MOON & YANG, APC
Kane Moon (SBN 249834)
E-mail: kane.moon@moonyanglaw.com
Allen Feghali (SBN 301080)
E-mail: allen.feghali@moonyanglaw.com
Brett Gunther (SBN 306448)
E-mail: brett.gunther@moonyanglaw.com
Sohyun Julie Oh (SBN 341157)
E-mail: julie.oh@moonyanglaw.com
1055 W. Seventh St., Suite 1880
Los Angeles, California 90017
Telephone: (213) 232-3128
Facsimile: (213) 232-3125

Attorneys for Plaintiff Jose Ernesto Lucas

Additional counsel listed on following page

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO

JOSE ERNESTO LUCAS, individually, and on behalf of all others similarly situated, Plaintiff, vs. SW INGREDIENTS HOLDINGS, LLC, a Delaware limited liability company; SPICE WORLD INC., a Florida corporation; SPICE WORLD, LLC, a Florida limited liability company; and DOES 1 through 10, inclusive, Defendants	Lead Case No. 21CECG01943 (Consolidated with cases 21CECG03840, 22CECG00586) [Assigned to Hon. Jonathan Skiles, Dept. 403] **CONSOLIDATED CLASS AND REPRESENTATIVE ACTION** **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR AN ORDER GRANTING PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT** Date: May 11, 2023 Time: 3:30 p.m. Dept. 403 Judge: Jonathan Skiles

JOSE MAGALLAN, on behalf of himself and all others similarly situated,

Plaintiff,

vs.

SW INGREDIENTS HOLDINGS, LLC d/b/a SPICE WORLD, INC., a Delaware Limited Liability Company; and DOES 1 Through 10, inclusive,

Defendants.

COHELAN KHOURY & SINGER
Isam C. Khoury (SBN 58759)
E-mail: ikhoury@ckslaw.com
Michael D. Singer (SBN 115301)
E-mail: msigner@ckslaw.com
Rosemary C. Khoury (SBN 331307)
E-mail: rkhoury@ckslaw.com
605 C Street, Suite 200
San Diego, California 92101
Telephone: (619) 595-3001
Facsimile: (619) 595-3000

DAVTYAN LAW FIRM, INC.
Emil Davtyan (SBN 299363)
E-mail: support@davtyanlaw.com
400 N. Brand Blvd, Suite 700
Glendale, California 91203
Telephone: (818) 875-2008
Facsimile: (818) 722-3974

Attorneys for Plaintiff Jose Magallan

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES

CALIFORNIA CODE OF CIVIL PROCEDURE

CALIFORNIA LABOR CODE

CALIFORNIA RULES OF COURT

I. INTRODUCTION

This motion seeks preliminary approval of a pre-certification consolidated wage and hour class and PAGA[1] representative action settlement of $425,000 by Plaintiffs Jose Ernesto Lucas and Jose Magallan ("Plaintiffs"), individually and on behalf of a putative Class of California non-exempt employees against Defendants SW INGREDIENTS HOLDINGS, LLC, SPICE WORLD, INC., and SPICE WORLD, LLC (collectively, "Defendants") employed any time during the Class Period (July 20, 2017 through the date the Court preliminarily approves of the Settlement or the on the day on which the number of workweeks reaches 24,461 at Defendants' option). Declaration of Isam C. Khoury ("Khoury Decl."), ¶ 10, Ex. 1 – Class Action and PAGA Settlement Agreement ("Agreement" or "SA"), ¶ 1.12.

Plaintiffs allege Defendants maintained a practice of failing to: pay for time spent undergoing security and temperature checks and working off the clock; pay overtime wages at the correct rate incorporating all applicable pay; provide timely, compliant, off-duty meal and rest breaks or pay premiums for non-compliant breaks; provide one day's rest in seven; reimbursement reasonable and necessary work-related expenses. Derivatively, Defendants failed to provide accurate wage statements and timely final wages. Khoury Decl., ¶ 11; Declaration of Jose Ernesto Lucas ("Lucas Decl."), ¶¶ 4-5; Declaration of Jose Magallan ("Magallan Decl."), ¶¶ 4-5.

II. THE PARTIES

A. Defendants

Defendants manufacture, package, and sell a variety of prepared ingredients, such as pre-minced garlic and seasoning blends. Khoury Decl., ¶ 12.

