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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA

CARLOS HUMBERTO CARRILLO DIAZ,
an individual, on behalf of himself and others
similarly situated,

PLAINTIFF,

v.

RECON360, LLC; and DOES 1 thru 50,
inclusive,

DEFENDANTS.

CASE NO. 20CV370603

[Case Assigned for All Purposes to Hon.
Sunil R. Kulkarni in Dept. 1]

**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: TBD
Time: TBD
Dept.: 1

Complaint Filed: September 22, 2020
FAC Filed: November 30, 2020
Trial Date: None Set

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

2 **PLEASE TAKE NOTICE** that on _____ at _____ a.m./p.m. in Department 1
3 of the above-entitled court, Plaintiff Carlos Humberto Carrillo Diaz will move the Court for an
4 Order of Preliminary Approval of the Joint Stipulation of Class Action Settlement and Release of
5 Claims (“Settlement” or “Settlement Agreement”), a copy of which is attached to the concurrently
6 filed Declaration of Kelsey M. Szamet as Exhibit “1”.

7 By this Motion, Plaintiff requests that the Court:

8 (1) Grant preliminary approval of the fully executed Settlement Agreement. A true
9 and correct copy of the Settlement Agreement is attached to the concurrently filed Declaration of
10 Kelsey M. Szamet as Exhibit “1”;

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

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

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

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

23 DATED: November 18, 2021

KINGSLEY & KINGSLEY, APC

24
25 By:

26 Kelsey M. Szamet
27 Attorneys for Plaintiff Carlos Humberto Carrillo
28 Diaz and the Proposed Class

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Carlos Humberto Carrillo Diaz (“Plaintiff”) submits this Memorandum of Points
4 and Authorities in support of Plaintiff’s Motion for Preliminary Approval of the Joint Stipulation
5 of Class Action Settlement and Release of Claims reached between Plaintiff and Defendant
6 Recon360, LLC (“Defendant”) (Plaintiff and Defendant together, the “Parties”).

7 By this Motion, Plaintiff requests that the Court:

8 (1) Grant preliminary approval of the fully executed Joint Stipulation of Class Action
9 Settlement and Release of Claims (“Settlement” or “Settlement Agreement”). A true and correct
10 copy of the Settlement Agreement is attached to the concurrently filed Declaration of Kelsey M.
11 Szamet as Exhibit “1”;

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

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

18 **II. FACTUAL BACKGROUND**

19 A. Litigation Overview and Procedural History

20 Recon360, LLC is a construction company that provides services such as maintenance,
21 roofing, painting, and electrical work. (Declaration of Kelsey M. Szamet (“Szamet Decl.”) ¶4.)
22 Plaintiff began performing work for Defendant from 2018 to on or about April 4, 2020 in Santa
23 Clara County. (Szamet Decl. ¶5.) Plaintiff contends that Defendant failed to provide lawful meal
24 periods, failed to provide lawful rest periods, failed to reimburse Plaintiff and the proposed class
25 for work-related expenses, and failed to pay all wages due at the time of termination. (*Id.*)

26 On September 22, 2020, Plaintiff submitted a notice letter to the Labor and Workforce
27 Development Agency (“LWDA”) and Defendant regarding his intent to file an action seeking civil
28 penalties under the Labor Code Private Attorneys General Act of 2004, §2699, *et seq.* (“PAGA”).

(Szamet Decl. ¶6; Settlement Agreement, Ex. 1 at (“Ex. 1 at”) § II, ¶2.) That same day, Plaintiff filed a Class Action Complaint on behalf of himself and the proposed class in the California Superior Court, in and for the County of Santa Clara, thereby initiating the civil action entitled *CARLOS HUMBERTO CARRILLO DIAZ an individual, on behalf of himself and others similarly situated v. RECON360, LLC; and Does 1 thru 50, inclusive.* (hereinafter, the “Action”) (Szamet Decl. ¶7; *Id.*) Specifically, the Action alleges that Defendant failed to provide meal breaks pursuant to Labor Code §§ 226.7 and 512, failed to provide rest breaks pursuant to Labor Code § 226.7, failed to reimburse expenses pursuant to Labor Code § 2802, failed to provide all wages due at the time of termination pursuant to Labor Code § 203, and violated of Business & Professions Code § 17200. (*Id.*)

On November 30, 2020, Plaintiff amended his complaint, adding an additional cause of action for penalties under the California Labor Code’s Private Attorneys General Act (“PAGA”) based upon the facts previously alleged in the Complaint. (Szamet Decl. ¶8; *Id.*)

B. The Discovery Process and Mediation

After the matter was at issue, the Parties began to engage in informal discovery to understand the nature of the allegations and the scope of potential liability. (Szamet Decl. ¶9.) Through this discovery, Plaintiff sought numerous documents and substantial amounts of data that were needed to evaluate the case. (Szamet Decl. ¶10.) These documents included requests for time and wage records for the Class, policies and practices in place during the class period, including any policies regarding meal breaks, rest breaks, the payment of wages, and employee training in place during the class period, as well as data surrounding the number of current and former employees. (Szamet Decl. ¶11.) Defendant provided Plaintiff’s counsel with pertinent documents and data for the Class Members so that the Parties could fully investigate the claims at issue and understand their strengths and weaknesses. (Szamet Decl. ¶12.)

Thereafter, the Parties began to discuss potential resolution. (Szamet Decl. ¶13.) The Parties attended a full-day mediation with experienced class action mediator the Hon. Jamie Jacobs-May (Ret.) on May 13, 2021. (Szamet Decl. ¶14; *Id.*) The Parties engaged in good faith, arms-length negotiations aided by Judge Jacobs-May and were able to reach a tentative settlement

1 of the Action, subject to finalization of the formal Joint Stipulation of Class Action Settlement and
2 Release of Claims and the approval of the Court. (*Id.*) The Parties have since engaged in extensive
3 negotiations about the terms and conditions of the Settlement Agreement. (*Id.*) The Parties have
4 now entered into this formalized Settlement Agreement now presented to the Court for Preliminary
5 Approval. (*Id.*)

6 Defendant denies any liability or wrongdoing of any kind associated with the claims
7 alleged in the Action, disputes the damages and penalties claimed by Plaintiff, and further contends
8 that, for any purpose other than settlement, Plaintiff's claims are not appropriate for class or
9 representative action treatment. (Szamet Decl. ¶15.) Defendant contends, among other things,
10 that, at all times, it has complied with the California Labor Code, and the Industrial Wage
11 Commission Orders. (*Id.*)

12 Based on their own independent investigation and evaluation, Class Counsel is of the
13 opinion that the Settlement Agreement with Defendant is fair, reasonable and adequate, and in the
14 best interest of the settlement classes in light of all known facts and circumstances, including the
15 risk of significant delay, defenses asserted by Defendant, uncertainties regarding a class and
16 representative action trial on the merits, and numerous potential appellate issues. (Szamet Decl.
17 ¶16.) Although Defendant denies any liability, Defendant is agreeing to this Settlement Agreement
18 solely to avoid the cost of litigation. (*Id.*) Accordingly, the Parties and their counsel desire to
19 fully, finally, and forever settle, compromise and discharge all disputes and claims arising from or
20 relating to the Action on the terms set forth here. (*Id.*)

21 **III. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED FOR** 22 **SETTLEMENT PURPOSES**

23 Originally creatures of equity, class actions have been statutorily embraced by the
24 Legislature whenever “the question [in a case] is one of a common or general interest, of many
25 persons, or when the parties are numerous, and it is impracticable to bring them all before the
26 court” (Code Civ. Proc. § 382; *see, e.g., Fireside Bank v. Sup. Court* (2007) 40 Cal.4th 1069,
27 1078.) They serve an important function by “establishing a technique whereby the claims of many
28 individuals can be resolved at the same time” thereby “eliminat[ing] the possibility of repetitious

litigation and provid[ing] small claimants with a method of obtaining redress.” (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 469.) Public policy supports the use of class actions to enforce wage and overtime laws for the benefit of workers. (*See Sav-on Drug Stores, Inc. v. Sup. Court* (2004) 34 Cal.4th 319, 340.)

