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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**

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

Date: May 3, 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 PAGA<sup>1</sup> 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 of Defendants Lightning Source LLC, Ingram Distribution Management LLC<sup>2</sup>, 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.

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; derivatively, accurate wage statements and timely final wages. Khoury Decl. ¶11.

**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 putative Class worked.

**B. Plaintiff**

Plaintiff was employed as an “Operations Team Lead-2<sup>nd</sup> 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. See also, Declaration of Plaintiff Eric Garcia.

**C. The Class and Aggrieved Employees**

The Class is defined as all current and former non-exempt employees of Defendants

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

<sup>2</sup> Erroneously sued as “Ingram Distribution Management Inc”.

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

### 5 **III. LITIGATION AND DISCOVERY**

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

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

13 On June 10, 2020, Plaintiff filed a class action complaint alleging Defendants failed to  
14 (1) pay minimum wages (Labor Code §§ 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, and IWC  
15 Order(s) § 4); (2) pay overtime wages (Labor Code §§ 510, 1194, 1198, and IWC Wage  
16 Order(s) § 3); (3) provide meal periods (Labor Code §§ 226.7, 512, and IWC Order(s) § 11); (4)  
17 provide rest periods (Labor Code § 226.7 IWC Order(s) § 12); (5) provide accurate itemized  
18 wage statements (Labor Code § 226 and IWC Wages Order(s) § 7); (6) reimburse business  
19 expenses (Labor Code § 2802, and IWC Order(s) § 9); (7) timely pay wages due during  
20 employment (Labor Code §§ 204, 210, and IWC Order(s)); (8) timely pay wages due upon  
21 separation of employment (Labor Code §§ 201, 202, 203, and IWC Order(s)); and based on  
22 these allegations, (9) violation of the Unfair Competition Law (Business & Professions Code §§  
23 17200-17208). On June 24, 2020, Plaintiff served an amended PAGA notice on the LWDA and  
24 Defendants. Khoury Decl. ¶16, Exh. C. Defendants served their general denial and affirmative  
25 defenses to the complaint on August 21, 2020. Khoury Decl. ¶17.

26 On August 26, 2020, Defendants served Plaintiff with special interrogatories,  
27 employment form and form interrogatories, and requests for production of documents. Plaintiff  
28 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 produced<sup>3</sup>, 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 miscalculations. Damages were extrapolated to the Class. PAGA Penalties were also calculated. Khoury Decl. ¶23.

With a 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

<sup>3</sup> 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.

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 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 \$286,666.67<sup>4</sup>; (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, SA<sup>5</sup> ¶¶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¶. 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

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<sup>4</sup> 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.

<sup>5</sup> Stipulation of Class Action Settlement and Release of Claims (“SA”), attached as Exhibit A to the Khoury Declaration and presented for preliminary approval.

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 whose check was voided. Khoury Decl. ¶28, SA ¶84. No part of the GSA will revert to Defendants. Khoury Decl. ¶29, SA ¶18. The necessary information and data needed to distribute the funds are readily available from Defendants' records and the Administrator can apply the formula fairly and transparently. Khoury Decl. ¶30.

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

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

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

All claims of wrongful conduct, causes of action or legal theories of relief alleged or otherwise raised, or that could have been raised on the facts alleged in the Complaint, including all of the following: (1) failure to pay wages minimum wages (Labor Code §§ 1194, 1194.2, 1197, 1197.1, 1198, and IWC Orders); (2) failure to pay overtime wages (Labor Code §§ 510, 1194, 1198); (3) failure to provide rest periods and proper meal periods or compensation in lieu thereof (Labor Code §§ 226.7, 512, and IWC Orders); (4) failure to timely pay wages due while employed and at termination of employment (Labor Code §§ 201 - 204, 210 and IWC Orders); (5) failure to provide accurate wage statements (Labor Code § 226); (6) failure to reimburse business 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-

1 referenced Labor Code violations, and all damages, penalties, interest, attorneys' fees,  
2 litigation costs, restitution, equitable relief, and other amounts or types of relief  
3 recoverable under said claims, causes of action, or legal theories of relief, or other  
claims based on the facts alleged in the Action.

