

1 THE GRAVES FIRM  
2 ALLEN GRAVES (SB#204580)  
3 E-mail: allen@gravesfirm.com  
4 JACQUELINE TREU (SB#247927)  
5 E-mail: jacqueline@gravesfirm.com  
6 122 N. Baldwin Avenue, Main Floor  
7 Sierra Madre, CA 91024  
8 Telephone: (626) 240-0575  
9 Facsimile: (626) 737-7013

7 Attorney for Plaintiff  
8 Richard Barajas, Felicia Bovenkerk,  
9 Timothy Collins, Becky Eads,  
10 Amanda Johnson, Suzanne Lansford, Joe Ortiz, Kevin  
11 Robinson, Janet Tinoco, and David Velasco

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 COUNTY OF LOS ANGELES

13 Richard Barajas, Felicia Bovenkerk,  
14 Timothy Collins, Becky Eads,  
15 Amanda Johnson, Suzanne Lansford, Joe  
16 Ortiz, Kevin Robinson, Janet Tinoco, and  
17 David Velasco appearing on behalf of  
18 themselves and all others similarly  
19 situated

18 Plaintiffs,

19 v.

20 Marlu Restaurant Group, Inc., Marlu  
21 LC, Inc., Marlu Stockton LLC, Prestige  
22 Management LLC, Smart Management  
23 & Co., Inc., Secret River, Inc., Central  
24 Valley QSR, Inc., G Maroni Company,  
25 Inc., Caljax, Inc., C Food Concepts,  
26 Inc., Aksan United Fortune, Inc.,  
27 Cardinal Appliance & Hardware, Inc.,  
28 Maritime Management Company,  
Marlu Investment Group, Anton Lutfi,  
Stephen Lutfi, Nader Lutfi and  
DOES 1 through 10, inclusive,

Defendants

CONFIRMED COPY  
ORIGINAL FILED  
Superior Court of California  
County of Los Angeles

JAN 18 2017

Sherri R. Carter, Executive Officer/Clerk

By CRYSTAL VARGAS, Deputy

CASE NO: BC630452

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR AN ORDER:**

**(1) PRELIMINARILY APPROVING  
CLASS ACTION SETTLEMENT;**

**(2) CONDITIONALLY CERTIFYING  
THE SETTLEMENT CLASS;**

**(3) DIRECTING DISTRIBUTION OF  
NOTICE OF SETTLEMENT AND  
CLAIM FORM; AND**

**(4) SETTING A HEARING FOR FINAL  
APPROVAL OF THE SETTLEMENT**

Hearing Date: February 9, 2017

Time: 2:00 p.m.

Dept.: 322

Judge: Hon. William F. Highberger

**TABLE OF CONTENTS**

1

2 I. INTRODUCTION.....5

3 II. PROCEDURAL HISTORY .....6

4     A. The *Ortiz* Case .....6

5     B. The *Barajas* Case.....7

6     C. Pre-Mediation Discovery.....8

7     D. The Mediation Process .....9

8     E. Settlement Coordination .....9

9 III. THE CLASS .....10

10 IV. VALUE OF THE CLAIMS .....11

11     A. Meal Breaks .....11

12         1. Quantifying Break Violations.....12

13         2. Calculating Unpaid Wages.....12

14         3. Analyzing Penalties .....13

15             i. Labor Code §210.....13

16             ii. Labor Code §558.....13

17             iii. Labor Code §203.....14

18     B. Off-the-Clock Claims .....15

19     C. Failure to Reimburse Business Expenses .....15

20     D. Interest.....16

21     E. Total Liability .....16

22     F. Litigation Risks .....16

23 V. THE SETTLEMENT.....17

24     A. The Common Fund .....17

25     B. Payments to the Class Members .....18

26     C. Non-Monetary Relief.....19

27     D. Release of Claims by the Class.....19

28

1 VI. NOTICE AND CLAIM PROCEDURES.....20  
2 VII. TELEPHONE AND WEB SUPPORT FOR CLASS MEMBERS .....21  
3 VIII. CONFIRMATION, PAYMENT, AND DISMISSAL .....21  
4 IX. PRELIMINARY APPROVAL IS APPROPRIATE .....22  
5     A. The Preliminary Approval Process .....22  
6     B. The Settlement Is Fair and Reasonable.....23  
7 X. CONCLUSION.....23

8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**

**CASES**

*Aviation Data, Inc. v. American Express Travel Related Services Co., Inc.*,  
152 Cal. App. 4th 1522 (2007) .....22, 23

**STATUTES**

Cal. Civ. Proc. Code §338 ..... 14  
Cal. Civ. Proc. Code e §340 ..... 13  
Cal. Lab. Code §512 ..... 11, 14  
Cal. Lab. Code §226.7 ..... 7, 11  
Cal. Lab. Code §203 ..... 2, 14, 15  
Cal. Lab. Code §210 ..... 2, 13  
Cal. Lab. Code §218 ..... 14  
Cal. Lab. Code §218.6 ..... 16  
Cal. Lab. Code §2699 ..... 13, 14, 17  
Cal. Lab. Code §558 ..... 2, 13, 14  
Cal. Lab. Code §§201 and 202 ..... 6

**REGULATIONS**

8 CCR §13520 ..... 15

1 **I. INTRODUCTION**

2 This case addresses a series of wage and working condition issues at a set of fast-  
3 food and retail franchise locations across California. The Defendants (“Marlu”) are a  
4 group of related entities that operate the franchises.

5 The case includes subclasses with different claims: 1) All hourly employees  
6 (known as “Team Members”) claim that Defendants provided defective paystubs and  
7 failed to provide employee seating; 2) Employees who worked as a “Manager on Duty”  
8 (“MOD”) have the same claims as other Team Members and also claim that they missed  
9 meal breaks on those occasions that there was just one manager in the store and were  
10 required to use their personal vehicles without reimbursement; 3) General Managers have  
11 the same claims as other Team Members and MODs and also claim that they worked off  
12 the clock and incurred business expenses for use of personal phones; 4) Team Members  
13 who worked overnight shifts have a claim that they missed meal breaks because they were  
14 prohibited from leaving the premises during certain hours; and 5) Team Members who  
15 worked at one brand (Jack-in-the Box) have a claim that they were required to participate  
16 in a pay card program in a fashion that violates the Labor Code.

