

DOUGLAS HAN (SBN 232858)
SHUNT TATAVOS-GHARAJEH (SBN 272164)
ARSINÉ GRIGORYAN (SBN 319517)
JUSTICE LAW CORPORATION
751 N. Fair Oaks Avenue, Suite 101
Pasadena, California 91103
Telephone: (818) 230-7502
Facsimile: (818) 230-7259

Attorneys for Plaintiff

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO**

ELISALA TELA, individually, and on
behalf of other members of the general
public similarly situated and on behalf
of aggrieved employees pursuant to the
Private Attorneys General Act (“PAGA”);

Plaintiff,

v.

METROCELL CONSTRUCTION, INC., a
California corporation; and DOES 1 through
100, inclusive;

Defendant.

Case No.: CIVDS1918537

Honorable David Cohn
Department S26

CLASS ACTION

**PLAINTIFF’S NOTICE OF MOTION AND
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT, CONDITIONAL
CERTIFICATION, APPROVAL OF CLASS
NOTICE, SETTING OF FINAL
APPROVAL HEARING DATE;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

[Declaration of Proposed Class Counsel
(Douglas Han); and [Proposed] Order filed
concurrently herewith]

Hearing Date: September 8, 2021
Hearing Time: 10:00 a.m.
Hearing Place: Department S26

Complaint Filed: June 24, 2019
FAC Filed: June 28, 2019
SAC Filed: May 10, 2021
Jury Trial: None Set

1 **PLEASE TAKE NOTICE** that on at or as soon as the matter may be heard before the
2 Honorable David Cohn in Department S26 of the San Bernadino Superior Court Justice Center,
3 located at 247 West Third Street, San Bernadino, CA 92415-0210, Plaintiff Elisala Tela
4 (“Plaintiff”) will and hereby moves for an order:

- 5 • Granting Preliminary Approval of the proposed class action settlement described
6 herein and as set forth in the Parties’ Joint Stipulation and Settlement Agreement
7 (“Settlement Agreement,” “Settlement,” or “Agreement”), attached as
8 **“EXHIBIT 2”** to the Declaration of Douglas Han, including, and not limited to,
9 the means of allocation and distribution of funds, and the allocations for penalties
10 under the California Labor Code Private Attorneys General Act of 2004
11 (“PAGA”), the Attorney Fee Award, the Cost Award, the Class Representative
12 Enhancement Payment, and the Administration Costs;
- 13 • Conditionally certifying the proposed Class for settlement purposes only;
- 14 • Appointing Plaintiff as the Class Representative;
- 15 • Appointing Justice Law Corporation as Class Counsel;
- 16 • Approving the proposed Notice of Class Action Settlement (“Class Notice”)
17 attached as **“Exhibit A”** to the Settlement Agreement;
- 18 • Approving the Election Not To Participate or Opt-out Form (“Exclusion Form”)
19 attached as **“Exhibit B”** to the Settlement Agreement;
- 20 • Directing the mailing of the proposed Class Notice with a postage-paid return
21 envelope to the proposed Class;
- 22 • Approving the proposed deadlines for the notice and Settlement Administration
23 process;
- 24 • Approving Simpluris, Inc. (“Simpluris”) as the Settlement Administrator; and

25 ///

26 ///

27 ///

- Scheduling a hearing to consider whether to grant Final Approval of the Settlement Agreement, at which time the Court will also consider whether to grant Final Approval of the requests for the Attorney Fee Award, the Cost Award, the Class Representative Enhancement Payment, the Administration Costs, and approval of the allocation for PAGA penalties.

This motion is based upon the following memorandum of points and authorities; the Declaration of Proposed Class Counsel (Douglas Han); the [Proposed] Order filed concurrently with this motion; the pleadings and other records on file with the Court in this matter; and such documentary evidence and oral argument as may be presented at the hearing on this motion.

Dated: June 24, 2021

JUSTICE LAW CORPORATION

By: 
Douglas Han
Shunt Tatavos-Gharajeh
Arsiné Grigoryan
Attorneys for Plaintiff

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	BACKGROUND	1
III.	INVESTIGATION/ LITIGATION HISTORY	3
a.	Discovery, Investigation, and the Parties' Staunchly Conflicting Positions	3
b.	The Parties Were Able to Reach an Agreement on Settlement of the Action.....	8
i.	The Parties Attended Mediation Which Ultimately Led to the Joint Stipulation and Settlement Agreement	8
ii.	The Settlement Was Reached as a Result of Arm's-Length Negotiations.....	8
iii.	The Settlement Is the Result of Thorough Investigation and Discovery....	9
c.	Terms of the Proposed Settlement.....	9
i.	Deductions from the Settlement	9
ii.	Calculation of the Settlement Payments to Class Members	10
iii.	Notice to the Class	11
iv.	Distribution of Funds.....	12
v.	Release of Claims	13
d.	Counsel for Both Parties Are Experienced in Similar Litigation	14
IV.	ARGUMENT	15
a.	Class Action Settlements Are Subject to Court Review	15
b.	The Proposed Settlement Is a Reasonable Compromise of Claims	16
i.	The Settlement Is Fair and Reasonable	16
ii.	The Settlement Amount of \$175,000 Is Reasonable	18
c.	Discount Analysis Justifies the Settlement.....	21
d.	Conditional Certification of the Class Is Appropriate	23
i.	The Proposed Class Is Ascertainable and Sufficiently Numerous	23
ii.	The Class Members Share a Well-Defined Community of Interest.....	24

1	1.	Common Issues Predominate	24
2	2.	Plaintiff’s Claims Are Typical of the Class Claims	25
3	3.	Plaintiff is Adequate to Represent the Class	26
4	4.	Class Action is Superior for the Fair and Efficient Adjudication of	
5		this Controversy	26
6	e.	The Settlement Is Fair, Reasonable, and Adequate	26
7	f.	Notice to Class Members Complies with California Rule of Court 3.769(f)	27
8	V.	CONCLUSION	27

TABLE OF AUTHORITIES

Cases

<i>Aguilar v. Cintas Corp. No. 2,</i>	
144 Cal. App. 4 th 121 (2006)	17
<i>Amaral v. Cintas Corp.,</i>	
163 Cal. App. 4 th 1157 (2008)	19
<i>Bartold v. Glendale Federal Bank,</i>	
81 Cal. App. 4 th 816 (2000)	23
<i>In re Beef Indus. Antitrust Litig.,</i>	
607 F. 2d 167 (5 th Cir. 1979)	15
<i>Boyd v. Bechtel Corp.,</i>	
485 F.Supp. 610 (N.D. Cal. 1979)	9, 17
<i>Brinker Restaurant Corp. v. Superior Ct.,</i>	
53 Cal. 4 th 1024 (2012)	24
<i>Capitol People First v. Dep’t of Developmental Servs,</i>	
155 Cal. App. 4 th 676 (2007)	24
<i>Carrington v. Starbucks Corp.,</i>	
30 Cal. App. 5 th 504 (2018)	21
<i>City of Detroit v. Grinnell Corp.,</i>	
495 F. 2d 448 (2d Cir. 1974)	22
<i>Classen v. Weller,</i>	
145 Cal. App. 3d 27 (1983)	25
<i>Costter v. Lyft, Inc.,</i>	
193 F Supp.3d 1030 (N.D. Cal. 2016)	20
<i>Dunbar v. Albertson’s Inc.,</i>	
141 Cal. App. 4 th 1422 (2006)	17
<i>Dunk v. Ford Motor Co.,</i>	
48 Cal. App. 4 th 1794 (1996)	15, 26

1	<i>Espinoza v. Galardi South Enterprises Inc.,</i>	
2	Case No. 1:14-cv-21244 (S.D. Fla. 2016)	24
3	<i>Ghazaryan v. Diva Limousine, Ltd.,</i>	
4	169 Cal. App. 4 th 1524 (2008)	23
5	<i>Green v. Obledo,</i>	
6	29 Cal. 3d 126 (1981)	15
7	<i>Harris v. Superior Ct.,</i>	
8	154 Cal. App. 4 th 164 (2007)	17
9	<i>Hicks v. Kaufman & Broad Home Corp.,</i>	
10	89 Cal. App. 4 th 908 (2001)	23
11	<i>Hopson v. Hanesbrands Inc.,</i>	
12	2009 U.S. Dist. LEXIS 33900 (N.D. Cal. Apr. 3, 2009)	21
13	<i>Iowa Beef Processors, Inc. v. Meat Price Investigators Ass’n,</i>	
14	452 U.S. 905 (1981)	15
15	<i>Jones v. JGC Dallas LLC,</i>	
16	Case No. 3:11-cv-02743 (N.D. Tex. 2014)	24
17	<i>Kullar v. Foot Locker Retail, Inc.,</i>	
18	168 Cal. App. 4 th 116 (2008)	16
19	<i>Linder v. Thrifty Oil Co.,</i>	
20	23 Cal. 4 th 429 (2000)	23
21	<i>Linney v. Cellular Alaska Partnership,</i>	
22	151 F. 3d 1234 (9 th Cir. 1998)	22
23	<i>Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles,</i>	
24	186 Cal. App. 4 th 399 (2010)	16
25	<i>Nordstrom Com. Cases,</i>	
26	186 Cal. App. 4 th 576 (2010)	21
27	<i>Sav-On Drug Stores, Inc. v. Superior Ct.,</i>	
28	34 Cal. 4 th 319 (2004)	17, 23, 24

