



FILED
Superior Court of California
County of Los Angeles

MAR 24 2023

David W. Slayton, Executive Officer/Clerk of Court
By: N. Navarro, Deputy

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

ROBERT ESQUER, individually and on
behalf of all individuals similarly situated,

Plaintiff,

v.

MEDICAL BREAKTHROUGH
MASSAGE CHAIRS, LLC, a California
limited liability company; MAX LUN, an
individual; and DOES 1 through 100,
inclusive,

Defendants.

Case No.: 21STCV28968

ORDER GRANTING
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT ON CONDITIONS

I. BACKGROUND

Plaintiff Robert Esquer sues his former employer, Defendants Medical
Breakthrough Massage Chair, LLC and Max Lun (collectively, "Defendants") for

1 alleged wage and hour violations. Defendants manufacturer massage chairs. Plaintiff
2 seeks to represent a class of Defendants' current and former non-exempt employees.

3 On August 4, 2021, Plaintiff filed a class action complaint against Defendants
4 alleging causes of action for: (1) Failure to Compensate All Hours Worked in Violation
5 of Industrial Welfare Commission Order No. 4 and Cal. Labor Code §§ 200, 226, 500,
6 510, 1194, 1197, and 1198; (2) Missed Meal and Rest Breaks in Violation of Cal. Labor
7 Code §§ 200, 226.7, 512, and 12 California Code of Regulations § 11040; (3) Failure to
8 Pay Minimum Wages in Violation of Labor Code §§ 1182.12, 1194, 1194.2, 1197; (4)
9 Failure to Pay Overtime and Doubletime Compensation in Violation of Cal. Labor
10 Code § 1194, et seq.; (5) Failure to Provide Proper Wage Statement in Violation of Cal.
11 Labor Code § 226; (6) Failure to Pay Compensation Upon Termination of Employment
12 in Violation of Cal. Labor Code §§ 201-203; (7) Violation of Labor Code §§ 2698, et
13 seq. ("PAGA"); (8) Misclassification of Employee as "Independent Contractor"; (9)
14 Violations of Cal. Business & Professions Code §§ 17200, et seq.; and (10) Failure to
15 Permit Inspection of Personnel and Payroll Records in Violation of Cal. Labor Code §
16 1198.5.

17 On October 12, 2021, Plaintiff filed a First Amended Complaint against
18 Defendants to amend his PAGA cause of action to include allegations involving the
19 independent contractor misclassification claim.

20 On June 2, 2022, the parties attended a full day mediation session with the Hon.
21 Jeffrey Winikow (Ret.), which resulted in settlement. The terms were finalized in a
22 long-form Class Action and PAGA Settlement Agreement. Plaintiff filed a motion for
23 preliminary approval of the settlement which was heard January 20, 2023. Additional
24 information was requested and certain deficiencies were noted.

1 As a result, the parties filed a Second Amended Complaint, which defendants
2 answered. Additional information was provided by Declarations filed February 6, 2023
3 (Ryu, Springer, Park, Lun) and the settlement agreement was amended. The matter was
4 continued to March 2, 2023 and then to March 16, 2023. At hearing on March 16, 2023
5 additional information was requested, which was provided March 22, 2023.

6 For the reasons set forth below, the Court preliminarily grants approval for the
7 settlement attached to the Declaration of Joshua Park, filed February 17, 2023 on
8 condition that a copy of this Order is served on the LWDA no later than March 30,
9 2023 and proof of service of same is filed at least sixteen court days prior to the final
10 approval hearing.

11 **II. THE TERMS OF THE SETTLEMENT**

12 **A. SETTLEMENT CLASS AND RELATED DEFINITIONS**

13 "Class" means (a) all individuals who have previously been or currently are
14 employed by Defendants as an hourly or non-exempt employee in the State of
15 California at any time during the Class Period, and (b) all individuals who were
16 classified as independent contractors by Defendants in the State of California at any
17 time during the Class Period. (§1.6)

18 "Class Period" means the period from August 3, 2017 to June 2, 2022. (§1.13)

19 "Aggrieved Employees" means (a) all individuals who have previously been or
20 currently are employed by Defendants as an hourly or non-exempt employee in the
21 State of California at any time during the PAGA Period and (b) all individuals who
22 were classified as independent contractors by Defendants in the State of California at
23 any time during the PAGA Period. (§1.4)

24 "PAGA Period" means the period from May 30, 2020 to June 2, 2022. (§1.31)

1 "Participating Class Member" means a Class Member who does not submit a
2 valid and timely Request for Exclusion from the Settlement. (¶1.34)

