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SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

FRANCISCO SCHILLER, on behalf of
himself and all other aggrieved and similarly-
situated employees,

Plaintiff,

v.

ASHLEY DISTRIBUTION SERVICES,
LTD., a Wisconsin Limited Company; and
DOES 1 through 10, Inclusive,

Defendants.

LEAD CASE NO. CIVDS2013264
Consolidated with Case No. CIVDS2014776
ASSIGNED FOR ALL PURPOSES TO:
The Honorable Jessica Morgan
Department S26

CLASS AND REPRESENTATIVE ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR AN ORDER GRANTING
PRELIMINARY APPROVAL OF
CLASS ACTION AND PAGA
SETTLEMENT**

Date: November 29, 2023

Time: 8:30 a.m.

Dept: 26

Judge: Hon. Jessica Morgan

Complaint filed: June 16, 2020

Trial Date: Not set

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I. INTRODUCTION

Plaintiff Francisco Schiller (“Plaintiff”) seeks preliminary approval of a \$350,000 non-reversionary wage and hour Class Action and Private Attorneys General Act (“PAGA”) settlement for all current and former, hourly, nonexempt employees who worked for Ashley Distribution Services, Ltd. (“ADS”) any time from August 23, 2018 to September 13, 2022 (“Class Period”) or any time from April 12, 2019 to September 13, 2022 (“PAGA Period”). Declaration of Michael D. Singer (“Singer Decl.”), ¶12. The putative class of all non-exempt employees has an estimated 495 members¹ who worked an estimated 39,685 Workweeks during the Class Period and 448 Aggrieved Employees who worked 31,575 pay periods during the PAGA Period. Singer Decl., ¶13, Exh. 1 – Class and Private Attorneys General Act (“PAGA”) Settlement Agreement (“Agreement” or “SA”), ¶¶4.1, 8.

II. PARTIES

Defendant ADS, founded in 1974, is Ashley Furniture Industries, Inc.’s transportation fleet. ADS drivers transport furniture between warehouses and stores and to customers. Singer Decl., ¶14. Plaintiff Francisco Schiller was employed by ADS as a non-exempt Shuttle Driver, driving a shuttle between ADS facilities and picking up and delivering furniture to customers, from December 2017 through October 26, 2020. *Id.*, ¶15; Declaration of Francisco Schiller (“Schiller Decl.”), ¶2.

III. PROCEDURAL HISTORY

On June 15, 2020, Plaintiff commenced this Action by filing the Operative PAGA Complaint seeking civil penalties under California Labor Code sections 2699, *et seq.* against Defendant for its alleged failure to 1) pay minimum, regular, and overtime wages; 2) provide meal periods; 3) provide rest periods; 4) provide accurate itemized wage statements; 5) timely pay wages due during employment; 6) timely pay wages due upon separation of employment; 7) reimburse business-related expenses; and 8) maintain accurate records. Singer Decl., ¶16;

¹ The estimated 495 Members include 402 driver non-exempt employees and 93 non-driver non-exempt employees. Of the drivers, 145 are PTP Drivers; 43 are Sleeper Cab Drivers; 30 are Day Cab Drivers; 19 are Shuttle Delivery Drivers; 109 are Shuttle Drivers; and 56 are Yard Drivers.

1 SA, ¶2.1. Pursuant to Labor Code section 2699.3(a), Plaintiff gave timely written notice to
2 Defendant and the LWDA by sending the April 9, 2020 PAGA Notice. Singer Decl., ¶17; SA,
3 ¶2.4.

4 On July 23, 2020, Plaintiff filed the Operative Class Complaint against ADS seeking
5 damages, penalties, and other appropriate relief for failure to 1) pay minimum, regular, and
6 overtime wages; 2) provide meal periods or compensation in lieu thereof; 3) provide rest
7 periods or compensation in lieu thereof; 4) provide accurate itemized wage statements; 5)
8 timely pay wages due upon separation of employment; and 6) reimburse business-related
9 expenses, resulting in 7) violation of the Unfair Competition Law (Bus. & Prof. Code §§
10 17200, *et seq.*). Singer Decl., ¶18; SA, ¶2.2.

11 On August 17, 2022, the Parties participated in an all-day mediation presided over by
12 experienced employment mediator Todd Smith, Esq. which led to the Agreement to settle the
13 Action. Singer Decl., ¶19; SA, ¶2.5. Prior to mediation, Plaintiff obtained, through informal
14 discovery, information sufficient to meaningfully evaluate the claims at issue, including
15 Plaintiff's personnel file, ADS' written wage and hour policies applicable to the Class, a
16 breakdown of Class Members by position, and time and pay records for a random sample of the
17 Class spanning August 23, 2018 through July 9, 2022. Plaintiff's consultant determined that the
18 records contained 16,111 Workweeks to analyze, or about 40% of the Class workweeks
19 (16,111/39,685). Thus, Plaintiff's consultant applied a 2.5 multiplier to violations ascertained
20 from the records to account for the whole class (40% x 2.5 = 100%). Singer Decl., ¶20.
21 Plaintiff's investigation was sufficient to satisfy the criteria for court approval set forth in *Dunk*
22 *v. Foot Locker Retail, Inc.* (1996) 48 Cal. App. 4th 1794, 1801 ("*Dunk*") and *Kullar v. Foot*
23 *Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 129-130 ("*Kullar*"). Singer Decl., ¶21; SA,
24 ¶2.6. Before settlement Plaintiff had not moved for, and the Court had not granted, class
25 certification. Singer Decl., ¶22; SA, ¶2.7.

