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on behalf of all others similarly situated

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

MICHELLE KUSSNER, individually and on
behalf of all others similarly situated,

Plaintiff,

vs.

MV PUBLIC TRANSPORTATION, INC, a
California Corporation; MV
TRANSPORTATION, INC., a California
Corporation; DOES 1 through 25,

Defendants.

Case No.: 21STCV12259
*Assigned to Hon. Carolyn B. Kuhl
Department SSC-12*

**NOTICE OF MOTION AND
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
AND PAGA SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES**

[Filed concurrently with Declarations of
Aaron Gundzik, Daniel Holzman,
Michelle Kussner and Jodey Lawrence of
Phoenix Settlement Administrators;
[Proposed] Order]

Date: August 29, 2023
Time: 10:30 a.m.
Place: Department SSC-12

Complaint Filed: March 30, 2021

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

2 **PLEASE TAKE NOTICE** that on August 29, 2023, at 10:30 a.m. in Department 12
3 of the above-entitled Court, located at 312 N. Spring St, Los Angeles, CA 90012, Plaintiff
4 Michelle Kussner will and, by this Notice of Motion and Motion, hereby does, move for an
5 Order as follows:

6 1. Granting preliminary approval of a class action settlement in the gross
7 amount of \$1,350,000, pursuant to Rules of Court 3.766 and 3.769;

8 2. Provisionally certifying the proposed class for settlement purposes only as an
9 opt-out class action under Section 382 of the Code of Civil Procedure, with the Class
10 defined as all employees of Defendants MV Public Transportation, Inc. and MV
11 Transportation, Inc. (collectively “Defendants” or “MV”) who have been employed in
12 California in a non-exempt position during the Class Period for at least one week and
13 performed services as drivers, or assisting drivers, including bus operators, bus aides, road
14 supervisors and dispatchers;

15 3. Appointing Plaintiff Michelle Kussner as the class representative for the
16 Class;

17 4. Appointing Aaron C. Gundzik, Rebecca G. Gundzik and Daniel Holzman as
18 Class Counsel;

19 5. Approving Phoenix Settlement Administrators (“Phoenix”) as the third-party
20 settlement administrator;

21 6. Approving the form of the Court Approved Notice of Proposed Class Action
22 Settlement and Hearing Date for Final Court Approval (“Class Notice”) to be sent to the
23 Class and authorizing its dissemination;

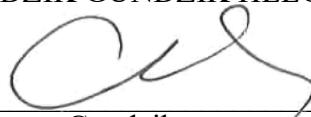
24 7. Scheduling a subsequent hearing for final approval of the settlement
25 including approval of a Class Representative Service Payment in an amount not to exceed
26 \$10,000, an Administration Expenses Payment in an amount not to exceed \$46,250, a Class
27 Counsel Litigation Expenses Payment in an amount not to exceed \$25,000, and a Class
28 Counsel Fees Payment in an amount not to exceed \$450,000; and

1 8. Granting such other and further relief as the Court may deem just and proper.
2 Plaintiff's motion is based on this Notice of Motion and Motion, the attached
3 Memorandum of Points and Authorities, the [Proposed] Preliminary Approval Order, the
4 Declarations of the proposed Class Counsel, Aaron C. Gundzik and Daniel Holzman, the
5 Declaration of the proposed Class Representative, Michelle Kussner, the Declaration of
6 Jodey Lawrence of Phoenix Settlement Administrators, the pleadings and other papers filed
7 in this action, and such further argument or evidence as may be considered at the hearing on
8 the motion.

9 As this Motion will be unopposed, Plaintiff respectfully requests relief from the page
10 limit requirement set by California Rules of Court, Rule 3.1113(d).

11 DATED: July 6, 2023

GUNDZIK GUNDZIK HEEGER LLP

12
13 By: 

Aaron Gundzik

14 Attorneys for Plaintiff Michelle Kussner,
15 individually and on behalf of all others
16 similarly situated
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This is a class action filed by Plaintiff Michelle Kussner against her former employer
4 Defendants MV Public Transportation, Inc, and MV Transportation, Inc. (collectively
5 “Defendants” or “MV”) on behalf of a class consisting of all persons employed by
6 Defendants in California who worked for Defendants in a non-exempt position during the
7 Class Period for at least one week and performed services as drivers, or assisting drivers,
8 including bus operators, bus aides, road supervisors and dispatchers. Plaintiff’s operative
9 complaint alleges causes of action against Defendant for: (1) failure to pay wages; (2) failure
10 to pay overtime; (3) failure to provide meal and rest breaks; (4) inaccurate wage statements;
11 (5) failure to pay unpaid wages at separation; (6) failure to reimburse necessary
12 expenditures; (7) violation of the Unfair Practices Act; and (8) recovery of civil penalties
13 under the California Labor Code Private Attorneys’ General Act, Cal. Lab. Code §§ 2698-
14 2699.5 (“PAGA”). No class has been certified by the Court.

15 Defendants denies that it has violated California law and denies that it owes Plaintiff
16 and the other employees on whose behalf the lawsuit was filed any additional
17 reimbursements, penalties, or other relief.

18 Plaintiff and Defendants have reached a proposed settlement of Plaintiff’s Class and
19 PAGA claims whereby Defendants will pay a gross settlement amount of \$1.35 million. As
20 explained below, although Defendants deny that they have any liability whatsoever, this
21 gross settlement value is within the range of Defendant’s potential liability, as estimated by
22 Plaintiff’s Counsel. The settlement is advantageous to Plaintiff and the Class in that it
23 provides them prompt compensation and eliminates the uncertainty and risk of continued
24 litigation against Defendants. The proposed settlement is memorialized in the “Class Action
25 and PAGA Settlement Agreement”¹ (hereafter referred to as the “Settlement Agreement”), a
26

27 ¹ The parties used the Court’s model form to create the Settlement Agreement. A red-lined
28 comparison of the model form to the parties’ Settlement Agreement is attached to the
Gundzik Declaration as Exhibit 2.

1 true and correct copy of which is attached as Ex. 1 to the Declaration of Aaron C. Gundzik
2 (“Gundzik Decl.”), ¶ 41.

3 Under the terms of the Settlement Agreement, the proposed Class consists of
4 approximately 7,800 persons employed by Defendants in California who worked for
5 Defendants in a non-exempt position during the Class Period for at least one week and
6 performed services as drivers, or assisting drivers, including bus operators, bus aides, road
7 supervisors and dispatchers (“Class”). Gundzik Decl., ¶ 41, Ex. 1, ¶ 1.5. The proposed Class
8 Period is from June 11, 2020, to the date of preliminary approval (“Class Period”). *Id.*, ¶
9 1.12. Pursuant to the terms of the proposed settlement, Defendant will pay a Gross
10 Settlement Amount of \$1,350,000. After proposed deductions, as approved by the Court, the
11 Net Settlement Amount of approximately \$743,750 will be available to distribute to
12 Participating Class Members, resulting in an average payment of about \$95.35 per class
13 member. Gundzik Decl., ¶ 56.

