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

MARCOS TAFOLLA, an individual, on
behalf of himself and others similarly
situated,

PLAINTIFF,

v.

DAYLIGHT TRANSPORT, LLC; and DOES
1 thru 50, inclusive,

DEFENDANTS.

CASE NO. 21STCV16822

[Case Assigned for All Purposes to Hon. Elihu
M. Berle in Dept. 6]

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

*[Filed concurrently with Declaration of Kelsey
M. Szamet in Support of Plaintiff's Motion for
Preliminary Approval of the Class Action
Settlement; Declaration of Marcos Tafolla;
and [Proposed] Order]*

Date: February 28, 2024
Time: 11:00 AM
Dept.: 6

Complaint Filed: May 3, 2021
Trial Date: None Set

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

2 **PLEASE TAKE NOTICE** that on February 28, 2024 at 11:00 AM in Department 6 of the
3 above-entitled court, Plaintiff MARCOS TAFOLLA will move the Court for an Order of
4 Preliminary Approval of the Class Action and PAGA Settlement Agreement (“Agreement”), a
5 copy of which is filed concurrently herewith.

6 By this Motion, Plaintiff requests that the Court:

7 (1) Grant preliminary approval of the fully-executed Class Action and PAGA
8 Settlement Agreement (“Settlement” or “Agreement”). A true and correct copy of the Agreement
9 is attached hereto as Exhibit “1”;

10 (2) Approve the proposed Notice to Class Members, a copy of which is attached to the
11 Agreement as Exhibit “A,” and direct that the Notice be sent to Class Members in the manner set
12 forth in the Agreement;

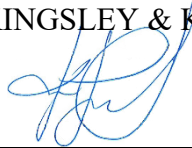
13 (3) Schedule a hearing on final approval of the proposed Settlement and Plaintiff’s
14 counsel’s application for an award of attorney’s fees and litigation costs at which Class Members
15 may be heard (“Final Approval Hearing”).

16 The Motion will be made on the grounds that the proposed Agreement is fair, adequate,
17 reasonable, and in the best interest of the Class and the Parties.

18 The Motion will be based on this Notice of Motion, the attached Memorandum of Points
19 and Authorities, the Declarations of Kelsey M. Szamet, Marcos Tafolla, the Agreement and
20 Release, all other papers and records on file in this action, and on such oral and documentary
21 evidence as may be presented at the hearing on this Motion.

22
23 DATED: January 29, 2024

KINGSLEY & KINGSLEY, APC

24
25 By: 

26 Kelsey M. Szamet
27 Attorneys for Plaintiff MARCOS TAFOLLA and
28 the proposed class

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff MARCOS TAFOLLA (“Plaintiff”) submits this Memorandum of Points and
4 Authorities in support of Plaintiff’s Motion for Preliminary Approval of the Class Action and
5 PAGA Settlement Agreement reached between Plaintiff and Defendant Daylight Transport, LLC
6 (“Defendant”) (Plaintiff and Defendant together, the “Parties”).

7 By this Motion, Plaintiff requests that the Court:

8 (1) Grant preliminary approval of the fully-executed Class Action and PAGA
9 Settlement Agreement (“Settlement” or “Agreement”). A true and correct copy of the Agreement
10 is attached hereto as Exhibit “1”;¹

11 (2) Approve the proposed Notice to Class Members, a copy of which is attached to the
12 Agreement as Exhibit “A,” and direct that the Notice be sent to Class Members in the manner set
13 forth in the Agreement;

14 (3) Schedule a hearing on final approval of the proposed Settlement and Plaintiff’s
15 counsel’s application for an award of attorney’s fees and litigation costs at which Class Members
16 may be heard (“Final Approval Hearing”).

17 **II. FACTUAL BACKGROUND**

18 A. Litigation Overview and Procedural History

19 Daylight Transport, LLC (“Defendant”) operates throughout California, specializing in
20 providing transportation and logistics services. (Declaration of Kelsey M. Szamet (“Szamet Decl.”)
21 ¶4.) Plaintiff worked as a warehouse worker for Defendant from approximately January 2020 to
22 February 2021. (Szamet Decl. ¶5.) Plaintiff and the Proposed Class worked as non-exempt
23 employees who earned hourly wages. (Szamet Decl. ¶6.)

24 On May 3, 2021, Plaintiff MARCOS TAFOLLA filed a Class Action Complaint entitled
25 *MARCOS TAFOLLA, on behalf of himself and others similarly situated, PLAINTIFF v.*
26 *DAYLIGHT TRANSPORT, LLC; and DOES 1 thru 50; DEFENDANTS*, in the Los Angeles County
27 Superior Court, case number 21STCV16822. (Szamet Decl. ¶7.) In the Complaint, Plaintiff alleged

28 ¹ The Parties used the LASC Model Class Action Settlement Agreement.

five causes of action for: (1) Failure to Pay Wages and/or Overtime under Labor Code §§ 510, 1194, 1194.2, and 1199; (2) Failure to Provide Meal Breaks Pursuant to Labor Code §§ 226.7 and 512; (3) Failure to Provide Accurate Itemized Wage Statements Pursuant to Labor Code §§ 226(a); (4) Penalties Pursuant to Labor Code § 203; and (5) Violation of Business & Professions Code § 17200, *et seq.* (Szamet Decl. ¶8.) (Agreement, Ex. 1 at (“Ex. 1”) § 2 ¶2.1.).

Also on May 3, 2021, per Labor Code § 2699, *et seq.*, the Private Attorneys General Act (“PAGA”), Plaintiff sent a letter to the Labor Workforce Development Agency (“LWDA”) regarding his intent to seek civil penalties for the Labor Code violations above. (Szamet Decl. ¶ 9; Exhibit “2”.) A true and correct copy of the initial PAGA letter is attached hereto as Exhibit “2”.

On July 7, 2021, Plaintiff filed a First Amended Class and Representative Action Complaint adding an additional cause of action for penalties pursuant to Labor Code section 2699, *et seq.* (Szamet Decl. ¶10.) (hereafter the “Lawsuit” or “Operative Action”)

B. Mediation

Through this formal discovery, Plaintiff obtained employment records, paystubs, time records, employment handbooks, and arbitration agreements. (Szamet Decl. ¶11.) As such, the Parties engaged in extensive formal and informal discovery that allowed the Parties to fully investigate the claims at issue and understand their strengths and weakness. (Szamet Decl. ¶12.) Plaintiff’s investigation was sufficient to satisfy the criteria for court approval set forth in *Dunk v. Foot Locker Retail, Inc.* (1996) 48 Cal.App.4th 1794, 1801 and *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129-130 (“*Dunk/Kullar*”).

After the meaningful exchange of information, the Parties agreed to attend private mediation with experienced wage and hour class action mediator Jeffrey Krivis, Esq. on April 5, 2022. (Szamet Decl. ¶13.) To effectuate the mediation, Defendant produced a data sample including a 77 person sample of time and pay records out of class of 654 (at the time of mediation). (Szamet Decl. ¶ 14.) There were 29,685 shifts in the data analyzed. (Szamet Decl. ¶ 15.) Plaintiff worked with an expert to review and analyze these records. (*Id.*) Though the matter did not settle that day, the mediator worked with the Parties in follow up and made a mediator’s proposal. (Szamet Decl. ¶16.) It was not accepted and the Parties moved forward with litigation and formal discovery. (Szamet Decl. ¶17.)

1 C. The Discovery Process

2 On May 12, 2022, Plaintiff served his First Set of Specially Prepared Interrogatories and his
3 First Set of Requests for Production to Defendant. (Szamet Decl. ¶ 18.) The discovery sought the
4 identities of all putative class members, time and pay records for all class members, applicable wage
5 and hour policies, among other things. (*Id.*) Defendant served its responses to Plaintiff's First Set of
6 Specially Prepared Interrogatories and Plaintiff's First Set of Requests for Production of Documents
7 on August 12, 2022. (Szamet Decl. ¶19.) Defendant's Supplemental Responses to Plaintiff's First Set
8 of Specially Prepared Interrogatories and First Set of Requests for Production of Documents was
9 served on January 8, 2023. (*Id.*)

10 On December 13, 2022, Plaintiff served his Second Set of Specially Prepared Interrogatories
11 and Requests for Production to Defendant. (Szamet Decl. ¶20.) Defendant served responses to
12 Plaintiff's Second Set of discovery on January 17, 2023, and provided supplemental responses on
13 January 26, 2023. (Szamet Decl. ¶21.)