3
4 **B. THE MONETARY TERMS OF SETTLEMENT**

5 The essential monetary terms are as follows:

- 6 • The Gross Settlement Amount ("GSA") is **\$400,000** (¶1.23). This includes
7 payment of a PAGA penalty of **\$40,000** to be paid 75% to the LWDA (\$30,000)
8 and 25% to the Aggrieved Employees (\$10,000) (¶1.33).
 - 9 ○ Escalator Clause: Based on a review of its records to date, Defendants
10 estimate that there are approximately 165 Class Members who
11 collectively worked a total of approximately 9,800 Workweeks, and 92
12 Aggrieved Employees who worked a total of 2,903 PAGA Pay Periods. If
13 the number of the aggregate Workweeks worked by Settlement Class
14 Members during the Class Period is more than 10% greater than this
15 figure (i.e., if there are 980 or more Workweeks worked by the Settlement
16 Class), Defendants agree to increase the Gross Settlement Amount on a
17 proportional basis (i.e., if there was a 15% increase in the number of
18 Workweeks worked by Settlement Class Members, Defendants would
19 agree to increase the Gross Settlement Amount by 15%.) (¶9)
- 20 • The Net Settlement Amount ("Net") (**\$196,666.67**) is the GSA less:
 - 21 ○ Up to **\$133,333.33** (33 1/3%) for attorney fees (¶3.2.2);
 - 22 ○ Up to **\$15,000** for attorney costs (*Ibid.*);
 - 23 ○ Up to **\$10,000** for a service award to the proposed class representative
24 (¶3.2.1); and
 - 25 ○ Estimated **\$5,000** for settlement administration costs (¶3.2.3).

- 1 • Employer-side payroll taxes will be paid by Defendants separately from the GSA
2 (¶3.1).
- 3 • Assuming the Court approves all maximum requested deductions, approximately
4 \$196,666.67 will be available for automatic distribution to participating class
5 members. Assuming full participation, the average settlement share will be
6 approximately \$1,191.91. ($\$196,666.67 \text{ Net} \div 165 \text{ class members} = \$1,191.91$).
7 In addition, each Aggrieved Employee will receive a portion of the PAGA
8 penalty, estimated to be \$108.69 per Aggrieved Employee. ($\$10,000 \text{ or } 25\% \text{ of}$
9 $\$40,000 \text{ PAGA penalty} \div 92 \text{ Aggrieved Employees} = \108.69).
- 10 • There is no Claim Requirement (¶3.1).
- 11 • The settlement is not reversionary (¶3.1).
- 12 • Individual Settlement Share Calculation: Each Participating Class Member will
13 receive an Individual Class Payment calculated by (a) dividing the Net
14 Settlement Amount by the total number of Workweeks worked by all
15 Participating Class Members during the Class Period and (b) multiplying the
16 result by each Participating Class Member's Workweeks. For the purposes of
17 calculating the Individual Class Payments, Workweeks shall be calculated to the
18 hundredth (i.e., two decimal places). (¶3.2.4) Non-Participating Class Members
19 will not receive any Individual Class Payments. The Administrator will retain
20 amounts equal to their Individual Class Payments in the Net Settlement Amount
21 for distribution to Participating Class Members on a pro rata basis. (¶3.2.6)
 - 22 ○ PAGA Payments: The Administrator will calculate each Individual
23 PAGA Payment by (a) dividing the amount of the Aggrieved Employees'
24 25% share of PAGA Penalties \$10,000 by the total number of PAGA
25 Period Pay Periods worked by all Aggrieved Employees during the

PAGA Period and (b) multiplying the result by each Aggrieved Employee's PAGA Period Pay Periods. For purposes of calculating the Individual PAGA Payments, Pay Periods will be calculated to the hundredth (i.e., two decimal places). (§3.2.7)

- Tax Withholdings: Each Settlement Class Member's Individual Class Payment will be allocated as 1/3 wages, 1/3 penalties, and 1/3 interest. (§3.2.5) Aggrieved Employees assume full responsibility and liability for any taxes owed on their Individual PAGA Payment. (§3.2.7)
- Funding of Settlement: Defendants shall fund the Gross Settlement Amount plus the amounts necessary to pay Defendants' share of payroll taxes in 12 monthly installments. The first installment of \$33,333.37 and one-twelfth of the amount necessary to fully pay Defendants' share of payroll taxes shall be due December 2, 2022, or thirty (30) calendar days after the Court issues an order finally approving the settlement, whichever is later. Defendants shall pay \$33,333.33 plus one-twelfth of the Defendants' share of payroll taxes per month every thirty (30) calendar days hereafter for eleven (11) consecutive months until the remaining balance is paid in full. (§4.3)
- Distribution: Within ten (10) calendar days after Defendants' fully fund the Gross Settlement Amount, the Administrator will mail checks for all Individual Class Payments, any Individual PAGA Payments, the LWDA PAGA Payment, the Class Representative Service Payment, the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment, and the Administrative Expenses Payment. Disbursement of the Class Representative Service Payment, Class Counsel Fees Payment, Class Counsel Litigation Expenses Payment, and Administration Expenses Payment shall not precede disbursement of Individual

