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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
FINAL APPROVAL OF CLASS ACTION
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

*[Filed concurrently with Motion for Approval
of Attorneys' Fees and Costs; Declarations of
Kelsey M. Szamet, Plaintiff Robert Dell and
Yami Burns of ILYM Group, Inc., Proposed
Order Thereon]*

Date: October 6, 2023

Time: 9:00 AM

Dept.: 21

Reservation Number: 634546545128

Complaint Filed: September 30, 2021

Trial Date: None Set

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

2 PLEASE TAKE NOTICE that on October 6, 2023 at 9:00 AM in Department 21 of the
3 above-entitled court, Plaintiff Robert Dell ("Plaintiff") will, and hereby does, move the Court for
4 an Order of Final Approval of the Class Settlement in this case. Plaintiff moves the Court for an
5 order:

6 1. Granting final approval of the settlement in the case pursuant to the Class Action
7 and PAGA Settlement Agreement ("Agreement"), a copy of which is attached to the concurrently-
8 filed Declaration of Kelsey M. Szamet as Exhibit "1";

9 2. Affirming Kingsley & Kingsley, APC as Class Counsel;

10 3. Affirming Robert Dell as Class Representative and awarding an enhancement
11 award of \$5,000.00;

12 4. Awarding Phoenix Settlement Administrators claims administration fees of
13 \$7,000.00 for its services as Administrator; and,

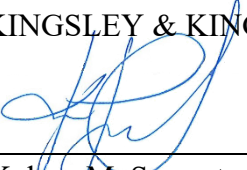
14 5. Entering judgment.

15 This Motion will be made pursuant to Code of Civil Procedure section 382 and California
16 Rule of Court, rule 3.769 on the grounds that the proposed Agreement is fair, adequate,
17 reasonable, and in the best interest of the Settlement Class Members and the parties.

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

22 DATED: September 13, 2023

KINGSLEY & KINGSLEY, APC

23
24 By: 

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

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	FACTUAL BACKGROUND.....	1
A.	Company Background	1
B.	Litigation Overview and Procedural History	1
C.	The Discovery Process.....	2
D.	Preliminary Approval.....	3
III.	THE PRELIMINARILY APPROVED SETTLEMENT	3
A.	The Settlement Class.....	3
B.	The Aggrieved Employees.....	3
C.	Gross Settlement Amount	4
D.	Individual Settlement Payments	4
E.	Individual PAGA Payments.....	5
F.	Class Notice	5
G.	Check Mailed Settlement – No Reversion.....	5
IV.	THE COURT SHOULD ORDER FINAL APPROVAL OF THE SETTLEMENT	5
A.	The Settlement is Entitled to a Presumption of Fairness	6
B.	The Court Should Approve This Class Action Settlement Because it Satisfies Each of the <i>Kullar</i> Factors	7
1.	The Strength of Plaintiffs’ Case.....	7
a)	The Risks Associated with the Wages/Overtime Claim.....	7
b)	The Risks Associated with the Meal Break Claim.....	9
c)	The Risks Associated with the Rest Break Claim.....	12
d)	The Risks Associated with the Inaccurate Wage Statement Claim.....	14
e)	The Risks Associated with the Waiting Time Penalty Claim.....	15

1	f) The Risks Associated with the PAGA Claim.....	17
2	2. The Risk, Expense, Complexity, and Likely Duration of Further Litigation	
3		18
4	3. The Risk of Maintaining Class Action Status through Trial.....	19
5	4. The Amount Offered in Settlement.....	19
6	5. The Extent of Discovery Completed and Stage of the proceedings	21
7	6. The Experience and Views of Counsel	21
8	7. The Presence of a Governmental Participant.....	21
9	8. The Proposed Plan of Allocation Is Fair and Reasonable.....	22
10	9. The Reaction of the Class Members to the Proposed Settlement	22
11	V. ENHANCEMENT TO PLAINTIFF	22
12	VI. SUBMISSION TO THE LABOR AND WORKFORCE DEVELOPMENT AGENCY.	23
13		
14	VII. CONCLUSION.....	23
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES

