of those differences will cancel each other out and the average award will be the same in the collective trial as it would have been with the individualized determinations." (Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts* (1992) 44 Stan. L. Rev. 815, 837.) As the court explained in *Long*, "the very purpose of a statistical model is to account for individual issues," which it does by capturing those issues through the representativeness of the sample. (*Long*, 761 F.Supp. at p. 1326; see also *Bell*, 115 Cal.App.4th at p. 576.)

C. Calculating an Aggregate Amount of Unpaid Wages Through a Sample Does Not Infringe Defendant's Rights

"In situations when aggregate proof of damages is sought to be proved on behalf of a class, no special or unique rules of evidence are involved; nor are any special substantive principles invoked; nor is the defendant's monetary liability increased at all from what it would be if all class members individually proved their monetary claims." (*Newberg*, § 10.2, p. 478.) An aggregate award of unpaid wages in the present case, therefore, can in no way infringe Defendant's due process rights. As noted in *Newberg*, there is simply "no constitutional, statutory, procedural, or theoretical bar to aggregate recovery for the class." (*Newberg* , § 10.5, p. 486; *id.* [Constitution "does not guarantee the defendants a jury trial to contest each class member's damage claim just as if the defendant were involved in a traditional, nonclass suit."].)

> Aggregate proof of the defendant's monetary liability is no more unfair than class treatment of other elements of liability. Under these circumstances, there is no room for the defendant to complain of any litigation unfairness by use of the aggregate proofs of the defendant's monetary liability to the class. On the contrary, it is not unusual, and probably more likely in many types of cases, that aggregate evidence of the defendant's liability is more accurate and precise than would be so with individual proofs of loss.

(*Id.* § 10.2, pp. 478-79; *id.* at p. 483 ["Challenges that such aggregate proof affects substantive law and otherwise violates the defendant's due process or jury trial rights to contest each member's claim individually, will not withstand analysis."]; see also *Bruno v. Super. Ct.* (1981) 127 Cal.App.3d 120,

129, fn. 4 ["Due process does not prevent calculation of damages on a classwide basis."]; accord *Schwab v. Philip Morris USA, Inc.* (E.D.N.Y. 2006) 449 F.Supp.2d 992, 1239 ["Plaintiff's use of aggregate proof does not violate defendants' constitutional rights."]; *In re Sugar Industry Antitrust Litigation* (E.D. Pa. 1976) 73 F.R.D. 322, 354 ["Classwide recovery of damages has been upheld in a number of disputes as being consistent with due process."].)

The fact that an aggregate award is determined through statistical methods does not introduce any due process or constitutional concerns. (*Schwab,* 449 F.Supp.2d at p. 1246 ["The use of statistical evidence in the instant case violates neither the Constitutional guarantee of due process nor the Constitutional right to a jury trial."].) As the Court of Appeal held in *Bell*, the only objection to statistical sampling on due process grounds is if it increases a defendant's overall liability. (*Bell*, 115 Cal.App.4th at p. 752 ["FIE may object to statistical sampling on due process grounds only to the extent that the procedure affected its overall liability for damages."]; accord *Hilao v. Estate of Marcos* (9th Cir. 1996) 103 F.3d 767, 786 [acknowledging that a defendant's interest "is only in the total amount of damages for which it will be liable"]; *In re Agent Orange Product Liability Litigation* (E.D.N.Y. 1984) 597 F.Supp. 740, 839, *aff'd*, 818 F.2d 145 (2d Cir. 1987) ["No matter what system is used [to determine damages] the purpose is to hold a defendant liable for no more than the aggregate loss fairly attributable to its tortious conduct. As long as that goal is met a defendant can have no valid objection that its rights have been violated."].)

Sampling, by definition, cannot increase Defendant's aggregate liability. (*Bell*, at p. 576.) As the Court of Appeal explained in *Bell*, "the presence of nonclaimants in the class . . . has no relevance to FIE's due process claim so long as the inclusion of these class members did not increase the total amount of damages," which it could not because the record showed "that the damage award was in fact calculated on the basis of an average weekly overtime figure that factored in the presence of nonclaimants." (*Id.*)

Inasmuch as Defendant might argue that "extrapolation from a representative sample is less likely than is full discovery to produce an accurate reflection of total damages," "the use of a proper model and an appropriate sample size" will minimize "any such deviation." (*Long*, 761 F.Supp. at p. 1329.) "Furthermore, there is no way of knowing whether the total amount of damages assessed on the

basis of such extrapolation would be higher or lower than the amount assessed based on full discovery and individual hearings, and it would seem that the likelihood that extrapolation would produce a lower total for damages is the same as the likelihood that it would produce a higher total." (*Id.*)

Indeed, an aggregate monetary award obtained through sampling can actually be *more accurate* than aggregating individually determined awards. (*Bell*, 115 Cal.App.4th at p. 754 ["[i]n many cases such an aggregate calculation will be far more accurate than summing all individual claims"].) That is because individualized determinations "also involve estimates, inferences and other sources of error." (*Id.*) It is just that proof by statistical inference "openly acknowledges the possibility of error and offers a quantitative measure of possible inaccuracy." (*Id.*; see also *Schwab*, 449 F.Supp.2d at p. 1240 [quoting David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System* (1984) 97 Harv. L.Rev. 851, 870: "'Particularistic' evidence, however, is in fact no less probabilistic than is the statistical evidence that courts purport to shun."].) As explained by Professor Robert G. Bone in his law review article:

> The sample average when multiplied by the number of cases in the aggregation produces an aggregate liability very close to total damages for the whole population, closer in fact than the total of individual verdicts had all the cases been tried separately . . . because, with a large enough sample, the standard deviation of the sample average distribution is less than the standard deviation of the error distribution for individual trials.

