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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF KERN**

JOSE PABLO JIMENEZ, as an individual
and on behalf of all others similarly
situated,

Plaintiff,

vs.

NESTLE WATERS NORTH AMERICA,
INC., a Delaware corporation; and DOES
1 through 50, inclusive,

Defendants.

Case No.: BCV-20-102561

**PLAINTIFF JOSE PABLO JIMENEZ'S
NOTICE OF MOTION AND MOTION FOR
PRELIMINARY APPROVAL OF CLASS
AND REPRESENTATIVE ACTION
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT**

Date: April 6, 2022
Time: 8:30 a.m.
Division: J

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 6, 2022, at 8:30, a.m., or as soon thereafter as the matter may be heard, before the Honorable Eric J. Bradshaw, judge presiding, in Division J, of the above referenced Court located at 1215 Truxtun Avenue Bakersfield California 93301, Plaintiff Jose Pablo Jimenez (“Plaintiff”) will seek an Order:

(1) preliminarily approving the Joint Stipulation of Class and Representative Action Settlement (“Settlement Agreement” or “Settlement”) in this matter;

(2) conditionally certifying the following Class for settlement purposes only: all current and former non-exempt employees of Defendant Nestle Waters North America, Inc., now known as Blue Triton Brands, Inc. (“Defendant”), who worked in the State of California at any time during the period of May 6, 2016 through January 10, 2022;¹

(3) appointing Plaintiff as the Class Representative and Larry W. Lee, Kristen M. Agnew and Nicholas Rosenthal of Diversity Law Group, P.C. as Class Counsel;

(4) preliminarily approving the Settlement and the Maximum Settlement Amount of \$1,600,000.00;

(5) finding on a preliminary basis that the Settlement Agreement appears to be within the range of reasonableness of a settlement, including the amount of the PAGA penalties, Enhancement Payment to Plaintiff, Class Counsel’s fees and costs, the Settlement Administration Costs, and the allocation of payments to Class Members, that could ultimately be given final approval by this Court;

(6) approving the Notice of Proposed Class Action Settlement (“Notice Packet”) to be sent to Class Members, which is attached as an exhibit to the Settlement Agreement;

(7) approving the distribution of the Notice Packet to Class Members substantially in the manner and form set forth in the Settlement Agreement;

¹ The Class shall exclude (a) those Class Members who participated in the *Ortega et al. v. Nestle Waters North America, Inc.* (Los Angeles Sup. Ct. Case No. No. BC623610) settlement and separated employment on or before May 9, 2018, and (b) any pay periods on or before May 9, 2018 for those in the Class who participated in the Ortega Settlement and remained employed after May 9, 2018.

- 1 (8) appointing Phoenix Settlement Administrators as the settlement administrator; and
2 (9) setting the matter for a Final Fairness and Final Approval hearing.

3 This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which
4 provides for court approval of the settlement of a purported class action and allows the Court to
5 preliminarily certify a class for settlement purposes. The basis for this Motion, filed without any
6 opposition from Defendant, is that the proposed settlement is fair, adequate, and reasonable and
7 the procedures proposed by the parties are adequate to ensure the opportunity of class members to
8 participate in, opt-out of, or object to the settlement.

9 This Motion will be based on the attached Memorandum of Points and Authorities, the
10 Settlement Agreement, the proposed Notice Packet, and the supporting Declarations of Larry W.
11 Lee, Kristen M. Agnew, Nick Rosenthal, Plaintiff Jose Pablo Jimenez, and Phoenix Settlement
12 Administrators (Jodey Lawrence), and upon the oral arguments of counsel (should there be any)
13 and on the complete records and file herein.

14
15 DATED: February 28, 2022

DIVERSITY LAW GROUP, P.C.

16
17 By: _____

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

Attorneys for Plaintiff and the Class
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1 **I. INTRODUCTION**

2 Plaintiff Jose Pablo Jimenez (“Plaintiff”) respectfully requests that the Court grant
3 preliminary approval of the Joint Class and Representative Action Settlement (“Settlement
4 Agreement” or “Settlement”) that he has reached in the above-captioned matter with Defendant
5 Nestle Waters North America, Inc., now known as Blue Triton Brands, Inc. (Plaintiff and
6 Defendant collectively referred to as the “Parties”). The terms of the settlement provide that
7 Defendant shall pay the Maximum Settlement Amount of One Million Six Hundred Thousand
8 Dollars (\$1,600,000.00). **Significantly, the entire settlement amount is non-reversionary, such**
9 **that no monies will revert back to Defendant.** Further, the Class Members will not need to do
10 anything to participate in the settlement. The Parties believe that this amount is fair, adequate, and
11 reasonable, especially given the risks and uncertainty of trial and the merits of this case. Therefore,
12 the Parties respectfully request that the Court grant this Motion for Preliminary Approval of Class
13 and Representative Action Settlement.

14 **II. FACTUAL AND PROCEDURAL BACKGROUND**

15 **A. The Complaint**

16 On November 2, 2020, Plaintiff filed a class and representative action complaint
17 (“Complaint”) in Kern County Superior Court, Case No. BCV-20-102561, naming Nestle Waters
18 North America as a defendant.² Declaration of Kristen M. Agnew (“Agnew Decl.”) ¶ 2. As set
19 forth in the Complaint, Plaintiff alleged that Defendant maintained a policy and practice of: (1)
20 failing to pay overtime at the regular rate of pay, in violation of California Labor Code sections
21 510, 558, and 1194; (2) failing to provide off-duty meal periods and/or pay meal period premiums
22 at the regular rate of pay, in violation of California Labor Code sections 226.7 and 512; (3) failing
23 to provide off-duty rest periods and/or pay rest period premiums at the regular rate of pay, in
24 violation of California Labor Code section 226.7; (4) failing to pay all earned wages upon
25 termination, including sick pay, in violation of Labor Code sections 201, 202, and 203; (5) failing
26