B. Plaintiffs

Plaintiff Lucas worked for Defendants as a non-exempt forklift operator from approximately June 2020 to May 2021 and was classified as non-exempt during the entirety of his employment. Khoury Decl., ¶ 13; Lucas Decl., ¶ 3. Plaintiff Magallan worked for

---

[1] Private Attorneys General Act of 2004, Labor Code sections 2698, *et seq.*

Defendants as a non-exempt employee from approximately April 2020 to April 21, 2021. From April 2020 to August 2020, Mr. Magallan worked as a Sanitation Cleaner, from August 2020 to February 2021 as a Quality Assurance employee, and from February 2021 to April 21, 2021 as a Maintenance Clerk. Khoury Decl., ¶ 14; Magallan Decl., ¶ 3.

C. The Class and Aggrieved Employees

The Class is defined as all current and former non-exempt employees of Defendants employed in California during the Class Period. Khoury Decl., ¶ 15; SA, ¶ 1.5. Approximately 296 individuals who worked 21,270 workweeks during the Class Period fall within this Class definition, including Plaintiffs Lucas and Magallan. Khoury Decl., ¶ 16; SA, ¶ 4.1. Aggrieved Employees, a subset of the Class consisting of 268 individuals, worked an estimated 7,128 pay periods during the PAGA Period (July 2, 2020, to the date the Court preliminarily approves of the Settlement). Khoury Decl., ¶ 17, SA, ¶¶ 1.31, 4.1.

III. PROCEDURAL HISTORY

Plaintiff Lucas filed a class action complaint on July 2, 2021 alleging that Defendants systematically: (1) failed to pay minimum and straight time wages, (2) failed to pay overtime compensation, (3) failed to provide meal periods, (4) failed to authorize and permit rest periods, (5) failed to reimburse necessary business expenses, (6) failed to timely pay wages at termination, (7) failed to provide accurate itemized wage statements and (8) engaged in unfair business practices. Khoury Decl., ¶ 18. On September 23, 2021, Lucas amended his complaint to add a ninth (9) cause of action under the PAGA, after giving requisite notice to the LWDA and Defendants with no response. Khoury Decl., ¶ 19.

On June 28, 2021, Defendants responded to Plaintiff Magallan's record request and produced Plaintiff Magallan's personnel file containing, in pertinent part, employment policies and procedures, new employee documents, time cards, and wage statements. Khoury Decl., ¶ 20.

On August 30, 2021, Plaintiff Magallan filed a PAGA action relating to the same employees sought to be represented by Plaintiff Lucas, after giving requisite notice to the LWDA and Defendants with no response. Khoury Decl., ¶ 21. On September 13, 2021, Plaintiff Magallan filed a class action largely overlapping with the Lucas action, with many of the same claims and an entirely overlapping Class definition. Khoury Decl., ¶ 22.

On February 25, 2022, Plaintiff Magallan served Defendants with employment and form interrogatories, special interrogatories, requests for admission, and requests for production of documents in the PAGA action. That same day, Plaintiff Magallan also noticed the deposition of Defendants for March 29, 2022. Khoury Decl., ¶ 23.

Plaintiffs Magallan and Lucas agreed to consolidate their actions, and an Order consolidating the actions was entered on March 25, 2022. Khoury Decl., ¶ 24. A consolidated complaint was filed on March 28, 2022, which Defendants answered on April 11, 2022. *Id.*, ¶ 25.

In early March 2022, the Parties agreed to stay formal discovery and to attend mediation. Plaintiffs requested, and Defendants produced[2] sufficient data and documents to allow Plaintiffs to assess liability and to calculate Class-wide damages for purposes of mediation. Khoury Decl., ¶ 26.

IV. MEDIATION

Plaintiffs' Counsel retained a damages consultant to review the data to assess actual short, late, or missed meal periods where no premium was paid and underpaid overtime wages due to regular rate miscalculations. Using reasonable assumptions provided by Plaintiffs, the consultant also assessed unreimbursed business expenses, wages not paid for off-the-clock time, unpaid rest period premiums, wage statement penalties, and waiting time penalties. PAGA Penalties were also calculated. Khoury Decl., ¶ 27.

With Class-wide damages and PAGA penalties models prepared, on October 12, 2022, the Parties attended mediation with Tripper Ortman, Esq., an experienced wage and hour class action mediator facilitating the day-long arms'-length negotiations. By the end of the day, the Parties were able to reach a settlement in principle. Khoury Decl., ¶ 28.

---

[2] That information included: (a) excel spreadsheets with timekeeping records and corresponding spreadsheets with payroll records for all purported Class Members (with identities redacted); (b) the estimated Class size: 296 (c) the estimated number of former employees in the three-year statute of limitations for waiting time penalties: 161; (d) the estimated number employees during the one-year statute of limitations for PAGA Penalties: 268 (e) the estimated number of Class Period workweeks: 21,270 workweeks during the Class Period, from July 20, 2017 to October 12, 2022 (f) the estimated number of PAGA Period pay periods: 7,128 PAGA Pay Periods Worked from July 2, 2020 to October 12, 2022 (PAGA Period); and (g) Defendants' employee handbook provided to the Class, containing all pertinent policies including those relating to compensation, timekeeping, work expenses, and meal and rest periods.