Federal Cases

<i>Ingram v. The Coca-Cola Company</i> , 200 F.R.D. 685 (N.D. Ga 2001).....	22
<i>Officers for Justice v. Civil Service Comm’n</i> , (9th Cir. 1982) 688 F.2d 615	22
<i>Van Vranken v. Atlantic Richfield Co.</i> , 901 F. Supp. 294 (N.D. Cal. 1995)	22

State Cases

<i>Augustus v. ABM Sec. Servs., Inc.</i> , (2016) 2 Cal. 5th 257	13
<i>Benton v. Telecom Network Specialists, Inc.</i> , (2013) 220 Cal.App.4th 701	10
<i>Bradley v. Networkers International LLC</i> , (2012) 211 Cal.App.4th 1129	10
<i>Brinker Rest. Corp. v. Superior Court</i> , (2012) 53 Cal.4th 1004	9, 10, 12
<i>Bufile v. Dollar Fin. Grp., Inc.</i> , (2008) 162 Cal.App.4th 1193	13
<i>Carrington v. Starbucks Corporation</i> , (2018) 30 Cal.App.5th 504, 241 Cal.Rptr.3d 647.....	18
<i>Diaz v. Grill Concepts Services, Inc.</i> , (2018) 23 Cal.App.5th 859	16
<i>Donohue v. AMN Servs., LLC</i> , (2021) 11 Cal. 5th 58	passim
<i>Dunk v. Ford Motor Co.</i> , (1996) 48 Cal.App.4th 1794	5, 6
<i>Faulkinbury v. Boyd & Associates, Inc.</i> , (2013) 216 Cal.App.4th 220	10
<i>Kullar v. Foot Locker Retail, Inc.</i> , (2008) 168 Cal.App.4th 116	7
<i>Murphy v. Kenneth Cole Productions, Inc.</i> , (2002) 40 Cal.4th 1094	16

1	<i>Naranjo, et al. v. Spectrum Security Services, Inc.,</i>	
2	(2019) 40 Cal.App.5th 444	16
3	<i>Nordstrom Commissions Cases,</i>	
4	(2010) 186 Cal.App.4th 576	18
5	<u>State Statutes</u>	
6	Business & Professions Code Section 17200	2
7	California Code of Civil Procedure § 382	5
8	California Code of Civil Procedure § 1781(f)	5
9	Civil Code Section 1542	23
10	Labor Code § 201.....	17
11	Labor Code § 202.....	17
12	Labor Code § 203.....	passim
13	Labor Code § 203(a)	15
14	Labor Code § 218.....	7
15	Labor Code § 218.5.....	7
16	Labor Code § 222.....	7
17	Labor Code § 223.....	7
18	Labor Code § 224.....	7
19	Labor Code § 226.....	18
20	Labor Code § 226(a)	passim
21	Labor Code § 226(e)(2)(B)	14
22	Labor Code § 226.7	passim
23	Labor Code, § 226.7, subd. (c).....	16
24	Labor Code § 510.....	1, 17
25	Labor Code, § 510, subd. (a).....	7
26	Labor Code § 512.....	passim
27	Labor Code § 1194.....	1, 7, 17
28		

1	Labor Code § 1194.2.....	1, 7
2	Labor Code § 1197.....	7
3	Labor Code § 1199.....	1, 7, 17
4	Labor Code § 2698.....	17
5	Labor Code § 2699.....	2
6	Labor Code § 2699.3(a)	2
7	Labor Code § 2699(e)(2)	18
8	<u>State Regulations</u>	
9	Cal. Code Regs., tit. 8, § 11160, subd. 11(A)	12
10	Cal. Code Regs., tit. 8, § 13520	16
11	<u>Other Authorities</u>	
12	<i>Glass v. UBS Financial Services, Inc.</i> ,	
13	Case No. C-06-4068 MMC, 2007 WL 227862 (N.D. Cal. Jan. 26, 2007)	22
14	<i>Avila v. Cold Spring Granite Co.</i> ,	
15	(E.D. Cal. Jan. 12, 2018) Case No. 1:16-cv-001533-AWI-SKO 2018 U.S. Dist. LEXIS 6142	
16	*17.....	18