1	<i>In re Tableware Antitrust Litig.,</i>	
2	484 F. Supp. 2d 1078 (N.D. Cal. 2007).....	22
3	<i>Tech-Bilt v. Woodward-Clyde & Associates,</i>	
4	38 Cal. 3d 488 (1985).....	16
5	<i>Ubrino v. Orkin Svcs. Of Calif., Inc.,</i>	
6	726 F. 3d 118 (9 th Cir. 2013).....	20
7	<i>Vasquez v. Superior Ct.,</i>	
8	4 Cal. 3d 800 (1971).....	15
9	<i>Viceral v. Mistras Grp., Inc.,</i>	
10	2016 WL 5907869 (N.D. Cal. Oct. 11, 2016).....	20
11	<i>Walsh v. IKON Solutions, Inc.,</i>	
12	148 Cal. App. 4 th 1440 (2007).....	17
13	<i>Yocupicio v. PAE Grp., LLC,</i>	
14	795 F. 3d 1057 (9 th Cir. 2015).....	20
15	<u>Statutes</u>	
16	Bus. & Prof. Code § 17200	2
17	Civ. Proc. Code § 382.....	23, 26
18	Lab. Code § 201	18
19	Lab. Code § 202	18
20	Lab. Code § 203	7, 8
21	Lab. Code § 226	6, 17, 18, 21
22	Lab. Code § 226.7	2, 18, 21
23	Lab. Code § 510	2, 18, 21
24	Lab. Code § 512	2, 18, 21
25	Lab. Code § 1194	2, 18, 21
26	Lab. Code § 1197	2, 18, 21
27	Lab. Code § 1197.1	2, 18
28	Lab. Code § 1198	2, 18, 21

1	Lab. Code § 2800	2
2	Lab. Code § 2802	2, 18, 21
3	Lab. Code § 2699	18, 19, 20
4	Lab. Code § 2699.5	18
5	Rule 3.769	15, 27

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 **I. INTRODUCTION**

2 This motion seeks preliminary approval of a non-reversionary \$175,000 proposed wage
3 and hour class action settlement by Plaintiff on behalf of himself and all current or former non-
4 exempt employees directly employed by Defendant Metrocell Construction, Inc. (“Defendant”)
5 in California during the Class Period (“Class”). The Class Period is the time period from June 25,
6 2015, through March 31, 2021 (“Class Period”). At the time of this filing, the number of Class
7 Members provided by Defendants is currently estimated to be one hundred thirty-five (135).

8 It is requested this Court grant Preliminary Approval, as, when analyzing the strengths
9 and vulnerabilities of the class claims along-side Defendant’s potential liability exposure, this
10 proposed settlement of \$175,000 – with an average settlement share amount estimated at
11 \$512.96¹ – is well within the “ballpark” of reasonableness.

12 As the following sections show, Class Counsel is convinced that the proposed Settlement
13 is in the best interests of the Class based on the negotiations and a detailed knowledge of the
14 issues present in this action. The length and risks of trial and perils of litigation that affect the
15 value of the claims were all carefully weighed. In addition, the defenses asserted by Defendant,
16 particularly, the uncertainty of class certification, the difficulties of complex litigation, the
17 lengthy process of establishing specific damages and various possible delays and appeals, were
18 also carefully considered by Class Counsel in arriving at the proposed Settlement.

19 **II. BACKGROUND**

20 Defendant was established in 2004 as a full-service engineering, project management,
21 and construction company in the wireless industry. (Declaration of Douglas Han (“Han Dec.”) at
22 ¶ 9.) Specifically, Defendant offers cell site construction, modification, and repair and
23 maintenance for services providers (i.e., Verizon, AT&T, and T-Mobile) (*Ibid.*). This case
24 involves all current or former non-exempt employees directly employed by Defendant within
25 California during the Class Period (“Class”) (*Ibid.*). The Class Period is the time period from
26 June 25, 2015, through March 31, 2021 (“Class Period”). (*Ibid.*)

27
28 ¹ \$69,250 (Net Settlement Amount) / 135 (Class Members) = \$512.96.

1 Plaintiff is a former employee of Defendant who filed a class action on behalf of all
2 current or former non-exempt employees directly employed by Defendant who worked for
3 Defendant during the relevant period. (Han Dec., *supra*, at ¶ 10.) Plaintiff filed his complaint on
4 June 24, 2019, in the Superior Court of San Bernadino, alleging one (1) cause of action for the
5 violation of the Business & Professions Code section 17200, et seq. (*Ibid.*) Plaintiff alleged that
6 Defendant's violation of the California Business & Professions Code section 17200, et seq., was
7 predicated on Defendant's violation of: (1) Labor Code sections 510 and 1198 (failure to pay
8 overtime); (2) Labor Code sections 226.7 and 512(a) (failure to provide meal periods); (3) Labor
9 Code section 226.7 (failure to provide rest breaks); (4) Labor Code sections 1194, 1197, and
10 1197.1 (failure to pay minimum wages); and (5) Labor Code sections 2800 and 2802 (failure to
11 reimburse business expenses). (*Ibid.*)

12 On March 17, 2021, Plaintiff provided written notice to the California Labor and
13 Workforce Development Agency ("LWDA") and Defendant of the specific provisions of the
14 Labor Code he contends were violated and the theories supporting his contention. (Han Dec.,
15 *supra*, at ¶ 12.) Plaintiff believes the requisite sixty-five (65) days for the Private Attorneys
16 General Act of 2004 ("PAGA") notice period expired on May 21, 2021. (Han Dec., *supra*, at ¶
17 13.) On May 10, 2021, Plaintiff filed a Second Amended Complaint ("SAC") in the Superior
18 Court of California, County of San Bernardino, against Defendant on behalf of all current and
19 former non-exempt employees directly employed by Defendant within California at any time
20 between June 25, 2015 to March 31, 2021. (*Ibid.*) The SAC added eight (8) additional causes of
21 action for violating the Labor Code, including a cause of action under PAGA. (*Ibid.*)

22 The Parties attended mediation on Plaintiff's claims on March 16, 2021. (Han Dec.,
23 *supra*, at ¶ 11.) Under the auspices of the mediator Jeffrey Krivis, the Parties were eventually
24 able to reach an agreement on the settlement of the action. (*Ibid.*)

25 ///

26 ///

27 ///

1 Defendant generally and specifically denies any and all liability or wrongdoing of any
2 sort with regard to any of the claims alleged, makes no concessions or admissions of liability of
3 any sort, and contends that for any purpose other than settlement, the Class Action is not
4 appropriate for class or representative treatment. (Han Dec., *supra*, at ¶ 14.) Furthermore,
5 Defendant asserts a number of defenses to the claims, and has denied any wrongdoing or liability
6 arising out of any of the alleged facts or conduct in the Class Action. (*Ibid.*)

7 **III. INVESTIGATION/ LITIGATION HISTORY**

8 **a. Discovery, Investigation, and the Parties’ Staunchly Conflicting Positions**

9 After Plaintiff filed his representative PAGA action, both Parties conducted significant
10 investigation and discovery of the facts and law. (Han Dec., *supra*, at ¶ 15.) Prior to the
11 mediation with Jeffrey Krivis on March 16, 2021, Defendant produced hundreds of documents
12 relating to its policies, practices, and procedures regarding reimbursement of business expenses,
13 paying non-exempt employees for all hours worked, meal and rest period policies, and payroll
14 and operational policies. (*Ibid.*) As part of Defendant’s production, Plaintiff also reviewed time
15 records, pay records, and information relating to the size and scope of the Class, as well as data
16 permitting Plaintiff to understand the number of workweeks in the Class Period. (*Ibid.*) Plaintiff
17 also obtained the class contact information and interviewed numerous Class Members who
18 worked for Defendant throughout the Class Period. (*Ibid.*)