V. SUMMARY OF PROPOSED SETTLEMENT

A. Settlement Terms

The Parties agreed to settle the Action for the Gross Settlement Amount ("GSA") of $425,000 which includes, subject to Court approval: (a) attorneys' fees of $141,666.67[3] (not to exceed one-third of the GSA); (b) litigation costs of up to $30,000; (c) Service Payment of $7,500 to each named Plaintiff for their efforts in initiating and prosecuting the Action, work performed, risks undertaken for costs, substantial benefits conferred on absent Class Members, and a general release; (d) PAGA Payment of $5,000 for civil penalties, of which $3,750 (75%) will be paid to the LWDA and $1,250 (25%) will be distributed to Aggrieved Employees; and (e) administration expenses to ILYM Group, Inc., up to $10,000; costs are currently estimated at $8,600. Khoury Decl., ¶ 29; SA, ¶¶ 3.1-3.2; Declaration of Sean Hartranft on Behalf of ILYM Group, Inc. ("ILYM Decl."), ¶ 10. In addition to the GSA, Defendants will pay the employer's share of payroll taxes on Class Members' payment allocated as wages. Khoury Decl., ¶ 30; SA, ¶ 4.3.

The remaining Net Settlement Amount estimated at $224,733.33[4] will be distributed to Participating Class Members based on the number of weeks each worked during the Class Period. No claim form will be necessary. Khoury Decl., ¶ 31; SA, ¶¶ 1.23, 1.28, 7.4.2. With an estimated 21,270 weeks worked during the Class Period, a Participating Class Member will receive an estimated $10.57 for each week worked during the Class Period, or an average payment of $759.23 ($224,733.33 / 296 Class Members). Khoury Decl., ¶ 32; SA, ¶ 4.1. Aggrieved Employees will receive a proportionate share of the $1,250 PAGA Payment based on the number of pay periods worked during the PAGA Period. With 7,128 pay periods during the PAGA Period, each Aggrieved Employee will receive an estimated $0.18 for each pay period. Khoury Decl., ¶ 33; SA, ¶¶ 1.24, 4.1. After 180 days of issuance of the Settlement Payments, uncashed checks will be voided and funds sent to the State of California Controller, Unclaimed Property Division for further handling on behalf

[3] Plaintiffs consented in writing to the equal distribution of attorneys' fees recovered in this case, i.e., 50% to Moon & Yang, and 50% to Cohelan Khoury and Singer (to be divided with co-counsel Davtyan Law Firm, Inc. subject to separate agreement). Khoury Decl., ¶ 29; Magallan Dec., ¶ 17; Lucas Decl., ¶ 17.

[4] $425,000 GSA- $141,666.67 attorneys' fees- $30,000 litigation costs - $15,000 for two service payments - $5,000 PAGA Payment - $8,600 administration costs = $224,733.33.

of the Class Member whose check was voided. Khoury Decl., ¶ 34; SA, ¶¶ 4.4.1, 4.4.3. No part of the GSA will revert to Defendants. Khoury Decl., ¶ 35; SA, ¶ 3.1. The information needed to distribute the funds is available from Defendants' records and the Administrator can apply the formula fairly. Khoury Decl., ¶ 36; ILYM Decl., ¶¶ 5-10.

B. Administrator, Notice of Settlement to the Class, and Release of Claims

The administrator will search the National Change of Address database to update Class Member mailing addresses produced by Defendants before mailing the Court-approved Notice of Proposed Class Action Settlement ("Class Notice"). Khoury Decl., ¶ 37; ILYM Decl., ¶¶ 6-7; SA, ¶¶ 1.10, 4.4.1, Ex. A. If a Class Notice is returned undeliverable, the Administrator will skip-trace using the Class Member's social security number and re-mail if a better address is found. Khoury Decl., ¶ 38; ILYM Decl., ¶ 7; SA, ¶¶ 1.10, 7.4.3. Class Members with re-mailed Class Notices will have an additional 14 days beyond the Response Deadline to act. Khoury Decl., ¶ 39; SA, ¶¶ 1.43, 7.4.4.