27 ² October 16, 2020, Plaintiff filed a letter with the Labor Workforce & Development Agency
28 (“LWDA”) alleging that Defendant had violated Labor Code sections 201-203, 204, 226(a), 226.7,
246, 510, 512, 558, and 1194. Agnew Decl. ¶ 1.
8

1 to provide accurate itemized wage statements, in violation of Labor Code section 226(a); and (6)
2 engaging in unfair business practices, in violation of California Business and Professions Code
3 section 17200, *et seq.* (“UCL”). *Id.* Plaintiff also sought derivative civil penalties pursuant to
4 California Labor Code section 2698, *et seq.*, the Private Attorneys General Act (“PAGA”). *Id.*

5 **B. Defendant Removes the Action to Federal Court**

6 On December 14, 2020, Defendant filed a Notice of Removal in the United States District
7 Court for the Eastern District of California, pursuant to 28 U.S.C. section 1332(d)(2) (Class Action
8 Fairness Act [“CAFA”]), thereby effectuating the removal of the Action to Federal Court. Agnew
9 Decl. ¶ 4.

10 Following the removal, the Parties met and conferred to discuss the factual allegations and
11 the merits of their respective claims and defenses. Agnew Decl. ¶ 9. Defendant expressed its view
12 that the overtime and meal/rest break claims of Plaintiff, and other putative class members, were
13 preempted by the Federal Motor Carrier Safety Act (“FMSCA”) and applicable Department of
14 Transportation (“DOT”) regulations. *Id.* at 10. Defendant also raised the prior court-approved class
15 action settlement in *Ortega et al. v. Nestle Waters North America, Inc.*, (Los Angeles Sup. Ct. Case
16 No. No. BC623610) as a partial bar to liability. *Id.* at 11. *Ortega* resulted in a class action and
17 PAGA settlement on behalf of all current and former non-exempt employees of Defendant who
18 worked in various positions from June 10, 2012 to May 9, 2018. *Id.* The claims resolved included
19 the same claims as alleged here for unpaid meal and rest periods, unpaid overtime and minimum
20 wages, unlawful wage statements, unpaid wages due at termination, and claims under PAGA. *Id.*

21 Additionally, the Parties engaged in both formal and informal discovery. Agnew Decl. ¶¶
22 12, 13. Amongst other relevant topics, the discovery required Defendant to provide documents and
23 information relevant to class certification, including the number of putative class members, payroll
24 records of putative class members, Defendant’s policies and procedures with respect to the
25 calculation of the regular rate of pay used to calculate overtime wages, sick pay earnings and meal
26 and rest period premiums, and policies governing when and how putative class members were
27 provided meal and rest periods. *Id.*

28 ///

1 **C. The Parties Participate in Mediation**

2 On or about May 7, 2021, the Parties agreed to engage in private mediation with a third-
3 party neutral and agreed to stay the Action, including formal discovery. Agnew Decl. ¶ 14. In
4 advance of the mediation, Defendant produced extensive payroll data. *Id.* ¶ 15. With the assistance
5 of an expert witness, Plaintiff’s Counsel was able to use the payroll and time records to create a
6 full damage analysis. *Id.* ¶¶ 16, 34.

7 On October 12, 2021, the Parties participated in a full day mediation with the Honorable
8 Brian C. Walsh (Ret.). Agnew Decl. ¶ 17. After continued arm’s length negotiations, facilitated
9 by the mediator, the Parties reached a settlement in principle and entered into a Memorandum of
10 Understanding. *Id.*³

11 **D. The Operative First Amended Complaint**

12 As a condition of settlement, Plaintiff further agreed to file a Supplemental PAGA Notice
13 and amended Complaint. Agnew Decl. ¶ 18. The Supplemental PAGA Notice clarifies that, as a
14 result of the work performed during unpaid meal periods, Defendant failed to pay wages for all
15 hours worked. *Id.* ¶ 6. The Supplemental PAGA Notice also included an additional allegation that
16 Defendant rounded employee time, in violation of Labor Code sections 510, 558, 1194, 1197, and
17 1197.1. *Id.*⁴ On February 7, 2021, Plaintiff filed the operative First Amended Complaint to add
18 these additional allegations. *Id.* ¶ 7.

19 **III. SUMMARY OF THE CURRENT SETTLEMENT**

20 The material terms of the settlement are described below and set forth in detail in the
21 Settlement Agreement. A true and correct copy of the Settlement Agreement is attached to the
22 Declaration of Kristen M. Agnew as Exhibit A.

23
24
25 ³ As a condition of settlement, the Parties also agreed to the remand of the Action to this Court.
26 Agnew Decl. ¶ 18. Pursuant to the Parties’ Joint Stipulation to Remand, the Action was
remanded to this Court, on December 6, 2021. *Id.* ¶ 5.

27 ⁴ Class Counsel retained an expert to review the payroll data and perform a comprehensive
28 damage analysis in preparation for mediation. Agnew Decl. ¶ 16. The expert opined that it
appeared that, on occasion, Defendant paid wages based on the rounded the punch in and out
times of putative class members. *Id.*

1 **A. The Class Definition**

2 The proposed Class consists of all current and former non-exempt employees of Defendant
3 who worked in the State of California at any time during the period of May 6, 2016 through January
4 10, 2022 (the “Class Period”). Settlement Agreement (“SA”) § A-3.⁵ Defendant represents that
5 there 1,807 Class Members who collectively worked approximately 112,693 pay periods during
6 the Class Period. SA § D-2.