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Robert Dell (“Plaintiff”) submits this Motion for Final Approval of Class
4 Settlement and requests that the Court:

5 1. Grant final approval of the settlement in this case pursuant to the Class Action and
6 PAGA Settlement Agreement (“Agreement”), a copy of which is attached to the concurrently-filed
7 Declaration of Kelsey M. Szamet as Exhibit “1”;

8 2. Award attorneys’ fees and costs as detailed in the concurrently-filed Motion for
9 Attorneys’ Fees and Costs;

10 3. Award Phoenix Settlement Administrators claims administration fees of \$7,000.00
11 for its services as Administrator;

12 4. Affirm named Plaintiff Robert Dell as Class Representative and award a cumulative
13 Class Representative payment of \$5,000.00; and

14 5. Enter judgment.

15 **II. FACTUAL BACKGROUND**

16 **A. Company Background**

17 NRC provides environmental, industrial, and emergency response solutions. (Declaration
18 of Kelsey M. Szamet (“Szamet Decl.”) ¶5.) Plaintiff and Proposed Class members were
19 employed by Defendant and performed work as non-exempt, hourly employees. (Szamet Decl.
20 ¶6.) In Plaintiff’s position as Marine Technician, he traveled to various sites to perform cleanup
21 of hazardous spills. (Szamet Decl. ¶7.) In addition to Marine Technicians, the Proposed Class
22 includes hazardous waste vehicle operators and other hourly employees. (Szamet Decl. ¶8.)

23 **B. Litigation Overview and Procedural History**

24 On September 30, 2021, Plaintiff commenced this lawsuit by filing a Complaint in the
25 Superior Court of the State of California, County of Alameda, captioned Robert Dell v. US
26 Ecology Illinois, Inc., et al., Case No. RG21114398, alleging causes of action against Defendant
27 for 1) Failure to Pay Wages and/or Overtime Under Labor Code Sections 510, 1194, 1194.2, and
28 1199; 2) Failure to Provide Meal Breaks Pursuant to Labor Code Sections 226.7 and 512; 3) Failure

1 to Provide Rest Breaks Pursuant to Labor Code Section 226.7; 4) Violation of Labor Code Section
2 226(a); 5) Penalties Pursuant to Labor Code Section 203; and 6) Violation of Business &
3 Professions Code Section 17200 (hereafter, the “Action”). (Szamet Decl. ¶9.)

4 On December 7, 2021, Plaintiff filed a First Amended Complaint (“FAC”), naming NRC
5 Environmental Services Inc. as the Defendant in the Action and alleging an additional cause of
6 action against Defendant for penalties pursuant to the Private Attorney General Act of 2004
7 (“PAGA”) (Lab. Code § 2699, et seq.). (Szamet Decl. ¶10.) Pursuant to Labor Code section
8 2699.3(a), Plaintiff gave timely written notice to Defendant and the Labor and Workforce
9 Development Agency (“LWDA”) by sending the PAGA Notice. (*Id.*) As part of this settlement,
10 the Parties have agreed to permit Plaintiff to file a Second Amended Complaint (“SAC”) to amend
11 the class definition to exclude employees who had acknowledged arbitration agreements from the
12 Class. (Szamet Decl. ¶11.) On November 7, 2022, the Parties filed a stipulation to permit Plaintiff
13 to file a SAC. (*Id.*) Counsel for Plaintiff has contacted the clerk and believes that the Court is still
14 processing the filing, but that the SAC will be filed before the Court hears the instant Motion. (*Id.*)

15 C. The Discovery Process

16 The Parties engaged in informal discovery prior to mediation to permit them to
17 meaningfully evaluate the alleged claims and ultimately arrive at the proposed settlement. (Szamet
18 Decl. ¶12.) Plaintiff obtained, through informal discovery, pertinent time and pay data for the
19 proposed settlement class and PAGA members, including Plaintiff’s personnel file, so that the
20 Parties could fully investigate the claims at issue and understand their strengths and weaknesses.
21 (Szamet Decl. ¶13.)

