

Adam Rose (210880)
adam@frontierlawcenter.com
Manny Starr (319778)
manny@frontierlawcenter.com
Frontier Law Center
23901 Calabasas Road, #2074
Calabasas, CA 91302
Telephone: (818) 914-3433
Facsimile: (818) 914-3433

Attorneys for Plaintiff
Mariano Gagliardi

ADDITIONAL COUNSEL ON FOLLOWING PAGE

SUPERIOR COURT OF CALIFORNIA

COUNTY OF RIVERSIDE

MARIANO GAGLIARDI, individually and on
behalf of all similarly situated and aggrieved
employees,

Plaintiff,

v.

RALPH LAUREN RETAIL, INC., a Delaware
Corporation doing business in California, and
DOES 1 to 100,

Defendants.

AND CONSOLIDATED ACTION.

) NO. CVRI2103581
) Consolidated with CVR2200840
)
) PLAINTIFFS' NOTICE OF MOTION
) AND MOTION FOR PRELIMINARY
) APPROVAL; MEMORANDUM OF
) POINTS AND AUTHORITIES;
) DECLARATION OF ADAM ROSE;
) DECLARATION OF MAX GAVRON;
) DECLARATION OF LARRY LEE;
) DECLARATION OF WILLIAM
) MARDER; DECLARATION OF
) MARIANO GAGLIARDI;
) DECLARATION OF ANGELICA
) ROMERO; DECLARATION OF DANIEL
) DE LA CRUZ; DECLARATION OF
) ALYSSA CATALANO; DECLARATION
) OF JODEY LAWRENCE; PROPOSED
) ORDER

Date: June 3, 2024
Time: 8:30 a.m.
Dept: 1
Res: 390594856597

1 Larry W. Lee (State Bar No. 228175)
2 Max Gavron (State Bar No. 291697)
3 Mai Tulyathan (State Bar No. 316704)

DIVERSITY LAW GROUP, P.C.

4 515 S. Figueroa Street, Suite 1250
5 Los Angeles, CA 90071

6 (213) 488-6555

7 (213) 488-6554 facsimile

8 lwlee@diversitylaw.com

9 mgavron@diversitylaw.com

10 ktulyathan@diversitylaw.com

11 WILLIAM L. MARDER, ESQ. (CBN 170131)

12 bill@polarislawgroup.com

Polaris Law Group

13 501 San Benito Street, Suite 200

14 Hollister, CA 95023

15 Tel: (831) 531-4214

16 Fax: (831) 634-0333

17 Attorneys for Plaintiff ANGELICA ROMERO,
18 as an individual and on behalf of all others similarly situated
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1 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on June 3, 2024, at 8:30 a.m. in Department 1 of the
3 Riverside County Superior Court located at 4050 Main St., Riverside, CA 92501, plaintiffs
4 Mariano Gagliardi and Angelica Romero will move the court pursuant to Rule of Court 3.769(c)
5 and Code of Civil Procedure section 382 for an order for the following: (1) preliminarily approving
6 the settlement, (2) provisionally certifying the class, (3) approving the class notice and plan, (4)
7 appointing class representatives and class counsel, (5) appointing a settlement administrator, and
8 (6) scheduling a final approval hearing.

9 The motion will be unopposed and is based on the memorandum of points and authorities
10 and the declarations of Adam Rose with exhibits including the settlement agreement and proposed
11 notice to class members, Max Gavron, Larry W. Lee, William Marder, and Plaintiffs.

12
13 Date: May 9, 2024

FRONTIER LAW CENTER

14
15 /s/ Adam Rose
16 Attorney for Plaintiff
17 Mariano Gagliardi
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 Plaintiffs Mariano Gagliardi and Angelica Romero seek preliminary approval of a \$375,000
4 class action settlement with defendant Ralph Lauren Retail, Inc. (“RL”). The settlement provides a
5 recovery to the 934 class members who worked in nonexempt capacities at RL’s outlet stores. RL
6 operates 19 outlet stores in California. Mr. Gagliardi worked at RL’s store in a retail capacity in
7 Cabazon from February 11, 2018 to June 10, 2021, and Ms. Romero worked for RL from
8 approximately April 2012, through November 2021.

9 Correspondingly, the class period is from December 20, 2020 to July 8, 2023 which is 60
10 days after the May 9, 2023 mediation. As explained further below, RL was involved in a prior class
11 action called *Gilmore v. Ralph Lauren Retail, Inc.* in Ventura County, case number 56-2018-
12 00514077-CU-OE-VTA with a class period from September 25, 2014 to December 19, 2020.
13 Consequently, the class period for this case starts after the release from the prior action ended.

14 The class is defined as all hourly, non-exempt Polo Ralph Lauren Factory Store employees
15 employed by Defendant Ralph Lauren Retail, Inc. in California during the Class Period who did
16 not sign an electronic arbitration agreement. The “Aggrieved Employees” are defined as all hourly,
17 non-exempt Polo Ralph Lauren Factory Store employees employed by Defendant Ralph Lauren
18 Retail, Inc. in California during the PAGA Period who did not sign an electronic arbitration
19 agreement. The “PAGA Period” means the period beginning December 20, 2020, and ending on
20 July 8, 2023.

