

KINGSLEY & KINGSLEY, APC
ERIC B. KINGSLEY, Esq. (SBN 185123)
eric@kingsleykingsley.com
KELSEY M. SZAMET, Esq. (SBN 260264)
kelsey@kingsleykingsley.com
16133 Ventura Blvd., Suite 1200
Encino, CA 91436
Tel: (818) 990-8300, Fax (818) 990-2903

Attorneys for Plaintiff and the proposed class

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

RIVELINO TAVIRA, an individual, on
behalf of himself and others similarly situated

PLAINTIFF,

v.

GENERAL FOUNDRY SERVICE
CORPORATION; and DOES 1 thru 50,
inclusive,

DEFENDANTS.

CASE NO. RG20072299

[Case Assigned for All Purposes to Hon. Brad
Seligman in Dept. 23]

**NOTICE OF MOTION AND MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

*[Filed concurrently with Declaration of Kelsey
M. Szamet and Proposed Order]*

Date: April 27, 2021

Time: 3:00 p.m.

Dept.: 23

Reservation No.: R-2243711

Complaint Filed: August 24, 2020
FAC Filed: October 29, 2020
Trial Date: None Set

1 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on April 27, 2021 at 3:00 p.m. in Department 23 of the
3 above-entitled court, Plaintiff RIVELINO TAVIRA will move the Court for an Order of
4 Preliminary Approval of the Joint Stipulation of Class Action and Release of Claims (“Settlement
5 Agreement” or “Settlement”), a copy of which is filed concurrently herewith.

6 The Motion will be made on the grounds that the proposed Settlement Agreement is fair,
7 adequate, reasonable, and in the best interest of the Class and the Parties.

8 The Motion will be based on this Notice of Motion, the attached Memorandum of Points
9 and Authorities, the Declaration of Kelsey M. Szamet, the Settlement Agreement and Release, all
10 other papers and records on file in this action, and on such oral and documentary evidence as may
11 be presented at the hearing on this Motion.

12 DATED: March 17, 2021

KINGSLEY & KINGSLEY, APC

13
14 By: _____

Kelsey M. Szamet
Attorneys for Plaintiff RIVELINO TAVIRA and the
proposed class

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff RIVELINO TAVIRA (“Plaintiff”) submits this Memorandum of Points and
4 Authorities in support of Plaintiff’s Motion for Preliminary Approval of the Joint Stipulation of
5 Class Action and Release of Claims reached between Plaintiff and Defendant GENERAL
6 FOUNDRY SERVICE CORPORATION (“Defendant”) (Plaintiff and Defendant together, the
7 “Parties”).

8 By this Motion, Plaintiff requests that the Court:

9 (1) Grant preliminary approval of the fully-executed Joint Stipulation of Class Action
10 and Release of Claims (“Settlement” or “Settlement Agreement”) and certify the Proposed
11 Settlement Class for settlement purposes only. A true and correct copy of the Settlement
12 Agreement is attached to the Declaration Kelsey M. Szamet as Exhibit “1”;

13 (2) Approve the proposed Notice to Class Members, a copy of which is attached to the
14 Settlement Agreement as Exhibit “A,” and direct that the Notice be sent to Class Members in the
15 manner set forth in the Settlement Agreement;

16 (3) Schedule a hearing on final approval of the proposed Settlement and Plaintiff’s
17 counsel’s application for an award of attorney’s fees and litigation costs at which Class Members
18 may be heard (“Final Approval Hearing”).

19 **II. FACTUAL BACKGROUND**

20 **A. Litigation Overview and Procedural History**

21 On August 24, 2020, Plaintiff filed a Class Action Complaint and a notice with California’s
22 Labor and Workforce Development Agency (“LWDA”) regarding his intent to file an action
23 seeking civil penalties under PAGA. (Declaration of Kelsey M. Szamet (“Szamet Decl.”)
24 ¶4.)(Settlement Agreement, Ex. 1 at (“Ex. 1 at”) § II, ¶2.) On October 29, 2020, Plaintiff filed a
25 First Amended Complaint (“FAC”), adding the PAGA claim based on the facts previously alleged
26 in the Complaint. (*Id.*) On December 8, 2020, Defendant filed an Answer to Plaintiff’s FAC.

27 The FAC alleged claims for: (1) Failure to pay wages and/or overtime pursuant to Labor
28 Code §§ 510, 1194, and 1199; (2) Violation of Labor Code § 226(a); (3) Violation of Business &

1 Professions Code § 17200; and (4) Penalties pursuant to Labor Code § 2699, et seq. (Szamet Decl.
2 ¶5; Ex. 1 at § II, ¶2.)

3 The Parties stipulated to the amendment of the FAC to permit Plaintiff to file a Second
4 Amended Complaint (“SAC”). (Szamet Decl. ¶6; Ex. 1 at § II, ¶2.) On February 5, 2021, Plaintiff
5 filed his SAC which alleges only two claims: (1) Penalties pursuant to Labor Code §226(a); and
6 (2) PAGA penalties pursuant to Labor Code § 2699, et seq. based upon the alleged Labor Code
7 §226(a) violation. (*Id.*) On February 8, 2021, Defendant filed an Answer to Plaintiff’s SAC.

8 B. Settlement Efforts

9 After the matter was at issue, the Parties began to engage in informal discovery to
10 understand the nature of the allegations and the scope of potential liability. (Szamet Decl. ¶7; Ex.
11 1 at § II, ¶2.) Defendant provided Plaintiff’s counsel with pertinent data for the Class Members
12 so that the Parties could fully investigate the claims at issue and understand their strengths and
13 weaknesses. (Szamet Decl. ¶8; *Id.*) During this process, Plaintiff learned there are 2,914 itemized
14 wage statements at issue and 55 Proposed Settlement Class Members. (Szamet Decl. ¶9; Ex. 1 at
15 § III, ¶29.)

