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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA**

ROBERT DELL, an individual, on behalf of
himself and others similarly situated,

PLAINTIFF,

v.

NRC ENVIRONMENTAL SERVICES,
INC.; and DOES 1 thru 50, inclusive,

DEFENDANTS.

CASE NO. RG21114398

[Case Assigned for All Purposes to Hon.
Evelio Grillo in Dept. 21]

**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 and Proposed Order]*

Date: March 1, 2023

Time: 10:00 a.m.

Dept.: 21

Reservation ID: 932497687913

Trial Date: None Set

Complaint Filed: September 30, 2021

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

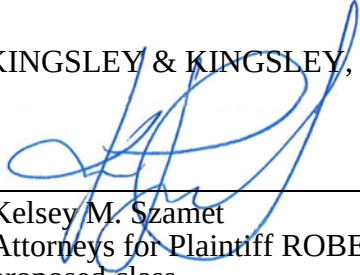
2 **PLEASE TAKE NOTICE** that on March 1, 2023 at 10:00 a.m. in Department 21 of the
3 above-entitled court, Plaintiff ROBERT DELL will move the Court for an Order of Preliminary
4 Approval of the Class Action and PAGA Settlement Agreement (“Agreement”), a copy of which
5 is filed concurrently herewith.

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

8 The Motion will be based on this Notice of Motion, the attached Memorandum of Points
9 and Authorities, the Declaration of Kelsey M. Szamet, the Agreement and Release, all other papers
10 and records on file in this action, and on such oral and documentary evidence as may be presented
11 at the hearing on this Motion.

12
13 DATED: February 3, 2023

KINGSLEY & KINGSLEY, APC

14
15 By: 

16 Kelsey M. Szamet
17 Attorneys for Plaintiff ROBERT DELL and the
18 proposed class
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff ROBERT DELL (“Plaintiff”) submits this Memorandum of Points and Authorities
4 in support of Plaintiff’s Motion for Preliminary Approval of the Class Action and PAGA
5 Settlement Agreement reached between Plaintiff and Defendants NRC ENVIRONMENTAL
6 SERVICES, INC. and US ECOLOGY ILLINOIS, INC. (collectively, “Defendants”) (Plaintiff and
7 Defendants together, the “Parties”).

8 By this Motion, Plaintiff requests that the Court:

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

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

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

18 **II. FACTUAL BACKGROUND**

19 A. Company Background

20 NRC provides environmental, industrial, and emergency response solutions. (Declaration
21 of Kelsey M. Szamet (“Szamet Decl.”) ¶4.) Plaintiff and Proposed Class members were employed
22 by Defendant and performed work as non-exempt, hourly employees. (Szamet Decl. ¶5.) In
23 Plaintiff’s position as Marine Technician, he traveled to various sites to perform cleanup of
24 hazardous spills. (Szamet Decl. ¶6.) In addition to Marine Technicians, the Proposed Class
25 includes hazardous waste vehicle operators and other hourly employees. (Szamet Decl. ¶7.)

26 B. Litigation Overview and Procedural History

27 On September 30, 2021, Plaintiff commenced this lawsuit by filing a Complaint in the
28 Superior Court of the State of California, County of Alameda, captioned Robert Dell v. US

Ecology Illinois, Inc., et al., Case No. RG21114398, alleging causes of action against Defendant for 1) Failure to Pay Wages and/or Overtime Under Labor Code Sections 510, 1194, 1104.2, and 1199; 2) Failure to Provide Meal Breaks Pursuant to Labor Code Sections 226.7 and 512; 3) Failure to Provide Rest Breaks Pursuant to Labor Code Section 226.7; 4) Violation of Labor Code Section 226(a); 5) Penalties Pursuant to Labor Code Section 203; and 6) Violation of Business & Professions Code Section 17200 (hereafter, the “Action”). (Szamet Decl. ¶8.)

On December 7, 2021, Plaintiff filed a First Amended Complaint (“FAC”), naming NRC Environmental Services Inc. as the Defendant in the Action and alleging an additional cause of action against Defendant for penalties pursuant to the Private Attorney General Act of 2004 (“PAGA”) (Lab. Code § 2699, *et seq.*). (Szamet Decl. ¶9.) Pursuant to Labor Code section 2699.3(a), Plaintiff gave timely written notice to Defendant and the Labor and Workforce Development Agency (“LWDA”) by sending the PAGA Notice. (*Id.*) As part of this settlement, the Parties have agreed to permit Plaintiff to file a Second Amended Complaint (“SAC”) to amend the class definition to exclude employees who had acknowledged arbitration agreements from the Class. (Szamet Decl. ¶10.) On November 7, 2022, the Parties filed a stipulation to permit Plaintiff to file a SAC. (*Id.*) Counsel for Plaintiff has contacted the clerk and believes that the Court is still processing the filing, but that the SAC will be filed before the Court hears the instant Motion. (*Id.*)

C. The Discovery Process and Mediation

The Parties engaged in extensive informal discovery to arrive at the proposed settlement. (Szamet Decl. ¶11.) Plaintiff obtained, through informal discovery, pertinent time and pay data for the proposed settlement class and PAGA members, including Plaintiff’s personnel file, so that the Parties could fully investigate the claims at issue and understand their strengths and weaknesses. (Szamet Decl. ¶12.)

On July 26, 2022, the Parties participated in an all-day private mediation presided over by experienced mediator Frances “Tripper” Ortman, Esq. which led to this proposed settlement of the Action on a class and representative basis, subject to the Court’s approval. (Szamet Decl. ¶13.)

Defendants deny any liability or wrongdoing of any kind associated with the claims alleged in the Action, disputes the damages and penalties claimed by Plaintiff, and further contend that,

1 for any purpose other than settlement, Plaintiff’s claims are not appropriate for class or
2 representative action treatment. (Szamet Decl. ¶14.) Defendants contend, among other things,
3 that, at all times, it has complied with the California Labor Code, and the Industrial Wage
4 Commission Orders. (*Id.*)

5 Based on their own independent investigation and evaluation, Class Counsel is of the
6 opinion that the Agreement with Defendants are fair, reasonable and adequate, and in the best
7 interest of the settlement class in light of all known facts and circumstances, including the risk of
8 significant delay, defenses asserted by Defendants, uncertainties regarding a class and
9 representative action trial on the merits, and numerous potential appellate issues. (Szamet Decl.
10 ¶15.) Although Defendants deny any liability, Defendants are agreeing to this Agreement solely
11 to avoid the cost of litigation. (*Id.*) Accordingly, the Parties and their counsel desire to fully, finally,
12 and forever settle, compromise and discharge all disputes and claims arising from or relating to
13 the Action on the terms set forth here. (*Id.*)

14 **III. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED FOR** 15 **SETTLEMENT PURPOSES**

16 Originally creatures of equity, class actions have been statutorily embraced by the
17 Legislature whenever “the question [in a case] is one of a common or general interest, of many
18 persons, or when the parties are numerous, and it is impracticable to bring them all before the
19 court” (Code Civ. Proc. § 382; *see, e.g., Fireside Bank v. Sup. Court* (2007) 40 Cal.4th 1069,
20 1078.) They serve an important function by “establishing a technique whereby the claims of many
21 individuals can be resolved at the same time” thereby “eliminat[ing] the possibility of repetitious
22 litigation and provid[ing] small claimants with a method of obtaining redress.” (*Richmond v. Dart*
23 *Industries, Inc.* (1981) 29 Cal.3d 462, 469.) Public policy supports the use of class actions to
24 enforce wage and overtime laws for the benefit of workers. (*See Sav-on Drug Stores, Inc. v. Sup.*
25 *Court* (2004) 34 Cal.4th 319, 340.)