21 The settlement was reached after an all-day mediation with Steve Pearl on November 14,
22 2022, and a second session on May 9, 2023. The settlement agreement was ultimately fully signed
23 on October 10, 2023.

24
25 **II. BACKGROUND**

26 The Gagliardi case was originally filed on August 3, 2021. This was subsequent to an initial
27 PAGA letter that was sent to RL and uploaded to the LWDA website on July 15, 2021. The causes
28 of action in the Gagliardi complaint were the following: 1) unpaid sick time wages, 2) waiting time

1 penalties, and 3) violation of the Unfair Competition Law. A first amended complaint was filed on
2 October 6, 2021 to add causes of action for wage statement penalties and PAGA penalties. On
3 March 1, 2022, Angelica Romero filed her complaint in Riverside Superior Court, which alleged
4 claims for failure to pay wages, violation of Labor Code § 226, and violation of the Unfair
5 Competition Law. Plaintiff Romero later amended her complaint to include an allegation premised
6 on the PAGA.

7 The gist of the case is twofold. First, Plaintiffs and the class members/aggrieved employees
8 received sick pay pursuant to Labor Code section 245 et seq. which was not paid at the correct
9 regular rate. Section 246(l) provides that sick pay must be paid at the regular rate, which is
10 calculated by dividing the employee's total wages, not including overtime premium pay, by the
11 employee's total hours in the workweek. Plaintiffs and the class members received bonus
12 incentives, but the bonus incentives were not factored into the regular rate for sick pay or for
13 overtime. The regular rate violation forms the first general component of the case.

14 The second component relates to not paying overtime at the correct regular rate. The
15 employees received bonuses, and pursuant to Labor 200 bonuses should be included in the regular
16 rate for overtime payments.

17 The third component relates to going through unpaid bag security checks in contravention
18 of *Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038, which also resulted in meal and rest period
19 violations. The fourth and final component relates to derivative wage statement, waiting time, and
20 PAGA penalties. Each of these types of penalties hinged on the off-the-clock work, sick pay, and
21 overtime violations described above. On November 16, 2023, Plaintiffs filed a Consolidated
22 Second Amended Complaint, which is the operative pleading.

23 The Parties have conducted an extensive investigation of the facts and the law. The Parties
24 held numerous meetings and informal conferences wherein they exchanged information, class data,
25 and theories of the case. Counsel for the Parties further investigated the applicable law as applied
26 to the facts discovered regarding the alleged claims of Plaintiffs and potential defenses thereto,
27 Defendant's contentions that it at all times complied with all relevant Labor Code provisions, and
28 the damages claimed by Plaintiffs. In addition, prior to mediation, the Parties exchanged relevant

1 data and documents applicable to Plaintiffs' claims, including Defendant's relevant policies and
2 class member data. The settlement was reached after the exchange of data regarding the number of
3 putative class members and claims alleged, and two mediation session with experienced
4 employment law mediator Steven Pearl, as well as follow-up conferences that led to the settlement.
5 Subsequently, the settlement's terms and a discussion of the factors that merit preliminary approval
6 of the settlement follow.

7 8 **III. THE SETTLEMENT TERMS**

9 RL will pay a total of \$375,000 on a non-reversionary basis. The delineation of this figure is
10 the following:

- 11 a) \$10,000 as a service award to Mariano Gagliardi;
- 12 b) \$10,000 as a service award to Angelica Romero;
- 13 c) \$14,000 as administration expenses;
- 14 d) up to \$125,000 (1/3 of settlement) for attorney fees;
- 15 e) up to \$24,000 for attorney costs; and
- 16 f) \$18,750 for a PAGA allocation, which will be distributed 75% to the LWDA and 25% to
17 the Aggrieved Employees.

18 This leaves a net settlement fund of \$176,251 to share among the 934 class members. That
19 is an average recovery of \$188.71 per class member, which is an excellent result given the risks
20 and benefits of moving forward with litigation as discussed below. As explained further in Section
21 X.G. of the settlement agreement, the payout fund will be distributed based on a per workweek
22 basis; class members will receive a pro rata share based on how many workweeks they worked
23 during the class period as compared to all workweeks worked by all class members during the class
24 period. The number of workweeks for a class member is determined by adding all the calendar
25 days within their respective dates of employment and dividing that number by seven – this will be
26 the class member's Workweek Figure.

27 Then, the payout fund (i.e., net settlement amount) will be divided by the total workweeks
28 from all class members to arrive at a per workweek amount. The per workweek amount will be

1 multiplied by each class member's Workweek Figure.

2 An example in the settlement agreement is that if a class member worked 365 days, they
3 would have a Workweek Figure of 52 weeks. If the Payout Fund were (for example only)
4 \$171,937.50, and the total workweeks for all class members was 22,514, it would result in a \$7.64
5 per workweek amount. This exemplar class member would be eligible for \$7.64 per week for 52
6 weeks, or a total of \$397.28.

7 From each class member's settlement share, 1/3 is attributed to taxable wages, and 2/3 is
8 attributed to nontaxable payments. Correlatively, the PAGA payout fund, it will distributed to the
9 aggrieved employees on a per workweek basis; the aggrieved employees will receive a pro rata
10 share based on how many workweeks they worked during the PAGA period compared to all
11 workweeks worked by all aggrieved employees during the PAGA period.