16 After the Parties exchanges all relevant information, they engaged in informed arms-length
17 negotiations to try to resolve the claims at issue. (Szamet Decl. ¶10; Ex. 1 at § II, ¶2.) The Parties
18 were able to come to an agreement as reflected in the Settlement Agreement now presented to the
19 Court for preliminary-approval. (Szamet Decl. ¶11.)

20 Based on their own independent investigation and evaluation, Class Counsel is of the
21 opinion that the Settlement Agreement with Defendant is fair, reasonable and adequate, and in the
22 best interest of the settlement classes in light of all known facts and circumstances, including the
23 risk of significant delay, defenses asserted by Defendant, uncertainties regarding a class and
24 representative action trial on the merits, and numerous potential appellate issues. (Szamet Decl.
25 ¶12; Ex. 1 at § II, ¶2.) Although Defendant denies any liability, Defendant is agreeing to this
26 Settlement Agreement solely to avoid the cost of litigation. (*Id.*) Accordingly, the Parties and
27 their counsel desire to fully, finally, and forever settle, compromise and discharge all disputes and
28 claims arising from or relating to the Actions on the terms set forth here. (*Id.*)

1 **III. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED FOR**
2 **SETTLEMENT PURPOSES**

3 Originally creatures of equity, class actions have been statutorily embraced by the
4 Legislature whenever “the question [in a case] is one of a common or general interest, of many
5 persons, or when the parties are numerous, and it is impracticable to bring them all before the
6 court” (Code Civ. Proc. § 382; *see, e.g., Fireside Bank v. Sup. Court* (2007) 40 Cal.4th 1069,
7 1078.) They serve an important function by “establishing a technique whereby the claims of many
8 individuals can be resolved at the same time” thereby “eliminat[ing] the possibility of repetitious
9 litigation and provid[ing] small claimants with a method of obtaining redress.” (*Richmond v. Dart*
10 *Industries, Inc.* (1981) 29 Cal.3d 462, 469.) Public policy supports the use of class actions to
11 enforce wage and overtime laws for the benefit of workers. (*See Sav-on Drug Stores, Inc. v. Sup.*
12 *Court* (2004) 34 Cal.4th 319, 340.)

13 The certification question is “essentially a procedural one that does not ask whether an
14 action is legally or factually meritorious.” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439–
15 440.) A court ruling on a certification motion must determine “whether . . . the issues which may
16 be jointly tried, when compared with those requiring separate adjudication, are so numerous or
17 substantial that the maintenance of a class action would be advantageous to the judicial process
18 and to the litigants.” (*Collins v. Rocha* (1972) 7 Cal.3d 232, 238.)

19 The California Supreme Court has identified three certification requirements: (1) “the
20 existence of an ascertainable and sufficiently numerous class”; (2) “a well-defined community of
21 interest”; and, (3) “substantial benefits from certification that render proceeding as a class superior
22 to the alternatives.” (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021.)
23 The “community of interest” requirement includes three additional requirements: (1) common
24 questions of law or fact predominant over individual questions; (2) the class representatives have
25 claims or defenses typical of the class; and (3) the class representatives can adequately represent
26 the class. (*Ibid, citing Fireside Bank, supra*, 40 Cal.4th at 1089.)

27 Class certification for settlement purposes is proper in this case as the proposed Settlement
28 Class satisfies each of the requirements under Code of Civil Procedure § 382. Accordingly, this

1 Court should certify the putative settlement class.

2 A. The Proposed Classes Are Ascertainable and Sufficiently Numerous

3 1. Ascertainability

4 Putative class members are deemed “ascertainable” when they may be “readily identified
5 without unreasonable expense or time by reference to official records.” (*Rose v. City of Hayward*
6 (1981) 126 Cal.App.3d 926, 932.) In determining whether a class is ascertainable, a court
7 scrutinizes the class definition, the size of the class and the means of identifying class members.
8 (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.)

9 Here, Plaintiff maintains that the proposed settlement class is ascertainable for several
10 reasons: First, Defendant has agreed in the Settlement Agreement to provide a class list to the
11 Settlement Administrator containing the full name, last known address, last known home telephone
12 number, social security number, dates of employment and Compensable Work Weeks for all
13 putative class members after issuance of the preliminary approval order. (Szamet Decl. ¶13; Ex. 1
14 at § I, ¶4.) Second, Settlement Class Members consist of Defendant’s hourly employees, and
15 Defendant is required to keep records of its hourly employees’ names, home addresses, and social
16 security numbers. (*See* Wage Order 1-2001, subsection 7(c); Szamet Decl. ¶14.) As such, Plaintiff
17 contends that Settlement Class Members may be readily identified based on Defendant’s records.
18 (Szamet Decl. ¶15.)

19 2. Numerosity

20 There is no set number that is required as a matter of law to maintain a class action. (*See*,
21 *e.g.*, *Rose v. City of Hayward*, *supra*, 126 Cal.App.3d at p. 934.) Here, the proposed settlement
22 class contains, based upon information and belief, approximately 55 employees in the State of
23 California. (Ex. 1 at § III, ¶29.) Therefore, Plaintiff is confident he will be able to establish that
24 the proposed settlement class is ascertainable and sufficiently numerous. (Szamet Decl. ¶16.)