7 **B. The Maximum Settlement Amount**

8 The Settlement provides for the gross settlement amount (“Maximum Settlement
9 Amount”) of One Million Six Hundred Thousand Dollars (\$1,600,000.00). SA § A-18. The
10 Settlement allocates Fifty Thousand Dollars (\$50,000.00) of the Maximum Settlement Amount to
11 resolve all claims, penalties, and remedies under the PAGA. *See* SA § A-24. Pursuant to PAGA,
12 seventy-five percent of the PAGA Payment, *i.e.*, the sum of Thirty-Seven Thousand Five Hundred
13 Dollars (\$37,500.00), will be paid to the California Labor and Workforce Development Agency
14 (“LWDA”). *Id.* The remaining twenty-five percent of the PAGA Payment, *i.e.*, the sum of Twelve
15 Thousand Five Hundred Dollars (\$12,500.00), will be distributed to PAGA Group Members. *Id.*

16 **C. The Calculation of the Individual Class Settlement Payment**

17 The balance of the Maximum Settlement Amount remaining after deduction of the
18 approved Service Payment to Plaintiff, Settlement Administration Costs, the PAGA Payment, and
19 Class Counsel Award (“Net Settlement Amount”), will be available for distribution to Participating
20 Settlement Class Members. SA § A-19. The Parties currently estimate that the Net Settlement
21 Amount will be at least \$952,750.00. Agnew Decl. ¶ 29. Class Members do not need to do anything
22 should they wish to receive their share of the settlement funds. *See* SA § E-5.

23 The amount allocated to each Settlement Class Member (*i.e.*, those Class Members who
24 do not opt-out) will be based on the number of pay periods he or she worked during the Class
25

26 _____
27 ⁵ In light of the *Ortega* release, the Class excludes: (a) those Class Members who participated in
28 the *Ortega* Settlement and separated employment on or before May 9, 2018; and (b) any pay
periods on or before May 9, 2018 for those in the Class who participated in the *Ortega* Settlement
and remained employed after May 9, 2018. SA § A-3; Agnew Decl. ¶ 11.

Period. See SA § D-10. Based on the size of the Class, the number of pay periods at issue and the Maximum Settlement Amount, Class Members will be entitled to recover, on average, up to approximately \$527.25 each or \$8.45 per pay period worked during the Class Period, after deductions for the PAGA Payment, Enhancement Payment to Plaintiff, attorneys' fees, and costs. Agnew Decl. ¶ 30. The amount any particular Class Member will be entitled to recover will be greater or lower than this average depending on the number of pay periods he or she worked during the Class Period, with some entitled to receive more, and others less. *Id.* This is fair, as it directly allocates greater recovery to individual Class Members who have allegedly suffered greater harm. *Id.*

The Settlement Agreement provides that all Individual Class Settlement Payments shall be allocated as 20% to W-2 wages and 80% to interest and penalties. SA § D-15.

D. The Calculation of the Individual PAGA Settlement Payments

Consistent with the requirements of PAGA, the Settlement Agreement requires that twenty-five percent of the PAGA Payment (the "Net PAGA Penalty") will be paid to PAGA Group Members. SA § D-8. The amount allocated to each PAGA Group Member will be based on the number of pay periods he or she worked during the PAGA Period. SA § D-8. All Individual PAGA Settlement Payments shall be allocated 100% as penalties. SA § D-14.

E. The Settlement is Non-Reversionary

This is a non-reversionary settlement as the entirety of the Maximum Settlement Amount will be fully paid out. SA §§ D-1, D-12. Any individual settlement payments to Settlement Class Members or PAGA Group Member that remain un-cashed within one hundred eighty (180) days of the mailing of settlement checks by the Settlement Administrator will be paid to the *cy pres* recipient Legal Aid at Work, pursuant to California Code of Civil Procedure section 384. SA § D-12.

F. Attorneys' Fees and Reimbursement for Litigation Costs

As part of the Settlement, Defendant does not object to Class Counsel's request for attorney's fees up to thirty-five percent (35%) of the Maximum Settlement Amount, *i.e.*, the sum of Five Hundred Sixty Thousand Dollars (\$560,000.00), plus up to Twenty Thousand Dollars

1 (\$20,000.00) for reimbursement of litigation costs, subject to the Court finally approving this
2 Settlement. SA § A-5.

3 **G. Enhancement Payment to Plaintiff**

4 Pursuant to the terms of the Settlement Agreement, and without opposition from
5 Defendant, Plaintiff is entitled to request an Enhancement Payment of Ten Thousand Dollars
6 (\$10,000.00). SA § A-14. Both Plaintiff and Class Counsel expressly acknowledge that the Court
7 has final discretion in any fee award or Enhancement Payment. SA § A-14.

8 **H. Settlement Administration Costs**

9 Finally, the Settlement provides for the payment of the fees and expenses reasonably
10 incurred by the Settlement Administrator. SA § D-6. The Parties have received a quote from
11 Phoenix Settlement Administrators for a fee of approximately Seven Thousand Two Hundred Fifty
12 Dollars (\$7,250.00). SA § D-6; Declaration of Jodey Lawrence (“Lawrence Decl.”) ¶ 8, Ex. B.
13 Any portion of the Settlement Administration Costs not used or approved by the Court shall be
14 added to the Net Settlement Amount. SA § D-6.

15 **I. Scope of the Settlement Class Members’ Release**

16 The scope of the release, as listed below, is identified in the Settlement at section A-29, as
17 well as in the Notice Packet that will be sent to Settlement Class Members. Upon the deposit of
18 the Maximum Settlement Amount into a Qualified Settlement Fund, Plaintiff and all Participating
19 Settlement Class Members will release the following:

20 any claims for wages, premiums, fringes, liquidated damages, or penalties alleged
21 or that could have been alleged against Released Parties arising out of the facts,
22 circumstances, and primary rights at issue in the operative complaint and any
23 amendments, including all claims for: (1) failure to pay overtime wages, including
24 claims for unpaid time and off-the-clock work, in violation of Labor Code sections
25 510, 558, and 1194; (2) failure to pay minimum wages, including claims for unpaid
26 time and off-the-clock work, in violation of Labor Code sections 1194, 1197 and
27 1197.1; (3) failure to provide meal periods and properly calculate the rate of
28 compensation on premiums paid, in violation of Labor Code sections 226.7 and
512; (4) failure to provide rest periods and properly calculate the rate of
compensation on premiums paid, in violation of Labor Code section 226.7; (5)
failure to pay or properly calculate sick pay wages, in violation of Labor Code
section 246; (6) failure to pay wages during employment and upon termination, in
violation of Labor Code sections 201, 202, 203 and 204; (7) failure to provide

accurate itemized wage statements, in violation of Labor Code section 226(a); and (8) violations of California's unfair competition law (Business and Professions Code section 17200, et seq.) predicated on the above alleged violations. The Released Class Claims covers claims that accrued during the Class Period.