4 Khoury Decl. ¶34; SA ¶33. If a Class Member opts out, and is an eligible PAGA Member, they  
5 will receive a proportionate share of the \$12,500 PAGA Payment and release only those claims  
6 brought under PAGA because no right exists to opt out of a PAGA settlement. Khoury Decl.  
7 ¶35; SA ¶¶25, 67.B.

## 8 **VI. ARGUMENT**

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

10 "Before final approval, the court must conduct an inquiry into the fairness of the  
11 proposed settlement." California Rules of Court, Rule 3.769(g). Where a settlement is reached  
12 on terms agreeable to all Parties, a court should disapprove of the settlement "only with  
13 considerable circumspection." *Jamison v. Butcher & Sherrerd* (E.D. Pa. 1975) 68 F.R.D. 479,  
14 481. California courts may look to federal authority analyzing class issues for guidance. *See*  
15 *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 239-40.

16 At preliminary approval, a court "limits its inquiry to the extent necessary to reach a  
17 reasoned judgment that the agreement is not the product of fraud or overreaching by, or  
18 collusion between, the negotiating parties." *In re Microsoft I-V Cases* (2006) 135 Cal. App. 4th  
19 706, 723.

### 20 **B. The Settlement is Fair, Reasonable, and Adequate**

21 To approve a proposed class action settlement under Code of Civil Procedure § 382, the  
22 Court must find the settlement is "fair, adequate and reasonable." *Dunk v. Ford Motor Co.*  
23 (1996) 48 Cal.App.4th 1794, 1801. The trial court considers "the strength of Plaintiff's case, the  
24 risk, expense, complexity and likely duration of further litigation, the risk of maintaining class  
25 action status through trial, the amount offered in settlement, the extent of discovery completed  
26 and the stage of the proceedings, the experience and views of counsel, the presence of a  
27 governmental participant, and the reaction of the class members to the proposed settlement." *Id.*  
28 The Court must determine the Settlement is not fraudulent, overreaching, or collusive, but is

1 fair, reasonable and adequate to all concerned. *Dunk, supra*, at 1801.

2 A proposed class action settlement is presumed fair where there are: (1) extensive arms'-  
3 length negotiations; (2) investigation and discovery sufficient to allow counsel and the Court to  
4 act intelligently; (3) experienced counsel; and, (4) few objectors. *Id.* at 1802.

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

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

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

10 Plaintiff's Counsel investigated the claims and Defendants' potential defenses before  
11 serving the PAGA letter and filing the complaints. For mediation, Defendants produced contact  
12 information for 10 members of the 127-member Class, and data, documents, and information  
13 for 25 Class Members (20% of the Class) that allowed liability to be assessed and Class-wide  
14 damages and penalties to be extrapolated to the Class. Khoury Decl. ¶36. Proof of the Class  
15 claims is based on an analysis of punch, time and pay records. *Id.* This gave the Parties a clear  
16 understanding of the strengths and weaknesses of their positions before negotiations. Khoury  
17 Decl. ¶37. *See Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal. App. 4th  
18 399, 410 (approving settlement where "considerable information [exists]...to assess the strength  
19 of the class claims" and risks of litigation).

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

21 Counsel for Plaintiff and the Class have significant experience in litigating employment  
22 wage and hour class actions. Khoury Decl. ¶¶3-9, 38. Defense counsel Ryan Eddings and  
23 Andrew Woo of the Littler firm are also skilled and experienced wage and hour litigators who  
24 defended their clients vigorously through mediation and subsequent negotiations to finalize all  
25 settlement terms. Khoury Decl. ¶39. Class Counsel believes the Settlement is fair, reasonable,  
26 and in the Class' best interest in light of the monetary recovery, the risks of  
27 certification/decertification, adverse summary adjudication rulings, the lengthy process of  
28 establishing damages, and the delay and uncertainty of appeals. Khoury Decl. ¶40. The view of

attorneys actively conducting the litigation “is entitled to significant weight” in deciding whether to approve the settlement. *Fisher Bros. v. Cambridge Lee Industries, Inc.* (E.D. Pa. 1985) 630 F.Supp. 482, 488. As the Settlement satisfies three of the four *Dunk* requirements, preliminary approval should be granted.

