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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

LUIS LOPEZ, individually and on behalf of)
all similarly-situated and aggrieved)
employees,)

Plaintiff,)

vs.)

GE UNITED TECHNOLOGIES, LLC, a)
Delaware Limited Liability Company d/b/a)
GRASSDOOR, and DOES 1 through 10,)
Inclusive,)

Defendants.)

Case No. 20STCV34691

) ASSIGNED FOR ALL PURPOSES TO:

) The Honorable William F. Highberger

) Dept. SS 10

CLASS AND REPRESENTATIVE ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR ORDER GRANTING
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT, CONDITIONAL
CERTIFICATION, APPROVAL OF
CLASS NOTICE AND SETTING OF
FINAL FAIRNESS HEARING DATE**

) Date: May 16, 2022

) Time: 10:00 a.m.

) Dept: SS 10

) Judge: William F. Highberger

) Filed: September 11, 2020

) Trial date: None set

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I. INTRODUCTION AND BACKGROUND

This motion seeks preliminary approval of a pre-certification wage and hour class and Private Attorneys General Act (“PAGA”) Settlement of \$350,500 by Plaintiff Luis Lopez (“Plaintiff”), individually and on behalf of the 606-member Class employed in California by Defendant GE United Technologies, LLC dba Grassdoor (“Grassdoor”) as non-exempt employees, including delivery drivers, at any time during the period from July 19, 2019 through July 13, 2021 (the “Class Period”). Declaration of Diana M. Khoury, (“Khoury Dec.”) ¶10. In this litigation, Plaintiff contends that during the Class Period, Grassdoor failed to: pay the putative Class wages for all time worked or subject to Defendant’s control; to pay correctly-calculated overtime wages; to provide compliant meal periods and rest periods or pay premium wages in lieu of non-compliant breaks; reimburse business-related mileage and cell phone expenses; provide accurate itemized wage statements; and timely pay all final wages owed. Plaintiff also contends Grassdoor unlawfully deducted a percentage of employees’ tips as a service charge.

II. THE PARTIES

A. Defendant. GE United Technologies, LLC dba Grassdoor delivers cannabis products throughout Los Angeles and Orange Counties. According to its website: “Grassdoor is a cannabis delivery technology company that has developed a platform to help retailers efficiently manage and deliver orders for cannabis products to their customers and patients.” <https://grassdoor.com/becomedriver>. Grassdoor began employing non-exempt employees, including delivery drivers on July 19, 2019.

B. Plaintiff and the Putative Class. Plaintiff Luis Lopez worked for Grassdoor as a non-exempt delivery driver, delivering cannabis products throughout Los Angeles County from October 2019 through June 2020. Khoury Dec. ¶11. The proposed Class is defined as all hourly, non-exempt individuals employed by GE United Technologies, LLC dba Grassdoor in California at any time during the Class Period defined as from July 19, 2019 through July 13, 2021. Khoury Dec. ¶12; SA ¶¶1.7, 1.38. There are 606 Class Members who worked 18,355 Pay

Periods¹ during the two-year Class Period. *Id.* Of the 606 Class Members, 562 are non-exempt delivery drivers (who worked 16,933 pay periods) and 44 are other non-exempt employees (who worked 1,452 Pay Periods). Khoury Dec. ¶13; SA ¶¶1.38, 1.40. A subgroup of the Class, PAGA Members, were employed some time during the September 11, 2019 through July 19, 2021 PAGA Period. There are 604 PAGA Members that worked 18,144 Pay Periods during the PAGA Period. Khoury Dec. ¶14; SA ¶1.24.

III. PRE-MEDIATION LITIGATION AND INFORMAL DISCOVERY

On September 11, 2020, Plaintiff filed a class action complaint in the Los Angeles County Superior Court alleging Grassdoor’s failure to (1) pay minimum, regular, and overtime wages (Labor Code §§ 510, 1194; IWC Wage Order 9-2001, §§ 3, 4); (2) provide meal periods (Labor Code §§ 226.7, 512; IWC Wage Order 9-2001, §11); (3) reimburse business expenses (Labor Code §§ 2800, 2802, 2804); (4) provide accurate itemized wage statements (Labor Code § 226); and (5) timely pay wages due upon separation of employment (Labor Code §§ 201, 202, 203). Based on these allegations, Plaintiff alleged unfair business practices in violation of the Unfair Competition Law (Bus. & Prof. Code §§ 17200-17208). Khoury Dec. ¶15.

In early January 2021, the Parties agreed to mediate and scheduled mediation with Todd A. Smith for April 14, 2021. Khoury Dec. ¶16. On January 29, 2021, Plaintiff filed a First Amended Complaint (“FAC”)² seeking PAGA civil penalties³ pursuant to Labor Code §§ 2699, *et seq.*, based on Plaintiff’s causes of action, and sought penalties for Grassdoor’s unlawful deduction of tips (Labor Code § 351) and failure to maintain accurate records (Labor Code § 1174). Khoury Dec. ¶17.

IV. MEDIATION

To prepare for mediation, Plaintiff requested, and Defendant produced, subject to a

¹ The Class was paid weekly, a “Pay Period”. “Work Week” and “Pay Period” are used interchangeably.