SA §§ A-29, F-2. As shown, the scope of the release is narrow and is limited to the claims asserted in the Complaint, on behalf of Settlement Class Members. Significantly, the Agreement does not release the claims of Class Members who are not members of the Settlement Class.

J. Scope of the PAGA Members' Release

The Settlement Agreement includes a separate PAGA release. SA § A-30. As shown below, the Released PAGA Claims is narrowly tailored to encompass the PAGA claims alleged in the Action:

"Released PAGA Claims" means all claims for penalties under the California Private Attorneys' General Act, Labor Code section 2698 et. seq. alleged or that could have been alleged against Released Parties arising out of the facts, circumstances, and primary rights at issue in the operative complaint and any amendments, including all claims for (1) failure to pay overtime wages, including claims for unpaid time and off-the-clock work; (2) failure to pay minimum wages, including claims for unpaid time and off-the-clock work; (3) failure to provide meal periods and properly calculate the rate of compensation on premiums paid; (4) failure to provide rest periods and properly calculate the rate of compensation on premiums paid; (5) failure to pay or properly calculate sick pay wages (6) failure to pay wages during employment and upon termination; and (7) failure to provide accurate itemized wage statements during the PAGA Period.

SA §§ A- 30, F-3. The Released PAGA Claims will be set forth in the Class Notice that will be sent to Class Members. See SA Ex. A. Class Members may not opt out of or be excluded from participating in the settlement of the Released PAGA Claims. SA § E-8. However, all Class Members will receive a portion of the Net PAGA Penalty – even if the employee opts out of the Settlement Class. SA § E-7.

IV. THE COURT SHOULD GRANT PRELIMINARY APPROVAL OF THE SETTLEMENT

To prevent fraud, collusion, or unfairness to the class, the settlement of a class action requires court approval. *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1800-01 (1996) . In

1 considering whether a settlement is reasonable, the trial court should consider relevant factors,
2 which may include the strength of plaintiff's case, the risk, expense, complexity and likely duration
3 of further litigation, the risk of maintaining class action status through trial, the amount offered in
4 settlement, the extent of discovery completed and the stage of the proceedings, the experience and
5 views of counsel, the presence of a governmental participant, and the reaction of the class members
6 to the proposed settlement. *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 128 (2008).

7 In order to approve a class action settlement, the court must satisfy itself that the class
8 settlement is within the "ballpark" of reasonableness. *Kullar*, 168 Cal. App. 4th. at 133. The record
9 need not contain an explicit statement of the maximum theoretical recovery. *Munoz v. BCI Coca-*
10 *Cola Bottling Co. of Los Angeles*, 186 Cal. App. 4th 399, 408-9 (2010).

11 **A. The Settlement Was Reached Through Arm's Length Negotiations Between**
12 **Experienced Wage and Hour Attorneys**

13 As demonstrated in Section II *supra*, the settlement is a result of arms' length negotiations.
14 The Parties attended a full-day mediation with experienced wage and hour mediator, Honorable
15 Brian C. Walsh (Ret.). Agnew Decl. ¶ 17. Both during and prior to the mediation, the Parties spoke
16 at length about the strengths and weaknesses of each sides' claims and defenses, whether the claims
17 could be certified, and the scope of Defendant's liability. *Id.* ¶¶ 10, 11, 35-49. With the assistance
18 of Judge Walsh, the Parties reached an agreement for a global resolution of the Action. *Id.* ¶ 17.

19 **B. The Parties Engaged in Significant Investigation and Discovery**

20 As demonstrated in Section II *supra*, Plaintiff engaged in extensive investigation and
21 discovery regarding the merits of the claim and Defendant's defenses. Agnew Decl. ¶¶ 8-16.
22 Additionally, in advance of mediation, Defendant produced extensive payroll data for each Class
23 Member, which allowed counsel for Plaintiff to conduct a full damages and penalty analysis. *Id.*
24 ¶¶ 15, 16.

25 **C. The Strengths and Weaknesses of the Class and Representative PAGA Claims**

26 **1. The Strengths and Weaknesses of the Overtime Claim**

27 Pursuant to California law, employers must include all non-discretionary items of pay,
28 including incentive pay and/or bonuses, into the regular rate of compensation or pay. Cal. Division

1 of Labor Standards Enforcement (“DLSE”) Enforcement Policies and Interpretation Manual at §§
2 49.1, 49.2.4 (June 2002); *Marin v. Costco Wholesale Corp.*, 169 Cal. App. 4th 804, 807 (2008), as
3 modified on denial of reh’g (Jan. 21, 2009).

4 Here, Defendant paid a variety of quarterly and monthly bonuses to Class Members,
5 including Plaintiff, other drivers, and sales representatives. Agnew Decl. ¶ 35. There is no dispute
6 that these are non-discretionary incentive wages, which are required to be incorporated into the
7 regular rate of pay. However, the Parties disagree as to whether these incentive wages were
8 included in the regular rate of pay for purposes of calculating overtime wages. *Id.* ¶ 36. Defendant
9 maintains that, as a matter of policy, it adjusted the regular rate of pay to account for non-
10 discretionary bonuses. *Id.* More specifically, the bonuses included a retroactive true-up to adjust
11 the overtime rate. *Id.* Defendant further maintains that it calculated these true-up payments at the
12 flat-sum bonus rate under *Alvarado v. Dart Container Corp. of Cal.*, 4 Cal. 5th 542 (2018), such
13 that the rate was not diluted by overtime hours. Defendant provided confirmatory evidence to
14 support this defense, including wage statements and the formula used to calculate the incentive
15 payments. *Id.*