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

Plaintiff and his counsel concluded the proposed Settlement is reasonable. Plaintiff’s counsel recognized and considered the inherent risks and uncertainty of litigation, including: (i) denial of certification; (ii) if certified, that decertification may be granted; (iii) a grant of summary judgment or summary adjudication; (iv) the possibility of an unfavorable, or less favorable, result at trial; (v) the possibility post-trial motions may result in an unfavorable, or 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 strength of his claims, Defendants’ defenses create a significant possibility Class claims would not be certified or would fail on the merits, conferring no Class benefit. By contrast, the proposed Settlement will yield a prompt, certain, and substantial Class recovery, without additional time or judicial resources. Khoury Decl. ¶41. The \$860,000 non-reversionary settlement stands to benefit 127 Class Members with an average payment of \$3,861. Khoury Decl. ¶42.

Defendants firmly disputed liability and contended, among other things, they abided all of California’s labor laws and provided: proper wages for all hours worked, compliant meal and rest periods, accurate and itemized wage statements, timely final wages, and reimbursements for necessary business-related expenses, if any existed. Khoury Decl. ¶43. Defendants’ arguments in support of their defenses to each claim follow:

**(a) Unpaid Wage Claims**

Defendants contend their policies were lawful, and in the event that any compensable time was unpaid because it was “off the clock,” that they are not liable because any failure to record hours worked was the fault of Plaintiff and/or other employees. Defendants rely upon the California Court of Appeal’s holding that where an employer has no knowledge an employee is

1 engaging in compensable work and that employee fails to notify the employer or deliberately  
2 prevents the employer from acquiring knowledge of the compensable work, the employer's  
3 failure to pay for that time is not a violation of the California Labor Code. (*Jong v. Kaiser*  
4 *Foundation Health Plan, Inc.* (2014) 226 Cal.App.4th 391, 395.) Defendants contend their  
5 policies and practices required employees to accurately record all their time worked, via  
6 punching in and out using time clocks and supplementing any mistakes in the time clock record  
7 by submitting Time Clock Missed Punch Request Forms to add any additional time worked not  
8 captured by the time punches.

9 Defendants also contend that declarations obtained by their counsel confirmed  
10 employees believed they were correctly paid for all hours worked, and had had the opportunity  
11 to capture all of their compensable time by using the time clock and utilizing the Time Clock  
12 Missed Punch Request Forms to add time worked not captured by the time clocks.

13 With respect to Plaintiff's claim that Defendants failed to incorporate bonuses into the  
14 regular rate for purposes of calculating overtime wages, Defendants contend such bonuses were  
15 entirely discretionary because they were not measured by or dependent upon hours worked,  
16 production, or efficiency and thus properly excluded from the regular rate of pay calculation.

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

18 Defendants contend they promulgated compliant meal and rest period policies and any  
19 failure to receive compliant meal and rest periods would have been voluntary. Under *Brinker*,  
20 "[a]n employer's duty with respect to meal breaks ... is an obligation to provide a meal period  
21 to its employees." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1040.)  
22 "The employer satisfies this obligation if it relieves its employees of all duty, relinquishes  
23 control over their activities and permits them a reasonable opportunity to take an uninterrupted  
24 30-minute break, and does not impede or discourage them from doing so." (*Ibid.*) "[T]he  
25 employer is not obligated to police meal breaks and ensure no work thereafter is performed."  
26 (*Id.* at p. 1040-41.) "[W]ork by a relieved employee during a meal break does not thereby place  
27 the employer in violation of its obligations and create liability for premium pay...." (*Id.* at p.  
28 1041.) Defendants further contends the sworn declarations they obtained confirm employees

1 had the opportunity to take meal and rest periods in compliance with California law.

2 **(c) Expense Reimbursement Claims**

3 Defendants contends that while Plaintiff claims he should have been reimbursed for  
4 expenses relating to the use of his cell phone, those expenses were not reimbursable under  
5 California Labor Code section 2802 (a) because they were not “necessary.” Defendants contend  
6 employees whose jobs required cell phones were provided company-issued cell phones, and that  
7 Plaintiff’s job position did not require the use of a personal cell phone. Defendants contend  
8 sworn declarations they obtained from those holding the same job position as Plaintiff,  
9 confirmed the position did not require the use of a cell phone.

