

1 Scott Edward Cole, Esq. (S.B. #160744)
2 Laura Grace Van Note, Esq. (S.B. #310160)
3 Cody Alexander Bolce, Esq. (S.B. #322725)
4 **COLE & VAN NOTE**
5 555 12th Street, Suite 1725
6 Oakland, California 94607
7 Telephone: (510) 891-9800
8 Facsimile: (510) 891-7030
9 Email: sec@colevannote.com
10 Email: lvn@colevannote.com
11 Email: cab@colevannote.com
12 Web: www.colevannote.com

13 Attorneys for Representative Plaintiffs

14 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**

15 **IN AND FOR THE COUNTY OF ALAMEDA**

16 CHANDRA COX, JACE WHITE,
17 individually, and on behalf of all others
18 similarly situated,

19 Plaintiffs,
20 vs.

21 CBCB; RISHON, LLC; GARY HILLER,
22 and DOES 1 through 100, inclusive,

23 Defendants.

Case No. HG20062001

CLASS ACTION

**REPRESENTATIVE PLAINTIFFS' NOTICE
OF MOTION AND MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT; MEMORANDUM
OF POINTS AND AUTHORITIES**

Date: January 6, 2022
Time: 9:00 a.m.
Dept.: 24
Reserv.: 521313231485

NOTICE OF MOTION

24 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, NOTICE IS**
25 **HEREBY GIVEN** that, at 9:00 a.m. on January 6, 2022, or as soon thereafter as the matter may
26 be heard in Department 24 of the above-entitled Court, located at 1221 Oak Street, 3rd Floor,
27 Oakland, California 94612, Representative Plaintiffs Chandra Cox and Jace White, on behalf of
28 the Plaintiff Class, will and hereby do apply to this Court for an Order: (1) granting preliminary
approval of the parties' class action settlement agreement, (2) granting conditional certification of

ELECTRONICALLY FILED

Superior Court of California,
County of Alameda

12/10/2021 at 04:07:51 PM

By: Anita Dhir, Deputy Clerk

1 the settlement class, (3) appointing class counsel, (4) appointing the class representatives, (5)
2 appointing a settlement claims administrator, (6) approving the class notice, and (7) setting a
3 hearing date for final settlement approval.

4 This motion is based upon the accompanying memorandum of points and authorities, the
5 declaration of Cody Alexander Bolce, Esq. and exhibits thereto, and such other oral argument and
6 documentary evidence as may be presented to the Court at the hearing of this motion.
7

8 Dated: December 10, 2021

COLE & VAN NOTE

9
10 By:


Cody Alexander Bolce, Esq.
Attorneys for Representative Plaintiffs

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	LITIGATION HISTORY	1
III.	THE SETTLEMENT.....	2
A.	SETTLEMENT TERMS.....	2
IV.	THE RELEASE	3
V.	JUDICIAL APPROVAL OF CLASS ACTION SETTLEMENTS.....	5
A.	THE SETTLEMENT FALLS WITHIN THE RANGE OF REASONABLENESS	5
B.	VALUATION OF PRIMARY CLAIMS ALLEGED	6
1.	<i>Missed Meal Breaks</i>	6
2.	<i>Missed Rest Breaks</i>	7
3.	<i>Waiting Time Penalties</i>	7
4.	<i>Wage Statement Violations</i>	7
5.	<i>PAGA Penalties</i>	8
6.	<i>Summary</i>	9
C.	THE RISK, EXPENSE AND LIKELY DURATION OF FURTHER LITIGATION SUPPORTS SETTLEMENT	10
VI.	THE SETTLEMENT MEETS THE STANDARD FOR PROVISIONAL CLASS CERTIFICATION	10
A.	THE CLASS IS SUFFICIENTLY NUMEROUS	11
B.	THE CLASS HAS A WELL-DEFINED COMMUNITY OF INTEREST IN QUESTIONS OF LAW AND FACT	11
1.	<i>The Class Satisfies the Commonality Element</i>	11
2.	<i>Plaintiffs Satisfy the Typicality Element</i>	12
3.	<i>Plaintiffs and Their Counsel Satisfy the Adequacy Requirement</i>	13
VII.	THE COURT SHOULD APPROVE THE PROPOSED CLASS NOTICE.....	13

1	VIII. A FINAL APPROVAL HEARING SHOULD BE SET	14
2	IX. CONCLUSION	14
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