26 The certification question is “essentially a procedural one that does not ask whether an
27 action is legally or factually meritorious.” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439–
28 440.) A court ruling on a certification motion must determine “whether . . . the issues which may

1 be jointly tried, when compared with those requiring separate adjudication, are so numerous or
2 substantial that the maintenance of a class action would be advantageous to the judicial process
3 and to the litigants.” (*Collins v. Rocha* (1972) 7 Cal.3d 232, 238.)

4 The California Supreme Court has identified three certification requirements: (1) “the
5 existence of an ascertainable and sufficiently numerous class”; (2) “a well-defined community of
6 interest”; and, (3) “substantial benefits from certification that render proceeding as a class superior
7 to the alternatives.” (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021.)
8 The “community of interest” requirement includes three additional requirements: (1) common
9 questions of law or fact predominant over individual questions; (2) the class representatives have
10 claims or defenses typical of the class; and (3) the class representatives can adequately represent
11 the class. (*Ibid, citing Fireside Bank, supra*, 40 Cal.4th at 1089.)

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

15 A. Plaintiff Contends That The Proposed Class Is Ascertainable and Sufficiently
16 Numerous

17 1. Ascertainability

18 Putative class members are deemed “ascertainable” when they may be “readily identified
19 without unreasonable expense or time by reference to official records.” (*Rose v. City of Hayward*
20 (1981) 126 Cal.App.3d 926, 932.) In determining whether a class is ascertainable, a court
21 scrutinizes the class definition, the size of the class and the means of identifying class members.
22 (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.)

23 Here, Plaintiff maintains that the proposed settlement class is ascertainable for several
24 reasons: First, Defendants have agreed in the Agreement to provide a class list to the Administrator
25 containing the name, last-known mailing address, social security number, and number of class
26 settlement period workweeks and PAGA pay periods for all putative class members and PAGA
27 members after issuance of the preliminary approval order. (Szamet Decl. ¶16; Ex. 1 at ¶1.8.)
28 Second, the proposed settlement class consist of Defendants’ employees, and Defendants are

1 required to keep records of its employees' names, home addresses, and social security numbers.
2 (See Wage Order 16-2001, subsection 7(c); Szamet Decl. ¶17.) Third and finally, Defendants
3 informally produced Plaintiff's personnel file and time and pay data for settlement class members
4 containing class member contact information, which confirms that all settlement class members
5 may be readily identified based on Defendants' records. (Szamet Decl. ¶18.)

6 2. Numerosity

7 There is no set number that is required as a matter of law to maintain a class action. (See,
8 *e.g.*, *Rose v. City of Hayward*, *supra*, 126 Cal.App.3d at p. 934.) Here, the proposed settlement
9 class contains, based upon information and belief, approximately 179 employees in the State of
10 California. (Ex. 1 at ¶4.1.) Therefore, Plaintiff is confident he will be able to establish that the
11 proposed settlement class is ascertainable and sufficiently numerous. (Szamet Decl. ¶19.)

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

13 1. There Are Predominant Questions of Law and Fact

14 In deciding whether questions of common or general interest predominate, a court must
15 determine whether "the issues which may be jointly tried, when compared with those requiring
16 separate adjudication, are so numerous or substantial that the maintenance of a class action would
17 be advantageous to the judicial process and to the litigants." (*Collins v. Rocha* (1972) 7 Cal.3d
18 232, 238; *accord*, *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) As a
19 general matter, if the Defendants' liability can be determined by facts common to all members of
20 the class, a class will be certified even if the members must individually prove their damages."
21 (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916, 107; *accord*, *Knapp v.*
22 *AT & T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 941.)

23 Here, Plaintiff argues that there are questions of law and fact common to the proposed
24 settlement class that predominate over any questions affecting only individual class members.
25 (Szamet Decl. ¶20.) These common questions include:

- 26 1) Whether Defendants failed to pay all wages and/or overtime compensation;
27 2) Whether Defendants failed to provide lawfully required meal periods and/or failed
28 to compensate employees one (1) hour's wages in lieu thereof;

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

(Szamet Decl. ¶21.)

Plaintiff's challenge to Defendants' uniform policies and practices involves common factual and legal issues that are amenable to class treatment. (Szamet Decl. ¶22.) As the California Supreme Court has emphasized, "[c]laims alleging that a uniform policy consistently applied to a group of employees is in violation of the wage and hour laws are of the sort routinely, and properly, found suitable for class treatment." (*Brinker, supra*, 53 Cal.4th at 1033; *see also Bradley v. Networkers International, LLC* (2012) 211 Cal.App.4th 1129, 1141-1146.) Moreover, a class of similarly situated employees may be certified based on common questions of fact or law, even if each employee has to establish the amount of his or her damages. (*See Bell v. Farmers Ins. Exch.* (2004) 115 Cal.App.4th 715, 741; *Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th at 340.)

Here, Plaintiff maintains that the proposed settlement class members suffered the same injuries, in the same manner: (1) settlement class members were not properly paid all wages/overtime; (2) settlement class members did not receive their meal and rest periods as required; (3) settlement class members were not provided accurate itemized wage statements; (4) and, (5) settlement class members were not paid all wages owed upon termination/resignation. (Szamet Decl. ¶23.) Plaintiff alleges that settlement class members worked in the same capacity for the same employer and were subject to the same employment policies and practices, the questions of fact and claims regarding the status of these employees are the same for each member of the settlement class. Accordingly, for purposes of settlement, certification for settlement

purposes is appropriate. (Szamet Decl. ¶24.)

2. Plaintiff Contends That The Class Representative Has Claims Typical of the Proposed Class

A putative class representative's claim must be "typical," but not necessarily identical, to the claims of other class members. The test of typicality "is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the Class Representatives, and whether other class members have been injured by the same course of conduct." (*Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502.) Thus, it is sufficient that the representative is similarly situated so that he or she will have the motive to litigate on behalf of all class members. (*Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502.) Thus, it is sufficient that the representative is similarly situated so that he or she will have the motive to litigate on behalf of all class members. (*See, e.g., Classen v. Weller* (1983) 145 Cal.App.3d 27, 45.) It is not necessary that the class representative have personally incurred all of the damages suffered by each of the other class members. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 238.)

Plaintiff performed work for Defendant as a Marine Technician, which required him to travel to various sites requiring code-compliant cleanup of hazardous spills. (Szamet Decl. ¶25.) Plaintiff was an hourly employee and was paid on a weekly basis. (*Id.*) Plaintiff alleges that he: (1) worked without being paid all wages and/or overtime, including minimum wage; (2) worked without being provided compliant meal/rest periods as required by law; (3) worked without being provided accurate itemized wage statements that share the same alleged defect of failing to show all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate; and (4) worked without being paid all wages due upon separation. Plaintiff also alleges that he experienced derivative claims for unfair business competition (B&P Code §17200) and Labor Code §2699, *et seq.* (Szamet Decl. ¶26.) Plaintiff also contends that his claims are typical of those of the settlement class. (Szamet Decl. ¶27.)

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///

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

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

Plaintiff believes that he is capable of fairly representing and adequately protecting the interests of the proposed settlement class members. (Szamet Decl. ¶28.) Plaintiff’s interests in this litigation are coextensive with the interests of the proposed settlement class members. The members of the proposed settlement class all worked for Defendants during the relevant time period and incurred the same type of alleged damages with regard to Defendants’ alleged violations of the law. (Szamet Decl. ¶29.)

Moreover, Plaintiff has agreed to serve as Class Representative and has retained qualified Counsel who is experienced in prosecuting wage and hour class actions. (Szamet Decl. ¶30.) This demonstrates his commitment to bringing about the best possible results for the benefit of the proposed settlement class. (Szamet Decl. ¶31.)