14 On June 22, 2023, the Parties agreed upon the form of a notice pursuant to *Belaire-West*
15 *Landscape, Inc. v. Superior Court* (2007) 149 Cal.App.4th 554 (the "*Belaire Notice*") giving putative
16 class members in the above-entitled action notice and the opportunity to opt out of having their
17 names, addresses, email and telephone information ("contact information") disclosed to Plaintiff's
18 counsel. (Szamet Decl. ¶22.) The Parties requested approval of the *Belaire-West* notice, and the
19 Court approved the *Belaire* notice on June 23, 2023. (Szamet Decl. ¶23.) The *Belaire* notice was
20 disseminated on July 31, 2023. (Szamet Decl. ¶24.)

21 D. Motion for Decertification

22 On December 9, 2022, Defendant filed a motion to deny class certification, arguing that
23 Plaintiff's wage claims on behalf of Defendant's California employees are defective as a matter
24 of law because most of the putative class members are subject to binding arbitration agreements.
25 (Szamet Decl. ¶25.) Because Plaintiff is not, Defendant maintained that Plaintiff is neither a
26 typical nor adequate class representative for those who signed the agreement. (Szamet Decl.
27 ¶26.) On March 13, 2023, the Court issued a Minute Order denying Defendant's Motion.
28 (Szamet Decl. ¶27.) Ultimately, the Court found that the issue is not ripe yet, but indicated that

1 Defendant's arguments could be raised in opposition to Plaintiff's certification motion. (Szamet
2 Decl. ¶28.)

3 E. Resolution

4 After the completion of additional formal discovery and the filing of Defendant's Motion for
5 Decertification, the Parties decided to refocus their efforts on resolution. (Szamet Decl. ¶29.)

6 Through extensive and meaningful direct negotiations, the Parties were able to reach the proposed
7 Settlement now present to the Court for preliminary approval. (Szamet Decl. ¶30.)

8 Defendant denies any liability or wrongdoing of any kind associated with the claims
9 alleged in the Action, disputes the damages and penalties claimed by Plaintiff, and further contends
10 that, for any purpose other than settlement, Plaintiff's claims are not appropriate for class or
11 representative action treatment. (Szamet Decl. ¶ 31.) Defendant contends, among other things,
12 that, at all times, it has complied with the California Labor Code, and the Industrial Wage
13 Commission Orders. (*Id.*)

14 Based on their own independent investigation and evaluation, Class Counsel is of the
15 opinion that the Agreement with Defendant is fair, reasonable and adequate, and in the best interest
16 of the settlement classes in light of all known facts and circumstances, including the risk of
17 significant delay, defenses asserted by Defendant, uncertainties regarding a class and
18 representative action trial on the merits, and numerous potential appellate issues. (Szamet Decl. ¶
19 32.) Although Defendant denies any liability, Defendant is agreeing to this Agreement solely to
20 avoid the cost of litigation. (*Id.*) Accordingly, the Parties and their counsel desire to fully, finally,
21 and forever settle, compromise and discharge all disputes and claims arising from or relating to
22 the Action on the terms set forth here. (*Id.*)

23 **III. THE PROPOSED SETTLEMENT**

24 A. The Settlement Class

25 For purposes of Agreement, the settlement class is defined as: "all persons who are
26 employed or have been employed as an hourly employee by DAYLIGHT TRANSPORT, LLC, in
27 the State of California since four (4) years prior to the filing of this action to the present." ("Class"
28 or "Class Members" or "Settlement Class Members") (Szamet Decl. ¶ 33; Agreement, Ex. 1 at §

1 1, ¶1.5.) The Class Period is from May 3, 2017, through December 31, 2023. (Szamet Decl. ¶ 34;
2 Ex. 1 at § 1, ¶1.12.) Based on documents and other information produced by Defendant, there are
3 approximately 760 Settlement Class Members. (Szamet Decl. ¶35; Ex. 1 at § 4, ¶4.1.)

4 B. The Aggrieved Employees

5 For purposes of the Agreement, the Aggrieved Employees are defined as: “all persons
6 who are employed or have been employed as an hourly employee by DAYLIGHT
7 TRANSPORT, LLC, in the State of California who worked one or more pay periods during the
8 PAGA Period.” (“Aggrieved Employees”) (Szamet Decl. ¶36; Settlement, Ex. 1 at § 1, ¶1.4.)
9 The PAGA Period is May 3, 2020, through December 31, 2023. (Szamet Decl. ¶37; Ex. 1 at § 1,
10 ¶1.33.) Based on documents and other information produced by Defendant, there are
11 approximately 486 Aggrieved Employees. (Szamet Decl. ¶38; Ex. 1 at § 4, ¶4.1.)

12 C. Gross Settlement Amount

13 As detailed fully in the Agreement, the Settlement provides for Defendant to pay a Gross
14 Settlement Amount of \$425,000.00, which includes the sum of the Individual Class Payments,
15 Individual PAGA Payments, the Class Representative Service Payment, the Class Counsel Fees
16 and Class Counsel Expenses, LWDA PAGA Payment, and the Administrator’s Expenses. (Szamet
17 Decl. ¶39; Ex. 1 at § 1, ¶1.22.)

18 The Net Settlement Amount is the Gross Settlement Amount, less Individual PAGA
19 Payments, the LWDA PAGA Payment, Class Representative Service Payment, Class Counsel
20 Fees Payment, Class Counsel Litigation Expenses Payment, and the Administration Expenses
21 Payment. (Szamet Decl. ¶40; Ex. 1 at § 1, ¶1.28.)

22 The Parties estimate the amount of the Net Settlement Amount as follows:

23	Gross Settlement Amount:	\$	425,000.00
24	Less Class Representative Service Payment:	\$	7,500.00
25	Less Class Counsel’s Fees:	\$	141,666.67
26	Less Class Counsel’s Costs:	\$	25,000.00
27	Less LWDA PAGA Payment:	\$	20,000.00
28			<i>(\$15,000.00 to the LWDA and \$5,000.00 to remain in the Net Settlement Amount)</i>
	<u>Less Administrator Expenses:</u>	<u>\$</u>	<u>17,000.00</u>
	Anticipated Net Settlement Amount	\$	218,833.33

(Ex. 1 at § 3.)

D. Individual Settlement Payments

The amount of each Participating Class Member's Individual Class Payment is an individualized amount that is based on the number of compensable workweeks worked by the Participating Class Member during the Class Period. (Ex. 1 at § 1, ¶1.23; *see also* Ex. A to the Agreement at pp. 1 [Class Notice].) This individual amount shall be determined according to the settlement payment formula set forth in the Agreement. (*See* Ex. 1 at § 1, ¶3.2.4; *Id.* at Ex. A to the Agreement [Class Notice].) The Agreement provides for a specific and detailed dispute process. (*See* Ex. 1 at § 7, ¶7.6.)

The Individual PAGA Payment is an individualized amount that is based on the number of compensable PAGA Period Pay Periods worked by each Aggrieved Employee during the PAGA Period. (Ex. 1 at § 1, ¶1.24.) This individual amount shall be determined according to the settlement payment formula set forth in the Agreement. (*See* Ex. 1 at § 1, ¶3.2.5.1.) The Agreement provides for a specific and detailed dispute process. (*See* Ex. 1 at § 7, ¶7.6.)

E. Process for Administering Settlement after Preliminary Approval

The detailed Notice Procedure established by the Agreement will efficiently and accurately ensure that Notice is provided to the Settlement Class Members. (Ex. 1 at § 7, ¶7.4.) The Parties have agreed to use a reputable third-party claims administrator, ILYM Group, Inc., to administer the Agreement. (Ex. 1 at § 7, ¶7.1.)

F. Process for Settlement Class Members to Respond to Class Notice

As detailed in the Agreement, Settlement Class Members will have an opportunity to request exclusion from the Agreement (i.e. opt out) and to object to the Agreement at the Final Approval Hearing. (*See* Ex. 1 at § 7, ¶¶7.5;7.7; *see also* Ex. A to the Agreement at pp. 2 and 4 [Class Notice].) The Agreement and Class Notice contain details about the process to request exclusion or object. (*Id.* at Ex. 1; *see also* Ex. A to the Agreement at pp. 3-4 [Class Notice].)