<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591, 117 S.Ct. 2231 (1997)	10
<i>Brinker Restaurant Corp. v. Superior Court</i> , 53 Cal.4th 1004 (2012)	12
<i>Churchill Vill., L.L.C. v. GE</i> , 361 F.3d 566 (9th Cir. 2004)	13
<i>County of Suffolk v. Long Island Lighting Co.</i> , 710 F. Supp. 1422 (E.D.N.Y. 1989)	10
<i>Daar v. Yellow Cab Co.</i> , 67 Cal.2d 695 (1967)	11
<i>Day v. NLO</i> , 851 F. Supp. 869 (S.D. Ohio 1994)	12
<i>Eisen v. Carlisle & Jacquelin</i> , 417 U.S. 156 (1974)	4,13
<i>Ferguson v. Lieff, Cabraser, Heimann & Bernstein</i> , 30 Cal.4th 1037 (2003)	5,10
<i>Finder v. Leprino Foods Co.</i> , No. 1:13-CV-2059 AWI-BAM, 2015 U.S. Dist. LEXIS 30652 (E.D. Cal. 2015)	7
<i>Franklin v. Kayrpo Corp.</i> , 884 F.2d 1222 (9th Cir. 1989)	10
<i>Gay v. Waiters' & Dairy Lunchmen's Union</i> , 489 F.Supp. 282 (N.D. Cal. 1980), aff'd 694 F.2d 531 (9th Cir. 1982)	11
<i>Gutierrez v. Kovacevich "5" Farms</i> , 2004 WL 3745224 (E.D. Cal. Dec. 2, 2004)	12
<i>Haley v. Medtronic, Inc.</i> , 169 F.R.D. 643 (C.D. Cal. 1996)	11
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9th Cir. 1998)	5,12,13
<i>In re Wells Fargo Loan Processor Overtime Pay Litig.</i> , 2011 WL 3352460 (N.D. Cal. Aug. 2, 2011)	13
<i>Kullar v. Foot Locker Retail, Inc.</i> , 168 Cal.App.4th 116 (2008)	5,10

1	<i>Ling v. P.F. Chang's China Bistro, Inc.</i> , 245 Cal.App.4th 1242 (2016)	7
2		
3	<i>Maldonado v. Epsolon Plastics, Inc.</i> , 22 Cal.App.5th 1308 (2018)	7
4	<i>Rainbow Bus. Solutions v. Merch. Servs.</i> , 2013 U.S. Dist. LEXIS 179288 (N.D. Cal. 2013)	12
5		
6	<i>Rodriguez v. West Publ'g Corp.</i> , 563 F.3d 9483 (9th Cir. 2009)	13
7	<i>Sav-On Drug Stores, Inc. v. Superior Court</i> , 34 Cal.4th 319 (2004)	11,12
8		
9	<i>Slaven v. BP Am., Inc.</i> , 190 F.R.D. 649 (C.D. Cal. 2000)	11
10	<i>Tierno v. Rite Aid Corp.</i> , 2006 U.S. Dist. LEXIS 71794 (N.D. Cal. Aug. 31, 2006)	12
11		
12	<i>Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.</i> , 396 F.3d 96 (2d Cir. 2005)	5
13	<i>Wershba v. Apple Computer, Inc.</i> , 91 Cal.App.4th 224 (2001)	10
14		
15	<i>Young v. Katz</i> , 447 F.2d 4313 (5th Cir. 1971)	10
16	<u>Statutes</u>	
17	Cal. Civ. Code § 1542.....	4
18	Cal. Civ. Code § 1781.....	5
19	Cal. Civ. Proc. Code § 382	11
20	Cal. Civ. Proc. Code § 384	2
21	Cal. Labor Code § 203	6,7,12
22	Cal. Labor Code § 226	7-9,12
23	Cal. Labor Code § 226.7	7,12
24	Cal. Labor Code § 512	12
25	Cal. Labor Code § 2699	<i>passim</i>
26		
27		
28		

1	<u>Rules</u>	
2	California Rules of Court Rule 3.766	4
3	California Rules of Court Rule 3.769(a)	5
4	Fed. R. Civ. P. 23	5,11
5		
6	<u>Treatises</u>	
7	Manual for Complex Litigation (4th ed. 2004)	5
8	Newberg & Conte, Newberg on Class Actions (5th ed. 2017)	5
9	Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (TRG 2015)	10
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This motion seeks preliminary court approval of a \$100,000 settlement fund obtained by plaintiffs Chandra Cox and Jace White (hereinafter “Representative Plaintiffs”) against Rishon, LLC, Cannabis Buyers Club of Berkeley (sued as “CBCB”) and Gary Hiller (collectively, “Defendants”). Given the modest size of the Defendants’ businesses, relatively low wage rate of putative class members, early-stage of litigation and challenges to class certification and liability, the settlement achieved here merits preliminary court approval.¹

II. LITIGATION HISTORY

Representative Plaintiffs worked for cannabis dispensaries that Defendants operated within California. Representative Plaintiffs filed notices with the California Labor and Workforce Development Agency (“LWDA”) asserting an intent to seek recovery of civil penalties on a representative basis against Defendants on April 13, 2020 and January 14, 2021, respectively.² On May 11, 2020, Representative Plaintiff Cox filed a class action Complaint in Alameda County Superior Court seeking individual and class-wide damages and penalties for Labor Code violations. Plaintiff Cox sought to represent all of CBCB’s non-exempt employees in California. As discovered during litigation, the actual class totaled 73 individuals.