16 Defendant further maintains that the overtime claim is preempted by the FMSCA and DOT
17 regulations. Agnew Decl. ¶ 37. These laws preempt overtime claims where the individual (a) was
18 employed by a motor carrier registered with the Department of Transportation, (b) engaged
19 through his or her job duties in activities that affect the safety of the motor vehicle operation, and
20 (c) engaged in the transport of property in interstate commerce. *See* 29 U.S.C. § 213(b)(1); 29
21 C.F.R. § 782.2; 49 U.S.C. 13501, *et seq.*; IWC Wage Order 9, § 3(L)(1); Cal. Code Regs. tit. 8, §
22 11090(3)(L). Here, Defendant contends that Plaintiff and other putative class members who were
23 drivers fall squarely within these requirements. Agnew Decl. ¶ 37. Defendant presented
24 confirmatory evidence that it is a licensed DOT carrier and Plaintiff and other drivers operated
25 covered commercial motor vehicles. *Id.* Defendant also produced documents demonstrating that
26 Plaintiff and other drivers were engaged in activities that affect the safety of the motor vehicle
27 operations and moved goods in interstate commerce. *Id.*

28 ///

1 **2. The Strengths and Weaknesses of the Sick Pay Claim**

2 As a separate regular rate violation, Plaintiff alleges that Defendant underpaid sick pay
3 earnings whenever non-discretionary incentive wages were paid within the same work week.
4 Agnew Decl. ¶ 42. Under the Healthy Workplaces, Healthy Families Act of 2014, Cal. Lab. Code
5 § 245, *et seq.* (“HWHFA”), sick pay must be “[p]aid sick time for nonexempt employees shall be
6 calculated in the same manner as the regular rate of pay for the workweek in which the employee
7 uses paid sick time, whether or not the employee actually works overtime in that workweek.” Cal.
8 Lab. Code § 226(l)(1) (emphasis added); *Powell v. Walmart Inc.*, 2021 WL 369550, at *2 (S.D.
9 Cal. 2021) (“The rate of sick pay is calculated by dividing the employee's total wages (not
10 including overtime premium pay) by the employee's total hours worked in the full pay periods of
11 the prior 90 days of employment”). Plaintiff alleges that Defendant, as a matter of policy and
12 practice, consistently paid sick pay wages at an employee’s base hourly rate, and not the regular
13 rate.

14 Defendant maintains that there is no private right of action to bring a paid sick pay claim.
15 Agnew Decl. ¶ 43. This argument presents novel legal issues and there is substantial ground for
16 difference of opinion as to the remedies, if any, available to employees who have experienced a
17 violation of the HWHFA. *Id.* Class Counsel is unaware of the existence of any published California
18 Court of Appeal decision that grapples with this issue. *Id.* There are a handful of unreported district
19 court opinions, including *Titus v. McLane Foodservice, Inc.*, which have held that only the Labor
20 Commissioner may recover penalties for a violation of HWHFA. 2016 WL 4797497 (E.D. Cal
21 2016). While *Titus* is by no means controlling authority, the Court may look to it as a persuasive
22 authority, despite Plaintiff’s contention that it was wrongly decided. Even had Plaintiff ultimately
23 prevailed on the merits, given the novelty of the legal questions it raised, Defendant may have
24 sought immediate appellate review through a writ or appeal. Agnew Decl. ¶ 43.

25 **3. The Strengths and Weaknesses of the Meal and Rest Period Claims**

26 Plaintiff alleges that he and other putative class members were not provided with “duty
27 free” meal and rest breaks, as required by California law. Agnew Decl. ¶ 39. A meal or rest period
28 is not “duty-free” if the employee must carry and monitor their cell phone and be available to work

1 during that time. Indeed, courts have repeatedly held that employers may not impose any limits on
2 meal/rest breaks, such as dictating what the employee can do during breaks, nor may they
3 discourage or impede breaks. *See Augustus v. ABM Sec. Servs., Inc.*, 2 Cal. 5th 257, 269 (2016)
4 (an employer cannot “satisfy its obligation to relieve employees from duties and employer control
5 during rest periods when the employer [] requires its employees to remain on call”); *Bradley v.*
6 *Networkers Int’l, LLC*, 211 Cal. App. 4th 1129, 1144 (2012) (explaining that in *Brinker*, 53 Cal.
7 4th at 1004, the California Supreme Court explained that, for an employer to satisfy its break
8 requirements, it must relieve its employees of all duty and **relinquish all control over their**
9 **activities** and not impede or discourage them from doing so”). There is no requirement that the
10 employee be actually called on the cell phone in order for a violation to occur. Rather, the mere
11 fact that they are required to carry the cell phone and monitor it for potential calls is sufficient to
12 find every meal and rest break to be non-compliant. The exact same theory of liability applies here.

13 Plaintiff alleges that he and other putative class members were required to carry and
14 respond to calls on their cell phones during their meal and rest breaks. Agnew Decl. ¶ 39. Similar
15 to *Augustus*, Plaintiff contends that employees were required to remain “on call” during their meal
16 and rest breaks, by keeping their cell phones on and monitor them, in case needs arise, that need
17 to be addressed right away. Plaintiff further alleges that, on the occasions where Defendant paid
18 meal/rest period premiums, it was paid at a rate that was below the regular rate of pay, as mandated
19 by Labor Code section 226.7; *Ferra v. Loews Hollywood Hotel, LLC*, 11 Cal. 5th 858, 878 (2021).