17 The Class Representatives have obtained an excellent settlement for all of these  
18 claims. A class of less than 8,500 employees will share a total payment of \$2,500,000.  
19 All funds will be paid out. There will be no reversion to Defendants. In addition, the  
20 settlement provides actual changes to company practices. Defendants have already  
21 implemented changes to provide compliant paystubs. The settlement provides that  
22 Defendants will provide employee seating at each work location and provide employees  
23 with a form explicitly allowing them to opt in or out of the company’s pay card program.

24 The parties now seek preliminary approval of the settlement. Once this Court  
25 grants approval, a third-party Settlement Administrator will mail a written notice of the  
26 settlement and a claim form to each Class Member. Each Class Member will then have an  
27 opportunity to claim his or her share of the settlement, opt out of participation, or object to  
28 the settlement. Finally, the parties will return to this Court, and seek final approval.

1 **II. PROCEDURAL HISTORY**

2 This case is the result of two different actions:

3 **A. The *Ortiz* Case**

4 Class Representative Joe Ortiz filed the first action against Marlu on  
5 November 7, 2014 in the Central District. The case is captioned *Ortiz v Marlu Restaurant*  
6 *Group, Inc. et al*, SACV14-01790 DOC (DFMx). The *Ortiz* action brought the following  
7 types of claims:

8 **Off the Clock Work.** Ortiz alleges that General Managers, who are hourly  
9 employees, were not paid for work done outside of the restaurant such as answering calls  
10 from the restaurant, attending telephone conferences with District Managers, or driving to  
11 pick up necessary supplies.

12 **Expense Reimbursement.** The allegedly uncompensated work also implicates  
13 claims for expense reimbursement relating to cell phone use and vehicle use.

14 **Paystub Violations.** Ortiz also brings a claim for paystub violations on behalf of  
15 all California employee because, at the time Ortiz filed his complaint, Marlu’s paystubs  
16 lacked the name of the employer, the address of the employer and the inclusive dates of  
17 the pay period.

18 **Derivative Claims.** Ortiz also brings claims that were derivative of the foregoing.  
19 For example, because Ortiz alleged that General Managers were not paid for work done  
20 off the clock, and some of that work was performed after the eighth hour in a day or 40<sup>th</sup>  
21 hour in a workweek, the *Ortiz* Complaint includes an overtime claim. Similarly, because  
22 General Managers who had their employment terminated were allegedly owed unpaid  
23 wages at the time of termination, the *Ortiz* complaint includes a claim for violation of  
24 Labor Code §§201 and 202. In addition to the non-derivative paystub claim described  
25 above, the *Ortiz* Complaint also included derivative allegations related to the failure to  
26 track or include off the clock hours on paystubs.

27 A copy of the operative *Ortiz* Complaint is attached as Exhibit 1 to Plaintiffs’  
28 Request for Judicial Notice filed herewith (“RJN”).

1 **B. The *Barajas* Case**

2 During the course of the *Ortiz* case, Class Counsel’s office interviewed more than  
3 one hundred individuals who had worked for Marlu in California and obtained sworn  
4 statements from at least ninety such individuals. Graves Decl. ¶9. The interviews and  
5 sworn statements revealed additional issues:

6 **Meal Breaks.** Some types of employees were allegedly denied meal breaks  
7 because they were forbidden from leaving the stores under certain circumstances. For  
8 example, an employee who was the only MOD in a store was forbidden from leaving the  
9 premises. In addition, employees claim that Marlu operated a small number of restaurants  
10 that were open 24 hours and employees who worked the overnight shift were forbidden  
11 from leaving the premises. The issue raised by these employees was not a general failure  
12 to provide meal breaks. Instead, the issue related to particular circumstances under which  
13 specific employees were not free to leave the facility and do as they pleased even if they  
14 clocked out for a full 30-minute meal break.

15 **Pay Card Program.** Employees at one Marlu franchise brand allege that the  
16 company required them to participate in a pay card program rather than receive traditional  
17 paychecks or direct deposit.

18 **Seating.** Employees allege that, it is possible to provide a lean stool or other  
19 seating at cashier locations inside stores and Marlu failed to provide such seating.

20 **Derivative Claims.** The meal break allegations implicate a failure to timely pay  
21 wages as well as a failure to pay all wages due on termination and a failure to pay the  
22 wages required by Labor Code section 226.7. The meal break claims also implicate a  
23 derivative paystub violation for failure to reflect unpaid Section 226.7 wages.

24 On August 17, 2016, a group of nine current and former California Marlu  
25 employees brought the instant case with the foregoing allegations. The nine Plaintiffs  
26 represent all of the different franchise brands that Marlu operates in California. On  
27 December 27, 2016, the *Barajas* Complaint was amended to include all claims and parties  
28 from the *Ortiz* action.

1 **C. Pre-Mediation Discovery**

2 In addition to more than 100 witness interviews that provided information for both  
3 the *Ortiz* and *Barajas* cases, the Plaintiffs in this matter engaged in extensive formal and  
4 informal discovery before attempting mediation. Within six weeks after filing, Plaintiff  
5 Ortiz promulgated discovery that included both Interrogatories and Document Requests.  
6 Graves Decl. ¶10. The discovery sought policy documents relating to work hours, time  
7 tracking, reimbursements, and payroll practices. *Id.* The discovery also sought records of  
8 reimbursement of expenses and detailed information on all individuals Marlu employed  
9 during the Liability Period, including contact information as well as employment dates,  
10 work location and rates of pay. *Id.* The discovery further sought detailed records of  
11 Marlu’s ownership and management structure. *Id.*

12 Plaintiff got what he wanted. Initially, Plaintiff obtained information through  
13 Defendants’ discovery responses. As a condition to mediation in this matter, Plaintiff  
14 insisted that the company provide additional records responsive to the topics on which  
15 Plaintiff has sought discovery. Graves Decl. ¶11. Plaintiff followed up on the written  
16 discovery and witness interviews with depositions. Before reaching the instant settlement,  
17 Plaintiff took a total of three full days of depositions from multiple corporate witnesses,  
18 inducing Marlu President Anton Lutfi. *Id.* at ¶12.