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

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

Class certification for settlement purposes is proper in this case as the proposed Settlement Class satisfies each of the requirements under Code of Civil Procedure § 382. Accordingly, this Court should certify the putative settlement class.

A. The Proposed Classes Are Ascertainable and Sufficiently Numerous

1. Ascertainability

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

1 Here, Plaintiff maintains that the proposed Settlement Class is ascertainable for several
2 reasons: First, Defendant has agreed in the Settlement Agreement to provide a class list to the
3 Settlement Administrator containing each Settlement Class Member's full name, last known
4 address, last known home telephone number, last four digits of social security number, dates of
5 employment, and Compensable Work Weeks for all putative class members after issuance of the
6 preliminary approval order. (Szamet Decl. ¶17; Ex. 1 at § I, ¶4.) Second, Settlement Class
7 Members consist of Defendant's hourly employees, and Defendant is required to keep records of
8 its hourly employees' names, home addresses, and social security numbers. (See Wage Order 16-
9 2001, subsection 7(c); Szamet Decl. ¶18.) Third and finally, Defendant informally produced
10 Plaintiff's personnel file and pay statements, relevant documents and policies, and a sampling of
11 shift data and pay data which confirms that all Settlement Class Members may be readily identified
12 based on Defendant's records. (Szamet Decl. ¶19.)

13 2. Numerosity

14 There is no set number that is required as a matter of law to maintain a class action. (See,
15 e.g., *Rose v. City of Hayward*, *supra*, 126 Cal.App.3d at p. 934.) Here, the proposed Settlement
16 Class contains, based upon information and belief, approximately 265 hourly non-exempt
17 employees in the State of California. (Ex. 1 at § III, ¶30.) Therefore, Plaintiff is confident he will
18 be able to establish that the proposed Settlement Class is ascertainable and sufficiently numerous.
19 (Szamet Decl. ¶20.)

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

21 1. There Are Predominant Questions of Law and Fact

22 In deciding whether questions of common or general interest predominate, a court must
23 determine whether "the issues which may be jointly tried, when compared with those requiring
24 separate adjudication, are so numerous or substantial that the maintenance of a class action would
25 be advantageous to the judicial process and to the litigants." (*Collins v. Rocha* (1972) 7 Cal.3d
26 232, 238; *accord*, *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) As a
27 general matter, if the defendant's liability can be determined by facts common to all members of
28 the class, a class will be certified even if the members must individually prove their damages."

1 (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916, 107; *accord*, *Knapp v.*
2 *AT & T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 941.)

3 Here, Plaintiff argues that there are questions of law and fact common to the proposed
4 Settlement Class that predominate over any questions affecting only individual Class Members.
5 (Szamet Decl. ¶21.) These common questions include:

- 6 1) Whether Defendant failed to provide lawfully required meal periods and/or failed
7 to compensate employees one (1) hour's wages in lieu thereof;
- 8 2) Whether Defendant failed to provide lawfully required rest periods and/or failed to
9 compensate employees one (1) hour's wages in lieu thereof;
- 10 3) Whether Defendant failed to reimburse business-related expenses;
- 11 4) Whether Defendant failed to pay compensation due and owing upon termination
12 of employment;
- 13 5) Whether Defendant engaged in unfair competition; and,
- 14 6) Whether Defendant violated § 2699, et seq. of the Labor Code by engaging in the
15 acts previously alleged.

16 (Szamet Decl. ¶22.)

17 Plaintiff's challenge to Defendant's uniform policies and practices involves common
18 factual and legal issues that are amenable to class treatment. (Szamet Decl. ¶23.) As the California
19 Supreme Court has emphasized, "[c]laims alleging that a uniform policy consistently applied to a
20 group of employees is in violation of the wage and hour laws are of the sort routinely, and properly,
21 found suitable for class treatment." (*Brinker, supra*, 53 Cal.4th at 1033; *see also Bradley v.*
22 *Networkers International, LLC* (2012) 211 Cal.App.4th 1129, 1141-1146.) Moreover, a class of
23 similarly situated employees may be certified based on common questions of fact or law, even if
24 each employee has to establish the amount of his or her damages. (*See Bell v. Farmers Ins. Exch.*
25 (2004) 115 Cal.App.4th 715, 741; *Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th
26 at 340.)

27 Here, Plaintiff maintains that the proposed Settlement Class Members suffered the same
28 injuries, in the same manner: (1) Settlement Class Members did not receive their meal and rest
periods as required; (2) Settlement Class Members were not reimbursed for business-related

1 expenses; and (3) Settlement Class Members were not paid all wages owed upon
2 termination/resignation. (Szamet Decl. ¶24.) Plaintiff alleges that Settlement Class Members
3 worked in the same capacity for the same employer and were subject to the same employment
4 policies and practices, the questions of fact and claims regarding the status of these employees are
5 the same for each member of the Settlement Class. Accordingly, for purposes of settlement,
6 certification for settlement purposes is appropriate. (Szamet Decl. ¶25.)

7 2. The Named Plaintiff Has Claims Typical of the Proposed Class

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

20 Plaintiff worked as an hourly employee for Defendant from 2018 to on or about April 4,
21 2020 in Santa Clara County. (Szamet Decl. ¶26.) Plaintiff alleges that he and others: (1) worked
22 without being provided meal/rest periods as required by law; (2) worked without being reimbursed
23 for costs associated with personal cell-phone usage and incurred mileage from driving personal
24 vehicle; and (3) worked without being paid all wages due upon separation. He also alleges that he
25 experienced derivative claims for unfair business competition (B&P Code §17200) and Labor
26 Code §2699, et seq. (Szamet Decl. ¶27.) Plaintiff also contends that his claims are typical of those
27 of the Settlement Class. (Szamet Decl. ¶28.)