The proposed Class Notice advises the Class of: (1) the right to participate in the Settlement/that a claim form is not needed; (2) the manner and timing to submit objections or request exclusion; (3) how to challenge the payment calculation information; (4) the released claims; and (5) the date, place, and time to appear for the Final Approval hearing. Khoury Decl., ¶ 40; SA - Ex. A. Class Members who remain in the Class will release only those claims alleged in the Action, i.e.:

> all claims that were alleged, or reasonably could have been alleged, based on the Class Period facts stated in the Operative Complaint, including, e.g., any and all claims arising under California Labor Code sections 201, 202, 203, 204, 218.5, 218.6, 226, 226.7, 510, 512, 1174(d), 1194, 1194.2, 1197, 1198, 2802 and the applicable Industrial Welfare Commission Wage Orders based on any alleged failure to pay minimum wage; failure to pay overtime compensation; failure to pay paid time off wages; failure to provide meal periods; failure to authorize and permit rest periods; failure to indemnify necessary business expenses; failure to timely pay final wages; failure to timely pay wages during employment; failure to provide accurate wage statements; failure to keep adequate records; and unfair business practices arising under California Business and Professions Code section 17200 *et seq*.

Khoury Decl., ¶ 41; SA, ¶ 5.2. If a Class Member requests exclusion, and is an eligible Aggrieved Employee, they will receive a proportionate share of the $1,250 PAGA Payment and release only those claims brought under the PAGA. Khoury Decl., ¶ 42; SA, ¶¶ 1.9, 4.4.1, 5.3.

VI. ARGUMENT

A. Class Action Settlements Are Subject to Court Review and Approval

"Before final approval, the court must conduct an inquiry into the fairness of the proposed settlement." California Rules of Court, Rule 3.769(g). Where a settlement is reached on terms agreeable to all Parties, a court should disapprove of the settlement "only with considerable circumspection." *Jamison v. Butcher & Sherrerd* (E.D. Pa. 1975) 68 F.R.D. 479, 481. California courts may look to federal authority analyzing class issues for guidance. *See Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 239-40. At preliminary approval, a court "limits its inquiry to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties." *In re Microsoft I-V Cases* (2006) 135 Cal. App. 4th 706, 723.

B. The Settlement is Fair, Reasonable, and Adequate

To approve a proposed class action settlement under Code of Civil Procedure section 382, the Court must find the settlement is "fair, adequate and reasonable." *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. The trial court considers "the strength of Plaintiff's case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement." *Id*. A proposed class action settlement is presumed fair where there are: (1) extensive arms'-length negotiations; (2) investigation and discovery sufficient to allow counsel and the Court to act intelligently; (3) experienced counsel; and, (4) few objectors. *Id*. at p. 1802.

1. Serious, Informed, Non-Collusive Negotiations Led to Settlement

The Settlement was reached through arm's-length negotiations facilitated by an experienced wage and hour class action mediator. Though cordial and professional, the negotiations were at all times, adversarial and non-collusive in nature. Khoury Decl., ¶ 43.

2. Discovery and Stage of the Proceedings Support Settlement

Plaintiffs' Counsel investigated claims and Defendants' potential defenses before serving the

PAGA letters and filing the complaints. For mediation, Defendants produced time and payroll data and pertinent policies for all putative Class Members which Plaintiffs used to analyze their claims and potential damages and penalties. Khoury Decl., ¶ 44; footnote 2 *supra*. This gave the Parties an understanding of the strengths and weaknesses of their positions before negotiations. Khoury Decl., ¶ 45. *See Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal. App. 4th 399, 410 (approving settlement where "considerable information [exists]…to assess the strength of the class claims" and risks of litigation).

3. Counsel are Experienced in Similar Litigation

Counsel for Plaintiffs and the Class have significant experience in litigating employment wage and hour class actions. Khoury Decl., ¶¶ 2-9, 46; Declaration of Allen Feghali ("Feghali Decl."), ¶¶ 6-23; Declaration of Emil Davytan ("Davtyan Decl."), ¶¶ 2-8. Defense counsel Ronald H. Barsamian, Patrick S. Moody, and Catherine Houlihan of Barsamian & Moody are also skilled and experienced wage and hour litigators who defended their clients vigorously to settle this action. Khoury Decl., ¶ 47. Class Counsel believes the Settlement is fair, reasonable, and in the Class' best interest in light of the recovery and risks of continued litigation. Khoury Decl., ¶ 48. The view of attorneys actively conducting the litigation "is entitled to significant weight" in deciding whether to approve the settlement. *Fisher Bros. v. Cambridge Lee Industries, Inc*. (E.D. Pa. 1985) 630 F.Supp. 482, 488. As the Settlement satisfies three of the four *Dunk* requirements, preliminary approval should be granted.