PAGA Members will not be provided with the opportunity to opt out of the PAGA Settlement. If the Court approves the PAGA Payment, the Administrator will mail out checks and the PAGA Letter, which shall explain the PAGA Payment, to the PAGA Members at the same

1 time the Class Members are mailed their Individual PAGA Payments.

2 G. The Proposed Settlement Fully Resolves Plaintiff's and the Class's Claims at Issue
3 in the Operative Complaint

4 The Release goes into effect on the date when Defendant fully funds the entire Gross
5 Settlement Amount and funds all employer payroll taxes owed on the Wage Portion of the
6 Individual Class Payments. (Ex. 1 at § 5.) Defendant shall fully fund 14 days after the Effective
7 Date. (Ex. 1 at § 4, ¶4.3.) The "Effective Date" means the date by when both of the following have
8 occurred: (a) the Court enters a Judgment on its Order Granting Final Approval of the Settlement;
9 and (b) the Judgment is final. The Judgment is final as of the latest of the following occurrences:
10 (a) if no Participating Class Member objects to the Settlement, the day the Court enters Judgment;
11 (b) if one or more Participating Class Members objects to the Settlement, the day after the deadline
12 for filing a notice of appeal from the Judgment; or if a timely appeal from the Judgment is filed,
13 the day after the appellate court affirms the Judgment and issues a remittitur. (Ex. 1 at § 1, ¶1.18.)

14 The Release by Participating Class Members is defined as: "all claims that were alleged,
15 or reasonably could have been alleged, based on the factual allegations and primary rights stated
16 in the Operative Complaint and any amendments thereto, including all claims under Labor Code
17 §§ 201, 202, 203, 226(a), 226.7, 510, 512, 1194, 1194.2, 1199; Wage Order 9-2001; California
18 Code of Regulations, Title 8, Section 11090, and Business & Professions Code § 17200, and claims
19 for failure to pay minimum wages and/or overtime, failure to provide meal breaks, wage statement
20 violations, waiting time penalties, and unfair competition. Except as set forth in Paragraph 5.3 of
21 this Agreement, Participating Class Members do not release any other claims, including claims for
22 vested benefits, wrongful termination, violation of the Fair Employment and Housing Act,
23 unemployment insurance, disability, social security, workers' compensation, or claims based on
24 facts occurring outside the Class Period. (Ex. 1 at § 5, ¶5.2.)

25 The Release by the Aggrieved Employees is defined as: all claims for PAGA penalties that
26 were alleged, or reasonably could have been alleged, based on the factual allegations and primary
27 rights stated in the Operative Complaint, including all claims under Labor Code §§ 201, 202, 203,
28 226(a), 226.7, 510, 512, 1194, 1194.2, 1199; Wage Order 9-2001; California Code of Regulations,

1 Title 8, Section 11090, and Business & Professions Code § 17200, failure to pay minimum wages
2 and/or overtime, failure to provide meal breaks, wage statement violations, waiting time penalties,
3 and unfair competition. (Ex. 1 at § 5, ¶5.3.)

4 **IV. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED FOR** 5 **SETTLEMENT PURPOSES**

6 Originally creatures of equity, class actions have been statutorily embraced by the
7 Legislature whenever “the question [in a case] is one of a common or general interest, of many
8 persons, or when the parties are numerous, and it is impracticable to bring them all before the
9 court” (Code Civ. Proc. § 382; *see, e.g., Fireside Bank v. Sup. Court* (2007) 40 Cal.4th 1069,
10 1078.) They serve an important function by “establishing a technique whereby the claims of many
11 individuals can be resolved at the same time” thereby “eliminat[ing] the possibility of repetitious
12 litigation and provid[ing] small claimants with a method of obtaining redress.” (*Richmond v. Dart*
13 *Industries, Inc.* (1981) 29 Cal.3d 462, 469.) Public policy supports the use of class actions to
14 enforce wage and overtime laws for the benefit of workers. (*See Sav-on Drug Stores, Inc. v. Sup.*
15 *Court* (2004) 34 Cal.4th 319, 340.)

16 The certification question is “essentially a procedural one that does not ask whether an
17 action is legally or factually meritorious.” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439–
18 440.) A court ruling on a certification motion must determine “whether . . . the issues which may
19 be jointly tried, when compared with those requiring separate adjudication, are so numerous or
20 substantial that the maintenance of a class action would be advantageous to the judicial process
21 and to the litigants.” (*Collins v. Rocha* (1972) 7 Cal.3d 232, 238.)

22 The California Supreme Court has identified three certification requirements: (1) “the
23 existence of an ascertainable and sufficiently numerous class”; (2) “a well-defined community of
24 interest”; and, (3) “substantial benefits from certification that render proceeding as a class superior
25 to the alternatives.” (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021.)
26 The “community of interest” requirement includes three additional requirements: (1) common
27 questions of law or fact predominant over individual questions; (2) the class representatives have
28 claims or defenses typical of the class; and (3) the class representatives can adequately represent

1 the class. (*Ibid*, citing *Fireside Bank*, *supra*, 40 Cal.4th at 1089.)

2 Class certification for settlement purposes is proper in this case as the proposed Settlement
3 Class satisfies each of the requirements under Code of Civil Procedure § 382. Accordingly, this
4 Court should certify the putative settlement class.

5 A. Plaintiff Contends That The Proposed Class Is Ascertainable and Sufficiently
6 Numerous

7 1. Ascertainability

8 Putative class members are deemed “ascertainable” when they may be “readily identified
9 without unreasonable expense or time by reference to official records.” (*Rose v. City of Hayward*
10 (1981) 126 Cal.App.3d 926, 932.) In determining whether a class is ascertainable, a court
11 scrutinizes the class definition, the size of the class and the means of identifying class members.
12 (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.)

13 Here, Plaintiff maintains that the proposed Class is ascertainable for several reasons: First,
14 Defendant has agreed in the Agreement to provide a class list to the Administrator containing the
15 name, last known mailing address, social security number, and number of Class Period Workweeks
16 and PAGA Pay Periods for all putative class members after issuance of the preliminary approval
17 order. (Szamet Decl. ¶ 41; Ex. 1 at § 1, ¶1.8.) Second, Settlement Class Member consist of
18 Defendant’s hourly employees, and Defendant is required to keep records of its hourly employees’
19 names, home addresses, and social security numbers. (*See* Wage Order 9-2001, subsection 7(c);
20 Szamet Decl. ¶ 42.) Third and finally, Defendant formally produced Plaintiff’s personnel file and
21 employment records, paystubs, time records, employment handbooks, and arbitration agreements
22 for Settlement Class Members containing class member contact information, which confirms that
23 all Settlement Class Members may be readily identified based on Defendant’s records. (Szamet
24 Decl. ¶ 43; Ex. 1 at § 2, ¶2.4.)

25 2. Numerosity

26 There is no set number that is required as a matter of law to maintain a class action. (*See*,
27 *e.g.*, *Rose v. City of Hayward*, *supra*, 126 Cal.App.3d at p. 934.) Here, the proposed Class contains,
28 based upon information and belief, approximately 760 hourly non-exempt employees in the State

of California. (Ex. 1 at § 4, ¶4.1.) Therefore, Plaintiff is confident he will be able to establish that the proposed Class is ascertainable and sufficiently numerous. (Szamet Decl. ¶ 44.)

B. Plaintiff Contends That There Is a Well-Defined Community of Interest

1. There Are Predominant Questions of Law and Fact

In deciding whether questions of common or general interest predominate, a court must determine whether “the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.” (*Collins v. Rocha* (1972) 7 Cal.3d 232, 238; *accord, Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) As a general matter, if the defendant’s liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.” (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916, 107; *accord, Knapp v. AT & T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 941.)