28 ///

1 3. Plaintiff Contends That as The Named Plaintiff He Has and Will Fairly
2 Represent the Interests of the Settlement Class Members

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

7 Plaintiff believes that he is capable of fairly representing and adequately protecting the
8 interests of the proposed Settlement Class Members. (Szamet Decl. ¶29.) Plaintiff’s interests in
9 this litigation are coextensive with the interests of the proposed Settlement Class Members. The
10 members of the proposed Settlement Class all worked for Defendant during the relevant time
11 period and incurred the same type of alleged damages with regard to Defendant’s alleged violations
12 of the law. (Szamet Decl. ¶30.) Moreover, Plaintiff has agreed to serve as Named Plaintiff and
13 has retained qualified Counsel who is experienced in prosecuting wage and hour class actions.
14 (Szamet Decl. ¶31.) This demonstrates his commitment to bringing about the best possible results
15 for the benefit of the proposed Settlement Class. (Szamet Decl. ¶32.) Plaintiff has provided his
16 Counsel with all necessary and pertinent information. (Szamet Decl. ¶33.) He has been a very
17 active participant in the litigation including having frequent contact with Settlement Class
18 Members and working closely with Class Counsel to develop the theories of liability. (Szamet
19 Decl. ¶34.) Plaintiff has provided his Counsel with all necessary and pertinent information.
20 (Szamet Decl. ¶35.) He also was available and in contact with Class Counsel for the full-day
21 mediation in this matter and was informed of and involved in all of the Settlement negotiations.
22 Therefore, Plaintiff believes that he has and will continue to adequately represent the proposed
23 Settlement Class Members. (Szamet Decl. ¶36.) Plaintiff has provided his Counsel with all
24 necessary and pertinent information. (Szamet Decl. ¶37.)

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

26 “The ultimate question in every case of this type is whether . . . the issues which may be
27 jointly tried, when compared with those requiring separate adjudication, are so numerous or
28 substantial that the maintenance of a class action would be advantageous to the judicial process

1 and to the litigants.” (*Lockheed Martin, supra*, 29 Cal.App.4th at 1104–1105.) The California
2 Supreme Court has directed the courts to utilize the class action device to fashion “an effective
3 and inclusive group remedy.” (*Richmond v. Dart Indus., Inc.* (1981) 29 Cal.3d 462, 469.)
4 Normally, in making its class certification decision, the Court must determine that a class action
5 would be superior to alternate means for a fair and efficient adjudication. If the causes of action
6 may be adjudicated in a single proceeding, thereby saving time, reducing waste, and limiting
7 duplication of effort, class certification is superior to individual litigation. (*See, e.g., Vasquez v.*
8 *Superior Court* (1971) 4 Cal.3d 800, 816.) Since the Parties agreed to a settlement in principal
9 and now seek Court approval of that Settlement, Plaintiff submits that there is not as much need
10 as there would be in an ordinary motion for class certification for the Court to determine that the
11 case can be manageably tried.

12 Plaintiff maintains that class treatment would be the superior method of managing this case.
13 A class action is superior to individual litigation “when numerous parties suffer injury of
14 insufficient size to warrant individual action and when denial of class relief would result in unjust
15 advantage to the wrongdoer.” (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.) In
16 cases such as this, where individual damages may be small, the class action device is the most
17 feasible method of recovery. (*See, e.g. Lockheed Martin, supra*, 29 Cal.4th at 1131.) In this regard,
18 the superiority of class treatment is evident here because individual pursuit of class members’
19 claims may not be economically viable. (Szamet Decl. ¶38.) The only alternative to certification
20 would be to force over 265 employees to join this action, file individual, uniform actions, or
21 abandon their legal rights altogether. (Szamet Decl. ¶39.) Plaintiff maintains that this economic
22 reality would result in a windfall for Defendant if this case were not certified. (Szamet Decl. ¶40.)

23 **IV. THE PROPOSED SETTLEMENT**

24 **A. The Settlement Class**

25 For purposes of Settlement Agreement, the settlement class is defined as: “all persons who
26 are employed or have been employed as hourly, non-exempt employees by RECON360, LLC, in
27 the State of California during the Covered Period.” (“Settlement Class Members” or “Class
28 Members”) The “Settlement Class Members” shall not include any person who submits a timely

and valid Request for Exclusion as provided in this Agreement, or any person who previously released the Released Claims under a separate agreement. (Szamet Decl. ¶41; Settlement Agreement, Ex. 1 at § III, ¶11.)

The Covered Period is September 22, 2016 to July 30, 2021. (Szamet Decl. ¶42; Ex. 1 at § I, ¶6.) As of May 13, 2021 (the date of mediation) and based on documents and other information produced by Defendant, there are approximately 265 Settlement Class Members. (Szamet Decl. ¶43; Ex. 1 at § III, ¶30.)

B. Gross Settlement Amount

As detailed fully in the Settlement Agreement, the Settlement provides for Defendant to pay a Gross Settlement Amount of \$700,000.00, which includes the sum of the Individual Settlement Amounts, the Named Plaintiff service award, the Class Counsel Award¹, PAGA Payment, and the Settlement Administration Costs. (Szamet Decl. ¶44; Ex. 1 at § I, ¶36.)

The Net Settlement Amount is the Gross Settlement Amount, less Class Counsel Award, Named Plaintiff Enhancement, PAGA Payment, and Settlement Administration Costs. (Szamet Decl. ¶45; Ex. 1 at § I, ¶19.)

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

Gross Settlement Amount:	\$	700,000.00
Less Named Plaintiff Enhancement:	\$	5,000.00
Less Class Counsel's Fees:	\$	233,333.33
Less Class Counsel's Costs:	\$	10,000.00
Less PAGA Payment:	\$	25,000.00
		<i>(\$18,750.00 to the LWDA and \$6,250.00 to remain in the Net Settlement Amount)</i>
<u>Less Settlement Administrator Costs:</u>	<u>\$</u>	<u>15,000.00</u>
Anticipated Net Settlement Amount	\$	411,666.67

(Ex. 1 at § III, ¶15.)

C. Checks-Mailed Settlement

This is a cash, checks-mailed Settlement. (Szamet Decl. ¶46; Ex. 1 at § III, ¶16.) Class Members will not be required to submit a claim form. (*Id.*) Unless a Class Member requests

¹ Kingsley and Kingsley, APC and Davtyan Law Firm, Inc. have entered into a written fee sharing agreement that was also signed by the named Plaintiff.

1 exclusion, a settlement check will be automatically sent to the Class Member. (Ex. 1 at § III, ¶11.)

2 D. Process for Administering Settlement after Preliminary Approval

3 The detailed Notice procedure established by the Settlement Agreement will efficiently
4 and accurately ensure that Notice is provided to the Settlement Class Members. (Ex. 1 at § III,
5 ¶¶7-8.) The agreement provides for a 60-day notice period. (Ex. 1 at § I, ¶32.)

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

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

13 F. Individual Settlement Payments

14 The amount of each Class Member's Individual Settlement Amount is an individualized
15 amount that is based on the number of compensable workweeks worked by the Class Member
16 during the Covered Period. (Ex. 1 at § I, ¶17; *see also* Ex. A to the Settlement Agreement at pp. 3
17 [Class Notice].) This individual amount shall be determined according to the settlement payment
18 formula set forth in the Settlement Agreement. (See Ex. 1 at § III, ¶17; *Id.* at Ex. A to the Settlement
19 Agreement [Class Notice].)

20 G. Dispute Process

21 The Settlement Agreement provides for a specific and detailed Compensable Work Weeks
22 dispute process. (See Ex. 1 at § III, ¶9.)

23 H. Allocation for Tax Purposes

24 The Agreement provides that Individual Settlement Payments will be allocated as one-third
25 wages, one-third penalties, and one-third interest. (Szamet Decl. ¶47; Ex. 1 at § III, ¶16.)
26 Defendant shall separately pay any employer-side payroll taxes associated with the Individual
27 Settlement Payments. (Szamet Decl. ¶48; Ex. 1 at § III, ¶15.) This allocation makes sense in light
28

1 of the claims at issue and the risks discussed below as arguably meal and rest penalties are deemed
2 “wages”,² while reimbursement of expenses and penalties and interest are not. (Szamet Decl. ¶48.)