14 Given the comparative strengths and weaknesses of Plaintiff’s claims and
15 Defendants’ defenses, as well as the inherent uncertainties of litigation, this settlement is
16 well within the scope of what is fair, reasonable and adequate for the Class and should be
17 approved by the Court. Accordingly, Plaintiff, on behalf of himself and the Class, now seeks
18 an order:

- 19 • Granting preliminary approval of the settlement as being fair, reasonable and
20 adequate;
 - 21 • Provisionally certifying the Class on an opt-out basis and for settlement purposes
22 only, and appointing Plaintiff Michelle Kussner as the Class Representative and
23 Aaron C. Gundzik, Rebecca G. Gundzik and Daniel Holzman as Class Counsel;
 - 24 • Entering the proposed Preliminary Approval Order, which is filed concurrently
25 herewith, and directing that the Class Notice be mailed to the Class Members;
 - 26 • Appointing Phoenix Settlement Administrators (“Phoenix”) as the Administrator;
- 27
28

- Finding that the proposed form and method of the Class Notice constitutes the best notice practicable under the circumstances and complies with the requirements of Code of Civil Procedure Section 382 and due process; and
- Scheduling a final approval hearing approximately 150 days after the preliminary approval hearing to decide, among other things, (i) whether the settlement should be granted final approval; (ii) whether the proposed Order and Final Judgment should be entered; (iii) the amount of the Class Counsel Fees Payment and Class Counsel Litigation Expenses Payment; (iv) the amount of the Class Representative Service Payment; (v) approving the Administrator’s proposed fee; and (vi) approving the proposed PAGA Penalties and the distribution of 75% of such amount to the LWDA and 25% to the Aggrieved Employees.

II. RELEVANT AND KEY FACTS

A. Relevant Facts Showing Settlement is Fair, Adequate and Reasonable

1. Investigation and Discovery

Plaintiff’s counsel have been directly involved in all aspects of this case on behalf of Plaintiff. They have thoroughly investigated Plaintiff’s claims, reviewed and analyzed records and information produced by Defendant, and worked to develop information on potential damages. Gundzik Decl., ¶¶ 8-11. They engaged in formal discovery and informally exchanged additional information and documents for the mediation. Gundzik Decl., ¶ 8. Among other things, Plaintiff’s counsel has taken a deposition of Defendants’ representative, obtained from Defendants, and then reviewed and analyzed policy documents, which included almost 100 collective bargaining agreements, a sample of time and pay records and other information concerning class member wages and reimbursements. *Id.* Plaintiff’s counsel also obtained class member contact information and have interviewed about 60 class members. *Id.* In connection with the mediation, Defendant provided information on the number of Class Members and PAGA Aggrieved Employees, total Class Member workweeks, total PAGA Aggrieved Employee pay periods and other data

1 concerning the class. Gundzik Decl., ¶ 9. Plaintiff's counsel also investigated and compiled
2 publicly available information about Defendants and its business. Gundzik Decl., ¶ 8. Based
3 on this information, as well as information provided by the Plaintiff, Plaintiff's counsel was
4 able to assess Defendants' potential liability and worked with a consultant to estimate the
5 damages incurred by the Class. Gundzik Decl., ¶ 9.

6 **2. Summary of Settlement Negotiations**

7 On March 28, 2023, Plaintiff Michelle Kussner, Plaintiff's counsel, Defendants and
8 Defendants' counsel attended a mediation session with well-respected mediator, Michael
9 Loeb. Ms. Kussner participated in the mediation. The case did not settle at the mediation.
10 However, the mediator issued a settlement proposal, which was accepted by the parties on
11 April 4, 2023. Gundzik Decl., ¶ 12.

12 **3. Summary of Class Counsel's Experience**

13 Plaintiff's counsel, Aaron Gundzik, graduated from the University of Southern
14 California Law School in 1987 and has been a member of the California bar since 1987.
15 Gundzik Decl., ¶ 13. He has been involved in the litigation of complex cases, including
16 securities, consumer and wage and hour class actions, and is currently plaintiff's counsel in
17 approximately fifteen class and representative actions in various stages of litigation. He has
18 served as class counsel in numerous wage and hour class actions that have already settled
19 and successfully represented a class of service technicians at trial and through appeal in
20 *Gonzalez v. Downtown LA Motors, LP*, 215 Cal. App. 4th 36 (2013). Gundzik Decl., ¶¶ 14,
21 16. Many of these cases involve wage and hour issues similar to the legal and factual issues
22 involved in this case. Gundzik Decl., ¶ 17. His partner, Rebecca Gundzik, graduated from
23 the University of Southern California Law School in 1988, has been a member of the
24 California bar since 1988, and was co-counsel at the trial of *Gonzalez v. Downtown LA*
25 *Motors, LP*, 215 Cal. App. 4th 36 (2013). Gundzik Decl., ¶ 15.

26 **4. Summary of Legal and Factual Bases for Plaintiff's Claims**

27 Based upon counsel's investigation and discovery, Plaintiff contends as follows.
28 During the Class Period, Defendants have been in the business of providing bus services to

1 its customers in California and elsewhere. Plaintiff was employed by Defendants as a bus
2 driver. She worked for Defendants from 2005 to 2006 and then from 2007 until December
3 2020. Gundzik Decl., ¶ 18; Declaration of Michelle Kussner (“Kussner Decl.”), ¶ 2.

4 During the Class Period, which begins on June 11, 2020, Plaintiff alleges that
5 Defendants did not provide employees with compliant meal periods or rest breaks or provide
6 required premium wages as compensation. Kussner Decl., ¶ 3; Gundzik Decl., ¶ 19. In
7 addition, Plaintiff alleges that Defendants failed to provide accurate wage statements that
8 reflected the unpaid premium wages and failed to pay these unpaid wages when employees
9 separated. *Id.* Plaintiff also contended that Defendants did not reimburse employees for
10 using their personal cell phones for navigation and communicating with dispatchers and
11 supervisors. *Id.* Finally, Plaintiff contended that Defendants failed to pay overtime or sick
12 leave at the regular rate of pay because Defendants did not include periodic bonuses in
13 calculating the regular rate. *Id.*

14 The Class Period in the operative complaint and agreed upon in the settlement begins
15 on June 11, 2020. Gundzik Decl. ¶ 20. Typically, the class period in a wage and hour action
16 begins on the date that is four years before the action is filed. *Id.* However, here, Defendants
17 were also defendants in an several earlier wage and hour class actions that were coordinated
18 as *MV Transportation Wage & Hour Cases*, JCCP No. 4993. *Id.* Those cases settled
19 collectively in 2019 and the settlement class period ended on June 10, 2020. *Id.* The class
20 period for this action picks up on the date after the class period for the previously settled
21 actions ends. *Id.* That case settled for \$4,425,000 but covered almost seven years and more
22 than twice as many employees, and involved five separate actions and law firms
23 representing plaintiffs. *Id.*

24 **5. Risks, Expenses, Complexity and Duration if Settlement Not**
25 **Approved**

26 After taking into account the sharply disputed factual and legal issues involved in the
27 lawsuit, the risks attending further prosecution, and the substantial benefits to be received
28 pursuant to the compromise and settlement of the action, Plaintiff’s counsel concluded that

1 the settlement is in the best interests of the Class and is fair and reasonable. Gundzik Decl., ¶
2 21; Declaration of Daniel Holzman (“Holzman Decl.”), ¶ 8. They also considered the
3 possibility that the Class would not be certified and factored in the additional delay in
4 recovery for Class members if the settlement were rejected and the case went to trial. *Id.*

5 If the settlement is not approved, Plaintiff would need to move forward with
6 discovery and then move for class certification. Gundzik Decl., ¶ 22. Defendants will oppose
7 certification on the grounds that numerous individualized fact issues exist. *Id.* Defendants
8 will argue and could succeed in claiming that these individualized issues overwhelm
9 common issues, and/or that the action is not manageable on a class wide basis. *Id.* The result
10 could be that the case would not be certifiable as a class action. *Id.*

11 **6. Risks of Maintaining Class Action Status**

12 Even if Plaintiff proceeded with the case and the Class was certified, significant risks
13 would remain. At trial Defendants could interpose a successful defense which could either
14 cause the jury to reject Plaintiff’s claims or award the Class only a small amount of the
15 damages sought. Gundzik Decl., ¶ 23. And, even if the Class ultimately prevailed, Class
16 Members would have to wait years before they received any payment from the lawsuit. *Id.*

17 Plaintiff’s counsel concluded that the settlement of \$1.35 million represents a fair
18 and reasonable discount from the realistic recovery. Gundzik Decl., ¶ 24. The settlement
19 provides a significant benefit for the Class which would not otherwise have been available
20 unless a settlement was reached. Plaintiff’s counsel, who have significant experience
21 litigating these types of claims, are of the opinion that a gross settlement of \$1.35 million is
22 within the “ballpark” of a fair, reasonable and adequate settlement. *Id.*; Holzman Decl., ¶ 8.