Plaintiff has provided his Counsel with all necessary and pertinent information. (Szamet Decl. ¶32.) He has been a very active participant in the litigation including having frequent contact with settlement class members and working closely with Class Counsel to develop the theories of liability. (Szamet Decl. ¶33.) Plaintiff also was informed of and involved in all of the Settlement negotiations. Therefore, Plaintiff believes that he has and will continue to adequately represent the proposed settlement class members. (Szamet Decl. ¶34.)

C. Plaintiff Contends That The Class Action Vehicle Is Superior to the Alternatives

“The ultimate question in every case of this type is 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.” (*Lockheed Martin, supra*, 29 Cal.App.4th at 1104–1105.) The California Supreme Court has directed the courts to utilize the class action device to fashion “an effective

1 and inclusive group remedy.” (*Richmond v. Dart Indus., Inc.* (1981) 29 Cal.3d 462, 469.)
2 Normally, in making its class certification decision, the Court must determine that a class action
3 would be superior to alternate means for a fair and efficient adjudication. If the causes of action
4 may be adjudicated in a single proceeding, thereby saving time, reducing waste, and limiting
5 duplication of effort, class certification is superior to individual litigation. (*See, e.g., Vasquez v.*
6 *Superior Court* (1971) 4 Cal.3d 800, 816.) Since the Parties agreed to a settlement in principal
7 and now seek Court approval of that Settlement, Plaintiff submits that there is not as much need
8 as there would be in an ordinary motion for class certification for the Court to determine that the
9 case can be manageably tried.

10 Plaintiff maintains that class treatment would be the superior method of managing this case.
11 A class action is superior to individual litigation “when numerous parties suffer injury of
12 insufficient size to warrant individual action and when denial of class relief would result in unjust
13 advantage to the wrongdoer.” (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.) In
14 cases such as this, where individual damages may be small, the class action device is the most
15 feasible method of recovery. (*See, e.g. Lockheed Martin, supra*, 29 Cal.4th at 1131.) In this regard,
16 the superiority of class treatment is evident here because individual pursuit of class members’
17 claims may not be economically viable. (Szamet Decl. ¶35.) The only alternative to certification
18 would be to force over 170 employees to join this action, file individual, uniform actions, or
19 abandon their legal rights altogether. (Szamet Decl. ¶36.) Plaintiff maintains that this economic
20 reality would result in a windfall for Defendants if this case were not certified. (Szamet Decl. ¶37.)

21 **IV. THE PROPOSED SETTLEMENT**

22 **A. The Settlement Class**

23 For purposes of Settlement, the settlement class is defined as: “all of Defendant’s current
24 and former non-exempt employees in the state of California from September 30, 2017 through
25 September 24, 2022.” (“Class”) (Szamet Decl. ¶38; Ex. 1 at ¶1.5.)

26 The Class Settlement Period is September 30, 2017 through September 24, 2022. (Szamet
27 Decl. ¶39; Ex. 1 at ¶1.12.) Based on documents and other information produced by Defendants,
28 there are approximately 179 members of the Class. (Szamet Decl. ¶40; Ex. 1 at ¶¶4.1 and 9.)

1 B. The Aggrieved Employees

2 For purposes of Settlement, the Aggrieved Employees are defined as: “all of Defendant’s
3 current and former non-exempt employees in the state of California from September 30, 2020
4 through September 24, 2022” (“Aggrieved employees” or “PAGA Members”) (Szamet Decl. ¶41;
5 Ex. 1 at ¶1.4.)

6 The PAGA Settlement Period is September 30, 2020 through September 24, 2022. (Szamet
7 Decl. ¶42; Ex. 1 at ¶1.31.)

8 C. Gross Settlement Amount

9 As detailed fully in the Agreement, the Settlement provides for Defendants to pay a Gross
10 Settlement Amount of \$750,000.00, which includes the sum of the Individual Class Payments, the
11 Class Representative service award, the Class Counsel Award, PAGA Payment, and the Settlement
12 Administration Costs. (Szamet Decl. ¶43; Ex. 1 at ¶¶1.22 and 3.)

13 The Net Settlement Amount is the Gross Settlement Amount, less Class Counsel Award,
14 Class Representative Enhancement, PAGA Payment, and Settlement Administration Costs.
15 (Szamet Decl. ¶44; Ex. 1 at ¶1.28.)

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

17	Gross Settlement Amount:	\$	750,000.00
18	Less Class Representative Enhancement:	\$	5,000.00
19	Less Class Counsel’s Fees:	\$	250,000.00
20	Less Class Counsel’s Costs:	\$	15,000.00
21	Less PAGA Payment:	\$	100,000.00
22			<i>(\$75,000.00 to the LWDA and</i>
23			<i>\$25,000.00 to be distributed to</i>
24			<i>Aggrieved Employees)</i>
25	Less Administrator Costs:	\$	10,000.00
26	Anticipated Net Settlement Amount	\$	370,000.00

27 (Ex. 1 at ¶3.)

28 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 Settlement Period. (Ex. 1 at ¶¶1.23 and 3.2.4; see
also Ex. A to the Agreement at pp. 1, 7 [Class Notice].) This individual amount shall be

determined according to the settlement payment formula set forth in the Agreement. (*Ibid.*) The Agreement provides for a specific and detailed Work Week dispute process. (*See* Ex. 1 at ¶8.6.)

E. Individual PAGA Payments

The amount of each Aggrieved Employees' Individual PAGA Payment will be paid from the twenty-five percent (25%) of the PAGA Payment of \$100,000.00 and is an individualized amount that is based on the number of compensable pay periods worked by the Aggrieved Employee during the PAGA Settlement Period. (Ex. 1 at ¶¶1.24 and 3.2.5.1)

F. 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 members of the Class. (Ex. 1 at ¶8.) The Parties have agreed to use a reputable third-party claims administrator, Phoenix Settlement Administrators, to administer the Agreement. (*Id.*)

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

As detailed in the Agreement, members of the Class 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 ¶¶8.5 and 8.7; *see also* Ex. A to the Agreement at pp. 2, 3, 5-6, 8-9 [Class Notice].) The Agreement and Class Notice contain details about the process to request exclusion or object. (*Ibid.*)

Aggrieved Employees will not be provided with the opportunity to opt out of the PAGA portion of the 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 Aggrieved Employees at the same time the members of the Class are mailed their Individual Settlement Payments.

H. The Release

The Released Class Claims are defined as: "any and all claims, demands, liabilities, damages, attorney's fees, costs, and penalties, relating to any and all facts and claims asserted in the Action or any other claims that could have been asserted in the Action based on the facts alleged or ascertained, including but not limited to claims arising from alleged unpaid wages,

1 minimum wages, regular wages, overtime and double time wages, meal and rest period violations,
2 unpaid reimbursements and expenses, wage statement violations, separation pay violations; and
3 PAGA penalties (collectively, the “Released Class Claims”) during the Class Settlement Period
4 Except as set forth in Section 6.3 of the Settlement Agreement, Participating Class Members do
5 not release any other claims, including claims for vested benefits, wrongful termination, violation
6 of the Fair Employment and Housing Act, unemployment insurance, disability, social security,
7 workers’ compensation, or claims based on facts occurring outside the Class Settlement Period.”
8 (Ex. 1 at ¶6.2.)

9 The Released PAGA Claims are defined as: “any and all claims for PAGA penalties that
10 were alleged, or reasonably could have been alleged, based on the facts stated in the Operative
11 Complaint the PAGA Notice and ascertained in the course of the Action including, any and all
12 claims involving any alleged failure to pay unpaid wages, minimum wages, regular wages,
13 overtime and double time wages, meal and rest period violations, unpaid reimbursements and
14 expenses, wage statement violations, separation pay violations; and PAGA penalties (collectively,
15 the “Released PAGA Claims”) during the PAGA Settlement Period.” (Ex. 1 at ¶6.3.)

16 Plaintiff will also execute a general release of any and all claims, known or unknown, in
17 favor of the Released Parties. (Ex. 1 at ¶6.1.)