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

11 “[T]o ensure that the recovery represents a reasonable compromise, given the magnitude  
12 and apparent merit of the claims being released, discounted by the risks and expenses of  
13 attempting to establish and collect on those claims by pursuing the litigation,” information is  
14 presented to the Court, as a fiduciary for absent class members. *Kullar v. Foot Locker Retail,*  
15 *Inc.* (2008) 168 Cal.App.4th 116, 129. *Kullar* does not require the parties to predict the outer  
16 reaches of exposure without factoring in actual risks of certification, decertification, dispositive  
17 motions, and trial. *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186  
18 Cal.App.4th 399, 408. Rather, *Kullar* requires only “an understanding of the amount that is in  
19 controversy and the realistic range of outcomes of the litigation.” *Munoz*, 186 Cal.App.4th at  
20 409 (finding trial court’s review of the number of class members, payroll data, and declarations  
21 on hours worked, duties, and meal and rest period experiences were an adequate basis to  
22 understand the amount in controversy under *Kullar*). As in *Munoz*, Class Counsel relied on time  
23 and pay records for 20% of the randomly selected Class, extrapolated to the Class for the Class  
24 Period. On these bases, Class counsel’s damages consultant calculated Class-wide damages and  
25 penalties through the date of mediation. Khoury Decl. ¶44.

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

27 **(a) Rounding.** An employer must pay at least minimum wages for all time it  
28 “suffer[s] or permit[s]” employees to work and overtime wages at one and one-half times the

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

6 Defendants rounded employees' time worked to the nearest quarter hour, which Plaintiff  
7 contends was neither fair nor neutral on its face or in practice. Time records analyzed revealed  
8 that on average, 2.6 minutes per shift were unpaid. Over the Class Period, 2,335.5 hours were  
9 unpaid and 436.1 hours were overpaid, with a net of 1,899.4 unpaid hours. Plaintiff estimated  
10 Defendants' exposure at \$42,878.95, assuming half of unpaid hours were regular and half were  
11 overtime [(949.7 hours x \$18.06 per hour=\$17,151.58) + (949.7 hours x \$27.09 per hour  
12 (overtime rate) =\$25,727.37)]. Khoury Decl. ¶45. Plaintiff reduced Defendants' estimated  
13 exposure by 50%, to **\$21,439.48**, based on case law suggesting a court might uphold  
14 Defendants' rounding policy. *Id.* See *Ferra v. Loews Hollywood Hotel, LLC* (2019) 40  
15 Cal.App.5th 1239, 1255, reversed on other grounds, 11 Cal.5th 858 (upholding nearest quarter-  
16 hour rounding with grace period policy; "a system can be fair or neutral even where a small  
17 majority loses compensation"); *Donohue v. AMN Servs., LLC* (2018) 29 Cal.App.5th 1068,  
18 1085, reversed on other grounds, 11 Cal.5th 58 (granting summary judgment for employer);  
19 *Utne v. Home Depot U.S.A., Inc.* (N.D. Cal., Dec. 4, 2017) 2017 WL 5991863 at \*3 (granting  
20 summary judgment for employer; noting "rounding contemplates the possibility that in any  
21 given time period some employees will have net overcompensation and some will have net  
22 under compensation"). Furthermore, as Class Counsel has previously litigated rounding claims  
23 through appellate review, Defendants successfully argue that it is Plaintiff's burden to prove  
24 employees were actually working during the rounded "windows". This is especially problematic  
25 when factual disputes exist as to the nature of the rounded (deleted) time and the concept of a  
26 communicated "grace period".

27 **(b) Off-the-clock Work.** Plaintiff contends Defendants failed to pay for time  
28 worked off-the-clock during meal periods and estimates being interrupted approximately three

1 times per week for two minutes each time, resulting in six unpaid minutes per week. Unpaid  
2 minimum wages for off-the-clock work was estimated at \$19,541 (0.1 hours x 10,818  
3 workweeks x \$18.06 per hour). Given that courts often deny certification of off-the-clock  
4 claims due to the need for individual inquiries as in *Kilbourne v. Coca-Cola Co.* (S.D. Cal. July  
5 29, 2015) 2015 U.S. Dist. LEXIS 118756, at \*46, Plaintiff reduced Defendants' exposure by  
6 50% to **\$9,770.50**. Khoury Decl. ¶46.

