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11 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **IN AND FOR THE COUNTY OF LOS ANGELES – SPRING STREET COURTHOUSE**
13

14 ANDRE BROWN individually, and on
behalf of all others similarly situated,

15 Plaintiff,

16 vs.

17 YOSHI, INC., and DOES 1 through 100,
inclusive,

18 Defendants.
19

22 MICHAEL ALLEN RIOS individually,
and on behalf of all others similarly
23 situated,

24 Plaintiff,

25 vs.

26 YOSHI, INC., and DOES 1 through 100,
inclusive,

27 Defendants.
28

**Case Nos. 21STCV19677 (*Brown*);
21STCV13691 (*Rios*)**

CLASS ACTION

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

**Date: February 16, 2023
Time: 9:00 a.m.
Dept.: 6**

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NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, NOTICE IS
HEREBY GIVEN that, at 9:00 a.m. on February 16, 2023, or as soon thereafter as the matter may be heard in Department 6 of the above-entitled Court, located at 312 North Spring Street, Los Angeles, California 90012, Representative Plaintiffs Andre Brown and Michael Allen Rios, on behalf of the themselves and the Plaintiff Class, will and hereby do apply to this Court for an order: (1) granting preliminary approval of the parties' class action settlement agreement, (2) granting conditional certification of the settlement class, (3) appointing class counsel, (4) appointing the class representative, (5) appointing a settlement claims administrator, (6) approving the class notice, and (7) setting a hearing date for final settlement approval.

This motion is based upon the accompanying memorandum of points and authorities, the declaration of Laura Van Note, Esq. and exhibits thereto, the Declaration of Justin F. Marquez, the Declaration of Plaintiff Andre Brown, the Declaration of Allen Rios, and such other oral argument and documentary evidence as may be presented to the Court at the hearing of this motion.

Dated: January 11, 2023

COLE & VAN NOTE

By:



Laura Van Note, Esq.

Attorneys for Representative Plaintiff Andre Brown

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This motion seeks preliminary court approval of a \$250,000.00 settlement fund obtained by Representative Plaintiff Andre Brown (“Plaintiff Brown” or “Brown”) and Representative Plaintiff Michael Allen Rios (“Plaintiff Rios” or “Rios”) against Defendant Yoshi, LLC (“Yoshi” or “Defendant”). Given that Defendant operates with a modest-sized workforce, the relatively low wage rate of putative class members, and challenges to class certification and liability, the settlement achieved here represents an impressive result which now merits preliminary court approval.¹

II. LITIGATION HISTORY

Yoshi operates a gas delivery and car maintenance business within California for which Representative Plaintiffs and Class Members worked as field technicians. Defendants had a consistent policy of (1) unlawfully denying Class Members statutorily-mandated meal and rest periods, (2) willfully failing to provide Class Members with accurate semimonthly itemized wage statements reflecting the total number of hours each worked, the applicable deductions, and the applicable hourly rates in effect during the pay period, and (3) willfully failing to pay compensation in a prompt and timely manner to those Class Members whose employment with Defendants has terminated.

On April 9, 2021, Plaintiff filed a putative wage and hour class action on behalf of himself and all hourly-paid, non-exempt employees in California against Defendant for: (1) failure to pay minimum and straight time wages; (2) failure to pay overtime wages; (3) failure to provide meal periods; (4) failure to authorize and permit rest periods; (5) failure to timely pay final wages at termination; (6) failure to provide accurate itemized wage statements; and (7) violation of California’s Unfair Competition Law, California Business and Professions Code §§17200, *et*

¹ A copy of the fully executed Settlement Agreement and Release of Claims (“Agreement”) is attached to the accompanying Declaration of Laura Van Note, Esq. (“Van Note Decl.”) as Exhibit “A.” Unless otherwise noted, all exhibits cited herein are attached to the Van Note Decl.

1 *seq.* On April 12, 2021, he also sent notice to Defendant and the California Labor & Workforce
2 Development Agency (“LWDA”) alleging similar wage and hour violations pursuant to the Private
3 Attorneys General Act (“PAGA”) (Cal. Lab. Code §§ 2699, *et seq.*). Plaintiff filed a First
4 Amended Class and Representative Action Complaint on September 28, 2021, which added a
5 claim for civil penalties pursuant to the PAGA.

