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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO

ERIC GARCIA, individually and on behalf
of all others similarly situated,

Plaintiff,

v.

LIGHTNING SOURCE LLC; INGRAM
DISTRIBUTION MANAGEMENT INC.;
INGRAM CONTENT GROUP LLC; and
DOES 1 through 25, inclusive

Defendants.

Case No. 20CECG01641
ASSIGNED FOR ALL PURPOSES TO:
The Honorable Kimberly Gaab
Department 503

CLASS AND PAGA ACTION

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

Date: October 13, 2022
Time: 3:30 p.m.
Dept: 503
Judge: Hon. Kimberly Gaab

Filed: June 10, 2020
Trial date: Not set

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I. INTRODUCTION

This motion seeks preliminary approval of a pre-certification wage and hour class and PAGA¹ representative action settlement of \$860,000 by Plaintiff Eric Garcia (“Plaintiff”), individually and on behalf of a putative Class of 127 California non-exempt employees against Defendants Lightning Source LLC, Ingram Distribution Management LLC², and Ingram Content Group LLC (collectively, “Defendants”) employed any time during the Class Period (April 6, 2016 through June 28, 2021). Declaration of Diana M. Khoury (“Khoury Decl.”) ¶10; Declaration of Jacqueline Letson (“Letson Decl.”) ¶2-4.

Plaintiff alleges he and the putative Class were subject to Defendants’ unlawful policies and practices which denied them compliant meal and rest periods or premiums in lieu thereof; all wages owed due to rounding time worked to the nearest 15-minute increment, off-the-clock work, and miscalculating overtime wages; expense reimbursements for work-related cell-phone use; and derivatively, accurate wage statements and timely final wages. Khoury Decl. ¶11; Declaration of Eric Garcia (“Garcia Decl.”) ¶4.

II. THE PARTIES

A. Defendants

Defendants are printers and distributors of print-on-demand books throughout the United States. Defendants operate a book-binding factory in Fresno, California where Plaintiff and the entire putative Class worked.

B. Plaintiff

Plaintiff was employed as an “Operations Team Lead-2nd Shift” in Defendants’ Fresno book-binding factory from May 7, 2018 through February 18, 2020. In this position, Plaintiff ensured next-day priority shipping; filled, boxed, packed, and labeled orders; and loaded boxes of books into trucks for delivery. Plaintiff typically worked four days per week, with three 12-hour workdays, and one six-hour workday per week. Khoury Decl. ¶12; Garcia Decl. ¶3.

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¹ Private Attorney General’s Act of 2004, Labor Code §§ 2698, *et seq.*

² Erroneously sued as “Ingram Distribution Management Inc”.

C. The Class and Aggrieved Employees

The Class is defined as all current and former non-exempt employees of Defendants employed in California during the Class Period. Khoury Decl. ¶13. There are approximately 127 individuals, including Garcia, that fall within the class definition. All 127 individuals within the class are (or were) employees of Defendant Lightning Source LLC. Letson Decl. ¶4.³ All 127 individuals within the class worked at the same location, at 3145 S. Northpointe Dr. in Fresno, California and all were “Production” employees with various job titles. Letson Decl. ¶¶5-6. Regardless of job title, all employees working at 3145 S. Northpointe Dr. were subject to the same written policies set forth in an Associate Handbook distributed to all employees, as well as the written policies set forth in a separate “California Addendum to Associate Handbook, that was also distributed to all employees. Letson Decl. ¶ 7;⁴ Garcia Decl., Exh. 1. Similarly, regardless of job title, all employees working at 3145 S. Northpointe Dr. followed the same practices for timekeeping. All employees punched in and out by swiping a badge at the time clock located in the facility. Also, Defendants attest all employees could submit a “Time Clock Missed Punch Request Form” to report additional time worked that was not captured by time punches for any reason. Letson Decl. ¶8;⁵ Garcia Decl. ¶4. Further, Plaintiff, and apparently “All Fresno Associates,” were provided a written “Fresno Cell Phone Policy” stating in pertinent part: “Cell phones...may not be used during work time.” Garcia Decl., Exh. 2.

The 127 Class Members worked an estimated 10,818 workweeks during the Class Period. PAGA Members, a subset of the Class, worked an estimated 2,623 pay periods during the PAGA Period (April 6, 2019 through June 28, 2021). Khoury Decl. ¶13.

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³ Notwithstanding Garcia’s legal claim that there were other joint employer entities of these 127 individuals, it is Defendants position that none of the individuals are (or were) employees of Defendant Ingram Distribution Management Inc. or Ingram Content Group LLC. Letson Decl. ¶4.

⁴ Pertinent sections of those written policies covering “Time Reporting,” “Overtime,” and “Meal and Rest Breaks” are attached as “Exhibit A” and incorporated in Letson’s declaration by reference. Letson Decl. ¶ 7.

⁵ Examples of “Time Clock Missed Punch Request Form” submissions from Plaintiff ERIC GARCIA are attached as “Exhibit B” and incorporated in Letson’s Declaration by reference. Letson Decl. ¶ 8.

III. LITIGATION AND DISCOVERY

On May 19, 2020, Defendants responded to Plaintiff's record request and produced Plaintiff's personnel file containing, in pertinent part, employment policies and procedures, new employee documents, performance evaluations, and wage statements. Khoury Decl. ¶14.