22 On July 26, 2022, the Parties participated in an all-day private mediation presided over by
23 experienced mediator Frances “Tripper” Ortman, Esq. which led to this proposed settlement of the
24 Action on a class and representative basis, subject to the Court’s approval. (Szamet Decl. ¶14.)

25 Defendants deny any liability or wrongdoing of any kind associated with the claims alleged
26 in the Action, disputes the damages and penalties claimed by Plaintiff, and further contend that,
27 for any purpose other than settlement, Plaintiff’s claims are not appropriate for class or
28 representative action treatment. (Szamet Decl. ¶15.) Defendants contend, among other things, that,

at all times, it has complied with the California Labor Code, and the Industrial Wage Commission Orders. (*Id.*)

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

D. Preliminary Approval

On May 26, 2023, the Court issued an Order preliminarily approving the settlement in this case, approving the proposed Class Notice, ordering that the Administrator send notice to the Class, and setting a date for the Final Approval and Fairness Hearing. (Szamet Decl. ¶17.)

III. THE PRELIMINARILY APPROVED SETTLEMENT

A. The Settlement Class

For purposes of Settlement, the settlement class is defined as: “all of Defendant’s current and former non-exempt employees in the state of California from September 30, 2017 through September 24, 2022.” (“Class”) (Szamet Decl. ¶18; Ex. 1 at ¶1.5.)

The Class Settlement Period is September 30, 2017 through September 24, 2022. (Szamet Decl. ¶19; Ex. 1 at ¶1.12.) Based on documents and other information produced by Defendants, there are approximately 179 members of the Class. (Szamet Decl. ¶20; Ex. 1 at ¶¶4.1 and 9.)

The final Class contained 209 individuals. (Burns Decl. ¶3.)

B. The Aggrieved Employees

For purposes of Settlement, the Aggrieved Employees are defined as: “all of Defendant’s current and former non-exempt employees in the state of California from September 30, 2020

through September 24, 2022” (“Aggrieved employees” or “PAGA Members”) (Szamet Decl. ¶21; Ex. 1 at ¶1.4.)

The PAGA Settlement Period is September 30, 2020 through September 24, 2022. (Szamet Decl. ¶22; Ex. 1 at ¶1.31.)

C. Gross Settlement Amount

As detailed fully in the Agreement, the Settlement provides for Defendants to pay a Gross Settlement Amount of \$750,000.00, which includes the sum of the Individual Class Payments, the Class Representative service award, the Class Counsel Award, PAGA Payment, and the Settlement Administration Costs. (Szamet Decl. ¶23; Ex. 1 at ¶¶1.22 and 3.) Plaintiff now requests final approval of the allocation of the Gross Settlement Amount to determine the Net Settlement Amount for distribution to the Class as follows:

Gross Settlement Amount:	\$	750,000.00
Less Class Representative Enhancement:	\$	5,000.00
Less Class Counsel’s Fees:	\$	250,000.00
Less Class Counsel’s Costs:	\$	15,000.00
Less PAGA Payment:	\$	100,000.00
		(\$75,000.00 to the LWDA; \$25,000.00 to be distributed to Aggrieved Employees)
Less Administrator Costs	\$	<u>7,000.00</u>
Net Settlement Amount:	\$	373,000.00

(Ex. 1 at ¶3.)

D. Individual Settlement Payments

The amount of each Participating Class Member’s Individual Class Payment is an individualized amount that is based on the number of compensable workweeks worked by the Participating Class Member during the Class 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.*) Agreement provides for a specific and detailed Work Week dispute process. (See Ex. 1 at ¶8.6.)

Based on these calculations, the average potential recovery is \$1,784.69 per Settlement Class Member. (Burns Decl. ¶13.)