6 On May 24, 2021, Plaintiff Andre Brown filed a Class Action Complaint alleging similar
7 claims on behalf of the class, all of Yoshi’s non-exempt employees in California. Both cases were
8 subsequently amended to add a cause of action under PAGA, and Brown and Rios separately filed
9 notices with the California Labor and Workforce Development Agency (“LWDA”) asserting an
10 intent to seek recovery of civil penalties on a representative basis against Defendant.

11 After filing their respective actions, the parties engaged in traditional and informal
12 discovery efforts, including the production of documents detailing Defendants’ business
13 operations, common policies and procedures, wage rates and payroll information for numerous
14 putative class members. Following mediation on April 4, 2022 before neutral Joel Grossman, the
15 parties resolved the case, culminating in the settlement agreement accompanying this motion.

16 Representative Plaintiffs Brown and Rios now move this Court for an Order granting
17 preliminary approval of this settlement which makes a large amount of money available for a group
18 of mostly low-wage workers. The Settlement was negotiated at arms-length between experienced
19 counsel and followed over one year of intense litigation. It merits approval. The Court should grant
20 the motion.

21 22 **III. THE SETTLEMENT**

23 **A. THE CLASS**

24 The proposed settlement encompasses a class defined as “all current and former non-
25 exempt employees who worked at any time for Defendant Yoshi, Inc. in California from April 9,
26 2017 through the date of preliminary approval, or July 1, 2022, whichever is earlier,” excluding
27 any such individuals who opt out of this Settlement.

B. SETTLEMENT TERMS

Under the proposed non-reversionary² settlement, the claims of all class members shall be settled for \$250,000.00, inclusive of all individual settlement awards to class members who do not timely opt out (“Settlement Class Members”), the class representative service award, the PAGA allocation, class counsel’s fees and costs, and reimbursement of the claims administrator costs. Agreement ¶¶ 10, 11, 29. The settlement amount shall be allocated as follows:

Individual Settlement Awards. The Net Settlement Fund shall be distributed in its entirety to Settlement Class Members. Each Settlement Class Member shall receive his/her respective share thereof, based on his/her number of compensable pay periods worked during the Settlement Period, divided by the total number of compensable pay periods worked by all Settlement Class Members during that period.³ Settlement checks will remain valid for 180 days after the date of issuance.⁴ If a Settlement Class Member does not cash his/her settlement check within 180 days, the uncashed funds shall be transmitted in accordance with CCP § 384(b) to Legal Aid at Work in San Francisco, CA.⁵

Class Representative’s Service Award. Subject to Court approval, Representative Plaintiff Brown shall be paid a service award not to exceed \$7,500, and Representative Plaintiff Rios shall be paid a service award not to exceed \$15,000, for their time, risk and effort in bringing their respective lawsuits, representing the class, and releasing their claims.⁶ These individuals initiated their respective actions and devoted considerable time thereto. This included frequent emails and telephone calls with counsel, production of documents and communications surrounding mediation and settlement. Moreover, these individuals risked retaliation (now and in the future) and disruption of their daily work life because they challenged the status quo of these alleged

² This amount is non-reversionary, such that no amount will revert back to the defendant, and the employer’s share of payroll taxes shall be funded independently by the company so it does not deplete the settlement proceeds.

³ Exhibit “A,” Agreement ¶ 35.

⁴ Exhibit “A,” Agreement ¶ 61.

⁵ Exhibit “A,” Agreement ¶ 61. Between the claims here and Legal Aid at Work there is a “driving nexus,” given that this organization represents “low-wage workers who are victims of wage violations.” *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012); <https://legalaidatwork.org/cy-pres/>.

⁶ “Exhibit A,” Agreement ¶ 29.

1 unlawful labor practices.⁷ Finally, the proposed service award is reasonable given the minimal
2 impact this amount will have on any Settlement Class Member's level of recovery.

3 Without Representative Plaintiffs' courage, the action would never have commenced
4 and/or resolved on such favorable terms. This initiative deserves to be rewarded. Finally, the
5 proposed service awards are fair to other Settlement Class Members because they will not
6 significantly reduce the settlement funds available to them.