25 B. There Is a Well-Defined Community of Interest

26 1. There Are Predominant Questions of Law and Fact

27 In deciding whether questions of common or general interest predominate, a court must
28 determine whether “the issues which may be jointly tried, when compared with those requiring

1 separate adjudication, are so numerous or substantial that the maintenance of a class action would
2 be advantageous to the judicial process and to the litigants.” (*Collins v. Rocha* (1972) 7 Cal.3d
3 232, 238; *accord, Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) As a
4 general matter, if the defendant’s liability can be determined by facts common to all members of
5 the class, a class will be certified even if the members must individually prove their damages.”
6 (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916, 107; *accord, Knapp v.*
7 *AT & T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 941.)

8 Here, Plaintiff argues that there are questions of law and fact common to the proposed
9 settlement class that predominate over any questions affecting only individual Class Members.
10 (Szamet Decl. ¶17.) These common questions include:

- 11 1) Whether Defendant failed to provide accurate itemized wage statements; and,
- 12 2) Whether Defendant violated § 2699, et seq. of the Labor Code by engaging in the
- 13 acts previously alleged.

14 (Szamet Decl. ¶18.)

15 Plaintiff’s challenge to Defendant’s uniform policies and practices involves common
16 factual and legal issues that are amenable to class treatment. (Szamet Decl. ¶19.) As the California
17 Supreme Court has emphasized, “[c]aims alleging that a uniform policy consistently applied to a
18 group of employees is in violation of the wage and hour laws are of the sort routinely, and properly,
19 found suitable for class treatment.” (*Brinker, supra*, 53 Cal.4th at 1033; *see also Bradley v.*
20 *Networkers International, LLC* (2012) 211 Cal.App.4th 1129, 1141-1146.) Moreover, a class of
21 similarly situated employees may be certified based on common questions of fact or law, even if
22 each employee has to establish the amount of his or her damages. (*See Bell v. Farmers Ins. Exch.*
23 (2004) 115 Cal.App.4th 715, 741; *Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th
24 at 340.)

25 Here, Plaintiff maintains that the proposed Settlement Class Members suffered the same
26 injuries, in the same manner in that Settlement Class Members were not provided with accurate
27 itemized wage statements that comply with California law. (Szamet Decl. ¶20.) Plaintiff alleges
28 that Settlement Class Members worked in the same capacity for the same employer and were

1 subject to the same employment policies and practices, the questions of fact and claims regarding
2 the status of these employees are the same for each member of the settling class. Accordingly, for
3 purposes of settlement, certification for settlement purposes is appropriate. (Szamet Decl. ¶21.)

4 2. The Class Representative Has Claims Typical of the Proposed Class

5 A putative class representative's claim must be "typical," but not necessarily identical, to
6 the claims of other class members. The test of typicality "is whether other members have the same
7 or similar injury, whether the action is based on conduct which is not unique to the Class
8 Representatives, and whether other class members have been injured by the same course of
9 conduct." (*Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502.) Thus, it is sufficient
10 that the representative is similarly situated so that he or she will have the motive to litigate on
11 behalf of all class members. (*Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502.) Thus,
12 it is sufficient that the representative is similarly situated so that he or she will have the motive to
13 litigate on behalf of all class members. (*See, e.g., Classen v. Weller* (1983) 145 Cal.App.3d 27,
14 45.) It is not necessary that the class representative have personally incurred all of the damages
15 suffered by each of the other class members. (*Wershba v. Apple Computer, Inc.* (2001) 91
16 Cal.App.4th 224, 238.)

17 Plaintiff worked as an "hourly employee" for Defendant. (Szamet Decl. ¶22.) Plaintiff
18 alleges that he worked without being provided accurate itemized wage statements that share the
19 same alleged defect of failing to show the address of the legal entity that is the employer and the
20 start and end date for each pay period. He also alleges that he experienced derivative claims for
21 Labor Code §2699, et seq. (Szamet Decl. ¶23.) Plaintiff also contends that his claims are typical
22 of those of the Settlement Class Members. (Szamet Decl. ¶24.)

23 3. Plaintiff Contends That As The Class Representative He Has and Will
24 Fairly Represent the Interests of the Settlement Class Members

25 A putative class representative must show that he can adequately represent the class.
26 (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.App.4th 1096, 1104.) The representative,
27 through qualified counsel, must be capable of "vigorously and tenaciously" protecting the interests
28 of the class members. (*Simons v. Horowitz* (1984) 151 Cal.App.3d 834, 846.)

1 Plaintiff believes that he is capable of fairly representing and adequately protecting the
2 interests of the proposed Settlement Class Members. (Szamet Decl. ¶25.) Plaintiff's interests in
3 this litigation are coextensive with the interests of the proposed Settlement Class Members. The
4 members of the proposed settlement class all worked for Defendant during the relevant time period
5 and incurred the same type of alleged damages with regard to Defendant's alleged violations of
6 the law. (Szamet Decl. ¶26.) Moreover, Plaintiff has agreed to serve as Class Representative and
7 has retained qualified Counsel who is experienced in prosecuting wage and hour class actions.
8 (Szamet Decl. ¶27.) This demonstrates his commitment to bringing about the best possible results
9 for the benefit of the proposed settlement class. (Szamet Decl. ¶28.) Plaintiff has provided his
10 Counsel with all necessary and pertinent information. (Szamet Decl. ¶29.) He has been an active
11 participant in the litigation including having frequent contact with Settlement Class Members, and
12 working closely with Class Counsel to develop the theories of liability. (Szamet Decl. ¶30.)
13 Plaintiff has provided his Counsel with all necessary and pertinent information. (Szamet Decl. ¶31.)
14 He also was informed of and involved in all of the Settlement negotiations. Therefore, Plaintiff
15 believes that he has and will continue to adequately represent the proposed Settlement Class
16 Members. (Szamet Decl. ¶32.) Plaintiff has provided his Counsel with all necessary and pertinent
17 information. (Szamet Decl. ¶33.)