19 In addition to the foregoing discovery, Class Counsel also performed analysis of  
20 Plaintiff’s own phone records by using a known list of Marlu-related numbers to identify  
21 work-related communications. *Id.* at ¶15. Next, Class Counsel analyzed the results over  
22 time to identify the daily frequency of specific work-related communications; Class  
23 Counsel separately quantified communication with store locations, subordinates, peers  
24 and superiors, and further quantified in terms of incoming and outgoing communication  
25 and communication type (calls, text messages, and images.) *Id.*

26 Class Counsel also developed dynamic calculation tools that allowed him to project  
27 the potential recovery available to the class on the basis of different positions that  
28 Defendants might take at trial. Graves Decl. ¶16.



1 **D. The Mediation Process**

2 The parties went through two mediations before finally accepting a mediator’s  
3 proposal to resolve these cases. The first mediation took place on May 11, 2015 with  
4 well-known mediator Mark Rudy. Prior to mediation, Class Counsel provided Rudy  
5 with 24 pages of single-spaced mediation briefing and more than 500 pages of supporting  
6 materials. Graves Decl. ¶22. The materials included multiple charts and graphs giving  
7 the specific results of Plaintiff’s interviews and data analysis. *Id.* Plaintiff also shared his  
8 mediation brief with Defendants prior to the mediation to ensure that all calculations were  
9 sufficiently accurate and robust to survive adversarial scrutiny. *Id.* at ¶23. Despite the  
10 extensive preparation briefing, the parties were unable to reach agreement. *Id.* at ¶24.

11 After failing to reach agreement at the first mediation, the parties tried again with  
12 Rudy on September 6, 2016. The preparation for the second mediation was even more  
13 extensive, including more than 40 pages of single-spaced briefing by Class Counsel and a  
14 new, even more extensive set of exhibits and data analysis. *Id.* at ¶25. After hours of  
15 negotiations, Mediator Rudy concluded that the mediation could not succeed without a  
16 mediator’s proposal. Rudy made a mediator’s proposal based on his own valuation to  
17 resolve both the *Ortiz* and *Barajas* cases. *Id.* at ¶26. The parties accepted. *Id.* The  
18 Stipulation of Settlement is Exhibit A to the Declaration of Allen Graves filed herewith.

19 **E. Settlement Coordination**

20 After agreeing to the mediator’s proposal, the parties took several steps to  
21 coordinate the approval and administration process between the two cases:

22 **Informal Conference.** On October 28, 2016, the parties met with this Court in an  
23 informal conference to discuss the best procedure for efficiently completing the notice and  
24 approval process. Following this Court’s guidance, the parties agreed to a procedure  
25 whereby:

- 26 1) Plaintiffs file an amended complaint in the instant *Barajas* action that adds all  
27 of the claims from the *Ortiz* action, thereby putting all of the issues in that case  
28 before this Court for approval administration of the settlement.

- 1           2) The parties file a joint stipulation with the *Ortiz* court describing the plan for  
2           settlement approval administration and requesting a stay of proceedings.
- 3           3) Plaintiffs will seek preliminary and ultimately final approval of the settlement  
4           in this Court.
- 5           4) Once this Court grants final approval and enters its final judgment, the parties  
6           will jointly stipulate to a dismissal without prejudice of the *Ortiz* matter.

7           **Amended Complaint.** On December 27, 2016, Plaintiffs filed a Second Amended  
8 Complaint as described above.

9           **Stipulation and Orders in *Ortiz*.** On November 8, 2016, the parties filed a  
10 stipulation and proposed order in the *Ortiz* case that detailed the plan for approval and  
11 administration of the instant settlement. The parties filed a copy of the Second Amended  
12 *Barajas* Complaint with the stipulation in the *Ortiz* matter. A copy of the November 8  
13 stipulation can be found at Exhibit 2 to Plaintiffs’ Request for Judicial Notice filed  
14 herewith. The *Ortiz* court granted the requested relief in an order dated November 10,  
15 2016. RJN Exh. 3. On November 21, acting on its own initiative, the *Ortiz* court entered  
16 an order dismissing the case without prejudice but maintaining jurisdiction to conduct a  
17 status conference and vacate the dismissal if the settlement has not been consummated in  
18 this Court. *Id.* Exh. 4.

19           With the *Ortiz* case dismissed and all of the claims now pending exclusively before  
20 this Court, Plaintiffs seek preliminary approval of the settlement from this Court.

21  
22                               **III. THE CLASS**

23           The Settlement Class is the same as the class that Plaintiffs sought to represent in  
24 their pleadings: Defendants’ hourly employees in California. Stipulation and Settlement  
25 of Class Action Claims (“Agreement”) ¶6.<sup>1</sup> The Class Members are divided among four  
26 sub-classes:  
27

28           \_\_\_\_\_  
<sup>1</sup> The Agreement is attached as Exhibit A to the Declaration of Allen Graves.

1 **Team Members:** all current and former non-exempt employees who worked for  
2 Defendants in California from November 7, 2013 through preliminary approval;  
3 **General Managers:** all current and former non-exempt employees who worked for  
4 Defendants in California as General Managers from November 7, 2010 through  
5 preliminary approval;  
6 **Managers on Duty:** all current and former non-exempt hourly employees  
7 who worked as Managers/Shift Leads for Defendants in California from  
8 August 17, 2012 through preliminary approval;  
9 **Overnight:** all current and former non-exempt hourly employees who worked  
10 overnight shifts at Defendants' Jack-in-the-Box locations in California from  
11 August 17, 2012 through preliminary approval.