7 Class Counsel's Fees. The settlement provides for an attorneys' fee award of 35% of the
8 settlement amount, a typical percentage in the resolution of common fund cases. Class counsel has
9 devoted numerous hours to and faced significant risk⁸ in the prosecution of this matter and, more
10 importantly, made an extraordinary fund available given the challenges faced here and the modest
11 claim values—to a large number of otherwise-underrepresented, low-paid workers.

12 The "common fund" method, or "percentage-of-the-benefit" analysis, calculates attorneys'
13 fees based on a percentage of the common benefit to the class. *In re Consumer Privacy Cases*, 175
14 Cal.App.4th 545 (2009); *Serrano v. Priest*, 20 Cal.3d 25 (1977). In cases where a common fund
15 has been created—i.e., where each class member will "receive a mathematically ascertainable
16 payment"—California state courts,⁹ the Ninth Circuit¹⁰ and the United States Supreme Court¹¹
17 agree that awarding attorneys' fees as a percentage of the common fund is the proper method.
18 A common fund doctrine award of fees for that work, risks assumed and results is, thus,
19 appropriate.

20 PAGA Allocation. The settlement also provides for a payment of \$5,000 for a release of
21 PAGA claims, 75% of which will be remitted to the LWDA and 25% of which will remain in the
22
23

24 ⁷ A declaration illustrating Representative Plaintiffs' entitlement to a service award will be submitted at the time
of final approval.

25 ⁸ Class counsel undertook this matter solely on a contingent basis, with no guarantee regarding the potential
duration of the litigation or even the ultimate reimbursement of fees or costs.

26 ⁹ See, fn. 10; *Lealao v. Beneficial California*, 82 Cal.App.4th 19 (2000); *Serrano v. Priest*, 20 Cal.3d 25 (1977).

27 ¹⁰ *Staten v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003); *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000).

28 ¹¹ The United States Supreme Court has always computed common fund fee awards on a percentage of the fund
basis. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 100 S.Ct. 745 (1980); *Central Railroad & Banking Co. of Georgia v.*
Pettus, 113 U.S. 116, 5 S.Ct. 387 (1885); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 59 S.Ct. 777 (1939).

1 Net Settlement Fund.¹² The \$5,000 allocation for PAGA penalties is reasonable under the
2 circumstances and consistent with PAGA allocations in similar actions.

3 Litigation Expenses. Over the course of this litigation, class counsel incurred ordinary
4 litigation costs and (just as with regard to the post-settlement efforts ordinarily attendant to class
5 action work), class counsel anticipates incurring additional expenses in overseeing the settlement
6 process, making future appearances, ensuring claims administration compliance with this Court's
7 orders, responding to Settlement Class Members, CPAs, etc. class counsel will submit a detailed
8 cost report with its motion for final approval of the settlement. While not finalized, class counsel's
9 costs are reasonable and went to benefit the Class Members.

10 Settlement Administration Costs. The settlement administrator, Simpluris, is an established
11 and respected firm that regularly provides competitive bids in similar cases. The settlement
12 administration costs shall be paid from the Gross Settlement Fund. Agreement ¶¶ 10, 15, 34.

13 Tax Treatment of Individual Settlement Shares. Settlement Class Members' settlement
14 shares will be allocated as 15% wages and 85% interest and statutory penalties for tax purposes.¹³
15 This allocation is reasonable given that the majority of the class claims are, arguably, for penalties
16 (See, e.g., Labor Code §§ 203 and 226), not underlying wages. Obviously, this particular tax
17 treatment provides additional monies to these already low-paid workers.

18 Employer's Share of Payroll Taxes. Defendant's share of payroll taxes, including, but not
19 limited to FICA and FUTA, will be included within the Gross Settlement Fund. Agreement ¶ 40.
20 However, based on the percentage of the settlement share allocated to wages (i.e., 15%), Plaintiff
21 estimates the total amount allocated to payroll taxes to be less than \$3,000 (i.e., \$250,000 x 15%
22 x 6.2% maximum for employer-side payroll taxes per employee).