12 The number of workweeks will be determined by adding all the calendar days within the
13 dates of employment and dividing that number by seven. This will be considered each Aggrieved
14 Employee's PAGA Workweek Figure. The individual PAGA payouts will be calculated by
15 dividing the PAGA payout fund by the total of all Aggrieved Employees' Workweek Figures to
16 arrive at a per workweek amount, and then multiplying the amount by each aggrieved employee's
17 PAGA workweek figure.

18 Any checks that are not returned but remain uncashed within 180 days of issuance will be
19 redistributed to Participating Class Members and Aggrieved Employees.

20
21 A. Scope of the Class Release

22 As stated in paragraph X.C. of the settlement agreement, as of the effective date and
23 settlement funding, the participating class members, including the named plaintiffs/class
24 representatives, release the Released Parties and from all any and all claims, demands, rights,
25 liabilities, and causes of action during the Class Period, of every nature and description whatsoever,
26 known or unknown, asserted or that might have been asserted, whether in contract, or for violation
27 of any California or Federal statute, rule or regulation, based on California or Federal wage-and-
28 hour laws, whether for economic damages, restitution, penalties or liquidated damages, arising out

of, relating to, or in connection with the Class Claims alleged or that could have been alleged based upon the facts pleaded in the Actions under any theory of law, including but not limited to all claims for unpaid wages, including but not limited to minimum wages, straight time wages, overtime wages (including but not limited to those brought on an off-the-clock, bag check, rounding, regular rate, overtime computation or other theory); sick leave claims; meal and rest period claims (including failure to provide meal and rest periods and/or to pay properly calculated penalties); wage statement claims; recordkeeping claims; all claims arising under the California Labor Code, IWC Wage Orders, local ordinance, or otherwise, which are based on the facts alleged in the Actions; and any and all associated penalties and damages on any and all claims (including but not limited to PAGA penalties that are premised on the facts alleged in the Actions and/or Plaintiffs' notices to the Labor and Workforce Development Agency, wage statement penalties, waiting time penalties, late payment penalties, meal and rest period penalties, and liquidated damages)..

Similarly, as of the Effective Date and funding of the Settlement Fund, Plaintiffs and the State of California shall release the Released Parties from all claims alleged or that could have been alleged based upon the facts pleaded in the Actions under any theory of law, including but not limited to all claims under the PAGA for unpaid wages, including but not limited to minimum wages, straight time wages, or overtime wages (including but not limited to those brought on an off-the-clock, bag check, rounding, regular rate, overtime computation or other theory); sick leave claims; meal and rest period claims (including failure to provide meal and rest periods and/or to pay properly calculated penalties); wage statement claims; recordkeeping claims arising during the PAGA Period.

As shown below, the settlement merits preliminary approval.

IV. PRELIMINARY APPROVAL OF THE SETTLEMENT IS APPROPRIATE

The purpose of preliminary evaluation of class action settlements is to determine whether the proposed settlement is within the range of possible approval, whether notice to the class of the settlement terms and conditions should be sent, and to the schedule a fairness hearing. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 234-35.)

1 For determining whether a class settlement is fair, adequate and reasonable, a court must be
2 provided with “basic information about the nature and magnitude of the claims in question and the
3 basis for concluding that the consideration being paid for the release of those claims represents a
4 reasonable compromise.” (*Clark v. American Residential Services LLC* (2009) 175 Cal. App. 4th
5 785, 799.) Thus, the court exercises discretion through applying well-recognized factors when
6 deciding whether a class action settlement is fair. (*Id.* at 799.)

7 The list of factors, which is not exhaustive and should be tailored to each case, includes “the
8 strength of plaintiff’s case, the risk, expense, complexity and likely duration of further litigation,
9 the risk of maintaining class action status through trial, the amount offered in settlement, the extent
10 of discovery completed and the stage of the proceedings, the experience and views of counsel, the
11 presence of a governmental participant, and the reaction of the class members to the proposed
12 settlement.” (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 128.)

13 The most important factor the court should consider is the strength of the case for plaintiff
14 on the merits, balanced against the amount offered in settlement. (*Muñoz v. BCI Coca-Cola*
15 *Bottling Co. of Los Angeles*, 186 Cal. App. 4th (2010) 399, 407-408; *Kullar, supra*, 168 Cal. App.
16 4th at 130.) These factors are analyzed below.

17 A. The Settlement is the Result of Informed, Arms’ Length Negotiations

18 Courts typically recognize that a “presumption of fairness exists where (1) the settlement is
19 reached through arm’s-length bargaining; (2) sufficient investigation allows counsel and the court
20 to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of
21 objectors is small.” (*Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1802.) “[W]hat
22 transpires in settlement negotiations [including mediation] is highly relevant to the assessment of a
23 proposed settlement’s fairness.” (*State v. Levi Strauss & Co.* (1986) 41 Cal. 3d 460, 482.) In short,
24 there is a presumption that the negotiations were conducted in good faith. (Newberg on Class
25 Actions § 13:45 (5th ed. 2011-2017).)

