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19
20 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
21 **FOR THE COUNTY OF SAN BERNARDINO**
22

23 ROBERT DE LA HOYA, an individual, and
24 MARISAL DOBBINS, an individual, on
25 behalf of themselves and others similarly
26 situated, and as a private attorney general on
27 behalf of the State of California,

28 Plaintiffs,

vs.

SIERRA WEST FINISH, INC., a Delaware
corporation; and DOES 1 to 50, Inclusive,

Defendants.

Case No.: CIVSB2107351

Assigned for all Purposes to:
Hon. David Cohn
Dept. S-26

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT**

[Filed concurrently with Memorandum of Points
and Authorities; Declarations of Zachary M.
Crosner and David S. Winston; [Proposed]
Order]

Date: February 28, 2022
Time: 10:00 a.m.
Dept.: S-26

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND..... 1

III. PROPOSED SETTLEMENT TERMS 4

 A. Certification of the Settlement Class 4

 B. The Benefit Conferred on the Settlement Class 4

 C. Settlement Administration..... 5

 D. The Class Notice..... 5

 E. Right to Correct Information, Opt Out, or Object 6

 F. Release of Claims..... 6

 G. Attorney’s Fees and Costs, and Plaintiffs’ Enhancement Awards 6

 H. PAGA and Notice to the LWDA 6

IV. ARGUMENT 7

 A. Standard of Review for a Class Action Settlement 7

 B. The Proposed Settlement Class Should Be Conditionally Certified 8

 C. The Proposed Settlement Meets the Dunk and Kullar Factors and is within the Range of Reasonableness..... 9

V. CONCLUSION 15

TABLE OF AUTHORITIES

CASES

<u>7-Eleven Owners for Fair Franchising v. Southland Corp.</u> (2000) 85 Cal.App.4th 1135, 1150.....	14
<u>Amaral v. Cintas Corp. No. 2</u> (2008) 163 Cal.App.4th 1157, 1203-04	12
<u>Carrington v. Starbucks Corp.</u> (2018) 30 Cal.App.5th 504.....	13
<u>Class Plaintiffs v. City of Seattle</u> (9th Cir. 1992) 955 F.2d 1268, 1276, <u>cert. denied</u> , 506 U.S. 953	7
<u>Cochran v. Schwan’s Home Serv., Inc.</u> (2014) 228 Cal.App.4th 113 (2014).....	12
<u>Dunk v. Ford Motor Co.</u> (1996) 48 Cal.App.4th 1794, 1801.....	7, 8
<u>Fleming v. Covidien</u> (C.D. Cal. 2011) 2011 U.S. Dist. LEXIS 154590, *8-9	12
<u>Global Minerals & Metals Corp. v. Superior Court</u> (2003) 113 Cal.App.4th 836, 839.....	8
<u>Jennings v. Open Door Mktg. Inc.</u> (N.D. Cal. Oct. 3, 2018) 2018 U.S. Dist. LEXIS 171356, at *27	
.....	13
<u>Jones v. Farmers Ins. Exch.</u> (2013) 221 Cal.App.4th 986, 996.....	9
<u>Kullar v. Foot Locker Retail, Inc.</u> (2008) 168 Cal.App.4th 116, 128	9
<u>Lane v. Facebook, Inc.</u> (9th Cir. 2012) 696 F.3d 811, 819	14
<u>Maldonado v. Epsilon Plastics, Inc.</u> (2018) 22 Cal.App.5th 1308	12
<u>North County Contractors Ass’n, Inc. v. Touchstone Ins. Servs.</u> (1994) 27 Cal.App.4th 1085,	
1089-90.....	7
<u>Potter v. Pacific Coast Lumber Co.</u> (1951) 37 Cal.2d 592, 602.....	7
<u>See’s Candy Shops, Inc. v. Superior Court</u> (2012) 210 Cal.App.4th 889, 905-908	10
<u>Slavkov v. First Water Heater Partners I</u> (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS 11630	
.....	13
<u>Taco Bell Wage and Hour Actions</u> (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. Lexis 48557	13

1	<u>Van Kempen v. Matheson Tri-Gas, Inc.</u> (N.D. Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182	
2		13
3	<u>Wershba v. Apple Computer</u> (2001) 91 Cal.App.4th 224, 245.....	7, 8, 14
4	<u>White v. Experian Information Solutions, Inc.</u> (C.D. Cal. 2011) 803 F.Supp.2d 1086, 1098	14
5	<u>Williams v. Superior Court</u> (2013) 221 Cal.App.4th 1353	9

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STATUTES

Bus. & Prof. Code sections 17200	2
California Rule of Court 3.769(c)	7
California Rule of Court. 3.769.....	7
Code of Civil Procedure section 382.....	8
Labor Code § 201	12
Labor Code § 203	12
Labor Code § 226.....	12
Labor Code section 2699(l)(2)	6
Labor Code section 2802.....	12
Wage Order 1, § 7(A)(3)	11