23 24 **C. THE RELEASE**

25 Upon the Effective Date, Settlement Class Members who do not timely request exclusion
26 shall release and discharge Defendant Yoshi from "any and all debts, liabilities, costs, demands,
27

28 ¹² Cal. Labor Code § 2699(i); "Exhibit A," Agreement ¶ 31.

¹³ Exhibit "A," Agreement ¶ 36.

obligations, claims, causes of action, or complaints arising during the Settlement Period that were pled, or which could have been pled based on the same facts as pled in Representative Plaintiff's operative Complaint, all preceding Complaints, and the LWDA letter."¹⁴ For unnamed class members,¹⁵ a Civil Code § 1542 release applies, but only to those claims.¹⁶

D. CLASS NOTICE

Notice is necessary in order to inform class members of the settlement and their options with regard thereto. Within five calendar days of the granting of preliminary approval, Defendant will provide the claims administrator with class members' names, social security numbers, dates of employment, and last known addresses, which the claims administrator will verify and update using the National Change of Address ("NCOA") Database.¹⁷ Subject to Court approval, the Class Notice shall be sent to the Plaintiff Class by first class mail within 5 business days of the entry of an Order for preliminary approval.¹⁸ To avoid unnecessary confusion, maximize their recoveries, and reduce administrative costs, Settlement Class Members will not be required to file a claim form to receive their portion of the settlement.

1. Notice to Class Members

The proposed Notice meets the requirements of CRC Rule 3.766(b).¹⁹ The Notice costs will be included in the settlement administration expenses to be paid from the Gross Settlement Fund.²⁰ The contents of the Notice comply with CRC Rule 3.766(d) insofar as it provides information on the meaning and nature of the settlement, its key provisions, how payments will be calculated, the amounts of class counsel's attorneys' fees and costs, the service award, the date,

¹⁴ Exhibit "A," Agreement ¶ 62.

¹⁵ In exchange for her option of receiving a service award, the Representative Plaintiff agreed to a § 1542 release of all potential claims (whether pled or not). Exhibit "A," Agreement ¶ 63.

¹⁶ Exhibit "A," Agreement ¶ 62.

¹⁷ Exhibit "A," Agreement ¶¶ 47-48.

¹⁸ Exhibit "A," ¶ 46.

¹⁹ Exhibit "B," Notice of Settlement of Class Action Lawsuit.

²⁰ Exhibit "A," Agreement ¶¶ 10, 34.

1 time, and place of the final fairness hearing, and the procedures and deadlines for requesting
2 exclusion from and/or objecting to the settlement.

3 4 **2. Exclusions and Objections**

5 Class members will have 30 calendar days (or 10 calendar days after the date the Notices
6 are re-mailed after having been returned as undeliverable) to opt out or object.²¹ Class members
7 who wish to exclude themselves or “*opt out*” of the settlement must submit a signed, written
8 request therefor to the claims administrator by the response deadline.²² A class member wishing
9 to *object* must submit a written objection thereto describing why the objector believes the
10 settlement is unfair and whether the objector intends to appear at the final approval hearing.²³
11

12 **IV. JUDICIAL APPROVAL OF CLASS ACTION SETTLEMENTS**

13 The commonly accepted approval procedure calls for: (1) preliminary approval of the
14 proposed settlement at an informal hearing, (2) notice to class members of the proposed settlement
15 and of their rights with respect thereto, and (3) a formal hearing on the fairness of the proposed
16 settlement, at which members of the class may be heard concerning their support for or objection
17 to the settlement, also known as a final approval hearing or “final fairness” hearing. *Manual for*
18 *Complex Litigation* § 21.63 at 447-50 (4th ed. 2004).

19 The policy under California law, favors and encourages settlement of class actions.
20 *Ferguson v. Lieff, Cabraser, Heimann & Bernstein*, 30 Cal.4th 1037, 1054 (2003) (acknowledging
21 the “overriding public policy favoring settlement of class actions”). The purpose of the Court’s
22 preliminary evaluation of the proposed settlement is to (1) determine whether it is within the “range
23 of possible approval” (4 *Newberg* § 13.13 at 311) and to (2) provisionally certify the proposed
24 settlement class (4 *Newberg* § 13:12 at 305) in order to facilitate dissemination of the Notice—
25 which outlines the key settlement terms—to the class members and apprises them of the date and
26

27 ²¹ Exhibit “A,” Agreement ¶ 53.