19 Based upon Defendant’s discovery responses and document production, as well as
20 interviews Plaintiff’s counsel had with non-exempt employees, Plaintiff contends – and
21 Defendant denies – that Defendant failed to provide employees legally mandated rest breaks.
22 (Han Dec., *supra*, at ¶ 17.) From March 2014 to January 2016, Defendant’s Employee Manuals
23 did not have *Brinker*-complaint rest break policies. (*Ibid.*) Specifically, Defendant’s Break/Rest
24 Periods policy was not *Brinker*-compliant because it did not include the necessary “major
25 fraction thereof” language. (*Ibid.*) The policy also failed to advise employees of their right to
26 receive additional rest breaks. Next, the Break/Rest Periods policy was not code-compliant
27 because it failed to authorize and permit employees to receive duty-free rest breaks. (*Ibid.*)
28 Relatedly, Defendant’s policies also indicate that employees were pressured to cut their rest

breaks short to avoid being considered tardy. (Han Dec., *supra*, at ¶ 17.) Additionally, Plaintiff alleges that Defendant would frequently assigned employees time-sensitive projects that left them with little to no opportunities to take their rest breaks. (*Ibid.*) For example, lead technicians were forced to skip most of their rest breaks due to Defendant expecting them to complete numerous time-sensitive projects. (*Ibid.*) Since Defendant was understaffed with lead technicians, Defendant expected and pressured lead technicians to complete their heavy workloads within a couple of days or else Defendant would lose bids. (*Ibid.*) Moreover, taking rest breaks was also rarely an option and almost impossible for lead technicians because they were expected to lift heavy equipment up cell towers and would lose momentum and delay completing projects if they stopped to take a break. (*Ibid.*) Finally, Plaintiff asserts that Defendant did not have a policy or practice of paying premium wages for noncompliant rest breaks. (*Ibid.*)

Moreover, Plaintiff asserts – and Defendant denies – that Defendant failed to provide employees with legally mandated meal breaks. (Han Dec., *supra*, at ¶ 18.) Defendant’s Lunch Period policy from March 2014 to January 2016 and onward is not Brinker-compliant because it failed to advise employees of their right to receive meal breaks before their fifth (5th) and tenth (10th) hour of work. (*Ibid.*) Moreover, Defendant’s Lunch Period policy was not code-compliant either because it states that employees may be requested to perform work during their meal breaks if “specifically requested to do so” by their managers. (*Ibid.*) Therefore, the Lunch Period policy fails to satisfy Defendant’s obligation to relieve its employees of all their duties. (*Ibid.*) Finally, like the issues with its Break/Rest Periods policy, Defendant’s stringent policies pressured employees to cut their meal breaks short to avoid appearing tardy. (*Ibid.*) Plaintiff also contends that Defendant had a uniform, improper practice of denying compliant meal breaks. (*Ibid.*) Specifically due to the volume of time-sensitive work Defendant expected employees to complete, employees were frequently prevented from taking timely and full meal breaks. (*Ibid.*) For instance, both site preps like Plaintiff and foremen were pressured to complete their tasks before their tight deadlines at the jobsites, which forced them to work through their meal breaks. (*Ibid.*) Employees like site preps even worked shifts exceeding ten (10) hours without receiving

1 a second meal break. (Han Dec., *supra*, at ¶ 18.) Next, Plaintiff asserts that Defendant would
2 automatically deduct thirty (30) minutes from employees' shifts even if they did not receive meal
3 breaks. (*Ibid.*) Specifically, the ExactTime app that employees used to clock in and out would
4 automatically clock them out at six (6) hours to reflect that they had received their meal breaks
5 regardless of if they had. (*Ibid.*) Even if an employee inputted that they did not receive meal
6 breaks, Defendant would remove this input. (*Ibid.*) Finally, Defendant did not have a policy or
7 practice of paying premium wages for noncompliant meal breaks. (*Ibid.*)

8 Furthermore, Plaintiff contends – and Defendant denies – that Defendant failed to
9 compensate employees for all hours worked. (Han Dec., *supra*, at ¶ 19.) Firstly, a review of
10 employees' timecards has revealed that Defendant had an unlawful rounding practice that was
11 not fair and neutral on its face, which undercompensated employees. (*Ibid.*) Secondly, Plaintiff
12 contends Defendant's policies pressured employees into working off-the-clock for which they
13 were not compensated. (*Ibid.*) For instance, Defendant's Overtime Pay policy in its 2016
14 Employee Manual generally discouraged overtime work because it required preauthorization
15 from managers and threatened employees with disciplinary action for working unauthorized
16 overtime hours. (*Ibid.*) Since employees were already working additional hours due to the
17 number of time-sensitive projects they were assigned, this Overtime Pay policy deterred them
18 from asking for compensation to avoid disciplinary action. (*Ibid.*) This problem with working
19 off-the-clock was exacerbated by Defendant's stringent Excessive Absenteeism or Lateness
20 policy that pressured employees to arrive to work earlier than usual to avoid being considered
21 tardy. (*Ibid.*) Furthermore, Plaintiff alleges that employees were often forced to work off-the-
22 clock both pre-shift and post-shift for which they were not compensated. (*Ibid.*) For example,
23 site preps were tasked with driving to their jobsites after getting their equipment from the
24 warehouse, but Defendant did not compensate them for their drivetime to and from the jobsite
25 despite previously promising to compensate them. (*Ibid.*) In other words, site preps were already
26 working when they drove to and from jobsites to begin working on their projects, but they were
27 not compensated for this. (*Ibid.*) Next, Plaintiff contends that Defendant did not always pay
28 employees overtime or double time despite employees working the requisite hours. (*Ibid.*)

1 Finally, Plaintiff alleges Defendant failed to adhere to the weighted average method when
2 calculating overtime rates for employees who received two (2) regular rates of pay within the
3 same pay period. (Han Dec., *supra*, at ¶ 19.)

4 Plaintiff also asserts – and Defendant denies – that Defendant failed to reimburse
5 employees for necessary business-related expenses. (Han Dec., *supra*, at ¶ 20.) For instance,
6 foremen had to spend \$400 to \$500 to purchase crimpers, loppers, impact drills, power tools, and
7 attachments for power tools to perform their duties. (*Ibid.*) Similarly, radio frequency technicians
8 were required to purchase climbing gear (\$450) personal protective equipment (“PPEs”) (\$800)
9 and tools (\$1,000) to efficiently perform their duties. (*Ibid.*) Defendant did not reimburse them
10 for these purchases. (*Ibid.*) In addition, employees were often required to use their personal cell
11 phones for business-related purposes (i.e., sending and receiving work emails, calling operators
12 of phone companies, emailing daily reports, taking pictures, clocking in and out, etc.) (*Ibid.*)
13 Defendant failed to reimburse them for this usage. (*Ibid.*) Finally, employees were also expected
14 to use their personal vehicles to perform their duties (i.e., drive to and from jobsites, transport
15 antennas, deliver materials to crew members, etc.). (*Ibid.*) Defendant did not reimburse them for
16 the gas or mileage. (*Ibid.*)

17 Additionally, Plaintiff asserts – and Defendant denies – that Defendant is liable for
18 issuing noncompliant wage statements. (Han Dec., *supra*, at ¶ 21.) Specifically, Defendant issued
19 wage statements in violation of Labor Code section 226(a) because the statements omit any
20 record of the automatic 30-minute deductions, which undermines not only the express
21 requirements of section 226 that all deductions be clearly itemized but also its purpose of
22 enabling employees to ascertain whether they were paid appropriately. (*Ibid.*) For those
23 employees who did not receive meal breaks for precisely thirty (30) minutes, Defendant’s
24 deductions also caused a failure to accurately record the actual hours worked, the gross wages
25 earned, and the net wages earned. (*Ibid.*) Even if Defendant asserts that its violation of section
26 226(a) is trivial, the California courts have held that strict compliance of section 226(a) is exactly
27 what is intended. (*Ibid.*)

28 ///

1 Finally, Plaintiff contends – and Defendant denies – that Defendant is liable for waiting
2 time penalties. (Han Dec., *supra*, at ¶ 22.) Specifically, Defendant’s hourly-paid or non-exempt
3 employees are entitled to back underpaid overtime and compensation for time worked off-the-
4 clock as well as missed meal and rest breaks, thereby triggering waiting time penalties under
5 Labor Code section 203. (*Ibid.*) Thus, Defendant owes compensation for underpaid work and
6 missed meal and rest breaks as a matter of fact and law but intentionally failed or refused to
7 perform an act, which was required to be done, constituting “willful” conduct and justifying
8 “waiting-time” penalties under section 203 to former employees. (*Ibid.*)