3 I. The Release

4 The Released Claims are defined as: “any and all claims, debts, liabilities, demands,
5 obligations, penalties, guarantees, costs, expenses, attorney’s fees, damages, action or causes of
6 action of whatever kind or nature, whether known or unknown, contingent or accrued, that are
7 alleged, or that reasonably could have arisen out of the same facts alleged in the Action, including,
8 but not limited to: (1) Failure to Provide Meal Breaks Pursuant to Labor Code §§ 226.7 and 512;
9 (2) Failure to Provide Rest Breaks Pursuant to Labor Code §§ 226.7; (3) Failure to Reimburse
10 Expenses Pursuant to Labor Code § 2802; (4) Penalties Pursuant to Labor Code § 203; (5)
11 Violation of Business & Professions Code § 17200; (6) Penalties Pursuant to Labor Code §2699,
12 et seq. (“PAGA”).” (Ex. 1 at § I, ¶29.)

13 J. Qualifications of Settlement Administrator

14 The Parties have agreed to use a reputable third-party claims administrator, ILYM Group,
15 Inc., to administer the Settlement Agreement. (Ex. 1 at § I, ¶34.) ILYM Group, Inc. is a very
16 experienced third-party settlement administrator. (Declaration of Jonathan Paul of ILYM Group
17 ¶2-3 “Paul Decl.”.) It is Class Counsel’s understanding that any funds allocated to the settlement
18 administrator, but not paid will be included in the Net Settlement Amount and distributed to the
19 Class pursuant to the settlement payment formula. (Szamet Decl. ¶49; Paul Decl. ¶9.)

20 K. Uncashed Checks

21 The agreement provides that after 180 days, any uncashed Individual Settlement checks
22 will become void and any monies attributable to those checks shall be transmitted to the Office of
23 the Controller Unclaimed Property Fund. (Ex. 1 at § III, ¶20.) Class Counsel believes this
24 provision is fair and reasonable as it makes the money allocated to an Individual but for some
25 reason uncashed available to them via the Unclaimed Property Fund. (Szamet Decl. ¶50.)
26 However, if the Court is inclined to disallow this provision, the Agreement provides that monies

27 ² In *Murphy v. Kenneth Cole Prod.*, the California Supreme Court ruled that payments
28 mandated by California Labor Code § 226.7 for meal and rest period violations are “wages” and
not “penalties.” (2007) 40 Cal.4th 1094, 1102.

1 shall be sent to cy pres recipient Bet Tzedek. (*Id.*). Class Counsel’s firm has no interest in Bet
2 Tzedek and believe this is an appropriate cy pres recipient as they provide free legal services to
3 low-income individuals including representation in wage and hour matters. (Szamet Decl. ¶51.)

4 **V. ARGUMENT**

5 A. Plaintiff Requests Approval of This Class Action Settlement

6 An understanding of the amount in controversy is an important factor into whether the
7 settlement “of the class members’ claims is reasonable in light of the strengths and weaknesses of
8 the claims and the risks of the particular litigation.” *Kullar v. Foot Locker Retail, Inc.* (2008) 168
9 Cal.App.4th 116, 129; see also *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186
10 Cal.App.4th 399, 409. The most important factor in this regard is “the strength of the case for
11 plaintiffs on the merits, balanced against the amount offered in settlement.” *Id.*

12 *Kullar* set forth several factors that the Court should analyze in determining whether to
13 approve a class action settlement. These factors include: (1) the strength of plaintiff’s case; (2) the
14 risk, expense, complexity and likely duration of further litigation; (3) the risk of maintaining class
15 action status through trial; (4) the amount offered in settlement; (5) the extent of discovery
16 completed and stage of the proceedings; (6) the experience and views of counsel; (7) the presence
17 of a governmental participant; and (8) the reaction of the class members to the proposed settlement.
18 *Kullar, supra*, at 128.

19 The proposed settlement satisfies each of these factors. Class Counsel conducted extensive
20 informal discovery before entering into meaningful settlement negotiations in this matter. (*Id.* at
21 Szamet Decl. ¶¶9-12.) This discovery permitted Class Counsel to fairly evaluate the strength of
22 the case and the risks associated with ongoing litigation. (Szamet Decl. ¶52.) Class Counsel is
23 experienced in handling wage and hour class actions and, after weighing all of the following
24 factors, supports this Settlement Agreement. (Szamet Decl. ¶53.)

25 1. The Strength of Plaintiff’s Case

26 a) The Risks Associated with the Meal Break Claim

27
28

1 Based upon the discovery conducted, Plaintiff contends – and Defendant denies – that
2 Defendant has a policy and practice under which all Class Members are not provided with a full
3 30 minutes in which to take their meal periods.

4 Under California Labor Code section 512 and IWC Wage Order No. 16, no employer shall
5 employ any person for a work period of more than five hours without providing a meal period of
6 not less than thirty minutes. The first meal period must be permitted to commence no later than
7 after five hours of work, or the start of the sixth hour of work (5.0 hours on the clock). (*Brinker*
8 *Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1049.) The second meal period must be
9 permitted to commence no later than after ten hours of work, or the start of the eleventh hour of
10 work (10.0 hours on the clock). (*Ibid.*) The California Supreme Court succinctly described Section
11 512’s mandate: “Employers must afford employees uninterrupted half-hour periods in which they
12 are relieved of any duty or employer control and are free to come and go as they please.” (*Brinker*
13 *Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1037.)

14 It is well settled that if an employer fails to maintain a uniform policy that authorizes and
15 permits the meal periods or rest breaks called for under the law (as specified in the applicable
16 Wage Order), “it has violated the wage order and is liable.” (See *Brinker*, 53 Cal.4th at p. 1033.)
17 Following *Brinker*, California courts have confirmed that liability for meal and rest period
18 violations arises when an employer adopts a uniform policy that fails to comply with the Labor
19 Code. (See *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220, 235, [“In
20 *Faulkinbury I*, we concluded that even if [defendant]’s on-duty meal break policy was unlawful,
21 [defendant] would be liable only when it actually failed to provide a required off-duty meal break.
22 *Brinker* leads us now to conclude [defendant] would be liable upon a determination that
23 [defendant]’s uniform on-duty meal break policy was unlawful.” (emphasis added)]; accord
24 *Bradley v. Networkers International LLC* (2012) 211 Cal.App.4th 1129; *Benton v. Telecom*
25 *Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 725–726 [finding that the employer would
26 become liable upon a showing that it failed to maintain a policy authorizing required breaks, which
27 does not require an individual technician to provide he or she actually missed breaks as a result of
28 the employer’s policies. Rather, “the Wage Order . . . imposes an affirmative obligation on every

1 employer to authorize and provide legally-required meal and rest breaks; if it fails to do so, it has
2 violated the law and is liable.”].)

3 *Brinker* and its progeny are relevant here. It appears as though Defendant did not maintain
4 a valid written meal period policy from September 2016 to July 2017. If Defendant failed to
5 maintain a valid written meal period policy, per *Benton*, it is liable.