28 ²² Exhibit “A,” Agreement ¶ 51.

²³ Exhibit “A,” Agreement ¶ 54.

1 time of the final approval hearing. *Manual for Complex Litigation* (4th ed. 2004) (“MCL”) § 21.63;
2 CRC Rule 3.769(e).

3
4 **A. THE SETTLEMENT FALLS WITHIN THE RANGE OF**
5 **REASONABLENESS**

6 At the preliminary approval stage, a proposed settlement is *presumed* to be fair when (1) it
7 is reached through arm’s-length negotiations, (2) the putative class is represented by experienced
8 counsel, and (3) the parties have conducted sufficient investigation or discovery. *Wal-Mart Stores,*
9 *Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005).²⁴ As previously discussed, this settlement
10 is the result of an arm’s-length transaction, reached through mediation before an experienced
11 neutral. Moreover, CVN has vast experience in similar litigation—having litigated hundreds of
12 wage and hour class actions.²⁵ Finally, as detailed above, the presence of significant formal and
13 informal discovery produced by Defendant is more than “sufficient investigation” to warrant
14 preliminary approval of this settlement.

15 Second, in determining whether the settlement is *actually* within the range of fairness,
16 courts consider additional factors such as the strength of the plaintiff’s case, the risk, expense,
17 complexity and likely duration of further litigation, the risk of maintaining class action status
18 throughout trial, the amount offered in settlement, and the experience and views of counsel.
19 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (1998); *Kullar v. Foot Locker Retail, Inc.*, 168
20 Cal.App.4th 116 (2008). Each of these factors illustrates the reasonableness of the settlement here.
21 CVN calculated Defendant’s potential exposure if all of the class claims were proven at trial but
22 discounted the theoretical maximum recovery to account for inherent risks such as the denial of
23 class certification and the possible success of Defendant’s defenses at the liability phase.

24
25
26 ²⁴ This Motion occasionally cites federal case law and commentaries thereon which construe authority for
27 conditional class certification and settlement approval in California courts. The California Supreme Court has
28 authorized and urged California’s trial courts to use federal resources for guidance in considering class issues. *Vasquez*
v. Superior Court, 4 Cal.3d 800, 821 (1971); *Green v. Obledo*, 29 Cal.3d 126, 145-46 (1981).

²⁵ Van Note Decl. ¶ 19-23; Exhibit “C,” CVN’s Professional Resume.

B. VALUATION OF PRIMARY CLAIMS ALLEGED

1. Missed Meal and Rest Breaks

The allegation that Defendant deprived class members of meal and rest periods was the driving force of this litigation. However, as the company's policies exhibited, Defendant Yoshi had taken a variety of steps to adopt and enforce compliant meal and rest break policies by the time this case was filed. Indeed, class counsel all but conceded this fact, and yet, maintained that the violations stemmed more from scheduling practices (versus a *per se* noncompliant policy) whereby many workers were required to remain "on-duty" during their breaks, an inadequate labor budget to consistently permit employee coverage during breaks, and/or that workers were uninformed as to what constituted a valid break to begin with.

Nevertheless, based on class counsel's analysis of the available payroll records, it was determined that the number of pay periods in which meal periods could be missed was as high as 1,820. Using this information and data provided by Defendant, an average hourly wage of \$22.00, and assuming a violation every worker worked a full time shift five days per week, every week, the potential exposure for this claim could exceed \$407,680 over the period since April 2017. This recovery number is, of course, based on a variety of assumptions, none of which Defendant has agreed to, on schedules for this largely part time workforce that would be unrealistic and on the assumption that all elements of this claim could be proven (as well as its frequency) at trial.

Indeed, perhaps the most questionable assumption is that roughly 10-11 potential meal periods per pay cycle (i.e., a violation every single working day) were actually "missed," not to mention represent a "violation" of Labor Code §512. Given that class members would rarely have made or kept independent records of whether they took compliant breaks, it is likely that many, if not the vast majority, of any breaks missed would be, in fact, punch-in/punch-out errors or class member neglect in punching in/out at all. That, and given the generally unsophisticated approach by entry-level workers to diligent timekeeping, it is very likely that many workers simply took their breaks without punching out properly or notifying management when they left for a break. These challenges—and the paucity of records to demonstrate the violations—reveals that a substantial discount off class counsel's original damages estimate was appropriate.