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IV. PLAINTIFF'S CLAIMS AND ADS'S DEFENSES

A. Labor Code §§ 1194, 510—Unpaid Minimum & Overtime Wages²

Employers must pay at least minimum wage for all time worked or subject to the employer's control and must pay for hours in excess of eight per day or forty per week at a rate not less than one and one-half the employee's regular rate. Labor Code §§ 1194(a), 510(a).

Plaintiff contends that from March 21, 2020 to June 7, 2021, ADS required its non-exempt employees to undergo a health screening before allowing them to clock in for work if they passed, pursuant to its "Temperature Measurement Procedure" produced by ADS. Singer Decl., ¶24, Exh. 2 - "Temperature Measurement Procedure" ("Procedure"). The Procedure provides: "Individuals who refuse cooperation with these measures will not be allowed access to Ashley work environments." Singer Decl., ¶25; Exh. 2. ADS contends Plaintiff cannot prove these screenings were done off-the-clock, that determination of this claim would be individualized, and that certification would likely not be granted given individualized issues of proof. Singer Decl., ¶26.

B. Labor Code § 226.7—Meal and Rest Period Premiums

Employers must provide a first uninterrupted 30-minute meal period before the end of the fifth hour of work and a second such meal period before the end of the tenth hour of work. Labor Code § 512; *see also Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1005. Otherwise, the employer owes one hour of pay to the employee at their regular rate of pay. Labor Code § 226.7. If records show a missed, late, short, or interrupted meal period there is a presumption of liability, which the employer may rebut. *Donohue v. AMN Servs., LLC*

² Plaintiff also contends overtime wages were not paid at the correct regular rate. However, Plaintiff's consultant determined from sampled records that the potential value of this claim is negligible. Thus, Plaintiff does not include potential regular rate underpayments in his *Kullar* analysis. Specifically, Plaintiff's consultant determined that only 6.3% of sampled employees earned overtime and additional compensation in the same pay period, and that the potential underpayment to the entire class was a mere \$12,275 (\$4,910 identified x 2.5 to extrapolate to the class), if the consultant assumed all of the following pay codes should have been included: LDPAY Earns (PP), DPDIF Earns (PP), CONTR Earns (PP), DRPHK Earns (PP), REFSU Earns (PP), PEDPY Earns (PP), DRDAY Earns (PP), LUBH Earns (PP), LLBH Earns (PP), MGDPR Earns (PP), ODNDR Earns (PP), RSINS Earns (PP), RBSOT Earns (PP), BONUS Earns (PP), GIFTTC Earns (PP), BONOT Earns (Quarterly), NDBON Earns (Quarterly), PSBON Earns (Annual). Singer Decl., ¶23.

(2021) 11 Cal. 5th 58, 77. Employers must also authorize and permit a first uninterrupted 10-minute rest break after three and one-half (3.5) hours worked, a second such rest break after six (6) hours worked, and a third such rest break after ten (10) hours worked. Labor Code § 226.7; *see also Brinker Rest. Corp*, 53 Cal. 4th at p. 1029. Otherwise, the employer owes one hour of pay to the employee at their regular rate of pay. Labor Code § 226.7.

Plaintiff contends ADS did not provide adequate meal and rest periods and that time pressures, work demands, and a lack of ADS scheduling breaks prevented him and other non-exempt employees from taking compliant meal and rest periods. Further, Plaintiff's consultant determined that ADS's sampled time records showed missed, late, and short meal periods, discussed *infra* at Section VII(C)(2), without adequate premiums being paid. Schiller Decl., ¶4; Singer Decl., ¶27.

ADS counters that it provided compliant written meal and rest period policies to all non-exempt employees during the Class Period. Singer Decl., ¶28, Exh. 3 – Meal and Rest Period Policies, [ADS_FS_000230 (operations, non-driver)] [ADS_FS_000248 (office)]. ADS further counters that all driver non-exempt employees (except Yard Drivers) are exempt from meal and rest period requirements under a 2018 Federal Motor Carrier Safety Administration ruling because they crossed state lines, transported goods manufactured outside California, and drove large commercial trucks. *See California's Meal and Rest Break Rules for Commercial Motor Vehicle Drivers*, 83 Fed. Reg. 67470-01, (Dec. 28, 2018) 2018 WL 6809341 (determining that California meal and rest break rules were federally preempted as to commercial truck drivers). Singer Decl., ¶29. Finally, ADS counters that individualized inquiries would be needed to determine whether breaks were in fact non-compliant or whether Class Members chose to work through them. *Id.*, ¶30.