26 As stated above, the parties participated in two mediations with Steven Pearl, and
27 subsequent discussions facilitated by Steven Pearl facilitated finalization of the terms. The fully
28 signed settlement agreement is attached to the concurrently filed declaration of Adam Rose.

Counsel came prepared, with clients available, and intelligently discussed the case, including the strengths and weaknesses of the claims, the risks of further litigation, the state of the law relating to the claims, and the respective valuations. The negotiations were thorough and conducted at arm's length between attorneys with significant wage and hour class action experience; the informal data that was produced and analyzed helped construct the settlement.

B. The Parties Settled After Factual Investigation and Informal Discovery

There is a presumption that a proposed settlement is fair and reasonable when there was an investigation and discovery to permit counsel and the court to act intelligently, and counsel are experienced in similar litigation. (*Dunk, supra*, 48 Cal. App. 4th at p. 1802.)

Pursuant to the Parties' agreement to an informal exchange of information for the mediation, RL agreed to produce (and did produce) the following: 1) exemplar arbitration agreements, 2) a sampling of the class members' time records, 3) a sampling of the class members' pay records, 4) Mariano Gagliardi's and Angelica Romero's full personnel files, 5) a list of bonus payouts from April 2021, and 6) a list of pay codes.

Using this data, Plaintiffs engaged an economics expert to help formulate a damages analysis and projection. The maximum liability is discussed below, tempered with the risks inherent in proceeding further.

C. Class Counsel is Highly Experienced and Support Preliminary Approval

Plaintiffs and the class are represented by well-qualified counsel with significant experience in wage and hour class action litigation. Class counsel's recommendations usually receive a presumption of reasonableness when there is familiarity with the lawsuit, are competent, have ample experience with the type of litigation, and discovery has been completed. (*Boyd v. Bechtel Corp.* (N.D. Cal. 1979) 485 F.Supp.610; Newberg on Class Actions § 13:53 (5th ed. 2011-2017).)

D. The Settlement Provides Substantial Monetary Relief to the Class; Discussion of Risks

The party seeking approval provides information about the nature of the claims and the asserted basis for concluding that the settlement is fair. (*Kullar, supra*, 168 Cal. App. 4th at p. 133.)

1 A settlement is not judged against what might have been recovered at trial and does not have to
2 provide 100% of the damages sought. (*Wershba, supra*, 91 Cal.App.4th at p. 250.)

3 As stated above, the average recovery each class member will receive is \$188.71. This
4 amount is favorable given the risks to the three components of the case delineated above; the risks
5 are discussed in detail below. At the outset, it is important to note that the proposed settlement is
6 limited to those individuals for whom Defendant did not have a signed, electronic arbitration
7 agreement during the Class Period. Defendant argued that Plaintiffs' claims were not capable of
8 certification because class members were subject to arbitration agreements that included class
9 action waivers, while Plaintiffs countered that certain versions of the arbitration agreements were
10 more susceptible to attack and thus at least claims on behalf of some individuals were capable of
11 certification.

12 1. Sick Pay Claim

13 Under the Healthy Workplaces, Healthy Families Act of 2014, Cal. Lab. Code § 245 et seq.
14 ("HWHFA"), "[p]aid sick time for nonexempt employees shall be calculated in the same manner as
15 the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not
16 the employee actually works overtime in that workweek." Cal. Lab. Code § 226(l)(1) (emphasis
17 added). Here, Plaintiffs allege that during workweeks where an employee earned non-discretionary
18 wages and sick pay earnings, Defendant paid the sick pay at the employee's base hourly rate.
19 Although Labor Code section 246(l) provides that accrued sick time must be paid at the correct
20 regular rate, the primary risk is that not all class members received bonuses during the same pay
21 periods that sick time was paid. Typically, the regular rate is found by adding up the total
22 remuneration the employee receives by the total hours worked in the workweek. (29 CFR §
23 778.108.)

24 Nonetheless, sick pay is not paid every workweek, since sick pay accrues at one hour for
25 every 30 hours of work, for a maximum of 24 hours of sick pay per year (this amount was
26 increased to a maximum of 40 hours of sick pay beginning January 1, 2024). So, to trigger a sick
27 pay regular rate violation, the employee would have to use sick pay hours during the same pay
28 periods they were paid an incentive bonus.

1 Plaintiffs' expert found that for the class members that did not sign arbitration agreements
2 following the settlement in *Gilmore v. Ralph Lauren Retail, Inc.*, the maximum liability for not
3 paying sick time at the correct regular rate was \$5,523 assuming 234 underpaid sick hours. This
4 relatively low number is reflective of the risks described above.

5 In fact, the maximum amount might be lower if, statistically, the number of employees who
6 received sick pay during the same workweek they received an incentive bonus is not as frequent
7 and the analyzed wage statements. A very in-depth analysis of all the class members' wage
8 statements would follow, and the results could possibly show a lower violation rate.