6 Very recently in *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, the California
7 Supreme Court decided two issues of law relevant to meal periods. First, though not relevant here,
8 the Court held that employers cannot round time punches, i.e., adjust the hours that an employee
9 has actually worked to the nearest preset time increment, in the meal period context. Second, the
10 Court held that time records depicting noncompliant (late, interrupted, or missed) meal periods
11 raise a rebuttable presumption of meal period violations, including at the summary judgment stage
12 of litigation.³ *Id.* at 77.

13 This latest decision makes clear that it is not enough for California employers to have a
14 policy that “provides” required meal periods or even to record the actual timing and length of such
15 meal periods. Employers must also be prepared to prove that any deviation from the required meal
16 period was by employee choice, without any pressure or influence by the employer (i.e. “bona fide
17 relief from duty and that this is accurately reflected in the employer's time records.”) *Donahue*,
18 *supra*, at 77-78. Thus, for each time an employee’s meal period is short of 30 minutes, late, or
19 missed altogether, the employer bears the burden of proving (through “Representative testimony,
20 surveys, and statistical analysis,”) that the employer provided the meal period, and that the
21 employee voluntarily chose not to take it — even in some circumstances when an employee signs
22 a timesheet each pay period, confirming that the employer had in fact provided all such breaks.⁴

23 ³ Reasoning that the “affirmative defense” of waiver goes to the merits of the case, the
24 Court in *Donohue* held, “the presumption goes to the question of liability and applies at the
summary judgment stage, not just at the class certification stage.” *Id.* at 76.

25 ⁴ Employers that rely only on employee general acknowledgments and certifications that
26 the employee received compliant meal periods, such as timesheet certifications, should be aware
27 of the Court’s view that such certifications cannot be used to prove that the employer provided the
28 compliant meal period if employees would not have known about the potentially noncompliant
meal periods that were not flagged by the employer. The Court reasoned, “It is the employer’s
duty to keep accurate time records; the law does not expect or require employees to keep their own
time records to uncover potential meal period violations.” (*Donohue v. AMN Services, LLC* (2021)
11 Cal.5th 58.)

1 Once a plaintiff can show prima facie evidence of potential meal period violations, courts will now
2 presume the employer violated the law and the employer has the burden of rebutting this
3 presumption.

4 Plaintiff maintains that *Donahue*'s relevance here is interesting.⁵ Defendant produced a
5 sampling of both handwritten and electronic time records for class members from approximately
6 August 2017 to present. (Szamet Decl. ¶54.) Plaintiff contends that the handwritten time records
7 are facially very similar generally showing that class members clocked in at 8:00 am, clocked out
8 for lunch from 12-12:30 pm, and clocked out for the day at 4:30pm. (Szamet Decl. ¶55.) Indeed,
9 per a review of the handwritten timecards produced, it appears that every person, every single day
10 worked the following schedule:

11 In 8:00 am – 12:00 pm Lunch 12:00-12:30 pm Out 4:30pm

12 At some point in mid-2019, Defendant switched over to electronic timekeeping. (Szamet
13 Decl. ¶56.) Again, these records are quite remarkably similar for all class members. (Szamet Decl.
14 ¶57.) As with the handwritten notes, the majority of electronic time records show similar time
15 punches of working 8:00 am – 12:00 pm, Lunch 12:00-12:30pm, and Out 4:30pm. (Szamet Decl.
16 ¶58.)

17 Though Plaintiff acknowledges that there are some punches where the person clocked in
18 at perhaps 7:59 am or 8:01 am, Plaintiff argues that often those punch records show meals periods
19 that are not 30 minutes in length, are taken late, or missed altogether. (Szamet Decl. ¶59.) Taken
20 together, Plaintiff maintained that Defendant's records are potentially very problematic for
21 Defendant. (Szamet Decl. ¶60.) Plaintiff argues that these records are so specious that they are
22 akin to having no records at all. (Szamet Decl. ¶61.) As a result, Plaintiff asserts that the class
23 can invoke the burden shifting clearly set forth in *Donahue* to successfully argue that nearly
24 identical records are the same as having records rife with violations which will create a

25
26 ⁵ "The rebuttable presumption does not require employers to police meal periods. **Instead,**
27 **it requires employers to give employees a mechanism for recording their meal periods and**
28 **to ensure that employees use the mechanism properly.**" Where, as here, there are identical
meal period punches for the vast majority of people during the entire relevant class period, one of
the important questions for Defendant becomes was it ensuring that employees were accurately
recording meal periods?

1 presumption of liability. (Szamet Decl. ¶62.) The burden would then, in theory, shift to Defendant
2 to prove that in fact all class members got their meal periods at exactly 12-12:30 each day
3 throughout the entire class period without fail. (Szamet Decl. ¶63.)

4 Plaintiff was confident that if the burden did shift to Defendant, Defendant would attempt
5 to gather testimonial evidence from class members indicating that the records were accurate and
6 they took their meal breaks as reflected in the records. (Szamet Decl. ¶64.) Though Plaintiff does
7 not believe this was the case, Plaintiff must acknowledge it poses risks for the Class. (Szamet
8 Decl. ¶65.) There is risk as to both sides as to what declarations and depositions of class members
9 might reveal. (Szamet Decl. ¶66.)

10 Apart from the issue above regarding Defendant's records, Plaintiff contends that
11 Defendant failed to provide Plaintiff and the proposed class with proper meal periods of not less
12 than thirty (30) minutes as required by the Labor Code during the relevant time period because he
13 and other class members were required to keep personal cellphones on and be available at all times
14 for calls/texts. (Szamet Decl. ¶67.) Therefore, Plaintiff contends that he was routinely interrupted,
15 was not relieved of all duties and free from Defendant's control, and was sometimes required to
16 clock out for lunch and keep working. (Szamet Decl. ¶68.)

17 In response, first and foremost, Defendant argued that Class Members were unquestionably
18 provided with legally compliant meal periods. (Szamet Decl. ¶69.) In addition, Plaintiff
19 anticipated that Defendant would assert that such an argument would pose individual issues and
20 Defendant would be entitled to inquire of each class member, on each day whether or not they
21 were interrupted, thereby creating individual issues and defeating class certification. (Szamet
22 Decl. ¶70.)

23 Taken together, Plaintiff acknowledged some risk but was confident that he could certify
24 the meal period claim and that Defendant faced significant risk and exposure on the meal period
25 claim. (Szamet Decl. ¶71.) Plaintiff contends that as a result of its failure to provide compliant
26 meal periods to Plaintiff and all class members, Defendant must pay an additional hour at the
27 employee's regular rate of compensation for each workday the employer failed to provide a lawful
28 meal period to each employee. (See Lab. Code, § 226.7, subd. (c).)

1 b) The Risks Associated with the Rest Break Claim

2 Under IWC Wage Order No. 16, every employer shall authorize and permit all employees
3 to take rest periods. Employees are entitled to a paid ten minute rest break for every four hours
4 worked, or major fraction thereof. (Cal. Code Regs., tit. 8, § 11160, subd. 11(A).)

5 The *Brinker* court clarified what steps an employer must take to make rest breaks available
6 to its employees:

7 An employer is required to authorize and permit the amount of rest break time
8 called for under the wage order for its industry. If it does not—if, for example, it
9 adopts a uniform policy authorizing and permitting only one rest break for
10 employees working a seven-hour shift when two are required—it *has violated the*
11 *wage order and is liable*. No issue of waiver ever arises for a rest break that was
12 required by law but never authorized; if a break is not authorized, an employee has
13 no opportunity to decline to take it.