23 **7. Information Regarding Strengths, Weaknesses, and Range of** 24 **Value of Each Claim**

25 The First Cause of Action is for failure to pay for all hours worked. This claim was
26 based on information provided by Plaintiff that she and some other class members were
27 required to remain with their buses when they took meal breaks. Gundzik Decl., ¶ 25. Class
28 member interviews suggested that only about 12% of class members occasionally worked

1 during meal periods while clocked out. *Id.* Most of those employees reported that this
2 occurred about once per week. *Id.* Using this information, Plaintiff's counsel estimated the
3 maximum value of this claim to be \$1,076,694. 437,254 total workweeks x 12% of class
4 members who worked through meals x \$20.52 average hourly rate = \$1,076,692.25. *Id.*
5 However, there was no documentation evidencing this alleged off the clock work and no
6 written policies that require drivers to remain with their buses. *Id.* Accordingly, in light of
7 the lack of documentary evidence supporting this claim, Plaintiff's counsel concluded that
8 the potential range of recovery for this claim would be between \$0 and \$750,000. *Id.*

9 The Second Cause of Action is for failure to pay overtime. This claim was based on
10 the manner in which Defendants calculated hourly overtime when a bonus is paid. Gundzik
11 Decl., ¶ 26. After further investigation, Plaintiff's counsel determined the Defendants'
12 policy is compliant. As a result, no value was assigned to this claim. *Id.*

13 The Third Cause of Action is for failure to provide compliant meal and rest periods.
14 The sample time and pay records produced by Defendants, indicated that employees
15 frequently did not record facially compliant meal breaks and that a significant percentage of
16 the meal breaks were not legally compliant based on the records. Gundzik Decl., ¶ 27.
17 According to Defendants' data, meal breaks were recorded as missed, late or short on about
18 35% of shifts, which results in about 703,979 violations during the class period. *Id.*
19 However, about 15% of those violations were late or short by only a few minutes. *Id.*
20 Defendants' records also showed that Defendants paid meal period premium wages on about
21 21% of potential violations. *Id.* Based upon this information, Plaintiff's counsel estimated
22 the maximum value of the meal break claim to be about \$9,700,252. 437,254 workweeks x
23 4.6 shifts per workweek x 35% violation rate x 79% non-compensated violations x 20.52
24 average hourly rate – 15% for *de minimis* violations = \$9,700,252. *Id.* However, this
25 maximum number must be discounted due to Defendants' defenses. Defendants contended
26 that pursuant to Labor Code section 512(e), Plaintiff would not be able to maintain her meal
27 break claim for the many class members who were covered by CBAs. *Id.* Under section
28 512(e), California's meal period requirements do not apply to employees in certain

1 occupations, including commercial drivers, where a CBA is in place that “expressly
2 provides for the wages, hours of work, and working conditions of employees, and expressly
3 provides for meal periods for those employees, final and binding arbitration of disputes
4 concerning application of its meal period provisions, premium wage rates for all overtime
5 hours worked, and a regular hourly rate of pay of not less than 30 percent more than the state
6 minimum wage rate.” In addition, because the CBAs provide for arbitration of claims and
7 exclude class claims, Defendants contended that many employees would be precluded from
8 participating in a class action. *Id.* In light of the CBAs, and other defenses that would
9 impact class certification and damages, Plaintiff’s counsel determined that the potential
10 range of recovery on this claim is between zero and \$5 million. *Id.*

11 The Third Cause of Action also includes a claim for non-compliant rest breaks.
12 Defendants did not track rest breaks, but Plaintiff and a small majority of others reported
13 that they occasionally missed breaks due to the press of work or because they were
14 interrupted while on break. Gundzik Decl., ¶ 28. Based on this information, Plaintiff’s
15 counsel estimated that about 60% of class members did not have a compliant rest period
16 about once per week. *Id.* Counsel therefore calculated the maximum value of the rest break
17 claim to \$5,383,471. 437,254 workweeks x 60% of class members reporting violations x 1
18 violation per week x \$20.52 average hourly pay = \$5,383,471. *Id.* However, because of the
19 lack of documentary evidence regarding rest break violations, the arbitration provisions in
20 the CBAs and the possibility that Defendants could successfully contend that individualized
21 issues predominate on this claim, Plaintiff’s counsel determined that the potential range of
22 recovery on this claim is between zero and \$3 million. *Id.*

23 The Fourth Cause of Action is for failure to provide compliant wage statements. The
24 statute of limitations on such a claim is one year. This claim is derivative of Plaintiff’s other
25 wage claims, as it is based on the fact that the wage statements issued to Plaintiff and the
26 class are incorrect in that they do not reflect meal and rest break wage premiums that should
27 have been paid. Gundzik Decl., ¶ 29. The penalties for inaccurate wage statements are \$50
28 per employee for the first violation and \$100 per employee per violation for all subsequent

1 violations. Penalties per employee are limited to \$4,000. Cal. Lab. Code § 226(e). During
2 the relevant limitations period, Defendants issued a total of 218,627 wage statements to
3 about 7,800 class members. *Id.* The meal period violation rate and class member interviews
4 indicated that only about 45% of wage statements (about 98,382) would include a potential
5 violation that was greater than just a few minutes. *Id.* Based on this figure, the maximum
6 amount recoverable on this claim is \$9,448,215. 218,627 total wage statements x 45%
7 violation rate x \$100 per violation – (\$50 per violation x 7,800 employees) = \$9,448,215. *Id.*
8 Considering the defenses to the wage claims discussed above, Plaintiff’s counsel determined
9 that the potential range of recovery on this claim is between zero and \$5 million. *Id.*

10 The Fifth Cause of Action is for failure to pay separated employees all wages due at
11 the time of separation. This claim is based on Defendants’ alleged failure to pay Class
12 Members amounts due for meal or rest period premiums. Gundzik Decl., ¶ 30. The data and
13 employee interviews suggested that about 60% of employees were subject to an alleged
14 meal or rest period violation and that about 3,015 putative class members were separated
15 during the relevant statutory period. *Id.* Plaintiff’s counsel calculated that that the maximum
16 value of this claim is approximately \$8,797,601. \$20.52 average hourly wage x 7.9 hours per
17 shift x 30 days x 3,015 employees x 60% = \$8,797,601. *Id.* However, in light of the defenses
18 identified above applicable to Plaintiff’s wage claims, Plaintiff’s counsel concluded that the
19 potential range of recovery on this claim is between zero and \$4.5 million.