² The Parties stipulated to allow Plaintiff to file the FAC, and that Defendant’s answer would not be due until 30 days after the court lifted the stay on pleadings, which would be in place until the date of the Initial Status Conference. The ISC was continued to allow the Parties to prepare for and attend mediation.

³ Plaintiff served notice of his charges against Grassdoor on the Labor and Workforce Development Agency (“LWDA”) and on Grassdoor on September 9, 2020. Khoury Dec. ¶18, Exh. 2. Through the present, the LWDA has not communicated any intention to investigate the charges alleged. *Id.*

1 Stipulated Protective Order, key data for the period from July 19, 2019 through November 12,
2 2020 that included: (1) total number of Class Members; (2) number of formerly employed Class
3 Members; (3) number of Class Member Pay Periods; (4) number of Class Member Work
4 Weeks; and (5) average hourly rate of pay; and for the PAGA Penalties for the period from
5 September 11, 2019 to November 12, 2020: (1) total number of aggrieved employees, (“PAGA
6 Members”); (2) number of formerly employed PAGA Members; (3) number of PAGA Member
7 Pay Periods; (4) number of PAGA Member Work Weeks; and (5) average hourly rate of pay.
8 In addition, Grassdoor produced excel spreadsheet data containing a 10% random sample of
9 Class Member time (through November 12, 2020) and payroll records (through Pay Period
10 ending September 27, 2020), and the names and contact information for ten Class Members.
11 Khoury Dec. ¶19.

12 After receipt of the data and an analysis of the information produced by Grassdoor and
13 gathered from informal interviews of Class Members, Plaintiff’s Counsel retained the services
14 of a damages’ consultant to review the information and data to assess violation rates for short,
15 late, or missed meal periods, unpaid or underpaid expense reimbursements for mileage and cell
16 phone expenses, the incidence of underpaid overtime wages due to failure to use the Class
17 Members’ regular rate of pay, and derivative claims for wage statements penalties, waiting time
18 penalties, PAGA civil penalties, and to extrapolate the damages to the Class. Khoury Dec. ¶20.

19 On April 14, 2021, the Parties attended mediation via Zoom with Todd A. Smith, an
20 experienced and respected wage and hour mediator. The Parties engaged in a day of serious,
21 informed and lengthy arms’-length negotiations, which resulted in a Settlement in principle and
22 a memorandum of understanding. Khoury Dec. ¶21.

23 **V. POST-MEDIATION NEGOTIATIONS & SETTLEMENT AGREEMENT**

24 Several months after mediation and after drafting the long-form settlement agreement,
25 Counsel for Grassdoor proposed a release of rest period claims. To evaluate the request,
26 Plaintiff reenlisted his damages’ consultant to analyze the data previously produced which had
27 included data documenting clock-in and clock-out times for rest periods. The rest period
28 violation rate was identified, and extrapolated to the Class. Based on the identified violation

1 rate, and after an exchange of written demands and counter-offers between the Parties, on
2 January 26, 2022, an agreement was reached on a fair negotiated sum to release the rest period
3 claims on behalf of the Class reflected in the discussion below. Khoury Dec. ¶22.

4 To effectuate the terms of the proposed Settlement, which now includes a release of rest
5 period claims, on March 21, 2022, the Parties filed a Stipulation for Leave to File a Second
6 Amended Class and Representative Action Complaint. Khoury Decl. ¶23.

7 **VI. SUMMARY OF PROPOSED SETTLEMENT**

8 **A. Settlement Terms.** The Parties have agreed the Action may be settled for the
9 Gross Settlement Amount of \$350,500 (“GSA”) which, subject to Court approval, includes:
10 (a) attorneys’ fees of \$116,833 (one-third of the GSA) to compensate Class Counsel for work
11 performed and remaining to be performed in securing final Court approval; (b) Class Counsel’s
12 litigation expenses of up to \$15,000; (c) a Service Payment to Plaintiff Luis Lopez of \$5,000 in
13 consideration of his initiation and prosecution of the action, service as Class Representative,
14 work performed, and risks undertaken for the payment of costs in the event the case was
15 unsuccessful, and benefits conferred on absent Class Members; (d) PAGA Payment of \$5,000
16 of which \$3,750 (75% of \$5,000) will be paid to the LWDA, and \$1,250 (25% of \$5,000) will
17 be distributed to PAGA Members); and (e) Administration expenses to Simpluris of up to
18 \$13,000⁴. Khoury Dec. ¶24; SA ¶1.17. In addition to the GSA, Defendant will pay the
19 Employer Tax Obligations. *Id.*; SA ¶1.14.

20 Based on anticipated Court-approved deductions for attorneys’ fees, litigation costs,
21 Service Payment, PAGA Payment, and administration expenses, the Net Settlement Amount
22 estimated at \$195,667 will be distributed to Participating Class Members based on number of
23 Pay Periods worked at any time during Class Period without the need to return a claim form.
24 Khoury Decl. ¶25; SA ¶1.20. With an estimated 18,355 pay periods worked during the Class
25 Period (SA ¶1.38), a Participating Class Member will receive an estimated **\$10.64** for each Pay
26 Period worked during the Class Period. No part of the GSA may revert to Defendant under any
27

28 ⁴ See Declaration of Michael Bui, on behalf of Simpluris, Inc., regarding its qualifications to act as the
neutral administrator of the Settlement.