On June 8, 2020, Plaintiff served a PAGA notice on Defendants and the California Labor and Workforce Development Agency ("LWDA") advising that he intended to file a representative action on behalf of himself and all other aggrieved employees to seek civil penalties for the alleged Labor Code violations. Khoury Decl. ¶15, Exh. B.

On June 10, 2020, Plaintiff filed a class action complaint alleging Defendants failed to (1) pay minimum wages (Labor Code §§ 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, and IWC Order(s) § 4); (2) pay overtime wages (Labor Code §§ 510, 1194, 1198, and IWC Wage Order(s) § 3); (3) provide meal periods (Labor Code §§ 226.7, 512, and IWC Order(s) § 11); (4) provide rest periods (Labor Code § 226.7 IWC Order(s) § 12); (5) provide accurate itemized wage statements (Labor Code § 226 and IWC Wages Order(s) § 7); (6) reimburse business expenses (Labor Code § 2802, and IWC Order(s) § 9); (7) timely pay wages due during employment (Labor Code §§ 204, 210, and IWC Order(s)); (8) timely pay wages due upon separation of employment (Labor Code §§ 201, 202, 203, and IWC Order(s)); and based on these allegations, (9) violation of the Unfair Competition Law (Business & Professions Code §§ 17200-17208). On June 24, 2020, Plaintiff served an amended PAGA notice on the LWDA and Defendants. Khoury Decl. ¶16, Exh. C. Defendants served their general denial and affirmative defenses to the complaint on August 21, 2020. Khoury Decl. ¶17.

On August 26, 2020, Defendants served Plaintiff with special interrogatories, employment form and form interrogatories, and requests for production of documents. Plaintiff served verified discovery responses and produced 110-pages of responsive documents on November 6, 2020. Khoury Decl. ¶18.

After receiving no notice from the LWDA it intended to investigate the charges, on September 10, 2020, a First Amended Complaint ("FAC") seeking PAGA civil penalties was filed and served. Defendants served their general denials and affirmative defenses on October

12, 2020. Khoury Decl. ¶19.

On September 10, 2020, Plaintiff served each Defendant with employment and form interrogatories, special interrogatories, requests for admission, and requests for production of documents. Khoury Decl. ¶20.

In late-September 2020, the Parties agreed to stay formal discovery and to attend mediation. Plaintiff requested, and Defendants produced⁶, after several meetings with Plaintiff in early 2021, sufficient data and documents to allow Plaintiff to assess liability and to calculate Class-wide damages for purposes of mediation. Khoury Decl. ¶21.

IV. MEDIATION

Plaintiff's Counsel retained a damages' consultant to review the data to assess short, late, or missed meal periods and underpaid wages due to rounding, off-the-clock work, and overtime wages miscalculations⁷. Damages were extrapolated to the Class. PAGA Penalties were also calculated. Khoury Decl. ¶23.

With Class-wide damages and PAGA penalties models prepared, on April 29, 2021, the Parties attended mediation with Steven Serratore, an experienced wage and hour class action mediator facilitating the day-long arms'-length negotiations. At the end of the day, the mediator tendered a proposal which was, by May 4, 2021, accepted by the Parties. As a term of Settlement, Plaintiff filed and served a Second Amended Complaint on August 10, 2021

⁶ That information included: (a) contact information for ten (10) Class Members; (b) an excel spreadsheet with timekeeping records and corresponding spreadsheets with payroll records for 25 randomly selected Class Members chosen by Plaintiff's Counsel (20% of the Class – (13 former employees and 12 current employees)); (c) the estimated Class size: 127, of which 67 were currently employed, and 60 were formerly employed; (d) the estimated number of former employees within three years: 60 former employees in the three-year statute of limitations for waiting time penalties, April 6, 2017 to April 26, 2021; (e) the estimated number of former employees within one year: 29 former employees during the one-year statute of limitations for PAGA Penalties; (f) the estimated number of Class Period pay periods: 5,538 pay periods worked during the Class Period, from April 6, 2016 to April 26, 2021, (g) the estimated number of PAGA Period pay periods: 2,623 PAGA Pay Periods Worked from April 6, 2019 to April 26, 2021 (PAGA Period). Khoury Decl. ¶22.

⁷ Plaintiff's initial theory for regular rate miscalculation, identified in his PAGA letters—that exempt items were included in the regular rate—was determined by Plaintiff to be in error and was not pled in his Complaint nor his First Amended Complaint. For mediation, Plaintiff's consultant determined that payments labeled “Discretionary Bonus” and “Shift Differential” were not included in the regular rate and calculated the amount of underpayment solely based on these exclusions, while accounting for offset payments apparently made to account for shift differential payments. Khoury Decl. ¶23.

alleging the unlawful time-rounding and underpaid overtime wages which were evaluated at mediation. Khoury Decl. ¶24.