1 Class Payments, Individual PAGA Payments, and the LWDA PAGA Payment.
2 (§4.4)

- 3 • Uncashed Settlement Payment Checks: The Administrator will issue checks for
4 the Individual Class Payments and/or Individual PAGA Payments and send them
5 to the Class Members via First Class U.S. Mail, postage prepaid. The face of
6 each check shall prominently state the date (not less than 180 days after the date
7 of mailing) when the check will be voided. The Administrator will cancel all
8 checks not cashed by the void date. (§4.4.1) For any Class Member whose
9 Individual Class Payment check or Individual PAGA Payment check is uncashed
10 and cancelled after the void date, the Administrator shall transmit the funds
11 represented by such checks to the California Controller's Unclaimed Property
12 Fund in the name of the Class Member thereby leaving no "unpaid residue"
13 subject to the requirements of California Code of Civil Procedure Section 384,
14 subd. (b). (§4.4.3)
- 15 • Other - Defendants' Declaration in Support of Preliminary Approval: Within
16 seven (7) calendar days of the full execution of this Agreement, Defendants will
17 prepare and deliver to Class Counsel a signed declaration from Defendants and
18 Defense Counsel disclosing all facts relevant to any actual or potential conflicts
19 of interest with the Administrator as well as Defendants' financial conditions and
20 need for installment plan set forth in Paragraph 4.3. (§7.1) Defendant's principal
21 is a party to this action and has provided a Declaration as to the corporate
22 defendant's ability to make these payments.

23 //

24 //

25 //

1 **C. TERMS OF RELEASES**

- 2 • Release of Claims: Effective on the date when Defendants fully fund the entire
3 Gross Settlement Amount and fund all employer payroll taxes owed on the
4 Wage Portion of the Individual Class Payments, Plaintiff, Class Members, and
5 Class Counsel will release claims against all Released Parties as follows: (¶6)
- 6 • Release by Participating Class Members Who Are Also Aggrieved Employees:
7 Participating Class Members, on behalf of themselves and their respective
8 former and present representatives, agents, attorneys, heirs, administrators,
9 successors, and assigns, who are also Aggrieved Employees, release Released
10 Parties from all claims that were alleged, or reasonably could have been alleged,
11 based on the Class Period and PAGA Period facts stated in the Operative
12 Complaint and the Amended PAGA Notice, including but not limited to any and
13 all claims for class damages and/or PAGA penalties based on unpaid wages of
14 any type, unpaid overtime, unpaid minimum wages, untimely wage payments
15 both during and at the end of employment, non-compliant meal periods, non-
16 compliant rest periods, non-compliant wage statements, unreimbursed business
17 expenses, failure to maintain payroll records, failure to pay meal and/or rest
18 period premiums, misclassification of employees as independent contractors,
19 failure to permit inspection of personnel and payroll records, and claims for
20 interest, penalties (including but not limited to wait time penalties), or premiums
21 in connection therewith, as well as any claims under California Labor Code and
22 California Wage Orders, California Labor Code §§ 200, 201, 202, 203, 204, 210,
23 223, 225.5, 226, 226.3, 226.7, 226.8, 227.3, 432, 500, 510, 512, 516, 558, 558.1,
24 1171, 1173, 1173.1, 1174, 1182.12, 1194, 1194.2, 1197, 1197.1 , 1198, 1198.5,
25 1199, 2698 et seq, 2800, and 2802 and for related claims under Business &

1 Professions Code § 17200 et seq.). Participating Class Members, who are also
2 Aggrieved Employees, do not release any other claims, including claims for
3 vested benefits, wrongful termination, violation of the Fair Employment and
4 Housing Act, unemployment insurance, disability, social security, workers'
5 compensation, or claims based on facts occurring outside the Class Period. (§6.2)
6 The Court notes that the operative complaint is the Seconded Amended
7 Complaint filed February 7, 2023. (§2.1)

- 8 • Release by Participating Class Members Who Are Not Aggrieved Employees:
9 All Participating Class Members, on behalf of themselves and their respective
10 former and present representatives, agents, attorneys, heirs, administrators,
11 successors, and assigns, who are not also Aggrieved Employees, release
12 Released Parties from all claims that were alleged, or reasonably could have
13 been alleged, based on the Class Period facts stated in the Operative Complaint,
14 including but not limited to any and all claims for class damages based on
15 unpaid wages of any type, unpaid overtime, unpaid minimum wages, untimely
16 wage payments both during and at the end of employment, non-compliant meal
17 periods, non-compliant rest periods, non-compliant wage statements,
18 unreimbursed business expenses, failure to maintain payroll records, failure to
19 pay meal and/or rest period premiums, misclassification of employees as
20 independent contractors, failure to permit inspection of personnel and payroll
21 records, and claims for interest, penalties (including but not limited to wait time
22 penalties), or premiums in connection therewith, as well as any claims under
23 California Labor Code and California Wage Orders, California Labor Code §§
24 200, 201, 202, 203, 204, 210, 223, 225.5, 226, 226.3, 226.7, 226.8, 227.3, 432,
25 500, 510, 512, 516, 558, 558.1, 1171, 1173, 1173.1, 1174, 1182.12, 1194,

1 1194.2, 1197, 1197.1, 1198, 1198.5, 1199, 2800, and 2802 and for related claims
2 under Business & Professions Code § 17200 et seq.). Participating Class
3 Members, who are not Aggrieved Employees, do not release any other claims,
4 including claims for vested benefits, wrongful termination, violation of the Fair
5 Employment and Housing Act, violation of the California Private Attorneys
6 General Act, unemployment insurance, disability, social security, workers'
7 compensation, or claims based on facts occurring outside the Class Period. (§6.3)