7 (c) **Overtime Wages Owed at the Regular Rate of Pay.** Plaintiff contends  
8 Defendants failed to factor into the regular rate of pay all non-discretionary bonuses when  
9 calculating overtime wages. *Alvarado v. Dart Container Corp. of California* (2018) 4 Cal. 5th  
10 542, 554. Both overtime and bonuses were paid in 326 of 1,320 pay periods. Plaintiff calculated  
11 unpaid overtime wages at \$81,371.00. Given the risk this claim could fail at certification,  
12 Plaintiff reduced Defendants' exposure by 50%, to **\$40,685.50**. Khoury Decl. ¶47.

13 **2. Labor Code §§ 226.7, 512 Meal Periods**

14 Employers must provide "an uninterrupted 30-minute period during which the employee  
15 is relieved of all duty." "[F]irst meal periods must start after no more than five hours." 53 Cal.  
16 4th 1004, 1042 (2012). Otherwise, the employer owes one hour of pay to the employee at their  
17 regular rate of pay. Labor Code §§ 226.7, 512. If records show a missed, late, short, or  
18 interrupted meal period there is a presumption of liability, which the employer may rebut.  
19 *Donohue v. AMN Servs., LLC* (2021) 11 Cal. 5th 58, 77.

20 Defendants' time records showed (1) no meal breaks on 9.3% of shifts longer than 6  
21 hours (\$72,792.00 in premiums owed); (2) late first meal breaks on 35.1% of shifts over 5 hours  
22 (\$250,045.00 in premiums owed); (3) short first meal breaks on 39.3% of shifts over 5 hours  
23 (\$279,987.00 in premiums owed); and (4) no second meal break on 99.9% of shifts over 10  
24 hours (\$246,968.00 in premiums owed), yielding exposure of \$849,792.00. However,  
25 recognizing only one meal period premium may be owed per shift, regardless of the number of  
26 meal period violations suffered, and that a second meal period may be waived if the first meal  
27 period is taken, a more appropriate exposure figure of **\$602,824.00** was calculated, subtracting  
28 premiums calculated for failure to provide a second meal period. Khoury Decl. ¶48.

1           **3. Labor Code § 226.7 Rest Periods**

2           California employers must authorize a first 10-minute rest period after 3.5 hours and a  
3 second after 6 hours. *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1029  
4 (2012). Otherwise, the employer owes one hour of pay at the employee’s regular rate of pay.  
5 Labor Code § 226.7. Class Members’ heavy workloads resulted in non-compliant late, short or  
6 missed rest periods. Given rest periods were not recorded, and based on Plaintiff’s experiences,  
7 Plaintiff assumed a 50% violation rate (22,507 violations) requiring \$406,548.00 in rest period  
8 premiums. Given that rest period claims are inherently difficult to certify, that Class Members  
9 likely could not remember which, if any, shifts had non-compliant or missed rest periods, and  
10 the lack of rest period records, Defendants’ potential exposure was reduced by 90% to  
11 **\$40,654.80**. Khoury Decl. ¶49.

12           **4. Labor Code § 2802 – Reimbursement of Business Expenses**

13           An employer must indemnify its employees for all their necessary expenditures or losses  
14 incurred in the discharge of their duties. Labor Code § 2802. A reasonable percentage of an  
15 employee’s cell phone charges, which vary in each case, must be reimbursed. *Cochran v.*  
16 *Schwan’s Home Services, Inc.* (2014) 228 Cal. App. 4th 1137, 1145 (2014). Plaintiff alleged  
17 Defendants failed to reimburse Class Members for the use of personal cell phones to  
18 communicate with supervisors during their shifts and to report mechanical failures. Maximum  
19 exposure was estimated at \$43,180 (\$5 a month x 68 months during Class Period x 127 Class  
20 Members). Defendants contend Class Members were generally prohibited from taking their cell  
21 phones onto the factory floor<sup>6</sup>, and that Plaintiff’s position did not require the use of a personal  
22 cell phone. Defendants’ exposure was thus reduced by 75% to **\$10,795**. Khoury Decl. ¶50.