2. Unreimbursed Business Expenses

Plaintiffs also allege Defendant failed to properly reimburse Class Members for business expenses in violation of California Labor Code § 2802. The value of those claims, based on 1,820 workweeks assuming \$5.00 in unreimbursed expenses per week is \$9,100. In addition, Plaintiffs calculated interest at 7%, which makes the total potential damages \$9,737.00. However, many employees may not have had any unreimbursed expenses, and thus the value of this claim was minimal for settlement purposes.

3. Waiting Time Penalties

The strongest claims in this case were the meal and rest break claims, neither of which *conclusively* generate a “wage” to which a Labor Code § 203 claim could be tethered. The California Court of Appeal stated, *arguably in dicta*, that a meal break violation under Labor Code § 226.7 cannot support a “waiting time penalty” under Labor Code § 203. *Ling v. P.F. Chang’s China Bistro, Inc.*, 245 Cal.App.4th 1242, 1261 (2016).

Based on a typical eight-hour workday, on records showing that 30 class members were “severed” employees, and that their average hourly wage was \$22.00 Defendant’s liability could reach as high as \$158,400 for waiting time penalties. But, given the state of the law, and that an unrealistic full eight-hour workday was used to calculate this penalty for all severed workers, the value of this claim was discounted *significantly*.

4. Wage Statement Violations

Although some federal court decisions have held break premiums under Labor Code § 226.7 can support a wage statement penalty under Labor Code § 226(e), there are no published California state court decisions issuing a similar holding. *Maldonado v. Epsiolon Plastics, Inc.*, 22 Cal.App.5th 1308, 1337 (2018) (meal and rest claims cannot support a class-wide claim for inaccurate wage statements). In light of the California authority explaining that a violation of Labor Code § 226.7 cannot support a § 203 waiting time penalty, the same logic may apply to § 226 wage statement penalties, making those entirely unrecoverable in this litigation.

Under § 226, class members may recover \$50.00 for the initial violation and \$100.00 for each subsequent violation. Based on data provided by Defendant and subsequent analysis thereof

1 by class counsel, class members stood to potentially recover \$55,350 if they fully prevailed on
2 these claims at trial. Given the numerous elements Representative Plaintiffs would be required to
3 demonstrate, and anticipating Yoshi's "penalties on penalties" argument, class counsel's "reality
4 check" and, thus, significant discount to the potential value of this claim, was appropriate. What's
5 more, this analysis assumes the penalties for all class members would never have reached the §
6 226 cap of \$4,000—although numerous workers stayed with the company beyond the tipping point
7 where their aggregated per-pay-period penalties would have reached that cap.

8 **5. PAGA Penalties**

9 Representative Plaintiffs also alleged that Defendant's conduct created liability under the
10 Labor Code Private Attorney General Act ("PAGA"). PAGA claims are extraordinarily difficult
11 to evaluate because there are several obstacles to the actual award of the civil penalty. First, it is
12 arguably unclear whether penalties continue to accrue until the court finds a violation to exist.
13 Second, Labor Code § 2699(e)(1) and (2) give trial courts immense discretion to access or lower
14 the penalty amount.²⁶ Third, defendants routinely argue that, when other statutory penalties have
15 been imposed, additional penalties under PAGA are unjust (e.g., in cases where damages are
16 already "in play" based on underlying wage violation claims, as we have here).

17 Thus, while the PAGA calculation herein for approximately 578 pay periods could reach
18 \$224,200, the likelihood of that sum ever being awarded, or anything even close to it, is extremely
19 slim. Despite this potential recovery, given that PAGA penalties would likely be deemed
20 duplicative of other penalties awardable here, the extreme "haircuts" many courts are giving to
21 PAGA penalties, and the presence here of class action allegations (the absence of which often
22 being the reason so-called "Plan B" PAGA penalties are sought to begin with), PAGA penalties
23 were significantly discounted.