20 The Sixth Cause of Action is for failure to reimburse employees for necessary
21 expenses in violation of Labor Code section 2802. That section provides, in part: “An
22 employer shall indemnify his or her employee for all necessary expenditures or losses
23 incurred by the employee in direct consequence of the discharge of his or her duties, or of
24 his or her obedience to the directions of the employer.” Cal. Lab. Code § 2802(a). Plaintiff
25 contends that class members occasionally used their own cell phones to navigate and
26 communicate with supervisors and dispatchers. Gundzik Decl., ¶ 31. Interviews of class
27 members suggested that many class members did not use cell phones at all and those that
28 reported doing so, advised that they were used on limited occasions. *Id.* As a result,

1 Plaintiff's counsel estimated that only about 30% of class members were entitled to some
2 reimbursement and that reimbursement should be limited to four times per year. *Id.* Using
3 these assumptions and a bi-weekly reimbursement amount of \$20, Plaintiff's counsel
4 calculated that class members should have received reimbursements totalling \$196,764.
5 $437,254 \text{ workweeks} \times 30\% \text{ class members entitled to reimbursement} \times 15\% \text{ of workweeks}$
6 $\text{in which cell phone was used} \times \$20 \text{ per pay period} = \$196,764.$ *Id.* Defendants contended
7 that the use of cell phones was very rare, even for those employees who used them. *Id.*
8 Plaintiff's counsel therefore concluded that the recovery range on this claim is between
9 \$100,000 and \$0. *Id.*

10 The Seventh Cause of Action is for violation of Business & Professions Code section
11 17200, *et. seq.* The forgoing analysis assumes the longer four-year statute of limitations that
12 is available under the UCL for the meal and rest period violations. For the most part, this
13 cause of action is derivative of the other claims that have already been analyzed. This cause
14 of action includes a recovery for underpaid sick leave. This claim is based on Defendants'
15 alleged practice of paying sick leave at the standard hourly rate, not the regular rate.
16 Gundzik Decl., ¶ 32. Class members' regular rate will be different for those employees who
17 receive a bonus. *Id.* On occasion, Defendants granted bonuses of a few hundred dollars to
18 some employees during the class period. *Id.* For the most part, these are safety and
19 attendance bonuses that are paid annually. *Id.* About 35% of employees received such a
20 bonus in the average amount of \$227. *Id.* Class members worked an average of 1,817 hours
21 per year. *Id.* Dividing the \$227 bonus by 1,817 hours results in 12.5 cent increase in the
22 regular rate for only those employees who received a bonus. *Id.* Assuming that employees
23 took three sick leave days per year, the 35% of employees that received bonuses would be
24 entitled to recover about \$4.50 each for a total of about \$12,285. *Id.* Thus, the maximum
25 potential recovery on this claim is \$12,285 and the minimum is \$0. *Id.*

26 The Eighth Cause of Action is for recovery of civil penalties under PAGA for the
27 forgoing alleged Labor Code violations. The PAGA claim is limited in time to one year. The
28

1 strength of the PAGA claim would be impacted by the factors discussed above for the non-
2 PAGA claims. Gundzik Decl., ¶ 33.

3 Based upon the forgoing, the class claims in this case have a minimum value of
4 nothing and the maximum potential recovery is \$18 million, not including the PAGA
5 penalties. Gundzik Decl., ¶ 34. A reasonable estimate of the average amount that Class
6 members could have obtained if Plaintiff prevailed at trial on behalf of the entire Class, if
7 the Class was certified, would be a minimum of about \$0 and a maximum of about \$2,354.
8 *Id.* However, the maximum amount is almost never recovered at trial and never in a
9 settlement. *Id.* Settlements, by their nature, must account for the weaknesses in a plaintiff's
10 case, which are discussed above. *Id.* Indeed, because Defendants raised a colorable legal or
11 factual defense to each of the claims Plaintiff alleged, it is possible that, after trial, the Class
12 would recover nothing. *Id.*

13 The PAGA settlement satisfies the criteria in *Moniz v. Adecco USA, Inc.* 72 Cal.
14 App. 5th 56, 77 (2021), because “it is fair, reasonable, and adequate in view of PAGA’s
15 purposes to remediate present labor law violations, deter future ones, and to maximize
16 enforcement of state labor laws.” The settlement allocates \$75,000 to Plaintiff’s PAGA
17 claim. Gundzik Decl., ¶ 35. In conjunction with the class settlement, this settlement will
18 serve to remediate Defendants’ alleged Labor Code violations. *Id.* Given that Defendants
19 will be paying \$1,350,000 as a result of the alleged violations, the class and PAGA
20 settlement is a large disincentive for Defendants to engage in similar Labor Code violations
21 in the future. *Id.* And, because Defendants are aware that Plaintiff’s counsel has been in
22 contact with class members and aggrieved employees as a result of the litigation and
23 because all class members will receive a Class Notice with counsel’s contact information,
24 those employees will be able to contact Plaintiff’s counsel in the future if Defendants
25 attempt to engage in similar practices. *Id.* These factors—the payment of a large sum and
26 employee notice of violations and potential violations—serve to maximize enforcement of
27 state labor laws. *Id.* Also, unlike in *Moniz*, here there is no unsubstantiated and
28 disproportionate allocation of civil penalties between different groups of employees. *Id.* All

1 aggrieved employees will receive an allocation of PAGA civil penalties based on the
2 number of qualifying months that they worked for Defendants. *Id.*

3 **B. Facts Relevant to Class Certification (Numerosity, Ascertainability and**
4 **Community of Interest)**

5 There are approximately 7,800 Class Members. Gundzik Decl., ¶ 36. The exact
6 number and identity of Class Members will be provided by Defendants in connection with
7 its duty to provide Class Data to the Administrator within 20 days after the Court
8 preliminarily approves the settlement. Gundzik Decl., ¶¶ 37, 41, Ex. 1, ¶ 4.2. And, a
9 community of interest exists, as in the pleading, Plaintiff is claiming the same injuries based
10 upon the same alleged wage and hour policies as are the Class Members. Gundzik Decl., ¶
11 38.

12 **C. Facts Relevant to Other Concerns**

13 Plaintiff's counsel has conferred with Defendants' counsel, and Defendants have
14 indicated that all Class Members are fluent in English because work-related communications
15 are in English. Gundzik Decl., ¶ 39. For that reason, the Class Notice will be printed only in
16 English. *Id.*

17 Gundzik Gundzik Heeger LLP ("GGH") and Caskey & Holzman have entered into a
18 written retention agreement with the Class Representative and have agreed therein to divide
19 any attorney's fees awarded in this case. Gundzik Decl., ¶ 40, Ex. 3. Plaintiff has consented
20 to the division of fees. *Id.*

21 **III. The Settlement Agreement**

22 **A. Class Definition and Class and Release Period**

23 The Class consists of all persons employed by Defendants in California who worked
24 for Defendants in a non-exempt position during the Class Period for at least one week and
25 performed services as drivers, or assisting drivers, including bus operators, bus aides, road
26 supervisors and dispatchers. Gundzik Decl., ¶ 41, Ex. 1, ¶ 1.5. The Class Period and the
27 class release period both begin on June 11, 2020, and end on the date of preliminary
28 approval. Gundzik Decl., ¶ 43, Ex. 1, ¶¶ 1.12, 5.2. The Settlement Agreement provides that

1 if the total class member workweeks is more than 110% of 437,254 (which is the number of
2 workweeks reported prior to mediation), Defendants may either increase the portion of the
3 Gross Settlement Amount allocated to the Class pro rata, or elect to limit the date for
4 determining class membership and released claims to limit the class workweeks so that they
5 are less than or equal to 437,254 plus 10%. Gundzik Decl., ¶ 41, Ex. 1, ¶ 8.