V. SUMMARY OF PROPOSED SETTLEMENT

A. Settlement Terms

The Parties agreed to settle the Action for the Gross Settlement Amount (“GSA”) of \$860,000 which includes, subject to Court approval: (a) attorneys’ fees of \$286,666.67⁸; (b) litigation costs of up to \$18,000; (c) Service Payment of \$10,000 to Plaintiff for his efforts in initiating and prosecuting the Action, work performed, risks undertaken for costs, substantial benefits conferred on absent Class Members, and a general release; (d) PAGA Payment of \$50,000 for civil penalties, of which \$37,500 (75%) to be paid to the LWDA and \$12,500 (25%) to be distributed to PAGA Members; and (e) administration expenses to Simpluris, up to \$5,000. Khoury Decl. ¶25, SA⁹ ¶¶18, 19, 25. In addition to the GSA, Defendants will pay the employer’s share of payroll taxes on Class Members’ payment allocated as wages. *Id.*, SA ¶¶18, 80.

The remaining Net Settlement Amount estimated at \$490,333.33 will be distributed to Participating Class Members based on the number of weeks each worked during the Class Period. No claim form will be necessary. Khoury Decl. ¶26, SA ¶38. With an estimated 10,818 weeks worked during the Class Period, a Participating Class Member will receive an estimated \$45.32 for each week worked during the Class Period, or an average payment of \$3,861 (\$490,333.33 / 127 Class Members). Khoury Decl. ¶27, SA ¶40. PAGA Members will receive a proportionate share of the \$12,500 PAGA Payment based on the number of pay periods worked during the PAGA Period. With 2,623 pay periods during the PAGA Period, each PAGA Member will receive an estimated \$4.76 for each pay period. After 120 days of issuance of the Settlement Payments, uncashed checks will be voided and funds sent to the State of California Controller, Unclaimed Property Division for further handling on behalf of the Class Member

⁸ Plaintiff consented in writing to the equal distribution of attorneys’ fees recovered in this case, i.e., 50% to Lebe Law APLC, and 50% to Cohelan, Khoury and Singer. Khoury Decl. ¶25.

⁹ Stipulation of Class Action Settlement and Release of Claims (“SA”), attached as Exhibit A to the Khoury Declaration and presented for preliminary approval.

1 whose check was voided. Khoury Decl. ¶28, SA ¶84. No part of the GSA will revert to
2 Defendants. Khoury Decl. ¶29, SA ¶18. The information needed to distribute the funds is
3 available from Defendants' records and the Administrator can apply the formula fairly. Khoury
4 Decl. ¶30.

5 **B. Administrator, Notice of Settlement to the Class, and Release of Claims**

6 The administrator will search the National Change of Address database to update Class
7 Member mailing addresses produced by Defendants before mailing the Court-approved Notice
8 of Class Action Settlement ("Notice"), Change of Address Form, and pre-printed return
9 envelope, ("Notice Packet"). Khoury Decl. ¶31; SA - Exhs. 1, 2. If a Notice Packet is returned
10 undeliverable, the Administrator will skip-trace using the Class Member's social security
11 number and re-mail if a better address is found. Class Members with remailed Notice Packets
12 will have an additional 15 days beyond the Response Deadline to act. Khoury Decl. ¶32.

13 The proposed Notice advises the Class of: (1) the right to participate in the
14 Settlement/that a claim form is not needed; (2) the manner and timing to submit objections or
15 opt out requests; (3) how to dispute the payment calculation information; (4) the released
16 claims; and (5) the date, place, and time to appear for the Final Approval hearing. Khoury Decl.
17 ¶33; SA - Exh. 1. Class Members who remain in the Class will release only those claims alleged
18 in the Action, i.e.:

19 All claims of wrongful conduct, causes of action or legal theories of relief alleged or
20 otherwise raised, or that could have been raised on the facts alleged in the Complaint,
21 including all of the following: (1) failure to pay wages minimum wages (Labor Code
22 §§ 1194, 1194.2, 1197, 1197.1, 1198, and IWC Orders); (2) failure to pay overtime
23 wages (Labor Code §§ 510, 1194, 1198); (3) failure to provide rest periods and proper
24 meal periods or compensation in lieu thereof (Labor Code §§ 226.7, 512, and IWC
25 Orders); (4) failure to timely pay wages due while employed and at termination of
26 employment (Labor Code §§ 201 - 204, 210 and IWC Orders); (5) failure to provide
27 accurate wage statements (Labor Code § 226); (6) failure to reimburse business
28 expenses (Labor Code § 2802, and IWC Orders); (7) Unfair Business Practices
(Business & Professions Code §§ 17200, et seq.); and (8) civil penalties pursuant to the
Private Attorneys General Act ("PAGA"), Labor Code §§ 2698, et seq., for the above-
referenced Labor Code violations, and all damages, penalties, interest, attorneys' fees,
litigation costs, restitution, equitable relief, and other amounts or types of relief
recoverable under said claims, causes of action, or legal theories of relief, or other
claims based on the facts alleged in the Action.

28 Khoury Decl. ¶34; SA ¶33. If a Class Member opts out, and is an eligible PAGA Member, they

will receive a proportionate share of the \$12,500 PAGA Payment and release only those claims brought under PAGA. Khoury Decl. ¶35; SA ¶¶25, 67.B.