(*Bone*, 46 Va. L. Rev. at p. 600; see also Glen O. Robinson & Kenneth S. Abraham, *Collective Justice in Tort Law* (1992) 78 Va. L. Rev. 1504, 1509 ["In fact, because aggregative valuation would reduce the variance of expected damage payments defendants would face, risk-averse defendants would benefit from the approach rather than merely break even under it."].) As the court in *Schwab* recognized, "[w]hen, as in the case at bar, the plaintiffs are a widely spread group complaining of injury from a common course of conduct by defendants, statistical analysis may provide a more accurate and comprehensible form of evidence than would the testimony of millions of individual [claimants]." (*Schwab*, at p. 1241.)

In sum, any balancing of the parties' respective due process rights in the present case tilts heavily in favor of sampling. (*Bell*, 115 Cal.App.4th at p. 751 [affirming trial court's "weigh[ing] the disadvantage of statistical inference—the calculation of average damages imperfectly tailored to the

facts of particular employees—with the opportunity it afforded to vindicate an important statutory policy without unduly burdening the courts"]; see also *Schwab*, 449 F.Supp.2d at p. 1249 ["Under the balancing test set forth in *Doehr*, the use of statistical evidence . . . by plaintiffs does not violate due process strictures."].)

D. Plaintiff's Proposed Method for Procuring and Presenting Evidence from the Sample

Plaintiff believes that all of the claims in the pending action (unpaid wages, auto deduction, 2nd meal break and 3rd rest break) can be easily determined by analyzing all of the class members' timecards during the class period. Alternatively, after the sample is selected, class members comprising the sample could be deposed. Plaintiff proposes that these depositions be handled efficiently with each side exchanging relevant documents prior to the depositions, the depositions being scheduled in an expeditious fashion (five double-tracked depositions per day) and with appropriate time limits (for instance, each side could question each deponent for up to one hour). This would make the discovery manageable.

At trial, the parties then would present the class members' testimony and evidence. The parties could stipulate to use the deposition transcripts as evidence, avoiding the necessity of trial testimony of all persons in the sample. The parties could also stipulate to present agreed-to summaries of the depositions of the class members in the sample, possibly in the form of a stipulated weekly figures assigned to each deponent for each daily task in dispute. If the parties are unable to stipulate, each side could present its summary of this evidence in conjunction with proper expert testimony. The Court could, at its discretion, appoint a special master to review each transcript and assign a weekly figure to each daily task in dispute. The trier-of-fact would then determine an aggregate award to the class based on this evidence adduced from the sample.

E. The Aggregate Award Can Be Distributed Among Class Members Through a Claims Process

It is well established that "the allocation of that aggregate sum [of the judgment] among class members is an internal class accounting question that does not directly concern the defendant." (*Bell*, 115 Cal.App.4th at p. 759; see also *Newberg*, § 10.12, pp. 505-07 [identifying various means by which aggregate awards may be distributed].) "A class action which affords due process of law to the

defendant through the time when the amount of his liability is calculated cannot suddenly deprive him of his constitutional rights because of the way the damages are distributed." (*Bruno*, 127 Cal.App.3d at p. 129.) "Where damages have been fairly and legally removed from his possession, a defendant's due process rights have been fully vindicated." (*Id.*) Accordingly, the only concern in allocation is the due process rights of the class members, which can be adequately protected "by notice and claim procedures that give class members an adequate opportunity to obtain their individual shares before the residue is distributed through a fluid recovery procedure." (*Id.*; see also *Bell*, at p. 763 [noting that providing claims administrator discretionary authority to challenge claims presenting indicia of possible fraud would be provident]; *accord Schwab*, 449 F.Supp.2d at p. 1272 ["The risk of such overcompensation can be limited by requiring proof through claim forms from claimants concerning the extent of their reliance during the distribution stage."].)

Against this backdrop, courts typically adopt a claims procedure once liability is established wherein individual class members would be afforded an opportunity to collect their individual shares by proving their particular damages, "usually according to a lowered standard of proof." (*State of California v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 472; *Bell*, 115 Cal.App.4th at p. 759.) As stated in *Newberg*,

> When the court elects to appoint either a special master under Rule 53 or a committee of counsel, distribution of individual claims proceeds in much the same way that settlement funds might be distributed. Basically, there are four steps in the distribution of damages to individual class members, when the distribution cannot be done centrally by an apportionment plan based on readily available information concerning each claims: (1) notice; (2) submission of proof of claim; (3) claim verification; (4) actual distribution.

(*Newberg*, § 10.12, p. 507.)

Plaintiffs propose to track the process outlined in *Newberg*. In this context, Plaintiffs propose that the claims of those class members who were deposed would be based on their deposition testimony and that other claims be signed under penalty of perjury. In sum, there is substantial authority to support Plaintiff's proposal that the aggregate award be distributed to class members through a post-judgment claims process.

V. CONCLUSION

Plaintiff believes that the claims in the pending action are straightforward from an evidentiary perspective and any challenges that arise from individualized damage assessments can readily be managed by looking at the employees' timecards and/or through sampling. Overall, there are no indications that trial of Plaintiff's claim would be unmanageable or would infringe any of Defendant's rights. Accordingly, Plaintiff respectfully requests that the Court adopt his proposed trial management plan.

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Respectfully submitted,
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