Here, Plaintiff argues that there are questions of law and fact common to the proposed Class that predominate over any questions affecting only individual Class Members. (Szamet Decl. ¶45.) These common questions include:

- 1) Whether Defendant failed to pay all wages and/or overtime compensation due;
- 2) Whether Defendant failed to provide lawfully required meal periods and/or failed to compensate employees one (1) hour’s wages in lieu thereof;
- 3) Whether Defendant failed to provide accurate itemized wage statements;
- 4) Whether Defendant failed to pay compensation due and owing upon termination of employment;
- 5) Whether Defendant engaged in unfair competition; and,
- 6) Whether Defendant violated § 2699, et seq. of the Labor Code by engaging in the acts previously alleged.

(Szamet Decl. ¶ 46.)

Defendant maintained common written policies such as a company handbook containing uniform meal break policies for all hourly employees. (Szamet Decl. ¶ 47.) Plaintiff maintains

1 that the presence of a company-wide meal policy suggests that Defendant applied the same policies
2 to all employees, which would weigh in favor of class certification. (*Id.*)

3 Plaintiff's challenge to Defendant's uniform policies and practices involves common
4 factual and legal issues that are amenable to class treatment. (Szamet Decl. ¶ 48.) As the California
5 Supreme Court has emphasized, "[c]laims alleging that a uniform policy consistently applied to a
6 group of employees is in violation of the wage and hour laws are of the sort routinely, and properly,
7 found suitable for class treatment." (*Brinker, supra*, 53 Cal.4th at 1033; *see also Bradley v.*
8 *Networkers International, LLC* (2012) 211 Cal.App.4th 1129, 1141-1146.) Moreover, a class of
9 similarly situated employees may be certified based on common questions of fact or law, even if
10 each employee has to establish the amount of his or her damages. (*See Bell v. Farmers Ins. Exch.*
11 (2004) 115 Cal.App.4th 715, 741; *Sav-On Drug Stores, supra*, 34 Cal.4th at 340.)

12 Here, Plaintiff maintains that the proposed Settlement Class Members suffered the same
13 injuries, in the same manner: (1) Settlement Class Members were not properly paid all
14 wages/overtime; (2) Settlement Class Members did not receive their meal periods as required; (3)
15 Settlement Class Members were not provided accurate itemized wage statements; (4) Settlement
16 Class Members were not paid all wages owed upon termination/resignation. (Szamet Decl. ¶ 49.)
17 Plaintiff alleges that Settlement Class Members worked in the same capacity for the same
18 employer and were subject to the same employment policies and practices, the questions of fact
19 and claims regarding the status of these employees are the same for each member of the Class.
20 Accordingly, for purposes of settlement, the evidence reviewed by Class Counsel demonstrates
21 that common meal and rest policies and wage policies applied to the proposed Settlement Class
22 Members and certification for settlement purposes is appropriate. (Szamet Decl. ¶ 50.)

23 2. The Class Representative Has Claims Typical of the Proposed Class

24 A putative class representative's claim must be "typical," but not necessarily identical, to
25 the claims of other class members. The test of typicality "is whether other members have the same
26 or similar injury, whether the action is based on conduct which is not unique to the Class
27 Representatives, and whether other class members have been injured by the same course of
28 conduct." (*Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502.) Thus, it is sufficient

1 that the representative is similarly situated so that he or she will have the motive to litigate on
2 behalf of all class members. (*Id.* at 1502.) Thus, it is sufficient that the representative is similarly
3 situated so that he or she will have the motive to litigate on behalf of all class members. (*See, e.g.,*
4 *Classen v. Weller* (1983) 145 Cal.App.3d 27, 45.) It is not necessary that the class representative
5 have personally incurred all of the damages suffered by each of the other class members. (*Wershba*
6 *v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 238.)

7 Plaintiff worked as a warehouse worker for Defendant. (Szamet Decl. ¶ 51.) Plaintiff
8 alleges that he: (1) worked without being paid all wages and/or overtime; (2) worked without being
9 provided meal periods as required by law; (3) worked without being provided accurate itemized
10 wage statements; and (4) worked without being paid all wages due upon separation. He also
11 alleges that he experienced derivative claims for unfair business competition (B&P Code §17200)
12 and Labor Code §2699, et seq. (Szamet Decl. ¶ 52.) Plaintiff also contends that he claims are
13 typical of those of the Class. (Szamet Decl. ¶ 53.)

14 3. Plaintiff Contends That As The Class Representative He Has and Will
15 Fairly Represent the Interests of the Settlement Class Members

16 A putative class representative must show that he can adequately represent the class.
17 (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.App.4th 1096, 1104.) The representative,
18 through qualified counsel, must be capable of “vigorously and tenaciously” protecting the interests
19 of the class members. (*Simons v. Horowitz* (1984) 151 Cal.App.3d 834, 846.)

20 Plaintiff believes that he is capable of fairly representing and adequately protecting the
21 interests of the proposed Settlement Class Members. (Szamet Decl. ¶ 54.) Plaintiff’s interests in
22 this litigation are coextensive with the interests of the proposed Settlement Class Members. The
23 members of the proposed Class all worked for Defendant during the relevant time period and
24 incurred the same type of alleged damages with regard to Defendant’s alleged violations of the
25 law. (Szamet Decl. ¶ 55.) Moreover, Plaintiff has agreed to serve as Class Representative and has
26 retained qualified Counsel who is experienced in prosecuting wage and hour class actions. (Szamet
27 Decl. ¶ 56.) This demonstrates his commitment to bringing about the best possible results for the
28 benefit of the proposed Class. (Szamet Decl. ¶ 57.) Plaintiff has been a very active participant in

1 the litigation including having frequent contact with Settlement Class Members, preparing detailed
2 responses to formal discovery, and working closely with Class Counsel to develop the theories of
3 liability. (Szamet Decl. ¶ 58.) He also made himself available for the full-day mediation in this
4 matter and was informed of and involved in all of the Settlement negotiations. (*Id.*) Therefore,
5 Plaintiff believes that he has and will continue to adequately represent the proposed Settlement
6 Class Members. (Szamet Decl. ¶ 59.) Plaintiff has provided his Counsel with all necessary and
7 pertinent information. (Szamet Decl. ¶ 60.)

8 C. The Class Action Vehicle Is Superior to the Alternatives

9 “The ultimate question in every case of this type is whether . . . the issues which may be
10 jointly tried, when compared with those requiring separate adjudication, are so numerous or
11 substantial that the maintenance of a class action would be advantageous to the judicial process
12 and to the litigants.” (*Lockheed Martin, supra*, 29 Cal.App.4th at 1104–1105.) The California
13 Supreme Court has directed the courts to utilize the class action device to fashion “an effective
14 and inclusive group remedy.” (*Richmond v. Dart Indus., Inc.* (1981) 29 Cal.3d 462, 469.)
15 Normally, in making its class certification decision, the Court must determine that a class action
16 would be superior to alternate means for a fair and efficient adjudication. If the causes of action
17 may be adjudicated in a single proceeding, thereby saving time, reducing waste, and limiting
18 duplication of effort, class certification is superior to individual litigation. (*See, e.g., Vasquez v.*
19 *Superior Court* (1971) 4 Cal.3d 800, 816.) Since the Parties agreed to a settlement in principal
20 and now seek Court approval of that Settlement, Plaintiff submits that there is not as much need
21 as there would be in an ordinary motion for class certification for the Court to determine that the
22 case can be manageably tried.

23 Plaintiff maintains that class treatment would be the superior method of managing this case.
24 A class action is superior to individual litigation “when numerous parties suffer injury of
25 insufficient size to warrant individual action and when denial of class relief would result in unjust
26 advantage to the wrongdoer.” (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.) In
27 cases such as this, where individual damages may be small, the class action device is the most
28 feasible method of recovery. (*See, e.g., Lockheed Martin, supra*, 29 Cal.4th at 1131.) In this regard,

1 the superiority of class treatment is evident here because individual pursuit of class members’
2 claims may not be economically viable. (Szamet Decl. ¶ 61.) The only alternative to certification
3 would be to force over 760 employees to join this action, file individual, uniform actions, or
4 abandon their legal rights altogether. (Szamet Decl. ¶ 62.) Plaintiff maintains that this economic
5 reality would result in a windfall for Defendant if this case were not certified. (Szamet Decl. ¶ 63.)