18 C. The Class Action Vehicle Is Superior to the Alternatives

19 "The ultimate question in every case of this type is whether . . . the issues which may be
20 jointly tried, when compared with those requiring separate adjudication, are so numerous or
21 substantial that the maintenance of a class action would be advantageous to the judicial process
22 and to the litigants." (*Lockheed Martin, supra*, 29 Cal.App.4th at 1104–1105.) The California
23 Supreme Court has directed the courts to utilize the class action device to fashion "an effective
24 and inclusive group remedy." (*Richmond v. Dart Indus., Inc.* (1981) 29 Cal.3d 462, 469.)
25 Normally, in making its class certification decision, the Court must determine that a class action
26 would be superior to alternate means for a fair and efficient adjudication. If the causes of action
27 may be adjudicated in a single proceeding, thereby saving time, reducing waste, and limiting
28 duplication of effort, class certification is superior to individual litigation. (*See, e.g., Vasquez v.*

1 *Superior Court* (1971) 4 Cal.3d 800, 816.) Since the Parties agreed to a settlement in principal
2 and now seek Court approval of that Settlement, Plaintiff submits that there is not as much need
3 as there would be in an ordinary motion for class certification for the Court to determine that the
4 case can be manageably tried.

5 Plaintiff maintains that class treatment would be the superior method of managing this case.
6 A class action is superior to individual litigation “when numerous parties suffer injury of
7 insufficient size to warrant individual action and when denial of class relief would result in unjust
8 advantage to the wrongdoer.” (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.) In
9 cases such as this, where individual damages may be small, the class action device is the most
10 feasible method of recovery. (See, e.g. *Lockheed Martin, supra*, 29 Cal.4th at 1131.) In this regard,
11 the superiority of class treatment is evident here because individual pursuit of class members’
12 claims may not be economically viable. (Szamet Decl. ¶34.) The only alternative to certification
13 would be to force over 55 employees to join this action, file individual, uniform actions, or abandon
14 their legal rights altogether. (Szamet Decl. ¶35.) Plaintiff maintains that this economic reality
15 would result in a windfall for Defendant if this case were not certified. (Szamet Decl. ¶36.)

16 **IV. THE PROPOSED SETTLEMENT**

17 **A. The Settlement Class**

18 For purposes of Settlement Agreement, the settlement class is defined as: “all persons who
19 are employed or have been employed as an hourly employee by GENERAL FOUNDRY
20 SERVICE CORPORATION, in the State of California who worked one or more pay periods
21 during the Class Period.” (“Settlement Class Members” or “Class Members”) (Szamet Decl. ¶37;
22 Ex. 1 at § I, ¶5.)

23 The Class Period is August 24, 2019 to August 21, 2020. (Szamet Decl. ¶38; Ex. 1 at § I,
24 ¶6.) Based on documents and other information produced by Defendant, there are approximately
25 55 Settlement Class Members. (Szamet Decl. ¶39; Ex. 1 at § III, ¶29.)

26 **B. Gross Settlement Amount**

27 As detailed fully in the Settlement Agreement, the Settlement provides for Defendant to
28 pay a Gross Settlement Amount of \$144,325.00, which includes the sum of the Individual

Settlement Payments, the Class Representative Enhancement Award, the Class Counsel Award, PAGA Payment, and the Settlement Administrator Costs. (Szamet Decl. ¶40; Ex. 1 at § I, ¶17.)

The Net Settlement Amount is the Gross Settlement Amount, less Class Counsel Award, Class Representative Enhancement Award, Payment to the LWDA, and Settlement Administration Costs. (Szamet Decl. ¶41; Ex. 1 at § I, ¶20.)

The Parties estimate the amount of the Net Settlement Amount as follows:

Gross Settlement Amount:	\$	\$144,325.00
Less Class Representative Enhancement:	\$	\$2,500.00
Less Class Counsel's Fees:	\$	\$48,108.33
Less Class Counsel's Costs:	\$	\$5,000.00
Less PAGA Payment:	\$	\$8,000 .00
		<i>(\$6,000 to the LWDA and \$2,000 to remain in the Net Settlement Amount)</i>
<u>Less Settlement Administrator Costs:</u>	<u>\$</u>	<u>\$6,500.00</u>
Anticipated Net Settlement Amount	\$	\$76,216.67

(Ex. 1 at § III, ¶15.)

The Agreement also contains an escalator clause in the event the number of Proposed Settlement Class Members increases beyond 55 by more than 5%. (Szamet Decl. ¶42; (Ex. 1 at § III, ¶29.)

C. Individual Settlement Payments

The amount of each Participating Class Member's Individual Settlement Payment is an individualized amount that is based on the number of Compensable Workweeks worked by the Participating Class Member during the Class Period. (Ex. 1 at § III, ¶17; *see also* Ex. A to the Settlement Agreement at pp. 3 [Class Notice].) This individual amount shall be determined according to the settlement payment formula set forth in the Settlement Agreement. (*Id.*) The Settlement Agreement provides for a specific and detailed dispute process regarding Individual Settlement Payments. (*See* Ex. 1 at § III, ¶9.)