1 E. Individual PAGA Payments

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

6 F. Class Notice

7 The Court approved the proposed Class Notice and directed the mailing of the Notice by
8 first-class mail to Settlement Class Members in accordance with the proposed implementation
9 schedule. (Szamet Decl. ¶24) The procedures for giving notice to the Settlement Class Members,
10 as set forth in the Agreement and Plaintiffs' Motion for Preliminary Approval and approved by
11 the Court, have been fully and properly carried out. (Burns Decl. ¶5.)

12 To date, Phoenix Settlement Administrators received zero (0) requests to be excluded
13 ("opt-outs") from the proposed Agreement and zero (0) objections. (Burns Decl. ¶¶8- 9.)

14 G. Check Mailed Settlement – No Reversion

15 The Parties agreed to, and the Court preliminary approved, a checks-mailed settlement
16 without the possibility of reversion of settlement funds to Defendant. Under the Agreement, every
17 Settlement Class Member will receive a settlement check and Settlement Class Members do not
18 need to submit a claim in order to receive a settlement check. Any funds that remain uncashed
19 after 180 days shall be turned over by the Administrator, with information for each Settlement
20 Class Member who failed to timely cash his/her settlement check, to Bet Tzedek. (Ex. 1 at ¶4.4.3.)

21 **IV. THE COURT SHOULD ORDER FINAL APPROVAL OF THE SETTLEMENT**

22 Pursuant to California Code of Civil Procedure § 1781(f), "a class action shall not be
23 dismissed or compromised without the approval of the court, and notice of the proposed dismissal
24 or compromise shall be given to all members of the Class in such manner as the court directs"
25 In deciding whether to grant final approval to a proposed class action settlement under Code of
26 Civil Procedure § 382, the court's overriding concern is whether the proposed settlement is "fair,
27 adequate, and reasonable." (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.)

28 ///

1 A. The Settlement is Entitled to a Presumption of Fairness

2 “A presumption of fairness exists where: (1) the settlement is reached through arm’s length
3 bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act
4 intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is
5 small.” (*Dunk, supra*, 48 Cal.App.4th at p. 1802.) The proposed Settlement in the present case
6 meets all of the *Dunk* factors and is therefore entitled to a presumption of fairness.

7 As to the first *Dunk* factor, this settlement is the result of adversarial, non-collusive, and
8 arm’s-length negotiations overseen by an experienced mediator. All settlement discussions were
9 made by experienced and informed counsel, who believe that this settlement represents a favorable
10 resolution for the Settlement Class Members. (Szamet Decl. ¶25.) The settlement negotiations
11 have been, at all times, adversarial and non-collusive, with the aid of a mediator, and no self-
12 dealing or other type of misconduct by either side has taken place. (Szamet Decl. ¶26.)

13 Second, the Parties engaged in informal discovery that permitted Class Counsel to fairly
14 evaluate the strength of the case and the risks associated with ongoing litigation. Plaintiff obtained,
15 through informal discovery, pertinent time and pay data for the proposed settlement class and
16 PAGA members, including Plaintiff’s personnel file, so that the Parties could fully investigate the
17 claims at issue and understand their strengths and weaknesses. (Szamet Decl. ¶27.) Receipt of
18 appropriate discovery allowed Class Counsel to fairly evaluate the exposure and risks associated
19 with each claim alleged in the lawsuit. (Szamet Decl. ¶28.)

20 Third, Class Counsel have significant experience in cases of this type, including several
21 years prosecuting wage, hour, and working condition violations. (Szamet Decl. ¶29.) Class
22 Counsel is thus qualified to evaluate the class claims and viability of the defenses. Class Counsel
23 believes that the settlement is fair, reasonable, adequate, and in the best interests of the class and
24 that the average recovery for each Settlement Class Member of over \$1,784.69 is substantial, given
25 the risks inherent in litigation and the defenses asserted. (Szamet Decl. ¶30.)

26 Finally, the fourth *Dunk* factor considers the percentage of objectors. Here, there were zero
27 (0) opt-outs and zero (0) objections. (Burns Decl. ¶¶8-9.) As all of the *Dunk* factors are satisfied,
28 this settlement is entitled to a presumption of fairness.