20 Defendant asserts several defenses to the meal and rest period claims. First, as noted above,
21 Defendant contends that these claims are preempted by the FMSCA and DOT regulations. Agnew
22 Decl. ¶ 40. Defendant further argues that the meal and rest period claims are not suitable for class
23 treatment because there is no common method of proof to establish liability. *Id.* Citing the recent
24 Court of Appeal decision in *Donohue v. AMN Servs.*, Defendant argues that time records showing
25 missed, short, or delayed meal periods do not result in “automatic liability for employers.” 11 Cal.
26 5th 58 (2021). Instead, Plaintiff must prove that Defendant actively impeded, discouraged, or
27 prohibited employees from taking a break. *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.
28 4th 1004 (2012). Thus, as argued by Defendant, individualized issues will predominate as to the

specific reason for an allegedly improper meal or rest period. Agnew Decl. ¶ 40. Relatedly, Defendant contends that its meal period compliance rates are above 95%, and on the occasions where a meal period was missed/short/late, it automatically processed the meal period premium pay. *Id.*

4. The Strengths and Weaknesses of the Wage Statement Claim

The wage statement claim is purely derivative in nature, and therefore vulnerable to a motion for summary judgment. Agnew Decl. ¶ 46; *see Maldonado v. Epsilon Plastics, Inc.*, 22 Cal. App. 5th 1308 (2018) (finding that the employees did not suffer a violation under 226(a) where their wage statement cause of action was derived from an underlying wage and hour violation for overtime). Additionally, Defendant maintains that any alleged omission of information from the wage statements was not a “knowing and intentional failure” by Defendant to comply with Labor Code section 226(a), and penalties are therefore unwarranted. Agnew Decl. ¶ 46; *see Harris v. Vector Mktg. Corp.*, 656 F. Supp. 2d 1128, 1145-46 (N.D. Cal. 2009).

5. The Strengths and Weaknesses of the PAGA Claims

Plaintiff pursues derivative PAGA penalties based on the Labor Code violations discussed above. Agnew Decl. ¶ 3. The trial court has the discretion to reduce PAGA civil penalties “if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” *See* Labor Code § 2699(e)(2). Class Counsel is not blind to the fact that Defendant could be persuasive to the Court at trial and that the penalties herein could be substantially reduced. Agnew Decl. ¶ 49.

D. The Settlement is Reasonable as Compared to the Potential Estimated Value of the Class and Representative PAGA Claims

Class Counsel retained an expert to calculate the potential damages/penalties at issue. Agnew Decl. ¶ 16. Based on the class data provided by Defendant, Class Counsel estimates that Defendant would realistically face liability in the amount of approximately \$9,302,179.50 for the class and PAGA claims. Agnew Decl. ¶¶ 34-50. Thus, the Maximum Settlement Amount

represents 17.20% of the realistic maximum damages and penalties at issue.⁶

1. Regular Rate Violation

As discussed above, the *Ortega* settlement substantially limits the liability period for the regular rate claim alleged in the Action. Agnew Decl. ¶ 11. To the extent that any damages arise from the alleged overtime violation, this amount is reflected in the valuation of the derivative waiting time penalties claim. *Id.* at ¶ 8.

2. Meal and Rest Period Penalties

Using Defendant's payroll data, Plaintiff's expert estimates that Class Members worked approximately 224,482 workweeks during the Class Period. Agnew Decl. ¶ 41. Assuming that Class Members experienced one non-compliant meal or rest periods each week, with an average regular rate of \$23.00 per hour, the maximum potential exposure as \$5,163,086. *Id.* However, Class Counsel discounted this figure by 25% to account for the meal/rest period penalties already paid by Defendant, difficulty of certifying and proving the claim (particularly because rest periods do not have to be recorded), and to account for the possibility of Class Members voluntarily choosing to forego a meal/rest period, yielding a realistic damage estimate of approximately \$3,872,314.50. *Id.*

3. Derivative Wage Statement Penalties

The data produced by Defendant indicates that 1,348 Class Members received approximately 57,159 wage statements during the period of May 6, 2019 to the end of the Class Period. Agnew Decl. ¶ 47. Thus, the maximum Labor Code section 226(e) penalties total \$5,648,500.00. *Id.* However, Class Counsel discounted the maximum exposure by 75% to account for the significant risk that the claim could be dismissed on a motion for summary judgment. *Id.*

⁶ Courts have held that gross settlements approximating between only 8 and 25% of the defendant's potential exposure are fair and reasonable. *See Bellinghausen v. Tractor Supply Co.*, 2015 WL 1289342, at *6 (N.D. Cal. Mar. 20, 2015) (approving class settlement recovering between 8.5% and 25% of the defendant's potential exposure); *Van Ba Ma v. Covidien Holding Inc.*, U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014) (approving wage and hour class settlement which obtained only 9.1% of projected damages); *Villegas v. J.P. Morgan Chase & Co.*, 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21, 2012) (holding that settlement of approximately 15% of the potential recovery was fair and reasonable).

As a result, a more realistic damage estimate for the wage statement penalty claim is approximately \$1,412,125. *Id.*

4. Waiting Time Penalties

The data produced by Defendant indicates that there are 859 Class Members who separated employment during the period of May 6, 2017 to the end of the Class Period. Agnew Decl. ¶ 45. Based on an average straight time hourly rate of \$23.00, Class Counsel estimates that the maximum amount of waiting time penalties total \$4,741,680.00 (\$23 x 8 hours x 30 days x 859 Class Members). *Id.* However, Class Counsel discounted this figure by 25% to account for the difficulty of prevailing at class certification and at trial, Defendant's available defenses, and how a disproportionate award of penalties compared to the amounts for the underlying wage claims would raise Due Process concerns. As a result, a more realistic damage estimate for the waiting time penalty claim is approximately \$3,556,260.00. *Id.*