18 **V. ARGUMENT**

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

20 The case of *Kullar v. Foot Locker Retail, Inc* (2008) 168 Cal.App.4th 116, 128, set forth
21 several factors that the Court should analyze in determining whether to approve a class action
22 settlement. These factors include: (1) the strength of plaintiff’s case; (2) the risk, expense,
23 complexity and likely duration of further litigation; (3) the risk of maintaining class action status
24 through trial; (4) the amount offered in settlement; (5) the extent of discovery completed and stage
25 of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental
26 participant; and (8) the reaction of the class members to the proposed settlement.

27 The proposed settlement satisfies each of these factors. Class Counsel conducted extensive
28 informal discovery before entering into meaningful settlement negotiations in this matter. (*Id* at

1 Szamet Decl. ¶¶11-15.) This discovery permitted Class Counsel to fairly evaluate the strength of
2 the case and the risks associated with ongoing litigation. (Szamet Decl. ¶45.) Class Counsel is
3 experienced in handling wage and hour class actions and, after weighing all of the following
4 factors, supports this Agreement. (Szamet Decl. ¶46.)

5 1. The Strength of Plaintiff's Case

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

7 Plaintiff contends that Defendants have had a policy of not paying him and members of the
8 Class for all hours worked in violation of established law guaranteeing a minimum wage and wages
9 owed under contract or statute and prohibitions on making deductions reducing the agreed upon
10 wage. (See Lab. Code §§ 218, 218.5, 222, 223, 224, 1194, 1194.2, & 1197.) California workers
11 are statutorily entitled to overtime compensation, unless they are properly classified as falling
12 within one of the narrow exemption categories. Under California law, “[a]ny work in excess of
13 eight hours in one workday and any work in excess of 40 hours in any one workweek...shall be
14 compensated at the rate of no less than one and one-half times the regular rate of pay for an
15 employee.” (Lab. Code, § 510, subd. (a).) Furthermore, “[a]ny work in excess of 12 hours in one
16 day shall be compensated at the rate of no less than twice the regular rate of pay for an employee.”
17 (Lab. Code, § 510, subd. (a).)

18 Plaintiff maintains that he and the Class members were required to work on a regular and
19 consistent basis without receiving compensation for all hours worked at the proper rate of pay.
20 (Szamet Decl. ¶47.) Specifically, Plaintiff contends that Defendants routinely altered Plaintiff and
21 the Class members’ time records to shave time and also to indicate a meal period has been taken
22 regardless of whether the employee took a compliant 30-minute meal break. (*Id.*) Plaintiff contends
23 that his review of the randomized time records provided by Defendants show evidence of a routine
24 practice of rounding time in that 99.8% employee shifts were recorded to the quarter hour, and
25 more than half of all shifts were recorded as exactly 8 hours. (Szamet Decl. ¶48.)

26 The California Supreme Court held in Donohue v. AMN Servs., LLC (2021) 11 Cal. 5th 58
27 that the practice of rounding time punches for employee meal periods is not consistent with the
28 legislative intent behind Labor Code provisions providing for premium pay for shortened or missed

1 meal periods. Specifically, “[s]mall rounding errors can amount to significant infringement of
2 employees’ right to meal periods”, and “even relatively minor infringements on meal periods can
3 cause substantial burdens to employees....” *Id.* at 69. The Court also held that a genuine issue of
4 material fact as to whether rounding policy properly accounted for missed or shortened meal
5 periods precluded summary judgment on claim for failure to pay premium wages. In this case, any
6 motion for summary judgment by Defendant on that basis is likely to fail.

7 Plaintiff contends that, just as the employer in *Donahue* did, Defendants improperly
8 rounded time records for meal periods to the nearest quarter, or half, hour. (Szamet Decl. ¶49.)
9 Plaintiff’s review of the records for mediation revealed that all meal punch times were to the exact
10 half hour (e.g. 7:00 am to 11:00am, then lunch, and then 11:30am to 2:30pm). (Szamet Decl. ¶50.)
11 Plaintiff anticipated that Defendant would argue that this was necessary given the industry (many
12 of the Class Members were physically moving to and from different cites each day), but the
13 *Donahue* Court squarely addressed this argument. While recognizing that rounding may be useful
14 in certain industries, the Court noted the defendant employer was “already using an electronic
15 timekeeping system...that recorded employees’ unrounded punches” and thus defendant could
16 have used that system to keep track of noncompliant meal periods for purposes of premium pay.
17 *Id.* at 73. Here, Plaintiff contends that Defendants were using a timekeeping system which required
18 employees to submit handwritten time sheets reflecting their actual hours worked and that time
19 was later input into an electronic timekeeping system. (Szamet Decl. ¶51.) As such, Plaintiff argues
20 that Defendants could have maintained accurate punch records, but instead rounded employee
21 time. (*Id.*) Plaintiff felt confident that this claim was certifiable and that damages could be
22 determined easily by matching up handwritten timecards with punch records for the same pay
23 period to determine if any wages were owed to class members. (Szamet Decl. ¶52.)

24 In addition, Plaintiff alleged Defendants also required Plaintiff and the Class members to
25 arrive prior to the scheduled time of their shift to begin their work tasks and also to work after their
26 shift. (Szamet Decl. ¶53.) As such Plaintiff and the Class members allege that they worked hours
27 off-the-clock and were not compensated for this time. (*Id.*) Plaintiff contends that he and the Class
28 members were often required to work overtime hours for which they were not compensated.

1 (Szamet Decl. ¶54.)

2 Plaintiff acknowledges that this can be a highly difficult type of claim to prove because
3 there are no time records to substantiate or evaluate the claim. (Szamet Decl. ¶55.) Instead,
4 Defendant would argue that if there was any such issue of pre-shift work, it would necessitate
5 speaking to each and every Settlement Class Member about their experiences day to day and
6 whether any off the clock time was ever worked and if so, why it was worked. (Szamet Decl. ¶56.)
7 This type of inquiry, Defendants would argue, makes its very difficult to establish liability based
8 on common proof. (Szamet Decl. ¶57.) Based on this acute risk, Plaintiff believed it was
9 appropriate to discount this claim for settlement purposes. (Szamet Decl. ¶58.)

10 b) The Risks Associated with the Meal Break Claim

11 Under California Labor Code section 512 and IWC Wage Order No. 16, no employer shall
12 employ any person for a work period of more than five hours without providing a meal period of
13 not less than thirty minutes. The first meal period must be permitted to commence no later than
14 after five hours of work, or the start of the sixth hour of work (5.0 hours on the clock). (*Brinker*
15 *Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1049.) The second meal period must be
16 permitted to commence no later than after ten hours of work, or the start of the eleventh hour of
17 work (10.0 hours on the clock). (*Ibid.*) The California Supreme Court succinctly described Section
18 512's mandate: "Employers must afford employees uninterrupted half-hour periods in which they
19 are relieved of any duty or employer control and are free to come and go as they please." (*Brinker*
20 *Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1037.)

21 It is well settled that if an employer fails to maintain a uniform policy that authorizes and
22 permits the meal periods or rest breaks called for under the law (as specified in the applicable
23 Wage Order), "it has violated the wage order and is liable." (See *Brinker*, 53 Cal.4th at p. 1033.)
24 Following *Brinker*, California courts have confirmed that liability for meal and rest period
25 violations arises when an employer adopts a uniform policy that fails to comply with the Labor
26 Code. (See *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220, 235, ["In
27 *Faulkinbury I*, we concluded that even if [defendant]'s on-duty meal break policy was unlawful,
28 [defendant] would be liable only when it actually failed to provide a required off-duty meal break.

1 *Brinker* leads us now to conclude [defendant] would be liable upon a determination that
2 [defendant]’s uniform on-duty meal break policy was unlawful.” (emphasis added)]; *accord*
3 *Bradley v. Networkers International LLC* (2012) 211 Cal.App.4th 1129; *Benton v. Telecom*
4 *Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 725–726.)