1 circumstances. Khoury Dec. ¶26; SA ¶¶1.17, 5.1.

2 **B. Notice of Class Action Settlement and Administration.** Following preliminary
3 approval, Simpluris will mail the approved Notice of Class Action Settlement, Change of
4 Address form, and return envelope (“Notice Packet”) to each Class Member. Khoury Dec. ¶27;
5 SA ¶¶1.21, 7.1, 8.1 - Exhs A & B. The Notice advises the Class: (1) of the right to participate in
6 the Settlement and to receive a Settlement Payment without a claim form; (2) how to object or
7 opt-out of the Settlement; (3) how to dispute the information on which Settlement Payments are
8 calculated; (4) of the Released Claims; and (5) of the date, time and place to appear for the Final
9 Approval hearing. Khoury Decl. ¶28.

10 Simpluris will endeavor to locate Class Members to allow participation in the Settlement
11 and receipt of settlement checks, by means which include a National Change of Address
12 database search prior to the initial mailing of the Notice Packet, and thereafter, skip tracing
13 undelivered Notice Packets. Khoury Dec. ¶29; SA ¶7.1. Following the issuance of Settlement
14 Payments, Simpluris will mail a postcard to all Class Members who have not by the 30th day of
15 issuance negotiated their checks to remind them of the void date. Khoury Dec. ¶30; SA ¶9.5.
16 All checks not cashed by the 180th day, will be cancelled, and sums represented by the uncashed
17 checks will be sent to the California Controller, Unclaimed Property Division for further
18 handling on behalf of Class Members whose checks were voided. *Id.*

19 **C. The Released Claims.** In exchange for a Settlement Payment, all Class
20 Members who have not timely requested exclusion will release the “Released Claims” arising
21 from the claims alleged in the operative complaint. Khoury Dec. ¶31; SA ¶1.33.

22 **VII. ARGUMENT**

23 **A. Class Action Settlements Are Subject to Court Review and Approval.**
24 “Before final approval, the court must conduct an inquiry into the fairness of the proposed
25 settlement.” California Rules of Court, Rule 3.769(g). Court’s should disapprove settlements
26 “only with considerable circumspection.” *Jamison v. Butcher & Sherrerd* (1975) 68 F.R.D. 479,
27 481. At preliminary approval, the Court “limits its inquiry to the extent necessary to reach a
28 reasoned judgment that the agreement is not the product of fraud or overreaching by, or

collusion between, the negotiating parties.” *In re Microsoft I-V Cases* (2006) 135 Cal. App. 4th 706, 723 (citation omitted).

B. The Settlement is Fair, Adequate, and Reasonable. A Court must find a proposed settlement is “fair, adequate and reasonable.” *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. The trial court considers all relevant factors, such as: “the strength of Plaintiff’s case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.” *Id.* The Court’s primary function is to determine the Settlement is not the product of fraud, overreaching, or collusion, and, taken as a whole, is fair, adequate, and reasonable. *Id.*

A proposed class action settlement is presumed fair where: (1) the parties reached agreement after extensive arms’-length negotiations; (2) investigation and discovery were sufficient to allow counsel and the Court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. *Id.* at 1802.

1. The Settlement Is the Result of Serious, Informed, Non-Collusive Negotiations

The Parties attended a full day of mediation with Todd A. Smith, an experienced wage and hour class action mediator that resulted in a settlement in principle by the end of the day. Thereafter, the Parties continued their arms’-length, and sometimes contentious, negotiations by phone and email to create the detailed written Settlement Agreement before the Court for approval. Counsel aggressively pursued their respective positions at all times. Khoury Dec. ¶¶21, 22.

2. Investigation, Informal Discovery and Stage of the Proceedings Support Settlement

Plaintiff investigated the merits of Plaintiff’s claims and potential defenses before initiating this Action. Following agreement to proceed to mediation, Grassdoor produced their written policies in effect during the Class Period, corresponding timekeeping and payroll records (excel spreadsheets) and the other essential data referenced above to allow violation rates to be identified and damages tabulated and extrapolated to the Class. Proof of the claims

1 asserted by Plaintiff on behalf of the Class would be based largely on an analysis of time and
2 pay records produced by Defendant, and anecdotal information obtained from Class Member
3 interviews.

4 The investigation, discovery, and informal exchange provided the Parties with a clear
5 understanding of the strengths and weaknesses of their respective positions before negotiations.
6 *See Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal. App. 4th 399, 410 (2010)
7 (settlement approved where “considerable information from which to assess the strength of the
8 class claims” and risks and expense of litigation).

9 3. Counsel are Experienced in Similar Litigation

10 Plaintiff’s Counsel have significant experience litigating wage and hour employment
11 class actions. Khoury Dec. ¶¶3-9, 32. This allowed Counsel to evaluate settlement of the Class
12 claims compared to the risks of further litigation, including trial, appeals and collection.
13 Defense counsel with Carothers DiSante & Freudenberger LLP are also highly skilled and
14 sophisticated lawyers, with extensive class action experience. They defended their client
15 vigorously and aggressively through all phases of the case, including mediation and subsequent
16 negotiations. Khoury Dec. ¶33.