5. PAGA Penalties

The data produced by Defendant indicates there are approximately 46,148 pay periods worked by PAGA Group Members within the statute of limitations period for PAGA penalties. Agnew Decl. ¶ 48. Applying the standard penalty of \$100 per pay period yields \$4,614,800.00 in potential liability. *Id.* However, it is unrealistic to assume that the Court will award the full amount of PAGA penalties if Plaintiffs are able to prevail at trial. Indeed, the potential recovery is uncertain because the Court can decline to award the full amount of PAGA penalties where "...if, based on the facts and circumstances of the particular case, to do otherwise, would result in an award that is unjust, arbitrary and oppressive, or confiscatory." As shown in the Court of Appeal's decision in *Carrington v. Starbucks Corp.*, while the plaintiff prevailed on his PAGA claim upon trial, the trial court reduced the maximum PAGA penalty amount by 90%, citing the employer's good faith attempt at complying with the law. 30 Cal. App. 5th 504, 517 (2018). Upon review, the Court of Appeal found such reduction to be proper. *Id.* at 539; see *O'Connor*, 2016 WL 4398271, at *17 (noting that even if PAGA penalties amounted to \$1 billion, such award "could well be reduced, as a court may reduce the penalty when to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory"). Thus, assuming that the Court uses *Carrington* as a

benchmark and assesses PAGA penalties of approximately 10% of the total maximum, a more realistic estimate of the PAGA penalties at issue is \$461,480.00.

E. The Court Should Preliminarily Approve the Proposed Payment to Class Representative

Plaintiff requests an enhancement of Ten Thousand Dollars (\$10,000.00). Plaintiff personally met with Class Counsel on various occasions to discuss the case, provide documents and information to Class Counsel, and review the Settlement Agreement. *See* Declaration of Jose Pablo Jimenez (“Jimenez Decl.”) ¶ 7. Moreover, as part of his duties as the representative, Plaintiff provided invaluable information, evidence, and documents that resulted in this settlement. *Id.* In addition to the invaluable services that Plaintiff provided, he also took significant risks, both professionally and monetarily, in acting as the Class Representative and seeking benefits on behalf of the Class. *Id.* ¶¶ 8, 9. Because the claims alleged by the class representatives involved the payment of costs to the prevailing party, Plaintiff could have possibly faced paying the fees and costs of Defendant, had Plaintiff not prevailed in this action. *Id.* ¶ 8.

Further, given that future employers are much less likely to hire individuals who have filed suit against their prior employer, particularly cases of this nature, Plaintiff may face prejudice in the future from other potential employers. Plaintiff took this risk upon himself and the whole class benefited from these risks taken by Plaintiff. Class Members did not have to file individual lawsuits and bear the risks of payment of fees and costs if they did not prevail, nor did they have to face the potential for retaliation and not getting future employment had they filed a public lawsuit. Notably, courts have routinely granted approval of representative enhancements for far greater amounts than the \$10,000 sought by Plaintiff in this case.⁷

⁷ *See, e.g., Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two incentive awards of \$55,000, and three incentive awards of \$35,000); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001) (granting a \$50,000 incentive award); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251-52 (S.D. Ohio 1991) (\$50,000 awarded to each class representative); *Glass v. UBS Fin. Servs.*, No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007) (awarding \$25,000 incentive award in FL~~S~~A overtime wages class action); *Cook v.*

1 **F. The Court Should Preliminary Approve the Award of Litigation Costs and**
2 **Fees**

3 California state and federal courts have recognized that an appropriate method for
4 determining award of attorneys' fees is based on a percentage of the total value of benefits to Class
5 Members by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001);
6 *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977) ("Serrano III"); *Vincent v. Hughes Air West, Inc.*, 557
7 F.2d 759, 769 (9th Cir. 1997). Indeed, most recently, the California Supreme Court has also now
8 held that the award of attorneys' fees in common fund wage and hour class action settlements
9 should start with the percentage method. *See Laffitte v. Robert Half Int'l*, 1 Cal. 5th 480, 503
10 (2016). The Parties have agreed to a payment of a maximum of 35% of the Maximum Settlement
11 Amount (\$560,000.00) for payment to Class Counsel as attorneys' fees.

12 Further, the Parties have agreed to reimbursement of class counsel's litigation costs of up
13 to \$20,000. Class Counsel have, at their own risk, expended costs, for example, to file this instant
14 action, service of process, and payment of other litigation related costs. Declaration of Larry W.
15 Lee ("Lee Decl.") ¶ 4. Based on the foregoing, the Court should preliminarily approve the
16 attorney's fees and costs being requested by the parties.

17 **G. The Court Should Preliminary Approve the Award of Class Administration**
18 **Fees**

19 The Parties have agreed to payment of a maximum of Seven Thousand Two Hundred-Fifty
20 Dollars (\$7,250.00) to the settlement administrator, Phoenix Settlement Administrators, to send
21 notices and to administer this settlement. SA § A-35. Phoenix is a well-recognized class action
22 settlement administrator. Lawrence Decl. ¶ 4, Ex. A. The Parties believe that the administration
23 fee is reasonable and should be approved. Agnew Decl. ¶ 26.

24 **V. THE PROPOSED SETTLEMENT CLASS MEETS ALL CERTIFICATION**
25 **REQUIREMENTS**

26 _____
27 *Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (affirming \$25,000 Incentive award to class
28 representative in ERISA case).

1 Although Defendant disagrees with Plaintiffs' contentions for purposes of settlement,
2 Defendant has agreed to certify the Class for settlement purposes only.

3 The Class that Plaintiffs seek to conditionally certify is ascertainable. "Class members are
4 'ascertainable' where they may be readily identified without unreasonable expense or time by
5 reference to official records." *Lee v. Dynamex, Inc.*, 166 Cal. App. 4th 1325, 1334 (2008). Here,
6 members of the Class are readily identifiable. Defendant has determined that there are
7 approximately 4,163 individuals that comprise the Class. *See* Stip. § 1.2. Furthermore, the Class
8 is sufficiently numerous. Courts generally find that numerosity is satisfied if the class includes
9 forty or more members. *See Villalpando v. Excel Direct Inc.*, 303 F.R.D. 588, 605-606 (N.D. Cal.
10 2014).