9 24. Defendant denies Plaintiff’s contentions in their entirety. (Han Dec., *supra*, at ¶
10 23.) Among other things, Defendant denies Plaintiff’s rest and meal break contentions, on the
11 grounds that it provided breaks within compliant times and that non-exempt employees were
12 given discretion as to when to take their breaks. (*Ibid.*) Defendant also counters that it did not
13 regularly assign time-sensitive projects that pressured employees to skip, cut short, or take late
14 meal and rest breaks. (*Ibid.*) Furthermore, Defendant asserts that it had in place compliant meal
15 and rest break policies. (*Ibid.*) Defendant asserts that its thirty (30) minute deduction from
16 employees’ shifts was not an attempt to conceal employees not receiving full and timely breaks.
17 (*Ibid.*) Defendant further contends that whether non-exempt employees took meal and rest breaks
18 during compliant time frames and were relieved of all duties are questions that could only be
19 resolved by resorting to individualized inquiries to each non-exempt employee and, therefore,
20 class certification would not be appropriate. (*Ibid.*) Defendant also asserts that it paid its
21 employees for all times worked, including overtime, minimum, and premium wages. (*Ibid.*)
22 Moreover, Defendant asserts that it did not have in place policies or practices that pressured
23 employees to work off-the-clock without asking for compensation. (*Ibid.*) Defendant adds that it
24 properly paid employees overtime and double time if they worked the requisite hours. (*Ibid.*)
25 Defendant also counters that it rarely, if ever, neglected to adhere to the weighted average
26 method. (*Ibid.*) Further, Defendant contends that Plaintiff’s claims regarding off-the-clock work
27 and unpaid overtime and double time are trivial as only a small number of employees actually
28 worked off-the-clock. (*Ibid.*) Defendant adds that its rounding policy was fair and neutral on its

1 face. (Han Dec., *supra*, at ¶ 23.) Defendant also asserts that it reimbursed employees for all
2 business expenses, including purchasing equipment and using their personal cell phones and
3 vehicles. (*Ibid.*) Finally, Defendant argues that its failure to comply with California labor laws
4 was an honest mistake made in good faith. (*Ibid.*) Thus, Defendant’s conduct could not be
5 deemed “willful” under Labor Code section 203. (*Ibid.*)

6 As demonstrated above, the Parties took staunchly conflicting positions concerning
7 Defendant’s policies and procedures and their effect on hourly-paid and non-exempt employees.

8 **b. The Parties Were Able to Reach an Agreement on Settlement of the Action**

9 **i. The Parties Attended Mediation Which Ultimately Led to the Joint**
10 **Stipulation and Settlement Agreement**

11 The Parties agreed to go to mediation with experienced wage and hour mediator, Jeffrey
12 Krivis. The mediation took place on March 16, 2021. (Han Dec., *supra*, at ¶ 24.) During the
13 mediation, the Parties discussed the risks of continued litigation, risks of certification, and risks
14 on the merits of the claims versus the benefits of settlement. (*Ibid.*) Under the auspices of the
15 mediator, the Parties were able to reach an agreement on a settlement of the Class Action, the
16 terms of which were memorialized in a “Joint Stipulation and Settlement Agreement”
17 (“Settlement Agreement,” “Settlement,” or “Agreement”), that the Parties now seek Preliminary
18 Approval of in the instant motion. (*Ibid.*; Exhibit 2.) (*Ibid.*)

19 **ii. The Settlement Was Reached as a Result of Arm’s-Length**
20 **Negotiations**

21 The Settlement Agreement was reached as a result of arm’s-length negotiations. (Han
22 Dec., *supra*, at ¶ 40.) Though cordial and professional, the settlement negotiations have been, at
23 all times, adversarial and non-collusive in nature. (*Ibid.*) At the mediations, Counsel for the
24 Parties conducted extensive arm’s length settlement negotiations until an agreement was
25 ultimately reached by all Parties. (*Ibid.*)

26 ///

27 ///

28 ///

1 Plaintiff and Class Counsel believe in the merits of the case but also recognize the
2 expense and length of continued proceedings necessary to continue the litigation against
3 Defendant through class certification and trial and through any possible appeals. (Han Dec.,
4 *supra*, at ¶ 41.) Plaintiff and Class Counsel have also taken into account the uncertainty and risk
5 of further litigation, the potential outcome, and the difficulties and delays inherent in such
6 litigation. (*Ibid.*) Plaintiff and Class Counsel have conducted extensive settlement negotiations,
7 including formal mediation on March 16, 2021. (*Ibid.*) Based on the foregoing, Plaintiff and
8 Class Counsel believe the settlement set forth in the Settlement Agreement is a fair, adequate,
9 and reasonable settlement, and is in the best interests of the Class. (*Ibid.*)

10 **iii. The Settlement Is the Result of Thorough Investigation and Discovery**

11 The Parties thoroughly investigated and evaluated the factual strengths and weaknesses
12 before reaching the proposed settlement, and engaged in sufficient investigation, research, and
13 discovery to support the settlement. (Han Dec., *supra*, at ¶ 42.) The proposed settlement was
14 only possible following significant discovery and evaluation of Defendant’s relevant policies and
15 procedures, as well as the data they produced for the putative Class, which permitted Class
16 Counsel to engage in a comprehensive analysis of liability and potential damages. (*Ibid.*)
17 Furthermore, this case has reached the stage where “the Parties certainly have a clear view of the
18 strengths and weaknesses of their cases” sufficient to support the Settlement. (*Boyd v. Bechtel*
19 *Corp.* (N.D. Cal. 1979) 485 F.Supp. 610, 617.) (*Ibid.*)

20 **c. Terms of the Proposed Settlement**

21 **i. Deductions from the Settlement**

22 The Parties have agreed (subject to and contingent upon the Court’s approval) that this
23 action be settled and compromised for the non-reversionary total sum of \$175,000 (“Gross
24 Settlement Amount”) which includes, subject to Court approval: (a) Attorney Fee Award in an
25 amount not to exceed \$61,250 (thirty-five percent (35%) of the Gross Settlement Amount) to
26 compensate Class Counsel for work already performed and all work remaining to be performed
27 in documenting the settlement, administrating the settlement and securing Court approval; (b)
28

Cost Award for actual litigation costs not to exceed \$20,000²; (c) A Class Representative Enhancement Payment in the amount of \$10,000 to the Class Representative in recognition of Plaintiff's work and efforts in obtaining the benefits for the Class and undertaking the risk for the payment of costs in the event this matter had not successfully resolved; (d) Administration Costs to Simpluris, Inc. ("Simpluris"), the Settlement Administrator, currently estimated at \$4,500 but not to exceed \$7,500; and (e) PAGA Payment of \$10,000, seventy-five percent (75%) of which (\$7,500) be paid to the LWDA and twenty-five percent (25%) of which (\$2,500) shall be distributed to the aggrieved employees eligible to recover the PAGA Payment that consist of all hourly-paid or non-exempt employees of Defendant in California during the period between March 17, 2020, and March 31, 2021 ("Eligible Aggrieved Employees," "PAGA Period," and "Individual PAGA Payment"), on a pro rata basis. (Han Dec., *supra*, at ¶ 25.)

ii. Calculation of the Settlement Payments to Class Members

After all Court-approved deductions from the Gross Settlement Amount, it is estimated that \$69,250 ("Net Settlement Amount") will be distributed to Class Members – with an average settlement share estimated at \$512.96. (Han Dec., *supra*, at ¶ 27.) The Settlement Administrator will withhold the amount of the Participating Class Members' portion of normal payroll withholding taxes out of each person's Individual Settlement Share. (Han Dec., *supra*, at ¶ 28.) The Settlement Administrator will also calculate the amounts of the Participating Class Members' and Defendant's portions of payroll withholding taxes. (*Ibid.*) Finally, the Settlement Administrator will submit Defendant's portion of payroll withholding tax calculation to Defendant for additional funding and forward those amounts along with each person's Individual Settlement Share withholdings to the appropriate taxing authorities. (*Ibid.*) The Individual Settlement Share is calculated based on each Participating Class Member's pro rata share of the Net Settlement Amount based on workweeks during the Class Period as follows:

///

² If Plaintiff's actual litigation costs exceed \$20,000, Plaintiff will only seek reimbursement in the amount of \$20,000. (Han Dec., *supra*, at ¶ 26.) If the amount awarded is less than the amount requested by Class Counsel for the Attorney Fee Award and/or Cost Award, the difference shall become part of the Net Settlement Amount and will be distributed to all Class Members who do not submit a valid and timely request to exclude themselves from the class action Settlement ("Participating Class Members"). (*Ibid.*)

(i) the number of weeks he or she worked as a hourly-paid or non-exempt employee during the Class Period, divided by (ii) the total number of weeks worked by all Participating Class Members collectively during the Class Period, which is then multiplied by the Net Settlement Amount. The Settlement Administrator will use the Class Data to calculate the number of workweeks worked by each Class Member based on their dates of employment for purposes of this calculation. (Han Dec., *supra*, at ¶ 29.)