6 **V. ARGUMENT**

7 **A. Plaintiff Requests Approval of This Class Action Settlement**

8 California Rule of Court (“Rule”), Rule 3.769 requires litigants to obtain court approval of
9 class action settlements. Approval occurs in two steps: (1) an early “preliminary” review by the trial
10 court; and (2) a subsequent “final” review after notice of the settlement has been distributed to class
11 members for their comments and objections. Cal. R. Ct. 3.769(c)-(g); *Cellphone Termination Fee*
12 *Cases*, 180 Cal. App. 4th 1110, 1118 (2010) (the court first “preliminarily approves the settlement”
13 and later “conducts a final approval hearing to inquire into the fairness of the proposed settlement”).
14 The motion for preliminary approval must be accompanied by (1) the settlement agreement, (2)
15 proposed notice to the class, and (3) the proposed order. *Id.* at 3.769(c). The motion must also identify
16 any agreement concerning the payment of attorneys’ fees. *Id.* at 3.769(b).

17 If the trial court grants preliminary approval of a settlement, Rule 3.769(f) requires the court
18 to (1) schedule a final approval hearing and (2) approve the method by which the parties are to provide
19 notice to the class of the hearing and “an explanation of the proposed settlement.” The court must also
20 approve a procedure for class members to file objections to the settlement. *Id.* at 3.769(f). At the final
21 approval hearing, the court must conduct an inquiry into the fairness of the proposed settlement. *Id.* at
22 3.769(g).

23 Although Rule 3.769 does not provide detail as to the scope of review of the proposed
24 settlement, preliminary approval is warranted if the settlement falls within a “reasonable range.” *See*
25 *North County Contractor’s Assn., Inc. v. Touchstone Ins. Services*, 27 Cal. App. 4th 1085, 1089-90
26 (1994); Conte & Newberg, *Newberg on Class Actions*, §§ 11.26 (4th ed. 2002) (“Newberg”).

27 The case of *Kullar v. Foot Locker Retail, Inc* (2008) 168 Cal.App.4th 116, 128, set forth
28 several factors that the Court should analyze in determining whether to approve a class action

1 settlement. These factors include: (1) the strength of plaintiff’s case; (2) the risk, expense,
2 complexity and likely duration of further litigation; (3) the risk of maintaining class action status
3 through trial; (4) the amount offered in settlement; (5) the extent of discovery completed and stage
4 of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental
5 participant; and (8) the reaction of the class members to the proposed settlement.

6 The proposed settlement satisfies each of these factors. (Szamet Decl. ¶ 64.) Class Counsel
7 conducted extensive formal and informal discovery before entering into meaningful settlement
8 negotiations in this matter. (*Id.* at Szamet Decl. ¶¶ 18-24.) This discovery permitted Class Counsel
9 to fairly evaluate the strength of the case and the risks associated with ongoing litigation. (Szamet
10 Decl. ¶65.) Class Counsel is experienced in handling wage and hour class actions and, after
11 weighing all of the following factors, supports this Agreement. (Szamet Decl. ¶ 66.)

12 1. The Strength of Plaintiff’s Case

13 a) The Risks Associated with Minimum Wage/Overtime Claim

14 California employees are entitled to compensation for all hours worked, which means “the
15 time during which an employee is subject to the control of an employer, and includes all the time
16 the employee is suffered or permitted to work, whether or not required to do so.” (Title 8 Cal. Code
17 of Regs., § 11050(2)(K); *See Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 845, as modified
18 on denial of reh’g (Aug. 29, 2018).) Time is compensable if an employee is “*subject to the control*
19 *of an employer*” even if not working, or if an employee “*is suffered or permitted to work*” even if
20 not “under the employer’s control, provided the employer has or should have knowledge of the
21 employee’s work.” (*Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038, 1046, reh'g denied (May 13, 2020)
22 (citations omitted.) An employer controls an employee if the employer directs an employee and
23 the employee is unable to use their time how they wish. (*Id.* at p. 1047.) Other factors courts may
24 consider include whether the activity is required, “the location of the activity, the degree of the
25 employer’s control, whether the activity primarily benefits the employee or employer, and whether
26 the activity is enforced through disciplinary measures.” (*Id.* at p. 1056; *Cf. Gibbs v. TWC*
27 *Administration, LLC* (S.D. Cal., Jan. 3, 2020, No. 17CV01513DMSAGS) 2020 WL 42768, at *9
28 (denying Defendant’s motion for summary judgment when plaintiff-employees conducted off-the

1 clock pre-shift activity in preparation to start work right when they clocked in).)

2 In *Troester*, employees spent four to ten minutes completing tasks to close up the store,
3 such as setting the alarm and locking the door. (*Troester*, 5 Cal.5th 829 at p. 843.) The Court held
4 that California law prohibits employers from requiring employees to work off the clock, even for
5 minutes, without compensation. (*Id.* at p. 848.) The Court explained:

6 An employer that requires its employees to work minutes off the clock on a regular
7 basis or as a regular feature of the job may not evade the obligation to compensate
8 the employee for that time by invoking the de minimis doctrine. As the facts here
9 demonstrate, a few extra minutes of work each day can add up. . . . What Starbucks
calls “de minimis” is not de minimis at all to many ordinary people who work for
hourly wages.

10 (*Id.* at p. 847.)

11 Additionally, California workers are statutorily entitled to overtime compensation, unless
12 they are properly classified as falling within one of the narrow exemption categories. Under
13 California law, “[a]ny work in excess of eight hours in one workday and any work in excess of 40
14 hours in any one workweek...shall be compensated at the rate of no less than one and one-half
15 times the regular rate of pay for an employee.” (Lab. Code, § 510, subd. (a).) Furthermore, “[a]ny
16 work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the
17 regular rate of pay for an employee.” (Lab. Code, § 510, subd. (a).)

18 Plaintiff contends that he, like all Class Members, were required to work “off the clock” to
19 complete temperature checks without being compensated for this time in compliance with
20 California law. (Szamet Decl. ¶ 67.) Plaintiff alleges that he and all Class Members were required
21 to report to the job site and complete temperature checks before the scheduled start of each shift.
22 (Szamet Decl. ¶ 68.) Plaintiff contends that Defendant required Plaintiff and the Class Members
23 to undergo these temperature checks before the scheduled start of each shift daily, without
24 compensation for this time worked at the appropriate rate of pay. (Szamet Decl. ¶ 69.)

25 Plaintiff contends that this was a daily requirement for the benefit of the employer, as
26 temperature health screening procedures were necessary to ensure the safety and protection of
27 employees’ health at all times. (Szamet Decl. ¶ 70.) As such, Plaintiff argued that he and Class
28 Members were entitled to be compensated for this time worked and Defendant is liable for unpaid

1 wages and/or overtime at the appropriate rate. (Szamet Decl. ¶ 71.) Defendant vehemently denies
2 the minimum wage/overtime claim is appropriate for class certification. (Szamet Decl. ¶ 72.) First,
3 Defendant argued that any temperature checks were limited to the one facility where Plaintiff
4 worked and only in place for a limited number of months after the initial March 2020 statewide
5 covid outbreak. (Szamet Decl. ¶ 73.) Therefore, it argued that Plaintiff was not a typical
6 representative of the entire Class and at most perhaps Plaintiff could attempt to certify a small
7 subclass of employees who underwent temperature checks at his facility for a period of a few
8 months. (Szamet Decl. ¶ 74.) In addition, Defendant argued that any temperature checks merely
9 took a few seconds to complete as employees entered the one facility and were not compensable
10 time. (Szamet Decl. ¶ 75.) Ultimately, Plaintiff felt confident he could certify this claim, but had
11 to acknowledge that exposure may be extremely limited if the Court only certified a small, single-
12 location subclass for a limited time period thereby reducing the potential value of the claim
13 significantly. (Szamet Decl. ¶ 76.) Plaintiff took this significant risk into consideration in
14 determining that settlement of this claim was reasonable. (Szamet Decl. ¶ 77.)

15 Plaintiff also alleged that Defendant paid hazard pay and safety pay that it did not properly
16 blend for the purposes of determining the correct overtime rate. (Szamet Decl. ¶ 78.) Plaintiff felt
17 confident that this claim was certifiable, but acknowledges the potential damages are limited as
18 this additional compensation was paid only during a limited window as part of Defendant's covid
19 protocols. (Szamet Decl. ¶ 79.)