24 **6. Summary**

25 Once looking more realistically at potential recovery, *before even considering the*
26 *likelihood of recovering these damages/penalties*, the analysis would look more like this:

27
28 ²⁶ Cal. Labor Code § 2699(e)(2) (courts have discretion to deny or significantly reduce PAGA penalties, particularly when the prescribed award would be "unjust, arbitrary and oppressive, or confiscatory.")

REALISTIC “STARTING PLACE” VALUATIONS				
Meal and Rest Breaks	Waiting Time	Wage Statements	PAGA	TOTAL
200k	75k	50k	75k	400k

Indeed, while, on its face, the total damages and penalties available to class members under either scenario are certainly higher than the settlement amount, so were the risks and delays inherent in protracted litigation. As a result, the extraordinary result of a *non-reversionary* \$250,000.00 fund is more than reasonable when balanced against the risks of continued litigation.

C. THE RISK, EXPENSE, AND LIKELY DURATION OF FURTHER LITIGATION SUPPORTS SETTLEMENT

In evaluating for fairness, the Court should weigh the benefits of settlement against the expense and delay involved in achieving an equivalent or even more favorable result at trial. *Young v. Katz*, 447 F.2d 431, 433 (5th Cir. 1971); *Kullar*, 168 Cal.App.4th 116 (2008). As California jurists have recognized, there exists “an overriding public policy favoring settlement of class actions.” *Ferguson v. Lieff, Cabraser, Heimann & Bernstein*, 30 Cal.4th 1037, 1054 (2003) (citing *Franklin v. Kayrpo Corp.*, 884 F.2d 1222, 1229 (9th Cir. 1989) (“public policy favor[s] the compromise and settlement of disputes”)). Here, the settlement provides *all* Settlement Class Members, regardless of their means, the opportunity of monetary recovery in a prompt and efficient manner, without the risk of the Court denying class certification and these workers potentially recovering nothing at all.

V. THE SETTLEMENT MEETS THE STANDARD FOR PROVISIONAL CLASS CERTIFICATION

When the class has not been certified prior to settlement—as here—the parties may stipulate that a defined class be conditionally certified for settlement purposes only. *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1422, 1425 (E.D.N.Y. 1989). The traditional prerequisites for certification are used to determine whether conditional certification of the proposed class should be granted. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

1 **A. THE CLASS IS SUFFICIENTLY NUMEROUS**

2 Here, the class consists of approximately 49 employees, which is sufficiently numerous.
3 With this workforce size, joinder of all class members would be impracticable and the relatively
4 small value of each individual claim makes it unlikely individual workers would pursue relief
5 absent class certification, diminishing the prospect that joinder is a feasible alternative.
6 Class members can easily be identified through Defendant's records.

7 **B. THE CLASS HAS A WELL-DEFINED COMMUNITY OF INTEREST IN**
8 **QUESTIONS OF LAW AND FACT**

9 The "community of interest" requirement requires: (1) predominant common questions of
10 law or fact, (2) class representatives whose claims or defenses are typical of the class, and (3) class
11 representatives who adequately represent the class. *Brinker*, 53 Cal.4th at 1021.

12 **1. The Class Satisfies the Commonality Element**

13 The first prong of the test (i.e., predominant common questions of law or fact) is met so
14 long as common questions are likely to arise in the action and the theory of recovery is "amenable
15 to class treatment." *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319, 327 (2004).²⁷ The
16 class members' claims in this action stem from Defendant's alleged uniform practice of short-
17 staffing, failing to provide "rovers" to cover for class members during their meal and rest periods,
18 and Defendant's general failure to implement any kind of system to ensure it was following the
19 law. Representative Plaintiffs contended these alleged practices undermined Defendant's
20 otherwise compliant break policies.

21 Indeed, the following common questions of law and fact, among others, flow logically from
22 the practices detailed above:

- 23 • Whether Defendant violated each of the elements of Labor Code §§ 203, 226, 226.7
24 and 512 (the primary claims);
25

26

27 ²⁷ Borrowing from federal authority, FRCP Rule 23 applies a permissive standard to demonstrate common questions
28 of law or fact. *Hanlon*, 150 F.3d at 1011 (9th Cir. 1998) (emphasizing the "minimal" requirements and "permissive"
 interpretation of Rule 23(a)(2)). The presence of merely one common issue of law or fact is sufficient. *Haley v.*
 Medtronic, Inc., 169 F.R.D. 643, 648 (C.D. Cal. 1996); *Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 655 (C.D. Cal. 2000).