9 Defendant also would have contended that Plaintiffs could not recover sick leave directly
10 because there is no private right of action. See Cal. Lab. Code § 248.5 (providing only that "the
11 Labor Commissioner or the Attorney General may bring a civil action in a court of competent
12 jurisdiction against the employer or other person violating this article"); see also, e.g., *Titus v.*
13 *McLane Foodservices, Inc.*, 2016 WL 4797297, at *4 (E.D. Cal. Sept. 14, 2016) (the sick pay
14 "statute provides that only the LWDA may recover civil penalties for a violation"); *Schroeder v.*
15 *Envoy Air, Inc.*, 2016 WL 11520388, at *11 (C.D. Cal. Sept. 27, 2016) ("because the legislature did
16 not clearly and unmistakably create a private right of action to enforce section 246(h), the Court
17 concludes that there is none available"); but see *Wood v. Kaiser Found. Hosps.*, 88 Cal. App. 5th
18 742, 764, 305 Cal. Rptr. 3d 112, 126 (2023), as modified (Mar. 23, 2023) ("In sum, we hold that
19 section 248.5, subdivision (e) does not preclude an aggrieved employee from bringing a PAGA
20 action for violations of the Act.").

21 2. Overtime Regular Rate Claim

22 The same risk for the sick pay claim applies to the regular rate claim. A class member
23 would need to have worked overtime the same workweek they received an incentive (or other)
24 bonus. Mr. Gagliardi's personnel file shows a few instances where he received bonuses during the
25 same workweek he received overtime. Defendant denies that it failed to pay overtime wages at the
26 regular rate of pay. Consequently, the resulting underpaid overtime is relatively low. Assuming this
27 instance is similarly low occurrence rate among the class members, this constitutes another risk
28 weighing in favor of settlement.

1 3. Off the Clock Claim & Related Meal & Rest Period Claims

2 The crux of the off the clock claim is that Plaintiffs contend that employees had to go
3 through unpaid security bad checks to enter and leave the stores. Plaintiffs also argued that the
4 mandatory inspections also infringed on their meal and rest periods because they were required to
5 undergo inspections during their allotted meal/rest periods if they left the store.

6 *Frlekin*, supra at p. 644 held that time spent waiting for and undergoing exit searches is
7 compensable as hours worked. Although the employees of Apple could spend up to 45 minutes
8 waiting to go through security checks, the same situation did not occur entering a Ralph Lauren
9 Retail outlet store. For example, the Cabazon location is a typical mall-size store which did not
10 necessarily require a long wait for security checks.

11 Plaintiffs' expert found the maximum liability for unpaid time waiting for security checks
12 among the class members who did not sign arbitration agreements was \$162,019 assuming 10
13 minutes of off-the-clock work per shift. The amount might be lower if an employee did not have to
14 wait at all if, for example, there were not many people at a store on a given day. Defendant also
15 argued that it did not require employees to participate in unpaid security check procedures and
16 therefore this claim was heavily disputed.

17 Further, to the extent that any employee was able to demonstrate they were off the clock
18 while undergoing a security inspection, Defendant argued this would have been a unique scenario
19 not capable of class resolution. Defendant argued that these claims are not suitable for class
20 treatment because its policies required accurate recording of time and prohibited off-the-clock
21 work. Defendant's written policies strictly prohibit non-exempt employees from working off the
22 clock for any reason. Furthermore, all time spent working must be reported. Defendant further
23 argued that individual questions predominate. Citing to *Brinker Restaurant Corp. v. Superior*
24 *Court*, 53 Cal. 4th 1004 (2012) and its progeny, Defendant argued that its liability is contingent on
25 proof that Defendant knew or should have known that off-the-clock work was occurring. In the
26 absence of a uniform policy, Defendant contended that Plaintiffs will not be able to establish the
27 requisite knowledge through common proof and thus certification would not have been granted.

28 With respect to the meal and rest period theories of liability, Defendant argued that

1 Plaintiffs would have to demonstrate that Defendant did not meet its obligation under the Labor
2 Code and *Brinker* to provide employees a meal or rest period. *See Brinker Rest. Corp. v. Superior*
3 *Ct.*, 53 Cal. 4th 1004, 1040, 273 P.3d 513, 537 (2012) (“On the other hand, the employer is not
4 obligated to police meal breaks and ensure no work thereafter is performed.”). This, Defendant
5 argued, would result in a claim that could not be certified as a class action because Defendant
6 maintained and enforced legally compliant policies. Defendant claimed this would require
7 Plaintiffs to investigate and ask each putative class member the reason time records may have
8 triggered the payment of a premium or shown a deficient meal period and whether a premium was,
9 in fact, owed to the class member. Defendant argued a rest period theory of liability would be even
10 more difficult to certify and prove because time records did not demonstrate when employees
11 started or ended their rest periods. Thus, to be successful, Plaintiffs would have to evaluate each
12 employee’s individual circumstances, including: 1) whether the employee timely took a rest period;
13 2) and, even if they did, whether they decided to leave the premises such that they were subjected
14 to security inspection. The maximum exposure on Plaintiffs’ meal/rest period theories of liability
15 ranged from approximately \$866,250 on the high end (assuming one violation per shift and
16 estimating from the data produced by Defendant 55,000 shifts with a \$15.75 average rate of pay),
17 or more conservatively approximately \$216,563 (assuming a 25% violation rate). In either case,
18 Defendant argued that the likelihood of certification on these claims was extremely low.¹