Furthermore, the Settlement Administrator shall pay each Eligible Aggrieved Employee according to his or her proportional share, which will be based upon the total number of pay periods he or she was employed during the PAGA Period. (Han Dec., *supra*, at ¶ 30.) The Individual PAGA Payment is calculated based on each Eligible Aggrieved Employee's pro rata share of the PAGA Payment allocated to Eligible Aggrieved Employees based on pay periods during the PAGA Period as follows:

(i) the number of pay periods he or she worked as a non-exempt employee during the PAGA Period, divided by (ii) the total number of pay periods worked by all Eligible Aggrieved Employees collectively during the PAGA Period, which is then multiplied by the PAGA Payment allocated to the Eligible Aggrieved Employees. The Settlement Administrator will use the Class Data to calculate the number of periods worked by each Eligible Aggrieved Employee based on their dates of employment for purposes of this calculation. (*Ibid.*)

iii. Notice to the Class

Within twenty-one (21) calendar days after entry of the Preliminary Approval Order, Defendant shall deliver the Class Data to the Settlement Administrator. (Han Dec., *supra*, at ¶ 31.) The Class Data will be formatted as a Microsoft Excel spreadsheet and will include: (i) each Class Member's full name; (ii) each Class Member's last-known address; (iii) each Class Member's Social Security and Employee ID number, if any; (iv) the Class Member's relevant dates of employment. (*Ibid.*)

///

///

///

1 Within fourteen (14) calendar days after receipt of the Class Data, the Settlement
2 Administrator will mail the Notice of Class Action Settlement (“Class Notice”) and the Election
3 Not To Participate or Opt-out Form (“Exclusion Form”) to all identified Class Members via first-
4 class regular U.S. Mail. (Han Dec., *supra*, at ¶ 32.) Class Members are not required to submit a
5 claim form to receive their Individual Settlement Payments pursuant to the Settlement. (*Ibid.*)
6 Eligible Aggrieved Employees are not required to submit a claim form to receive their Individual
7 PAGA Payment. (*Ibid.*) The proposed Class Notice and Exclusion Form are attached as Exhibits
8 A and B to the Settlement Agreement respectively, which is Exhibit 2 to the Declaration of
9 Douglas Han. (*Ibid.*)

10 **iv. Distribution of Funds**

11 No later than ten (10) calendar days after the date the Final Approval of the Settlement
12 can no longer be appealed or, if there are no objectors and no Plaintiff is in intervention at the
13 time the Court grants Final Approval of the Settlement, the date the Court enters Judgment
14 granting Final Approval of the Settlement, Defendant shall deposit one-half of the Gross
15 Settlement Amount of \$175,000 by wiring the funds to the Settlement Administrator. No later
16 than two hundred seventy (270) calendar days after the funding date of the first one-half of the
17 Gross Settlement Amount, Defendant shall fund the remainder of the Gross Settlement Amount.
18 (Han Dec., *supra*, at ¶ 33.)

19 Within fourteen (14) calendar days after the Settlement is fully funded, the Settlement
20 Administrator shall calculate and disburse all payments due under the Settlement Agreement,
21 including all Individual Settlement Shares, Individual PAGA Payments, the Attorney Fee Award,
22 the Cost Award, the Class Representative Enhancement Payments, the PAGA Payment, and the
23 Administration Costs. (Han Dec., *supra*, at ¶ 34.) The Settlement Administrator will forward a
24 check for seventy-five percent (75%) of the PAGA Payment to the LWDA for settlement of the
25 PAGA claim. (*Ibid.*)

26 ///

27 ///

28 ///

1 Participating Class Members and Eligible Aggrieved Employees must cash or deposit
2 their Individual Settlement Share and Individual PAGA Payment checks within one hundred
3 eighty (180) calendar days after the checks are mailed to them. (Han Dec., *supra*, at ¶ 35.) If any
4 checks are returned as undeliverable and without a forwarding address, the Settlement
5 Administrator will conduct a skip trace search to find the most up-to-date mailing addresses and
6 re-mail the checks promptly. (*Ibid.*) If any checks are not redeemed or deposited within ninety
7 (90) calendar days after mailing, the Settlement Administrator will send a reminder postcard.
8 (*Ibid.*) If any checks remain uncashed or not deposited by the expiration of the 90-day period
9 after mailing the reminder notice, the Settlement Administrator will, within two hundred (200)
10 calendar days after the checks are mailed, pay the amount of the Individual Settlement Share or
11 Individual PAGA Payment (as applicable) to the California State Controller's Office in
12 accordance with California Unclaimed Property Law so that the Participating Class Member
13 and/or Eligible Aggrieved Employee will have his or her Individual Settlement Share and/or
14 Individual PAGA Payment available to him or her per the applicable claim procedure to request
15 that money from the State of California. (*Ibid.*)

16 **v. Release of Claims**

17 As of the Effective Final Settlement Date, in exchange for the consideration set forth in
18 the Settlement, Plaintiff and the Participating Class Members release the Released Parties from
19 the Released Claims for the Class Period ("Released Claims"). See Exhibit 2 §§ (I)(JJ), (III)(J).
20 (Han Dec., *supra*, at ¶ 36.)

21 As of the Effective Final Settlement, the LWDA and each Eligible Aggrieved Employee,
22 including Plaintiff, individually and on behalf of his heirs, executors, administrators,
23 representatives, attorneys, predecessors, successors, and assigns hereby voluntarily and
24 knowingly is barred from bringing forward the PAGA Released Claims during the PAGA
25 Period. The release of the PAGA Released Claims is effective, regardless of whether the Eligible
26 Aggrieved Employee submits a timely and valid request for exclusion ("PAGA Released
27 Claims"). See Exhibit 2 §§ (I)(EE), (III)(K). (Han Dec., *supra*, at ¶37.)

28 ///

1 The Released Parties include (i) Defendant; (ii) each of Defendant's past, present, and
2 future parents, subsidiaries, affiliates, and associated entities, including, without limitation, any
3 corporation, limited liability company, partnership, joint ventures, trust, foundation, and non-
4 profit entity which controls, is controlled by, or is under common control with Defendant; (iii)
5 the respective past, present and future shareholders, directors, officers, agents, employees,
6 attorneys, insurers, members, partners, managers, contractors, agents, consultants,
7 representatives, administrators, fiduciaries, benefit plans, transferees, predecessors, successors,
8 and assigns of any of the foregoing, and any other persons or entities acting by, through, under,
9 or in concert with any of them; and (iv) any individual or entity which could be jointly liable
10 with any of the foregoing. ("Released Parties"). *See* Exhibit 2 § (I)(KK). (Han Dec., *supra*, at
11 ¶ 38.)

12 As of the Effective Final Settlement Date, and in exchange for the Class Representative
13 Enhancement Payment to the Plaintiff in an amount not to exceed \$10,000, in recognition of his
14 work and efforts in obtaining the benefits for the Class and undertaking the risk for the payment
15 of costs in the event this matter had not successfully resolved, Plaintiff provides a general release
16 of claims for himself and on behalf of his spouse, heirs, successors, family members, trusts,
17 trustees, executors, estates, administrators, beneficiaries, distributees, fiduciaries, benefit plans,
18 transferees, attorneys, insurers, advisors, consultants, representatives, predecessors, and assigns.
19 *See* Exhibit 2 §§ (III)(L). (Han Dec., *supra*, at ¶ 39.)

20 **d. Counsel for Both Parties Are Experienced in Similar Litigation**

21 Both Plaintiff's counsel and Defendant's counsel are particularly experienced in wage
22 and hour employment law and class actions. Plaintiff's counsel has significant experience in
23 litigating unpaid wages, non-compliant meal period, and non-compliant rest period class actions.
24 (Han Dec., *supra*, at ¶¶ 2-7, Exhibit 1.)

25 ///

26 ///

27 ///

1 Plaintiff's counsel has prosecuted numerous cases on behalf of employees for California
2 Labor Code violations and thus are experienced and qualified to evaluate the class claims, to
3 evaluate settlement versus trial on a fully informed basis, and to evaluate the viability of the
4 defenses. (Han Dec., *supra*, at ¶¶ 2-7, Exhibit 1.) This experience instructed Plaintiff's counsel
5 on the risks and uncertainties of further litigation and guided their determination to endorse the
6 proposed Settlement.³ (*Ibid.*)

7 **IV. ARGUMENT**

8 **a. Class Action Settlements Are Subject to Court Review**

9 California Rule of Court 3.769 requires court approval for class action settlements.⁴
10 "Before final approval, the court must conduct an inquiry into the fairness of the proposed
11 settlement." (California Rules of Court, Rule 3.769(g).) Rule 3.769 further requires a noticed
12 motion for preliminary approval of class settlements:

13 (a) A settlement or compromise of an entire class action, or a cause of action
14 in a class action, or as to a party, requires the approval of the court after
15 hearing.