5 In *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, the California Supreme Court
6 decided two issues of law relevant to meal periods. First, though not relevant here, the Court held
7 that employers cannot round time punches, i.e., adjust the hours that an employee has actually
8 worked to the nearest preset time increment, in the meal period context. Second, the Court held
9 that time records depicting noncompliant (late, interrupted, or missed) meal periods raise a
10 rebuttable presumption of meal period violations, including at the summary judgment stage of
11 litigation.¹ *Id.* at 77.

12 This latest decision makes clear that it is not enough for California employers to have a
13 policy that “provides” required meal periods or even to record the actual timing and length of such
14 meal periods. Employers must also be prepared to prove that any deviation from the required meal
15 period was by employee choice, without any pressure or influence by the employer (i.e. “bona fide
16 relief from duty and that this is accurately reflected in the employer’s time records.”) *Donahue*,
17 *supra*, at 77-78. Thus, for each time an employee’s meal period is short of 30 minutes, late, or
18 missed altogether, the employer bears the burden of proving (through “Representative testimony,
19 surveys, and statistical analysis,”) that the employer provided the meal period, and that the
20 employee voluntarily chose not to take it — even in some circumstances when an employee signs
21 a timesheet each pay period, confirming that the employer had in fact provided all such breaks.²
22 Once a plaintiff can show prima facie evidence of potential meal period violations, courts will now

23 ¹ Reasoning that the “affirmative defense” of waiver goes to the merits of the case, the
24 Court in *Donohue* held, “the presumption goes to the question of liability and applies at the
summary judgment stage, not just at the class certification stage.” *Id.* at 76.

25 ² Employers that rely only on employee general acknowledgments and certifications that
26 the employee received compliant meal periods, such as timesheet certifications, should be aware
27 of the Court’s view that such certifications cannot be used to prove that the employer provided the
28 compliant meal period if employees would not have known about the potentially noncompliant
meal periods that were not flagged by the employer. The Court reasoned, “It is the employer’s
duty to keep accurate time records; the law does not expect or require employees to keep their own
time records to uncover potential meal period violations.” (*Donohue v. AMN Services, LLC* (2021)
11 Cal.5th 58.)

1 presume the employer violated the law and the employer has the burden of rebutting this
2 presumption.

3 Plaintiff alleged he and all other Class members consistently worked shifts over five (5)
4 hours and Defendants failed to provide Plaintiff and the Class members with proper meal periods
5 of not less than thirty (30) minutes as required by the Labor Code during the relevant time period.
6 (Szamet Decl. ¶59.) According to pay records informally produced by Defendants, there are two
7 issues. (Szamet Decl. ¶60.) First, the records overall consistent show exact 30 minute meal
8 periods. (Szamet Decl. ¶61.) Plaintiff would certainly challenge the validity of these records.
9 (Szamet Decl. ¶62.) Second, even timesheets showing exact 30-minute meal periods, reflected a
10 significant number of shifts with late first meal periods, shifts with no meal, and shifts with no
11 second meal. (Szamet Decl. ¶63.) As a result, Plaintiff asserts that the class can invoke the burden
12 shifting clearly set forth in *Donahue* to successfully argue that having records rife with violations
13 will create a presumption of liability. (Szamet Decl. ¶64.) The burden would then, in theory, shift
14 to Defendant to prove that in fact all class members got compliant meal periods. (Szamet Decl.
15 ¶65.)

16 Plaintiff was confident that if the burden did shift to Defendant, Defendant would attempt
17 to gather testimonial evidence from class members indicating that the records were accurate and
18 either they took compliant meal breaks as reflected in the records or were paid a meal period
19 premium in lieu thereof. (Szamet Decl. ¶66.) Though Plaintiff does not believe this was the case,
20 Plaintiff must acknowledge it poses risks for the Class. (Szamet Decl. ¶67.) There is risk as to
21 both sides as to what declarations and depositions of class members might reveal. (Szamet Decl.
22 ¶68.) Indeed, Plaintiff had to consider that Defendant could secure declarations from Class
23 Members that all complaint breaks were “provided”, but that Class Members chose to take late
24 breaks or miss breaks on occasion. (Szamet Decl. ¶69.) In short, simply because *Donohue* may
25 shift the burden to Defendant, it does not establish liability and provides Defendant an opportunity
26 to disprove the allegations. (Szamet Decl. ¶70.)

27 In response, first and foremost, Defendant argued that Class Members were provided with
28 legally compliant meal periods. (Szamet Decl. ¶71.) In addition, Plaintiff anticipated that

1 Defendant would assert that such an argument would pose individual issues and Defendant would
2 be entitled to inquire of each class member, on each day whether or not they were provided with
3 compliant meal periods. (Szamet Decl. ¶72.)

4 Taken together, Plaintiff acknowledged some risk but was confident that he could certify
5 the meal period claim and that Defendant faced significant risk and exposure on the meal period
6 claim. (Szamet Decl. ¶73.) Plaintiff contends that as a result of its failure to provide compliant
7 meal periods to Plaintiff and all class members, Defendant must pay an additional hour at the
8 employee's regular rate of compensation for each workday the employer failed to provide a lawful
9 meal period to each employee. (See Lab. Code, § 226.7, subd. (c).) .

10 c) The Risks Associated with the Rest Break Claim

11 Under IWC Wage Order No. 16, every employer shall authorize and permit all employees
12 to take rest periods. Employees are entitled to a paid ten-minute rest break for every four hours
13 worked, or major fraction thereof. (Cal. Code Regs., tit. 8, § 11160, subd. 11(A).)

14 The *Brinker* court clarified what steps an employer must take to make rest breaks available
15 to its employees:

16 An employer is required to authorize and permit the amount of rest
17 break time called for under the wage order for its industry. If it does
18 not—if, for example, it adopts a uniform policy authorizing and
19 permitting only one rest break for employees working a seven-hour
20 shift when two are required—it *has violated the wage order and is*
21 *liable*. No issue of waiver ever arises for a rest break that was
22 required by law but never authorized; if a break is not authorized, an
23 employee has no opportunity to decline to take it.

24 (*Ibid.*)

25 The California Supreme Court further refined requirements for rest periods, holding that
26 employees must be relieved of all duty and employer control and free to leave the premises during
27 rest breaks. (*Augustus v. ABM Sec. Servs., Inc.*, 2 Cal. 5th 257, 270 (2016) [“[A] rest period means
28 an interval of time free from labor, work, or any other employment-related duties. And employees
must not only be relieved of work duties, but also be freed from employer control over how they
spend their time.”].)

The 10-minute rest break must be a net 10-minutes in a suitable rest area. None of the time
allotted for rest breaks can be consumed by the time it takes to get to a suitable rest area. *See*

1 *Augustus v. ABM Security Services, Inc.*, 2 Cal.5th 257, 267-268 (2016) (relying on 1/3/86 and
2 2/22/02 DLSE Letters wherein the DLSE ruled that the net ten-minute language for rest breaks
3 means 10-minutes of time in a rest area and cannot include time it takes to get to and from the rest
4 area). The employer must show that it clearly articulates the right to rest periods and rest periods
5 of net ten minutes, which means it must clearly communicate “net” ten minutes means and that,
6 regardless of what happens along the way to or from the rest area, employees are entitled to a full
7 ten-minutes in the rest area. See *Bufile v. Dollar Fin. Grp., Inc.* (2008) 162 Cal.App.4th 1193, 1199
8 (the “onus is on the employer to clearly communicate the authorization and permission [to take
9 meal and rest breaks] to its employees.”)