1 B. The Court Should Approve This Class Action Settlement Because it Satisfies Each
2 of the Kullar Factors

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

10 The proposed settlement satisfies each of these factors. (Szamet Decl. ¶31.) Class Counsel
11 conducted extensive informal discovery before entering into meaningful settlement negotiations
12 in this matter. (*Id* at Szamet Decl. ¶¶12-16.) This discovery permitted Class Counsel to fairly
13 evaluate the strength of the case and the risks associated with ongoing litigation. (Szamet Decl.
14 ¶32.) Class Counsel is experienced in handling wage and hour class actions and, after weighing all
15 of the following factors, supports this Agreement. (Szamet Decl. ¶33.)

16 1. The Strength of Plaintiffs' Case

17 a) The Risks Associated with the Wages/Overtime Claim

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

1 Plaintiff maintains that he and the Class members were required to work on a regular and
2 consistent basis without receiving compensation for all hours worked at the proper rate of pay.
3 (Szamet Decl. ¶34.) Specifically, Plaintiff contends that Defendants routinely altered Plaintiff and
4 the Class members' time records to shave time and also to indicate a meal period has been taken
5 regardless of whether the employee took a compliant 30-minute meal break. (*Id.*) Plaintiff contends
6 that his review of the randomized time records provided by Defendants show evidence of a routine
7 practice of rounding time in that 99.8% employee shifts were recorded to the quarter hour, and
8 more than half of all shifts were recorded as exactly 8 hours. (Szamet Decl. ¶35.)

9 The California Supreme Court held in *Donohue v. AMN Servs., LLC* (2021) 11 Cal. 5th 58
10 that the practice of rounding time punches for employee meal periods is not consistent with the
11 legislative intent behind Labor Code provisions providing for premium pay for shortened or missed
12 meal periods. Specifically, “[s]mall rounding errors can amount to significant infringement of
13 employees’ right to meal periods”, and “even relatively minor infringements on meal periods can
14 cause substantial burdens to employees....” *Id.* at 69. The Court also held that a genuine issue of
15 material fact as to whether rounding policy properly accounted for missed or shortened meal
16 periods precluded summary judgment on claim for failure to pay premium wages. In this case, any
17 motion for summary judgment by Defendant on that basis is likely to fail.

18 Plaintiff contends that, just as the employer in *Donahue* did, Defendants improperly
19 rounded time records for meal periods to the nearest quarter, or half, hour. (Szamet Decl. ¶36.)
20 Plaintiff’s review of the records for mediation revealed that all meal punch times were to the exact
21 half-hour (e.g. 7:00 am to 11:00am, then lunch, and then 11:30am to 2:30pm). (Szamet Decl. ¶37.)
22 Plaintiff anticipated that Defendant would argue that this was necessary given the industry (many
23 of the Class Members were physically moving to and from different cites each day), but the
24 *Donahue* Court squarely addressed this argument. While recognizing that rounding may be useful
25 in certain industries, the Court noted the defendant employer was “already using an electronic
26 timekeeping system...that recorded employees’ unrounded punches” and thus defendant could
27 have used that system to keep track of noncompliant meal periods for purposes of premium pay.
28 *Id.* at 73. Here, Plaintiff contends that Defendants were using a timekeeping system which required

1 employees to submit handwritten time sheets reflecting their actual hours worked and that time
2 was later input into an electronic timekeeping system. (Szamet Decl. ¶38.) As such, Plaintiff argues
3 that Defendants could have maintained accurate punch records, but instead rounded employee
4 time. (*Id.*) Plaintiff felt confident that this claim was certifiable and that damages could be
5 determined easily by matching up handwritten timecards with punch records for the same pay
6 period to determine if any wages were owed to class members. (Szamet Decl. ¶39.)

7 In addition, Plaintiff alleged Defendants also required Plaintiff and the Class members to
8 arrive prior to the scheduled time of their shift to begin their work tasks and also to work after their
9 shift. (Szamet Decl. ¶40.) As such Plaintiff and the Class members allege that they worked hours
10 off-the-clock and were not compensated for this time. (*Id.*) Plaintiff contends that he and the Class
11 members were often required to work overtime hours for which they were not compensated.
12 (Szamet Decl. ¶41.)