VI. 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 a settlement is reached on terms agreeable to all Parties, a court should disapprove of the settlement “only with considerable circumspection.” *Jamison v. Butcher & Sherrerd* (E.D. Pa. 1975) 68 F.R.D. 479, 481. California courts may look to federal authority analyzing class issues for guidance. *See Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 239-40. 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

To approve a proposed class action settlement under Code of Civil Procedure § 382, the Court must find the settlement is “fair, adequate and reasonable.” *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. The trial court considers “the strength of Plaintiff’s case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.” *Id.* A proposed class action settlement is presumed fair where there are: (1) extensive arms’-length negotiations; (2) investigation and discovery sufficient to allow counsel and the Court to act intelligently; (3) experienced counsel; and, (4) few objectors. *Id.* at 1802.

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

The Settlement was reached through arm’s-length negotiations facilitated by an experienced wage and hour class action mediator. Though cordial and professional, the negotiations were at all times, adversarial and non-collusive in nature. Khoury Decl. ¶24.

1 **2. Discovery and Stage of the Proceedings Support Settlement**

2 Plaintiff's Counsel investigated claims and Defendants' potential defenses before
3 serving the PAGA letter and filing the complaints. For mediation, Defendants produced contact
4 information for 10 Class members, and data, documents, and information for 25 Class Members
5 (20% of the Class). Khoury Decl. ¶36. Proof of the Class claims is based on an analysis of these
6 punch, time and pay records. *Id.* This gave the Parties an understanding of the strengths and
7 weaknesses of their positions before negotiations. Khoury Decl. ¶37. *See Munoz v. BCI Coca-*
8 *Cola Bottling Co. of Los Angeles* (2010) 186 Cal. App. 4th 399, 410 (approving settlement
9 where "considerable information [exists]...to assess the strength of the class claims" and risks
10 of litigation).

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

12 Counsel for Plaintiff and the Class have significant experience in litigating employment
13 wage and hour class actions. Khoury Decl. ¶¶3-9, 38. Defense counsel Ryan Eddings and
14 Andrew Woo of Littler are also skilled and experienced wage and hour litigators who defended
15 their clients vigorously to settle this action. Khoury Decl. ¶39. Class Counsel believes the
16 Settlement is fair, reasonable, and in the Class' best interest in light of the recovery and risks of
17 continued litigation. Khoury Decl. ¶40. The view of attorneys actively conducting the litigation
18 "is entitled to significant weight" in deciding whether to approve the settlement. *Fisher Bros. v.*
19 *Cambridge Lee Industries, Inc.* (E.D. Pa. 1985) 630 F.Supp. 482, 488. As the Settlement
20 satisfies three of the four *Dunk* requirements, preliminary approval should be granted.

21 **4. The Settlement is Fair and Reasonable Based on the Strengths of**
22 **Plaintiff's Case and the Risks and Costs of Further Litigation**

23 Plaintiff and his counsel concluded the proposed Settlement is reasonable. Plaintiff's
24 counsel recognized and considered the inherent risks and uncertainty of litigation, including: (i)
25 denial of certification; (ii) if certified, that decertification may be granted; (iii) a grant of
26 summary judgment or summary adjudication; (iv) the possibility of an unfavorable, or less
27 favorable, result at trial; (v) the possibility post-trial motions may result in an unfavorable, or
28 less favorable, result than trial; and, (vi) the possibility of an unfavorable, or less favorable,
result on appeal, and the certainty that process would be lengthy. While Plaintiff believes in the

1 strength of his claims, Defendants’ defenses create a significant possibility Class claims would
2 not be certified or would fail on the merits, conferring no Class benefit. By contrast, the
3 proposed Settlement will yield a prompt, certain, and substantial Class recovery, without
4 additional time or judicial resources. Khoury Decl. ¶41. The \$860,000 non-reversionary
5 settlement stands to benefit 127 Class Members with an average payment of \$3,861. Khoury
6 Decl. ¶42.

7 Defendants disputed liability and contended they abided all California labor laws
8 pertinent to the claims brought in this action. Khoury Decl. ¶43. Defendants’ defenses follow:

9 **(a) Unpaid Wage Claims**

10 Defendants contend their policies were lawful, and in the event that any compensable
11 time was unpaid because it was “off the clock,” that they are not liable because they were not
12 informed of, and had no knowledge of, this work. *See Jong v. Kaiser Foundation Health Plan,*
13 *Inc.* (2014) 226 Cal.App.4th 391, 395. Defendants contend their policies and practices required
14 employees to accurately record all their time worked, via time clock punching and by
15 supplementing mistakes with Time Clock Missed Punch Request Forms. Defendants also
16 contend that declarations obtained by their counsel confirmed employees believed they were
17 correctly paid for all hours worked and had the opportunity to capture all compensable time
18 using the time clock and Time Clock Missed Punch Request Forms. With respect to Plaintiff’s
19 claim that Defendants failed to incorporate bonuses into the regular rate for purposes of
20 calculating overtime wages, Defendants contend such bonuses were discretionary because they
21 were not dependent upon hours worked, production, or efficiency and thus were properly
22 excluded from the regular rate of pay.

23 **(b) Meal and Rest Period Claims**

24 Defendants contend they promulgated compliant meal and rest period policies and any
25 failure to receive compliant meal and rest periods was voluntary. Under *Brinker*, “[a]n
26 employer’s duty with respect to meal breaks ... is an obligation to provide a meal period to its
27 employees.” *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1040. “The
28 employer satisfies this obligation if it relieves its employees of all duty, relinquishes control

over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so.” *Ibid.* “[T]he employer is not obligated to police meal breaks and ensure no work thereafter is performed.” *Id.* at p. 1040-41. Defendants further contend the sworn declarations they obtained confirm employees had the opportunity to take compliant meal and rest periods.