10 Here, similar to the meal break violations, Plaintiff alleged that Defendants maintained a
11 consistent policy of failing to provide Plaintiff and the Class members with rest breaks of not less
12 than ten (10) minutes per four (4) hour work period or major fraction thereof. (Szamet Decl. ¶74.)
13 Plaintiff maintains that he and the Class members were unable to take compliant rest breaks due
14 to work volume and the general inability to take a rest break while performing on-site work, or
15 traveling to or from a site. (Szamet Decl. ¶75.)

16 The same risk analysis does not apply as with the meal periods, though, because there
17 generally are no records associated with rest periods. (Szamet Decl. ¶76.) As such, Plaintiff does
18 not believe that he would be able to invoke the *Donahue* burden shifting in the same way. (Szamet
19 Decl. ¶77.) Plaintiff had to acknowledge that it could potentially be easier for Defendant to defeat
20 certification of this claim if it was able to gather testimonial evidence from class members
21 indicating that they were able to take all required rest breaks each day. (Szamet Decl. ¶78. Though
22 Plaintiff does not believe this was the case, Plaintiff must acknowledge it poses risks for the Class.
23 (Szamet Decl. ¶79. Just as with meal periods, there is risk as to both sides as to what declarations
24 and depositions of class members might reveal. (Szamet Decl. ¶80.)

25 d) The Risks Associated with the Inaccurate Wage Statement Claim

26 California Labor Code § 226(a) requires that employers furnish to his or her employee,
27 either as a detachable part of the check, draft, or voucher paying the employee’s wages, or
28 separately if wages are paid by personal check or cash, an accurate itemized statement in writing

1 showing (1) gross wages earned, (2) total hours worked by the employee, (3) the number of piece
2 rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all
3 deductions, provided that all deductions made on written orders of the employee may be
4 aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the period for
5 which the employee is paid, (7) the name of the employee and only the last four digits of his or her
6 social security number or an employee identification number other than a social security number,
7 (8) the name and address of the legal entity that is the employer, and (9) all applicable hourly rates
8 in effect during the pay period and the corresponding number of hours worked at each hourly rate
9 by the employee. (Labor Code §§ 226(a).)

10 Plaintiff contends that Defendants failed to issue him and the Class members accurate
11 itemized wage statements showing all applicable hourly rates in effect during the pay period and
12 the corresponding number of hours worked at each hourly rate by the employee. (Szamet Decl.
13 ¶81.)

14 Plaintiff is not required to prove injury to be awarded damages for these violations. First,
15 under Labor Code § 226(e)(2)(B):

16 (B) An employee is deemed to suffer injury for purposes of this subdivision
17 if the employer fails to provide accurate and complete information as
18 required by any one or more of items (1) to (9), inclusive, of subdivision (a)
19 and the employee cannot promptly and easily determine from the wage
20 statement alone one or more of the following:

21 (i) The amount of the gross wages or net wages paid to the employee during
22 the pay period or any of the other information required to be provided on
23 the itemized wage statement pursuant to items (2) to (4), inclusive, (6), and
24 (9) of subdivision (a).

25 As Plaintiff alleges that Defendants regularly knowingly and intentionally failed to issue
26 Plaintiff and the Class members accurate itemized wage statements, Plaintiff and the Class contend
27 that they are “deemed to suffer injury” because the information required to be contained in wage
28 statements is not easily ascertainable elsewhere. (Szamet Decl. ¶82.)

1 An employee suffering injury as a result of a knowing and intentional failure by an
2 employer to comply with Labor Code § 226(a) is entitled to recover the greater of all actual
3 damages or fifty dollars (\$50) for the initial pay period in which a violation occurs and one
4 hundred dollars (\$100) per employee for each violation in a subsequent pay period, not exceeding
5 an aggregate penalty of four thousand dollars (\$4,000) and is entitled to an award of costs and
6 reasonable attorneys' fees.

7 Here, Plaintiff anticipated that Defendants would argue its conduct was not "knowing and
8 intentional" and all required information was show on the paystubs and if there were ever any
9 errors it was the result of clerical error, omission, or oversight. (Szamet Decl. ¶83.) It was
10 anticipated that Defendant would argue that Plaintiffs claims were merely derivative of the
11 underlying wage and meal period claims, but that all record of payment actually received by a
12 Class Member was shown on the paystubs as required. (Szamet Decl. ¶84.)

13 e) The Risks Associated with the Waiting Time Penalty Claim

14 This claim alleges that Defendants failed to pay all wages due and owing upon termination
15 or resignation. Labor Code § 203(a) provides:

16 If an employer willfully fails to pay ... any wages of an employee
17 who is discharged or who quits, the wages of the employee shall
18 continue as a penalty from the due date thereof at the same rate until
19 paid or until an action therefor is commenced; but the wages shall
20 not continue for more than 30 days.

21 Under Labor Code § 203, a "'willful' failure to pay wages ... occurs when an employer
22 intentionally fails to pay wages to an employee when those wages are due." Cal. Code Regs., tit.
23 8, § 13520; *see also Diaz v. Grill Concepts Services, Inc.* (2018) 23 Cal.App.5th 859 ("willful"
24 simply means that "the employer intentionally failed or refused to perform an act which was
25 required to be done[.] Willful ... does not necessarily imply anything blameable, or any malice or
26 wrong toward the other party").

27 Here, Plaintiff contends that Defendants failed to properly pay overtime for any work in
28 excess of eight (8) hours per day and/or any work in excess of forty (40) hours per week. (Szamet
Decl. ¶85.) The risk analysis for the section 203 claim flows from the risk analysis for the
underlying wage claim discussed above. (Szamet Decl. ¶86.) If Defendants could prove, as it

1 contends, that Class members were properly paid for all hours worked, there would be no recovery
2 of wages and no waiting time penalties that flow therefrom. (Szamet Decl. ¶87.)

3 Plaintiff also alleged that Defendants owe waiting time penalties by not paying former
4 alleged employees all wages owed and all premium payments for non-compliant meal or rest
5 periods. Labor Code § 226.7. Pursuant to *Murphy v. Kenneth Cole Productions, Inc.* (2002) 40
6 Cal.4th 1094, 1120, Plaintiff contended that break premium payments constitute “wages” under
7 Labor Code § 203. (“We hold that section 226.7’s plain language, the administrative and
8 legislative history, and the compensatory purpose of the remedy compel the conclusion that the
9 ‘additional hour of pay’ is a premium wage, not a penalty”). (Szamet Decl. ¶88.) However, the
10 Court in *Naranjo* recently held that unpaid break premiums do not entitle employees to additional
11 remedies under the California Labor Code for waiting time penalties. *Naranjo, et al. v. Spectrum*
12 *Security Services, Inc.* (2019) 40 Cal.App.5th 444.

13 Further, to establish liability for waiting time penalties, Plaintiff would have to establish
14 not only that the underlying violations occurred, but also that Defendants’ conduct was “willful.”
15 Labor Code § 203. Plaintiff contends that Defendants were fully aware of its payment policies and
16 practices and intended to carry out said policies and practices. Therefore, Defendants are liable for
17 damages.

18 f) The Risks Associated with the PAGA Claim

19 As a result of Defendant’s conduct alleged above, Plaintiff seeks PAGA penalties available
20 for violations under Labor Code sections 201, 202, 203, 226(a), 226.7, 510, 512, 1194, and 1199.
21 In addition to the wage, meal period, rest period, itemized wage statement, and penalty claims
22 alleged in detail above, Plaintiff also alleges a record keeping violation as the basis for a PAGA
23 claim on behalf of the Aggrieved Employees. (Szamet Decl. ¶89.)

24 Wage Order 4-2001 states that “Every employer shall keep accurate information with
25 respect to each employee including the following:...(3)...Meal periods, split shift intervals and
26 total daily hours worked shall also be recorded.....” Labor Code section 1199 penalize and bar
27 employers from employing, requiring, or causing an employee to work under conditions of labor
28 prohibited by a wage order, and from violating, refusing, or neglecting to comply with such an

1 order.