20 b) The Risks Associated with the Meal Break Claim

21 California law requires employers to provide employees a duty-free, uninterrupted thirty
22 (30) minute meal period when an employee works more than five (5) hours in a workday, and it
23 must be provided within the first five (5) hours the employee works. Lab. Code 512; IWC Wage
24 Order 9-2001, §11(A) and (C); *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004.
25 Employers must also provide employees with a second duty-free, uninterrupted thirty (30) minute
26 meal period when an employee works more than (10) hours in a workday, and it must be provided
27 before the end of the 10th hour of work. *Ibid.* Meal periods can be waived, but only under the
28 following circumstances: (1) if an employee's total work period in a day is over five (5) hours but

no more than six (6) hours, the required meal period may be waived by mutual consent of the employer and employee, and (2) if an employee's total work period in a day is over ten (10) hours but no more than twelve (12) hours, the required second meal period may be waived by mutual consent of the employer and employee, but only if the first meal period was not waived.

Ibid.

Employers covered by Industrial Welfare Commission ("IWC") Wage Order 9-2001 have an obligation to both (1) relieve their employees for at least one meal period for shifts over five hours (see above), and (2) to record having done so. If the employer fails to properly record a valid meal period, it is presumed that no meal period was provided. IWC Wage Order 9-2001, §7(A)(3) ("Meal periods . . . shall also be recorded"); *Brinker, supra*, 53 Cal.4th 1004, 1052-1053, citing §7(A)(3) ("If an employer's records show no meal period for a given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided"). Employers must pay employees an additional hour of wages at the employees' regular rate of pay for each missed or improper (e.g., less than 30 minutes, interrupted meal period, first meal period provided after 5 hours, second meal period provided after 10 hours) meal period. Lab. Code §226.7; IWC Wage Order 9-2001, §11(B) ("If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided"); *Brinker, supra*, 53 Cal.4th 1004.

Plaintiff alleged that Defendant violated California's meal break laws by not allowing Plaintiff and other members of the Class to take compliant daily meal breaks that were timely, at least 30 minutes, and free of the employer's control. (Szamet Decl. ¶ 80.) Notable however is that expert analysis of the data revealed that 93% of shifts over five hours show that a meal period was taken during shifts over 5 hours and only 0.2% of those meal periods were taken after the 5th hour (495 meal periods out of 245,408) and only 0.10% were less than 30 full minutes. (Szamet Decl. ¶ 81.) Plaintiff acknowledges that this purported "violation rate" is quite low. (Szamet Decl. ¶ 82.) Thus, the data did not support a strong meal break claim for missed, short, late or missed meals. (Szamet Decl. ¶ 83.)

1 In addition to the data analysis, this can be an extremely tough claim to prove on a
2 classwide basis because Defendant will argue that it meets the *Brinker* “provide” standard, facially
3 compliant meal breaks are consistently reflected in the records. (Szamet Decl. ¶ 84.) Defendant
4 would argue that because the records largely show complaint breaks were taken, it would become
5 an individualized inquiry that would require questioning of each and every Class Member as to
6 each and every meal non-compliant period in the records as to whether in fact it was “provided”
7 in compliance with the law. (Szamet Decl. ¶ 85.) Such an expansive inquiry, Defendant would
8 argue, necessarily defeats class certification. (Szamet Decl. ¶ 86.) It could likewise devolve into
9 a battle of declarations with each party securing class member declarations that supported their
10 arguments. (Szamet Decl. ¶ 87.) Based on the data analysis and the risks above, Plaintiff
11 ultimately determined that accepting a dramatic discount on the meal claim for settlement purposes
12 was appropriate. (Szamet Decl. ¶ 88.)

13 Plaintiff also alleged a *Ferra* violation for failing to pay meal period premiums at the
14 appropriate rate based on a failure to blend hazard pay and safety bonus for the purpose of
15 determining the correct regular rate for meal period premium payment. (Szamet Decl. ¶ 89.) As
16 with the regular rate claim above, Plaintiff felt confident that this claim was certifiable, but
17 acknowledges the potential damages are limited as this additional compensation was paid only
18 during a limited window as part of Defendant’s covid protocols. (Szamet Decl. ¶ 90.)

19 c) The Risks Associated with the Inaccurate Wage Statement Claim

20 California Labor Code §226(a) requires Defendant to provide its employees with an
21 accurate, itemized written wage statement that shows, in relevant part, the start and end date of the
22 pay period and all applicable hourly rates and the corresponding number of hours worked. An
23 employee “suffering injury,” like Plaintiff and Class Members, can recover penalties for an
24 employer’s “knowing and intentional failure” to comply with Labor Code §226(a). *See* Labor Code
25 § 226(e)(1). Under the statute, an employee is deemed to “suffer injury” if the employer does not
26 provide accurate and complete information required by Labor Code § 226(a) and the employee
27 cannot “promptly and easily determine” from the wage statement alone the amount of gross wages
28 or net wages paid to the employee or other information specified by Labor Code § 226(a). *See*

1 Labor Code § 226(e)(2)(B).

2 Plaintiff alleged a derivative claim that Defendant issued wage statements that allegedly
3 violate Labor Code §§ 226(a)(2) and (9). (Szamet Decl. ¶ 91.) Labor Code § 226(a) specifically
4 requires that the employer shall, semimonthly or at the time of each payment of wages, furnish
5 each of his or her employees, an accurate itemized statement in writing showing all applicable
6 hourly rates in effect during the pay period and the corresponding number of hours worked at each
7 hourly rate by the employee. Plaintiff alleges that he and Class Members are issued wage
8 statements that do not accurately show the applicable overtime rate and the number of hours
9 worked at the corresponding rate based on Defendant's alleged failure to blend discussed above.
10 (Szamet Decl. ¶ 92.) However, Plaintiff has to recognize that this is a derivative claim. (Szamet
11 Decl. ¶ 93.) Plaintiff does not argue that Defendant failed to show required information on the
12 paystubs it issued to Class Members, only that the paystubs do not accurately show the
13 information. (Szamet Decl. ¶ 94.) While Plaintiff believes this claim is easily certifiable, Plaintiff
14 has to acknowledge that this is a more difficult argument to prevail on when it comes to assessing
15 liability and a resulting discount for settlement purposes is appropriate.

16 d) The Risks Associated with the Waiting Time Penalty Claim

17 Labor Code section 203 provides that if an employer fails to provide wages at the time of
18 an employee's termination or within 72 hours of his/her resignation, then such employee's wages
19 shall continue as a penalty for up to thirty (30) days. "If an employer willfully fails to pay . . .
20 any wages of an employee who is discharged or who quits, the wages of the employee shall
21 continue as a penalty from the due date thereof at the same rate until paid . . . but the wages shall
22 not continue for more than 30 days." (Lab. Code, § 203, subd. (a).)

23 Here, some Class Members, including Plaintiff, are no longer employed by Defendant.
24 (Szamet Decl. ¶95.) Plaintiff contends that Defendant has failed to pay employees wages
25 immediately or within 72 hours of termination and/or resignation by not paying all meal period
26 premiums owed and wages. (Szamet Decl. ¶96.) Therefore, under California Law, Plaintiff
27 contends that "waiting time" penalties would be triggered for each former employee in the class.
28 (Szamet Decl. ¶97.) Labor Code section 203 reflects a public policy concern that favors the full

1 and prompt payment of earned wages. (See, e.g., *Barnhill v. Robert Saunders & Co.* (1981) 125
2 Cal.App.3d 1, 7; *Mamika v. Barca* (1998) 68 Cal.App.4th 487, 492.)

3 Defendant maintains that it has paid all wages due to employees at the separation of
4 employment. Defendant argues that a good-faith belief applies here and that if it inadvertently
5 did not pay final wages to an individual, its actions were not willful. (Szamet Decl. ¶ 98.)
6 Plaintiff responds that the well-settled meaning of “willful,” as used in Labor Code section 203,
7 is that an employer has intentionally failed or refused to perform an act which was required to be
8 done. (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1201.) (Szamet Decl. ¶ 99.)
9 Plaintiff contends that Defendant knew wages were owed but failed to pay them. (Szamet Decl.
10 ¶ 100.) Therefore, Plaintiff contends that waiting time penalties apply here and each former
11 employee would be entitled to thirty (30) days of wages.