6 **B. Release of Claims**

7 Members of the Class, Plaintiff and the Aggrieved Employees will provide releases
8 to Defendants and its related entities. Gundzik Decl., ¶¶ 41, 44-48, Ex. 1, ¶¶ 5.1, 5.2, 5.3. All
9 releases will be effective “when MV provides all funds due under this Agreement to the
10 Administrator.” Gundzik Decl., ¶ 41, Ex. 1, ¶ 5. The scope of the release will be disclosed to
11 the Class in the proposed Class Notice. See Gundzik Decl., ¶ 44, Ex. 1, pp. 24-33. Any
12 member of the Class who does not like the scope of the release (or the Settlement in general)
13 can preserve his or her individual claims by timely submitting a written request to be
14 excluded from the Settlement and class.

15 The Release applicable to the Class Members provides:

16 All Participating Class Members, on behalf of themselves and their
17 respective former and present representatives, agents, attorneys, heirs,
18 administrators, successors, and assigns, release Released Parties from all
19 causes of action and factual or legal theories arising during the Class
20 Period that were alleged in the Operative Complaint (or LWDA notice) or
21 arise from facts alleged in the Operative Complaint (or LWDA notice),
22 including all damages, penalties, interest and other amounts recoverable
23 under said claims, causes of action or legal theories of relief, including but
24 not limited to claims for failure to provide meal periods, failure to provide
25 rest periods, failure to pay wages or other compensation earned (including
26 at the proper regular rate), failure to pay overtime, failure to indemnify
27 business expenses, failure to provide accurate wage statements, failure to
28 timely pay all final wages, unfair competition, civil penalties under

1 PAGA, Labor Code sections 201, 202, 203, 204, 510, 512, 226, 226.7,
2 246, 1194, 1194.2, 2802, and 2699, Business and Professions Code
3 section 17200 et seq., and Wage Order 9. Class Members shall not waive
4 section 1542 of the California Civil Code.

5 Gundzik Decl., ¶ 41, Ex. 1, ¶ 5.2.

6 The Release applicable to Aggrieved Employees provides:
7 All Participating and Non-Participating Class Members who are
8 Aggrieved Employees are deemed to release, on behalf of themselves and
9 their respective former and present representatives, agents, attorneys, heirs,
10 administrators, successors, and assigns, the Released Parties from any
11 liability for civil penalties recoverable under PAGA for violations during
12 the PAGA Period under PAGA based on any factual or legal theories that
13 were alleged in the Operative Complaint or LWDA notice or arise from
14 facts alleged in the Operative Complaint or LWDA notice, including for
15 the following California Labor Code sections: 201, 202, 203, 204, 226,
16 226.7, 246, 510, 512 and 2802. PAGA Employees shall not waive section
17 1542 of the California Civil Code.

18 Gundzik Decl., ¶ 41, Ex. 1, ¶ 5.3.

19 The release to be provided by the named Plaintiff will be broader and encompass
20 most claims that she might have against Defendants and will include a waiver of Civil Code
21 section 1542. Gundzik Decl., ¶ 41, Ex. 1, ¶ 5.1.

22 **C. Class Data.**

23 Within 20 days following the Court's order granting preliminary approval of the
24 Settlement, Defendants will provide the Administrator with the Class Data and at the same
25 time, will provide the Class Data, without Class Member names, contact information or
26 social security numbers, to Class Counsel. Gundzik Decl., ¶ 41, Ex. 1, ¶ 4.2. This
27 information will remain confidential. *Id.* Because Plaintiff's counsel will be provided
28

1 anonymized Class Data, they will be able to confirm that the Net Settlement Amount has
2 been divided correctly, based on the data provided by Defendants. Gundzik Decl., ¶ 42.

3 **D. Monetary Terms**

4 Defendants will pay a Gross Settlement Amount of \$1.35 million to the
5 Administrator plus the employer's share of all payroll taxes owed on the wage portion of all
6 individual settlement checks. Gundzik Decl., ¶ 41, Ex. 1, ¶¶ 3.1, 3.2.4.1. An escalator clause
7 may result in an increase in the Gross Settlement Amount if total Class Workweeks exceed
8 110% of 437,254. Gundzik Decl., ¶ 41, Ex. 1, ¶ 8.

9 After proposed deductions, as approved by the Court, and assuming that the escalator
10 clause does not result in an increase in the Gross Settlement Amount, the Net Settlement
11 Amount will be approximately \$743,750, all of which will be available to distribute to
12 Participating Class Members. Gundzik Decl., ¶¶ 50.

13 If the Court grants final approval of the Settlement, within no more than ten calendar
14 days of the Effective Date (which is approximately 60 days following the date of entry of
15 the Court's Final Approval Order), Defendants will deposit the Gross Settlement Amount
16 with the Administrator. Gundzik Decl., ¶ 41, Ex. 1, ¶¶ 1.18 ("Effective Date"), 4.3. Within
17 ten calendar days of Defendants' deposit of funds, the Administrator will pay settlement
18 payments to Participating Class Members and Aggrieved Employees, the Court-approved
19 Class Representative Service Payment, the Court-approved Class Counsel Fees Payment and
20 Class Counsel Litigation Expenses Payment, the LWDA PAGA Payment, and the
21 Administration Expenses Payment. Gundzik Decl., ¶ 41, Ex. 1, ¶ 4.4.

22 At the final approval hearing, the Court will be asked to grant final approval to the
23 settlement and approve the following deductions from the Gross Settlement Amount: (a)
24 Class Counsel Fees Payment of \$450,000; (b) Class Counsel Litigation Expenses Payment
25 not to exceed \$25,000; (c) a Class Representative Service Payment of \$10,000; (d)
26 Administration Expenses Payment not to exceed \$46,250; (e) An allocation of \$75,000 to
27 PAGA Penalties, seventy-five percent (75%) of which will be paid to the California Labor
28 and Workforce Development Agency (the "LWDA Payment"), and the remaining twenty-

1 five percent (25%) of which will be distributed to the Aggrieved Employees. Gundzik Decl.,
2 Ex. 1, ¶¶ 3.2.1, 3.2.2, 3.2.3, 3.2.5; Declaration of Jodey Lawrence (“Lawrence Decl.”), ¶ 15.

3 The Settlement Agreement provides for up to a \$10,000 Class Representative
4 Service Payment. Gundzik Decl., ¶ 41, Ex. 1, ¶ 3.2.1. This requested award is in recognition
5 of the significant time that Plaintiff Michelle Kussner expended pursuing this action and
6 assisting our efforts with the case, the risks she took in agreeing to file this action and in
7 recognition of the expanded general release that he is required to provide, as part of the
8 Settlement. Gundzik Decl., ¶ 53. Plaintiff is required to provide Defendant with a broad
9 general release which includes a waiver of Section 1542 of the California Civil Code.
10 Gundzik Decl., ¶ 41, Ex. 1, ¶ 5.1.