C. Labor Code §§ 203, 226—Derivative Waiting Time and Wage Statement Penalties

Employers must provide their employees with accurate itemized wage statements showing, among other things, total hours worked, gross and net wages earned, and the number of hours worked at each rate of pay. Labor Code §§ 226(a)(1), (2), (5), (9). Otherwise, each Class Member is entitled to recover \$50 for the first violation and \$100 for each subsequent

1 violation, with a maximum aggregate penalty of \$4,000, but only if the violations are willful.
2 Labor Code § 226(e). Employers must also pay all wages due to an involuntarily terminated
3 employee at the time of termination, or within 72 hours after voluntary termination. If an
4 employer willfully fails to timely pay all wages to separated employees, the wages continue at
5 the same rate for up to 30 days. Labor Code § 203. Only willful violations give rise to liability.
6 *Naranjo v. Spectrum Security Services, Inc.* (2023) 88 Cal. App. 5th 937, 950. Thus, an
7 employer raising a good faith defense will prevent an imposition of liability. *Id.*

8 Plaintiff contends that because ADS failed to pay wages for health screenings and meal
9 and rest period premium wages, it failed to pay all final wages owed under Labor Code section
10 203 and to issue accurate itemized wage statements under Labor Code section 226. Singer
11 Decl., ¶31. ADS disputes each underlying claim and contends Plaintiff cannot show any
12 violation was willful, and without a good faith belief no wages were owed, such that ADS
13 would owe these penalties. *Id.*, ¶32.

14 **D. Labor Code § 2802—Expense Reimbursement**

15 An employer must indemnify employees for necessary expenses incurred in the
16 discharge of their duties. Labor Code § 2802. A reasonable percentage of an employee’s cell
17 phone charges must be reimbursed, and “[b]ecause of the differences in cell phone plans and
18 work-related scenarios, the calculation of reimbursement must be left to the trial court and
19 parties in each particular case.” *Cochran v. Schwan’s Home Service, Inc.* (2014) 228 Cal. App.
20 4th 1137, 1145. Plaintiff contends he was practically required to use his cell phone for work
21 and that his supervisor knew this, but did not discourage him. Despite this, ADS did not
22 reimburse Plaintiff for any cell phone expenses. Schiller Decl., ¶5; Singer Decl., ¶33, Exh. 4 –
23 Schiller Payroll Register (showing no cell phone reimbursement).

24 ADS counters that, through its “Wireless Communications Stipend Policy,” it offered a
25 stipend for wireless communication devices for those employees whose duties required their
26 use; beyond this, ADS counters that even if this policy was not sufficient, individualized issues
27 of proof would prevent certification and prevailing at trial. Singer Decl., ¶34, Exh. 5 – Wireless
28 Communications Stipend Policy.

E. Labor Code §§ 2699—PAGA Penalties

Plaintiff also seeks PAGA penalties based on the purported violations discussed *supra* at Section IV(A)-(D). In addition, Plaintiff seeks PAGA penalties for ADS’s purported failure to maintain accurate records of time worked in violation of Labor Code section 1174. Singer Decl., ¶35.

V. INVESTIGATION AND MEDIATION

The Parties agreed to mediate with Todd Smith, Esq., a respected mediator of wage and hour class actions. For mediation, ADS produced: Plaintiff’s personnel file, time and payroll records, and wage statements; corresponding time and payroll records for a randomized sample of Class Members, with about 40% of the total Workweeks contained in the sample; all ADS’s written policies pertinent to the claims alleged—including as to meal and rest periods and pre-shift health screenings; and job descriptions for Class Members. Plaintiff’s consultant analyzed the data and created a damages model. Singer Decl., ¶36.

With significant investigation, research, informal discovery, and analysis of data by Plaintiff and his damages consultant completed, the Parties mediated with Mr. Smith on August 17, 2022. After a full day of arms’-length negotiations, the Parties were unable to reach a settlement. The Parties thereafter engaged in on-going settlement negotiations, facilitated by Mr. Smith, and were eventually able to reach a settlement. An MOU was fully executed on November 15, 2022 and the Agreement, presented for preliminary approval, was fully executed on March 22, 2023. Singer Decl., ¶37.

VI. SUMMARY OF PROPOSED SETTLEMENT

A. Settlement Terms

ADS will pay a non-reversionary, maximum Gross Settlement Amount (“GSA”) of \$350,000 which includes: (a) attorneys’ fees³ not to exceed \$116,666.67 (1/3 of GSA), to compensate Class Counsel for work performed and remaining to secure final Court approval; (b) litigation costs not to exceed \$20,000.00; (c) Class Representative Service Payment of

³ Plaintiff consented in writing to the 50%/50% division of attorneys’ fees between Cohelan Khoury & Singer and Sahag Majarian II. Singer Decl., ¶38.