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

24           Wage statements must show gross and net wages earned, “total hours worked by the  
25 employee” and the “corresponding number of hours worked at each hourly rate.” Labor Code §

26 \_\_\_\_\_  
27 <sup>6</sup> A “Cell Phone Policy” produced by Defendants and signed by Plaintiff explains: “1. The use  
28 of cellular devices is not permitted in the warehouse. 2. Cell phones may be used on designated  
paid company breaks, lunches, and before and after work.”

226 (a)(1)(2)(5)(9). Plaintiff contends wage statements were non-compliant because they 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.

Unpaid meal and rest period premiums do 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 faith defense to willfulness is clearly established under California law. *Nordstrom Comm’n Cases* (2010) 186 Cal. App. 4th 576, 584 (“There is no willful failure to pay wages if the employer and employee have a good faith dispute as to whether and when the wages were due.”).

For the 86 Class Members in the one-year liability period comprising 2,623 pay periods, Defendants’ potential exposure was calculated at \$131,150 (\$50 x 2,623). Khoury Decl. ¶51. The \$50 initial violation rate was applied to all pay periods per *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1209 (holding the ‘subsequent violation rate’ rate cannot be assessed until Defendant has been put on notice of the violation). Plaintiff estimated probability of certification at 50% and victory at trial at 50%, resulting in a 75% discount to realistic exposure of **\$32,787.50**. Khoury Decl. ¶52.

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

If Plaintiff proves the underlying claims for failure to pay all wages due, and rest and meal period premiums, then derivative claims arise under Labor Code § 203 for failure to pay all wages due on separation of employment.

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

1 The only claim which clearly supports waiting time penalties is for unpaid wages.  
2 *Naranjo*, 40 Cal. App. at 474 (rest and meal period premiums do not). To recover waiting time  
3 penalties, Plaintiff must prove wages owed were willfully not paid. Plaintiff's counsel believed  
4 there was only a 25% probability of prevailing at certification. Even if wages were found owed  
5 due to rounding, off-the-clock work, and regular rate miscalculation, a court could find  
6 Defendant had a good faith belief it was paying all wages and "a good faith dispute that any  
7 wages are due will preclude imposition of waiting time penalties under Section 203." *Hill v.*  
8 *Walmart Inc.* (N.D. Cal. January 14, 2021) 2021 U.S. Dist. LEXIS 20950, \*17. Realistic  
9 exposure was thus estimated at 25% of the maximum, or **\$65,016.00**. Khoury Decl. ¶53.

#### 10 **7. Labor Code §§ 2699 PAGA Penalties**

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

16 Maximum PAGA civil penalties, using the initial violation rate for all pay periods versus  
17 using the initial violation rate for the first pay period and the subsequent violation rate for all  
18 subsequent pay periods for 2,623 pay periods during the PAGA Period are estimated at  
19 \$4,230,400 / \$1,510,350 based on the underlying violations: (a) Section 226(a) - wage  
20 statements (\$250/\$1,000): \$2,558,500/\$655,750; (b) Section 510 - overtime/regular rate  
21 (\$100/\$200): \$121,000/\$64,800; (c) Section 1194- wages (\$100/\$200): \$516,000/\$262,300; (d)  
22 Sections 512 and 226.7 - meal periods (\$100/\$200)—\$516,000/\$262,300; (e) Section 226.7 -  
23 rest periods (\$100/\$200): \$516,000/\$262,300; and (f) Section 203 - final wages for 29 formers  
24 (\$100): \$2,900. Khoury Decl. ¶54.

25 PAGA penalties were discounted by using only initial violation rates, based on  
26 Defendants' argument that "courts have held that employers are not subject to heightened  
27 penalties for subsequent violations unless and until a court or commissioner notifies the  
28 employer that it is in violation of the Labor Code." *Vieyara-Flores v. Sika Corp.*, 2019 U.S.