(c) Expense Reimbursement Claims

Defendants contend that Plaintiff’s alleged cell phone expenses were not reimbursable under California Labor Code section 2802 (a) because they were not “necessary.” Defendants contend Class Members were generally prohibited from taking their cell phones onto the factory floor, that employees whose jobs required cell phones were provided company-issued cell phones, and that Plaintiff’s job position did not require the use of a personal cell phone. Defendants contend sworn declarations they obtained from those holding the same job position as Plaintiff confirmed the position did not require the use of a cell phone.

C. The Settlement is a Reasonable Compromise of Claims

“[T]o ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing the litigation,” information is presented to the Court, as a fiduciary for absent class members. *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129. *Kullar* requires only “an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.” *Munoz*, 186 Cal.App.4th at 409 (finding trial court’s review of the number of class members, payroll data, and declarations on hours worked, duties, and meal and rest period experiences were an adequate basis to understand the amount in controversy under *Kullar*). As in *Munoz*, Class Counsel relied on time and pay records for 20% of the randomly selected Class, extrapolated to the Class for the Class Period. On these bases, Class counsel’s damages consultant calculated Class-wide damages and penalties through the date of mediation. Khoury Decl. ¶44.

1. Labor Code §§ 510, 1194 –Minimum and Overtime Wages

(a) Rounding. An employer must pay at least minimum wages for all time it

1 “suffer[s] or permit[s]” employees to work and overtime wages at one and one-half times the
2 employee’s regular rate for such hours over eight per day or forty per week. Labor Code §§
3 1194, 510. An employer may not round employees’ time worked unless “the policy is fair and
4 neutral on its face and it...[does] not result, over a period of time, in failure to compensate the
5 employees properly for all the time they have actually worked. See’s *Candy Shops, Inc. v.*
6 *Superior Court* (2012) 210 Cal. App. 4th 889 (emphasis added).

7 Defendants rounded employees’ time worked to the nearest quarter hour, which Plaintiff
8 contends was neither fair nor neutral on its face or in practice. Time records analyzed revealed
9 that 100 percent of employees analyzed were subjected to rounding and were not paid for some
10 time worked due to rounding, and that on average, 2.6 minutes per shift were unpaid. Over the
11 Class Period, 2,335.5 hours were unpaid and 436.1 hours were overpaid, with a net of 1,899.4
12 unpaid hours. Plaintiff estimated Defendants’ exposure at \$42,878.95, assuming half of unpaid
13 hours were regular and half were overtime [(949.7 hours x \$18.06 per hour= \$17,151.58) +
14 (949.7 hours x \$27.09 per hour (overtime rate) = \$25,727.37)]. Khoury Decl. ¶45. Plaintiff
15 reduced Defendants’ estimated exposure by 50%, to **\$21,439.48**, based on case law suggesting a
16 court might uphold Defendants’ rounding policy. *Id.* See, e.g. *Ferra v. Loews Hollywood Hotel,*
17 *LLC* (2019) 40 Cal.App.5th 1239, 1255, reversed on other grounds, 11 Cal.5th 858 (upholding
18 nearest quarter-hour rounding with grace period policy; “a system can be fair or neutral even
19 where a small majority loses compensation”); *Donohue v. AMN Servs., LLC* (2018) 29
20 Cal.App.5th 1068, 1085, reversed on other grounds, 11 Cal.5th 58 (granting summary judgment
21 for employer). Furthermore, Defendants argue it is Plaintiff’s burden to prove employees were
22 actually working during the rounded “windows”.

23 **(b) Off-the-clock Work.** Plaintiff contends Defendants failed to pay for time
24 worked off-the-clock during meal periods and estimates being interrupted approximately three
25 times per week for two minutes each time, resulting in six unpaid minutes per week. Unpaid
26 minimum wages for off-the-clock work was estimated at \$19,541 (0.1 hours x 10,818
27 workweeks x \$18.06 per hour). Given that courts often deny certification of off-the-clock
28 claims due to the need for individual inquiries as in *Kilbourne v. Coca-Cola Co.* (S.D. Cal. July

29, 2015) 2015 U.S. Dist. LEXIS 118756, at *46, Plaintiff reduced Defendants' exposure by 50% to **\$9,770.50**. Khoury Decl. ¶46.

(c) **Overtime Wages Owed at the Regular Rate of Pay.** Plaintiff contends Defendants failed to factor into the regular rate of pay all non-discretionary bonuses when calculating overtime wages. *Alvarado v. Dart Container Corp. of California* (2018) 4 Cal. 5th 542, 554. Both overtime and bonuses were paid in 326 of 1,320 pay periods. Plaintiff calculated unpaid overtime wages at \$81,371.00. Given the risk this claim could fail at certification, Plaintiff reduced Defendants' exposure by 50%, to **\$40,685.50**. Khoury Decl. ¶47.