- Whether failing to pay and record meal and rest period premiums on employees' pay stubs was a violation of Labor Code § 226;
- Whether a violation of §§ 226.7 and/or 512 supports penalties under §§ 203 and/or 226;
- To what degree class members' job duties were common;

Following the California Supreme Court's seminal decision in *Brinker*, courts are routinely certifying these types of claims.²⁸ Starting with *Brinker*, California courts have repeatedly affirmed that "a uniform policy, and that policy, measured against wage order requirements, allegedly violated the law—*is by its nature* a common question eminently suited for class treatment." *Brinker*, 53 Cal.4th at 1033 (emphasis added). And, post-*Brinker*, courts are routinely reversing denials of certification when a common policy is the central issue. *Bradley v. Networkers International, LLC*, 211 Cal.App.4th 1129 (2012).

2. Plaintiffs Satisfy the Typicality Element

The second prong (i.e., typicality) is met when the class representative has claims or defenses typical of the class. *Sav-On*, 34 Cal.4th at 326. Here, typicality is met because the Representative Plaintiffs' claims arise from the same facts and are based on the same legal theories as those applicable to the class as a whole, yet those claims "need not be substantially identical." *Sav-On*, 34 Cal.4th at 326; *Hanlon*, 150 F.3d at 1020. Representative Plaintiffs allege the denial of meal and rest periods, seeks to champion precisely those claims for the remaining class members, and worked in the same or similar positions, under the same policies and procedures.

3. Plaintiffs and Their Counsel Satisfy the Adequacy Requirement

Under the third prong, class members are adequately represented if the named plaintiff and their counsel (1) do not have conflicts of interest with class members and (2) will prosecute the case vigorously for the class. *Hanlon*, 150 F.3d at 1020.²⁹ Here, there is no conflict of interest between Representative Plaintiffs (or their attorneys) and the remaining class members. Even if there were such a conflict in a certain instance, any class member may "opt-out" of the class.

²⁸ *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal.App.4th 1524, 1538 (2008) (wage and hour claims "routinely proceed as class actions").

²⁹ Notably, mere divergence of opinion between the class and its representatives is not sufficient to constitute a conflict. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000).

1 Finally, class counsel has significant experience in wage and hour class action litigation and is
2 routinely appointed class counsel in cases alleging precisely these issues.³⁰

3
4 **VI. THE COURT SHOULD APPROVE THE PROPOSED CLASS NOTICE**

5 As detailed above the Notice is written in simple, straightforward language that provides
6 all the information necessary for Class Members to make an informed and intelligent decision
7 about the settlement. Ex. B. Accordingly, it satisfies all due process requirements. *Rodriguez v.*
8 *West Publ'g Corp.*, 563 F.3d 948, 963 (9th Cir. 2009) (where class notice communicated the
9 essentials of the proposed settlement in a sufficiently balanced, accurate, and informative way, it
10 satisfied due process concerns).

11
12 **VII. A FINAL APPROVAL HEARING SHOULD BE SET**

13 Representative Plaintiffs request the Court set a final approval hearing at a time convenient
14 for the Court, roughly 85 calendar days after preliminary approval.

15
16 **VIII. CONCLUSION**

17 For the reasons set forth above, Representative Plaintiffs Brown and Rios respectfully
18 request that the Court (1) grant preliminary settlement approval, (2) approve the content and plan
19 for distribution of the Notice, (3) appoint class counsel, representative plaintiff and a claims
20 administrator, (4) conditionally certifying the class, and (5) schedule a Final Approval Hearing.

21
22 Dated: January 11, 2023

COLE & VAN NOTE

23
24 By:



Laura Van Note, Esq.

Attorneys for Representative Plaintiff Andre Brown

25
26
27
28 ³⁰ Van Note Decl. ¶¶ 19-23; Exhibit "C," CVN's Professional Resume; *see also, generally*, Declaration of Justin F. Marquez.