- 8 • Release by Non-Participating Class Members Who Are Aggrieved Employees:
9 All Non-Participating Class Members who are Aggrieved Employees are
10 deemed to release, on behalf of themselves and their respective former and
11 present representatives, agents, attorneys, heirs, administrators, successors, and
12 assigns, the Released Parties from all claims for PAGA penalties that were
13 alleged, or reasonably could have been alleged, based on the PAGA Period facts
14 stated in the Operative Complaint and the Amended PAGA Notice, including but
15 not limited to unpaid wages of any type, unpaid overtime, unpaid minimum
16 wages, untimely wage payments both during and at the end of employment, non-
17 compliant meal periods, non-compliant rest periods, non-compliant wage
18 statements, unreimbursed business expenses, failure to maintain payroll records,
19 failure to pay meal and/or rest period premiums, misclassification of employees
20 as independent contractors, failure to permit inspection of personnel and payroll
21 records, and claims for interest, penalties (including but not limited to wait time
22 penalties), or premiums in connection therewith, as well as any claims under
23 California Labor Code and California Wage Orders, California Labor Code §§
24 200, 201, 202, 203, 204, 210, 223, 225.5, 226, 226.3, 226.7, 226.8, 227.3, 432,
25 500, 510, 512, 516, 558, 558.1, 1171, 1173, 1173.1, 1174, 1182.12, 1194,

1 1194.2, 1197, 1197.1, 1198, 1198.5, 1199, 2698 et seq, 2800, and 2802 and for
2 related claims under Business & Professions Code § 17200 et seq. (§6.4)

3
4 This Release includes claims not squarely presented to the LWDA (i.e. for
5 reimbursement of business expenses and for rest period violations). Indeed,
6 plaintiff's amended letter of August 5, 2021 states rest periods were provided.
7 Accordingly, Plaintiff shall provide a copy of this Order to the LWDA no later
8 than March 30, 2023 so that any objection by it to the scope of the release may
9 be considered at the Final Approval Hearing.

10 "Released Parties" means: Defendants and each of their former and present
11 directors, officers, shareholders, owners, members, attorneys, insurers, predecessors,
12 successors, assigns, subsidiaries, and affiliates. (§1.37)

- 13 • The named Plaintiff will also provide a general release and a waiver of the
14 protections of Cal. Civ. Code §1542. (§6.1)
- 15 • The releases are effective on the date when Defendants fully fund the entire
16 Gross Settlement Amount and fund all employer payroll taxes owed. (§6)

17 18 **D. SETTLEMENT ADMINISTRATION**

- 19 • The proposed Settlement Administrator is Simpluris, Inc. (§1.2), which has
20 provided evidence that no counsel are affiliated with it and that it has adequate
21 procedures in place to safeguard the data and funds to be entrusted to it. (See
22 Declaration of Springer).
- 23 • Settlement administration costs are estimated to be \$5,000 (§3.2.3).
- 24 • Notice: The manner of giving notice is described below.

1 • Opt Out/Objection Dates: "Response Deadline" means 45 calendar days after the
2 Administrator mails Notice to Class Members and Aggrieved Employees, and
3 shall be the last date on which Class Members may: (a) mail Requests for
4 Exclusion from the Settlement, (b) mail Challenges to Workweeks and/or Pay
5 Periods, or (c) mail his or her Objection to the Settlement. Class Members to
6 whom Notice Packets are resent after having been returned undeliverable to the
7 Administrator shall have an additional 14 calendar days beyond the Response
8 Deadline has expired. (§1.39)

9 ○ Because future PAGA claims are subject to claim preclusion upon entry of
10 the Judgment, Non-Participating Class Members who are Aggrieved
11 Employees are deemed to release the claims identified in Paragraph 6.4 of
12 this Agreement and are eligible for an Individual PAGA Payment. (§8.5.3)

13 ○ If the number of valid Requests for Exclusion identified in the Exclusion
14 List exceeds 10% of the total of all Class Members, Defendants may, but
15 are not obligated to, elect to withdraw from the Settlement. (§10)

16 • Notice of Final Judgment will be provided by the Settlement Administrator by
17 providing a web link (§4.4.1)

19 **III. SETTLEMENT STANDARDS AND PROCEDURE**

20 California Rules of Court, rule 3.769(a) provides: "A settlement or compromise
21 of an entire class action, or of a cause of action in a class action, or as to a party,
22 requires the approval of the court after hearing." "Any party to a settlement agreement
23 may serve and file a written notice of motion for preliminary approval of the settlement.
24 The settlement agreement and proposed notice to class members must be filed with the
25

1 motion, and the proposed order must be lodged with the motion.” See Cal. Rules of
2 Court, rule 3.769(c).