2. Labor Code §§ 226.7, 512 Meal Periods

Employers must provide "an uninterrupted 30-minute period during which the employee is relieved of all duty." "[F]irst meal periods must start after no more than five hours." 53 Cal. 4th 1004, 1042 (2012). Otherwise, the employer owes one hour of pay to the employee at their regular rate of pay. Labor Code §§ 226.7, 512. 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* (2021) 11 Cal. 5th 58, 77.

Defendants' time records showed (1) no meal breaks on 9.3% of shifts longer than 6 hours (\$72,792.00 in premiums owed); (2) late first meal breaks on 35.1% of shifts over 5 hours (\$250,045.00 in premiums owed); (3) short first meal breaks on 39.3% of shifts over 5 hours (\$279,987.00 in premiums owed); and (4) no second meal break on 99.9% of shifts over 10 hours (\$246,968.00 in premiums owed), yielding exposure of \$849,792.00. Recognizing only one meal period premium may be owed per shift, and that a second meal period may be waived if the first meal period is taken, a more accurate figure of **\$602,824.00** was calculated, subtracting premiums calculated for failure to provide a second meal period. Khoury Decl. ¶48.

3. Labor Code § 226.7 Rest Periods

California employers must authorize a first 10-minute rest period after 3.5 hours and a second after 6 hours. *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1029 (2012). Otherwise, the employer owes one hour of pay at the employee's regular rate of pay. Labor Code § 226.7. Class Members' heavy workloads resulted in non-compliant late, short or

missed rest periods. Given rest periods were not recorded, and based on Plaintiff's experiences, Plaintiff assumed a 50% violation rate (22,507 violations) requiring \$406,548.00 in rest period premiums. Given that rest period claims are inherently difficult to certify, that Class Members likely could not remember which, if any, shifts had non-compliant rest periods, and the lack of rest period records, Defendants' potential exposure was reduced by 90% to **\$40,654.80**. Khoury Decl. ¶49.

4. Labor Code § 2802 – Reimbursement of Business Expenses

An employer must indemnify its employees for all their necessary expenditures or losses incurred in the discharge of their duties. Labor Code § 2802. A reasonable percentage of an employee's cell phone charges, which vary in each case, must be reimbursed. *Cochran v. Schwan's Home Services, Inc.* (2014) 228 Cal. App. 4th 1137, 1145 (2014). Plaintiff alleged Defendants failed to reimburse Class Members for the use of personal cell phones to communicate with supervisors during their shifts and to report mechanical failures. Maximum exposure was estimated at \$43,180 (\$5 a month x 68 months during Class Period x 127 Class Members). Defendants contend Class Members were generally prohibited from taking their cell phones onto the factory floor, and that Plaintiff's position did not require the use of a personal cell phone. Defendants' exposure was thus reduced by 75% to **\$10,795**. Khoury Decl. ¶50.

5. Labor Code § 226 - Wage Statement Penalties (Derivative)

Wage statements must show gross and net wages earned, "total hours worked by the employee" and the "corresponding number of hours worked at each hourly rate." Labor Code § 226 (a)(1)(2)(5)(9). Plaintiff contends wage statements did not show all hours worked due to rounded time and off-the-clock work and all wages earned due to regular rate miscalculation and failure to pay meal and rest break premiums. To recover penalties, Plaintiff needs to prevail on the underlying claims and show any violation was knowing, intentional, or willful. *Pedroza v. PetSmart, Inc.* (C.D. Cal. June 14, 2012) 2012 U.S. Dist. LEXIS 189530 *20.

At the time of settlement, unpaid meal and rest period premiums did not give rise to wage statement penalties. *Naranjo v. Spectrum Security Services, Inc.* 40 Cal. App. 5th 444, 474 (2019) review granted, 2020 Cal. LEXIS 167 (January 2, 2020) ("Naranjo"). Further, the good

1 faith defense to willfulness is clearly established under California law. *Nordstrom Comm'n*
2 *Cases* (2010) 186 Cal. App. 4th 576, 584 ("There is no willful failure to pay wages if the
3 employer and employee have a good faith dispute as to whether and when the wages were
4 due.").

5 For the 86 Class Members in the one-year liability period comprising 2,623 pay periods,
6 Defendants' potential exposure was calculated at \$131,150 (\$50 x 2,623). Khoury Decl. ¶51.
7 The \$50 initial violation rate was applied to all pay periods per *Amaral v. Cintas Corp. No.*
8 *2* (2008) 163 Cal.App.4th 1157, 1209. Plaintiff estimated probability of certification at 50% and
9 victory at trial at 50%, resulting in a 75% discount to realistic exposure of **\$32,787.50**. Khoury
10 Decl. ¶52.

11 **6. Labor Code § 203 - Waiting Time Penalties (Derivative)**

12 If Plaintiff proves the underlying claims for failure to pay all wages due then derivative
13 claims arise under Labor Code § 203 for failure to pay all wages due on separation of
14 employment.

15 An employer must pay all wages due to an involuntarily terminated employee at the time
16 of termination, or within 72 hours to an employee voluntarily terminating. Labor Code § 203. If
17 failure to pay final wages is willful, daily wages continue at the same rate for up to 30 days. For
18 the 60 former employees (in the period three years from filing), penalties of \$260,064.00 (8
19 hrs/day x \$18.06/hr x 30 days x 60 EEs) were calculated. Khoury Decl. ¶53.