\$10,000.00 to Plaintiff Francisco Schiller, for work as Class Representative, risks undertaken for costs if the case had not successfully concluded, and benefits conferred on the Class; (d) PAGA Payment of \$17,500.00 [\$13,125.00 to LWDA (75%)/\$4,375.00 to Aggrieved Employees (25%)] and (e) Settlement Administration costs currently estimated at \$10,000 (and not to exceed \$15,000.00).⁴ ADS will pay the employer's payroll taxes in addition to the GSA. Singer Decl., ¶39; SA, ¶¶3.1-3.2.5, 4.3.

After approved deductions, the estimated \$175,833.33⁵ Net Settlement Amount ("NSA") will be distributed to Participating Class Members. Individual Class Payments will be calculated based on the number of Workweeks that each Participating Class Member worked. Class Members will receive an estimated \$4.43 for each Workweek worked during the Class Period (\$175,833.33/39,685 Workweeks), with an average Individual Class Payment of \$355.22 (\$175,833.33/495 Class Members). Settlement payments are characterized as 20% unpaid wages (W-2), 40% unpaid interest (Form 1099), and 40% as alleged statutory and civil penalties (Form 1099). Singer Decl., ¶39; SA, ¶¶1.28, 3.2.4-3.2.4.1.

The Settlement distribution is fair and reasonable, does not give preferential treatment to any Class Member, can be made from data readily available from ADS, and the Administrator can apply the formula fairly and transparently. Singer Decl., ¶40; Green Decl., ¶7.

B. Settlement Administration and Class Notice

CPT will search the National Change of Address database, update Class Members' addresses, and mail the Notice of Settlement to each Class Member. Green Decl., ¶7; Singer Decl., ¶41, Exh. 6, Notice of Class Action Settlement ("Class Notice"); SA, ¶¶1.10, 4.4.1, 7.4.2. The Class Notice explains how to challenge the basis of an Individual Settlement Payment; object or opt out; the release to be given; date of Final Approval hearing; how to get further information; and that no claim form is necessary. Singer Decl., ¶42, Exh. 6.

⁴ CPT Group, Inc. ("CPT") estimated costs at \$10,00.00. Declaration of CPT Group, Inc., by Julie Green ("Green Decl."), ¶8. This is a fixed fee so long as the class size has been accurately represented. *Id.*

⁵ \$350,000 GSA - \$116,666.67 attorneys' fees - \$20,000 litigation costs - \$10,000 Class Representative Service Payment - \$17,500 PAGA Payment - \$10,000 Settlement Administration Costs.

C. Released Claims

All Participating Class Members release Released Parties from all class claims pled or which could have been pled based on the factual allegations contained in the Operative Class Complaint which occurred at any time from August 23, 2018 to September 13, 2022 including, but not limited to claims under California Labor Code sections 201, 202, 203, 204, 210, 218.6, 226, 226(a), 226.3, 226.7, 256, 510, 512, 515, 558(a), 1174, 1174.5, 1175, 1194, 1194.2, 1197, 1197.1, 1198, 1199, 2800, 2802, 2804, and 2810.5, and expressly excluding all other claims, including claims for vested benefits, wrongful termination, unemployment insurance, disability, social security, workers' compensation, and class claims outside of the Class Period. The time period of this release is August 23, 2018 to September 13, 2022. Singer Decl., ¶¶43; SA, ¶¶1.12, 1.35, 1.40, 2.2, 5.2.

All Class Members who are Aggrieved Employees are deemed to release all PAGA claims pled or which could have been pled based on the factual allegations contained in the Operative PAGA Complaint and PAGA letter sent by Plaintiff that occurred at any time from April 12, 2019 to September 13, 2022 that stated violations of California Labor Code sections 201, 202, 203, 204, 210, 218, 226, 226(a), 226.3, 226.7, 256, 510, 512, 558(a), 558.1, 1174, 1174.5, 1175, 1194, 1194.2, 1197, 1197.1, 1198, 1199, 2802, 2804, 2810.5, and 2698, *et seq*, as to the Aggrieved Employees and expressly excluding all other claims, including claims for vested benefits, wrongful termination, unemployment insurance, disability, social security, workers' compensation, and PAGA claims outside of the PAGA Period. The time period for this release is April 12, 2019 to September 13, 2022. Singer Decl., ¶¶44; SA, ¶¶1.4, 1.9, 1.31, 2.1, 5.3.