OTHER AUTHORITIES

Federal Judicial Center, <u>Managing Class Action Litigation: A Pocket Guide for Judges</u> (3d ed. 2010) at 20, available at http:// www.fjc.gov/sites/default/files/2012/ClassGd3.pdf	14
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1 **I. INTRODUCTION**

2 Plaintiffs Robert De La Hoya and Marisal Dobbins hereby move the Court for an order
3 granting preliminary approval to a proposed non-reversionary class action settlement to resolve
4 wage and hour claims on behalf of approximately 295 individuals¹ employed by Defendant Sierra
5 West Finish, Inc. (“Sierra” or “Defendant”) as non-exempt employees during the period of March
6 16, 2017 through January 31, 2022. The proposed non-reversionary \$625,000 settlement will
7 result in an estimated net settlement fund of approximately \$351,916.67 with a current estimated
8 average settlement of approximately \$1,184.90. The Settlement is the product of Plaintiffs’ pre-
9 and post-filing investigation, a pre-mediation exchange of information, and arms-length and
10 adversarial negotiations overseen by experienced and well-regarded mediator Laura Quigley
11 Saldana, Esq.

12 As demonstrated below, the settlement is within the “range of reasonableness” for
13 preliminary approval. Plaintiffs’ counsel believes the settlement is a significant result for the class
14 given the substantial risks inherent in this matter. Accordingly, Plaintiffs request the Court enter
15 an order: (1) granting preliminary approval to the proposed class action settlement; (2)
16 conditionally certifying the settlement class as defined below; (3) appointing Zachary M. Crosner,
17 Blake R. Jones and Chad Saunders of Crosner Legal, P.C., and David S. Winston of Winston Law
18 Group, P.C., as Class Counsel; (4) appointing plaintiffs Robert De La Hoya and Marisal Dobbins
19 as the Class Representatives; (5) appointing ILYM Group, Inc. as the Settlement Administrator;
20 (6) approving the form of notice to the class and the procedure for providing such notice; and (7)
21 scheduling a final fairness hearing.

22 **II. BACKGROUND**

23 On March 16, 2021, Plaintiff De La Hoya, on behalf of himself and all others similarly
24 situated, filed a class action complaint in this Court seeking damages against Defendant for several
25 alleged violations of the Labor Code and IWC Wage Orders. A few weeks later, on April 13, 2021,
26 Plaintiff Dobbins filed her original class action complaint in Riverside County Superior Court. The

27 ¹ This data was current as of the Parties’ Mediation in October 2020. Plaintiffs will provide updated counts of the
28 number of Class Members and pay periods at Final Approval. There will be a slight increase in the number of class
members and pay periods as the class cut-off period is January 31, 2022.

1 Parties subsequently agreed to consolidate both matters before this Court by filing a first amended
2 complaint in the De La Hoya action that added Dobbins as a party-plaintiff. [Declaration of Zachary
3 M. Crosner (“Crosner Decl.”), ¶ 3.]

4 Plaintiffs asserted their class claims on behalf of individuals who worked for Defendant as
5 non-exempt employees in California during the relevant time frame. Defendant Sierra is a
6 specialty subcontractor providing material and install of doors, hardware, trim and accessories
7 located in Norco, California. Plaintiff De La Hoya was employed by Defendants as a field and
8 warehouse employee from around 2013 to March 2019 and December 2019 to October 2020.
9 Plaintiff Dobbins worked for Defendant as an installer from approximately August 2019-June
10 2020, when she went on medical leave and eventually resigned. [Crosner Decl., ¶ 4.]

11 Plaintiffs assert multiple wage and hour claims against Defendant. First, Plaintiffs contend
12 they and the class members did not receive all required meal and rest breaks, or did not receive
13 them on a compliant basis, and never received an extra hour of premium pay in lieu of a missed or
14 non-compliant break. Next, based on review of time sheets and other records produced by Sierra,
15 Plaintiffs also alleged Sierra failed to pay for all hours worked for multiple reasons – one, Sierra
16 had an “auto-deduct” policy whereby 30 minutes were deducted from employee time regardless of
17 whether a lunch was taken or how long it lasted, two, Sierra rounded employee time punches off,
18 particularly at the start of a shift, as employees were allowed if not encouraged to clock in up to 10
19 minutes early but were only paid based on their scheduled start time, and third, Sierra failed to
20 incorporate various forms of non-discretionary, non-hourly pay in employee regular rates of pay,
21 and thus underpaid for overtime. Plaintiffs also allege they and the class members had to use their
22 personal cell phones for business purposes, but did not received any reimbursement. [Crosner
23 Decl., ¶ 5.]