12 The risk analysis for the section 203 claim flows from the risk analysis for the underlying
13 wage claims discussed above. (Szamet Decl. ¶ 101.) If Defendant could prove, as it contends,
14 that wages were not unlawfully deduct and all meal periods were provided as it contends, there
15 would be no waiting time penalties that flow therefrom. (Szamet Decl. ¶ 102.) Based on the risk
16 articulated above, Class Counsel believed a discount was also appropriate here for settlement
17 purposes. (Szamet Decl. ¶ 103.)

18 e) The Risks Associated with the PAGA Claim

19 California’s Private Attorneys General Act (“PAGA”), Labor Code § 2698, *et seq.*, permits
20 private litigants to recover civil penalties for violations of the Labor Code. PAGA provides that
21 plaintiffs may recover previously established civil penalties (section 2699(a)) or, if none were
22 established, plaintiffs may recover default penalties provided in section 2699(f) in the amount of
23 \$100 per employee per pay period for the initial violation and \$200 for subsequent violations.

24 Plaintiff discounted the PAGA claim for settlement purposes for multiple reasons. (Szamet
25 Decl. ¶104.) First, the aggrieved employees’ PAGA claims are derivative of all the foregoing class
26 claims. (*Id.*) Second, a court has discretion to award less than the maximum penalty. (*Id.*) Labor
27 Code § 2699(e)(2) (“a court may award a lesser amount than the maximum civil penalty amount
28 specified by this part if, based on the facts and circumstances of the particular case, to do otherwise

would result in an award that is unjust, arbitrary and oppressive, or confiscatory”). *See e.g., Carrington v. Starbucks Corporation* (2018) 30 Cal.App.5th 504, 241 Cal.Rptr.3d 647, 669 (affirming award of 10% of maximum PAGA penalty). Finally, the Class is compensated for these violations in the proposed Agreement, and thus any PAGA recovery for these same violations would be duplicative. (*Id.*) As such, the Agreement’s contemplated PAGA payment of \$20,000.00 is appropriate. (Szamet Decl. ¶105.) *See Nordstrom Commissions Cases*, 186 Cal.App.4th 576, 589 (2010) (affirming settlement allocating \$0 of \$6.4 million settlement to PAGA penalties).

2. The Risk, Expense, Complexity, and Likely Duration of Further Litigation

There is significant expense associated with the class certification process, which the Parties can avoid by entering into the contemplated Agreement now. (Szamet Decl. ¶106.) If the Court did eventually certify a meal or wage class, trial of a case involving approximately 760 Settlement Class Members would require the retention of expensive expert witnesses, the accrual of extensive litigation costs, and a significant time overlay by the parties. (Szamet Decl. ¶107.) Moreover, given the complexity and unsettled nature of the issues in this case it is likely that any outcome at trial would have resulted in a lengthy and costly appeal. (Szamet Decl. ¶108.) An appeal would result in further delay for the Settlement Class Members who are waiting for a resolution in this matter. (*Id.*)

3. The Risk of Maintaining Class Action Status through Trial

This case has not been certified to be tried as a class action. (Szamet Decl. ¶109.) While Plaintiff believes there is strong evidence to support certification of several possible subclasses, certification is always hard fought and subject to judicial discretion. Moreover, in class actions, decertification is always a possibility. (*Id.*) In attempting to certify a class, the parties would need to conduct multiple depositions, including of the Class Representative and of several person(s) most knowledgeable regarding Defendant’s meal and wage policies. (*Id.*) There is a risk for both sides as to what these depositions will reveal and whether they will support class certification to the extent expected. (*Id.*)

4. The Amount Offered in Settlement

It was very difficult for the Parties to reach this Settlement of \$425,000.00. (Szamet Decl.

¶110.) This Settlement is the result of adversarial, non-collusive, and arms-length negotiations. (Szamet Decl. ¶111.) The Parties arrived at it after extensive investigation and discovery; careful evaluation of the law, risks, and all information substantiating the amount of penalties reasonably likely to be awarded to the class were the trier of fact to find Defendant liable; the assistance of an experienced mediator, Jeffrey Krivis, Esq.; expert analysis of the data; and through their own meaningful meet and confer efforts in connection with direct negotiations. (*Id.*)

a) Plaintiff's Assessment of Defendant's Maximum Exposure

i. Damages

Plaintiff assessed full value of the minimum wage/overtime claim, without any discount, at approximately \$605,893. (Szamet Decl. ¶112.) This calculation assumed that Settlement Class Members worked 5 minutes of unpaid off the clock work per shift (281, 369 shifts extrapolated to the class) and that 50% of the time it resulted in unpaid overtime wages. (Szamet Decl. ¶113.) This resulted in 23,447 minutes of unpaid overtime/wages alleged to have been worked off the clock. (Szamet Decl. ¶114.) Defendant argued this amount was overstated because any temperature checks were a mere minute or two, were limited to one facility and only occurred for a few months of the liability period after the statewide lockdown in March 2020. (Szamet Decl. ¶115.) Plaintiff assessed the unpaid overtime due to the alleged failure to blend hazard pay and safety bonus into the regular rate for the purposes of determining the correct overtime rate at \$30,638. (Szamet Decl. ¶116.)

Plaintiff assessed the full value of the meal period claim, without any discount, at approximately \$399,537. (Szamet Decl. ¶117.) This amount assumed all shifts that did not show a complaint meal period meal periods within the first 5 hours of work (missed, late, short) were automatically violations. (Szamet Decl. ¶118.) For the reasons above, Plaintiff determined that accepting a discount of the full amount was appropriate. (Szamet Decl. ¶119.) Plaintiff assessed the unpaid wages/overtime due to the alleged failure to blend hazard pay and safety bonus into the regular rate for the purposes of determining the correct meal period premium amount at \$1,891. (Szamet Decl. ¶120.)

Together, Plaintiff valued the maximum potential exposure for core damages at

1 \$1,037,959.00. (Szamet Decl. ¶121.)

2 ii. Penalties

3 Plaintiff valued the Section 226(a) wage statement claim, without discount, at \$1,221,150.
4 (Szamet Decl. ¶122.) This analysis is based on \$50 for the initial pay period and \$100 thereafter
5 for 484 employees during the wage statement liability period. (Szamet Decl. ¶123.) Based on the
6 derivative nature of this claim and the risks as to recovery discussed above, Plaintiff determined
7 that a steep discount of this claim was fair for settlement purposes. (Szamet Decl. ¶124.)

8 Plaintiff valued the Section 203 waiting time penalty claim, tied to the wage/overtime
9 claim, at \$1,529,215. (Szamet Decl. ¶125.) This analysis is based on 313 employees during the
10 waiting time penalty liability period. (Szamet Decl. ¶126.) Considering the derivate nature of
11 Labor Code §203 and the dispute over whether class members were owed any wages, Plaintiff
12 determined that accepting a discount on this claim was appropriate. (Szamet Decl. ¶127.)

13 Finally, Plaintiff calculated the value of the PAGA claim at \$1,245,300 for Aggrieved
14 Employees. This is based upon \$100 per pay period for all 12,453 pay periods during the PAGA
15 liability period. (Szamet Decl. ¶128.) However, based on its confidence around certification,
16 Plaintiff acknowledges the more realistic exposure for the pay periods affected by the alleged
17 failure to blend, assessed at \$100/200 pay period, is \$144,700. (Szamet Decl. ¶129.) The main
18 risk taken into account with PAGA is the discretionary nature of the penalty award. (Szamet Decl.
19 ¶130.) A judge can award the statutory maximum of \$100 for the initial violation and \$200
20 thereafter or – in theory – one cent per wage statement. (Szamet Decl. ¶131.) While there is a
21 dearth of available authority, in Plaintiff's view, were he to succeed on any of the underlying Labor
22 Code violations, it is not likely that a Judge would also award a large amount of penalties of top
23 of any damages recovered. (Szamet Decl. ¶132.)