17 Plaintiff’s Counsel believes the Settlement achieved in this Action is fair and reasonable
18 and in the best interest of the Class in light of the monetary recovery by the Class, complexities
19 and difficulties of this litigation, the state of the law, the potential the case may not have been
20 certified, an adverse summary judgment or decertification ruling, the lengthy process of
21 establishing specific damages, and various possible delays and uncertainty regarding the
22 outcome of appeals. Each of these factors was carefully considered before reaching agreement.
23 Khoury Dec. ¶34.

24 Experienced counsel, operating at arms’-length, weighed the case strengths and
25 examined all issues and risks of litigation and endorse the Settlement. The view of attorneys
26 actively conducting the litigation “is entitled to significant weight” in deciding whether to
27 approve the settlement. *Fisher Bros. v. Cambridge Lee Industries, Inc.* (E.D. Pa. 1985) 630 F.
28 Supp. 482, 488; *Ellis v. Naval Air Rework Facility* (N.D. Cal. 1980) 87 F.R.D. 15, 18, *affd.* 661

1 F.2d 939 (9th Cir. 1981). “The recommendations of plaintiffs’ counsel should be given a
2 presumption of reasonableness.” *In re Omnivision Technologies, Inc.*, (N.D. Cal. 2007) 559 F.
3 Supp. 2d 1036, 10432 .

4 The Settlement satisfies the first three requirements of *Dunk*. The fourth, percentage of
5 objectors, remains unknown until after notice is given to the Class, and they have had an
6 opportunity to respond.

7 **C. The Settlement is a Reasonable Compromise of Claims.** “[T]o ensure that the
8 recovery represents a reasonable compromise, given the magnitude and apparent merit of the
9 claims being released, discounted by the risks and expenses of attempting to establish and
10 collect on those claims by pursuing the litigation,” information is presented to the Court, to
11 review in its role as a fiduciary for absent class members. *Kullar v. Foot Locker Retail, Inc.*
12 (2008) 168 Cal. App. 4th 116, 129.

13 A reasonable compromise of class claims considers actual risks of certification,
14 decertification, dispositive motions, and trial, not merely a prediction of Defendant’s maximum
15 exposure. An explicit statement of maximum class recovery on all claims is not required, only a
16 record which allows “an understanding of the amount that is in controversy and the realistic
17 range of outcomes of the litigation.” *Kullar, supra* at 120.

18 “*Kullar* is clear that the most important factor ‘is the strength of the case for plaintiffs
19 on the merits, balanced against the amount offered in settlement.’” *Munoz*, 186 Cal. App. 4th at
20 409 (internal punctuation omitted). *Munoz* had “no doubt that the trial court had ‘an
21 understanding of the amount ... in controversy,’” based on number of class members, payroll
22 data, variances in class member experiences, and a companion action alleging damages less
23 than twice the *Munoz* settlement. *Id.*, at 406. This was “an adequate basis from which to garner
24 a reasonably adequate understanding of the amount that is in controversy within the meaning of
25 *Kullar*.” *Id.*, at 410.

26 Plaintiff’s counsel relied on similar types of data and documents as in *Kullar* and *Munoz*,
27 including time, pay, and employment records. Plaintiff’s counsel and their consultant reviewed
28 and analyzed time and pay records to assess liability and to calculate Class-wide damages

before attending mediation, and thereafter to negotiate the release of the rest period claim. Khoury Dec. ¶35. Based on the damage assessments made for each claim as discussed below, and the realistic ranges of recovery, the \$350,500 Gross Settlement Amount is fair and reasonable given that it represents approximately 72% of the \$484,904 estimated damages on the primary claims alleged (exclusive of PAGA Penalties).⁵ Khoury Dec. ¶36.

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

Employers must provide at least minimum wages for all hours employees work or are subject to their employer's control. Labor Code § 1194; *see also Kaanaana v. Barrett Bus. Servs., Inc.* (2018) 29 Cal. App. 5th 778, 804 (citing Cal. Code Regs., tit. 8, § 11040, subd. 2(K).) Plaintiff alleges when he arrived to start his shift at Grassdoor's hub, he clocked in and picked up his daily tote bags with products, and that Grassdoor did not pay wages until he received his first order via the Grassdoor phone app. Khoury Dec. ¶37. Grassdoor disputes the contention and contends Plaintiff and Class Members were paid hourly for all time worked after they clocked-in. Given certain information and evidence provided by Grassdoor showing hourly wages were paid from the time of the clocked-in, Plaintiff assigned a nominal value to the minimum wage claim and estimated Grassdoor's maximum exposure at \$13,049⁶. Plaintiff estimated probability of certification at 25% and success at trial at 25%, resulting in a discounted realistic exposure of **\$815**. Khoury Dec. ¶38.

Employers must provide overtime wages at 1-1/2 times employee's regular rate of pay for hours worked over 8 per day or 40 per week. Labor Code §§ 510, 1194. Plaintiff alleges Grassdoor paid non-discretionary performance-based⁷ bonuses in the same pay periods that overtime wages were earned, but that Grassdoor did not factor these non-discretionary bonuses into Class Members' regular rates of pay for the purpose of calculating and paying their

⁵ Plaintiff's realistic recovery as discussed below is estimated at \$484,904 based on the following: \$815 (unpaid minimum wages); \$3,171 (underpaid overtime wages); \$105,936 (meal period premiums); \$91,428 (rest period premiums); \$12,922 (cell phone reimbursement); \$10,698 (mileage reimbursement); \$226,800 (derivative wage statement penalties); \$33,134 (derivative waiting time penalties) The GSA is 72% of \$484,904.