VII. ARGUMENT

A. Class Action Settlements Are Subject to Court Review and Approval

"Before final approval, the court must conduct an inquiry into the fairness of the proposed settlement." California Rules of Court, Rule 3.769(g). Where settlement terms are agreeable to all Parties, a court should disapprove a settlement "only with considerable circumspection." *Jamison v. Butcher & Sherrerd* (E.D. Pa. 1975) 68 F.R.D. 479, 481. At

preliminary approval, a court “limits its inquiry to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties.” *In re Microsoft I-V Cases* (2006) 135 Cal. App. 4th 706, 723.

B. The Settlement is Fair, Reasonable, and Adequate

In deciding whether to approve a proposed class action settlement the Court must find a proposed settlement is “fair, adequate and reasonable.” *Dunk*, 48 Cal.App.4th at p. 1801. A proposed settlement is presumed fair where: (1) parties settle after extensive arms’-length negotiations; (2) sufficient investigation and discovery allow counsel and the Court to act intelligently; (3) counsel is experienced; and, (4) the percentage of objectors is small. *Id.*, at p. 1802. Here, the first three *Dunk* factors are met, so the settlement is presumably fair. The fourth *Dunk* factor, percentage of objectors, cannot be known until the Class has notice and opportunity to respond. Singer Decl., ¶45.

1. Serious, Informed, Non-Collusive Negotiations Led to Settlement

The Settlement was reached through arm’s-length negotiations facilitated by Todd Smith, Esq., an experienced and respected mediator. Though cordial and professional, negotiations were at all times adversarial and non-collusive. Singer Decl., ¶46; Declaration of Sahag Majarian II (“Majarian Decl.”), ¶¶4-5.

2. Discovery and Stage of the Proceedings Support Settlement

Plaintiff’s Counsel investigated all claims and defenses before filing. When the Parties agreed to mediation, Plaintiff requested, and Defendant produced, all data and documents needed to assess liability and calculate Class-wide damages. Singer Decl., ¶47; Majarian Decl., ¶¶4-5.

Investigation and informal discovery gave the Parties a clear understanding of their strengths and weaknesses before negotiations. *See Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal. App. 4th 399, 410 (approving settlement where “considerable information [exists] from which to assess the strength of the class claims” and litigation risks). Singer Decl., ¶48; Majarian Decl., ¶¶4-5. Proof of wage and hour class claims is based, at any stage, almost entirely on written policies, class member and workweek numbers, and time and

1 pay records. Plaintiff's counsel obtained those records, and an expert analyzed them and
2 prepared a damage model before a settlement was negotiated. Singer Decl., ¶49.

3 **3. Counsel are Experienced in Similar Litigation**

4 Plaintiff's Counsel have significant experience in wage and hour employment class
5 actions. Singer Decl., ¶¶1-11, 50; Majarian Decl., ¶¶1-3. ADS's counsel, Lonnie D. Giamela,
6 Esq. of Fisher & Phillips LLP, is a skilled lawyer, with significant class action experience, who
7 defended ADS vigorously at all stages.⁶ Singer Decl., ¶51.

8 Experienced counsel believe the Settlement is fair, reasonable, and in the Class's best
9 interest in light of the monetary recovery, risks of certification, summary adjudication, the
10 lengthy process of establishing damages, and uncertainty of appeals. Singer Decl., ¶52;
11 Majarian Decl., ¶¶4-5. The view of attorneys actively conducting the litigation "is entitled to
12 significant weight" in settlement approval. *Fisher Bros. v. Cambridge Lee Industries, Inc.* (E.D.
13 Pa. 1985) 630 F.Supp. 482, 488. The Settlement satisfies the three *Dunk* requirements, should
14 be presumed fair, adequate and reasonable, and preliminarily approved. Singer Decl., ¶53.

15 **C. The Settlement is a Reasonable Compromise of Claims**

16 "[T]o ensure that the recovery represents a reasonable compromise, given the
17 magnitude and apparent merit of the claims being released, discounted by the risks and
18 expenses of attempting to establish and collect on those claims by pursuing the litigation," the
19 Court acts as a fiduciary for absent class members. *Kullar*, 168 Cal.App.4th at p.129.

20 *Kullar* does not require the parties to submit an illusory prediction of the outer reaches
21 of exposure without taking in to account actual risks of certification, decertification, dispositive
22 motions, and trial. *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186
23 Cal.App.4th 399, 408. It also does not require an explicit statement of the maximum amount
24 the class could recover if it prevailed on all claims provided the record allows "an
25 understanding of the amount that is in controversy and the realistic range of outcomes of the
26 litigation." *Id.*, at p. 409. An analysis made based on the number of class members, payroll
27 data, and declarations is sufficient. *See id.*

28 ⁶ During this litigation, ADS was also represented by skilled attorneys Devin Rauchwerger,
Esq. and Evan Kroll, Esq., formerly of Fisher & Phillips, LLP.

Class Counsel reviewed all relevant policies and relied on similar data as in *Munoz*. Plaintiff's consultant analyzed voluminous data and documents, and calculated Class-wide damages. Singer Decl., ¶54. For these calculations, Plaintiff's consultant analyzed time and pay data for 16,116 Workweeks and determined the average hourly rate of pay was \$17.14 (with an overtime rate of \$25.71). Singer Decl., ¶55.