C. The Settlement is a Reasonable Compromise of Claims

"[T]o ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing the litigation," information is presented to the Court, as a fiduciary for absent class members. *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129. *Kullar* requires only "an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation." *Munoz*, 186 Cal.App.4th at p. 409 (finding trial court's review of the number of class members, payroll data, and declarations on hours worked, duties, and meal and rest period experiences were an adequate basis to understand the amount in controversy under *Kullar*). As in *Munoz,* Class Counsel relied on time and pay records and policy documents for the Class during the Class Period. On these bases, Class counsel's damages consultant calculated Class-wide damages and penalties through the date of mediation. Khoury Decl., ¶ 51.

1. Labor Code §§ 510, 1194 –Minimum and Overtime Wages

(**a**) **Off-the-clock Work.** Plaintiffs contend Defendants failed to pay for off-the-clock time Class Members spent subject to its control. Specifically, Plaintiffs contend each morning Class Members had to go through a security screening, that next, they would have to wait in line to clock in, and that finally, once the pandemic began, Defendants initiated a COVID screening prior to clocking in. Unpaid minimum wages for off-the-clock work was estimated at $96,119 (3 minutes, or 0.05 hours x average hourly rate of $17.72 per hour x 108,487 shifts in Class Period). Given that courts often deny certification of off-the-clock claims due to the need for individual inquiries as in *Kilbourne v. Coca-Cola Co.* (S.D. Cal. July 29, 2015) 2015 U.S. Dist. LEXIS 118756, at *46, and that Defendants contested that these screenings were performed off the clock, Plaintiffs reduced Defendants' exposure by 50% to **$48,060**. Khoury Decl., ¶ 52.

(**b**) **Overtime Wages Owed for Shifts Over Eight Hours in a Day.** Plaintiffs contend Defendants failed to pay all overtime wages owed for hours worked over eight per day or forty per week, instead paying overtime according to the time table in Labor Code section 860 for agricultural workers or to an alternative workweek schedule. Plaintiffs contend Class Members were not employed in an agricultural occupation and that a search of the state's database returns zero reported alternative workweek election results. Based on time and pay records, Plaintiffs' consultant estimated that Defendants' overtime pay practice resulted in $22,940 in unpaid overtime wages. Given a dearth of case law explaining when Labor Code section 860 should apply, and given the risk that this claim would not be certified or prevail on the merits, Plaintiffs reduced this value by 50% to **$11,470**. Khoury Decl., ¶ 53.

(c) Overtime Wages Owed at the Regular Rate of Pay. Plaintiffs contend Defendants failed to factor into the regular rate of pay all non-discretionary bonuses when calculating overtime wages. *Alvarado v. Dart Container Corp. of California* (2018) 4 Cal. 5th 542, 554. Plaintiffs' consultant determined based on pay records that 66.8% of the Class worked overtime and received additional compensation, labeled "Bonus_amt (Annual)" in the same pay period, while 70.2% of pay periods included overtime and this additional remuneration. Plaintiffs calculated unpaid overtime wages at $14,406.00. Given the risk that the Bonus_amt (Annual). would not be deemed non-discretionary, and that this claim could fail at certification, Plaintiffs reduced Defendants' exposure by 50%, to **$7,203**. Khoury Decl., ¶ 54.

2. Labor Code §§ 226.7, 512 Meal Periods

Employers must provide "an uninterrupted 30-minute period during which the employee is relieved of all duty." *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1042. "An employer shall not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee." Labor Code § 512(a). Otherwise, the employer owes one hour of pay to the employee at their regular rate of pay. Labor Code §§ 226.7, 512. If records show a missed, late, short, or interrupted meal period there is a presumption of liability, which the employer may rebut. *Donohue v. AMN Servs., LLC* (2021) 11 Cal. 5th 58, 77.

Plaintiffs contend Defendants' time records showed meal period violation in 26.1% of all shifts, and this number is reduced by roughly half if Plaintiffs assume that all Class Members signed valid meal period waivers for shifts between five and six hours in length. More specifically, time records analyzed by Plaintiffs' consultant show: (1) no meal breaks on 0.8% of shifts longer than 6 hours ($14,333.00 in premiums owed)**;** (2) late first meal breaks on 13.4% of shifts over 5 hours ($244,863.00 in premiums owed); (3) short first meal breaks on 0.1% of shifts over 5 hours ($2,365.00 in premiums owed); and (4) no second meal break on 98.8% of shifts over 10 hours ($319,838.00 in premiums owed), yielding exposure of $591,390.00. Recognizing only one meal period premium may be owed per shift, that a second meal period may be waived if the first meal period is taken, and that Defendants produced signed meal period waiver forms for Plaintiffs, a more accurate figure of **$271,552** was calculated, subtracting premiums calculated for failure to provide a second meal period. This figure was further reduced in light of the risk that the claim would not be certified due to individualized issues regarding why breaks were non-compliant, and that Plaintiffs would not ultimately prevail, by 50%, to **$135,776**. Khoury Decl., ¶ 55.