12  
13 Class Counsel determined the number of Settlement Class Members based on  
14 representations made by Defendants and a review of the records already provided by  
15 Defendants. Graves Decl. ¶30. Defendants confirm in the Agreement that there are no  
16 more than 8,500 Class Members. Agreement ¶37. In the event that the number of Class  
17 Members increases above 8,500, the Total Settlement Amount will increase  
18 proportionally. *Id.*

## 20 **IV. VALUE OF THE CLAIMS**

### 21 **A. Meal Breaks**

22 In a meal break case, the value of an individual's wage claim is a function of the  
23 number of times that he or she has experienced a violation. Each hourly employee is  
24 entitled to a thirty-minute meal break after working five hours, and a second thirty-minute  
25 meal break after working ten hours. California Labor Code §512. When an employee  
26 does not receive a required meal break, he or she is entitled to a payment of one additional  
27 hour of wages at his or her normal rate of pay. California Labor Code §226.7. In order to  
28 determine the value of the claims in this case, Class Counsel applied a multi-step analysis:

1                   **1. Quantifying Break Violations**

2                   The instant case is unusual in that time records could not be used to quantify meal  
3 break violations. This is true because Plaintiffs allege that meal break violations occurred  
4 when employees, in certain circumstances, were prohibited from leaving the facility in  
5 which they were working. These employees routinely clocked out for a thirty-minute  
6 meal break but, Plaintiffs contend, were not relieved of duty because they were prohibited  
7 from leaving the premises. Because Defendants’ time records would show employees  
8 clocking a meal break and would not show the circumstances that prohibited employees  
9 from leaving the facility, they could not be used to quantify the meal break claims.  
10 Instead, Plaintiffs relied on information gathered from more than 100 interviews of  
11 current and former employees to identify the frequency of the circumstances that led to  
12 meal break violations.

13                   For members of the MOD subclass, violation occurred when an MOD worked at  
14 least five hours where there was no other MOD eligible employee at the facility. Under  
15 the circumstances, the MOD was prohibited from leaving the facility for a timely meal  
16 break. Plaintiffs estimated that the circumstances occurred in average of once per day at  
17 each Marlu facility in California. Graves Decl. ¶32.

18                   For members of the Overnight subclass, violations occurred when employees  
19 worked an overnight shift at one of the 18 units that operated 24 hours per day. Based on  
20 witness interviews and testimony obtained through deposition of corporate witnesses,  
21 Plaintiffs concluded that each of the 18 units produced approximately 20 meal break  
22 violations each work week. Graves Decl. ¶33.

23                   **2. Calculating Unpaid Wages**

24                   Taking into account the wage rates for each of the employees involved, Plaintiffs  
25 identified a total of \$313,992 in unpaid wages owed to Overnight employees and  
26 \$1,029,088 in unpaid wages owned to MOD employees for a total of \$1,343,080. Graves  
27 Decl. ¶34.

28

1           **3. Analyzing Penalties**

2           Prior to mediation, Class Counsel conducted a detailed analysis of the potential  
3 penalty recovery. Each penalty presents unique legal issues and potential defenses. Also,  
4 many penalties are paid in large part or even entirely to the State of California and it is  
5 necessary to distinguish these penalties from money that will actually be paid to the Class:

6           **i. Labor Code §210**

7           **Penalty.** Section 210 provides a penalty of \$100 for the first pay period in which  
8 an employer fails to pay earned wages and \$200 for every subsequent pay period.  
9 Section 210 also provides for a penalty equal to 25% of all unpaid wages. The applicable  
10 statute of limitations is one year. California Code of Civil Procedure §340.

11           **Distribution.** Although Plaintiffs have standing to collect Section 210 penalties  
12 pursuant to Labor Code §2699,<sup>2</sup> none of the money would be paid to the Class Members.  
13 Section 210 requires that 12.5% of all penalties be paid to the LWDA and “the remainder  
14 shall be paid into the State Treasury to the credit of the General Fund.”

15           **Defenses.** Where a statute provides for two penalty levels, defendants generally  
16 argue that only the lower rate applies in the absence of a court or Labor Commissioner’s  
17 prior ruling that the defendant had previously violated the relevant statutes. Defendants  
18 also often contend that the lower rate applies because the violation was not “willful.”

19           **ii. Labor Code §558**

20           **Penalty.** Section 558 provides for a penalty against any employer “who violates,  
21 or causes to be violated, a section of this chapter [Part Two, Chapter One] or any  
22 provision regulating hours and days of work in any order of the Industrial Welfare  
23 Commission.” The Section 558 penalty is \$50 for the first pay period in which an  
24 employee is subject to a violation and \$100 for every pay period thereafter in which the  
25 employee is subject to the same violation. The statute of limitations for Section 558  
26 penalties is one year. California Code of Civil Procedure §340.

27 \_\_\_\_\_  
28 <sup>2</sup> It appears that the distribution requirement of Section 210 would trump the Section 2699(i) rule  
that an employee may receive 25% of any penalty.

1           **Distribution.** Plaintiffs have standing to recover Section 558 penalties for their  
2 fellow employees pursuant to Labor Code §2699 *et seq.* However, that same statute  
3 requires that 75% of all penalties recovered be paid to the State of California. Labor Code  
4 §2699(i).

5           **Defenses.** Because Labor Code §512 requires meal breaks, and that section is  
6 located in Part Two, Section One of the Labor Code, Plaintiffs argue that Section 558  
7 penalties are applicable to each pay period in which a Class Member worked more than  
8 five hours without a meal break. Defendants generally contended that the penalty is  
9 inapplicable because Section 512 is not a “provision regulating hours and days of work.”

10                   **iii. Labor Code §203**

11           **Penalty.** This section applies to an employee who was entitled to unpaid wages at  
12 the time that his or her employment terminated. If an employee can demonstrate that the  
13 employer’s failure to pay was “willful,” he or she may collect up to thirty days of pay at  
14 his or her regular rate as a penalty. The statute of limitations for penalty claims under  
15 Section 203 is the same as the statute of limitations for a wage claim: three years.  
16 California Code of Civil Procedure §338.