20 At the time of settlement, the only claim which clearly supported waiting time penalties
21 was for unpaid wages. *Naranjo*, 40 Cal. App. at 474 (holding rest and meal period premiums do
22 not). To recover waiting time penalties, Plaintiff must prove wages owed were willfully not
23 paid. Plaintiff's counsel believed there was only a 25% probability of prevailing at certification.
24 Even if wages were found owed, a court could find Defendant had a good faith belief it was
25 paying all wages and "a good faith dispute that any wages are due will preclude imposition of
26 waiting time penalties under Section 203." *Hill v. Walmart Inc.* (N.D. Cal. January 14, 2021)
27 2021 U.S. Dist. LEXIS 20950, *17. Realistic exposure was estimated at 25% of the maximum,
28 or **\$65,016.00**. Khoury Decl. ¶53.

1 **7. Labor Code §§ 2699 PAGA Penalties**

2 “PAGA penalties are paid 75% to the California Labor and Workforce Development
3 Agency and 25% to aggrieved employees. Thus, in wage and hour class action cases that settle,
4 [] very little of the total settlement is paid to PAGA penalties in order to maximize payments to
5 class members.” *Magadia v. Wal-Mart Assocs.*, 384 F. Supp. 3d 1058,1101 (2019), disapproved
6 on other grounds, *Magadia v. Wal-Mart Assocs.*, 999 F.3d 668 (9th Cir., November 19, 2020).

7 Maximum PAGA civil penalties, using the initial violation rate for all pay periods versus
8 using the initial violation rate for the first pay period and the subsequent violation rate for all
9 subsequent pay periods for 2,623 pay periods during the PAGA Period are estimated at
10 \$4,230,400 / \$1,510,350 based on the underlying violations: (a) Section 226(a) - wage
11 statements (\$250/\$1,000): \$2,558,500/\$655,750; (b) Section 510 - overtime/regular rate
12 (\$100/\$200): \$121,000/\$64,800; (c) Section 1194- wages (\$100/\$200): \$516,000/\$262,300; (d)
13 Sections 512 and 226.7 - meal periods (\$100/\$200)—\$516,000/\$262,300; (e) Section 226.7 -
14 rest periods (\$100/\$200): \$516,000/\$262,300; and (f) Section 203 - final wages for 29 formers
15 (\$100): \$2,900. Khoury Decl. ¶54.

16 PAGA penalties were discounted by using only initial violation rates, based on
17 Defendants’ argument that “courts have held that employers are not subject to heightened
18 penalties for subsequent violations unless and until a court or commissioner notifies the
19 employer that it is in violation of the Labor Code.” *Vieyara-Flores v. Sika Corp.*, 2019 U.S.
20 Dist. LEXIS 98081, *13 (C.D. Cal. 2019). Thus, the maximum PAGA exposure was estimated
21 at \$1,510,350.

22 Maximum exposure was further discounted given the risk of not proving underlying
23 violations and the Court’s authority to reduce penalties, as long as not to “zero.” *Thurman v.*
24 *Bayshore Transit Management, Inc.* (2012) 203 Cal. App. 4th 1112, 1135. Further, Plaintiff
25 anticipated the court might deem a PAGA trial unmanageable given the need to interview Class
26 members as to rest and meal period violations and cell phone usage. Based on this, Plaintiff
27 believed reasonable exposure was no more than five (5) percent of maximum exposure at initial
28 violation rates, or **\$75,517.50** (5% of \$1,510.350). Khoury Decl. ¶55.

The \$50,000 amount allocated to PAGA, representing 5.8% of the settlement value, is higher than other approved settlements. *See, e.g., Alcala v. Meyer Logistics, Inc.* (C.D. Cal. June 17, 2019) 2019 LEXIS 166879, *26 (1.25% of settlement reasonable); *In re M.L. Stern Overtime Litig.* (S.D. Cal. Apr. 13, 2009) 2009 LEXIS 31650, *1 (2% of settlement reasonable).

D. The Settlement is Fair, Adequate, and Reasonable

Plaintiff and his Counsel seriously considered all facts and arguments and concluded the non-reversionary Settlement is fair and reasonable. After reasonable reductions to maximum exposure calculations, Defendants' reasonable exposure was calculated at \$823,972.78¹⁰ in damages and \$75,517.50 in PAGA penalties, for a total value of \$899,490.28. The GSA of \$860,000 represents over 100 % of the value of Class claims, and over 95% of the maximum exposure after reasonable reductions. A settlement is not judged solely against what might have been recovered at trial nor must it provide 100% of the damages sought to be fair and reasonable. *Linney v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242. Adequacy must be judged as "a yielding of absolutes... Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation ...". *Officers for Justice v. Civil Serv. Comm'n* (9th Cir. 1982) 688 F.2d 615, 624 (citation omitted). "It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not . . . render the settlement inadequate or unfair." *Id.* at 628. The proposed Settlement reflects an excellent recovery for the Class and should be granted preliminary approval. Khoury Decl. ¶56.