2 Here, Plaintiff contends that Defendants did not maintain accurate records of meal periods
3 for Plaintiff and the Aggrieved Employees and have violated IWC Wage Order 4, ¶7 with respect
4 to Plaintiff and all Aggrieved Employees. Defendants required Plaintiff and the Aggrieved
5 Employees to work under conditions of labor prohibited by an order of the Industrial Welfare
6 Commission (IWC) by violating, refusing, and neglecting to comply with the commission's orders
7 regarding working conditions. (Szamet Decl. ¶90.)

8 Defendants violated IWC Wage Order 4-2001 by failing to maintain accurate records of
9 meal periods for Plaintiff and Aggrieved Employees pursuant to Industrial Welfare Commission
10 Wage Order 4-2001. (Szamet Decl. ¶91.) Defendant's violation of IWC Wage Order 4-2001 was
11 all done on a regular and consistent basis.

12 California's Private Attorneys General Act ("PAGA"), Labor Code § 2698, *et seq.*, permits
13 private litigants to recover civil penalties for violations of the Labor Code. PAGA provides that
14 plaintiffs may recover previously established civil penalties (section 2699(a)) or, if none were
15 established, plaintiffs may recover default penalties provided in section 2699(f) in the amount of
16 \$100 per employee per pay period for the initial violation and \$200 for subsequent violations.

17 Plaintiff discounted the PAGA claim for multiple reasons. (Szamet Decl. ¶92.) First, the
18 aggrieved employees' PAGA claims are derivative of all the foregoing class claims. (Szamet Decl.
19 ¶92.) If Plaintiff cannot establish liability on the underlying claim (taking into account the risks
20 discussed above), then the derivative PAGA claim will also necessarily fail. (*Id.*) Second, a court
21 has discretion to award less than the maximum penalty. (Szamet Decl. ¶93.) (Labor Code §
22 2699(e)(2) ("a court may award a lesser amount than the maximum civil penalty amount specified
23 by this part if, based on the facts and circumstances of the particular case, to do otherwise would
24 result in an award that is unjust, arbitrary and oppressive, or confiscatory"). *See e.g., Carrington*
25 *v. Starbucks Corporation* (2018) 30 Cal.App.5th 504, 241 Cal.Rptr.3d 647, 669 (affirming award
26 of 10% of maximum PAGA penalty). Third, the likelihood of the Court reducing the PAGA
27 damages awarded to Plaintiffs and the aggrieved employees – assuming liability is proven as to
28 each of Plaintiffs' claims – is also higher in this case where these same individuals will also be

1 receiving money for the same unlawful conduct under the class claims. (Szamet Decl. ¶95.) (see
2 *Avila v. Cold Spring Granite Co.* (E.D. Cal. Jan. 12, 2018) Case No. 1:16-cv-001533-AWI-SKO,
3 2018 U.S. Dist. LEXIS 6142 *17 (“Because the PAGA penalties sought are at least partially
4 duplicative of penalties granted by the underlying Labor Code violations, see, e.g., Cal. Lab. Code
5 §§ 203, 226, 558(a), 1194.2, and because a Court has discretion in whether and in what amount to
6 award PAGA penalties, see Cal. Lab. Code § 2699(e)(2), Plaintiff recognizes that the potential
7 PAGA penalties are highly uncertain.”); and see *Nordstrom Commissions Cases*, 186 Cal.App.4th
8 576, 589 (2010) (affirming settlement allocating \$0 of \$6.4 million settlement to PAGA penalties).

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

10 There is significant expense associated with the class certification process, which the
11 Parties can avoid by entering into the contemplated Agreement now. (Szamet Decl. ¶96.) If the
12 Court did eventually certify a class, trial of a case involving approximately 179 Class members
13 would require the retention of expensive expert witnesses, the accrual of extensive litigation costs,
14 and a significant time overlay by the parties. (Szamet Decl. ¶97.) Moreover, given the complexity
15 and unsettled nature of the issues in this case it is likely that any outcome at trial would have
16 resulted in a lengthy and costly appeal. (Szamet Decl. ¶98.) An appeal would result in further
17 delay for the Class members who are waiting for a resolution in this matter. (*Id.*)

18 3. The Risk of Maintaining Class Action Status through Trial

19 This case has not been certified to be tried as a class action. (Szamet Decl. ¶99.) While
20 Plaintiff believes there is strong evidence to support certification of several possible subclasses
21 certification is always hard fought and subject to judicial discretion. Moreover, in class actions,
22 decertification is always a possibility. (*Id.*) In attempting to certify a class, the parties would need
23 to conduct multiple depositions, including of the Class Representative and of several person(s)
24 most knowledgeable regarding Defendants’ policies. (*Id.*) There is a risk for both sides as to what
25 these depositions will reveal and whether they will support class certification to the extent
26 expected. (*Id.*)

27 ///

28 ///

1 4. The Amount Offered in Settlement

2 It was very difficult for the Parties to reach this Settlement of \$750,000.00. (Szamet Decl.
3 ¶100.) This Settlement is the result of adversarial, non-collusive, and arms-length negotiations.
4 (Szamet Decl. ¶101.) The Parties arrived at it after extensive investigation and discovery, careful
5 evaluation of the law, risks, and all information substantiating the amount of penalties reasonably
6 likely to be awarded to the class were the trier of fact to find Defendants liable, and the assistance
7 of an experienced mediator, Tripper Ortman. (*Id.*)

8 a) Plaintiff's Assessment of Defendants' Maximum Exposure

9 Plaintiff assessed full value of the Minimum Wage/Overtime claim, without any discount,
10 at approximately \$364,542. (Szamet Decl. ¶102.) This calculation assumed that each Class
11 member worked 10 minutes of unpaid overtime per shift. (Szamet Decl. ¶103.)

12 Plaintiff assessed the full value of the meal period claim, without any discount, at
13 approximately \$320,380. (Szamet Decl. ¶104.) This calculation was based upon unique (alleged)
14 meal period violations in the records meaning missed first or second break, late break, or short
15 breaks. (Szamet Decl. ¶105.) Of course, if these violations were reduced by Defendant gathering
16 testimonial evidence per Donohue that breaks were "provided" but take late or missed for other
17 reasons, this number would go down. (Szamet Decl. ¶106.)

18 Plaintiff assessed the full value of the rest period claim, without any discount, at
19 approximately \$1,559,427. (Szamet Decl. ¶107.) This assumes a 100% violation rate of 5 rest
20 period violations per workweek per Settlement Class Members. (Szamet Decl. ¶108.) If Plaintiff
21 assumed there were only 2.5 meal period violations on average per workweek per Class Member
22 for the purposes of assessing maximum potential liability that number drops in half to \$779,713.50.
23 (Szamet Decl. ¶109.) In the settlement context and accounting for the risk discussed above,
24 Plaintiff determined that the lower number was more appropriate for settlement valuation
25 purposes. accepting a discount of the full amount of the rest period claim was appropriate. (Szamet
26 Decl. ¶110.)

27 Plaintiff assessed the full value of the wage statement claim pursuant to Labor Code
28 §226(a) at \$440,000. (Szamet Decl. ¶111.) This calculation was based on the number of class

1 members who received wage statements during the relevant recovery period (110) using \$50/\$100
2 for each of the allegedly violative wage statements. (Szamet Decl. ¶112.) Considering the derivate
3 nature of Labor Code §226, Plaintiff determined that accepting a discount on this claim was
4 appropriate. (Szamet Decl. ¶113.)