3. Labor Code § 226.7 Rest Periods

California employers must authorize a first 10-minute rest period after 3.5 hours and a second after 6 hours. *Brinker Restaurant Corp.*, 53 Cal. 4th at 1029. Otherwise, the employer owes one hour of pay at the employee's regular rate of pay. Labor Code § 226.7. Class Members' heavy workloads resulted in non-compliant late, short, or missed rest periods. Given rest periods were not recorded, and based on Plaintiffs' experiences, Plaintiffs conservatively assumed a 20% violation rate, requiring $380,505 in rest period premiums (107,366 shifts over 3.5 hours x 0.2 violation rate x $17.72). Given that rest period claims are inherently difficult to certify, that Class Members likely could not remember which, if any, shifts had non-compliant rest periods, and the lack of rest period records, Defendants' potential exposure was reduced by 75% to **$95,126**. Khoury Decl., ¶ 56.

4. Labor Code § 2802 – Reimbursement of Business Expenses

An employer must indemnify its employees for all their necessary expenditures or losses incurred in the discharge of their duties. Labor Code § 2802. A reasonable percentage of an employee's cell phone charges, which vary in each case, must be reimbursed. *Cochran v. Schwan's Home Services, Inc*. (2014) 228 Cal. App. 4th 1137, 1145. Plaintiffs alleged Defendants failed to reimburse them: for the use of personal cell phones to communicate with coworkers and managers during their shifts when issues arose; for gloves, masks, boots, and earplugs; and for mileage when Plaintiff Magallan was required to use his personal vehicle to drive during work hours when machines broke down and he was required to buy parts to repair them. Maximum exposure was estimated at $55,550.00 ($10 a month x 5,555 cumulative months during Class Period). Defendants contend that Plaintiffs' job positions did not require the use of a personal cell phone or vehicle. Defendants also provided a log showing it purchased hundreds of orders of masks, gloves, and other protective equipment for Class Members over the Class Period. Plaintiffs further considered that individualized issues might prevent certification and issues of proof might prevent victory at trial. Defendants' exposure was thus reduced by 90% to **$5,555.** Khoury Decl., ¶ 57.

5. Labor Code § 226 - Wage Statement Penalties (Derivative)

Wage statements must show gross and net wages earned, "total hours worked by the employee" and the "corresponding number of hours worked at each hourly rate." Labor Code §§ 226(a)(1),(2),(5), (9). Plaintiffs contend wage statements did not show all hours worked due to off-the-clock work and all wages earned due to regular rate miscalculation and failure to pay meal and rest break premiums. To recover penalties, Plaintiffs need to prevail on the underlying claims and show any violation was knowing, intentional, or willful. *Pedroza v. PetSmart, Inc*. (C.D. Cal. June 14, 2012) 2012 U.S. Dist. LEXIS 189530 *20.

At the time of settlement, unpaid meal and rest period premiums did not give rise to wage statement penalties. *Naranjo v. Spectrum Security Services*, Inc. (2019) 40 Cal. App. 5th 444, 474 review granted, 2020 Cal. LEXIS 167 (January 2, 2020) ("Naranjo"). Further, the good faith defense to willfulness is clearly established under California law. *Nordstrom Comm'n Cases* (2010) 186 Cal. App. 4th 576, 584 ("There is no willful failure to pay wages if the employer and employee have a good faith dispute as to whether and when the wages were due.").

For the 268 Class Members in the one-year liability period comprising 7,128 pay periods, Defendants' potential exposure was calculated at $699,400.00 (268 pay periods x $50 for initial violation + 6,860 pay periods x $100 for subsequent pay periods). Applying only the $50 initial violation rate to all pay periods per *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1209, this figure is reduced to $356,400 ($50 x 7,128 pay periods). Plaintiffs estimated probability of certification at 50% and victory at trial at 50%, resulting in a 75% discount to realistic exposure of **<u>$89,100</u>**. Khoury Decl., ¶ 58.