D. Process for Administering Settlement after Preliminary Approval

The detailed Notice Procedure established by the Settlement Agreement will efficiently and accurately ensure that Notice is provided to the Settlement Class Members. (Ex. 1 at § III, ¶6-12.) The Parties have agreed to use a reputable third-party claims administrator, ILYM Group,

1 Inc., to administer the Settlement Agreement. (Ex. 1 at § I, ¶34.)

2 E. Process for Settlement Class Members to Respond to Class Notice

3 As detailed in the Settlement Agreement, Settlement Class Members will have an
4 opportunity to request exclusion from the Settlement Agreement (i.e. opt out) and to object to the
5 Settlement Agreement at the Final Approval Hearing. (See Ex. 1 at § III, ¶¶11-12; see also Ex. A
6 to the Settlement Agreement at pp. 1, 2 and 4 [Class Notice].) The Settlement Agreement and
7 Class Notice contain details about the process to request exclusion or object. (*Id* at Ex. 1; see also
8 Ex. A to the Settlement Agreement at pp. 4 [Class Notice].)

9 F. The Release

10 The Released Claims are defined as: “all claims that are asserted in the operative complaint
11 and which could have been asserted based on the facts alleged in the complaint, for failure to issue
12 accurate itemized wage statements under Labor Code § 226, claims for penalties under the Labor
13 Code Private Attorneys General Act of 2004, §2699, et seq. (hereafter “PAGA”) for failure to issue
14 accurate itemized wage statements under Labor Code § 226, claims for restitution and other
15 equitable relief, liquidated damages, punitive damages, or penalties.” (Ex. 1 at § I, ¶29.)

16 **V. ARGUMENT**

17 A. Plaintiff Requests Approval of This Class Action Settlement

18 The case of *Kullar v. Foot Locker Retail, Inc* (2008) 168 Cal.App.4th 116, 128, sets forth
19 several factors that the Court should analyze in determining whether to approve a class action
20 settlement. These factors include: (1) the strength of plaintiff’s case; (2) the risk, expense,
21 complexity and likely duration of further litigation; (3) the risk of maintaining class action status
22 through trial; (4) the amount offered in settlement; (5) the extent of discovery completed and stage
23 of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental
24 participant; and (8) the reaction of the class members to the proposed settlement.

25 The proposed settlement satisfies each of these factors. Class Counsel conducted extensive
26 informal discovery before entering into meaningful settlement negotiations in this matter. (*Id* at
27 Szamet Decl. ¶¶7-10.) This discovery permitted Class Counsel to fairly evaluate the strength of
28 the case and the risks associated with ongoing litigation. (Szamet Decl. ¶43.) Class Counsel is

1 experienced in handling wage and hour class actions and, after weighing all of the following
2 factors, supports this Settlement Agreement. (Szamet Decl. ¶44)

3 1. The Strength of Plaintiff's Case

4 a) The Risks Associated with the Inaccurate Wage Statement Claim

5 Labor Code § 226(a) provides:

6 An employer ... shall furnish to his or her employee ... an accurate itemized
7 statement in writing showing ... (6) the inclusive dates for each pay period, (8) the
8 name and address of the legal entity that is the employer

9 Plaintiff alleges that Defendant provided employees with itemized wage statements, that
10 fail to show the start and end date for each pay period and the address of the legal entity that is the
11 employer and. (Szamet Decl. ¶45.) Wage statement penalties are “fifty dollars (\$50) for the initial
12 pay period in which a violation occurs and one hundred dollars (\$100) per employee for each
13 violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars
14 (\$4,000).” Labor Code § 226(e)(1).

15 Plaintiff takes the position that a review of the paystubs at issue reveals that Defendant's
16 itemized wage statements simply do not show the required information. (Szamet Decl. ¶46)
17 Given that, Plaintiff was confident that he could establish that Defendant violated Labor Code
18 § 226(a) on a class wide basis. (Szamet Decl. ¶47) Though Plaintiff perceived little risk that he
19 could prove at trial that Defendant violated section 226(a), Plaintiff anticipated that Defendant
20 would seek to minimize the alleged violation as merely “technical”. (Szamet Decl. ¶48.)
21 Ultimately, though, Plaintiff does not think this argument is persuasive because the trier of fact
22 can determine from the face of the instrument that the required information is not shown. (Szamet
23 Decl. ¶49.) While Plaintiff perceived little risk in proving, at trial, that the wage statements
24 violated §226(a), Plaintiff perceived cognizable risk in proving Defendant's alleged violations of
25 § 226(a) caused injury and were knowing and intentional.

26 Defendant maintained that Plaintiff was required to show injury per the Labor Code §226
27 (e)(1) and that Plaintiff would not be able to articulate a cognizable injury here. [“An employee
28 suffering injury as a result of a knowing and intentional failure by an employer to comply with
subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars (\$50) for the

1 initial pay period in which a violation occurs and one hundred dollars (\$100) per employee for
2 each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand
3 dollars (\$4,000), and is entitled to an award of costs and reasonable attorney’s fees.”] (Szamet
4 Decl. ¶50.)

5 In response, Plaintiff maintains that pursuant to Labor Code § 226(e)(2)(B) injury is
6 presumed by virtue of an employer failing to provide a properly itemized wage statement. [“An
7 employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide
8 accurate and complete information as required by any one or more of items (1) to (9), inclusive,
9 of subdivision (a) and the employee cannot promptly and easily determine¹ from the wage
10 statement alone... information required to be provided”.] (Szamet Decl. ¶51.)