19 20 4. Related Wage Statement and Waiting Time Penalties

21 Usually, risks with prevailing on wage statement penalties is the necessity to show a
22 knowing and intentional violation. (Lab. Code, § 226(e)(1).); *see Harris v. Vector Mktg. Corp.*, 656
23 F. Supp. 2d 1128, 1145-46 (N.D. Cal. 2009) (granting summary judgment in favor of employer and
24 finding its conduct was not “knowing and intentional”). There is a possibility that RL did not
25 intentionally miscalculate sick pay and overtime at the regular rate, and this is a risk for wage
26 statement penalties. Plaintiffs’ expert asserted that the maximum liability for wage statement

27
28 ¹ While Plaintiffs also brought claims under the unfair competition law (“UCL”), the potential exposure is largely
duplicative of their claims asserted directly under the Labor Code because Plaintiffs’ analysis factors in the extended
four year statute of limitations provided by the UCL claim.

penalties was \$723,046 assuming 7,583 pay periods with wage statement violations. On May 6, 2024, the California Supreme Court confirmed that a wage statement claim requires a plaintiff to prove the violation was knowing and intentional, making this claim even more difficult to prove. *Naranjo v. Spectrum Sec. Servs., Inc.*, No. S279397, 2024 WL 1979980, at *1 (Cal. May 6, 2024).

For waiting time penalties, there must be a willful nonpayment of wages. (Lab. Code, § 203.) Like with the wage statement violations, there is a possibility that RL did not willfully act if it was unaware of the regular rate issue; the regular rate issue did not come up in the *Gilmore* case. The maximum liability for the waiting time violations was \$389,869 assuming 131 employees who no longer worked for RL. The points above were restated in *Naranjo v. Spectrum Security Services, Inc.* (2023) 88 Cal.App.5th 937, which was another basis for a risk in proceeding further. *See, also Apodaca v. Costco Wholesale Corp.*, 2014 WL 2533427, at *3 (C.D. Cal. June 5, 2014) (“Where an employer has a good faith belief that it is not in violation of Section 226, any violation is not knowing and intentional.”)

With respect to the sick pay allegations, some courts have held that sick pay is not “wages” entitling employees to Section 203 penalties even if underpaid. *See McPherson v. EF Intercultural Found., Inc.*, 47 Cal. App. 5th 243, 263, 260 Cal. Rptr. 3d 640, 654 (2020), review denied (July 22, 2020) (“because paid sick leave is not considered a form of “wages,” employers are not required to pay employees their unused sick leave on termination—accrued or not. (§ 246, subd. (g)(1).)”).

5. PAGA Penalties

Succeeding with PAGA penalties would be dependent on proving the underlying violations and subject to the Court’s discretion to reduce penalties. Defendant represented that there are 22,514 workweeks during the Class Period, which translates into approximately 11,257 pay periods in the PAGA Period (22,514 workweeks / 2 weeks). Thus, Plaintiffs estimated that Defendant could face civil penalties of up to approximately \$1.13 million (~11,257 x \$100 penalty). This assumes complete victory at trial and that the Court would award the maximum penalty of \$100 per pay period, which is far from certain as discussed above. Further, while the PAGA provides for a heightened penalty for a “subsequent violation,” courts are hesitant to award the heightened penalty absent a showing of a prior violation. *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1209

(2008); *accord Amalgamated Transit Union Local 1309 v. Laidlaw Transit Service, Inc.* 2009 WL 2448430, at *9 (S.D. Cal. Aug. 10, 2009) (“under California law, courts have held that employers are not subject to heightened penalties for subsequent violations unless and until a court or commissioner notifies the employer that it is in violation of the Labor Code”); *see also Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1144 (9th Cir. 2021) (holding no subsequent penalty unless prior citation or court ruling).

Even assuming Plaintiffs ultimately prevailed on their PAGA claims, the Court still has discretion to reduce any PAGA penalties. Pursuant to Labor Code § 2699(e)(2), the Court can decline to award PAGA penalties where “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.” Indeed, as shown in the Court of Appeal’s decision in *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), while the plaintiff prevailed on his PAGA claim upon trial, the trial court reduced the maximum PAGA penalty amount by 90%, citing the employer’s good faith attempt at complying with the law. *Id.* at p. 517. Upon review, the Court of Appeal found such reduction to be proper. *Id.* at p. 539. Thus, even if Plaintiffs were to successfully prove their claims at trial, there is a possibility that the Court may only award a small percentage of PAGA penalties, as the Court has discretion to do so.

Although Plaintiffs believe in the merits of the alleged claims and maintain that there is no reason for reducing PAGA penalties, Plaintiffs are aware that Defendant may raise defenses to the claims. Thus, even if Plaintiffs were to successfully prove their claims at trial, there is a possibility that the Court may only award a small percentage of PAGA penalties, as the Court has discretion to do so. The Gross Settlement Amount was premised with this risk in mind, associated with the possibility of the Court significantly reducing Plaintiffs’ PAGA penalties, along with other attendant risks, even if Plaintiffs were to prevail at trial.

PAGA penalties tend to increase rapidly, but they must be contrasted with the risks of proceeding further since violations must be shown for each aggrieved employee for each pay period which might not have been feasible here.