13 Plaintiff acknowledges that this can be a highly difficult type of claim to prove because
14 there are no time records to substantiate or evaluate the claim. (Szamet Decl. ¶42.) Instead,
15 Defendant would argue that if there was any such issue of pre-shift work, it would necessitate
16 speaking to each and every Settlement Class Member about their experiences day to day and
17 whether any off the clock time was ever worked and if so, why it was worked. (Szamet Decl. ¶43.)
18 This type of inquiry, Defendants would argue, makes its very difficult to establish liability based
19 on common proof. (Szamet Decl. ¶44.) Based on this acute risk, Plaintiff believed it was
20 appropriate to discount this claim for settlement purposes. (Szamet Decl. ¶45.)

21 b) The Risks Associated with the Meal Break Claim

22 Under California Labor Code section 512 and IWC Wage Order No. 16, no employer shall
23 employ any person for a work period of more than five hours without providing a meal period of
24 not less than thirty minutes. The first meal period must be permitted to commence no later than
25 after five hours of work, or the start of the sixth hour of work (5.0 hours on the clock). (*Brinker*
26 *Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1049.) The second meal period must be
27 permitted to commence no later than after ten hours of work, or the start of the eleventh hour of
28 work (10.0 hours on the clock). (*Ibid.*) The California Supreme Court succinctly described Section

1 512’s mandate: “Employers must afford employees uninterrupted half-hour periods in which they
2 are relieved of any duty or employer control and are free to come and go as they please.” (*Brinker*
3 *Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1037.)

4 It is well settled that if an employer fails to maintain a uniform policy that authorizes and
5 permits the meal periods or rest breaks called for under the law (as specified in the applicable
6 Wage Order), “it has violated the wage order and is liable.” (See *Brinker*, 53 Cal.4th at p. 1033.)
7 Following *Brinker*, California courts have confirmed that liability for meal and rest period
8 violations arises when an employer adopts a uniform policy that fails to comply with the Labor
9 Code. (See *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220, 235, [“In
10 *Faulkinbury I*, we concluded that even if [defendant]’s on-duty meal break policy was unlawful,
11 [defendant] would be liable only when it actually failed to provide a required off-duty meal break
12 *Brinker* leads us now to conclude [defendant] would be liable upon a determination that
13 [defendant]’s uniform on-duty meal break policy was unlawful.” (emphasis added)]; accord
14 *Bradley v. Networkers International LLC* (2012) 211 Cal.App.4th 1129; *Benton v. Telecom*
15 *Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 725–726.)

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

23 This latest decision makes clear that it is not enough for California employers to have a
24 policy that “provides” required meal periods or even to record the actual timing and length of such
25 meal periods. Employers must also be prepared to prove that any deviation from the required meal
26

27 ¹ Reasoning that the “affirmative defense” of waiver goes to the merits of the case, the
28 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.

1 period was by employee choice, without any pressure or influence by the employer (i.e. “bona fide
2 relief from duty and that this is accurately reflected in the employer's time records.”) *Donahue*,
3 supra, at 77-78. Thus, for each time an employee’s meal period is short of 30 minutes, late, or
4 missed altogether, the employer bears the burden of proving (through “Representative testimony,
5 surveys, and statistical analysis,”) that the employer provided the meal period, and that the
6 employee voluntarily chose not to take it — even in some circumstances when an employee signs
7 a timesheet each pay period, confirming that the employer had in fact provided all such breaks.²
8 Once a plaintiff can show prima facie evidence of potential meal period violations, courts will now
9 presume the employer violated the law and the employer has the burden of rebutting this
10 presumption.