6. Labor Code § 203 - Waiting Time Penalties (Derivative)

If Plaintiffs prove the underlying claims for failure to pay all wages due then derivative claims arise under Labor Code section 203 for failure to pay all wages due on separation of employment. An employer must pay all wages due to an involuntarily terminated employee at the time of termination, or within 72 hours to an employee voluntarily terminating. Labor Code § 203. If failure to pay final wages is willful, daily wages are owed at the same rate for up to 30 days. For the 161 former employees (in the period three years from filing), penalties of $684,701 (8 hours per day x $17.72 per hour x 30 days x 161 EEs) were calculated. Khoury Decl., ¶ 59.

At the time of settlement, the only claim which clearly supported waiting time penalties was for unpaid wages. *Naranjo*, 40 Cal. App. at p. 474 (holding rest and meal period premiums do not). To recover waiting time penalties, Plaintiffs must prove wages owed were willfully not paid. Plaintiffs' counsel believed there was only a 25% probability of prevailing at certification and on the merits, given that "a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203." *Hill v. Walmart Inc*. (N.D. Cal. January 14, 2021) 2021 U.S. Dist. LEXIS 20950, *17. Realistic exposure was thus estimated at 25% of the maximum, or **<u>$171,175</u>**. Khoury Decl., ¶ 60.

7. Labor Code § 2699 PAGA Penalties

"PAGA penalties are paid 75% to the California Labor and Workforce Development Agency and 25% to aggrieved employees. Thus, in wage and hour class action cases that settle, [ ] very little of the total settlement is paid to PAGA penalties in order to maximize payments to class members." *Magadia v. Wal-Mart Assocs*. (2019) 384 F. Supp. 3d 1058, 1101, disapproved on other grounds, *Magadia v. Wal-Mart Assocs*. (9th Cir., November 19, 2020) 999 F.3d 668.

PAGA civil penalties were calculated using the initial violation rate for all 7,128 PAGA pay periods. *See Vieyara-Flores v. Sika Corp.* (C.D. Cal. 2019) 2019 U.S. Dist. LEXIS 98081, *13 ("[C]ourts 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."). Maximum penalties were calculated at over $4 million based on the underlying violations: (a) Section 226(a) - wage statements ($250 for 7,128 pay periods): $1,782,000; (b) Section 510 - overtime/regular rate ($100 for 7,128 pay periods): $712,800; (c) Section 1194-wages ($100 for 7,128 pay periods): $712,800; (d) Sections 512 and 226.7 - meal periods ($100 for 3,531 violative pay periods)—$353,100; (e) Section 226.7 - rest periods ($100 for 7,119 potentially violative pay periods): $711,900; and (f) Section 203 - final wages for 161 formers ($100): $16,100. Khoury Decl., ¶ 61.

Maximum exposure was greatly discounted given the risk of not proving underlying violations and the Court's authority to reduce penalties, as long as not to "zero." *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal. App. 4th 1112, 1135. Further, Plaintiffs anticipated the court might deem a PAGA trial unmanageable given the need to interview Class

Members as to rest and meal period violations, cell phone and personal vehicle usage, and safety equipment purchases. Based on this, Plaintiffs believed reasonable exposure was no more than two percent of the maximum exposure, or roughly $80,000. Plaintiffs believed this was reasonable given the extent to which courts have reduced PAGA awards from potential maximum exposure. *See, e.g. Carrington v. Starbucks Corp.* (2018) 30 Cal. App. 5th 504, 517 (4th DCA). (Plaintiff requested "nearly $70 million in penalties," trial court's $150,000 (or <u>0.2%</u> of the maximum) award upheld on appeal). Khoury Decl., ¶ 62.

Further, the $5,000 amount allocated to PAGA, representing 1.1% of the settlement value, is in line with other approved settlements. *See, e.g., In Re Nordstrom Commission Cases* (2010) 186 Cal. App. 4th 576, 589 (no abuse of discretion approving settlement attributing $0 to PAGA.); *Alcala v. Meyer Logistics, Inc*. (C.D. Cal. June 17, 2019) 2019 LEXIS 166879, *26 (PAGA penalties 1.25% of settlement, "falls within the zero to two percent range for PAGA claims approved by courts."); *In re M.L. Stern Overtime Litig*. (S.D. Cal. Apr. 13, 2009) 2009 LEXIS 31650, *1 (PAGA settlement of 2%). Khoury Decl., ¶ 63.