⁶ Calculated by assuming 1 minute underpaid per shift x 50,741 shifts in Class Period = 50,741 minutes underpaid / 60 minutes = 845.68 hours underpaid x \$15.43 (average hourly rate) = \$13,049.

⁷ For instance, Plaintiff received a bonus from Grassdoor for showing up on a day on which drivers were especially needed.

overtime wages. Rather, Grassdoor paid overtime wages at exactly 1-1/2 times the Class Members' base hourly rates of pay, regardless of whether they received a bonus in the same pay period; thus underpaying overtime wages during these pay periods. Plaintiff's damages' consultant used Class Member pay records to calculate and extrapolate to the Class, the amount of underpaid overtime wages at \$5,637. Khoury Dec. ¶39. Grassdoor contends that all overtime worked was properly paid, that no evidence exists of a policy or practice of underpaying overtime, and further that this claim is not amenable to class treatment. Plaintiff estimated probability of certification at 75% and success at trial at 75%, resulting in a discounted realistic exposure of **\$3,171**. Khoury Dec. ¶40.

2. Meal Periods—Labor Code §§ 226.7, 512

Employers must provide a first uninterrupted 30-minute meal period before the end of the fifth hour of work and a second such meal period before the end of the tenth hour of work. Labor Code § 512; *see also Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1005. Otherwise, the employer owes one hour of pay to the employee at their regular rate of pay. Labor Code § 226.7. If records show a missed, late, short, or interrupted meal period there is a presumption of liability, which the employer may rebut. *Donohue v. AMN Servs., LLC* (2021) 11 Cal. 5th 58, 77. Grassdoor's time records showed (1) no meal breaks on 55.6% of shifts longer than 6 hours (\$394,006 premiums owed); (2) late first meal breaks on 1.0% of shifts over 5 hours (\$3,540 premiums owed); (3) short first meal breaks on 0.3% of shifts over 5 hours (\$1,062 premiums owed); and (4) no second meal break on 98.3% of shifts over 10 hours (\$44,958 in premiums owed), yielding an exposure of \$423,743⁸. However, recognizing only one meal period premium may be owed per shift, regardless of the number of meal period violations suffered, and that a second meal period may be waived if the first meal period is taken, a more appropriate exposure figure of \$378,785 was calculated, subtracting the premium wages for failure to provide a second meal period. Khoury Dec. ¶41. Grassdoor asserts its meal break policies and practices were compliant with California law, including the use of meal

⁸Although adding the four values above yields damages of \$443,566.00, Plaintiff's consultant determined total damages of \$423,743.00 for *unique* meal period violations, given that some violations overlapped.

1 period waivers and the payment of meal period premiums, and further that this claim is not
2 amenable to class treatment. On this claim, Plaintiff estimated probability of certification at
3 75% and success at trial at 75%, resulting in a discounted realistic exposure of **\$105,936**.
4 Khoury Dec. ¶42.

5 **3. Rest Periods— Labor Code §§ 226.7**

6 Employers must authorize and permit a first uninterrupted 10-minute rest break after
7 three and one-half (3.5) hours worked, a second such rest break after six (6) hours worked, and
8 a third such rest break after ten (10) hours worked. Labor Code § 226.7; *see also Brinker Rest.*
9 *Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1029. Otherwise, the employer owes one hour
10 of pay to the employee at their regular rate of pay. Labor Code § 226.7. For part the period from
11 September 14, 2020 forward, Grassdoor maintained clock-in and clock-out records for
12 employee rest periods. Grassdoor provided these time records for 32 employees. Using these
13 records, Plaintiff's consultant calculated a 22.5% violation rate⁹, resulting in 10,534 unpaid rest
14 break violations when extrapolated over the entire Class Period. Khoury Dec. ¶43. No rest
15 period premiums were paid according to these records. Khoury Dec. ¶44. Thus, Grassdoor's
16 maximum exposure was calculated as \$162,539.62 (10,534 violations x \$15.43 average rate of
17 pay). Khoury Dec. ¶45. Grassdoor contends its policies and practices were compliant with
18 California law, and further that this claim is not amenable to class treatment. Plaintiff estimated
19 probability of success at certification at 75%, given the defense arguments and that no records
20 exist to support the claim for the major part of the Class Period, and victory at trial at 75%,
21 resulting in a discounted realistic exposure of **\$91,428**. Khoury Dec. ¶46.

22 **4. Reimburse Business-Related Expenses—Labor Code § 2802**

23 An employer must reimburse an employee's reasonable business-related expenses.
24 Labor Code § 2802. Plaintiff alleges Defendants failed to adequately reimburse Class Members
25 for business-related personal cell phone and mileage expenses. Khoury Dec. ¶47.

26 **(a). Cell Phones.** A reasonable percentage of an employee's cell
27

28 ⁹ Plaintiff's consultant determined 11.6% of first rest breaks were missed, 19.7% of second rest breaks
were missed, and 98.4% of third rest breaks were missed.