24 Based on these allegations, Plaintiffs’ action complaint asserts claims for: (1) failure to pay
25 all minimum and overtime wages due; (2) failure to provide all required meal and rest breaks or
26 compensation in lieu thereof; (3) failure to provide accurate, itemized wage statements; (4) failure
27 to pay all wages due upon termination of employment; (5) failure to reimburse expenses, and (6)
28 violations of the Unfair Competition Law, Bus. & Prof. Code sections 17200, *et seq.* Plaintiffs

1 also allege a claim under the Private Attorneys General Act based on the same alleged Labor Code
2 violations. [Crosner Decl., ¶ 6.]

3 Sierra has at all times denied Plaintiffs' allegations and maintained its meal break and
4 payroll policies and procedures comply with California law, that it provided the class members
5 with required meal and rest breaks, and that it paid Plaintiffs and the class members all wages due.
6 Additionally, Sierra strongly contends the case cannot be maintained as any kind of class or
7 representative action, arguing that to the extent class members missed breaks, that such breaks
8 were non-compliant, or that employees worked "off the clock," it was against company policy,
9 and intermittent or infrequent and evidence of such violations would be purely anecdotal. Thus,
10 per Sierra individual issues predominate and trial would be unmanageable. [Crosner Decl., ¶ 7.]

11 Since Plaintiffs filed their amended complaint, the Parties engaged in meet and confer
12 discussions regarding potential discovery issues, potential law and motion matters, and the merits
13 of the case, and ultimately agreed to attempt early mediation. They then engaged in significant
14 informal discovery to facilitate an exchange of information necessary to engage in a meaningful
15 mediation. Consequently, Plaintiffs' counsel reviewed payroll records, personnel
16 policies/handbooks, meal break policies, personnel files, and a random sampling of paystubs and
17 time records produced by Sierra. Defendant also provided documents and information reflecting
18 the estimated total amount of workweeks and pay periods they worked, and average hourly pay
19 rates, among other relevant data. [Crosner Decl., ¶ 8.]

20 The Parties then engaged Laurie Quigley Saldana, a respected mediator with extensive
21 wage and hour class action experience and, on October 12, 2021, participated in a full day
22 mediation with Ms. Saldana. Throughout the day, the arms-length negotiations were hard-fought
23 and adversarial as the Parties exchanged extensive information on their legal and factual positions,
24 and made numerous offers and counter-offers. Near the end of the day, the Parties reached
25 agreement on all major issues and then collaboratively drafted the Stipulation and Settlement
26 Agreement ("Settlement Agreement") setting forth the full and final settlement terms. [Crosner
27 Decl., ¶ 9.]

28 ///

1 **III. PROPOSED SETTLEMENT TERMS**

2 Under the settlement, Sierra will pay \$625,000.00 into a common fund, the Gross
3 Settlement Amount or GSA. Attorney's fees of up to one-third of the GSA (\$208,333.33),
4 litigation costs of up to \$20,000, enhancement awards of \$8,000 each for the plaintiffs (*i.e.*,
5 \$16,000 total), settlement administration costs of no more than \$10,000, and a payment of \$18,750
6 to the Labor & Workforce Development Agency for its share of the PAGA penalties, all will be
7 paid from the Gross Settlement Amount. The remainder of approximately \$351,916.67 will be
8 allocated among the Participating Class Members based on their total weeks worked during the
9 Class Period. No portion of the GSA will revert to Sierra. [Crosner Decl., ¶ 10.]

10 **A. Certification of the Settlement Class**

11 The settlement provides for conditional certification of a settlement class including all
12 individuals who worked for Sierra as a non-exempt employee in California during the Class
13 Period, which runs from March 16, 2017 through January 31, 2022. The Settlement Class, as of
14 October 2020, consisted of approximately 295 individuals. [Crosner Decl., ¶ 11.]

15 **B. The Benefit Conferred on the Settlement Class**

16 As noted, the settlement obligates Sierra to pay \$625,000 to resolve the Settlement Class'
17 claims, inclusive of attorney's fees and costs. Approximately \$351,916.67 from the GSA will be
18 distributed to the Participating Class Members. This is a cash settlement that does not require
19 Participating Class Members to submit a claim form to receive their settlement share.
20 Participating Class Members will receive their settlement checks automatically via First Class
21 U.S. Mail. Twenty percent of each settlement share will be allocated to wages and the remaining
22 eighty percent will be allocated to penalties and interest. Sierra will pay any and all applicable
23 employer-side payroll taxes separately and in addition to the GSA. Subject to the Court's
24 approval, any amounts not claimed (because a class member does not cash his or her settlement
25 check), plus interest, will be forwarded to CASA of San Bernardino County as the agreed upon *cy*
26 *pres* beneficiary. [Crosner Decl., ¶ 12.]