On October 13, 2020, the Complaint was amended to add Rishon, LLC and Gary Hiller as defendants and to add a cause of action under the Private Attorneys General Act (“PAGA”). On June 1, 2021, a Second Amended Complaint was filed which added Plaintiff White. After filing the action, the parties engaged in traditional and informal discovery efforts, including the production of documents detailing Defendants’ business operations, common policies and procedures, wage rates and payroll information for numerous putative class members. Following

¹ A copy of the fully executed Settlement Agreement and Release of Claims (“Agreement”) is attached to the accompanying Declaration of Cody Alexander Bolce, Esq. (“Bolge Decl.”) as Exhibit “A.” Unless otherwise noted, all exhibits cited herein are attached to the Bolge Decl.

² See Bolge Decl.

mediation on July 23, 2021, the parties resolved the case, culminating in the settlement agreement accompanying this motion.

III. THE SETTLEMENT

A. SETTLEMENT TERMS

The proposed settlement encompasses a class defined as “all hourly or nonexempt individuals employed by Rishon, LLC or Cannabis Buyers Club of Berkeley in California from January 14, 2020 through the preliminary approval by the Court of the Settlement of this Action.”³

Under the proposed non-reversionary⁴ settlement, the claims of all class members shall be settled for \$100,000, which is inclusive of all individual settlement awards to class members who do not timely opt out (“Settlement Class Members”), the class representative service awards, the PAGA allocation, CVN’s fees and costs, and reimbursement of the claims administrator’s costs.⁵

The settlement amount shall be allocated as follows:

Individual Settlement Awards. The Net Settlement Fund shall be distributed in its entirety to Settlement Class Members. Each Settlement Class Member shall receive his/her respective share thereof, based on his/her number of weeks worked during the Class Period, divided by the total number of weeks worked by all Settlement Class Members during that period.⁶ Settlement checks will remain valid for 180 days after the date of issuance.⁷ If a Settlement Class Member does not cash his/her settlement check within 180 days, the uncashed funds shall be transmitted in accordance with CCP § 384(b) to Legal Aid at Work in San Francisco, CA.⁸

³ Exhibit “A,” Section 1.4.

⁴ This amount is non-reversionary, such that no amount will revert back to the defendants, and the employer’s share of payroll taxes shall be funded independently by the company, so it does not deplete the settlement proceeds.

⁵ Exhibit “A,” Section 1.13.

⁶ Exhibit “A,” Section 9.2.

⁷ Exhibit “A,” Section 9.8.

⁸ Exhibit “A,” Section 9.8. CCP § 384(b) requires that cy pres awards go to organizations that “will benefit the class or similarly situated persons or that promote the law consistent with the objectives and purposes of the underlying cause of action[.]” Between the claims here and Legal Aid at Work there is a “driving nexus,” given that this organization represents “low-wage workers who are victims of wage violations.” *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012); <https://legalaidatwork.org/cy-pres/>.

1 Class Representatives' Service Awards. Subject to Court approval, Plaintiff Chandra Cox
2 and Jace White will each be paid a service award not to exceed \$5,000 (for an aggregate of
3 \$10,000) for their time, risk and effort in bringing the lawsuit, representing the class, and releasing
4 their claims.⁹

5 Class Counsel's Fees. The settlement provides for an attorneys' fee award of 35% of the
6 settlement amount, a typical percentage in the resolution of common fund cases.

7 PAGA Allocation. The settlement also provides for a payment of \$2,500 for a release of
8 PAGA claims, 75% of which will be remitted to the LWDA and 25% of which will remain in the
9 Net Settlement Fund.¹⁰

10 Litigation Expenses. Over the course of this litigation, CVN incurred ordinary litigation
11 costs and (just as with regard to the post-settlement efforts ordinarily attendant to class action
12 work), CVN anticipates incurring additional expenses in overseeing the settlement process,
13 making future court appearances, ensuring claims administration compliance with this Court's
14 Orders, responding to Settlement Class Members, CPAs, etc. CVN will submit a detailed cost
15 report with its motion for final approval of the settlement.

16 Settlement Administration Costs. The settlement administration costs of Simpluris, Inc. are
17 capped at \$6,500—a reasonable amount given the size of the class and the work required to send
18 the Notice, process settlement checks, and communicate with class members and counsel. The
19 settlement administration costs shall be paid from the Gross Settlement Fund.¹¹

20 Tax Treatment of Individual Settlement Shares. Settlement Class Members' settlement
21 shares will be allocated as 20% for wages and 80% for non-wages, including penalties and interest.

22
23 **IV. THE RELEASE**

24 Upon the Effective Date, Settlement Class Members shall release and discharge
25 Defendants from all claims "that arise from or relate to, or could have been asserted by the
26

27 ⁹ Exhibit "A," Agreement Section 6.