17           **Distribution.** The distribution of Section 203 penalties is an open question. Prior  
18 to the promulgation of Labor Code §2699, defendants routinely argued that individual  
19 employees lacked standing to collect Section 203 penalties. Plaintiffs argued that  
20 individual employees had standing to collect penalties pursuant to Labor Code §218, but a  
21 dearth of appealed authority led to inconsistent results at the trial court level. Labor  
22 Code §2699 mooted this debate by authorizing individual employees to stand in the place  
23 of the LWDA and collect all penalties, including Section 203 penalties, as a Private  
24 Attorney General. Although Section 2699 resolved the standing issue, it complicated the  
25 distribution question. If employees can collect Section 203 penalties without resorting to  
26 Section 2699, it seems likely that they are entitled to receive the entirety of any penalty.  
27 If, however, the employee must rely on Section 2699 to collect the Section 203 penalty,  
28 75% of any payment would go to the State pursuant to Section 2699(i).

1           **Defenses.** Defendants disputed the applicability of Section 203 penalties by  
2 arguing that the company’s failure to pay could not be classified as willful. In California,  
3 a failure to pay wages is not willful if the employer has a good faith dispute regarding the  
4 payment: “A good faith dispute that any wages are due will preclude imposition of  
5 waiting time penalties under Section 203.” 8 CCR §13520.

6           **B. Off-the-Clock Claims**

7           Plaintiffs allege that members of the General Manager subclass worked unpaid  
8 hours off the clock performing jobs like answering calls from District Managers and other  
9 executives, calling the restaurant to resolve problems, and driving supplies between  
10 different restaurants. Class Counsel used two methods to quantify the time spent on these  
11 tasks: **First**, Class Counsel examined telephone records. That analysis showed an average  
12 of 10.65 text messages and 2.45 phone calls for each day. Graves Decl. ¶35. **Second**,  
13 Class Counsel compared the result of this analysis with anecdotal information obtained  
14 from interviewing both Plaintiffs and other members of the General Manager Subclass.  
15 *Id.* at ¶36. Based on this analysis, Plaintiffs concluded that the average off-the-clock time  
16 worked by members of the General Manager subclass was not more than 2 hours per week  
17 total. *Id.* Assuming 2 hours per week, the maximum possible wage liability was  
18 \$787,645.35. *Id.* at ¶37.

19           **C. Failure to Reimburse Business Expenses**

20           Plaintiffs allege that members of the General Manager subclass were required to  
21 use cell phones for work-related communication and were required to use their personal  
22 vehicles for such work-related activity as transporting supplies between different  
23 restaurants, taking deposits to a bank, or traveling to and from the store to purchase  
24 needed supplies. Class Counsel conducted an analysis of Plaintiff Ortiz’s telephone  
25 records to determine that approximately 8% of cell phone communication was work  
26 related. Assuming other members of the General Manager subclass had similar usage and  
27 phone expenses, total cell phone reimbursement liability for all General Managers would  
28 be \$39,548. Graves Decl. ¶38. For the value of mileage reimbursement, Class Counsel

1 again looked to the specific mileage identified by Plaintiffs and the reports of other Class  
2 Members. Graves Decl. ¶39. Applying the 2013 IRS mileage rate of 56.5 cents per mile,  
3 this methodology yielded total mileage reimbursement liability of \$210,400.75. *Id.*

#### 4 **D. Interest**

5 Although interest is not available for unpaid penalties, plaintiffs can recover pre-  
6 judgment interest on unpaid wages and unreimbursed expenses. Labor Code §218.6.  
7 Assuming a 10% annual rate of interest and a consistent rate of accrual for unpaid wages  
8 since November 7, 2010, the accrued interest due would total approximately \$498,053.96.  
9 *Id.* at ¶40.

#### 10 **E. Total Liability**

11 Taken together, Plaintiffs estimated the total liability for all unpaid wages interest  
12 and reimbursements at \$2,843,612.78.

#### 13 **F. Litigation Risks**

14 Wages, penalties, and interest can be recovered only if the class prevails at trial.  
15 In this case, there were several risks that Class Counsel was required to consider in  
16 determining the value of the class claims:

17 **Reduction of Penalties.** There was a risk that this Court would rule the aggregate  
18 penalties in this matter are confiscatory or otherwise inappropriate in light of the damages  
19 suffered by each individual Class Member. For example, an average employee who  
20 missed just one meal break in a pay period might be entitled to less than \$10 in unpaid  
21 wages, but the employer could be liable for more than \$300 in penalties for the same  
22 violation. Defendants argued that an award of penalties that were more than 30 times the  
23 actual unpaid wages in a pay period would be unlikely to survive on appeal.

24 **Class Certification.** Because all of the Class Members have been subject to the  
25 same uniform policies, Plaintiff maintains that commonality and typicality would be  
26 easily established. For its part, Defendants maintained that variations in the type of work  
27 performed by different Class Members would weigh against class certification. Rulings  
28 on class certification are within the discretion of the trial court, and the Courts of Appeal



1 have upheld both certification and denial of certification in meal break and overtime  
2 cases. Because a denial of certification could eliminate any recovery for the class, and  
3 because reversal of a class certification ruling is difficult to obtain on appeal, the risk  
4 associated with class certification necessarily reduced the value of the class claims.