11 Plaintiff certainly anticipated that Defendant would argue Plaintiff could “promptly and
12 easily” determine the start date of the pay period from the face of the wage statement alone by
13 simply counting back from the listed end date of the pay period and likewise. (Szamet Decl. ¶52.)
14 Contrary to this argument, Plaintiff maintains that Plaintiff would have to look at documents
15 outside the four corners of the wage statement to determine the exact dates of Defendant’s pay
16 periods such as a calendar or pay date schedule. (Szamet Decl. ¶53.) (*See McKenzie v. Federal*
17 *Exp. Corp.*, (C.D. Cal. 2011) 765 F. Supp. 2d 1222 at 1229-1230 [the “Court concludes that
18 McKenzie's wage statements violated Section 226(a)(6) by failing to state the beginning date for
19 each pay period...”]) Nonetheless, on balance, Plaintiff had to acknowledge that there was at least
20 some risk that the trier of fact could determine that the start date of the pay period could easily be
21 determined from the face of the wage statement alone. (Szamet Decl. ¶54.)

22 Likewise, Defendant would argue that Plaintiff and all Proposed Class Members reported
23 to work each day at the location that is “the name and address of the employer” so all employees
24 knew this information. (Szamet Decl. ¶55.) Plaintiff ultimately does not think this is a strong
25 argument since Section 226(a) specifically states that this information must be shown on the face
26 of the paystub. (Szamet Decl. ¶56.)

27 ¹ Lab. Code § 226(2)(C) provides: For purposes of this paragraph, “promptly and easily determine” means a
28 reasonable person would be able to readily ascertain the information without reference to other documents or
information.

1 More importantly from a risk analysis perspective, however, is Plaintiff's ability to show
2 that any alleged Section 226(a) violation was "knowing and intentional". (Szamet Decl. ¶57)
3 Defendant maintained that if a Court determined that there was any violation, it would be only a
4 technical violation of Labor Code § 226(a) that did not merit the imposition of penalties. (Szamet
5 Decl. ¶58) Pursuant to Labor Code § 226(e), employees are only entitled to the statutory penalty
6 for a "knowing and intentional failure by an employer to comply with subdivision (a)." (Szamet
7 Decl. ¶59) Pursuant to Labor Code § 226.3, the Labor Commissioner has the discretion to "decide
8 not to penalize an employer for a first violation when that violation was due to a clerical error or
9 inadvertent mistake." (*Id.*) Plaintiff anticipated that at trial, Defendant would argue that any alleged
10 violation was the result of a clerical oversight and, accordingly, Plaintiff could not prove the
11 violation was "knowing and intentional." (Szamet Decl. ¶60.) Consequently, if Defendant could
12 make a potentially persuasive argument that if Defendant did not act knowingly or intentionally
13 there would be no penalties available under Labor Code § 226(e) to the Class Members. (Szamet
14 Decl. ¶61) While Class Counsel maintains that it could establish that the alleged violation was
15 "knowing and intentional", nonetheless Class Counsel had to recognize that there was risk that a
16 trier of fact might ultimately be swayed by Defendant's arguments. (Szamet Decl. ¶62)

17 b) The Risks Associated with the PAGA Claim

18 California's Private Attorneys General Act ("PAGA"), Labor Code § 2698, *et seq.*, permits
19 private litigants to recover civil penalties for violations of the Labor Code. PAGA provides that
20 plaintiffs may recover previously established civil penalties (section 2699(a)) or, if none were
21 established, plaintiffs may recover default penalties provided in section 2699(f) in the amount of
22 \$100 per employee per pay period for the initial violation and \$200 for subsequent violations.

23 Plaintiff discounted the PAGA claim for multiple reasons during the negotiation process.
24 (Szamet Decl. ¶63) First, the aggrieved employees' PAGA claims are derivative of the foregoing
25 class claims. (Szamet Decl. ¶64) Second, a court has discretion to award less than the maximum
26 penalty. Labor Code § 2699(e)(2) ("a court may award a lesser amount than the maximum civil
27 penalty amount specified by this part if, based on the facts and circumstances of the particular case,
28 to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory").

1 See e.g., *Carrington v. Starbucks Corporation* (2018) 30 Cal.App.5th 504, 241 Cal.Rptr.3d 647,
2 669 (affirming award of 10% of maximum PAGA penalty). (Szamet Decl. ¶65) Finally, the
3 settlement class is arguably compensated for these violations in the proposed Settlement
4 Agreement, and thus any sizeable PAGA recovery for these same violations could be deemed as
5 duplicative by the Court. (Szamet Decl. ¶66) As such, the Settlement Agreement's contemplated
6 PAGA payment of \$8,000.00 is appropriate. (Szamet Decl. ¶67) See *Nordstrom Commissions*
7 *Cases*, 186 Cal.App.4th 576, 589 (2010) (affirming settlement allocating \$0 of \$6.4 million
8 settlement to PAGA penalties).