28 ¹⁰ Cal. Labor Code § 2699(i).

¹¹ Exhibit "A," Section 1.13.

1 Settlement Class Members during the Class Period based on the allegations in the Action.” The
2 named Plaintiffs (Cox and White) shall also be subject to a Civil Code § 1542 release.¹²

3 Within 30 calendar days of the granting of preliminary approval, Defendants will provide
4 the claims administrator with class members’ names, social security numbers, number of weeks
5 worked during the Class Period and PAGA Period, last known phone number, and last known
6 addresses, which the claims administrator will verify and update using the National Change of
7 Address (“NCOA”) Database. Within 50 days of the later of the Preliminary Approval Order or
8 court approval of Class Notice, the Settlement Administrator shall provide the Class Notice by
9 bulk first class mail, forwarding requested, to the Class members at the addresses identified
10 through the process described above. Settlement Class Members will not be required to file a claim
11 form to receive their portion of the settlement.

12 The proposed Notice meets the requirements of CRC Rule 3.766(b).¹³ The Notice costs
13 will be included in the settlement administration expenses to be paid from the Gross Settlement
14 Fund. A notice sent by mail to class members’ last known addresses, accompanied by reasonable
15 attempts to locate class members where those notices are returned as undeliverable, is sufficient to
16 ensure due process. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-76 (1974). Finally, the
17 contents of the Notice comply with CRC Rule 3.766(d).

18 Class members will have 40 calendar days (or 10 calendar days after the date the Notices
19 are re-mailed if returned as undeliverable) to opt out or object. Class members who wish to exclude
20 themselves must submit a signed, written request therefor to the claims administrator by the
21 response deadline.¹⁴ A class member wishing to *object* must submit a written objection thereto
22 describing why the settlement is unfair and whether the objector intends to appear at the final
23 approval hearing.¹⁵

24
25
26
27 ¹² Exhibit “A,” Section 17.2.

28 ¹³ Exhibit “B,” Notice of Settlement of Class Action Lawsuit.

¹⁴ Exhibit “A,” Section 13.

¹⁵ Exhibit “A,” Section 13.

1 **V. JUDICIAL APPROVAL OF CLASS ACTION SETTLEMENTS**

2 A class action may not be dismissed, compromised, or settled without the approval of the
3 Court. Cal. Civ. Code § 1781(f); California Rules of Court (“CRC”) Rule 3.769(a); Fed. R. Civ.
4 P. 23(e). The policy under California law, however, favors and encourages settlement of class
5 actions. *Ferguson v. Lieff, Cabraser, Heimann & Bernstein*, 30 Cal.4th 1037, 1054 (2003)
6 (acknowledging the “overriding public policy favoring settlement of class actions”). The purpose
7 of the Court’s preliminary evaluation of the proposed settlement is to (1) determine whether it is
8 within the “range of possible approval” (4 *Newberg* § 13.13 at 311) and to (2) provisionally certify
9 the proposed settlement class (4 *Newberg* § 13:12 at 305) in order to facilitate dissemination of the
10 Notice—which outlines the key settlement terms—to the class members and apprises them of the
11 date and time of the final approval hearing. *Manual for Complex Litigation* (4th ed. 2004) (“MCL”)
12 § 21.63; CRC Rule 3.769(e). Representative Plaintiffs request the Court take the first step and
13 grant preliminary approval of the settlement.

14 **A. THE SETTLEMENT FALLS WITHIN THE RANGE OF**
15 **REASONABLENESS**

16 At the preliminary approval stage, a proposed settlement is *presumed* to be fair when (1) it
17 is reached through arm’s-length negotiations, (2) the putative class is represented by experienced
18 counsel, and (3) the parties have conducted sufficient investigation or discovery. *Wal-Mart Stores,*
19 *Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005).¹⁶ All three elements are satisfied here.

20 In determining whether the settlement is *actually* within the range of reasonableness, courts
21 consider additional factors such as the strength of the plaintiff’s case, the risk, expense, complexity
22 and likely duration of further litigation, the risk of maintaining class action status throughout trial,
23 the amount offered in settlement, and the experience and views of counsel. *Hanlon v. Chrysler*
24 *Corp.*, 150 F.3d 1011, 1026 (1998); *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116
25 (2008).

26

27 ¹⁶ This Motion occasionally cites federal case law and commentaries thereon which construe authority for conditional
28 class certification and settlement approval in California courts. The California Supreme Court has authorized and
 urged California’s trial courts to use federal resources for guidance in considering class issues. *Vasquez v. Superior*
 Court, 4 Cal.3d 800, 821 (1971); *Green v. Obledo*, 29 Cal.3d 126, 145-46 (1981).