27 Each Participating Class Member will receive a share of the Net Settlement Amount based
28 on his or her total weeks worked for Sierra in California during the Class Period while employed

1 in a non-exempt position. Thus, each Class Member's Individual Settlement Share will be
2 calculated using criteria typically used in determining appropriate amounts of unpaid wages,
3 unpaid premium wages for missed meal breaks, and potential statutory penalties under applicable
4 law. These methods are intended to ensure each Class Member receives a portion of the available
5 settlement funds corresponding to the relative value of his or her potential claims. The proposed
6 allocation provides a reasonable way to compensate Class Members based on the amount of time
7 they worked for Sierra and the number of instances they missed a meal break, were not provided
8 compensation in lieu of such missed breaks, or lost wages due to the alleged off the clock work,
9 regular rate miscalculation, etc. The average award currently is estimated to be approximately
10 \$1,184.90. [Crosner Decl., ¶ 13.]

11 **C. Settlement Administration**

12 Subject to the Court's approval, the Parties have agreed on ILYM Group, Inc. ("ILYM") as
13 the Settlement Administrator. ILYM is qualified and has significant experience administering
14 class action settlements, including numerous wage and hour matters. ILYM has agreed to cap its
15 fees and costs at \$10,000.00. If the Court approves less than the above amount, the difference will
16 remain in the Net Settlement Amount for distribution to the Participating Class Members.

17 [Crosner Decl., ¶ 14; Exh. 2.]

18 **D. The Class Notice**

19 The proposed Notice (Exhibit A to the Settlement Agreement) sets out information about
20 this case and explains the basic settlement terms in plain language. The Notice also sets forth the
21 individualized information used to calculate Class Members' Individual Settlement Shares and
22 each Class Member's estimated settlement award. The Notice likewise details the procedures for
23 Class Members to dispute their individual information, the procedure for submitting an objection
24 to the Settlement, and the procedure to request exclusion. In sum, the Notice provides the Class
25 Members with the information necessary to evaluate the Settlement and provides fair opportunity
26 to participate in, opt out of, or object to the proposed Settlement. Coupled with the notice
27 procedure, the proposed Notice provides the Settlement Class with the best notice practicable.

28 [Crosner Decl., ¶ 15.]

1 **E. Right to Correct Information, Opt Out, or Object**

2 Class Members will have 60 days to dispute the information in their Notice used to
3 calculate their settlement award, and also have 60 days to submit any objections to the settlement
4 or to request exclusion. In the event a Class Member disputes their individual information, the
5 Settlement Administrator will review the Class Member's records as well as any additional
6 information submitted, and make a final determination. [Crosner Decl., ¶ 16.]

7 **F. Release of Claims**

8 All Participating Class Members will be deemed to release defendant Sierra from all
9 claims alleged in the operative complaint, or that could have been brought based on the allegations
10 in the operative complaint, including PAGA claims, from March 16, 2017 through January 31,
11 2022. The release is limited to the claims that were actually pleaded or could have been pleaded
12 based on the alleged facts in the operative complaint. [Crosner Decl., ¶ 17.]

13 **G. Attorney's Fees and Costs, and Plaintiffs' Enhancement Awards**

14 The settlement provides Defendant will not oppose a request for attorney's fees not to
15 exceed one-third of the GSA, or \$208,333.33, nor will it oppose a request for reimbursement of
16 litigation costs and expenses of up to \$20,000.00. Defendant also will not oppose a request for an
17 enhancement award to Plaintiffs of not more than \$8,000 each in recognition of their time spent on
18 this matter, the risks they undertook on behalf of the class, and the benefit conferred to the class.
19 Plaintiffs and Plaintiffs' counsel will provide the Court with appropriate summaries and evidence
20 of their efforts and time records in anticipation of the Final Approval Hearing. If the Court
21 approves less than the above amounts, the difference will remain in the Net Settlement Amount for
22 distribution to the Participating Class Members. [Crosner Decl., ¶ 18.]

23 **H. PAGA and Notice to the LWDA**

24 As noted, the Parties allocated \$25,000 from the GSA to resolution of Plaintiffs' claims
25 under PAGA. As required by Labor Code section 2699(l)(2), Plaintiffs gave notice of the settlement
26 and the approval hearing to the LWDA via its online portal. [Crosner Decl., ¶ 19; Exh. 3.]