## 6 V. THE SETTLEMENT

7 In light of the risks in this case, the value of the settlement compares favorably  
8 with the value of the claims, recovering over 88% of the estimated wages, interest and  
9 reimbursements. Excluding interest, the total recovery is over 100%. The basic terms of  
10 the agreement are as follows:

### 11 A. The Common Fund

12 The proposed settlement will be a common fund with no reversion to Defendants.  
13 Agreement ¶37. The parties refer to the amount that Defendants will pay to create the  
14 common fund as the “Total Settlement Amount.” The Total Settlement Amount of  
15 \$2.5 million will be used to pay: 1) all amounts to be paid to Settlement Class Members;  
16 2) the payment to the Labor and Workforce Development Agency (“LWDA”) pursuant to  
17 Labor Code §2699 *et seq.*; 3) attorney fees and costs of Class Counsel; 4) the service  
18 payment to the Class Representatives; and 5) all costs of administration. *Id.*

19 All payments from the fund will be subject to final approval by this Court. The parties  
20 currently expect to seek approval for the following:

22 Total Settlement Amount	\$2,500,000
23 LWDA Payment	(\$75,000)
24 Maximum Requested Service Payments	(\$70,000)
25 Estimated Attorney Costs	(\$50,000)
26 Estimated Administration Costs	(\$75,000)
27 Net Settlement Amount	<b>\$1,396,667</b>

1 **B. Payments to the Class Members**

2 In the Agreement, the parties refer to the portion of the Total Settlement Amount  
3 that will be paid directly to the Settlement Class Members as the “Net Settlement  
4 Amount.” Agreement ¶23. The Net Settlement Amount is equal to the Total Settlement  
5 Amount less the expenses that are to be paid from the fund. *Id.* The entire Net Settlement  
6 Amount will be distributed among the Settlement Class Members who file claim forms.  
7 *Id.* at ¶37. Thus, if less than all of the Settlement Class Members file claim forms, the  
8 amount paid to each Class Member who does file a claim form will increase.

9 Each Class Member’s Individual Settlement Amount will be based on the number  
10 of pay periods that the Class Member worked as an hourly employee for a Marlu entity  
11 during the period covered by the settlement. The exact formula for calculating a Class  
12 Member’s Individual Settlement Amount will be as follows: each Class Member will  
13 receive one credit for each pay period or major fraction of a pay period that the Class  
14 Member worked as a Team Member, five credits for each pay period or major fraction  
15 thereof worked in the MOD or Overnight subclasses, and 20 credits for each pay period or  
16 major fraction thereof worked in the General Manager subclass. *Id.* at ¶65.

17 For example, if the Net Settlement Amount is \$1,396,667 and the total number of  
18 credits awarded to the Class Members who submit claim forms is 174,108, the value of a  
19 credit would be \$8.02 ( $\$1,396,667/174,108$ ). A member of the Team Member subclass  
20 who worked two years during the covered time frame would receive 52 credits (26 pay  
21 periods per year\*2 years). The total individual award would be \$417.04 ( $52*\$8.02$ ).

22 With regard to tax treatment, 25% of each Class Member’s payment will be treated  
23 as back wages subject to normal tax withholding and reporting on an IRS Form W-2.  
24 Agreement ¶69. The remaining 75% of will be treated as prejudgment interest and  
25 statutory non-wage penalties. *Id.* The Settlement Administrator will issue an IRS  
26 form 1099 where the amount of the non-wage payment exceeds the statutory minimum.  
27 *Id.* Marlu shall separately pay the employer’s share of payroll taxes due on payments and  
28 such payments shall be in addition to the Total Settlement Amount. *Id.* at ¶52.

1 **C. Non-Monetary Relief**

2 In addition to the payments to Class Members, the litigation and settlement also  
3 provides substantial and ongoing nonmonetary relief. With regard to the seating claims,  
4 Defendants have agreed, subject to approval by the relevant franchise owners, to provide  
5 an appropriate lean stool for seating at each location. Agreement at ¶¶78-80. The  
6 Agreement specifies that the lean stool provided must meet the same specifications as a  
7 specific high-quality product identified and examined by the parties. *Id.* at 79.

8 With regard to the mandatory pay card issue, Defendants will provide a written  
9 Payroll Election Form ensuring that employees can make a clear and documented choice  
10 to opt in or out of a pay card or traditional paycheck. *Id.* at 81. The parties have been  
11 unable to agree on the exact wording of the Payroll Election Form and file herewith a  
12 Joint Statement asking the Court to select either the form offered by Plaintiffs or the form  
13 offered by Defendants. Plaintiffs' proposed form is attached as Exhibit B to the  
14 Declaration of Allen Graves and Defendants' proposed form is attached as Exhibit C.

15 With regard to the paystub issue, Defendants have already, in the course of  
16 litigation, changed their paystub format and provided samples of the new compliant  
17 paystubs to Class Counsel. Graves Decl. ¶41.

18 **D. Release of Claims by the Class**

19 The claims released by the Class correspond to the allegations in this case.  
20 Agreement ¶33. The Class Members release claims "that were asserted or could have  
21 been asserted on the basis of the facts alleged in the Action during the applicable Class  
22 Periods." *Id.* Other than the need to file a claim form, the release is the only requirement  
23 that the settlement places on Settlement Class Members.

24 The release period is also limited. All released claims are limited to a Class Period  
25 that ends on November 7, 2016. Agreement at ¶¶9,33. By limiting the temporal scope of  
26 the release, the Agreement incentivizes immediate compliance from the employer as the  
27 release period has already ended and the employer must adopt and maintain lawful  
28 practices to avoid further liability.

1 **VI. NOTICE AND CLAIM PROCEDURES**

2 After examining the makeup of the Class, Class Counsel has concluded that  
3 requiring the return of the claim form before issuing the Individual Settlement Amount  
4 provides a superior benefit to the Class than mailing checks to all Class Members without  
5 requiring response. Graves Decl. ¶42. Class Counsel bases this conclusion on the fact  
6 that many Class Members will be difficult to locate and mailing checks without receiving  
7 claim forms could result in a large number of checks being received and possibly  
8 deposited by individuals who are not Class Members. *Id.* Because the instant settlement  
9 has no reversion and the entire Net Settlement Amount is being paid out, Class Counsel  
10 believes that requiring return of a claim form represents a better outcome for the Class  
11 Members as a whole because it minimizes the risk of fraud and waste and maximizes the  
12 payments being delivered to verified Class Members.