11 The commonality requirement is met when there are questions of law and fact common to
12 the class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (1998) ("The existence of shared
13 legal issues with divergent legal factual predicates is sufficient, as is a common core of salient
14 facts couple with disparate legal remedies within the class"). Plaintiffs allege, in part, that
15 Defendant, as a matter of its corporate policy, practice, or procedure violated the Labor Code by:
16 (1) failing to properly calculate the regular rate of pay for employees earning overtime and non-
17 discretionary incentives during the same pay period; (2) failing to provide off-duty meal/rest
18 periods and/or pay meal/rest period premiums at the regular rate of pay; (3) failing to pay all earned
19 wages upon termination, including sick pay; (4) and failing to provide accurate itemized wage
20 statements. Jimenez Decl. ¶¶ 2-5. In other words, Plaintiff was allegedly subjected to the same
21 policy and practice as other Class Members. Thus, Plaintiff's claims are typical to those of Class
22 Members.

23 The adequacy requirement is also met. "Adequacy of representation depends on whether
24 the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests
25 are not antagonistic to the interests of the class." *McGhee v. Bank of Am.*, 60 Cal. App. 3d 442,
26 450 (1976). Here, Plaintiff does not have any interests adverse to the Class, nor has any such issues
27 been raised or presented. Jimenez Decl. ¶ 6. Plaintiff has taken all necessary steps to represent the
28 interests of the Class, including by providing information and documents to Plaintiffs' counsel. *Id.*

¶ 7. For such reasons, Plaintiff asserts that he has adequately represented the Class Members and will continue to do so.

Further, as detailed in their declarations, Class Counsel are experienced and well-qualified class action litigators who have litigated many wage and hour class actions and have each been certified as class counsel in numerous other class actions, particularly wage and hour class actions. Agnew Decl. ¶¶ 54-60; Lee Decl. ¶¶ 6, 7; Declaration of Nick Rosenthal Decl. ¶ 3. From the inception of the case, Class Counsel has solely represented the interest of the Class. *See* Agnew Decl.

VI. LWDA HAS BEEN PROVIDED NOTICE OF THIS SETTLEMENT

Concurrent with the filing of this Motion, Plaintiffs provided notice of this Motion to the LWDA. Agnew Decl. ¶ 53.

VII. CONCLUSION

Here, the proposed settlement is fair, adequate, and reasonable. It will result in both substantial monetary benefits to Class Members; it is non-collusive; and it was achieved as the result of informed, extensive, and arm's length negotiations conducted by counsel for the respective Parties who are experienced in wage and hour class action litigation. For the foregoing reasons, Plaintiff respectfully request that the Court grant preliminary approval of the proposed settlement, sign the proposed Order, approve and authorize mailing of the proposed Notice Packet, and set a date for a final approval hearing.

DATED: February 28, 2022

DIVERSITY LAW GROUP, P.C.

By: _____

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

Attorneys for Plaintiff and the Class

1 **PROOF OF SERVICE**

2 **(Code of Civil Procedure Sections 1013a, 2015.5)**

3
4 STATE OF CALIFORNIA]
5]ss.
6 COUNTY OF LOS ANGELES]

7 I am employed in the County of Los Angeles, State of California. I am over the age of 18
8 and not a party to the within action; my business address is 515 S. Figueroa Street, Suite 1250,
9 Los Angeles, California 90071.

10 On February 28, 2022, I served the following document(s) described as:

11 **1. PLAINTIFF JOSE PABLE JIMENEZ’S NOTICE OF MOTION AND**
12 **MOTION FOR PRELIMINARY APPROVAL OF CLASS AND REPRESENTATIVE**
13 **ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN**
14 **SUPPORT**

15 **2. DECLARATION OF KRISTEN M. AGNEW IN SUPPORT OF**
16 **PLAINTIFF’S MOTION FOR PRELIMINARY APPROVAL OF CLASS AND**
17 **REPRESENTATIVE ACTION SETTLEMENT**

18 **3. DECLARATION OF LARRY W. LEE IN SUPPORT OF PLAINTIFF’S**
19 **MOTION FOR PRELIMINARY APPROVAL OF CLASS AND REPRESENTATIVE**
20 **ACTION SETTLEMENT**

21 **4. DECLARATION OF NICK ROSENTHAL IN SUPPORT OF PLAINTIFF’S**
22 **MOTION FOR PRELIMINARY APPROVAL OF CLASS AND REPRESENTATIVE**
23 **ACTION SETTLEMENT**

24 **5. DECLARATION OF PLAINTIFF JOSE PABLO JIMENEZ IN SUPPORT**
25 **OF PLAINTIFF’S MOTION FOR PRELIMINARY APPROVAL OF CLASS AND**
26 **REPRESENTATIVE ACTION SETTLEMENT**

27 **6. DECLARATION OF JODEY LAWRENCE REGARDING NOTICE AND**
28 **SETTLEMENT ADMINISTRATION**

7. [PROPOSED] ORDER GRANTING PLAINTIFF’S MOTION FOR
PRELIMINARY APPROVAL OF CLASS AND REPRESENTATIVE ACTION
SETTLEMENT

on the interested parties in this action as follows:

Spencer C. Skeen
Jesse C. Ferrantella

*Attorneys for Defendant Nestle Waters
North America, Inc.*

1 Cameron O. Flynn
2 Ogletree, Deakins, Nash, Smoak & Spencer.skeen@ogletree.com
3 Stewart, P.C. Jesse.ferrantella@ogletree.com
4 4370 La Jolla Village Drive, Suite 990 Cameron.flynn@ogletree.com
5 San Diego, CA 92122

6 X BY ELECTRONIC MAIL: by personally sending a true and correct copy of
7 the above-described document(s) to the party(ies) listed above or on the attached mailing list
8 from the e-mail server diversitylaw.com, to the electronic transmission address of the recipient(s)
9 indicated above or on the attached mailing list. I certify that said electronic transmission was
10 completed and that all pages were received by the party(ies) identified herein or on the attached
11 mailing list.

12 I declare under penalty of perjury under the laws of the State of California that the above
13 is true and correct. Executed on February 28, 2022, at Los Angeles, California.

14 

15

Linda Lee