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28 ///

1 **IV. ARGUMENT**

2 **A. Standard of Review for a Class Action Settlement**

3 The law favors settlement, particularly in class actions where substantial resources can be
4 conserved by avoiding the time, costs and rigors of formal litigation. H. Newberg & A. Conte, 4
5 Newberg on Class Actions (4th ed. 2002) § 11.41; Class Plaintiffs v. City of Seattle (9th Cir.
6 1992) 955 F.2d 1268, 1276, cert. denied, 506 U.S. 953; Potter v. Pacific Coast Lumber Co. (1951)
7 37 Cal.2d 592, 602. Nevertheless, to ensure the rights of absent class members are not unjustly
8 compromised, settlement of a class action requires court approval. Cal. Rule of Court. 3.769;
9 Wershba v. Apple Computer (2001) 91 Cal.App.4th 224, 245; Dunk v. Ford Motor Co. (1996) 48
10 Cal.App.4th 1794, 1801. This judicial review protects against fraud or collusion and ensures
11 fairness to the absent class members. Dunk, 48 Cal.App.4th at 1800-01. Judicial review occurs
12 via a two-step process to determine, under all the circumstances, if the proposed settlement is fair,
13 reasonable and adequate. Id. at 1801; Wershba, 91 Cal.App.4th at 245.

14 The first step is a motion for preliminary approval, through which the parties present the
15 court with the proposed settlement and seek a determination if it is sufficiently fair and reasonable
16 to warrant notice to the class and further proceedings as to its fairness and adequacy. Cal. Rule of
17 Court 3.769(c). This preliminary evaluation determines if the proposed settlement is within the
18 “range of reasonableness” and if notice should be provided to the class regarding the settlement’s
19 proposed terms and conditions, and whether a final fairness hearing should be scheduled.
20 Wershba, 91 Cal.App.4th at 234-35; North County Contractors Ass’n, Inc. v. Touchstone Ins.
21 Servs. (1994) 27 Cal.App.4th 1085, 1089-90. Considering the strong judicial policy favoring
22 settlement of class actions, courts generally apply a presumption of fairness to class action
23 settlements when (1) the settlement results from arms-length bargaining, (2) investigation and
24 discovery are sufficient to allow counsel and the court to act intelligently, (3) counsel is
25 experienced in similar litigation, and (4) the percentage of objectors is small. Dunk, 48
26 Cal.App.4th at 1802; Wershba, 91 Cal.App.4th at 245.

27 If the court grants preliminary approval, it then orders the class be given notice in an
28 appropriate manner, establishes a schedule and procedures for class members to request exclusion

1 or object, and sets the matter for a final fairness hearing. Typically, any motion for attorney's fees
2 and costs, and any enhancement for the class representative(s), is filed subsequent to preliminary
3 approval and heard with the motion for final approval, as part of the second step of the two-step
4 approval process. Dunk, 48 Cal.App.4th at 1800; Wershba, 91 Cal.App.4th at 232.

5 The proposed settlement in this matter warrants preliminary approval under the liberal
6 standard discussed above, as it is fair, reasonable and adequate under all the circumstances, and
7 represents a favorable result for the class.

8 **B. The Proposed Settlement Class Should Be Conditionally Certified**

9 The purpose of conditional class certification for purposes of settlement is to facilitate
10 provision of notice of the proposed settlement's terms, and the date and time of the final fairness
11 hearing. In this context, courts apply lesser scrutiny than they would otherwise in the context of
12 certifying a class. Dunk, 48 Cal.App.4th at 1807, n.19; Global Minerals & Metals Corp. v.
13 Superior Court (2003) 113 Cal.App.4th 836, 839 ("[I]t is well established that trial courts should
14 use different standards to determine the propriety of a settlement class.")

15 In the present matter, conditional certification is proper since this matter satisfies all
16 requirements for class certification under Code of Civil Procedure section 382. First, the class is
17 both sufficiently numerous, consisting of approximately 295 individuals, and ascertainable by
18 reference to Defendant's personnel and payroll records. [Crosner Decl., ¶ 20.] Next, Plaintiffs are
19 adequate class representatives, as their claims do not conflict with and are not antagonistic to the
20 claims of other class members. Further, their claims are typical given both are members of the
21 class and their claims arise from the same employment practices and course of conduct giving rise
22 to the claims of the other class members. [Crosner Decl., ¶ 21.] Lastly, their counsel is
23 experienced and adequate class counsel. [Crosner Decl., ¶¶ 37-42; Declaration of David S.
24 Winston ("Winston Decl."), ¶¶ 3-8.]

25 Next, common questions of law and fact predominate – particularly for purposes of a
26 settlement class – as the Class Members all were subject to the same break policy, or lack thereof,
27 and likewise were subject to same alleged failure to accurately record and pay for all hours
28 worked. Since the focus of the claims against Sierra concerns the legality of common policies

1 applied uniformly to the entire class, common issues predominate over individualized inquiries
2 concerning liability. Whether Sierra had an “auto-deduct” policy for meal periods, or scheduled
3 employee lunches such that they started later, are common questions applicable to all class
4 members. Regardless of the outcome, determining these questions will decide liability for all
5 class members one way or another. Similarly, the “regular rate” issue raises questions common to
6 all class members as to whether Sierra properly calculated and paid for overtime [Crosner Decl., ¶
7 22.]