B. VALUATION OF PRIMARY CLAIMS ALLEGED

1. Missed Meal Breaks

The allegation that Defendants deprived class members of meal and rest periods was the driving force of this litigation. However, as the company's policies exhibited, Defendants had taken a variety of steps to adopt and enforce compliant meal and rest break policies by the time this case was filed. And yet, CVN maintained that the violations stemmed more from scheduling practices (versus a *per se* noncompliant policy) whereby many workers were not permitted to take "uninterrupted" breaks, an inadequate labor budget to consistently permit employee coverage during breaks, and/or that workers were uninformed as to what constituted a valid break to begin with.

Based on CVN's analysis of the available payroll records, it was determined that the number of pay periods in which meal periods could be missed was as high as 104. Using this information and data provided by Defendants, an average (weighted) hourly wage of \$15.62, and assuming a violation every time a worker worked a full time shift five days per week, every week, the liability exposure possible for this claim could exceed \$1.1M since April 2016. This best-case scenario was, of course, based on a variety of assumptions, none of which Defendants have agreed to, on schedules for this largely part time workforce that would be unrealistic (i.e., that every worker worked every day for eight full hours), and on the assumption that all elements of this claim could be proven (as well as the frequency) at trial.

Moreover, given that class members would rarely have made or kept independent records of compliant breaks, it may be that many, if not the vast majority, of any breaks missed would be, in fact, punch-in/punch-out errors or class member neglect in punching in/out at all. It is plausible that many workers simply took their breaks without punching out properly or notifying management when they left for a break. These challenges—and the paucity of records to demonstrate the violations—reveals that a substantial discount off the original damages estimate was appropriate.

2. Missed Rest Breaks

As discussed above, the risk of losing class certification, arguably compliant policies, and aggressive enforcement measures means CVN was also compelled to deeply discount its rest break damages analysis. Using the same data points enumerated above and based upon its investigation, the exposure possible for missed rest periods could also exceed \$2.2M. Again, however, it is suspect if even a substantial percentage of these occurrences could constitute violations of § 226.7.

3. Waiting Time Penalties

The strongest claims in this case were the meal and rest break claims, neither of which *conclusively* generates a “wage” to which a Labor Code § 203 claim could be tethered. The California Court of Appeal stated, *arguably in dicta*, that a meal break violation under Labor Code § 226.7 cannot support a “waiting time penalty” under Labor Code § 203. *Ling v. P.F. Chang’s China Bistro, Inc.*, 245 Cal.App.4th 1242, 1261 (2016).

Based on a typical eight-hour workday, on records showing that 73 class members were “severed” employees, and that their average (weighted) hourly wage was \$15.62, Defendants’ liability could reach as high as \$760,000 for waiting time penalties. Given the state of the law, and that an unrealistic full eight-hour workday was used to calculate this penalty for all severed workers, the value of this claim was discounted *significantly*.

4. Wage Statement Violations

Although some federal court decisions have held break premiums under Labor Code § 226.7 can support a wage statement penalty under Labor Code § 226(e), there are no published California state court decisions issuing a similar holding. *Maldonado v. Epsilolon Plastics, Inc.*, 22 Cal.App.5th 1308, 1337 (2018) (meal and rest claims cannot support a class-wide claim for inaccurate wage statements); *Finder v. Leprino Foods Co.*, No. 1:13-CV-2059 AWI-BAM, 2015 U.S. Dist. LEXIS 30652, at *1 (E.D. Cal. March 12, 2015). In light of the California authority explaining that a violation of Labor Code § 226.7 cannot support a § 203 penalty, the same logic may apply to § 226 penalties, making those unrecoverable in this litigation.

Under § 226, class members may recover \$50.00 for the initial violation and \$100.00 for each subsequent violation. Based on data provided by Defendants and subsequent analysis thereof by CVN, class members stood to recover \$120,000 if they fully prevailed on these claims at trial. Given the numerous elements Representative Plaintiffs would be required to demonstrate, anticipating Defendants’ “penalties on penalties” argument, CVN’s “reality check” and, thus, significant discount to the potential value of this claim, was appropriate. What’s more, this analysis assumes the penalties for all class members would never have reached the § 226 cap of \$4,000—although numerous workers stayed with the company beyond the tipping point where their aggregated per-pay-period penalties would have reached that cap.

5. PAGA Penalties

Representative Plaintiffs also alleged that Defendants’ conduct created liability under the Labor Code Private Attorneys General Act (“PAGA”). PAGA claims are extraordinarily difficult to evaluate because there are several obstacles to the actual award of the civil penalty. First, it is arguably unclear whether penalties continue to accrue until the court finds a violation to exist. Second, Labor Code § 2699(e)(1) and (2) give trial courts immense discretion to lower the penalty amount.¹⁷ Third, Defendants routinely argue that, when other statutory penalties have been imposed, additional penalties under PAGA are unjust (e.g., in cases where damages are already “in play” based on underlying wage violation claims, as we have here).