1 phone charges, which vary in each case, must be reimbursed. *Cochran v. Schwan's Home*
2 *Services, Inc.* (2014) 228 Cal. App. 4th 1137, 1145 (2014). Employees were required to use
3 their personal cell phones to receive product orders through Grassdoor's phone application, to
4 use the GPS to navigate to customer locations, call and text customers about their orders, and
5 call and text managers about deliveries. Not until March 22, 2020, did Grassdoor
6 reimbursement Class Members, after which it paid \$30 per month to full-time drivers and \$25
7 per month to part-time drivers. The average U.S. cell phone bill is estimated at \$70 per month¹⁰.
8 Plaintiff estimated 50% of the time, he used his personal cell phone for work. Using \$35 per
9 month for the period September 11, 2019 through March 22, 2020 and \$7.50 per month for the
10 period from March 23, 2020 through April 14, 2021 (splitting the difference between \$5 and
11 \$10 deficiency for full time and part time drivers thereafter), maximum exposure was calculated
12 at \$51,688¹¹. Grassdoor contends that at all times its policies and practices regarding
13 reimbursing employees for necessary business expenses were in compliance with California
14 law, and further that this claim is not amenable to class treatment. Given the need for
15 individualized inquiries as to employees' monthly cell phone bill amounts and the amount of
16 time spent using personal cell phones for work, a Court may deny certification. Based on these
17 concerns, Plaintiff estimated probability of certification at 50%, and success at trial at 50%,
18 resulting in a discounted realistic exposure of **\$12,922**. Khoury Dec. ¶48.

19 (b). **Mileage.** From the beginning of the Class Period, July 19, 2019
20 to December 19, 2019, Grassdoor paid drivers \$5 per hour as mileage reimbursement.
21 Thereafter, Grassdoor paid mileage at the federal rate. Mileage was calculated by using Google
22 Maps to determine the mileage drivers drove for deliveries, with .7 miles added to all deliveries
23 as a buffer. Because employees had to pack their product orders a few blocks away from the
24 customer's delivery address for security purposes, Grassdoor automatically added one mile to
25 their mileage reimbursement as a buffer if an order was given to a driver within 1.5 miles of
26 their current location. Khoury Dec. ¶49. Plaintiff contends the reimbursement paid for the
27

28 ¹⁰ <https://www.usmobile.com/blog/cut-cell-phone-bill/>

¹¹ Calculated at 1,105 months x \$35 = \$38,675 plus 1,735 months x \$7.50 = \$13,013.

1 period from July 19, 2019 to December 19, 2019 was insufficient. Grassdoor's records reflect
2 drivers drove on average at least 75 miles per day, assuming they worked eight hours per day¹²
3 and were paid \$40 (\$5/hr x 8 hrs). However, at the 2019 federal mileage rate of \$.58, Class
4 Members were entitled to \$43.50 per day. Plaintiff contends Grassdoor is liable to each driver
5 for \$3.50 for each shift worked prior to December 19, 2019. Khoury Dec. ¶50.

6 Maximum exposure on this claim was estimated at \$42,791, [12,226 shifts prior to
7 December 19, 2019 x \$3.50]. Grassdoor contends its policies and practices regarding
8 reimbursing employees for necessary business expenses were in compliance with California
9 law, and that this claim is not amenable to class treatment. Plaintiff estimated probability of
10 certification at 50%, and success at trial at 50%, resulting in a discounted realistic exposure of
11 **\$10,698**. Khoury Dec. ¶51.

12 **5. Derivative Claim: Wage Statements— Labor Code § 226**

13 Employers must provide their employees with accurate itemized wage statements
14 showing, among other things, gross and net wages earned. Labor Code §226(a)(1)(5)(9).
15 Otherwise, each Class Member is entitled to recover \$50 for the first violation and \$100 for
16 each subsequent violation, with a maximum aggregate penalty of \$4,000. §226(e). Plaintiff
17 alleges his wage statements were non-compliant because they failed to show all wages earned
18 due to unrecorded and unpaid time prior to and after clocking in, regular rate miscalculation for
19 the payment of overtime wages, and failure to pay meal and rest break premiums. To recover on
20 this derivative claim, Plaintiff must prevail on the underlying claims and to show any violation
21 was knowing, intentional, or willful. *Pedroza v. PetSmart, Inc.* (C.D. Cal. June 14, 2012) 2012
22 U.S. Dist. LEXIS 189530 *20. Unpaid meal and rest period premiums do not give rise to wage
23 statement penalties. *Naranjo v. Spectrum Security Services, Inc.* 40 Cal. App. 5th 444, 474
24 (2019) review granted, 2020 Cal. LEXIS 167 (January 2, 2020) ("Naranjo"). During discovery,
25 Grassdoor provided Plaintiff with credible evidence he was paid for all time worked. Further,
26 the good faith defense to willfulness is clearly established under California law. *Nordstrom*
27

28 ¹² Plaintiff's consultant assessed the average number of hours worked per shift by Class Members was eight hours.

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

4 Defendant argues that because it did not receive notice of an initial violation, the
5 subsequent violation rate should not be awarded. *Amaral v. Cintas Corp. No. 2* (2008) 163
6 Cal.App.4th 1157, 1209 holding the 'subsequent violation rate' rate cannot be assessed until
7 Defendant has been put on notice of the violation. Thus, Plaintiff multiplied 18,144, the number
8 of Pay Periods going back one-year from the date of filing by the \$50 initial rate, yielding a
9 maximum exposure of \$907,200. Assuming Plaintiff prevailed on the underlying claims,
10 Plaintiff estimated probability of certification at 50% and probability of prevailing at trial at
11 50%, resulting in a discounted realistic exposure of **\$226,800**. Khoury Dec. ¶52.