8 By now it is well-settled that a theory of recovery asserting the existence of a uniform
9 policy violating California law is sufficient to satisfy the requirements for class certification. Jones
10 v. Farmers Ins. Exch. (2013) 221 Cal.App.4th 986, 996 (“Claims alleging that a uniform policy
11 consistently applied to a group of employees is in violation of the wage and hour laws are of the
12 sort routinely, and properly, found suitable for class treatment”); Williams v. Superior Court
13 (2013) 221 Cal.App.4th 1353 (“A company-wide practice can sustain a common question of fact
14 or law that supports commonality for class certification”). Lastly, a class action is superior to
15 other means for the fair and efficient adjudication of this controversy. [Crosner Decl., ¶ 23.]

16 C. **The Proposed Settlement Meets the Dunk and Kullar Factors and is within the**
17 **Range of Reasonableness**

18 The proposed settlement resulted from serious, arms-length negotiations facilitated by
19 respected mediator Laurie Quigley Saldana, Esq., who has extensive experience mediating wage
20 and hour class actions. [Crosner Decl., ¶ 9.] Plaintiffs’ counsel Zachary M. Crosner and Blake R.
21 Jones of Crosner Legal, P.C., and David Winston of Winston Law Group, P.C., have years of
22 litigation experience, including litigating wage and hour class actions. Plaintiffs’ counsel is well-
23 qualified to evaluate the risks and benefits of pursuing further litigation or settling the matter.
24 [Crosner Decl., ¶¶ 37-42; Winston Decl., ¶¶ 3-8.]

25 Next, California law recognizes several factors bearing on the fairness, adequacy, and
26 reasonableness of a proposed class settlement. Kullar v. Foot Locker Retail, Inc. (2008) 168
27 Cal.App.4th 116, 128. In relevant part, these factors include: 1) the amount offered in settlement 2)
28 the strength of plaintiff’s case; 3) the risk, expense, complexity, and likely duration of further

1 litigation; 4) the risk of maintaining class action status throughout trial; 5) the experience and views
2 of counsel; and 6) the reaction of the class members to the proposed settlement. Id. As demonstrated
3 below, the proposed settlement satisfies these requirements.

4 Prior to settlement, the parties engaged in extensive informal discovery to facilitate
5 settlement discussions. As a result, Plaintiffs reviewed documents and information regarding
6 Sierra's payroll practices, pay stubs and time records for a sampling of class members, meal and
7 rest break policies, etc., and information from Defendant regarding class size and breakdown, work
8 weeks, rates of pay, and other information used to formulate a damages model. Plaintiffs' counsel
9 is confident they obtained sufficient information to enable them to understand the law and facts of
10 this case and make an informed decision regarding the proposed settlement and whether it is in the
11 best interests of the class. [Crosner Decl., ¶¶ 8, 24.]

12 Using that data, Plaintiffs ran various calculations and estimated Sierra's likely maximum
13 exposure on the class claims at approximately \$3.291 million, including \$1,268,000 on the meal
14 break claims, \$1,268,000 on the rest break claims, \$192,000 on the wage statement claims,
15 \$35,000 on the waiting time penalty claims, \$35,000 on the expense reimbursement claims,
16 \$70,000 on the unpaid overtime/regular rate claims, and \$423,000 on the unpaid wage/off the
17 clock claims. Plaintiffs' counsel substantially discounted the value of these claims, however, in
18 light of the multiple and considerable risks posed by proceeding with the litigation. [Crosner
19 Decl., ¶¶ 25-26.]

20 On the unpaid wage claims, Plaintiffs argued Sierra had an "auto deduct" policy whereby
21 30 minutes were deducted from employee time for lunch periods regardless of whether the meal
22 period lasted a full 30 minutes or was taken at all. Plaintiffs also alleged Defendant had rounding
23 policy whereby employees clocked in up to 10 minutes early but only were paid based on the shift
24 start time and Plaintiffs contend this resulted in modest increments of off the clock work, as they
25 and the Class Members frequently worked several additional minutes either before after their
26 scheduled start/stop times. Lastly, Plaintiffs contend Sierra failed to properly calculate the class
27 members' regular of pay because it did not account for non-discretionary, non-hourly pay such as
28

1 bonuses and, as a result, did not use the correct rates of pay for purposes of paying overtime.

2 [Crosner Decl., ¶ 27.]

3 In response, Defendant took the position that its time keeping policies are legally
4 compliant, that it paid employees for all hours worked consistent with those policies, and that any
5 work done “off the clock” either on a meal period or before a shift was not sanctioned and done
6 without Sierra’s knowledge. Sierra contends further it correctly calculated and paid for all
7 overtime. [Crosner Decl., ¶ 28.]