13 The parties have selected Kurtzman Carson Consultants (“KCC”) as the Settlement  
14 Administrator. Before selecting KCC, the parties reviewed bids from three different  
15 settlement administration firms. Graves Decl. ¶43, Exhs. D-F. The KCC bid was not the  
16 lowest. However, Class Counsel bargained with KCC to discount its charges from the  
17 original bid such that the difference between the KCC bid and the next closest bid is less  
18 than \$1,000. Graves Decl. ¶44, Exh D. The parties agree that KCC is the best qualified to  
19 provide services in this case. *Id.* at ¶45. KCC will implement a three-step notice and  
20 claim procedure:

21 **First**, within fifteen (15) days after preliminary approval, Defendants will provide  
22 the Settlement Administrator with a list of all Settlement Class Members, including name,  
23 last known address, dates of employment, positions held, employee ID number, and Social  
24 Security Number. Agreement ¶¶8, 95. **Second**, the Settlement Administrator will search  
25 a National Change of Address Database to confirm the current address for each Settlement  
26 Class Member prior to mailing the notice. *Id.* at ¶96. **Third**, within fifteen (15) days after  
27 preliminary approval, the Settlement Administrator will send each Settlement Class  
28 Member a notice and a claim form printed on a postage-paid postcard. *Id.* Copies of the

1 proposed notice and claim form are attached as Exhibit 1 to the Stipulation and Settlement  
2 of Class Action Claims. Graves Decl. Exh. A. For convience, they are also attached as  
3 Exhibit 1 to the [Proposed] Order filed herewith.

4 Settlement Class Members will have sixty (60) days from the date of the initial  
5 mailing in which to file a claim form, request exclusion or object. *Id.* at ¶35. Throughout  
6 the process, the Settlement Administrator will find a correct address if possible and  
7 re-mail all returned notices within five (5) business days. *Id.* at 99.

#### 8 9 **VII. TELEPHONE AND WEB SUPPORT FOR CLASS MEMBERS**

10 The Settlement Administrator will maintain toll-free telephone support and a  
11 website that Class Members can use to contact the Settlement Administrator if they have  
12 questions. Agreement ¶¶97-98. The website will also allow Class Members to file claim  
13 forms online and check the status of pending claim forms. *Id.* at ¶97. Materials and  
14 phone support will be available in Spanish as well as English. *Id.* at ¶¶96-97.

#### 15 16 **VIII. CONFIRMATION, PAYMENT, AND DISMISSAL**

17 The parties will follow a three-step procedure for final disposition of the case:  
18 **First**, within thirty (30) days after the Court grants final approval, Marlu will deliver to  
19 the Settlement Administrator the Total Settlement Amount. Agreement ¶52. **Second**,  
20 within fifteen (15) days after the receipt of the funds from Marlu, the Settlement  
21 Administrator will mail the payments to the Settlement Class Members who filed claim  
22 forms. *Id.* at 71. **Third**, the Settlement Administrator will continue to monitor returned  
23 mail. Returned payments will be re-mailed to an updated address within five (5) days.  
24 If a payment is returned a second time, or if a payment check goes un-cashed for more  
25 than one hundred and eighty (180) days, the Settlement Administrator will donate the  
26 funds to the Legal Aid Society-Employment Law Center. *Id.* at ¶73.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**IX. PRELIMINARY APPROVAL IS APPROPRIATE**

**A. The Preliminary Approval Process**

In the class action context, California Courts recognize a “strong public policy favoring settlement.” *Aviation Data, Inc. v. American Express Travel Related Services Co., Inc.*, 152 Cal. App. 4th 1522, 1539 (2007). The reasons underlying the judicial policy of promoting settlement are the same as those that underlie the judicial preference for arbitration: “Offers to settle, like arbitration, are to be favored, as they encourage the amicable and quick settlement of suits outside the judicial system.” *Id.*

Mindful of the general preference for negotiated settlements of class actions, California Courts follow the two-step approval process established by the Federal Courts: 1) An early (preliminary) review by the trial court; and 2) A final review after notice has been distributed to the class members for their comment or objections. *The Manual for Complex Litigation Second* states at §30.44 (1985):

If the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that notice be given to the class members of a formal fairness hearing.

Thus, preliminary approval is simply a conditional finding that the settlement appears to be within the range of acceptable settlements. Consistent with the general policy favoring negotiated resolution, a settlement “within the range of reasonableness required for a settlement offer, is presumptively valid subject only to any objections that may be raised at a final hearing.” *Newburg on Class Actions*, 3rd. Ed., §11.26.

While the recommendations of counsel proposing the settlement are not conclusive, the Court can properly take such recommendations into account, particularly where, as here, counsel has been involved in litigation for some period of time, appear to be competent, have experience with this type of litigation, and have obtained substantial data from the opposing party. *See Newburg* §11.47. In this case, Class Counsel has

1 substantial experience with meal and rest-period cases like the one at issue here. Graves  
2 Decl. ¶44. After considering all of the risks and benefits of litigation, Class Counsel  
3 believes that this settlement is in the best interests of the class. *Id.*

#### 4 **B. The Settlement Is Fair and Reasonable**

5 This is an excellent settlement. The value of the settlement is \$2,500,000 while the  
6 best estimate of the unpaid wages, reimbursements and interest is approximately  
7 \$2,843,612.78. *See* Section IV *supra*. Thus, the settlement recovers 88% of the estimated  
8 unpaid wages, reimbursements and interest. Looking at wages and reimbursement alone,  
9 the recovery is more than 100%. In light of the risks inherent in any class action, a  
10 settlement that recovers 88% of the core amount in dispute (including interest) is  
11 substantively fair and reasonable.

12 The provision of extensive non-monetary relief is also important. For example,  
13 Defendants' provision of lean stools at each location provides additional benefit to Class  
14 Members who are still working for Defendants. This will also be salutary for the fast food  
15 industry as a whole as it will give franchisors with whom Defendants contract the  
16 opportunity to see compliant seating functioning effectively in working restaurants. The  
17 implementation of a payroll election form and complaint paystubs are likewise valuable.