14 (*Ibid.*)

15 The California Supreme Court further refined requirements for rest periods, holding that
16 employees must be relieved of all duty and employer control and free to leave the premises during
17 rest breaks. (*Augustus v. ABM Sec. Servs., Inc.*, 2 Cal. 5th 257, 270 (2016) [“[A] rest period means
18 an interval of time free from labor, work, or any other employment-related duties. And employees
19 must not only be relieved of work duties, but also be freed from employer control over how they
20 spend their time.”].)

21 The 10-minute rest break must be a net 10-minutes in a suitable rest area. None of
22 the time allotted for rest breaks can be consumed by the time it takes to get to a suitable rest area.
23 See *Augustus v. ABM Security Services, Inc.*, 2 Cal.5th 257, 267-268 (2016) (relying on 1/3/86 and
24 2/22/02 DLSE Letters wherein the DLSE ruled that the net ten-minute language for rest breaks
25 means 10-minutes of time in a rest area and cannot include time it takes to get to and from the rest
26 area). The employer must show that it clearly articulates the right to rest periods and rest periods
27 of net ten minutes, which means it must clearly communicate “net” ten minutes and that, regardless
28 of what happens along the way to or from the rest area, employees are entitled to a full ten minutes
in the rest area. See *Bufile v. Dollar Fin. Grp., Inc.* (2008) 162 Cal.App.4th 1193, 1199 (the “onus
is on the employer to clearly communicate the authorization and permission [to take meal and rest
breaks] to its employees.”) Labor Code section 226.7, subdivision (c), requires an employer to

1 pay an additional hour of compensation for each workday the employer fails to provide a rest
2 period according to law. Plaintiff contends that Defendant therefore owes Plaintiff and proposed
3 class members a rest period penalty for every shift of three and one half hours in length or more.
4 (Szamet Decl. ¶72.)

5 Here, Plaintiff maintains that the same factual contentions apply to the rest break claim as
6 discussed above regarding the meal break claim namely that: (1) Plaintiff was not able to take two
7 compliant rest periods each day; and (2) if he was able to take a moment to rest, he was required
8 to keep his cellphone on at all times and therefore not free from employer control; and he was
9 routinely called/interrupted. (Szamet Decl. ¶73.)

10 The same risk analysis does not apply as with the meal periods, though, because there
11 generally are no records associated with rest periods. (Szamet Decl. ¶74.) As such, Plaintiff does
12 not believe that he would be able to invoke the Donahue burden shifting in the same way. (Szamet
13 Decl. ¶75.) Plaintiff had to acknowledge that it could potentially be easier for Defendant to defeat
14 certification of this claim if it was able to gather testimonial evidence from class members
15 indicating that they were able to take all required rest breaks each day. (Szamet Decl. ¶76.)
16 Though Plaintiff does not believe this was the case, Plaintiff must acknowledge it poses risks for
17 the Class. (Szamet Decl. ¶77.) Just as with meal periods, there is risk as to both sides as to what
18 declarations and depositions of class members might reveal. (Szamet Decl. ¶78.)

19 c) The Risks Associated with the Reimbursement Claim

20 Labor Code §2802 requires employers to indemnify employees for all necessary
21 expenditures or losses incurred by the employee in direct consequence of the discharge of his or
22 her duties. Of importance here, Labor Code section 2802(c) provides that the employee is entitled
23 to “attorney’s fees incurred by the employee enforcing the rights granted by this section.”

24 Here, Plaintiff alleges that Defendant failed to reimburse Plaintiff and the proposed class
25 for the cost of personal cellphone usage for work purposes including (1) downloading and using
26 the “Paylocity” application for time clock purposes; and (2) being available and using his phone
27 for calls and texts throughout the day, each day. (Szamet Decl. ¶79.)
28

1 Plaintiff also contends that he was required to use his personal vehicle for work related
2 purposes. (Szamet Decl. ¶80.) As a result, Plaintiff contends that Defendant owes reimbursement
3 and a PAGA penalty for each pay period worked by each class member/aggrieved employee during
4 the relevant time period. (Szamet Decl. ¶81.)

5 Plaintiff anticipated that Defendant would argue that Plaintiff was not required to use his
6 personal cellphone for work purposes and that if he did, it was by choice. (Szamet Decl. ¶82.)
7 Defendant would also argue that it did not require class members to use personal vehicles for work
8 related purposes. (Szamet Decl. ¶83.) Defendant would also likely argue that if Plaintiff used his
9 phone or personal vehicle those issues were unique to him and not common to the class, thereby
10 defeating commonality. (Szamet Decl. ¶84.)

11 d) The Risks Associated with the Waiting Time Penalty Claim

12 Under Labor Code section 203, if an employer fails to provide wages at the time of an
13 employee's termination or within seventy-two (72) hours of resignation, then the employee's
14 wages shall continue as a penalty for up to thirty (30) days. (Labor Code § 203.) Section 203
15 reflects a public policy that favors the full and prompt payment of earned wages. (See, e.g.,
16 *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7; *Mamika v. Barca* (1998) 68
17 Cal.App.4th 487, 492.)

18 Here, Plaintiff and numerous proposed class members are no longer employed by
19 Defendant. (Szamet Decl. ¶85.) Due to Defendant's failure to pay meal and rest period premiums,
20 Defendant failed to pay all wages owed and due upon their termination and/or resignation. (*Id.*)
21 Defendant's actions were willful, as they have intentionally failed or refused to perform an act
22 which was required to be done. (See *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157,
23 1201.) "The failure to pay is willful if the employer 'knows what [it] is doing [and] intends to do
24 what [it] is doing', and does not also require proof that the employer acted with "a deliberate evil
25 purpose to defraud work[ers] of wages which the employer knows to be due.'" (*Diaz v. Grill*
26 *Concepts Services, Inc.* (2018) 23 Cal.App.5th 859, 868.) Plaintiff contends that Defendant was
27 fully aware of its payment policies and practices and intended to carry out said policies and
28 practices. (Szamet Decl. ¶86.) Therefore, Plaintiff maintains that Defendant is liable for damages.

1 (Szamet Decl. ¶87.)

2 It goes without saying that *Naranjo* is extremely impactful here. (*Naranjo v. Spectrum*
3 *Security Services, Inc.* (2019) 40 Cal.App.5th 444.) Prior to review being granted in *Naranjo*,
4 recovery of waiting time penalties on meal and rest claims was admittedly unlikely. However, it
5 is reasonable to assume that the Supreme Court took *Naranjo* to address this issue and overrule
6 the lower court with a clear statement that waiting penalties do flow from meal and rest period
7 violations. (Szamet Decl. ¶88.) If this assumption turns out to be correct, there is significant risk
8 and exposure for Defendant on the Section 203 penalties. (Szamet Decl. ¶89.)

9 e) The Risks Associated with the PAGA Claim

10 As a result of Defendant’s conduct alleged above, Plaintiff seeks PAGA penalties available
11 for violations under Labor Code sections 201, 202, 203, 226.7, 512, and 2802. (Szamet Decl. ¶90.)
12 Labor Code section 2699(f) provides, in relevant part, “[f]or all provisions of this code except
13 those for which a civil penalty is specifically provided, there is established a civil penalty for a
14 violation of these provisions, as follows: one hundred dollars (\$100) for each aggrieved employee
15 per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee
16 per pay period for each subsequent violation.” In addition, the statute provides that “[a]ny
17 employee who prevails in any action shall be entitled to an award of reasonable attorney’s fees
18 and costs.” (Labor Code § 2699(g)(1).)