11 Plaintiff will be supporting the request for attorneys’ fees in several ways. Plaintiff’s
12 counsel will include actual billing records and will also provide a chart which will specify
13 the number of hours spent on each type of task that was required in connection with the
14 case. Gundzik Decl., ¶ 54. Plaintiff’s counsel will be applying the percentage method and
15 supporting it with a lodestar cross-check. *Id.* And, if Plaintiff’s counsel are requesting a
16 multiplier, they will provide sufficient grounds for the application of the multiplier being
17 requested. *Id.*

18 The Net Settlement Amount of approximately \$743,750 will be distributed to
19 Participating Class Members based on the number of Workweeks they worked for
20 Defendants. The following formula will be used to calculate the settlement payments to be
21 made to Participating Class Members: (Net Settlement Amount ÷ All Participating Class
22 Members’ Workweeks) x (Individual Participating Class Member’s Workweeks). Gundzik
23 Decl., ¶ 41, Ex. 1, ¶ 3.2.4. Based on a Class size of 7,800, the Participating Class Members
24 will be paid, on average, about \$95.35. Individual Class Payments and Individual PAGA
25 Payments will be paid to the Class Members within 10 days of Defendant’s deposit of the
26 Gross Settlement Amount with the Administrator. Gundzik Decl., ¶ 41, Ex. 1, ¶ 4.3.

27 Participating Class Member’s Individual Class Payments will be allocated as
28 follows: one-third wages and two-thirds as interest and penalties. Gundzik Decl., ¶ 41, Ex. 1,

¶ 3.2.4.1. The wage portion of each Individual Class Payments shall be subject to wage withholdings and reported on a form W-2. *Id.* The interest and penalty portions will be reported on IRS 1099 Forms. *Id.*

\$75,000 of the Net Settlement Amount will be allocated to Plaintiff's PAGA claims (the "PAGA Penalties"), 75% (\$56,250) of which will be paid to the LWDA (the "LWDA PAGA Payment"), and the remaining 25% (\$18,750) of which will be distributed to the Aggrieved Employees based upon the number of PAGA Pay Periods that they worked during the PAGA Period. The following formula will be used to calculate the Individual PAGA Payments to be made Aggrieved Employees: $(\$18,750 \div \text{All Aggrieved Employees' PAGA Pay Periods}) \times \text{Individual Aggrieved Employee's PAGA Pay Periods}$. Gundzik Decl., ¶ 41, Ex. 1, ¶ 3.2.5.1. Participating Class Members who are also Aggrieved Employees may receive their Individual PAGA Payment included in the same checks as their Individual Class Payment. Class Members who exclude themselves from the Class Settlement will still receive their Individual PAGA Payment and such Class Members will still be bound by the Released PAGA Claims, notwithstanding their exclusion from the Class. Gundzik Decl., ¶ 41, Ex. 1, ¶¶ 5.3, 7.5.4. Individual PAGA Payments will be treated as penalties and reported on an IRS Form 1099. Gundzik Decl., ¶ 41, Ex. 1, ¶ 3.2.5.2.

E. Notice Administration

The settlement will be administered by Phoenix Settlement Administrators ("Phoenix" or "Administrator"). Gundzik Decl., ¶ 41, Ex. 1, ¶ 1.2; Lawrence Decl., ¶¶ 12-15. If the Court grants preliminary approval of the settlement, within 20 calendar days Defendants will provide the Administrator with the names, social security numbers, last known addresses for each Class Member and the number of Class Workweeks and PAGA Pay Periods. Gundzik Decl., ¶ 41, Ex. 1, ¶¶ 1.8, 4.2. The Administrator will check all addresses against the National Change of Address database and update the Class list as appropriate. Gundzik Decl., ¶ 41, Ex. 1, ¶ 7.4.2. Within ten days of receiving the Class Data, the Administrator will send to each Class Member's most recent address via First-Class United States mail an English version of the Class Notice. Gundzik Decl., ¶ 41, Ex. 1, ¶

1 7.4.2. No submission of a claim form is necessary, and all Class members are eligible to
2 receive a settlement payment except those who follow the procedure for requesting an
3 exclusion. Gundzik Decl., ¶ 41, Ex. 1, ¶ 3.1.

4 The proposed form of the Class Notice discloses the pendency of this litigation,
5 summarizes the allegations against Defendants, defines the Class, describes the
6 consideration that Defendants will provide in settlement along with an estimate of each
7 Class Member's estimated recovery if they participate in the settlement. Gundzik Decl., ¶
8 57, 67, Ex. 1 at pp. 24-33. The Class Notice also describes the claims that will be released
9 and explains the procedures to be used by members of the class to be excluded from or
10 object to the settlement. *Id.* Because this is an opt-out settlement and Class Members who do
11 nothing will still receive a settlement payment, the notice provisions agreed to by the parties
12 will adequately serve the interests of the individual Class Members in receiving the relief
13 provided by the settlement and adequately comply with California Rules of Court, Rule
14 3.766(e). Gundzik Decl., ¶ 58.

15 All settlement checks will be valid for 180 days from issuance. The funds
16 represented by all uncashed checks will be transmitted by the Administrator to the California
17 State Controller's Office Unclaimed Property Fund. Gundzik Decl., ¶¶ 41, 59, Ex. 1, ¶ 4.4.3.

18 For any Class Notice that is returned as undeliverable, the Administrator will
19 perform a skip trace. Gundzik Decl., ¶ 41, Ex. 1, ¶ 7.4.3. The returned Class Notices will be
20 re-mailed to the new addresses obtained for such Class Members. *Id.* Such searching and re-
21 mailing will be completed within three business days of the date that Class Notices were
22 originally returned as undeliverable. *Id.*

23 The Administrator will establish a private website for this settlement and will post
24 the settlement agreement and other relevant documents. Gundzik Decl., ¶ 41, Ex. 1, ¶ 7.8.1.
25 Additionally, in their individual Class Notices, Class Members will be provided with the
26 phone number and email address for the Administrator, as well as the website specific to the
27 Settlement and instructions on how to access the website. Gundzik Decl., ¶ 41, Ex. 1 at p.
28 33. If there is a change in the date or location of the Final Approval hearing, the

1 Administrator will post this information on the website. Gundzik Decl., ¶ 41, Ex. 1, ¶ 7.8.1.
2 Notice of the Final Judgment and Final Approval Order will also be posted on the
3 Administrator's website. Gundzik Decl., ¶ 41, Ex. 1, ¶ 7.8.1. The posting of the final
4 judgment in this manner is intended to satisfy the requirements of Rule of Court 3.771(b).

5 **F. Responses to Notice**

6 Any member of the Class who wishes to be excluded from the settlement must
7 submit a written request to be excluded to the Administrator, which must be postmarked no
8 later than forty-five (45) days after the Class Notice is mailed by the Administrator. Gundzik
9 Decl., ¶ 41, Ex. 1, ¶¶ 1.43 (Response Deadline); 7.5.1. Any Class Member wishing to object
10 to the approval of the Settlement must send a written statement of objection to the
11 Administrator no later than forty-five (45) days after the Class Notice is mailed by the
12 Administrator. Gundzik Decl., ¶ 41, Ex. 1 at ¶¶ 7.7.1, 7.7.2.

13 All Class Notices returned as being undeliverable will be re-mailed within three
14 business days of the date that Class Notices were originally returned as undeliverable.
15 Gundzik Decl., ¶ 41, Ex. 1, ¶ 7.4.3. For Class Notices that are re-mailed to a different
16 address, the 45-day opt-out and objection deadline will be extended by an additional 14
17 calendar days. Gundzik Decl., ¶ 41, Ex. 1, ¶ 1.43.