18 Procedurally, the settlement was reached after detailed and comprehensive  
19 discovery and a tremendous amount of factual and legal research. The mediation process  
20 itself was vigorous to say the least. Unable to agree on a settlement directly, the parties  
21 reached agreement only after two mediations and a neutral mediator's proposal by Mark  
22 Rudy that reflected Rudy's own independent valuation of the case. Graves Decl. ¶26.

### 24 **X. CONCLUSION**

25 After more than 100 witness interviews, carefully parsing the documents and data  
26 and exhaustively researching the current state of law, Class Counsel and Plaintiffs are all  
27 certain that accepting mediator's proposal was best for the class. Graves Decl. ¶46,  
28 Compendium of Declarations, *passim*.

1           In light of the excellent value that the instant settlement offers, and the multiple  
2 arm's-length mediations that produced the settlement, this Court should respect that  
3 conclusion and grant preliminary approval.

4  
5 DATED: January 17, 2017

THE GRAVES FIRM  
ALLEN GRAVES

6  
7 By: \_\_\_\_\_



ALLEN GRAVES

8 Attorney for Plaintiffs  
9 Richard Barajas, Felicia Bovenkerk, Timothy Collins,  
10 Becky Eads, Amanda Johnson, Suzanne Lansford,  
11 Joe Ortiz, Kevin Robinson, Janet Tinoco and  
12 David Velasco

13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28



1 PROOF OF SERVICE

2 STATE OF CALIFORNIA )  
3 ) ss:  
4 COUNTY OF LOS ANGELES )

5 I am employed in the County of Los Angeles, State of California. I am over the age of 18,  
6 and not a party to the within action. My business address is 122 N. Baldwin Ave., Main Floor,  
7 Sierra Madre, CA 91024.

8 On January 18, 2017, I served the following document(s) described as:

- 9 ■ **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION**  
10 **FOR AN ORDER:**  
11 **(1) PRELIMINARILY APPROVING CLASS ACTION SETTLEMENT;**  
12 **(2) CONDITIONALLY CERTIFYING THE SETTLEMENT CLASS;**  
13 **(3) DIRECTING DISTRIBUTION OF NOTICE OF SETTLEMENT AND**  
14 **CLAIM FORM; AND**  
15 **(4) SETTING A HEARING FOR FINAL APPROVAL OF THE SETTLEMENT**

16 on the interested parties by placing a true copy thereof in a sealed envelope(s) addressed as  
17 follows:

18 Shane Singh	Joshua Carlon
19 Lewis Brisbois Bisgaard & Smith LLP	Lewis Brisbois Bisgaard & Smith LLP
20 2020 W. El Camino Ave., Suite 700	633 W. Fifth St., Suite 4000
21 Sacramento, CA 95833	Los Angeles, CA 90071

- 22  **VIA OVERNIGHT MAIL:**  
23 By delivering such document(s) to an overnight mail service or an authorized courier in a  
24 sealed envelope or package designated by the express service courier addressed to the  
25 person(s) on whom it is to be served.
- 26  **VIA U.S. MAIL:**  
27 I am readily familiar with the firm's practice of collection and processing of correspondence  
28 for mailing. Under that practice such sealed envelope(s) would be deposited with the U.S.  
postal service on January 18, 2017 with postage thereon fully prepaid, at Sierra Madre,  
California.
- VIA PERSONAL DELIVERY:**  
I delivered such documents to a professional messenger to be personally delivered by hand  
today to the offices of the addressee(s) pursuant to CCP §1011.
- VIA EMAIL:**  
I personally sent such document(s) via email to the known email address of the person(s) on  
whom it is to be served before 5:00 p.m.

I declare under penalty of perjury under the laws of the State of California that the above  
is true and correct and was executed on January 18, 2017, at Sierra Madre, California.

Justine Gray  
Type or Print Name

  
Signature

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA )  
3 ) ss:  
4 COUNTY OF LOS ANGELES )

5 I am employed in the County of Los Angeles, State of California. I am over the age of 18,  
6 and not a party to the within action. My business address is 122 N. Baldwin Ave., Main Floor,  
7 Sierra Madre, CA 91024.

8 On January 18, 2017, I served the following document(s) described as:

- 9 ■ **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION**  
10 **FOR AN ORDER:**  
11 **(1) PRELIMINARILY APPROVING CLASS ACTION SETTLEMENT;**  
12 **(2) CONDITIONALLY CERTIFYING THE SETTLEMENT CLASS;**  
13 **(3) DIRECTING DISTRIBUTION OF NOTICE OF SETTLEMENT AND**  
14 **CLAIM FORM; AND**  
15 **(4) SETTING A HEARING FOR FINAL APPROVAL OF THE SETTLEMENT**

16 on the interested parties by placing a true copy thereof in a sealed envelope(s) addressed as  
17 follows:

18 Joshua Carlon  
19 Lewis Brisbois Bisgaard & Smith LLP  
20 633 W. Fifth St., Suite 4000  
21 Los Angeles, CA 90071

22  **VIA OVERNIGHT MAIL:**

23 By delivering such document(s) to an overnight mail service or an authorized courier in a  
24 sealed envelope or package designated by the express service courier addressed to the  
25 person(s) on whom it is to be served.

26  **VIA U.S. MAIL:**

27 I am readily familiar with the firm's practice of collection and processing of correspondence  
28 for mailing. Under that practice such sealed envelope(s) would be deposited with the U.S.  
postal service on January 18, 2017 with postage thereon fully prepaid, at Sierra Madre,  
California.

**VIA PERSONAL DELIVERY:**

I delivered such documents to a professional messenger to be personally delivered by hand  
today to the offices of the addressee(s) pursuant to CCP §1011.

**VIA EMAIL:**

I personally sent such document(s) via email to the known email address of the person(s) on  
whom it is to be served before 5:00 p.m.

I declare under penalty of perjury under the laws of the State of California that the above  
is true and correct and was executed on January 18, 2017, at Sierra Madre, California.

Kevin Karr

Type or Print Name

  
Signature