///

1 E. Discussion of Kullar Factors

2 The eight *Kullar* factors are analyzed below.

3 1. Strengths of the Case

4 The strengths are that RL did not factor bonus payments into the regular rate for overtime
5 and sick pay, which are wage and hour violations. However, as explained above, coupling bonus
6 payments with workweeks where sick pay and/or overtime was paid was infrequent.

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

8 The risk is the constant that regular rate violations did not occur on a robust basis, and the
9 risk for the off the clock portion is that many employees might state the time spent for security
10 checks was quite short. This would require taking statements from many of the class members to
11 ascertain their experiences and might weigh against class certification.

12 3. Risk of Maintaining Class Action Status Through Trial

13 It might not be difficult to obtain certification for the regular rate violations since they are
14 dependent on the data in the wage statements, but if discovery showed that relatively few members
15 received sick pay or overtime for workweeks where bonuses were paid, this could pose a risk for a
16 motion to decertify.

17 4. The Amount Offered in Settlement

18 The \$375,000 is within the range of reasonableness as explained below.

19 5. Extent of Discovery Completed and the Stage of Proceedings

20 As explained above, the parties agreed to informally exchange data described above in
21 anticipation of the mediation, and complied with the case management order directing the parties to
22 engage in settlement at the earliest practicable time.

23 6. Experience and Views of Counsel

24 All counsel support the settlement as it was finalized through arm's length negotiations with
25 mediator Steven Pearl. Further, the attached declaration demonstrates experience with facilitating
26 wage and hour settlements.

27 7. Presence of a Governmental Participant

28 The Labor and Workforce Development Agency did not involve itself in this case.

1 8. Reaction of Class Members to the Proposed Settlement

2 No class member has commented about the proposed settlement to date. Plaintiffs will be
3 able to provide further insight into the response of the class following distribution of notice, to the
4 extent the Court grants preliminary approval.

5 F. The Settlement is Within the Range of Reasonableness

6 The maximum liability, excluding PAGA penalties, for the class members who did not sign
7 arbitration agreements was approximately \$2.15 million. The gross settlement of \$375,000,
8 excluding the PAGA allocation, represents 17% of the maximum liability, and this is within the
9 range of reasonableness. Indeed, numerous courts have held that **gross** settlements approximating
10 between only 8 and 25% of the defendant’s potential exposure are fair and reasonable. *See, e.g., In*
11 *re Mego Fin. Corp. Secs. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (holding that class action
12 settlement recovering 16% of potential exposure was fair and reasonable; “[i]t is well-settled law
13 that a cash settlement amounting to only a fraction of the potential recovery does not per se render
14 the settlement inadequate or unfair. Rather, the fairness and the adequacy of the settlement should
15 be assessed relative to risks of pursuing the litigation to judgment”; noting that whether the
16 settlement is fair and adequate depends on the “the difficulties in proving the case”); *Bellinghausen*
17 *v. Tractor Supply Co.*, No. 13-CV-02377-JSC, 2015 WL 1289342, at p.*6 (N.D. Cal. Mar. 20,
18 2015) (holding that class action settlement recovering between **8.5% and 25%** of the defendant’s
19 potential exposure was fair); *Van Ba Ma v. Covidien Holding Inc.*, U.S. Dist. Ct. Case No. 8:12-cv-
20 02161 (C.D. Cal. 2014) (granting preliminary approval of wage and hour class settlement which
21 obtained **only 9.1%** of projected damages, given the risks of continued litigation); *Villegas v. J.P.*
22 *Morgan Chase & Co.*, No. CV 09-00261 SBA EMC, 2012 WL 5878390, at p.*6 (N.D. Cal. Nov.
23 21, 2012) (holding that gross class action settlement of approximately 15% of the potential
24 recovery was fair and reasonable).

25 If the Court awarded full PAGA penalties, the total potential exposure increases to
26 approximately \$3.27 million. Analyzing this exposure results in a settlement value of
27 approximately 11% of the total exposure, which still falls within the range of reasonableness
28 addressed above. Of course, if the Court were to reduce PAGA penalties as was done in

1 *Carrington*, the value of the settlement compared to the maximum exposure would increase.
2 Accordingly, the proposed settlement merits preliminary approval.

3
4 **V. PROVISIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE**

5 Provisional certification is appropriate with preliminary approval where the class has not
6 been certified yet. (Rules of Court, rule 3.769(d), see also Newberg on Class Actions §§ 13:16-
7 13:18 (5th ed. 2011-2017). To certify a settlement class, there should be an ascertainable class and
8 a well-defined community of interest in the questions of law and fact. (*Vasquez v. Superior Court*
9 (1971) 4 Cal. 3d 800, 809-811.)

10 A. There is an Ascertainable and Sufficiently Numerous Class

11 The class members are easily identifiable from RL's records. The information exchanged
12 shows a class size of 934 class members, easily meeting the numerosity requirement.

13 B. There is a Well-Defined Community of Interest / Commonality

14 The community of interest requirement involves three factors: (1) predominant common
15 questions of law or fact; (2) class representatives with claims or defenses typical of the class; and
16 (3) class representatives who can adequately represent the class. (*Linder v. Thrifty Oil Co.* (2000)
17 23 Cal.4th 429, 435.) The predominance factor tests whether a proposed class is sufficiently
18 cohesive to warrant adjudication by representation. (See, e.g., *Clothesrigger, Inc. v. GTE Corp.*
19 (1987) 191 Cal. App. 3d 605; *Lazar v. Hertz Corp.* (1983) 143 Cal. App. 3d 128.)