The \$350,000 GSA is fair and reasonable given that it represents approximately 83% of the \$421,024 rationally discounted damages based on the claims alleged (exclusive of PAGA Penalties).⁷ Singer Dec., ¶56.

1. Labor Code §§ 1194, 510—Unpaid Minimum & Overtime Wages

Plaintiff estimated pre-shift screening time took about one to ten minutes. Schiller Decl., ¶3. Multiplying approximately five minutes per shift (the average) for allegedly unpaid temperature screening time by the number of shifts worked from March 21, 2020 to June 7, 2021 (the "Screening Period") yields damages of \$108,676 [69,450 shifts⁸ x 5 minutes, or 0.083 hours = 5,764 hours. Assuming four-fifths of this time was regular time and one-fifth was overtime,⁹ the calculation is: \$79,032 (fourth-fifths of the hours, or 4,611 hours x \$17.14) + \$29,644 (one-fifth of the hours, or 1,153 hours x \$25.71) = \$108,676]. Given the difficulty in certifying and prevailing on this off-the-clock claim, Plaintiff believed the reasonable value of this claim was 20% of maximum exposure, or **\$21,735**. Singer Decl., ¶57.

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⁷ \$21,735 (unpaid minimum and overtime wages) + \$161,673 (meal period premium wages) + \$68,020 (rest period premium wages) + \$78,938 (wage statement penalties) + \$81,535 (waiting time penalties) + \$9,123 (cell phone expense reimbursement) = \$421,024.

⁸ The Class Period of April 12, 2019 to September 13, 2022 is 1,250 days. The Screening Period of March 21, 2020 to June 7, 2021 is 443 days. Thus, the Screening Period is approximately 35% of the Class Period (443/1250=0.35). 39,685 Class Period workweeks x 0.35 equals 13,890 workweeks during the Screening Period. Plaintiff's consultant determined that on average 5.0 shifts were worked per workweek. Thus, the Screening Period contains approximately 69,450 shifts (13,980 workweeks x 5.0 shifts per workweek).

⁹ Plaintiff's consultant calculated an average shift length of 9.4 hours. Given this, Plaintiff assumes that at least in some weeks, Class Members had worked over 40 hours before they began their fifth shift of the week, entitling them to overtime for the screening time on this fifth shift of the week.

2. Labor Code § 226.7—Meal and Rest Period Premiums

In the time sample ADS provided, covering 16,116 Workweeks, Plaintiff's consultant identified 8,507 shifts over five hours without a first recorded meal break (missed), 22,296 first meal periods recorded after the fifth hour (late), and 7,439 first meal periods less than 30 minutes (short), totaling 38,242 violations. Plaintiff's consultant extrapolated this sample data to the group, extrapolating 95,605 violations (38,242 identified violations x 2.5 multiplier to extrapolate to class). Plaintiff's consultant identified only 512 meal period premiums paid, and extrapolated this sample to 1,280 (512 x 2.5). Offsetting the violations with the premiums yields a net 94,325 uncompensated violations. Multiplying the total number of unique meal period violations by the hourly pay rate yields unpaid meal period premium damages of \$1,616,731 (94,325 violations x \$17.14). Singer Decl., ¶58.

However, Plaintiff estimated realistic exposure was no more than 10% of this maximum, given ADS's defenses that it had a compliant written meal period policy, most of the class was exempt from meal period requirements, and that ADS could raise individualized defenses to liability which could prevent certification or a finding of liability. Thus, Plaintiff believed the reasonable value of this claim was **\$161,673** (\$1,616,731 x 10%). Singer Decl., ¶59.

Assuming one rest period violation per Workweek, Plaintiff's consultant calculated rest period premium damages of \$680,200 (39,685 Workweeks x 1 violation per Workweek x \$17.14). The potential value of this claim was discounted substantially, however, given the challenges of proving when each Class Member missed a rest period, that ADS claims most of the class is exempt from rest period requirements, and that certifying a rest period claim would be difficult, especially given ADS's purportedly compliant written rest period policy. Given these issues, Plaintiff believed the reasonable value of this claim was 10% of maximum exposure, or **\$68,020**. Singer Decl., ¶60.

3. Labor Code §§ 226, 203—Wage Statement/Waiting Time Penalties

Multiplying 31,575 Pay Periods going back one year from the date of filing, by the

1 initial violation rate¹⁰ of \$50, Plaintiff's consultant determined maximum *wage statement*
2 *penalty* exposure of \$1,578,750. Singer Decl., ¶61.

3 Multiplying the 314 separated employees during the three-year statutory period by their
4 average daily wage for thirty days, Plaintiff's consultant determined maximum *waiting time*
5 *penalty* exposure of \$1,630,696 [314 separated employees x \$173.11 average daily wage¹¹ x 30
6 days]. Singer Decl., ¶62.