8 For the meal and rest break claims, Plaintiffs argued Defendant frequently provided late
9 meal breaks, including requiring Class Members to take their lunch at noon regardless of the start
10 time of their shift while working the day shift with similarly late first meal periods during the evening
11 shift as well. Defendant’s understaffing policies and practices also pressured, coerced, and forced
12 Class Members to take untimely first meal periods. In fact, Plaintiffs’ review of the sampling of time
13 records suggests substantial de facto violations for late and short meal periods. In response,
14 Defendant argued its break policies were fully compliant with California law, and that it provided
15 all required meal periods and thereby met its obligations under the Labor Code and Wage Order.
16 Further, Defendant argued to the extent employees missed a meal break or took a non-compliant
17 break, any such discrepancies were aberrational and against company policy and a myriad of
18 individual issues would be required to determine if the potential violation resulted from employee
19 choice or some other reason. Consequently, per the Defendant, individualized inquiries would
20 dominate on this issue and render class certification inappropriate. [Crosner Decl., ¶ 29.]

21 As with meal breaks, Defendant argued its rest break policies complied with California law
22 and authorized and permitted employees to take all required breaks. Defendant further contended
23 that, in light of the fact that it is not required to maintain a record of rest periods, any evidence of
24 failure to authorize rest periods and/or discouragement from taking rest periods would be purely
25 anecdotal and individual issues would predominate on liability. Defendant also may contend that it
26 is only liable if Plaintiff can prove, on a shift-by-shift basis, the aggrieved employees actually did
27 not receive a fully compliant rest break. This arguably would make a trial unmanageable since the
28

1 number of instances an employee missed a rest break would have to be tested on a case by case
2 basis to determine if there was compliance. [Crosner Decl., ¶ 30.]

3 Plaintiffs' based their expense reimbursement claim on the need to use their personal
4 mobile devices for company business, for which they were not reimbursed as required by Labor
5 Code section 2802 and Cochran v. Schwan's Home Serv., Inc. (2014) 228 Cal.App.4th 113 (2014)
6 ("We hold that when employees must use their personal cell phones for work-related calls, Labor Code
7 section 2802 requires the employer to reimburse them. Whether the employees have cell phone plans
8 with unlimited minutes or limited minutes, the reimbursement owed is a reasonable percentage of their
9 cell phone bills."). On the other hand, Defendant argued it provided employees with company-owned
10 mobile devices and any use of personal phones was not necessary. [Crosner Decl., ¶ 31.]

11 Finally, Plaintiffs also alleged derivative claims under Labor Code § 226 (alleged
12 inaccurate wage statement violations) and §§ 201-203 (waiting time penalties). These claims were
13 based on the "off the clock" unpaid wage claim and the overtime regular rate claims, and will rise
14 or fall along with that primary claim, in addition to being subject to "good faith" and other
15 defenses available to Defendant.² E.g., Amaral v. Cintas Corp. No. 2 (2008) 163 Cal.App.4th
16 1157, 1203-04 (holding employer did not willfully fail to pay wages under Labor Code § 203 even
17 though the class prevailed on the merits on the underlying claim for failing to pay living wages).
18 Accordingly, Plaintiffs discounted the derivative claims significantly in light of these multiple
19 potential defenses. [Crosner Decl., ¶ 32.]

20 As far as potential PAGA liability, the theoretical penalties theoretically totaled around
21 \$3.8 million should Plaintiffs prevail on all claims and establish violations of the multiple Labor
22 Code sections at issue for every single eligible pay period. [Crosner Decl., ¶ 33.] As with the class
23 claims, Plaintiffs discounted the potential PAGA penalties for the multi-layered defenses proffered
24 by Defendant on the merits, and further discounted these claims since the Court possesses wide
25 discretion to reduce such penalties even if Plaintiffs ultimately prevailed. Fleming v. Covidien
26 (C.D. Cal. 2011) 2011 U.S. Dist. LEXIS 154590, *8-9 (court reduced the potential penalties by
27

28 ² Defendant almost certainly will argue the alleged meal and rest break violations cannot support these claims based
on Maldonado v. Epsilon Plastics, Inc. (2018) 22 Cal.App.5th 1308.