3 “In a class action lawsuit, the court undertakes the responsibility to assess
4 fairness in order to prevent fraud, collusion or unfairness to the class, the settlement or
5 dismissal of a class action. The purpose of the requirement [of court review] is the
6 protection of those class members, including the named plaintiffs, whose rights may not
7 have been given due regard by the negotiating parties.” *Consumer Advocacy Group,*
8 *Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal. App.4th 46, 60 [internal
9 quotation marks omitted]; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224,
10 245, disapproved on another ground in *Hernandez v. Restoration Hardware, Inc.* (2018)
11 4 Cal. 5th 260 (“*Wershba*”), [Court needs to “scrutinize the proposed settlement
12 agreement to the extent necessary to reach a reasoned judgment that the agreement is
13 not the product of fraud or overreaching by, or collusion between, the negotiating
14 parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all
15 concerned.”] [internal quotation marks omitted].

16 “The burden is on the proponent of the settlement to show that it is fair and
17 reasonable. However, “a presumption of fairness exists where: (1) the settlement is
18 reached through arm's-length bargaining; (2) investigation and discovery are sufficient
19 to allow counsel and the court to act intelligently; (3) counsel is experienced in similar
20 litigation; and (4) the percentage of objectors is small.” *Wershba*, 91 Cal. App. 4th at
21 245 [citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802].

22 Notwithstanding an initial presumption of fairness, “the court should not give
23 rubber-stamp approval.” *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th
24 116, 130 (“*Kullar*”). “[W]hen class certification is deferred to the settlement stage, a
25 more careful scrutiny of the fairness of the settlement is required.” *Carter v. City of*

1 *Los Angeles* (2014) 224 Cal.App.4th 808, 819. “To protect the interests of absent class
2 members, the court must independently and objectively analyze the evidence and
3 circumstances before it in order to determine whether the settlement is in the best
4 interests of those whose claims will be extinguished.” *Kullar*, 168 Cal. App. 4th at 130.
5 In that determination, the court should consider factors such as “the strength of
6 plaintiffs' case, the risk, expense, complexity and likely duration of further litigation,
7 the risk of maintaining class action status through trial, the amount offered in
8 settlement, the extent of discovery completed and stage of the proceedings, the
9 experience and views of counsel, the presence of a governmental participant, and the
10 reaction of the class members to the proposed settlement.” *Id.* at 128. “Th[is] list of
11 factors is not exclusive and the court is free to engage in a balancing and weighing of
12 factors depending on the circumstances of each case.” *Wershba*, 91 Cal. App. 4th at
13 245.

14 At the same time, “[a] settlement need not obtain 100 percent of the damages
15 sought in order to be fair and reasonable. Compromise is inherent and necessary in the
16 settlement process. Thus, even if ‘the relief afforded by the proposed settlement is
17 substantially narrower than it would be if the suits were to be successfully litigated,’
18 this is no bar to a class settlement because ‘the public interest may indeed be served by
19 a voluntary settlement in which each side gives ground in the interest of avoiding
20 litigation.’” *Id.* at 250.

21 **IV. ANALYSIS OF SETTLEMENT AGREEMENT**

22 **A. THERE IS A PRESUMPTION OF FAIRNESS**

23
24
25 The settlement is entitled to a presumption of fairness for the following reasons:

1
2 **1. The settlement was reached through arm's-length bargaining**

3 On June 2, 2022, the parties attended a full day mediation session with the Hon.
4 Jeffrey Winikow (Ret.), which resulted in settlement. (Declaration of Young W. Ryu
5 ("Ryu Decl.") ¶12.)
6

7 **2. The investigation and discovery were sufficient**

8 Class Counsel represents that for purposes of attending mediation, the parties
9 agreed to exchange informal discovery, including policies and procedures of
10 Defendants, sample class member/allegedly aggrieved employees time and payroll
11 records, class statistics, and other class data. Counsel represent that the sample data had
12 a 10% margin of error with a 91.5% confidence interval. Plaintiff also propounded his
13 first set of written discovery requests on February 4, 2022. (*Id.* at ¶11.) The Settlement
14 Agreement at ¶7.1 also indicates that Defendants' financial condition was a factor
15 considered in arriving at the settlement terms and requires verification of data. In
16 addition, the corporate defendant's principal has provided information by way of
17 Declaration as to how it will fund the settlement.

18 This is sufficient to value the case for settlement purposes.
19

20 **3. Counsel is experienced in similar litigation**

21 Class Counsel represent that they are experienced in class action litigation,
22 including wage and hour class actions. (*Id.* at ¶¶5-6.)
23

24 //

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1 **4. Percentage of the class objecting**

2 This cannot be determined until the final fairness hearing. Weil & Brown et al.,
3 Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2019) ¶ 14:139.18 [“Should
4 the court receive objections to the proposed settlement, it will consider and either sustain
5 or overrule them at the fairness hearing.”].
6

7 **B. THE SETTLEMENT MAY PRELIMINARILY BE CONSIDERED**
8 **FAIR, ADEQUATE, AND REASONABLE**
9

10 Notwithstanding a presumption of fairness, the settlement must be evaluated in its
11 entirety. The evaluation of any settlement requires factoring unknowns. “As the court
12 does when it approves a settlement as in good faith under Code of Civil Procedure
13 section 877.6, the court must at least satisfy itself that the class settlement is within the
14 ‘ballpark’ of reasonableness. See *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985)
15 38 Cal.3d 488, 499–500. While the court is not to try the case, it is ‘called upon to
16 consider and weigh the nature of the claim, the possible defenses, the situation of the
17 parties, and *the exercise of business judgment* in determining whether the proposed
18 settlement is reasonable.’ (*City of Detroit v. Grinnell Corporation, supra*, 495 F.2d at p.
19 462, italics added.)” *Kullar*, 168 Cal.App.4th at 133 (emphasis in original).
20

21 **1. Amount Offered in Settlement**

22 The most important factor is the strength of the case for plaintiffs on the merits,
23 balanced against the amount offered in settlement.” (*Id.* at 130.)