D. The Settlement is Fair, Adequate, and Reasonable

Plaintiffs and their Counsel seriously considered all facts and arguments and concluded the non-reversionary Settlement is fair and reasonable. After reasonable reductions to maximum exposure calculations, Defendants' reasonable exposure was calculated at $563,465[5] in damages and $80,000 in PAGA penalties, for a total value of $643,465. The GSA of $425,000 represents over 75 % of the realistic value of Class claims, and over 66 % of the maximum exposure including PAGA penalties after reasonable reductions. A settlement is not judged solely against what might have been recovered at trial nor must it provide 100% of the damages sought to be fair and reasonable. *Linney v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242. Adequacy must be judged as "a yielding of absolutes... Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they

[5] $48,060 (off-the-clock unpaid wages) + $11,470 (unpaid overtime wages) + $7,203 (underpaid overtime wages due to regular rate miscalculations) + $135,776 (meal period premiums) + $95,126 (rest period premiums) + $5,555 (expense reimbursements) + $89,100 (wage statement penalties) + $171,175 (waiting time penalties) = $563,465.

might have won had they proceeded with litigation ...” *Officers for Justice v. Civil Serv. Comm’n* (9th Cir. 1982) 688 F.2d 615, 624 (citation omitted). “It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not . . . render the settlement inadequate or unfair.” *Id*. at p. 628. The proposed Settlement reflects a good recovery for the Class and should be granted preliminary approval. Khoury Decl., ¶ 64.

VII. CONDITIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE

When an ascertainable and sufficiently numerous class exists, with a well-defined community of interest, and class litigation would be superior to alternate means, certification is appropriate. See *Brinker Restaurant Corp.*, 53 Cal. 4th at p. 1021. Ascertainability is determined by examining class definition, size, and means for identifying members. *Reyes v. Bd. of Supervisors* (1987) 196 Cal. App. 3d 1263, 1271. The 296-member class is ascertainable from Defendants’ records and joinder is impracticable, satisfying numerosity. Khoury Decl., ¶ 65.

There is a community of interest if common legal or factual questions predominate, Plaintiffs’ claims are typical of the class, and Plaintiffs can adequately represent the class. *Fireside Bank v. Superior Court* (2007) 40 Cal. 4th 1069, 1089.

Common questions predominate and Plaintiffs’ claims are typical of the class because all members of the class, including Plaintiffs: were undisputedly employed by Defendants SW Ingredients Holdings, LLC, Spice World, Inc., and Spice World, LLC; were provided with, and were subject to, the same written policies regarding meal and rest breaks, overtime, timekeeping, protective gear, and cell phones; swiped in and out on the same time clock system and were subject to electronic timekeeping; were subject to the same security lines and medical screenings; recorded the start and end times of meal breaks, which allowed an analysis of missed, short, and late meal breaks; uniformly did not have bonuses incorporated into their regular rate of pay because Defendants categorized bonuses as discretionary; and worked in the same production environment, which Plaintiffs contend led to time pressure and work demands which prevented employees from taking compliant meal and rest breaks and led them to work off the clock during meal breaks.

Each Plaintiff is an adequate representative of the Class because he has no interests averse to the Class. Lucas Decl., ¶ 2; Magallan Decl., ¶ 2. Further, each Plaintiff accepted the risks of serving as a class representative, spent significant time assisting in the prosecution of the action, conferred a significant benefit on the Class through this Settlement, and remains committed to prosecuting this action. Lucas Decl., ¶¶ 2-13, 15; Magallan Decl., ¶¶ 2-13, 15. *Clark v. American Residential Services* (2009) *LLC*, 175 Cal.App.4th 785, 804-807. For these reasons, each Plaintiff requests a representative service award of $7,500. Lucas Decl., ¶ 14; Magallan Decl., ¶ 14.

Finally, Plaintiff's attorneys are qualified to conduct the litigation and their interests are not antagonistic to the interest of the Class. *McGhee v. Bank of Am*. (1976) 60 Cal.App.3d 442, 450; Khoury Decl., ¶¶ 2-9, 65; Feghali Decl., ¶¶ 6-24; Davtyan Decl., ¶¶ 2-8.

VIII. CONCLUSION

Plaintiffs request the Settlement be preliminarily approved, Notice of Class Action Settlement approved and ordered to be disseminated to the Class, ILYM be appointed the Administrator, Moon & Yang, APC, Cohelan Khoury & Singer, and Davtyan Law Firm, Inc. be appointed as Class Counsel, Plaintiffs Jose Lucas and Jose Magallan be appointed Class Representative, and Final Approval Hearing date be set.

MOON & YANG, APC

Dated: April 19, 2023

By: Rosemary Khoury for Brett Gunther with permission
Kane Moon
Allen Feghali
Brett Gunther
Sohyun Julie Oh
Attorneys for Plaintiff Jose Ernesto Lucas

COHELAN KHOURY & SINGER

Dated: April 19, 2023

By: Rosemary Khoury
Isam C. Khoury
Michael D. Singer
Rosemary C. Khoury
Attorneys for Plaintiff Jose Magallan