Thus, while the PAGA calculation herein for approximately 26 pay periods could reach \$636,500.00, the likelihood of that sum ever being awarded, or anything even close to it, is arguably slim. Despite this potential recovery, given that PAGA penalties may be deemed duplicative of other penalties awardable here, given the extreme “haircuts” many courts are giving to PAGA penalties, and given the presence here of class action allegations (the absence of which often being the reason so-called “Plan B” PAGA penalties are sought to begin with), PAGA penalties were significantly discounted.

¹⁷ Cal. Labor Code § 2699(e)(2) (courts have discretion to deny or significantly reduce PAGA penalties, particularly when the prescribed award would be “unjust, arbitrary and oppressive, or confiscatory.”)

6. Summary

Based on CVN's conversations with the named Plaintiffs, knowledge of workflows and typical conditions within the retail industry, and analysis of Defendants' meal and rest break policies, a number of deductions would be appropriate from the above calculations, due to:

Meal/Rest Periods: Many workers worked below the threshold number of hours for meal or rest period entitlements, worked less than five days per week, and only missed breaks (when they did) out of choice or mis-punches. More likely, one to two violations per pay period is realistic.

Waiting Time Penalties: If not all workers had meal/rest period violations to begin with, worked less than 8 hours per day, the starting place for this penalty analysis needs to be discounted.

Wage Statement Penalties: For the same reasons as those supporting a Waiting Time Penalty reduction, the top end/potential §226 penalty level should be reduced, even before a liability analysis for them begins.

PAGA: The penalties only apply if a predicate violation applies, which it oftentimes likely would not. Given that, the starting place for a PAGA analysis should be reduced.

Thus, *before even considering the likelihood of recovering these damages/penalties*, the realistic analysis would look like this:

REALISTIC "STARTING PLACE" VALUATIONS					
Meal Breaks	Rest Breaks	Waiting Time	Wage Statements	PAGA	TOTAL
~\$148K	~\$296K	~\$35K	~\$120K	~\$630K	~\$1.2M

Indeed, while, on its face, the total damages and penalties available to class members under this scenario are higher than the settlement amount, so were the risks and delays inherent in protracted litigation. As a result, the extraordinary result of a *non-reversionary* \$100,000.00 fund is very reasonable when balanced against the risks of continued litigation.

1 **C. THE RISK, EXPENSE AND LIKELY DURATION OF FURTHER**
2 **LITIGATION SUPPORTS SETTLEMENT**

3 In evaluating for fairness, the Court should weigh the benefits of settlement against the
4 expense and delay involved in achieving an equivalent or even more favorable result at trial. *Young*
5 *v. Katz*, 447 F.2d 431, 433 (5th Cir. 1971); *Kullar*, 168 Cal.App.4th 116 (2008). As California
6 jurists have recognized, there exists “an overriding public policy favoring settlement of class
7 actions.” *Ferguson v. Lieff, Cabraser, Heimann & Bernstein*, 30 Cal.4th 1037, 1054 (2003) (citing
8 *Franklin v. Kayrpo Corp.*, 884 F.2d 1222, 1229 (9th Cir. 1989) (“public policy favor[s] the
9 compromise and settlement of disputes”)). Here, however, the settlement provides *all* Settlement
10 Class Members, regardless of their means, the opportunity of monetary recovery in a prompt and
11 efficient manner, without the risk of the Court denying class certification and these workers
12 potentially recovering nothing at all.

13 **VI. THE SETTLEMENT MEETS THE STANDARD FOR PROVISIONAL CLASS**
14 **CERTIFICATION**

15 Prior to obtaining class certification, the parties to a class action suit may appropriately
16 negotiate a proposed settlement. *Wershba v. Apple Comput., Inc.*, 91 Cal. App. 4th 224, 240
17 (2001). When the class has not been certified prior to settlement—as here—the parties may stipulate
18 that a defined class be conditionally certified for settlement purposes only. *County of Suffolk v.*
19 *Long Island Lighting Co.*, 710 F. Supp. 1422, 1425 (E.D.N.Y. 1989). However, the traditional
20 prerequisites for certification are used to determine whether conditional certification of the
21 proposed class should be granted. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997).¹⁸
22 This case satisfies these elements for purposes of conditional certification.

23
24
25
26
27 ¹⁸ A pre-certification settlement may stipulate that a defined class be conditionally certified for settlement purposes.
28 This enables the defendant to get the benefit of a final judgment binding on all class members without conceding
 certification should the court disapprove the settlement. Weil & Brown., Cal. Prac. Guide: Civ. Pro. Before Trial (The
 Rutter Group 2015) ¶ 14:139, *et seq.*

1 **A. THE CLASS IS SUFFICIENTLY NUMEROUS**

2 For class certification, CCP § 382 requires the parties be “numerous [and it be]
3 impracticable to bring them all before the court....” *Daar v. Yellow Cab Co.*, 67 Cal.2d 695, 704
4 (1967); *Gay v. Waiters’ & Dairy Lunchmen’s Union*, 489 F.Supp. 282 (N.D. Cal. 1980), *aff’d* 694
5 F.2d 531 (9th Cir. 1982). Here, the class consists of 73 employees, which is sufficiently numerous.