12 **6. Derivative Claim: Waiting Time Penalties —Labor Code § 203**

13 If an employer willfully fails to timely pay all wages to separate employees, the wages
14 continue at the same rate for up to 30 days. Former employees are entitled to waiting time
15 penalties. The statute of limitations is three years. Labor Code § 203(b). A failure to pay wages
16 is "willful" when an employer intentionally fails to pay wages to an employee when those
17 wages are due. However, a good faith dispute that any wages are due will preclude imposition
18 of waiting time penalties under Labor Code § 203. Final wages must be paid to an involuntarily
19 terminated employee at the time of termination, or within 72 hours to an employee voluntarily
20 terminating. Labor Code §§ 201-202. For the 72 formerly employed Class Members (in the
21 period three years from filing), penalties of \$265,075 (8 hrs/day x \$15.34/hr x 30 days x 72
22 former EEs) were calculated. Khoury Dec. ¶53.

23 Plaintiff's claim for unpaid wages supports this derivative claim. Rest and meal period
24 premiums do not. *Naranjo*, 40 Cal. App. at 474. To recover waiting time penalties, Plaintiff
25 must prove wages owed were willfully not paid. Subject to Defendant's "good faith" defense, a
26 Court could find Grassdoor had a good faith belief it was paying all wages due which would
27 preclude imposition of waiting time penalties under Section 203. *Hill v. Walmart Inc.* (N.D.
28 Cal. January 14, 2021) 2021 U.S. Dist. LEXIS 20950, *17. Plaintiff's realistic exposure was

discounted by 50% for the risk in obtaining certification and discounted by 75% for purposes of Settlement, reducing the realistic exposure to **\$33,134**. Khoury Dec. ¶54.

7. PAGA Penalties— Labor Code § 2698, et seq.

Labor Code § 2699(f)(2) provides for civil penalties for violations of the Labor Code for which there is no corresponding civil penalty. The civil penalty is \$100 for the initial violation and \$200 for each subsequent violation for each underpaid employee in addition to “an amount sufficient to recover underpaid wages.” Labor Code §2699(f)(2). Plaintiff seeks PAGA penalties for all violations of the Labor Code, of which 75% would be paid to the state and 25% to the PAGA Members. Thus, in wage and hour class action cases that settle, [] very little of the total settlement is paid to PAGA penalties in order to maximize payments to class members.” *Magadia v. Wal-Mart Assocs.*, 384 F. Supp. 3d 1058, 1101 (2019) disapproved on other grounds, *Magadia v. Wal-Mart Assocs.*, 999 F.3d 668 (9th Cir., November 19, 2020); see also *Mejia v. Walgreen Co.*, 2020 U.S. Dist. LEXIS 220685, *26 (E.D. Cal. Mar. 24, 2021) (citations omitted) (noting “[C]ourts frequently approve settlements in wage and hour class action and PAGA actions that minimize the total amount of the settlement that is paid to PAGA penalties in order to maximize payments to class members.”)

With 18,144 Pay Periods in the PAGA Period, and using the initial violation rates¹³ for the 604 PAGA Members, maximum penalties were assessed for violations of Labor Code §§510, 1194 (minimum wages (\$100 / Pay Period (“PP”) at \$1,814,400, and overtime wages (\$100 / PP) at \$1,814,400; Labor Code §§226.7, 512 (meal) (\$100/PP at \$1,814,400; Labor Code §226.7 (rest) (\$100/PP) at \$1,814,400; Labor Code §351 (unlawful deduction of tips)¹⁴ (\$100/PP) at \$1,814,400; and Labor Code § 226 (wage statements) (\$250 / Pay Period) at \$4,536,000. Using initial violation rates for 4,536 PAGA Pay Periods in which PAGA Members did not receive proper expense reimbursements for violation of Labor Code §2802, and assuming expenses should have been reimbursed at least monthly (18,144 /4 = 4,536 Pay

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

¹⁴ There is no private right of action under the Labor Code for violation of Labor Code §351.

Periods), maximum penalties were assessed for violations of (expense reimbursements) (\$100/ Pay Period): \$453,600. Khoury Decl. ¶55. Finally, waiting time PAGA Penalties were assessed at \$7,200 (\$100 /final Pay Period x 72 former employees separated in PAGA Period). *Id.*

A court has authority to completely reduce penalties, as long as not to “zero.” *Thurman v. Bayshore Transit Management, Inc.*, 203 Cal. App. 4th 1112, 1135 (2012). *See Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504, 517 (2018) (Plaintiff requested “nearly \$70 million in penalties;” trial court’s \$150,000 award upheld on appeal). Plaintiff believed reasonable exposure was no more than 1% of maximum exposure, or **\$122,544** based on factors considered in determining reasonable exposure for Class claims, the discretionary nature of PAGA penalties, and Court ability to reduce penalties to nearly zero, and that “courts have inherent authority to ensure that PAGA claims can be fairly and efficiently tried and, if necessary, may strike a claim that cannot be rendered manageable.” *Wesson v. Staples the Office Superstore, LLC*, 2021 Cal. App. LEXIS 743, *18 (September 9, 2021).