20 Common issues of fact and law predominate because the action concerns the same
21 violations, namely not paying the correct regular rate for sick pay and overtime, not paying for
22 security checks, and related penalties. Resolution of these questions will determine liability for the
23 class overall. To the extent any individual questions exist about unpaid wages, these issues go to
24 damages, not liability, which does not preclude the maintenance of the suit as a class action.
25 (*Vasquez, supra*, 4 Cal.3d at p. 815.)

26 C. Plaintiffs' Claims are Typical, and the Adequacy Requirement is Met

27 Plaintiffs' claims are typical of the class because they were subject to the same alleged non-
28 compliant policies and procedures as they worked in the retail locations like the other RL workers.

1 Adequacy of representation is met with two conditions: first, named plaintiff must be
2 represented by counsel qualified to conduct the pending litigation; second, named plaintiff's
3 interests cannot be antagonistic to those of the class. (*Classen v. Weller* (1983) 145 Cal. App. 3d
4 27, 46-47.)

5 Frontier Law Center and Diversity Law Group have significant experience prosecuting
6 wage and hour class actions as explained in the attached declarations. Second, Plaintiffs are not
7 aware of any conflicts of interest with the class. The typicality and adequacy requirements are met.

8 9 **VI. THE PROPOSED CLASS NOTICE IS ACCEPTABLE**

10 Rules of Court, rule 3.769(f) requires that class members be provided with notice of the
11 final approval hearing, as well as an explanation of the proposed settlement and objection
12 procedures. Procedural due process requires notice reasonably calculated to apprise interested
13 parties of the pendency of the action affecting their interests and an opportunity to present their
14 objections. (*Ryan v. Cal. Interscholastic Fed'n – San Diego Section* (2001) 94 Cal. App. 4th 1048,
15 1072.) A notice that meets this standard and is neutrally worded satisfies due process. (*Phillips*
16 *Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 812.)

17 **A. The Notice is Accurate, Informative, and Appropriate**

18 The proposed notice attached to the settlement agreement provides all the information
19 needed to make a fully informed decision about the settlement. The notice summarizes the lawsuit,
20 including the contentions and denials of the parties, and explains the terms and conditions of the
21 settlement in plain language and in an informative and coherent manner. The notice explains the
22 process class members should follow if want to exclude themselves from the settlement.

23 The notice provides that class members may also at the fairness hearing to object,
24 and it provides that class members who do not object or exclude themselves will have waived all
25 objections to the settlement. Finally, the notice will include an estimated calculation of the class
26 member's share of the net settlement amount based on his or her number of qualifying workweeks,
27 and it explains the process for disputing the number of qualifying workweeks.

28 ///

1 B. The Notice Plan Satisfies Due Process

2 The proposed notice plan is consistent with Rule of Court 3.769(f), is the best notice
3 practicable, and is the method to give the best actual notice to the class members. RL will provide
4 the class list to the settlement administrator, who will then send the notice to the class members.

5 If any notice is returned as undeliverable without a forwarding address the administrator
6 will perform a skip trace to locate a better mailing address. If the administrator obtains a more
7 current address from the skip trace, it will resend the notice to that address. Thus, procedural due
8 process is satisfied with the proposed notice plan.

9
10 **VII. THE REQUESTED ATTORNEY FEES AND COSTS ARE REASONABLE**

11 Although the motion for attorney fees and costs will be filed in conjunction with the motion
12 for final approval, in general an award of attorney's fees in common fund wage and hour class
13 action settlements should start with the percentage method. (See *Laffitte v. Robert Half Int'l.* (2016)
14 1 Cal. 5th 480, 503.)

15 An award of 33% of the fund in attorneys' fees mimics the marketplace as it is supported by
16 the fact that typical contingency fee agreements provide that class counsel will recover 33% if the
17 case is resolved before trial and 40% if the case is tried." (*Fernandez v. Victoria Secret Stores LLC*,
18 2008 WL 8150856 at *16 n. 59 (C.D. Cal. July 21, 2008). Indeed, "empirical studies [that] show
19 that . . . fee awards in class actions average around one-third of the recovery." (*Chavez v. Netflix,*
20 *Inc.* (2008) 162 Cal. App. 4th 43, 66 n.11.) Thus, Plaintiffs respectfully request the court to
21 consider these principles when analyzing the settlement.

22 **VII. NOTICE TO THE LWDA**

23 Concurrently with this Motion, Plaintiffs provided notice to the LWDA as required under
24 the PAGA.

25
26 **VIII. CONCLUSION**

27 Plaintiffs respectfully request the court to grant preliminary approval, to provisionally
28

1 certify the class, to direct that notice is sent to the class members, to appoint Plaintiffs as the class
2 representatives and Frontier Law Center and Diversity Law Group as class counsel, designate
3 Phoenix Settlement Administrators as the settlement administrator, and to set a fairness hearing in
4 approximately four months.

5 Date: May 9, 2024

FRONTIER LAW CENTER

7
8 /s/ Adam Rose
9 Attorney for Plaintiff
Mariano Gagliardi