24 Class Counsel estimated Defendant’s maximum exposure at \$4,525,310.48, based
25 on the following analysis:

Violation	Maximum Exposure
Minimum Wages and Overtime	\$2,479,021.56
Meal Period Violations	\$803,953.92
Unreimbursed Business Expenses	\$253,456.00
Wage Statement Violations	\$258,650.00
Waiting Time Penalties	\$439,929.00
PAGA Penalties	\$290,300.00
Total	\$4,525,310.48

(Ryu Decl. filed 9/7/2022 ¶¶22-45.)

The settlement amount is a significant discount from the “maximum” exposure. Plaintiff’s counsel represents that this discount is appropriate because there were many individualized issues making class certification difficult. In addition, at hearing counsel explained that a central premise of the case—that the time clock used by employees did not record time over 8 hours—was shown in discovery to be inaccurate. Overtime pay was paid to some employees making it difficult to determine that there could be classwide liability.

2. The Risks of Future Litigation

The case is likely to be expensive and lengthy to try. Procedural hurdles (e.g., motion practice and appeals) are also likely to prolong the litigation as well as any recovery by the class members. Even if a class is certified, there is always a risk of decertification. *Weinstat v. Dentsply Intern., Inc.* (2010) 180 Cal.App.4th 1213, 1226 [“Our Supreme Court has recognized that trial courts should retain some flexibility in

1 conducting class actions, which means, under suitable circumstances, entertaining
2 successive motions on certification if the court subsequently discovers that the propriety
3 of a class action is not appropriate.”].) Further, the settlement was negotiated and
4 endorsed by Class Counsel who, as indicated above, are experienced in class action
5 litigation. Based upon their investigation and analysis, the attorneys representing
6 Plaintiff and the class are of the opinion that this settlement is fair, reasonable, and
7 adequate. (Ryu Decl. ¶44.)

8 The Court also notes that Plaintiff brings a PAGA claim on behalf of the LWDA,
9 which was sent a copy of the Settlement Agreement on February 17, 2023 (Sup. Decl. of
10 Joshua Park) and will be sent a copy of this Order. Any objection by it will be
11 considered at the final fairness hearing.

12 13 **3. The Releases Are Limited**

14 The Court has reviewed the Releases to be given by the absent class members and
15 the named plaintiff. The releases, described above, are tailored to the Second Amended
16 Complaint and release only those claims in the pleadings. There is no general release by
17 the absent class. The named plaintiff’s general release is appropriate given that he was
18 represented by counsel in its negotiation.

19 20 **4. Conclusion**

21 Class Counsel estimated Defendant’s maximum exposure at \$ \$4,525,310.48. Class
22 Counsel obtained a gross settlement valued at \$400,000. This is approximately 8.8% of
23 Defendant’s maximum exposure, which, given Defendants’ financial condition and the
24 uncertain outcomes, including the potential that the class might not be certified, that
25 liability is a contested issue, and that the full amount of penalties would not necessarily

1 be assessed even if the class is certified and liability found, the settlement is within the
2 “ballpark of reasonableness.”

3 4 **C. CONDITIONAL CLASS CERTIFICATION MAY BE GRANTED**

5 A detailed analysis of the elements required for class certification is not required,
6 but it is advisable to review each element when a class is being conditionally certified.
7 *Amchem Products, Inc. v. Winsor* (1997) 521 U.S. 591, 620, 622-627. The party
8 advocating class treatment must demonstrate the existence of an ascertainable and
9 sufficiently numerous class, a well-defined community of interest, and substantial
10 benefits from certification that render proceeding as a class superior to the alternatives.”
11 *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021.

12 13 **1. The Proposed Class is Numerous**

14 There are approximately 165 putative Class Members. (Ryu Decl. ¶55.a.)
15 Numerosity is established. *Franchise Tax Bd. Limited Liability Corp. Tax Refund*
16 *Cases* (2018) 25 Cal.App.5th 369, 393: stating that the “requirement that there be many
17 parties to a class action is liberally construed,” and citing examples wherein classes of
18 as little as 10, *Bowles v. Superior Court* (1955) 44 Cal.2d 574, and 28, *Hebbard v.*
19 *Colgrove* (1972) 28 Cal.App.3d 1017, were upheld).

20 21 **2. The Proposed Class Is Ascertainable**

22 “A class is ascertainable, as would support certification under statute
23 governing class actions generally, when it is defined in terms of objective
24 characteristics and common transactional facts that make the ultimate identification
25

1 of class members possible when that identification becomes necessary.” *Noel v. Thrifty*
2 *Payless, Inc.* (2019) 7 Cal.5th 955, 961 (*Noel*).