16 . . .

17 (c) Any party to a settlement agreement may serve and file a written notice of
18 motion for preliminary approval of the settlement. The settlement
19 agreement and proposed notice to class members must be filed with the
20 motion, and the proposed order must be lodged with the motion.

21 Courts act within their discretion in approving settlements that are fair, not collusive, and take
22 into account "all the normal perils of litigation as well as the additional uncertainties inherent in
23 complex class actions." (*In re Beef Industry Antitrust Litigation* (5th Cir. 1979) 607 F.2d 167,
24 179, cert. den. *sub nom. Iowa Beef Processors, Inc. v. Meat Price Investigators Ass'n* (1981) 452
25 U.S. 905.)

26 ///

27 ³ The final factor mentioned in *Dunk* – the number of objectors – is not determinable until the Notice of Class
28 Action Settlement has been provided to the Class and they have had an opportunity to respond. This information
will be provided to the Court in conjunction with the Motion for Final Approval of Class Action Settlement.

⁴ The California Supreme Court also has authorized California's trial courts to use Federal Rule 23 and cases
applying it for guidance in considering class issues. (See *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821; see
Green v. Obledo (1981) 29 Cal.3d 126, 145-146.) Where appropriate, therefore, the Parties cite Federal Rule 23 and
federal case law in addition to California law.

1 **b. The Proposed Settlement Is a Reasonable Compromise of Claims**

2 An understanding of the amount in controversy is an important factor in whether the
3 settlement “of the class members’ claims is reasonable in light of the strengths and weaknesses
4 of the claims and the risks of the particular litigation.” (*Kullar v. Foot Locker Retail, Inc.* (2008)
5 168 Cal.App.4th 116, 129; see also *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010)
6 186 Cal.App.4th 399, 409.) The most important factor in this regard is “the strength of the case
7 for plaintiffs on the merits, balanced against the amount offered in settlement.” (*Ibid.*)

8 In weighing the strength of the plaintiff’s case, *Kullar* instructs that the court is not to
9 “decide the merits of the case or to substitute its evaluation of the most appropriate settlement for
10 that of the attorneys.” (*Kullar, supra*, 168 Cal.App.4th at p. 133.) Finally, *Kullar* does not
11 require an explicit statement of the maximum amount the class could recover if the plaintiff
12 prevailed on all his claims, provided there is a record that allows “an understanding of the
13 amount that is in controversy and the realistic range of outcomes of the litigation.” (*Munoz,*
14 *supra*, 186 Cal.App.4th at p. 409.) Put differently, “as the court does when it approves a
15 settlement as in good faith under Code of Civil Procedure § 877.6, the court must at least satisfy
16 itself that the class settlement is within the ‘ballpark’ of reasonableness.” (*Kullar, supra*, 168
17 Cal.App.4th at p. 133 (citing *Tech-Bilt v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488,
18 499-500.).)

19 As the following subsections show, the Parties’ investigation and discovery revealed
20 numerous reasons to discount claims and agree to the Settlement.

21 **i. The Settlement Is Fair and Reasonable**

22 The Parties thoroughly investigated and evaluated the factual strengths and weaknesses
23 before reaching the proposed settlement, and engaged in sufficient investigation, research, and
24 discovery to support the settlement. (Han Dec., *supra*, at ¶ 42.) The proposed settlement was only
25 possible following significant discovery and evaluation of Defendant’s relevant policies and
26 procedures, as well as the data they produced for the putative Class, which permitted Class
27 Counsel to engage in a comprehensive analysis of liability and potential damages. (*Ibid.*)
28 Furthermore, this case has reached the stage where “the Parties certainly have a clear view of the

1 strengths and weaknesses of their cases” sufficient to support the Settlement. (*Boyd v. Bechtel*
2 *Corp.* (N.D. Cal. 1979) 485 F.Supp. 610, 617.) (*Ibid.*)

3 This discovery resulted in Plaintiff’s central theories of liability, which are predicated on
4 Plaintiff’s claims that Defendant failed to pay minimum, overtime, and premium wages, failing
5 to provide meal and rest breaks, failing to pay employees for all hours worked, failing to timely
6 pay wages during and after employment, failing to provide accurate and itemized wage
7 statements, failing to reimburse employees for business expenses, violating PAGA, and violating
8 the Business and Professions Code. (Han Dec., *supra*, at ¶ 43.)

9 Defendant vehemently denies Plaintiff’s theories of liability and contends, as stated
10 above, that all meal and rest periods were provided in compliance with California law, that all
11 wages were properly paid to Class Members, that it provided final wages in a timely manner, that
12 it provided wage statements in compliance with Labor Code section 226, and that it reimbursed
13 all business expenses. (Han Dec., *supra*, at ¶ 44.) Defendant further contends that any mistakes
14 made were honest rather than willful. (*Ibid.*) Finally, Defendant argues that if litigation were to
15 continue, it feels confident that it would prevail. (*Ibid.*)

16 Although Plaintiff believes the case is suitable for certification on the basis that there are
17 company-wide policies that Plaintiff contends violate California law and uniformly affect the
18 putative Class Members, uncertainties with respect to certification are always present. (Han Dec.,
19 *supra*, at ¶ 45.) As the California Supreme Court ruled in *Sav-On v. Superior Court* (2004) 34
20 Cal.4th 319, class certification is always a matter of the trial court’s sound discretion. (*Ibid.*)
21 Decisions following *Sav-On* have reached different conclusions concerning certification of wage
22 and hour claims.⁵ (*Ibid.*)

23 Although remaining confident in the strengths of his claims, all of these factors led
24 Plaintiff to discount the following calculations of potential damage claims.

25
26 ⁵ (See, e.g., *Harris v. Superior Court* (2007) 154 Cal.App.4th 164 (reversing decertification of class claiming
27 misclassification and ordering summary adjudication in favor of employees), review granted Nov. 28, 2007, 171
28 P.3d 545 (2007) (not cited as precedent, but rather for illustrative purposes only); *Walsh v. IKON Solutions, Inc.*,
148 Cal.App.4th 1440 (affirming decertification of class claiming misclassification); *Aguilar v. Cintas Corp. No. 2*
(2006) 144 Cal.App.4th 121 (reversing denial of certification); *Dunbar v. Albertson’s Inc.* (2006) 141 Cal.App.4th
1422 (affirming denial of certification).)

1 **ii. The Settlement Amount of \$175,000 Is Reasonable**

2 In addition to being able to discover the strengths and vulnerabilities associated with
3 Plaintiff's claims, in preparing for mediation, Defendant provided Plaintiff with a sampling of
4 time and pay records and information regarding the estimated number of workweeks worked by
5 putative class members and the average hourly rate for class members. (Han Dec., *supra*, at ¶
6 46.) Defendant also confirmed that there were approximately 5,790 workweeks worked by Class
7 Members. (*Ibid.*) Plaintiff was also able to determine that the average hourly rate for Class
8 Members was \$28.06. (*Ibid.*)

9 Moreover, the provisions of the Labor Code potentially triggering PAGA penalties in this
10 case include but are not limited to Labor Code sections 201, 202, 226(a), 226.7, 510, 512(a),
11 1194, 1197, 1197.1, 1198, and 2802. (Han Dec., *supra*, at ¶ 53.) Defendant asserted that,
12 regardless of the results of the underlying causes of action, PAGA penalties are not mandatory
13 but permissive and discretionary. (*Ibid.*) Defendant also maintained that, in addition to its strong
14 arguments against the underlying claims, it had a strong argument that it would be unjust to
15 award maximum PAGA penalties given the current unsettled state of law. (*Ibid.*)

16 Class Counsel calculated penalties under this cause of action by multiplying the number
17 of active Class Members (because of the shortened statutory period for this claim), by the civil
18 penalties that each could be awarded for the Labor Code sections enumerated under Labor Code
19 section 2699.5 that were applicable in this case. (Han Dec., *supra*, at ¶ 54.) Class Counsel then
20 applied discounts in light of the countervailing arguments with regard to the other causes of
21 action, as well as the Court's power to award "a lesser amount than the maximum civil liability."
22 Lab. Code § 2699(e)(2). (*Ibid.*)