6 **B. THE CLASS HAS A WELL-DEFINED COMMUNITY OF INTEREST IN**
7 **QUESTIONS OF LAW AND FACT**

8 The “community of interest” requirement requires: (1) predominant common questions of
9 law or fact, (2) class representatives whose claims or defenses are typical of the class, and (3) class
10 representatives who adequately represent the class. *Brinker Rest. Corp. v. Superior Court*, 53 Cal.
11 4th 1004, 1021 (2012).

12 **1. The Class Satisfies the Commonality Element**

13 The first prong of the test (i.e., predominant common questions of law or fact) is met so
14 long as common questions are likely to arise in the action and the theory of recovery is “amenable
15 to class treatment.” *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319, 327 (2004).¹⁹ The
16 class members’ claims in this action stem from Defendants’ alleged uniform practice of short-
17 staffing, failing to provide “rovers” to cover for class members during their meal and rest periods,
18 and Defendants’ commitment of full-time staffing to its clients. Representative Plaintiffs
19 contended these alleged practices undermined Defendants’ otherwise compliant break policies.

20 Moreover, class members’ duties did not vary significantly, nor did their actual
21 experiences. During this class period, Defendants’ policies and procedures changed little, and
22 Defendants required all class members to adhere to them. Not only do class members thus share
23 common policies on paper, CVN’s investigation revealed they were treated as a homogenous
24 group. Given the uniform nature of class members’ job duties, Defendants’ policies and
25

26
27 ¹⁹ Borrowing from federal authority, FRCP Rule 23 applies a permissive standard to demonstrate common questions
28 of law or fact. *Hanlon*, 150 F.3d at 1011 (9th Cir. 1998) (emphasizing the “minimal” requirements and “permissive”
interpretation of Rule 23(a)(2)). The presence of merely one common issue of law or fact is sufficient. *Haley v.*
Medtronic, Inc., 169 F.R.D. 643, 648 (C.D. Cal. 1996); *Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 655 (C.D. Cal. 2000).

1 procedures, and the fact that working conditions were common, this case is suitable for class
2 treatment. Indeed, the following common questions of law and fact, among others, flow logically
3 from the practices detailed above:

- 4 • Whether Defendants violated each of the elements of Labor Code §§ 203, 226, 226.7
5 and 512 (the primary claims);
- 6 • Whether failing to pay and record meal and rest period premiums on employees' pay
7 stubs was a violation of Labor Code § 226; and
- 8 • Whether a violation of §§ 226.7 and/or 512 supports penalties under §§ 203 and/or 226.

9 Given the host of common questions of law and fact, the commonality requirement is
10 satisfied. *Hanlon*, at 1019-20; *Gutierrez v. Kovacevich "5" Farms*, 2004 WL 3745224, at *5 (E.D.
11 Cal. Dec. 2, 2004) (finding commonality satisfied where plaintiffs presented common questions
12 of whether defendants failed to pay plaintiffs for all time worked); *Rainbow Bus. Solutions v.*
13 *Merch. Servs*, 2013 U.S. Dist. LEXIS 179288, *15 (N.D. Cal. 2013) (shared legal issues with
14 divergent factual predicates sufficient for class certification); *Tierno v. Rite Aid Corp.*, 2006 U.S.
15 Dist. LEXIS 71794 (N.D. Cal. Aug. 31, 2006) (certifying a wage and hour class of retail store
16 managers based on a common evaluation process). Following the California Supreme Court's
17 seminal decision in *Brinker*, courts are routinely certifying these types of claims.

18 19 **2. Representative Plaintiffs Satisfy the Typicality Element**

20 The second prong (i.e., Typicality) is met when the class representative has claims or
21 defenses typical of the class. *Sav-On*, 34 Cal.4th at 326. Here, Typicality is met because the
22 Representative Plaintiffs' claims arise from the same facts and are based on the same legal theories
23 as those applicable to the class as a whole, yet those claims "need not be substantially identical."
24 *Sav-On*, 34 Cal.4th at 326; *Hanlon*, 150 F.3d at 1020. In deciding whether individual variations
25 preclude Typicality, the focus should be on the behavior of the defendants. *Day v. NLO*, 851 F.
26 Supp. 869, 884 (S.D. Ohio 1994). Here, Representative Plaintiffs allege the denial of meal and rest
27 periods based on Defendant's policies and practices as applied to the class as whole. Accordingly,
28

1 because the offending policies and procedures applied equally to all class members, Typicality is
2 satisfied.