3 The class is defined above. Class Members are ascertainable through
4 Defendants’ records. (Ryu Decl. ¶55.a.)

6 **3. There Is A Community of Interest**

7 “The community of interest requirement involves three factors: ‘(1) predominant
8 common questions of law or fact; (2) class representatives with claims or defenses typical
9 of the class; and (3) class representatives who can adequately represent the class.’”
10 *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.

11 As to predominant questions of law or fact, Plaintiff contends that action involves,
12 inter alia, a determination about Defendant’s alleged failure to pay all wages owed
13 including minimum and overtime wages, failure to provide meal breaks or provide
14 premium pay in lieu thereof, failure to provide accurate wage statements, failure to
15 reimburse for necessary expenditures, failure to pay final wages when due and related
16 claims for violations of California’s Business & Professions Code, and penalties pursuant
17 to Labor Code section 2699, et seq. Plaintiff contends these practices, including the
18 alleged failure to provide corresponding premium payments that affected class members
19 in the same way. Plaintiff further contends that as all class members were employed
20 during the Class Period, the operative complaint delineates a common course of conduct
21 applicable to all Class Members. (Ryu Decl. ¶55.d.)

22 As to typicality, Plaintiff contends that his claims are typical of Class Members’
23 claims because they arose from the same factual basis and are based on the same legal
24 theories. Plaintiff asserts that he was employed by Defendants during the Class Period
25 subject to the allegedly unlawful meal break policies and pay and reimbursement

1 practices at issue in this litigation. Plaintiff contends that as a member of the class, the
2 central issues of this litigation (whether Defendant failed to pay all wages, whether
3 Defendant failed to provide meal periods, etc.), which would arise if this were an
4 individual action brought by Plaintiff, apply to the other Class Members as well, and the
5 answer to these questions would determine Defendants' liability to the entire putative
6 class. (*Id.* at ¶¶55.b.)

7 As to adequacy, Plaintiff represents that he is aware of the duties and risks of
8 serving as class representative and has participated in the litigation. (Declaration of
9 Robert Esquer ¶¶4-10.) As previously stated, Class Counsel have experience in class
10 action litigation.

11 **4. Substantial Benefits Exist**

12
13 Given the relatively small size of the individual claims, a class action is superior to
14 separate actions by the class members.

15 **D. THE PROPOSED NOTICE PLAN MEETS THE REQUIREMENTS** 16 **OF DUE PROCESS**

17
18 The purpose of notice is to provide due process to absent class members. A practical
19 approach is required, in which the circumstances of the case determine what forms of
20 notice will adequately address due process concerns. *Noel*, 7 Cal.5th at 982. California
21 Rules of Court, rule 3.766 (e) provides that in determining the manner of the notice, the
22 court must consider: (1) the interests of the class; (2) the type of relief requested; (3) the
23 stake of the individual class members; (4) the cost of notifying class members; (5) the
24 resources of the parties; (6) the possible prejudice to class members who do not receive
25 notice; and (7) the res judicata effect on class members.

1 **1. Method of class notice**

2 Not later than fourteen (14) calendar days after the Court grants Preliminary
3 Approval of the Settlement, Defendants will simultaneously deliver the Class Data to
4 the Administrator, in the form of a Microsoft Excel spreadsheet. (§4.2)

5 Using best efforts to perform as soon as possible, and in no event later than 14
6 calendar days after receiving the Class Data, the Administrator will send to all Class
7 Members identified in the Class Data, via First-Class U.S. Mail, the Class Notice, with
8 Spanish translation. (§8.4.2)

9 Not later than three (3) business days after the Administrator's receipt of any
10 Class Notice returned by the USPS as undelivered, the Administrator shall re-mail the
11 Class Notice using any forwarding address provided by the USPS. If the USPS does not
12 provide a forwarding address, the Administrator shall conduct a Class Member Address
13 Search, and re-mail the Class Notice to the most current address obtained. The
14 Administrator has no obligation to make further attempts to locate or send Class Notice
15 to Class Members whose Class Notice is returned by the USPS a second time. (§8.4.3)

16 The deadlines for Class Members' written objections, Challenges to Workweeks
17 and/or Pay Periods, and Requests for Exclusion will be extended an additional fourteen
18 (14) days beyond the forty-five (45) days otherwise provided in the Class Notice for all
19 Class Members whose notice is re-mailed. The Administrator will inform the Class
20 Member of the extended deadline with the re-mailed Class Notice. (§8.4.4)

21 **2. Content of class notice.**

22 A copy of the proposed class notice is attached to the Settlement Agreement as
23 Exhibit A. The notice includes information such as: a summary of the litigation; the
24 nature of the settlement; the terms of the settlement agreement; the maximum
25 deductions to be made from the gross settlement amount (i.e., attorney fees and costs,

1 the enhancement award, and claims administration costs); the procedures and deadlines
2 for participating in, opting out of, or objecting to, the settlement; the consequences of
3 participating in, opting out of, or objecting to, the settlement; and the date, time, and
4 place of the final approval hearing. See Cal Rules of Court, rule 3.766(d). It is to be
5 given in both English and Spanish (§1.12).