7 Plaintiff estimated probability of prevailing for each claim at no more than 5%, given
8 the risks the underlying violations would not be proven, that ADS would raise a good faith
9 defense to each claim, and that Plaintiff would not prevail at certification and trial. Discounted
10 realistic exposures were thus calculated as \$78,938 in wage statement penalties and \$81,535 in
11 waiting time penalties. Singer Decl., ¶63.

12 **4. Labor Code § 2802—Expense Reimbursement**

13 Plaintiff estimated \$10 per month per employee for unreimbursed cell phone expenses
14 was owed. *See, e.g. Murillo v. Target Corp.* (2023) 2023 U.S. Dist. LEXIS 121533, *27 (Court
15 not disapproving CAFA removing defendant assuming \$10 per month owed in cell phone
16 reimbursements). Maximum exposure for this claim was calculated at \$91,230 (9,123 months¹²
17 in Class Period x \$10.00). Given that ADS has a reimbursement stipend policy, and given the
18 need for individualized inquiries as to employees' monthly cell phone bill amounts and the
19 amount of time spent using their personal cell phones for work if at all and whether ADS knew
20 of each employer's cell phone use, Plaintiff believed reasonable exposure was no more than
21 10% of this maximum, or \$9,123. Singer Decl., ¶64.

22 **5. Labor Code §§ 2699—PAGA Penalties**

23 Based on ADS's data, there were an estimated 31,575 weekly pay periods during the
24

25 ¹⁰ *See, e.g. violations Robinson v. Open Top Sightseeing S.F.* (N.D. Cal. Feb. 14, 2018) 2018
26 U.S. Dist. LEXIS 24556, at *53 (holding the initial violation rate under Labor Code section 226
should apply any time before the employer is notified of the violations).

27 ¹¹ Records revealed an average shift length of 9.4 hours and an average hourly wage of \$17.14,
28 with an overtime wage of \$25.71. [\$137.12 (8 hours x \$17.14) + \$35.99 (1.4 hours x \$25.71) =
\$173.11].

¹² 39,685 Workweeks divided by 4.35 Workweeks per month equals 9,123 months.

PAGA Period. Using initial violation rates¹³ maximum penalties were estimated at \$16,544,700, for seven violations: Sec. 1194 (minimum wages) – \$3,157,500 (31,575 x \$100); Sec. 510 (overtime) – \$3,157,500 (same); Sec. 226.7 (meal) – \$3,157,500 (same); Sec. 226.7 (rest) - \$3,157,500 (same); Sec. 226 (wage statements)– \$3,157,500¹⁴ (same); Sec. 203 (final pay) for 314 formers - \$31,400 (314 formers x \$100 for final pay period); Sec. 2802 (expense reimbursement) - \$725,800 (31,575/4.35 workweeks/month, assuming monthly reimbursement = 7,258 x \$100 = \$725,800). Singer Decl., ¶65. However, Plaintiff considered that the maximum value of the PAGA penalties could be capped at \$3,157,500 given that stacking of penalties may not be allowed. *See, e.g. Merante v. Am. Inst. for Foreign Study, Inc.* (2022) 2022 U.S. Dist. LEXIS 131833, *18 (“This Court has previously noted that California Law is unsettled as to whether PAGA penalties may be stacked, and has observed that in the absence of binding appellate decision on this issue, courts have gone in different directions”) (finding \$100,000 settlement allocation to PAGA with a stacked maximum PAGA value of \$37 million “within the range of reasonableness”). Singer Decl., ¶66.

Realistic exposure was further discounted to no more than 5% of the unstacked value, or \$157,875 based on the following considerations: Even if the PAGA claim is viable, there were risks Plaintiff would not prove the underlying violations; and, if proven, the Court has authority to reduce penalties, as long as not to “zero.” *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal. App. 4th 1112, 1135; *Carrington v. Starbucks Corp.* (2018) 30 Cal. App. 5th 504, 517 (Plaintiff requested “nearly \$70 million in penalties;” trial court’s \$150,000 award upheld on appeal). Singer Decl., ¶67.

D. The Settlement is Fair, Adequate, and Reasonable

Plaintiff gave serious consideration to all facts and arguments and concluded the

¹³ Initial violation rates were used because “courts have held that employers are not subject to heightened penalties for subsequent violations unless and until a court or commissioner notifies the employer that it is in violation of the Labor Code.” *Vieyara-Flores v. Sika Corp.* (C.D. Cal. 2019) 2019 U.S. Dist. LEXIS 98081, *13.

¹⁴ The default penalty of \$100 per pay period should apply, not the \$250 per pay period penalty, when the employer does furnish a wage statement, but it is inaccurate. *See Gunther v. Alaska Airlines, Inc.* (2021) 72 Cal. App. 5th 334, 355.