9 2. The Risk, Expense, Complexity, and Likely Duration of Further Litigation

10 There is significant expense associated with the class certification process, which the
11 Parties can avoid by entering into the contemplated Settlement Agreement now. (Szamet Decl.
12 ¶68) If the Court did eventually certify a class, trial of a case involving approximately 55
13 Settlement Class Members would require the retention of expensive expert witnesses, the accrual
14 of extensive litigation costs, and a significant time overlay by the parties. (Szamet Decl. ¶69)
15 Moreover, given the complexity and unsettled nature of the issues in this case it is likely that any
16 outcome at trial would have resulted in a lengthy and costly appeal. (Szamet Decl. ¶70) An appeal
17 would result in further delay for the Settlement Class Members who are waiting for a resolution in
18 this matter. (*Id.*)

19 3. The Risk of Maintaining Class Action Status through Trial

20 This case has not been certified to be tried as a class action. (Szamet Decl. ¶71.) While
21 Plaintiff believes there is strong evidence to support certification of the Section 226(a) claim,
22 certification is always hard fought and subject to judicial discretion. Moreover, in class actions,
23 decertification is always a possibility. (*Id.*) In attempting to certify a class, the parties would need
24 to conduct multiple depositions, including of the Class Representative and of several person(s)
25 most knowledgeable regarding Defendant's policies. (*Id.*) There is a risk for both sides as to what
26 these depositions will reveal and whether they will support class certification to the extent
27 expected. (*Id.*)

28 ///

1 4. The Amount Offered in Settlement

2 This Settlement is the result of adversarial, non-collusive, and arms-length negotiations.
3 (Szamet Decl. ¶72.) The Parties arrived at it after extensive investigation and discovery, careful
4 evaluation of the law, risks, and all information substantiating the amount of penalties reasonably
5 likely to be awarded to the class were the trier of fact to find Defendant liable. (*Id.*)

6 Plaintiff valued the Wage Statement Claim, without discount, at \$288,650. (Szamet Decl.
7 ¶73.) Plaintiff used \$50 for each initial violation and \$100 thereafter ($2,914 \times \$100 - 55 \times \$50 =$
8 \$288,650. (Szamet Decl. ¶74.) This figure is likely overstated because Labor Code §226(e)(1)
9 puts a \$4,000 cap on wage statement penalties per employee. (Szamet Decl. ¶75.)

10 Plaintiff calculated the maximum potential value of the PAGA claim at \$291,400 using
11 \$100 per pay period). (Szamet Decl. ¶76.) The main risk taken into account with PAGA is the
12 discretionary nature of the penalty award. (Szamet Decl. ¶77.) A judge can award the statutory
13 maximum of \$100 for the initial violation and \$200 thereafter or – in theory – one cent per wage
14 statement. (Szamet Decl. ¶78.) While there is a dearth of available authority, in Plaintiff’s view,
15 were he to succeed on the underlying Labor Code Section 226a) violation, it is not likely that a
16 Judge would also award a large amount of PAGA penalties of top of any damages recovered.
17 (Szamet Decl. ¶79.)

18 Per Plaintiff’s assessment, the maximum potential value of all of Plaintiff’s and the
19 Settlement Class Members’ claims was \$580,050. (Szamet Decl. ¶80.) As a result of the forgoing
20 risks on the merits, Class Counsel believes the Gross Settlement Amount of \$144,325.00 is fair
21 and reasonable. (Szamet Decl. ¶81)

22 5. The Experience and Views of Counsel

23 Finally, counsel’s experience and success in similar class actions also weigh in favor of
24 preliminary approval. *See Wershba, supra*, 91 Cal.App.4th at 245. Kingsley & Kingsley, APC is
25 very experienced in prosecuting complex employment litigation, and the firm has focused its
26 practice since the year 2000 on complex wage, hour, and working condition violations. (Szamet
27 Decl. ¶¶82-84.) The firm is well versed in class action litigation and has diligently and aggressively
28 pursued this action. (*Id.*) Kingsley & Kingsley, APC currently serves as Class Counsel for dozens

1 of pending class action lawsuits in Northern, Central, and Southern California. (*Id.*) A list of
2 representative cases that Kingsley & Kingsley, APC has handled is included in the accompanying
3 declaration of Kelsey M. Szamet. (*Id.*) After factoring in the risks explained above, Class Counsel
4 believes that the proposed settlement is fair and reasonable. (Szamet Decl. ¶85.)

5 6. The Proposed Plan of Allocation Is Fair and Reasonable

6 Plans of allocation are subject to the same standard of review as class action settlements;
7 they must be “fair, adequate and reasonable.” (*See, e.g., Officers for Justice v. Civil Service*
8 *Comm’n* (9th Cir. 1982) 688 F.2d 615, 624–625, 629–630.) Here, the proposed plan of allocation
9 compensates Settlement Class Members pro rata based on the number of Compensable Work
10 Weeks worked by the Settlement Class Member during the Class Period. The lump sum payment
11 to each Settlement Class Member not excluding him/ herself will be determined on an
12 individualized basis based upon the compensable pay periods worked by the Settlement Class
13 Member. (Ex. 1 at § III, ¶17.) This allocation distributes Settlement Agreement funds
14 proportionally to each class member’s potential damages and should therefore be approved as fair,
15 adequate, and reasonable. (Szamet Decl. ¶86.)

16 7. The Proposed Notice Fairly Apprises the Settlement Class Members of the
17 Terms of the Settlement and of the Class Members’ Rights under the
18 Settlement

19 Plaintiff requests that the Court approve the proposed plan and form of Class Notice. The
20 standard for determining the adequacy of notice is whether the notice has “a reasonable chance of
21 reaching a substantial percentage of the class members.” (*Cartt v. Superior Court* (1975) 50
22 Cal.App.3d 960, 974.) Pursuant to the Settlement Agreement, the Notice will be sent to the last
23 known address of all Settlement Class Members, or to an updated address if one is located in the
24 National Change of Address Database. (Ex. 1 at § III, ¶7). If any Notices are returned as
25 undeliverable, the Settlement Administrator will undertake another reasonable address verification
26 measure to locate a valid mailing address and will promptly send the Notice to the new address.
27 (Ex. 1 at § III, ¶8.) As such, the Notice is likely to reach most, if not all, Settlement Class Members.