19 Plaintiff assessed multiple risks associated with the PAGA claim. (Szamet Decl. ¶91.)
20 First, the aggrieved employees’ PAGA claims are derivative of all the foregoing class claims.
21 (Szamet Decl. ¶92.) If Plaintiff cannot establish liability on the underlying claim (taking into
22 account the risks discussed above), then the derivative PAGA claim will also necessarily fail. (*Id.*)
23 Second, a court has discretion to award less than the maximum penalty. (Szamet Decl. ¶93.)
24 (Labor Code § 2699(e)(2) (“a court may award a lesser amount than the maximum civil penalty
25 amount specified by this part if, based on the facts and circumstances of the particular case, to do
26 otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory”). See
27 *e.g., Carrington v. Starbucks Corporation* (2018) 30 Cal.App.5th 504, 241 Cal.Rptr.3d 647, 669
28 (affirming award of 10% of maximum PAGA penalty). Third, the likelihood of the Court reducing

1 the PAGA damages awarded to Plaintiffs and the aggrieved employees – assuming liability is
2 proven as to each of Plaintiffs’ claims – is also higher in this case where these same individuals
3 will also be receiving money for the same unlawful conduct under the class claims. (Szamet Decl.
4 ¶94.) (see *Avila v. Cold Spring Granite Co.* (E.D. Cal. Jan. 12, 2018) Case No. 1:16-cv-001533-
5 AWI-SKO, 2018 U.S. Dist. LEXIS 6142 *17 (“Because the PAGA penalties sought are at least
6 partially duplicative of penalties granted by the underlying Labor Code violations, see, e.g., Cal.
7 Lab. Code §§ 203, 226, 558(a), 1194.2, and because a Court has discretion in whether and in what
8 amount to award PAGA penalties, see Cal. Lab. Code § 2699(e)(2), Plaintiff recognizes that the
9 potential PAGA penalties are highly uncertain.”); and see *Nordstrom Commissions Cases*, 186
10 Cal.App.4th 576, 589 (2010) (affirming settlement allocating \$0 of \$6.4 million settlement to
11 PAGA penalties).

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

13 There is significant expense associated with the class certification process, which the
14 Parties can avoid by entering into the contemplated Settlement Agreement now. (Szamet Decl.
15 ¶95.) If the Court did eventually certify class, trial of a case involving approximately 265
16 Settlement Class Members would require the retention of expensive expert witnesses, the accrual
17 of extensive litigation costs, and a significant time overlay by the parties. (Szamet Decl. ¶96.)
18 Moreover, given the complexity and unsettled nature of the issues in this case it is likely that any
19 outcome at trial would have resulted in a lengthy and costly appeal. (Szamet Decl. ¶97.) An
20 appeal would result in further delay for the Settlement Class Members who are waiting for a
21 resolution in this matter. (*Id.*)

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

23 This case has not been certified to be tried as a class action. (Szamet Decl. ¶98.) While
24 Plaintiff believes there is strong evidence to support certification of several possible subclasses
25 (especially a rest period class), certification is always hard fought and subject to judicial discretion.
26 Moreover, in class actions, decertification is always a possibility. (*Id.*) In attempting to certify a
27 class, the parties would need to conduct multiple depositions, including of the Named Plaintiff and
28 of several person(s) most knowledgeable regarding Defendant’s meal and rest policies. (*Id.*) There

1 is a risk for both sides as to what these depositions would reveal and whether they would support
2 class certification to the extent expected. (*Id.*)

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5 4. The Amount Offered in Settlement

6 It was very difficult for the Parties to reach this Settlement of \$700,000.00. (Szamet Decl.
7 ¶99.) This Settlement is the result of adversarial, non-collusive, and arms-length negotiations.
8 (Szamet Decl. ¶100.) The Parties arrived at it after extensive investigation and discovery, careful
9 evaluation of the law, risks, and all information substantiating the amount of penalties reasonably
10 likely to be awarded to the class were the trier of fact to find Defendant liable, and the assistance
11 of an experienced mediator, Judge Jacobs-May. (*Id.*)

12 a) Plaintiff's Assessment of Defendant's Maximum Exposure

13 Plaintiff assessed the full value of the meal period claim, without any discount, at
14 approximately \$1,044,051.20. (Szamet Decl. ¶101.) This calculation was based upon the
15 assumption that each Settlement Class Members was not provided a complaint meal period for
16 each day worked so a total of 5 meal period penalties per person, per week, at an average rate of
17 pay of \$23.68. (Szamet Decl. ¶102.) Of course, if the violation rate was reduced from five times
18 per week to two, for purposes of assessing damages, this number would go down. (Szamet Decl.
19 ¶103.) Indeed, if Plaintiff assumed there were two meal period violations per workweek per Class
20 Member for the purposes of assessing maximum potential liability that number drops to
21 \$417,620.48. (Szamet Decl. ¶104.) For the reasons above, Plaintiff determined that accepting a
22 discount of the full amount was appropriate. (Szamet Decl. ¶105.)

23 The calculations for the maximum potential value of the Rest Period claim are the same as
24 a meal premium is assessed at the same amount as a rest period premium. (Szamet Decl. ¶106.)
25 Thus, Plaintiff assessed the full value of the rest period claim, without any discount, at
26 approximately \$1,044,051.20. (Szamet Decl. ¶107.) Again, this assumes 5 rest period violations
27 per workweek per Settlement Class Members. (Szamet Decl. ¶108.) If Plaintiff assumed there
28 were two meal period violations per workweek per Class Member for the purposes of assessing

1 maximum potential liability that number drops to \$417,620.48. (Szamet Decl. ¶109.) For the
2 reasons above, Plaintiff determined that accepting a discount of the full amount of the rest period
3 claim was appropriate. (Szamet Decl. ¶110.)

4 With regard to the reimbursement claim analysis, Plaintiff believed that it was reasonable
5 to value the potential reimbursement at \$25 per month, per Settlement Class Members, for
6 reimbursement of personal cell phone usage and any incurred mileage from driving personal
7 vehicle. (Szamet Decl. ¶111.) This brought the damages for this claim to \$30,650.00. (Szamet
8 Decl. ¶112.)

9 Plaintiff assessed the full value of the waiting time claim for penalties pursuant to Labor
10 Code §203 at \$1,360,022.40. (Szamet Decl. ¶113.) Considering the derivate nature of Labor
11 Code §203 and the unresolved nature of whether Section 203 penalties are available for alleged
12 meal and rest period violations, Plaintiff determined that accepting a significant discount on this
13 claim was appropriate. (Szamet Decl. ¶114.)