6 **3. Settlement Administration Costs**

7 Settlement administration costs are estimated at **\$5,000**, including the cost of
8 notice (§3.2.3). Prior to the time of the final fairness hearing, the settlement
9 administrator must submit a declaration attesting to the total costs incurred and
10 anticipated to be incurred to finalize the settlement for approval by the Court.

11 12 **E. ATTORNEY FEES AND COSTS**

13 California Rule of Court, rule 3.769(b) states: “Any agreement, express or
14 implied, that has been entered into with respect to the payment of attorney fees or the
15 submission of an application for the approval of attorney fees must be set forth in full in
16 any application for approval of the dismissal or settlement of an action that has been
17 certified as a class action.”

18 Ultimately, the award of attorney fees is made by the court at the fairness
19 hearing, using the lodestar method with a multiplier, if appropriate. *PLCM Group, Inc.*
20 *v. Drexler* (2000) 22 Cal.4th 1084, 1095-1096; *Ramos v. Countrywide Home Loans, Inc.*
21 (2000) 82 Cal.App.4th 615, 625-626; *Ketchum III v. Moses* (2000) 24 Cal.4th 1122,
22 1132-1136. In common fund cases, the court may use the percentage method. If
23 sufficient information is provided a cross-check against the lodestar may be conducted.
24 *Laffitte v. Robert Half International, Inc.* (2016) 1 Cal.5th 480, 503. Despite any
25 agreement by the parties to the contrary, “the court ha[s] an independent right and

1 responsibility to review the attorney fee provision of the settlement agreement and
2 award only so much as it determined reasonable.” *Garabedian v. Los Angeles Cellular*
3 *Telephone Company* (2004) 118 Cal.App.4th 123, 128.

4 The question of class counsel’s entitlement to **\$133,333.33** (33 1/3%) in attorney
5 fees will be addressed at the final fairness hearing when class counsel brings a noticed
6 motion for attorney fees. If a lodestar analysis is requested class counsel must provide
7 the court with current market tested hourly rate information and billing information so
8 that it can properly apply the lodestar method and must indicate what multiplier (if
9 applicable) is being sought.

10 Class counsel should also be prepared to justify the costs sought (capped at
11 **\$15,000**) by detailing how they were incurred.

12 13 **F. SERVICE AWARD**

14 The Settlement Agreement provides for a service award of up to **\$10,000** for the
15 class representative. Trial courts should not sanction enhancement awards of thousands
16 of dollars with “nothing more than *pro forma* claims as to ‘countless’ hours expended,
17 ‘potential stigma’ and ‘potential risk.’ Significantly more specificity, in the form of
18 quantification of time and effort expended on the litigation, and in the form of reasoned
19 explanation of financial or other risks incurred by the named plaintiffs, is required in
20 order for the trial court to conclude that an enhancement was ‘necessary to induce [the
21 named plaintiff] to participate in the suit’” *Clark v. American Residential Services*
22 *LLC* (2009) 175 Cal.App.4th 785, 806-807, italics and ellipsis in original.

23 The Court will decide the issue of the enhancement award at the time of final
24 approval.

1 **V. CONCLUSION AND ORDER**

2 Contingent upon Plaintiff's counsel providing a copy of this Order to the LWDA
3 on or before March 30, 2023 and filing proof of service at least 16 court days in
4 advance of the final approval hearing, the Court hereby:

5 (1) Grants preliminary approval of the settlement as fair, adequate, and
6 reasonable;

7 (2) Grants conditional class certification;

8 (3) Appoints Robert Esquer as Class Representative;

9 (4) Appoints LOYR, APC as Class Counsel;

10 (5) Appoints Simpluris, Inc. as Settlement Administrator;

11 (6) Approves the proposed notice plan; and

12 (7) Approves the proposed schedule of settlement proceedings as follows:

- 13 • Deadline for Defendant to provide class list to settlement administrator: April 7,
14 2023 (within 14 calendar days from preliminary approval)
- 15 • Deadline for settlement administrator to mail notices: April 21, 2023 (within 14
16 calendar days after receiving the Class Data)
- 17 • Deadline for class members to opt out: June 5, 2023 (45 calendar days from the
18 initial mailing of the Notice Packets)
- 19 • Deadline for class members to object: June 5, 2023 (45 calendar days from the
20 initial mailing of the Notice Packets)

21 //

22 //

23 //

24 //

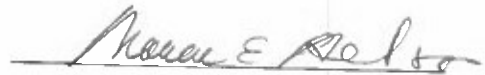
25 //

- Deadline for class counsel to file motion for final approval: August 18, 2023
2023 (16 court days prior to final fairness hearing)
- Final fairness hearing: September 12, 2023 at 9:00 a.m.

**Any failure to fully and timely comply with the contingency may result in the
revocation of this Order in its entirety.**

Dated:

3/23/23



MAREN E. NELSON

Judge of the Superior Court