Further, the allocation of the settlement for tax purposes as 90 percent penalties and interest and 10 percent wages should not prevent preliminary approval. First, the majority of Defendants' *maximum* exposure is for penalties and interest. The maximum exposures

¹⁰ \$21,439.48 (Rounding - 1194/510) + \$9,770.50 (Off-the-clock OT during meal periods - 1194) + \$40,685.50 (Overtime/regular rate - 510) + \$602,824.00 (meal periods - 512/226.7) + \$40,654.80 (rest periods - 226.7) + \$10,795.00 (cell phone expense reimbursement - 2802) + \$32,787.50 (wages statements - 226) + \$65,016.00 (waiting time penalties - 203) = \$823,972.78.

calculated by Plaintiff are as follows: \$1,153,162.95 for wages,¹¹ \$358,398.44 for prejudgment interest on wages,¹² and \$1,491,994.00 for penalties.¹³ Thus penalties and interest together represent 62 percent of maximum exposure and wages represent 38 percent. Second, this allocation is within the realm of possible recovery at trial. For instance, if Plaintiff only succeeded on his rounding wages claim and received derivative wage statement and waiting time penalties claims, the recovery could be \$42,878.95 for wages, \$17,260.00 for interest,¹⁴ \$131,150 for wage statement penalties, and \$260,064.00 for waiting time penalties; in other words, penalties and interest (without even considering PAGA penalties) could be \$392,940.00 and wages could be \$42,878.95, reflecting a recovery which is 90 percent penalties and interest and 10 percent wages. Finally, district courts have granted preliminary approval in cases with the same allocation for tax purposes without explicit discussion. *See, e.g. Nucci v. Rite Aid Corp.*, 2022 U.S. Dist. LEXIS 94936, at *11 (N.D. Cal. May 26, 2022) (granting preliminary approval with 90-10 allocation for penalties/interest and wages, respectively); *Reyes v. CVS Pharmacy, Inc.*, 2016 U.S. Dist. LEXIS 17180, at *7 (E.D. Cal. Feb. 10, 2016) (same).

VII. CONDITIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE

When an ascertainable and sufficiently numerous class exists, with a well-defined community of interest, and class litigation would be superior to alternate means, certification is appropriate. *See Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1021 (2012). Ascertainability is determined by examining class definition, size, and means for identifying members. *Reyes v. Bd. of Supervisors*, 196 Cal. App. 3d 1263, 1271 (1987). The 127-member class is ascertainable from Defendants' records and joinder is impracticable, satisfying numerosity

¹¹ Rounding (\$42,878.95) + off the clock (\$19,541) + overtime (\$81,371.00) + meal period premium (\$602,824.00) + rest period premium (\$406,548.00) = \$1,153,162.95 in wages

¹² Applying 7 percent interest per annum to all wage claims for the five years during the putative class period, interest would be \$358,398.44 ($\$1,153,162.95 \times 1.07 \times 1.07 \times 1.07 \times 1.07 \times 1.07$ - original amount of (\$1,153,162.95)).

¹³ Expense reimbursement (\$43,180) + wage statement penalties (\$131,150) + waiting time penalties (\$260,064.00) + 25% of PAGA penalties ($\$4,230,400 \times 0.25 = \$1,057,600$) = \$1,491,994.00.

¹⁴ Applying 7 percent per annum: $\$42,878.95 \times 1.07 \times 1.07 \times 1.07 \times 1.07 \times 1.07 = \$60,139.95$ - original amount of \$42,878.95 = \$17,260.00.

1 There is a community of interest if common legal or factual questions predominate,
2 Plaintiff's claims are typical of the class, and Plaintiff can adequately represent the class.
3 *Fireside Bank v. Superior Court* (2007) 40 Cal. 4th 1069, 1089.

4 Common questions predominate and Plaintiff's claims are typical of the class because
5 all members of the class, including Plaintiff: were undisputedly employed by Defendant
6 Lightning Source LLC at a single book-making factory in non-exempt Production positions;
7 were provided with, and were subject to, the same written policies regarding meal and rest
8 breaks, overtime, timekeeping, and cell phones; were generally prohibited by written policy
9 from using cell phones on work time; swiped in and out on the same time clock and were
10 subject to electronic timekeeping, and Plaintiff alleges based on time records obtained, to the
11 same 15-minute time rounding practice which led to uncompensated time worked; recorded the
12 start and end times of meal breaks, which allowed an analysis of missed, short, and late meal
13 breaks; uniformly did not have bonuses incorporated into their regular rate of pay because
14 Defendants categorized bonuses as discretionary; and worked in the same production
15 environment, which Plaintiff contends led to time pressure and work demands which prevented
16 employees from taking compliant meal and rest breaks and led them to work off the clock
17 during meal breaks. Further, Plaintiff is an adequate representative of the Class because he has
18 no interests antagonistic to the Class. Garcia Decl. ¶6.

19 **VIII. CONCLUSION**

20 Plaintiff requests the Settlement be preliminarily approved, Notice of Class Action
21 Settlement approved and ordered to be disseminated to the Class, Simpluris be appointed the
22 Administrator, Cohelan Khoury & Singer and Lebe Law, APLC be appointed as Class Counsel,
23 Plaintiff Eric Garcia be appointed Class Representative, and Final Approval Hearing date be set.

24 Respectfully submitted,
25 LEBE LAW, APLC
26 COHELAN KHOURY & SINGER

27 Dated: September 16, 2022

28 By: 
Diana M. Khoury/ Rosemary C. Khoury
Attorneys for Plaintiff Eric Garcia, individually and on
behalf of all others similarly situated