14 Finally, Plaintiff calculated the value of the PAGA claim at \$302,400.00 for Settlement
15 Class Members (using \$100 per pay period) for one alleged underlying Labor Code violation.
16 (Szamet Decl. ¶115.) As the law is unsettled regarding whether PAGA penalties can be awarded
17 for each of the underlying Labor Code violations (i.e. “stacked”) for the purposes of assessing the
18 maximum penalty amount, Plaintiff calculated the exposure at one penalty of \$100 per person per
19 pay period. (Szamet Decl. ¶116.) If PAGA penalties can be stacked, then the maximum amount
20 increases to \$882,583.33. (Szamet Decl. ¶117.) The main risk taken into account with PAGA is
21 the discretionary nature of the penalty award. (Szamet Decl. ¶118.) A judge can award the
22 statutory maximum of \$100 for the initial violation and \$200 thereafter or – in theory – one cent
23 per wage statement. (Szamet Decl. ¶119.) While there is a dearth of available authority, in
24 Plaintiff’s view, were he to succeed on any of the underlying Labor Code violations, it is not likely
25 that a Judge would also award a large amount of penalties of top of any damages recovered.
26 (Szamet Decl. ¶120.)

27 Using the figures set forth above, per Plaintiff’s assessment, the maximum potential value
28 of all of Plaintiff’s and the Settlement Class Members’ claims was approximately \$ \$4,361,358.13.

(Szamet Decl. ¶121.) If the more conservative estimates are used with only two meal and rest period violations per workweek and one PAGA penalty assessment, this maximum exposure drops significantly to \$2,528,313.36. (Szamet Decl. ¶122.)

As a result of the forgoing risks on the merits discussed extensively above, Class Counsel believes the Gross Settlement Amount of \$700,000.00 is fair and reasonable. (Szamet Decl. ¶123.)

5. The Experience and Views of Counsel

Finally, counsel's experience and success in similar class actions also weigh in favor of preliminary approval. *See Wershba, supra*, 91 Cal.App.4th at 245. Kingsley & Kingsley, APC is very experienced in prosecuting complex employment litigation, and the firm has focused its practice since the year 2000 on complex wage, hour, and working condition violations. (Szamet Decl. ¶¶124-126.) The firm is well versed in class action litigation and has diligently and aggressively pursued this action. (*Id.*) Kingsley & Kingsley, APC currently serves as Class Counsel for dozens of pending class action lawsuits in Northern, Central, and Southern California. (*Id.*) A list of representative cases that Kingsley & Kingsley, APC has handled is included in the accompanying declaration of Kelsey M. Szamet. (*Id.*) After factoring in the risks explained above, Class Counsel believes that the proposed settlement is fair and reasonable. (Szamet Decl. ¶127.)

6. The Proposed Plan of Allocation Is Fair and Reasonable

Plans of allocation are subject to the same standard of review as class action settlements; they must be "fair, adequate and reasonable." (*See, e.g., Officers for Justice v. Civil Service Comm'n* (9th Cir. 1982) 688 F.2d 615, 624–625, 629–630.) Here, the proposed plan of allocation compensates Settlement Class Members pro rata based on the number of Compensable Work Weeks worked by the Settlement Class Member during the Covered Period. The lump sum payment to each Settlement Class Member not excluding him/ herself will be determined on an individualized basis based upon the compensable pay periods worked by the Settlement Class Member. (Ex. 1 at § III, ¶17.) This allocation distributes Settlement Agreement funds proportionally to each class member's potential damages and should therefore be approved as fair, adequate, and reasonable. (Szamet Decl. ¶128.)

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5 7. The Proposed Notice Fairly Apprises the Settlement Class Members of the
6 Terms of the Settlement and of the Class Members' Rights under the
7 Settlement

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

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

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

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

2 The Named Plaintiff is entitled to an enhancement for his valiant effort and time expended
3 in this matter. (Szamet Decl. ¶129.) The time spent by Carlos Humberto Carrillo Diaz is significant
4 and includes researching and retaining competent counsel; providing information to Class Counsel
5 regarding the nature of the work at Defendant; compiling relevant documents; working closely
6 with Class Counsel to develop the theories of liability and martial relevant evidence; regularly
7 discussing the status of the case with Class Counsel; discussing the case via telephone with many
8 Settlement Class Members; and responding promptly to Class Counsel’s communications
9 regarding settlement. (*Id.*) Thus, in addition to the sums paid to Settlement Class Members,
10 Plaintiff requests a proposed litigation enhancement in the amount of \$5,000.00, to be paid from
11 the Gross Settlement Amount. (Ex. 1 at § III, ¶21.) As set forth in the Settlement Agreement,
12 Plaintiff will also be entering into a general release of liability pursuant to Civil Code Section
13 1542. (Szamet Decl. ¶130; Ex. 1 at § III, ¶2.)

14 Class Counsel considers this to be a fair and reasonable enhancement. (Szamet Decl.
15 ¶131.) The enhancement takes into consideration the time, effort, and expense incurred by Plaintiff
16 in coming forward to litigate this matter on behalf of all Settlement Class Members. (*Id.*) Plaintiff
17 will provide a detailed declaration with the Final Approval Motion detailing his participation and
18 further justification for the enhancement. (*Id.*)

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

20 As indicated on the Proof of Service, Plaintiff’s Motion for Approval of Class Action
21 Settlement (“Motion”) will be concurrently uploaded to the Labor and Workforce Development
22 Agency’s (“LWDA”) website on the date this Motion is filed as required by statute. Proof of
23 submission of Plaintiff’s Motion, all related documents, and copy of the email from the LWDA
24 confirming receipt is attached to the Declaration of Kelsey M. Szamet as Exhibit “2.” (Szamet
25 Decl. ¶132.)

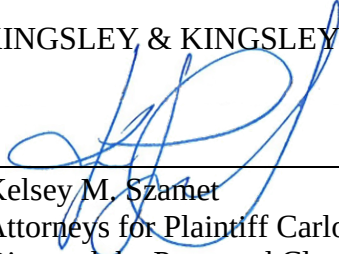
26 **VIII. CONCLUSION**

27 Plaintiff respectfully submits that the proposed Settlement Agreement is fair, adequate,
28 reasonable, and in the best interest of the Settlement Class Members. Therefore, the Parties

1 respectfully request that the Court (1) grant preliminary approval of the Joint Stipulation of Class
2 Action Settlement and Release of Claims, and all of its terms; (2) approve the proposed form of
3 notice, and direct that the Notice be sent to Settlement Class Members in the manner set forth in
4 the Joint Stipulation of Class Action Settlement and Release of Claims; and (3) schedule a hearing
5 on final approval of the Settlement Agreement and Class Counsel's application for an award of
6 attorney's fees and litigation costs.

7
8 DATED: November 18, 2021

KINGSLEY & KINGSLEY, APC

9
10 By: 

Kelsey M. Szamet
Attorneys for Plaintiff Carlos Humberto Carrillo
Diaz and the Proposed Class

(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 November 18, 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 a true copy thereof enclosed in a sealed envelope addressed as follows:

HOGUE FENTON, JONES, & APPEL, INC. Sarju A. Naran Sarju.naran@hogefenton.com 55 South Market Street, 9 th Floor San Jose, CA 95113-2396	DAVTYAN LAW FIRM, INC. Emil Davtyan emil@davtyanlaw.com 880 E. Broadway Glendale, CA 91205
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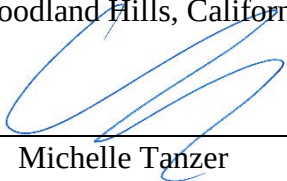
[] (BY MAIL): I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage fully prepaid at Encino, California in the ordinary course of business. I am aware that 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] (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 above email address(es).

[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 November 18, 2021, at Woodland Hills, California.



Michelle Tanzer