The \$5,000 PAGA Payment representing 1.4% of the \$350,500 settlement amount, is well within the range approved by California courts. *See Alcala v. Meyer Logistics, Inc.*, 2019 LEXIS 166879, *26 (C.D. Cal. June 17, 2019) (PAGA penalties 1.25% of settlement reasonable as “within the zero to two percent range for PAGA claims approved by courts.”); *In re M.L. Stern Overtime Litig.*, 2009 LEXIS 31650, *1 (S.D. Cal. Apr. 13, 2009) (PAGA penalties 2% of settlement reasonable); *Magadia, Id.*, at 1101, citing, among others, *Ceja-Corona v. CVS Pharm., Inc.*, 2015 U.S. Dist. LEXIS 5118 (E.D. Cal. Jan. 14, 2015) (\$10,000 PAGA penalties in \$900,000 settlement, or 1.1% of settlement, reasonable, recommendation adopted, 2015 U.S. Dist. LEXIS 25730 (E.D. Cal. Mar. 3, 2015). The LWDA was served with this preliminary approval motion on the same day it was filed with Court. Khoury Dec. ¶62, Exh. 3.

VIII. CLASS CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE

Before granting class certification for settlement, the Court must find the proposed Class satisfies the requirements of Code of Civil Procedure §382. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 237-38 237 (2001). The parties must show the existence of “an ascertainable class and a well-defined community of interest among class members.” *Sav-On*

1 *Drug Stores v. Super. Ct.* 34 Cal. 4th 319, 326 (2004). The “community of interest” element
2 embodies three factors: (1) predominant common questions of law or fact; and, (2) a class
3 representative with claims typical of the class; (3) who can adequately represent the class. *Id.*
4 The court must also determine a class action proceeding is the superior means for fair and
5 efficient adjudication of the litigation. *Id.*; *Dunk*, 48 Cal. App. 4th at 1806. For settlement
6 purposes, each of these prerequisites must be met. *See Wershba*, 91 Cal. App. 4th at 237-38.

7 **A. The Proposed Settlement Class Is Ascertainable and Numerous**

8 Grassdoor can easily identify Class Members through their records. Khoury Dec. ¶57.
9 The Class is numerous with 606 members. *Rose v. City of Hayward*, 126 Cal. App. 3d 926, 934
10 (1981). Joinder of these individuals would be impracticable and a Class-wide proceeding is
11 preferable and superior. Khoury Dec. ¶58.

12 **B. The Proposed Settlement Class Comprises a Community of Interest**

13 A community of interest exists where (1) legal or factual questions common to the Class
14 predominate over questions affecting individual Class Members; (2) claims of the Class
15 Representatives are typical of the claims or defenses of the Class; and (3) the Class
16 Representatives are able to adequately and fairly protect the interests of the class. *Sav-on Drug*
17 *Stores, Inc., supra*, at 326; *Wershba*, 91 Cal. App. 4th at 238. The proposed Class satisfies these
18 three factors. First, Class Members were subject to the same policies which Plaintiff has alleged
19 caused damages to him and the Class, including whether they were paid for all time under
20 Defendant’s control, properly paid overtime wages by including non-discretionary bonuses
21 when calculating their regular rate of pay, and whether they premiums for missed, short or late
22 meal periods or rest breaks, and whether Defendant properly reimbursed business related
23 expenses for mileage and personal cellphone usage. Where the same alleged policies form the
24 basis for the claims of all Class Members, a plaintiff’s claims are common for settlement
25 purposes. *See Hanlon*, 150 F.3d at 1022. Khoury Dec. ¶59.

26 Second, Plaintiff’s claims are typical of the claims of Class Members. Plaintiff and all
27 Class Members assert the same legal theories and the same types of damages. Khoury Dec. ¶60.

28 Third, Plaintiff can adequately protect the interests of the Class. Khoury Dec. ¶61. *See*

1 *Wershba*, 91 Cal. App. 4th at 238. His counsel has no conflicts of interest, has vigorously
2 prosecuted this action on behalf of Plaintiff and the Class, and has significant experience
3 litigating employment wage and hour class actions. Plaintiff and the Class have co-extensive
4 claims, the terms of the Settlement apply to all Class Members equally, and no conflict exists
5 between them. Khoury Dec. ¶¶61, 62 *McGhee v. Bank of Am.*, 60 Cal. App. 3d 442, 450 (1976).

6 **IX. CONCLUSION**

7 Plaintiff Luis Lopez requests the Settlement be preliminarily approved, the Notice of
8 Class Action Settlement be approved and ordered disseminated to the Class, that Simpluris be
9 appointed Administrator, that Cohelan Khoury & Singer and Mesriani Law Group be appointed
10 Class Counsel, that Plaintiff be appointed the Class Representative, and that a Final Approval
11 Hearing date be set.

12 Respectfully submitted,

13 COHELAN KHOURY & SINGER
14 MESRIANI LAW GROUP

15
16 Dated: March 25, 2022

17 By: 
18 Diana M. Khoury
19 Attorneys for Plaintiff Luis Lopez and the Putative
20 Class
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