23 ///

24 ///

25 ///

1 Given the state of the law and the range of PAGA penalties requested and actually
2 awarded in California courts, it is difficult to determine a reasonable value and actual exposure
3 for PAGA penalties. (Han Dec., *supra*, at ¶ 55.) However, if PAGA penalties are granted on
4 any one of the violations alleged in Plaintiff’s operative complaint, the total penalties exposure
5 for the eligible pay periods could be approximately \$396,900 $(([1 \times \$100] + [24 \times \$200]) \times 81$
6 employees). (*Ibid.*) Plaintiff calculated Defendant’s PAGA exposure using one hundred percent
7 (100%) violation rate based on the average number of pay periods (25) during the one-year
8 statutory period. (*Ibid.*) Multiplying the PAGA exposure by the number of alleged violations
9 under the PAGA theories of recovery (6) gives potential civil penalties of \$2,381,400. (*Ibid.*)

10 Although Plaintiff argued he could obtain over \$2 million for PAGA penalties, it seems
11 highly unlikely that the Court would award such a large amount. (Han Dec., *supra*, at ¶ 56.)
12 PAGA’s plain language indicates that an employer will be assessed a lower, “initial” penalty for
13 each initial pay period in which a violation occurs, and a higher, “subsequent” penalty for each
14 subsequent pay period in which a violation occurs. (Lab. Code, § 2699, subd. (f)(2).) In *Amaral*;
15 however, the court held that “until the employer has been notified that it is violating a Labor
16 Code provision (whether or not the commissioner or court chooses to impose penalties), the
17 employer cannot be presumed to be aware that its continuing underpayment of employees is a
18 ‘violation’ subject to penalties [and will be assessed only the ‘initial’ violation rate].” (*Amaral v.*
19 *Cintas Corp.*, 163 Cal.App.4th 1157, 1209 (2008)). This language could be interpreted as
20 indicating that until the Labor Commissioner or a court informs an employer that it has violated
21 the Labor Code, the employer can only be assessed the “initial” violation rate. Under this
22 interpretation, the maximum individual civil penalty for one statutory violation is \$8,100 (81
23 employees x \$100 (initial violation)), and for all possible Labor Code violations is \$48,600.

24 ///

25 ///

26 ///

1 Furthermore, PAGA’s statutory language is unclear as to whether PAGA penalties may
2 be “stacked” – that is, whether multiple civil penalties can be recovered in the same pay period
3 for different Labor Code violations. On one hand, Labor Code section 2699, subdivision (f)
4 establishes “a civil penalty for a violation” (emphasis added), implying a separate civil penalty
5 for each violation. On the other hand, employers cite Labor Code section 2699, subdivision
6 (g)(1), which states that “an aggrieved employee may recover the civil penalty described in
7 subdivision (f)...on behalf of himself or herself and other current or former employees against
8 whom one or more of the alleged violations was committed” (emphasis added). However,
9 Defendants contended that the Ninth Circuit’s opinions in *Ubrino v. Orkin Svcs. of Calif., Inc.*
10 (9th Cir. 2013) 726 F.3d 118 and *Yocupicio v. PAE Grp., LLC* (9th Cir. 2015) 795 F.3d 1057,
11 which, preclude the aggregation of PAGA penalties for purposes of removal, prevents “stacking”
12 of PAGA penalties. Without stacking and limited to the initial violation, the PAGA penalties
13 would be limited to \$8,100 on the low end and \$48,600 on the high end based on six (6) major
14 theories of recovery.

15 To the extent Defendant’s exposure remains in the tens of thousands of dollars, the civil
16 penalties would certainly be “unjust, arbitrary and oppressive, or confiscatory.” In fact, many
17 courts have taken liberties to dramatically reduce the civil penalties. (See e.g. *Viceral v. Mistras*
18 *Grp., Inc.* (N.D. Cal. Oct. 11, 2016, 2016 WL 5907869 at 9* [preliminarily approving class
19 action settlement that included a PAGA set-aside of just 0.15 percent of the PAGA claims’ full
20 potential value, where “Plaintiffs face[d] a substantial risk of recovering nothing on either class
21 or PAGA claims”]; *Costter v. Lyft, Inc.* (N.D. Cal. 2016) 193 F.Supp.3d 1030, 1037
22 [preliminarily approving class action settlement allocating a PAGA set-aside worth a fraction of
23 the PAGA claims’ potential value, where the defendant’s obligations were “genuinely unclear”
24 and there was no evidence the defendant acted deliberately or negligently failed to learn about its
25 obligations].).

26 ///

27 ///

28 ///

1 Plaintiff also recognized the risk that any PAGA award could be significantly reduced.
2 (Han Dec., *supra*, at ¶ 57.) Many of the causes of action brought were duplicative of the statutory
3 claims such as violations of California Labor Code §§ 226(a), 226.7, 510, 512(a), 1194, 1197,
4 1198, and 2802. (*Ibid.*) Thus, the maximum penalties for each pay period are not justified.
5 (*Ibid.*) It was indeed arguable whether the Court would award the maximum penalties under the
6 law. (*Ibid.*) Thus, allocating \$10,000 to PAGA civil penalties was reasonable based on a rate of
7 \$4.98 per pay period [$\$10,000 \div 2,007$ Pay Periods in PAGA Date Range = \$4.98], given the fact
8 that Defendant are also paying an additional \$165,000 in the class settlement. (*Id.* (citing *see*
9 *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 529 (affirming a rate of \$5 per
10 violation and a total PAGA penalty of \$150,000 while the plaintiff requested a rate of \$25 to \$75
11 per violation and a total PAGA penalty of \$70,000,000).)) Where PAGA penalties are negotiated
12 in good faith and “there is no indication that [the] amount was the result of self-interest at the
13 expense of other Class Members,” such amounts are generally considered reasonable. (Han
14 Dec., *supra*, at ¶ 52.) (citing *Hopson v. Hanesbrands Inc.* (N.D. Cal. Apr. 3, 2009) Case No. 08-
15 00844, 2009 U.S. Dist. LEXIS 33900, at *24; see, e.g., *Nordstrom Com. Cases* (2010) 186
16 Cal.App.4th 576, 579 (“[T]rial court did not abuse its discretion in approving a settlement which
17 does not allocate any damages to the PAGA claims.”).)

18 Accordingly, taking into consideration Defendants’ defenses, their supporting evidence,
19 and their position that the Class Action is not suitable for class treatment, the settlement amount
20 of \$175,000— with an average settlement share estimated at \$512.96—is reasonable and fair.

21 **c. Discount Analysis Justifies the Settlement**

22 Excluding the civil penalties, which could be completely discretionary, for the reasons
23 stated the total estimated potential exposure, assuming certification and prevailing at trial, would
24 be approximately \$1,775,685.14 on the low end and \$1,856,918.84 on the high end. (Han Dec.,
25 *supra*, at ¶ 58.)

26 ///

27 ///

28 ///

Category	Potential Exposure	Certification Risk	Merits Risk	Realistic Exposure
Rest Break Premiums	\$25,646.84	70%	60%	\$3,077.62
Meal Break Premiums	\$464,252.70	60%	50%	\$92,850.54
Overtime/Minimum Wage: Off-the-Clock	\$162,467.40 to \$243,701.10	70%	60%	\$19,496.09 to \$29,244.13
Overtime/Minimum Wage: Regular Rate/Weighted Average	\$67,693	70%	70%	\$6,092.37
Waiting Time Penalty	\$457,939.20	60%	50%	\$91,587.84
Wage Statement Penalty	\$198,450	60%	50%	\$39,690
Unreimbursed Business Expenses	\$399,236	50%	80%	\$39,923.60
MAXIMUM TOTAL EXPOSURE	\$1,775,685.14 TO \$1,856,918.84 ⁶			\$292,718.06 TO \$302,466.10 ⁷

Based on this analysis, the realistic recovery for this case is \$292,718.06 on the low end and \$302,466.10 on the high end. (Han Dec., *supra*, at ¶ 66.) The Gross Settlement Amount of \$175,000 is approximately nine percent (9.42%) of the maximum potential exposure and is approximately fifty-eight percent (57.85%) of the maximum realistic exposure at trial, which is an excellent settlement. (*Ibid.*)

The only question at preliminary approval is whether the settlement is within the range of possible approval. (*In re Tableware Antitrust Litig.* (N.D. Cal. 2007) 484 F.Supp.2d 1078, 1079.) “The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.” (*City of Detroit v. Grinnell Corporation* (2d Cir. 1974) 495 F.2d 448, 455; see also *Linney v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242 (“[I]t is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators.”) Nevertheless, this settlement exceeds the realistic exposure with which Plaintiff could have prevailed at trial and

⁶ Han Dec., *supra*, at ¶¶47-52

⁷ Han Dec., *supra*, at ¶¶59-66

1 provides a significant recovery for the Class Members. Thus, there can be no doubt that this
2 settlement is fair and reasonable.