28 ///

1 With respect to the contents of the Notice, the “notice given to the class must fairly apprise
2 the class members of the terms of the proposed compromise and of the options open to dissenting
3 class members.” (*Trotsky v. L.A. Fed. Sav. & Loan Ass’n* (1975) 48 Cal.App.3d 134, 151–52.)
4 The purpose of a class notice is to give class members sufficient information to decide whether
5 they should accept the benefits offered, opt out and pursue their own remedies, or object to the
6 settlement. (*Ibid.*)

7 Here, the Notice clearly explains the proposed Settlement Agreement and the options to
8 opt out of the Settlement or object to it at the Final Approval Hearing. (Ex. 1 at § III, ¶11-12; *see*
9 *also* Ex. A to the Settlement Agreement at pp. 1-2, 4-5 [Class Notice].) In short, the Court should
10 approve the proposed Class Notice because it describes the proposed settlement with enough
11 specificity to allow Settlement Class Members to make an informed choice regarding whether to
12 participate.

13 **VI. THE SERVICE AWARD TO THE NAMED PLAINTIFF**

14 The Class Representative is entitled to an enhancement for his valiant effort and time
15 expended in this matter. (Szamet Decl. ¶87.) The time spent by Rivelino Tavira is significant and
16 includes researching and retaining competent counsel; providing information to Class Counsel
17 regarding the nature of the work at Defendant; compiling relevant documents; working closely
18 with Class Counsel to develop the theories of liability and martial relevant evidence; regularly
19 discussing the status of the case with Class Counsel; discussing the case via telephone with many
20 Settlement Class Members; and responding promptly to Class Counsel’s communications
21 regarding settlement. (*Id.*) Thus, in addition to the sums paid to Settlement Class Members,
22 Plaintiff requests a proposed litigation enhancement in the amount of \$2,500.00, to be paid from
23 the Gross Settlement Amount. (Ex. 1 at § III, ¶21.) As set forth in the Settlement Agreement,
24 Plaintiff will also be entering into a general release of liability pursuant to Civil Code Section
25 1542. (Szamet Decl. ¶88; Ex. 1 at § III, ¶2.)

26 Class Counsel considers this to be a fair and reasonable enhancement. (Szamet Decl. ¶89.)
27 The enhancement takes into consideration the time, effort, and expense incurred by Plaintiff in
28 coming forward to litigate this matter on behalf of all Settlement Class Members. (*Id.*) Plaintiff

1 will provide a detailed declaration with the Final Approval Motion detailing his participation and
2 further justification for the enhancement. (*Id.*)

3 **VII. SUBMISSION TO THE LABOR AND WORKFORCE DEVELOPMENT AGENCY**

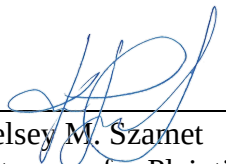
4 As indicated on the Proof of Service, Plaintiff's Motion for Approval of Class Action
5 Settlement ("Motion") will be concurrently uploaded to the Labor and Workforce Development
6 Agency's ("LWDA") website on the date this Motion is filed as required by statute. Proof of
7 submission of Plaintiff's Motion, all related documents, and copy of the email from the LWDA
8 confirming receipt is attached to the Declaration of Kelsey M. Szamet as Exhibit "2." (Szamet
9 Decl. ¶90.)

10 **VIII. CONCLUSION**

11 Plaintiff respectfully submits that the proposed Settlement Agreement is fair, adequate,
12 reasonable, and in the best interest of the Settlement Class Members. Therefore, the Parties
13 respectfully request that the Court (1) grant preliminary approval of the Joint Stipulation of Class
14 Action and Release of Claims, and all of its terms; (2) approve the proposed form of notice, and
15 direct that the Notice be sent to Settlement Class Members in the manner set forth in the Joint
16 Stipulation of Class Action and Release of Claims; and (3) schedule a hearing on final approval of
17 the Settlement Agreement and Class Counsel's application for an award of attorney's fees and
18 litigation costs.

19
20 DATED: March 17, 2021

KINGSLEY & KINGSLEY, APC

21
22 By: 

23 Kelsey M. Szamet
24 Attorneys for Plaintiff RIVELINO TAVIRA and the
25 proposed class
26
27
28

(PROOF OF SERVICE)
[CCP 1013(a)(3)]
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 16133 Ventura Boulevard, Suite 1200, Encino, California 91436.

On March 17, 2021, I served all interested parties in this action the following documents described as: **NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** by placing [] (the original) [X] (a true copy thereof) in a sealed envelope addressed as stated on the attached service list:

Charles H. Goldstein, Esq.
cgoldsteinesq@gmail.com
Joseph A. Goldstein, Esq.
josephgoldsteinesq@gmail.com
The Goldstein Law Firm, PC
8912 Burton Way
Beverly Hills, CA 90211
Attorney for Defendant

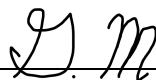
[XX] (BY ELECTRONIC MAIL TRANSMISSION): I caused the document to be send to the persons at the e-mail address(es) listed on the attached service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. A pdf copy of which was sent via email to the below email address(es).

[] (BY MAIL) I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage fully prepaid at Encino, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[XX] (BY ELECTRONIC SERVICE): I caused a true and correct copy thereof to be electronically filed using the Labor and Workforce Development Agency Electronic Filing ("EF") System (<https://dir.tfaforms.net/315>) and service was completed by electronic means by transmittal of the documents referenced herein on the EF System.

[XX] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 17, 2021, at Northridge, California.



Gabrielle Medrano