1 Settlement is fair and reasonable. The Gross Settlement Amount represents approximately 83%
2 of the reasonable value of the Class claims. The proposed settlement is well within the
3 “ballpark” of reasonableness. Singer Decl., ¶68.

4 A settlement is not judged solely against what might have been recovered at trial, nor
5 must a settlement provide 100% of the damages sought to be fair and reasonable. *Linney v.*
6 *Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242. Adequacy must be judged as
7 “a yielding of absolutes. . . Naturally, the agreement reached normally embodies a compromise;
8 in exchange for the saving of cost and elimination of risk, the parties each give up something
9 they might have won had they proceeded with litigation . . .” *Officers for Justice v. Civil Serv.*
10 *Comm’n* (9th Cir. 1982) 688 F.2d 615, 624 (citation omitted). “It is well-settled law that a cash
11 settlement amounting to only a fraction of the potential recovery does not . . . render the
12 settlement inadequate or unfair.” *Id.*, at p. 628.

13 **E. The Proposed PAGA Settlement is Reasonable**

14 The \$17,500 PAGA settlement will be paid \$13,125 (75%) to the LWDA and \$4,375
15 (25%) to Aggrieved Employees. SA, ¶3.2.5. Where PAGA penalties are negotiated in good
16 faith, with “no indication [the] amount was the result of self-interest at the expense of other
17 Class Members,” such amounts are considered reasonable. *Hopson v. Hanesbrands Inc.*, Case
18 No. 08-00844, (N.D. Cal. Apr. 3, 2009) 2009 U.S. Dist. LEXIS 33900, at *24. Singer Decl.,
19 ¶69.

20 The \$17,500 PAGA allocation, representing five percent of the GSA, is well within the
21 range approved by California courts. See *Alcala v. Meyer Logistics, Inc.* (C.D. Cal. June 17,
22 2019) 2019 LEXIS 166879, *26 (PAGA penalties 1.25% of settlement reasonable, “falls within
23 the zero to two percent range for PAGA claims approved by courts.”); *In re M.L. Stern*
24 *Overtime Litig.* (S.D. Cal. Apr. 13, 2009) 2009 LEXIS 31650, *1 (PAGA settlement of 2%).
25 Singer Decl., ¶70. The LWDA was served with the motion for approval when filed. Singer
26 Decl., ¶71, Exh. 7 – LWDA Confirmation of Receipt.

27 **VIII. CONDITIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE**

28 When an ascertainable and sufficiently numerous class exists, with a well-defined

community of interest, and class litigation is superior to alternate means, certification is appropriate. *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1021. Ascertainability is determined by examining class definition, size, and means for identifying class members. *Reyes v. Bd. of Supervisors* (1987) 196 Cal. App. 3d 1263, 1271. The Class is ascertainable from ADS's records, and is so numerous joinder would be impracticable at 495 members. Singer Decl., ¶72.

"Community of interest" embodies three factors: predominant common questions of law or fact; class representatives with claims typical of the class; and representatives who can adequately represent the class. *Fireside Bank v. Superior Court* (2007) 40 Cal. 4th 1069, 1089.

Plaintiff alleges the Class of non-exempt employees was subject to the same written ADS policies, underwent the same screenings without payment, and suffered measurable short, late, and missed meal periods without premiums paid, among other violations, which led to insufficient wage statements and final wages. Where the same alleged conduct forms the basis for Plaintiff and class claims, it is common for settlement purposes. *Fireside Bank*, 40 Cal. 4th at p. 1090. Singer Decl., ¶73.

Plaintiff can and will continue to protect the interests of the Class. *Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 224, 238. Plaintiff accepted the risks of serving as a class representative, spent significant time assisting in the prosecution of the action, and placed the interest of the class above his own. *Clark v. American Residential Services, LLC* (2009) 175 Cal.App.4th 785, 804-807; Singer Decl., ¶74; Schiller Decl., ¶¶6-18.

Plaintiff's attorneys are qualified to conduct the litigation and Plaintiff's interests are not antagonistic to the interest of the Class. *McGhee v. Bank of Am.* (1976) 60 Cal.App.3d 442, 450. Singer Decl., ¶¶1-11, 75; Majarian Decl., ¶¶1-6; Schiller Decl., ¶18.

IX. CONCLUSION

Plaintiff requests the Settlement be preliminarily approved, Class Notice approved and ordered disseminated to the Class, CPT Group appointed Administrator, Cohelan Khoury & Singer and Law Offices of Sahag Majarian II confirmed as Class Counsel, Plaintiff confirmed as Class Representative, and a Final Approval Hearing date set.

Respectfully submitted,

**COHELAN KHOURY & SINGER
LAW OFFICES OF SAHAG MAJARIAN II**

Dated: September 12, 2023

By: 

Michael Singer, Esq.

Rosemary C. Khoury, Esq.

Attorneys for Plaintiff Francisco Schiller, on behalf of
himself and as representative for the State of California
on behalf of all other aggrieved employees