24 Per Plaintiff's assessment, the maximum potential value of all the penalty claims was
25 approximately \$3,995,665. (Szamet Decl. ¶133.) Adding the damages and maximum penalties
26 together the result is \$5,033,624. However, when considering the regular rate exposure of \$30,638
27 plus the *Ferra* exposure of \$1,891, and the most realistic PAGA exposure tied to those claims of
28 \$144,700, the amount is reduced dramatically to \$177,229. (Szamet Decl. ¶134.) Weighing this

1 more conservative analysis against the maximum exposure and considering the forgoing risks on
2 the merits, Class Counsel believes the Gross Settlement Amount of \$425,000.00 is fair and
3 reasonable. (Szamet Decl. ¶135.)

4 5. The Experience and Views of Counsel

5 Finally, counsel’s experience and success in similar class actions also weigh in favor of
6 preliminary approval. *See Wershba, supra*, 91 Cal.App.4th at 245. Kingsley & Kingsley, APC is
7 very experienced in prosecuting complex employment litigation, and the firm has focused its
8 practice since the year 2000 on complex wage, hour, and working condition violations. (Szamet
9 Decl. ¶¶136-138.) The firm is well versed in class action litigation and has diligently and
10 aggressively pursued this action. (*Id.*) Kingsley & Kingsley, APC currently serves as Class
11 Counsel for dozens of pending class action lawsuits in Northern, Central, and Southern California.
12 (*Id.*) A list of representative cases that Kingsley & Kingsley, APC has handled is included in the
13 accompanying declaration of Kelsey M. Szamet. (*Id.*) After factoring in the risks explained above,
14 Class Counsel believes that the proposed settlement is fair and reasonable. (Szamet Decl. ¶139.)

15 6. The Proposed Plan of Allocation Is Fair and Reasonable

16 Plans of allocation are subject to the same standard of review as class action settlements;
17 they must be “fair, adequate and reasonable.” (*See, e.g., Officers for Justice v. Civil Service*
18 *Comm’n* (9th Cir. 1982) 688 F.2d 615, 624–625, 629–630.) Here, the proposed plan of allocation
19 compensates Participating Class Members pro rata based on the number of compensable
20 Workweeks worked by the Settlement Class Member during the Class Period. (Ex. 1 at § 3, ¶3.2.4.)
21 This allocation distributes Agreement funds proportionally to each class member’s potential
22 damages and should therefore be approved as fair, adequate, and reasonable. (Szamet Decl. ¶140.)

23 7. The Proposed Notice Fairly Apprises the Settlement Class Members of the
24 Terms of the Settlement and of the Class Members’ Rights under the
25 Settlement

26 Plaintiff requests that the Court approve the proposed plan and form of Class Notice. The
27 standard for determining the adequacy of notice is whether the notice has “a reasonable chance of
28 reaching a substantial percentage of the class members.” (*Cartt v. Superior Court* (1975) 50

Cal.App.3d 960, 974.) Pursuant to the Agreement, the Notice will be sent to the last known address of all Settlement Class Members, or to an updated address if one is located in the National Change of Address Database. (Ex. 1 at § 7, ¶7.4.2). If any Notices are returned as undeliverable, the Administrator will undertake another reasonable address verification measure to locate a valid mailing address and will promptly send the Notice to the new address. (*Id.*) As such, the Notice is likely to reach most, if not all, Settlement Class Members.

With respect to the contents of the Notice, the “notice given to the class must fairly apprise the class members of the terms of the proposed compromise and of the options open to dissenting class members.” (*Trotsky v. L.A. Fed. Sav. & Loan Ass’n* (1975) 48 Cal.App.3d 134, 151–52.) The purpose of a class notice is to give class members sufficient information to decide whether they should accept the benefits offered, opt out and pursue their own remedies, or object to the settlement. (*Ibid.*)

Here, the Notice clearly explains the proposed Agreement and the options to opt out of the Settlement or object to it at the Final Approval Hearing. (Ex. 1 at § 7, ¶7.5;7.7; *see also* Ex. A to the Agreement at pp. 1-2, 4 [Class Notice].) In short, the Court should approve the proposed Class Notice because it describes the proposed settlement with enough specificity to allow Settlement Class Members to make an informed choice regarding whether to participate.

VI. THE SERVICE AWARD TO THE NAMED PLAINTIFF

The Class Representative is entitled to an enhancement for his valiant effort and time expended in this matter. (Szamet Decl. ¶141.) The time spent by Marcos Tafolla is significant and includes researching and retaining competent counsel; providing information to Class Counsel regarding the nature of the work at Defendant; compiling relevant documents; working closely with Class Counsel to develop the theories of liability and martial relevant evidence; regularly discussing the status of the case with Class Counsel; discussing the case via telephone with many Settlement Class Members; making himself available for a full-day of mediation; and responding promptly to Class Counsel’s communications regarding settlement. (*Id.*) Thus, in addition to the sums paid to Settlement Class Members, Plaintiff requests a proposed litigation enhancement in the amount of \$7,500.00, to be paid from the Gross Settlement Amount. (Ex. 1 at § 3, ¶3.2.1.) As

1 set forth in the Agreement, Plaintiff will also be entering into a general release of liability pursuant
2 to Civil Code Section 1542. (Szamet Decl. ¶142; Ex. 1 at § 5, ¶5.1.1.)

3 Class Counsel considers this to be a fair and reasonable enhancement. (Szamet Decl.
4 ¶143.) The enhancement takes into consideration the time, effort, and expense incurred by Plaintiff
5 in coming forward to litigate this matter on behalf of all Settlement Class Members. (*Id.*) Plaintiff
6 concurrently provides a detailed declaration detailing his participation and further justification for
7 the enhancement. (*Id.*)

8 **VII. SUBMISSION TO THE LABOR AND WORKFORCE DEVELOPMENT AGENCY**

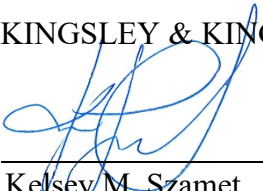
9 As indicated on the Proof of Service, Plaintiff's Motion for Approval of Class Action
10 Settlement ("Motion") will be concurrently uploaded to the Labor and Workforce Development
11 Agency's ("LWDA") website on the date this Motion is filed as required by statute. Proof of
12 submission of Plaintiff's Motion, all related documents, and copy of the email from the LWDA
13 confirming receipt is attached to the Declaration of Kelsey M. Szamet as Exhibit "3." (Szamet
14 Decl. ¶144.)

15 **VIII. CONCLUSION**

16 Plaintiff respectfully submits that the proposed Agreement is fair, adequate, reasonable,
17 and in the best interest of the Settlement Class Members. Therefore, the Parties respectfully
18 request that the Court (1) grant preliminary approval of the Class Action and PAGA Settlement
19 Agreement, and all of its terms; (2) approve the proposed form of notice, and direct that the Notice
20 be sent to Settlement Class Members in the manner set forth in the Class Action and PAGA
21 Settlement Agreement; and (3) schedule a hearing on final approval of the Agreement and Class
22 Counsel's application for an award of attorney's fees and litigation costs.

23
24 DATED: January 29, 2024

KINGSLEY & KINGSLEY, APC

25
26 By: 

27 Kelsey M. Szamet
28 Attorneys for Plaintiff MARCOS TAFOLLA and
the proposed class

(PROOF OF SERVICE)
[CCP 1013(a)(3)]

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 16133 Ventura Boulevard, Suite 1200, Encino, California 91436.

On January 30, 2024 I served all interested parties in this action the following documents described as: **NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Robert R. Vorhees
robert.vorhees@ogletree.com
David A. Garcia
david.garcia@ogletree.com
Susan M. Susebach
susan.susebach@ogletreedekins.com
Ogletree, Deakins, Nash, Smoak, & Stewart, P.C.
Park Tower, 695 Town Center Drive, Fifteenth Floor
Costa Mesa, CA 92626

[XX] BY ELECTRONIC SERVICE: I caused a true and correct copy thereof to be electronically filed using the Labor and Workforce Development Agency Electronic Filing ("EF") System (<https://dir.tfaforms.net/315>) and service was completed by electronic means by transmittal of the documents referenced herein on the EF System.

[XX] BY ELECTRONIC MAIL THROUGH CASE ANYWHERE: On interested parties set forth on the attached service list.

[XX] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 30, 2024 at Woodland Hills, California.



Michelle Tanzer