3 **3. The Adequacy Requirement is Satisfied**

4 Under the third prong, class members are adequately represented if the named plaintiff and
5 its counsel (1) do not have conflicts of interest with class members and (2) will prosecute the case
6 vigorously for the class. *Hanlon*, 150 F.3d at 1020.²⁰ Here, there is no conflict of interest between
7 Representative Plaintiffs (or their attorneys) and the remaining class members. Even if there were
8 such a conflict in a certain instance, any class member may “opt-out” of the class. Finally, CVN
9 has significant experience in wage and hour class action litigation and is routinely appointed class
10 counsel in cases alleging precisely these issues.²¹ Thus, CVN and its clients clearly have the
11 motivation and ability to litigate this class action had a fair settlement not been obtained.

13 **VII. THE COURT SHOULD APPROVE THE PROPOSED CLASS NOTICE**

14 Adequate notice is critical to court approval of a class settlement. *Hanlon*, 150 F.3d at
15 1025. The threshold requirement concerning the sufficiency of class notice is whether the means
16 employed to distribute the notice is reasonably calculated to apprise the class of the pendency of
17 the action, of the proposed settlement, and of class members’ rights to opt out or object. *Eisen*, 417
18 U.S. at 173-74 (1974). Notice is satisfactory if it “generally describes the terms of the settlement
19 in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and
20 be heard.” *Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 575 (9th Cir. 2004).

21 The Notice is written in simple, straightforward language.²² Since the Notice provides class
22 members with sufficient information to make an informed and intelligent decision about the
23 settlement, it satisfies all due process requirements. *In re Wells Fargo Loan Processor Overtime*
24 *Pay Litig.*, 2011 WL 3352460, at *4 (N.D. Cal. Aug. 2, 2011); *Rodriguez v. West Publ’g Corp.*,
25 563 F.3d 948, 963 (9th Cir. 2009) (where class notice communicated the essentials of the proposed

26
27 ²⁰ Notably, mere divergence of opinion between the class and its representatives is not sufficient to constitute a
conflict. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000).

28 ²¹ Bolce Decl. ¶¶ 19-23; Exhibit “C,” CVN’s Professional Resume.

²² Exhibit “B,” Notice of Settlement of Class Action Lawsuit.

1 settlement in a sufficiently balanced, accurate, and informative way, it satisfied due process
2 concerns).

3 **VIII. A FINAL APPROVAL HEARING SHOULD BE SET**

4 The final step in the settlement approval process is a final fairness hearing at which the
5 Court may hear all evidence and arguments necessary to make its evaluation regarding the
6 settlement. *MCL* § 21.63 at 318. Representative Plaintiffs request the Court set a final approval
7 hearing at a time convenient for the Court, roughly 85 calendar days after preliminary approval.
8

9 **IX. CONCLUSION**

10 For the reasons set forth above, Representative Plaintiffs respectfully request that the Court
11 (1) grant preliminary settlement approval, (2) approve the content and plan for distribution of the
12 Notice, (3) appoint class counsel, Representative Plaintiffs and a claims administrator, (4)
13 conditionally certifying the class, and (5) schedule a Final Approval Hearing.
14

15 Dated: December 10, 2021

COLE & VAN NOTE

16
17 By:


Cody Bolce, Esq.
Attorneys for Representative Plaintiff

PROOF OF SERVICE

I am over 18 years of age, not a party to the above-captioned action, and am employed by the law firm of Cole & Van Note, 555 12th St., Suite 1725, Oakland, California 94607.

On this date, I served a copy of:

REPRESENTATIVE PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES

DECLARATION OF CODY ALEXANDER BOLCE, ESQ. IN SUPPORT OF REPRESENTATIVE PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

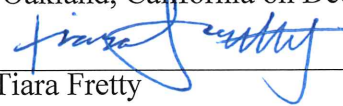
[PROPOSED] ORDER GRANTING REPRESENTATIVE PLAINTIFF' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

	By depositing the document(s) with the U.S. Postal Service, with postage fully prepaid, addressed as indicated below, in the ordinary course of business.
	By facsimile transmission to the fax number(s) below, before 5:00 p.m. PST.
	By placing the document(s) in a sealed Federal Express envelope, affixing a pre-paid air bill and delivering it to a Federal Express agent.
	By personal delivery.
X	By e-mail transmission to the e-mail address(es) below.
	By electronic filing using the CM/ECF System which will send a Notice of Electronic Filing to the email address(es) listed in the Electronic Mail Notice List.
	By uploading the document(s) to the third-party document management/service company, court-approved for purposes of this litigation.
	By electronic submission to the Labor and Workforce Development Agency.

on the following person(s):

Philip Baldwin, Esq.
Helene Wasserman, Esq.
LITTLER MENDELSON P.C.
333 Bush Street, 34th Floor
San Francisco, CA 94104
Email: PBaldwin@littler.com
Email: HWasserman@littler.com

I declare under penalty of perjury under the laws of the United States and the State of California the foregoing is true and correct. Executed in Oakland, California on December 10, 2021.


Tiara Fretty