1 Dist. LEXIS 98081, \*13 (C.D. Cal. 2019). Thus, the maximum PAGA exposure was estimated  
2 at \$1,510,350.

3 Maximum exposure was further discounted given the risk of not proving underlying  
4 violations and the Court's authority to reduce penalties, as long as not to "zero." *Thurman v.*  
5 *Bayshore Transit Management, Inc.* (2012) 203 Cal. App. 4th 1112, 1135; *see also Carrington*  
6 *v. Starbucks* (2018) 30 Cal.App.5th 504 (imposing \$5 penalty per pay period, noting \$50 would  
7 be unjust, arbitrary and oppressive; reducing penalty from \$1.5 million to \$150,000); *see also In*  
8 *Re Nordstrom Commission Cases* (2010) 186 Cal. App. 4th 576, 589 (holding trial court did not  
9 abuse its discretion in approving settlement attributing \$0 to PAGA penalties.) Further, Plaintiff  
10 anticipated the court might deem a PAGA trial unmanageable given the need to interview Class  
11 members as to rest and meal period violations and cell phone usage. Based on this, Plaintiff  
12 believed reasonable exposure was no more than five (5) percent of maximum exposure at initial  
13 violation rates, or **\$75,517.50** (5% of \$1,510.350). Khoury Decl. ¶55.

14 The \$50,000 amount allocated to PAGA, representing 5.8% of the settlement value, is  
15 higher than other approved settlements. *See, e.g., Alcala v. Meyer Logistics, Inc.* (C.D. Cal. June  
16 17, 2019) 2019 LEXIS 166879, \*26 (1.25% of settlement reasonable); *In re M.L. Stern*  
17 *Overtime Litig.* (S.D. Cal. Apr. 13, 2009) 2009 LEXIS 31650, \*1 (2% of settlement reasonable).

18 **D. The Settlement is Fair, Adequate, and Reasonable**

19 Plaintiff and his Counsel seriously considered all facts and arguments and concluded the  
20 non-reversionary Settlement is fair and reasonable. After reasonable reductions to maximum  
21 exposure calculations, Defendants' reasonable exposure was calculated at \$823,972.78<sup>7</sup> in  
22 damages and \$75,517.50 in PAGA penalties, for a total value of \$899,490.28. The GSA of  
23 \$860,000 represents over 100 % of the value of Class claims, and over 95% of the maximum  
24 exposure after reasonable reductions. A settlement is not judged solely against what might have

25 <sup>7</sup> \$21,439.48 (Rounding - 1194/510) + \$9,770.50 (Off-the-clock OT during meal periods -  
26 1194) + \$40,685.50 (Overtime/regular rate - 510) + \$602,824.00 (meal periods - 512/226.7) +  
27 \$40,654.80 (rest periods - 226.7) + \$10,795.00 (cell phone expense reimbursement - 2802) +  
28 \$32,787.50 (wages statements - 226) + \$65,016.00 (waiting time penalties - 203) =  
\$823,972.78.

1 been recovered at trial nor must it provide 100% of the damages sought to be fair and  
2 reasonable. *Linney v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242.  
3 Adequacy must be judged as “a yielding of absolutes... Naturally, the agreement reached  
4 normally embodies a compromise; in exchange for the saving of cost and elimination of risk,  
5 the parties each give up something they might have won had they proceeded with litigation ...”  
6 *Officers for Justice v. Civil Serv. Comm’n* (9th Cir. 1982) 688 F.2d 615, 624 (citation omitted).  
7 “It is well-settled law that a cash settlement amounting to only a fraction of the potential  
8 recovery does not . . . render the settlement inadequate or unfair.” *Id.* at 628. The proposed  
9 Settlement reflects an excellent recovery for the Class and should be granted preliminary  
10 approval. Khoury Decl. ¶56.

## 11 **VII. CONDITIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE**

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

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

21 Each Class Member was subject to the policies Plaintiff alleged caused damages to him  
22 and to the Class, including the failure to have written policies regarding rest breaks and meal  
23 periods, rounding time worked, and the failure to use the regular rate of pay to calculate  
24 overtime wages. Where the same alleged conduct forms the basis for claims of Plaintiff and the  
25 Class, they are common for settlement purposes, and here, Plaintiff’s claims are typical of the  
26 claims of the Class. Plaintiff can adequately protect the interests of the Class. See *Wershba*, 91  
27 Cal. App. 4th at 238. Plaintiff’s attorneys are qualified and Plaintiff’s interests are not  
28 antagonistic to those of the Class. *McGhee v. Bank of Am.* (1976) 60 Cal. App. 3d 442, 450.

**VIII. CONCLUSION**

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

Respectfully submitted,

LEBE LAW, APLC  
COHELAN KHOURY & SINGER

Dated: December 2, 2021

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