18 **G. Proposed Schedule of Events**

19 Based on the terms of the Settlement Agreement, the following sets forth the
20 proposed schedule of events to occur with respect to the effectuation of the settlement:

21

Event	Date
Deadline for Defendant to provide Class data to Administrator	within 20 calendar days of preliminary approval
Deadline to mail Class Notice to Class Members	within 10 calendar days of receipt of class data from Defendant
Deadline to challenge Workweeks, opt out of or object to settlement	within forty-five (45) calendar days of mailing Class Notice

27

Event	Date
Deadline to file motion for final approval of the settlement and award of attorneys' fees and costs	16 court days before final approval hearing
Hearing on motion for final approval of the settlement, granting of final approval, and entry of judgment	TBD
Deadline for Defendant to deliver funds to Administrator	Within 10 calendar days after the Effective Date
Deadline for Administrator to distribute settlement funds	within 10 calendar days of Defendant's delivery of funds to Administrator

IV. ARGUMENT

A. The Class Should be Certified for Settlement Purposes.

The proposed class satisfies the criteria for certification of a settlement class under California law. Section 382 of the Code of Civil Procedure “authorizes class suits in California when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court.” *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 435 (2000). “To obtain certification, a party must establish the existence of both an ascertainable class and a well-defined community of interest among the class members. *Id.*, at 435, citing *Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462, 470 (1981); also citing *Vasquez v. Superior Court*, 4 Cal. 3d 800, 809 (1971). The community of interest requirement will be met when the following three factors exist: “(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.” *Linder v. Thrifty Oil Co.*, 23 Cal. 4th at 435.

1. An Ascertainable Class Exists that can easily be Determined from Defendant's Records.

“An ascertainable class exists when, based upon the class definition, it is possible to give adequate notice to class members or to determine after the litigation has concluded who is barred from re-litigating. (Citation omitted.) The goal in defining the class is to use

terminology that will convey sufficient meaning to enable persons hearing it to determine whether they are members of the class plaintiff wishes to represent.” *Marler v. E.M. Johansing, LLC*, 199 Cal. App. 4th 1450, 1459-1460 (2011). Thus, a class is generally considered ascertainable when (i) under the class definition the members are clearly identifiable and (ii) the members can be located and notified through a reasonable expenditure of time and money. *See Reyes v. Board of Supervisors*, 196 Cal. App. 3d 1263, 1274-1275 (1987). Here, the Class definition is clear. The Class is defined as “all persons employed by Defendants in California who worked for Defendants in a non-exempt position during the Class Period for at least one week and performed services as drivers, or assisting drivers, including bus operators, bus aides, road supervisors and dispatchers.” Gundzik Decl., ¶ 41, Ex. 1, ¶ 1.5. The Class Period is defined as the period beginning on June 11, 2020, and ending on the date of preliminary approval. Gundzik Decl., ¶ 41, Ex. 1, ¶ 1.12.

2. There is a Well-Defined Community of Interest among the Class Members.

The community of interest requirement is met with respect to the Class and the claims asserted in the pleading. There are common issues regarding Defendants’ treatment of these employees as to meal and rest periods. Further, the claims of the named Plaintiff are typical of the claims of all Class Members, and she can and does adequately represent the Class. Gundzik Decl., ¶¶ 18, 19, 38; Declaration of Michelle Kussner (“Kussner Decl.”), ¶¶ 3-7.

3. Common Issues of Law and Fact Predominate over any Individual Issues.

To determine whether common issues predominate in a class action matter, “a court must examine the plaintiff’s theory of recovery and assess the nature of the legal and factual disputes *likely to be presented*...As a general rule if the defendant’s liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.” *Benton v. Telecom Network Specialists, Inc.*, 220 Cal. App. 4th 701, 716 (2013) (emphasis in original).

1 Here, Plaintiff maintains that common issues exist with respect to Defendants’
2 policies and practices regarding meal and rest breaks and payment of related wage
3 premiums. Gundzik Decl., ¶¶ 18, 19, 38. Plaintiff maintains that the only individualized
4 differences between Class members relate to the amount of compensation each Class
5 member would be entitled to receive. However, it is well-settled that mere differences as to
6 the amount of damages among Class members are not sufficient to prevent certification. *Id.*;
7 *Acree v. General Motors Acceptance Corp.*, 92 Cal. App. 4th 385, 387 (2001) (“A class
8 action may be maintained even if each class member must at some point individually show
9 his or her eligibility for recovery or the amount of his or her damages...”)

10 **4. Plaintiff’s Claims are typical of the Claims of the Class.**

11 “To maintain a class action, the representative plaintiff must adequately represent
12 and protect the interests of other members of the class. (Citation omitted.) Therefore, a
13 class representative plaintiff must be situated similarly to the other class members united by
14 a common interest.” *CashCall, Inc. v. Superior Court*, 159 Cal. App. 4th 273, 284 (2008).
15 Thus, the typicality requirement focuses on whether the proposed representative’s claims are
16 typical of the claims of the rest of the class. *Id.*; see *Classen v. Weller*, 145 Cal. App. 3d 27,
17 47 (1983).

18 Here, Plaintiff is seeking relief for the same wage and hour violations as are the rest
19 of the Class Members. Gundzik Decl., ¶ 38; Kussner Decl., ¶¶ 3-7. She seeks to impose
20 liability on Defendants based on the same claims and theories, as well as the same alleged
21 injuries, which apply to the Class as a whole. Thus, the claims of the Class Representative
22 are typical of the claims of the Class.

23 **5. The Class Representative and Class Counsel Will Adequately**
24 **Protect the Interests of the Class.**

25 “Adequacy of representation depends on whether the plaintiff’s attorney is qualified to
26 conduct the proposed litigation and the plaintiff’s interests are not antagonistic to the
27 interests of the class.” *McGhee v. Crocker-Citizens Nat. Bank*, 60 Cal. App. 3d 442, 450
28 (1976). Here, the Class Representative retained attorneys with extensive experience in

1 prosecuting wage and hour class actions. Gundzik Decl., ¶¶ 14-17; Declaration of Daniel
2 Holzman (“Holzman Decl.”), ¶¶ 2-4.

3 Nor is there any conflict between the interests of the Class Representative and the
4 members of the Class. The Class Representative and the Class are claiming the same injuries
5 based upon the same alleged wage and hour policies existing while they were employed by
6 Defendants. Gundzik Decl., ¶ 38; Kussner Decl., ¶ 8.

7 **B. Preliminary Approval is Appropriate Because the Settlement is Fair and**
8 **Reasonable.**

9 A trial court should approve a class action settlement agreement if it determines that
10 the agreement is fair, adequate, and reasonable. *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th
11 1794, 1801 (1996). In making this decision, a court “should consider relevant factors, which
12 may include, but are not limited to the strength of the plaintiffs' case, the risk, expense,
13 complexity and duration of further litigation as a class action, the amount offered in
14 settlement, the extent of discovery completed and the stage of the proceedings, the
15 experience and views of counsel, the presence of a governmental participant, and the
16 reaction of class members to the proposed settlement.” *In re Microsoft I-V Cases*, 135 Cal.
17 App. 4th 706, 723 (2006).

18 “At the same time, the trial court should give due regard to what is otherwise a
19 private consensual agreement between the parties.” *Id.* Thus, the Court “limits its inquiry to
20 the extent necessary to reach a reasoned judgment that the agreement is not the product of
21 fraud or overreaching by, or collusion between, the negotiating parties, and that the
22 settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” *In re*
23 *Microsoft I-V Cases*, 135 Cal. App. 4th at 723, citing *Dunk v. Ford Motor Co.*, 48 Cal. App.
24 4th at 1801; also citing *Officers for Justice v. Civil Service Com'n, etc.*, 688 F.2d 615, 625
25 (9th Cir. 1982). Whether the settlement was reached through arms-length negotiations is
26 also a strong factor which weighs in favor of presuming that the settlement is fair and
27 reasonable. *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th at 1801.