3 **d. Conditional Certification of the Class Is Appropriate**

4 For settlement purposes only, the requisites for establishing conditional class certification
5 are met. Code of Civil Procedure Section 382 “authorizes class actions ‘when the question is one
6 of a common or general interest, of many persons, or when the parties are numerous, and it is
7 impracticable to bring them all before the court.” (*Sav-On Drug Stores, Inc. v. Superior Court*
8 (2004) 34 Cal. 4th 319, 326.) California courts certify class actions where the plaintiff identifies
9 “both [1] an ascertainable class and [2] a well-defined community of interest among class
10 members.” (*Ibid.*)

11 The proposed Class is ascertainable and numerous as to make it impracticable to join all
12 Class Members, and there are common questions of law and fact that predominate over any
13 questions affecting any individual Class Member. (Han Dec., *supra*, at ¶ 67.) Plaintiff’s claims
14 are typical of the claims of the Class Members, and Class Counsel will fairly and adequately
15 protect the interests of the Class. (*Ibid.*) Also, the prosecution of separate actions by individual
16 Class Members would create the risk of inconsistent or varying adjudications, and a class action
17 is superior to other available means for the fair and efficient adjudication of the case. (*Ibid.*) As
18 discussed below, this case is amenable to class certification. (*Ibid.*)

19 **i. The Proposed Class Is Ascertainable and Sufficiently Numerous**

20 “Ascertainability is required in order to give notice to putative class members as to whom
21 the judgment in the action will be res judicata.” (*Hicks v. Kaufman & Broad Home Corp.* (2001)
22 89 Cal.App.4th 908, 914.) “A class is ascertainable if it identifies a group of unnamed plaintiffs
23 by describing a set of common characteristics sufficient to allow a member of that group to
24 identify himself or herself as having a right to recover based on the description.” (*Bartold v.*
25 *Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 828.) The proposed class must also be
26 sufficiently numerous. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.)

27 ///

28 ///

1 The Class Action involves one hundred thirty-five (135) Class Members. (Han Dec.,
2 *supra*, at ¶ 68.) This Class is sufficiently numerous. (*Id.* (citing see *Ghazaryan v. Diva*
3 *Limousine, Ltd.* (2008) 169 Cal.App.4th 1524, 1531, n.5 (finding that a proposed class of “as
4 many as 190 current and former employees” is sufficiently numerous.) Further, all Class
5 Members can and will be identified by Defendant to the Settlement Administrator through a
6 review of Defendant’s employment records concerning hourly-paid and non-exempt employees
7 employed by Defendant within the State of California during the Class Period. (*Ibid.*)

8 **ii. The Class Members Share a Well-Defined Community of Interest**

9 The community of interest requirement “embodies three factors: (1) predominant
10 common questions of law or fact; (2) class representatives with claims or defenses typical of the
11 class; and (3) class representatives who can adequately represent the class.” (*Sav-On Drugs,*
12 *supra*, 34 Cal.4th at p. 326.) “[T]he community of interest requirement for certification *does not*
13 *mandate that class members have uniform or identical claims.*” (*Capitol People First v.*
14 *Department of Developmental Services* (2007) 155 Cal.App.4th 676, 692 (emphasis in original).)
15 Rather, courts focus on the Defendant’s internal policies and “pattern and practice . . . in order to
16 assess whether that common behavior toward similarly situated plaintiffs renders class
17 certification appropriate.” (*Id.* (citing *Sav-On Drugs, supra*, 34 Cal.4th at p. 333).) The
18 application of each of these factors is discussed below.

19 **1. Common Issues Predominate**

20 The “common issues” requirement “involves analysis of whether the proponent’s ‘theory
21 of recovery’ is likely to prove compatible with class treatment.” (*Capitol People First, supra*,
22 155 Cal.App.4th at p. 690 (emphasis added) (citing *Sav-On, supra*, 34 Cal.4th at p. 327).) In
23 other words, courts determine whether the elements necessary to establish liability are
24 susceptible to common proof, even if the class members must individually prove their damages.
25 (*Brinker, supra*, 53 Cal.4th at p. 1024). These types of claims are regularly granted class
26 certification when the plaintiff can present evidence of common policies. (*See, e.g., Jones v. JGC*
27 *Dallas LLC* (N.D. Tex. 2014) Case No. 3:11-cv-02743 (certified collective action involving 190
28 dancers); *Espinoza v. Galardi South Enterprises Inc.* (S.D. Fla. 2016) Case No. 1:14-cv-21244

1 (court certified class of dancers on state law claims).)

2 Plaintiff asserts that common issues of fact and law predominate as to each of the claims
3 alleged by Plaintiff. (Han Dec., *supra*, at ¶ 69.) All hourly-paid and non-exempt employees who
4 worked for Defendant during the Class Period were subject to the same or similar employment
5 practices, policies, and procedures. (*Ibid.*) All of Plaintiff's claims surround Defendant's
6 common practice and scheme of failing to maintain compliant meal and rest break policies and
7 practices, failing to reimburse business expenses, failing to fully and properly compensate
8 employees, *inter alia*, for non-compliant rest and meal breaks, off-the-clock work, overtime
9 work, associated wage statement, and waiting time penalties. (*Ibid.*)

10 **2. Plaintiff's Claims Are Typical of the Class Claims**

11 Typical claims rely on legal theories and facts that are substantially similar to other class
12 members. (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 46.) Plaintiff was a non-exempt
13 employee and alleges that he and the Class Members were employed by the same company and
14 injured by Defendant's common policies and practices related to meal and rest breaks,
15 uncompensated off-the-clock work, unpaid overtime, untimely paid final wages, inaccurate wage
16 statements, and unreimbursed business expenses. (Han Dec., *supra*, at ¶ 70.) Plaintiff seeks relief
17 for these claims and derivative claims on behalf of all Class Members. (*Ibid.*) Thus, Plaintiff's
18 claims arise from the same employment practices and are based on the same legal theories as
19 those applicable to the other Class Members. (*Ibid.*) Plaintiff seeks relief for these claims and
20 derivative claims on behalf of all Class Members. (*Ibid.*) Thus, Plaintiff's claims arise from the
21 same employment practices and are based on the same legal theories as those applicable to the
22 other Class Members. (*Ibid.*)

23 ///

24 ///

25 ///

1

2

O

1

2

20

21

1 Preliminary Approval.

2 **f. Notice to Class Members Complies with California Rule of Court 3.769(f)**

3 California Rule of Court, No. 3.769(f), provides:

4 If the court has certified the action as a class action, notice of the final approval
5 hearing must be given to class members in the manner specified by the court. The
6 notice must contain an explanation of the proposed settlement and procedures for
7 class members to follow in filing written objections to it and in arranging to
8 appear at the settlement hearing and state any objections to the proposed
9 settlement.

10 The proposed Notice Packet meets all of these requirements. The proposed Notice
11 Packet advises the Class Members of their right to participate in the Settlement; how and when to
12 object to or request exclusion from the Settlement; and the date, time, and location of the Final
13 Approval hearing. (See Han Dec., *supra*; Exhibit A to Exhibit 2.)

14 **V. CONCLUSION**

15 Plaintiff respectfully submits that the proposed Settlement is in the best interests of the
16 Class, as it is fair, adequate, and reasonable. Under the applicable class action criteria and
17 guidelines, the proposed Settlement should be preliminarily approved by the Court, the Class
18 should be conditionally certified for purposes of settlement only, and the Class Notice should be
19 approved.

20 Dated: June 24, 2021

JUSTICE LAW CORPORATION

21 

22 Douglas Han
23 Shunt Tatavos-Gharajeh
24 Arsiné Grigoryan
25 *Attorneys for Plaintiff*
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE
1013A(3) CCP

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 751 N. Fair Oaks Ave., Ste. 101 Pasadena, California 91103. My electronic service address is arivera@justicelawcorp.com

On June 24, 21, I served the foregoing document described as

**PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION SETTLEMENT, CONDITIONAL CERTIFICATION,
APPROVAL OF CLASS NOTICE, SETTING OF FINAL APPROVAL HEARING
DATE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

for the following case: **Tela v. Metrocell Construction, Inc.**
LWDA/Court Case No.: **LWDA-CM-826519-21**
CIVDS1918537
San Bernardino County Superior Court

on interested parties in this action by electronically submitting as follows:

State of California
Labor & Workforce Development Agency
800 Capitol Mall, MIC-55
Sacramento, California 95814

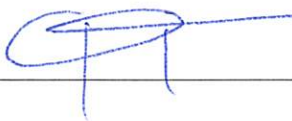
[X] BY ELECTRONIC SUBMISSION

Pursuant to California Senate Bill No. 836, I caused the documents described above to be electronically submitted by and through the procedure stated on the website of the State of California Labor and Workforce Development Agency.

[X] STATE

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 24, 2021, at Pasadena, California.



Allana Rivera