5 Plaintiff assessed the full value of the waiting time claim for penalties pursuant to Labor
6 Code §203 at \$527,553. (Szamet Decl. ¶114.) This calculation was based on the number of
7 former employees in the data who are allegedly owed any unpaid wages at the time of separation.
8 (Szamet Decl. ¶115.) Considering the derivate nature of Labor Code §203 and the unresolved
9 nature of whether Section 203 penalties are available for alleged meal and rest period violations,
10 Plaintiff determined that accepting a discount on this claim was appropriate. (Szamet Decl. ¶116.)

11 Finally, Plaintiff calculated the value of the PAGA claim at \$1,257,600 for Settlement
12 Class Members (using \$100 per pay period) for one alleged underlying Labor Code violation for
13 each of the 12,576 pay periods in the relevant time period. (Szamet Decl. ¶117.) As the law is
14 unsettled regarding whether PAGA penalties can be awarded for each of the underlying Labor
15 Code violations (i.e. “stacked”) for the purposes of assessing the maximum penalty amount,
16 Plaintiff calculated the exposure at one penalty of \$100 per person per pay period. (Szamet Decl.
17 ¶118.) The main risk taken into account with PAGA is the discretionary nature of the penalty
18 award. (Szamet Decl. ¶119.) A judge can award the statutory maximum of \$100 for the initial
19 violation and \$200 thereafter or – in theory – one cent per wage statement. (Szamet Decl. ¶120.)
20 While there is a dearth of available authority, in Plaintiff’s view, were he to succeed on any of the
21 underlying Labor Code violations, it is not likely that a Judge would also award a large amount of
22 penalties of top of any damages recovered. (Szamet Decl. ¶121.)

23 Using the figures set forth above, per Plaintiff’s assessment, the maximum potential value
24 of all of Plaintiff’s and the Settlement Class Members’ claims was approximately \$3,689,789.
25 (Szamet Decl. ¶122.) As a result of the forgoing risks on the merits discussed extensively above,
26 Class Counsel believes the Gross Settlement Amount of \$750,000.00 is fair and reasonable.
27 (Szamet Decl. ¶123.)

28 ///

1 5. The Experience and Views of Counsel

2 Finally, counsel’s experience and success in similar class actions also weigh in favor of
3 preliminary approval. *See Wershba, supra*, 91 Cal.App.4th at 245. Kingsley & Kingsley, APC is
4 very experienced in prosecuting complex employment litigation, and the firm has focused its
5 practice since the year 2000 on complex wage, hour, and working condition violations. (Szamet
6 Decl. ¶¶124-126.) The firm is well versed in class action litigation and has diligently and
7 aggressively pursued this action. (*Id.*) Kingsley & Kingsley, APC currently serves as Class
8 Counsel for dozens of pending class action lawsuits in Northern, Central, and Southern California.
9 (*Id.*) A list of representative cases that Kingsley & Kingsley, APC has handled is included in the
10 accompanying declaration of Kelsey M. Szamet. (*Id.*) After factoring in the risks explained above,
11 Class Counsel believes that the proposed settlement is fair and reasonable. (Szamet Decl. ¶127.)

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

13 Plans of allocation are subject to the same standard of review as class action settlements;
14 they must be “fair, adequate and reasonable.” (*See, e.g., Officers for Justice v. Civil Service*
15 *Comm’n* (9th Cir. 1982) 688 F.2d 615, 624–625, 629–630.) Here, the proposed plan of allocation
16 compensates Class members pro rata based on the number of Compensable Work Weeks worked
17 by the Settlement Class Member during the Class Settlement Period. The lump sum payment to
18 each Settlement Class Member not excluding him/ herself will be determined on an individualized
19 basis based upon the Compensable Work Weeks worked by the Settlement Class Member. (Ex. 1
20 at ¶¶1.23 and 3.2.4.) This allocation distributes Agreement funds proportionally to each class
21 member’s potential damages and should therefore be approved as fair, adequate, and reasonable.
22 (Szamet Decl. ¶128.)

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 Class members, or to an updated address if one is located in the National Change of Address Database. (Ex. 1 at ¶8.4.2). 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. (Ex. 1 at ¶8.4.3.) As such, the Notice is likely to reach most, if not all, 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 ¶¶8.5 and 8.7; *see also* Ex. A to the Agreement at pp. 2, 3, 5-6, 8-9 [Class Notice].) In short, the Court should approve the proposed Class Notice because it describes the proposed settlement with enough specificity to allow 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. ¶129.) The time spent by Robert Dell is significant and includes: researching and retaining competent counsel; providing information to Class Counsel regarding the nature of the work at Defendants; 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 Class members; and, responding promptly to Class Counsel’s communications regarding settlement. (*Id.*) Thus, in addition to the sums paid to Class members, Plaintiff requests a proposed litigation enhancement in the amount of \$5,000.00, to be paid from the Gross Settlement Amount. (Ex. 1 at ¶3.2.1.)

1 As set forth in the Agreement, Plaintiff will also be entering into a general release of
2 liability pursuant to Civil Code Section 1542. (Szamet Decl. ¶130; *Id at* ¶3.2.1 and ¶6.1.)

3 Class Counsel considers this to be a fair and reasonable enhancement. (Szamet Decl.
4 ¶131.) 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 Class members. (*Id.*) Plaintiff will provide
6 a detailed declaration with the Final Approval Motion detailing his participation and further
7 justification for 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 LWDA's website on the date this
11 Motion is filed as required by statute. Proof of submission of Plaintiff's Motion, all related
12 documents, and copy of the email from the LWDA confirming receipt is attached to the
13 Declaration of Kelsey M. Szamet as Exhibit "2." (Szamet Decl. ¶132.)

14 **VIII. CONCLUSION**

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

22
23 DATED: February 3, 2023

KINGSLEY & KINGSLEY, APC

24 By: _____

25 Kelsey M. Szamet
26 Attorneys for Plaintiff ROBERT DELL and the
27 proposed class
28

(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 February 3, 2023, 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:

Jason Geller, Esq.

Nathan Low, Esq.

Abby Harrington, Esq.

jgeller@fisherphillips.com

nlow@fisherphillips.com

aharrington@fisherphillips.com

lhamann@fisherphillips.com

nlarios@fisherphillips.com

FISHER & PHILLIPS LLP

1 Montgomery Street, Suite 3400

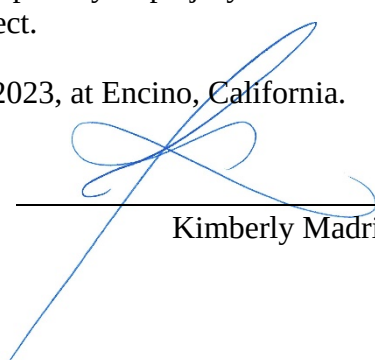
San Francisco, CA 94104

[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 TRANSMISSION): I caused the document to be send to the persons at the e-mail address(es) listed on the attached service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. A pdf copy of which was sent via email to the above email address(es).

[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 February 3, 2023, at Encino, California.



Kimberly Madrid



Reschedule a Reservation

Reservation

Reservation ID:
932497687913

Reservation Type:
Motion re: (Motion for Preliminary Approval of Class Action Settlement)

Case Number:
RG21114398

Case Title:
Dell VS US Ecology Illinois, Inc

Filing Party:
Robert Dell (Plaintiff)

Location:
Rene C. Davidson Courthouse - Department 21

Date/Time:
February 22nd 2023, 10:00AM

Status:
RESERVED

Number of Motions:
1

Motions to Reschedule

Motion re: (Motion for Preliminary Approval of Class Action Settlement)

Reschedule To:

Date: 03/01/2023 10:00 AM

Location: Rene C. Davidson Courthouse - Department 21

Fees

Description	Fee	Qty	Amount
Reschedule Fee	1.00	1	1.00

Description	Fee	Qty	Amount
TOTAL			\$1.00

Payment

Amount:
\$1.00

Type:
MasterCard

Account Number:
XXXX4583

Authorization:
03736Z

Payment Date:
1969-12-31

 Print Receipt

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