1 over 82% after a bench trial); Carrington v. Starbucks Corp. (2018) 30 Cal.App.5th 504 (after a
2 bench trial, the trial court awarded penalties of just \$5 per pay period, a 90% reduction, which
3 decision was upheld on appeal); In re Taco Bell Wage and Hour Actions (E.D. Cal. Apr. 8, 2016)
4 2016 U.S. Dist. Lexis 48557 (PAGA penalties denied after trial). Accordingly, the Parties
5 allocated \$25,000 to PAGA penalties, which amount is reasonable and in line with comparable
6 settlements in other class actions in California. Van Kempen v. Matheson Tri-Gas, Inc. (N.D. Cal.
7 Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182 (granting final approval of \$5,000 PAGA penalty
8 from \$370,000 settlement, or 1.4 percent of total settlement); Slavkov v. First Water Heater
9 Partners I (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS 116303 (finding a \$7,500 PAGA
10 payment reasonable when measured against the overall settlement of \$345,000 and the possible
11 weaknesses in plaintiffs' case, or 2.2 percent of total settlement). Additionally, the LWDA has
12 been informed of the terms of the PAGA portion of the settlement, and will be able to weigh in as
13 necessary. Jennings v. Open Door Mktg. Inc. (N.D. Cal. Oct. 3, 2018) 2018 U.S. Dist. LEXIS
14 171356, at *27 (approving settlement with PAGA penalties of 0.6% where "[p]laintiffs [have]
15 submitted the settlement agreement to the LWDA, and the LWDA has not objected to the
16 settlement").

17 The settlement obviates the significant risk that this Court may find any kind of class or
18 representative resolution unachievable or deny certification of all or some of Plaintiffs' claims.
19 Furthermore, even if Plaintiffs certify of all or some of the claims, continued litigation would be
20 lengthy and expensive as the parties pursued merits discovery, a probable motion to decertify, as
21 well as trial and possible appeals, and would substantially delay any recovery by the class with no
22 assurance of recovering significantly more than the proposed settlement. While Plaintiffs are
23 confident in the merits of their claims, legitimate controversies exist regarding Plaintiffs' claims.
24 Plaintiffs also recognize proving the amount of wages and penalties due each Class Member
25 would be an expensive, time-consuming, and uncertain proposition. [Crosner Decl., ¶¶ 34-36.]

26 Plaintiffs and their counsel discounted the value of the class claims consistent with the
27 risks discussed above, and carefully weighed the likelihood of the class receiving substantially
28 greater benefit if the litigation continued. Plaintiffs and counsel concluded – in light of these very

1 real and substantial risks – settlement on the proposed terms and without prolonged and costly
2 litigation was in the best interests of the class. The overall \$625,000 recovery represents a
3 significant percentage of Defendant’s potential exposure at roughly 19% of the maximum value of
4 the class claims. Given these risks, a total recovery for the class of \$625,000, which will result in
5 average award of some \$1,235 per class member, is a significant result well within the range of
6 reasonableness considering all potential outcomes, and it will provide direct monetary awards to
7 all Class Members without further delay. [Crosner Decl., ¶¶ 34-36; Winston Decl., ¶ 9.]

8 Importantly, the mere fact that a settlement does not provide the same recovery as might be
9 achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and
10 adequate. Wershba, 91 Cal.App.4th at 246, 250 (“Compromise is inherent and necessary in the
11 settlement process...even if the relief afforded by the proposed settlement is substantially
12 narrower than it would be if the suits were to be successfully litigated, this is no bar to a class
13 settlement because the public interest may indeed be served by a voluntary settlement in which
14 each side gives ground in the interest of avoiding litigation”); Lane v. Facebook, Inc. (9th Cir.
15 2012) 696 F.3d 811, 819 (“[T]he question whether a settlement is fundamentally fair . . . is
16 different from the question whether the settlement is perfect in the estimation of the reviewing
17 court”); 7-Eleven Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135,
18 1150 (“The fact that a proposed settlement may amount to only a fraction of the potential recovery
19 does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be
20 disapproved”); White v. Experian Information Solutions, Inc. (C.D. Cal. 2011) 803 F.Supp.2d
21 1086, 1098 (rejecting contention settlement was not fair and reasonable even though it represented
22 99% discount off the maximum value of the claims). Importantly as well, the proposed settlement
23 is non-reversionary and will provide timely benefits to the Class Members without a claims
24 process. White, 803 F.Supp.2d at 1098; c.f., Federal Judicial Center, Managing Class Action
25 Litigation: A Pocket Guide for Judges (3d ed. 2010) at 20, available at [http://](http://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf)
26 www.fjc.gov/sites/default/files/2012/ClassGd3.pdf (reversionary provisions and/or cumbersome
27 claims process may indicate lack of fairness). Plaintiffs and their counsel submit the settlement is
28 within the “range of reasonableness,” and is fair and adequate for the Class.

1 **V. CONCLUSION**

2 For all the foregoing reasons, Plaintiffs respectfully request that the Court grant this
3 motion, conditionally certify the settlement class, grant preliminary approval to the proposed class
4 action settlement, and enter the [Proposed] Order filed herewith.
5

6 Dated: January 24, 2022

CROSNER LEGAL, P.C.

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8
9 By:



Zach Crosner

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