1 These factors, as applied to this matter and as set forth below, strongly favor granting
2 preliminary approval of the Settlement Agreement:

3 **The Strength of Plaintiff's Case.** As set forth in the Section II above and the
4 Declaration of Aaron Gundzik, the parties have vigorously advocated the parties' respective
5 positions in this matter, and Defendants have consistently disputed that they violated
6 California's wage and hour laws. In fact, Defendants raised a colorable legal or factual
7 defense to each claim Plaintiff has alleged. Gundzik Decl., ¶¶ 25-33.

8 **The Risk, Expense, Complexity and Likely Duration of Further Litigation.** If the
9 settlement is not approved, the Class Representative would need to move forward with
10 discovery and then move for class certification. Defendants will oppose certification on the
11 grounds that numerous individualized fact issues allegedly exist. They will argue and could
12 succeed in claiming that these individualized issues overwhelm common issues and will also
13 argue that the action is not manageable on a class wide basis. The result could be that the
14 case would not be certifiable as a class action. Gundzik Decl., ¶¶ 21-22.

15 **The Risk of Maintaining Class Action Status Through Trial.** If the settlement is
16 not approved, and the Class Representative is successful on his motion for certification of
17 the class, the Class would still be faced with significant risks in continuing with the
18 litigation. Defendants could interpose a successful defense which could either cause the jury
19 to reject Plaintiff's claims or award the Class only a small amount of the unpaid wages and
20 other amounts due to them. And, even if the Class ultimately prevailed, most of the Class
21 Members would have to wait years or more before they received any payment from the
22 lawsuit. Gundzik Decl., ¶ 23. Further, the Court would still retain authority to de-certify the
23 case in the event the trial showed that common issues did not predominate. *See* Cal. Rule of
24 Court 3.764. *Id.*

25 **The Amount Offered in Settlement.** In the experience of Class counsel, a gross
26 settlement of \$1.35 million for a class of approximately 7,800, with the claims described
27 above, with \$75,000 allocated to Plaintiff's PAGA claim, is within the "ballpark" of a fair,
28 reasonable and adequate settlement. Gundzik Decl., ¶ 24; Holzman Decl., ¶ 8. Taking into

1 account the serious risks associated with proceeding— that the case might not be certified as
2 a class action, that Plaintiff might not succeed on the merits at trial or, if Plaintiff succeed at
3 trial, that the case is reversed on appeal – it becomes apparent that a settlement in this range
4 is fair to the Class.

5 **The Extent of Investigation and Discovery Completed and the Stage of the**
6 **Proceedings.** As set forth in Section II.A above and the Declaration of Aaron Gundzik, the
7 parties have engaged in extensive formal and informal discovery and factual investigation.
8 Gundzik Decl., ¶¶ 8-11.

9 **The Experience and Views of Counsel.** As set forth in the declaration of Aaron
10 Gundzik, Class Counsel has significant experience in wage and hour class actions. Gundzik
11 Decl., ¶¶ 14-17; Holzman Decl., ¶¶ 2-4. Aaron Gundzik and Rebecca Gundzik have
12 practiced law and been members of the California State Bar collectively for over 60 years.
13 *Id.* Daniel Holzman has been practicing law for more than 25 years. *Id.* Based upon their
14 vast experience in the area, when they arrived at a settlement with Defendants, Class
15 Counsel had sufficient information to assess the strengths and weaknesses of the claims
16 against Defendants, and the benefits of the settlement in light of the significant risks of
17 continuing with the litigation.

18 **Whether the Settlement Was Reached Through Arm’s-Length Bargaining or**
19 **was a Product of Fraud or Overreaching.** It is undisputed that the parties negotiated the
20 settlement at arm’s length during a mediation before a well-respected neutral third-party
21 mediator who had significant experience settling wage and hour class action lawsuits.
22 Gundzik Decl., ¶ 12. The settlement was negotiated at arms’ length and was in no sense
23 collusive. *Id.*

24 **C. The Proposed Class Notice Fairly Apprises the Class of the Terms of the**
25 **Settlement and Their Right to Object.**

26 “The principal purpose of notice to the class is the protection of the integrity of the
27 class action process, one of the functions of which is to prevent burdening the courts with
28 multiple claims where one will do.” *Cho v. Seagate Technology Holdings, Inc.*, 177 Cal.

1 App. 4th 734, 745-746 (2009). Thus, an appropriate notice is one which has a reasonable
2 chance of reaching a substantial percentage of the class members. *Cartt v. Superior Court*,
3 50 Cal. App. 3d 960, 974 (1975).

4 The proposed Class Notice addresses these concerns. It identifies the Class
5 Representative and Defendants, provides a description of the lawsuit, the settlement
6 amounts, the proposed plan of allocation and the attorneys' fees and expense payments that
7 Class counsel may receive. The proposed Class Notice provides information as to how to opt
8 out of the Class and be excluded, how to object to the settlement, as well as the date of the
9 final approval hearing. It also describes the Settlement Agreement with sufficient detail to
10 allow Class Members to make an informed decision as to whether to accept or object to it.
11 The proposed Class Notice further provides that it will bind all Class Members who do not
12 request exclusion. Gundzik Decl., ¶ 41, Ex. 1 at pp. 24-33. As such, the proposed Class
13 Notice describes the settlement with enough specificity to allow Class Members to make an
14 informed decision as to whether to participate in it. See California Rule of Court 3.766(d).

15 Further, the manner of giving notice is to be done in such a way as to maximize its
16 reach. The Class Notice will be sent to members of the Class by First Class regular U.S.
17 mail by the Administrator. Gundzik Decl., ¶ 41, Ex. 1, ¶ 7.4.2. Prior to mailing, the
18 Administrator shall check all addresses against the National Change of Address (NCOA)
19 database. *Id.* The Administrator will mail the Class Notice to the most current mailing
20 address identified through such means. Gundzik Decl., ¶ 41, Ex. 1, ¶ 7.4.2.

21 Pursuant to California Rules of Court, Rule 3.766(e), in determining whether the
22 manner of giving notice is sufficient, a court considers (1) the interests of the class; (2) the
23 type of relief requested; (3) the stake of the individual class members; (4) the cost of
24 notifying class members; (5) the resources of the parties; (6) the possible prejudice to class
25 members who do not receive notice; and (7) the res judicata effect on class members. Here,
26 the interests of the Class members are in receiving notice of the lawsuit and settlement.
27 Class Counsel and Defendant's counsel have conferred and determined that disseminating
28

1 the Class Notice by mail to the Class Members is the best way to maximize its reach.
2 Gundzik Decl., ¶ 65.

3 Delivering the Notice by mail complies with California Rules of Court, Rule
4 3.766(e) and the purpose of the Notice. An appropriate notice is one which has a reasonable
5 chance of reaching a substantial percentage of the class members. *Cartt v. Superior Court*,
6 50 Cal. App. 3d 960, 974 (1975). Because this is an opt-out settlement and Class Members
7 who do nothing will still receive a settlement payment, the notice provisions agreed to by
8 the parties will adequately serve the interests of the individual Class Members in receiving
9 the relief provided by the settlement.

10 **V. CONCLUSION**

11 For the foregoing reasons, Plaintiff, on behalf of himself and the Class, respectfully
12 requests that the Court grant preliminary approval of the settlement and set a final approval
13 hearing to take place within approximately 150 days.

14 DATED: July 6, 2023

GUNDZIK GUNDZIK HEEGER LLP

15
16 By: 

Aaron Gundzik

Attorneys for Plaintiff Michelle Kussner,
individually and on behalf of all others
similarly situated