11 Plaintiff alleged he and all other Class members consistently worked shifts over five (5)
12 hours and Defendants failed to provide Plaintiff and the Class members with proper meal periods
13 of not less than thirty (30) minutes as required by the Labor Code during the relevant time period.
14 (Szamet Decl. ¶46.) According to pay records informally produced by Defendants, there are two
15 issues. (Szamet Decl. ¶47.) First, the records overall consistent show exact 30 minute meal periods.
16 (Szamet Decl. ¶48.) Plaintiff would certainly challenge the validity of these records. (Szamet Decl.
17 ¶49.) Second, even timesheets showing exact 30-minute meal periods, reflected a significant
18 number of shifts with late first meal periods, shifts with no meal, and shifts with no second meal.
19 (Szamet Decl. ¶50.) As a result, Plaintiff asserts that the class can invoke the burden shifting clearly
20 set forth in *Donahue* to successfully argue that having records rife with violations will create a
21 presumption of liability. (Szamet Decl. ¶51.) The burden would then, in theory, shift to Defendant
22 to prove that in fact all class members got compliant meal periods. (Szamet Decl. ¶52.)

23 Plaintiff was confident that if the burden did shift to Defendant, Defendant would attempt

24 ² Employers that rely only on employee general acknowledgments and certifications that
25 the employee received compliant meal periods, such as timesheet certifications, should be aware
26 of the Court’s view that such certifications cannot be used to prove that the employer provided
27 the compliant meal period if employees would not have known about the potentially
28 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 to gather testimonial evidence from class members indicating that the records were accurate and
2 either they took compliant meal breaks as reflected in the records or were paid a meal period
3 premium in lieu thereof. (Szamet Decl. ¶53.) Though Plaintiff does not believe this was the case,
4 Plaintiff must acknowledge it poses risks for the Class. (Szamet Decl. ¶54.) There is risk as to both
5 sides as to what declarations and depositions of class members might reveal. (Szamet Decl. ¶55.)
6 Indeed, Plaintiff had to consider that Defendant could secure declarations from Class Members
7 that all complaint breaks were “provided”, but that Class Members chose to take late breaks or
8 miss breaks on occasion. (Szamet Decl. ¶56.) In short, simply because *Donohue* may shift the
9 burden to Defendant, it does not establish liability and provides Defendant an opportunity to
10 disprove the allegations. (Szamet Decl. ¶57.)

11 In response, first and foremost, Defendant argued that Class Members were provided with
12 legally compliant meal periods. (Szamet Decl. ¶58.) In addition, Plaintiff anticipated that
13 Defendant would assert that such an argument would pose individual issues and Defendant would
14 be entitled to inquire of each class member, on each day whether or not they were provided with
15 compliant meal periods. (Szamet Decl. ¶59.)

16 Taken together, Plaintiff acknowledged some risk but was confident that he could certify
17 the meal period claim and that Defendant faced significant risk and exposure on the meal period
18 claim. (Szamet Decl. ¶60.) Plaintiff contends that as a result of its failure to provide compliant
19 meal periods to Plaintiff and all class members, Defendant must pay an additional hour at the
20 employee’s regular rate of compensation for each workday the employer failed to provide a lawful
21 meal period to each employee. (See Lab. Code, § 226.7, subd. (c).) .

22 c) The Risks Associated with the Rest Break Claim

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

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

28 An employer is required to authorize and permit the amount of rest

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

(*Ibid.*)

The California Supreme Court further refined requirements for rest periods, holding that employees must be relieved of all duty and employer control and free to leave the premises during rest breaks. (*Augustus v. ABM Sec. Servs., Inc.*, 2 Cal. 5th 257, 270 (2016) [“[A] rest period means 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 *Augustus v. ABM Security Services, Inc.*, 2 Cal.5th 257, 267-268 (2016) (relying on 1/3/86 and 2/22/02 DLSE Letters wherein the DLSE ruled that the net ten-minute language for rest breaks means 10-minutes of time in a rest area and cannot include time it takes to get to and from the rest area). The employer must show that it clearly articulates the right to rest periods and rest periods of net ten minutes, which means it must clearly communicate “net” ten minutes means and that, regardless of what happens along the way to or from the rest area, employees are entitled to a full ten-minutes in the rest area. See *Bufile v. Dollar Fin. Grp., Inc.* (2008) 162 Cal.App.4th 1193, 1199 (the “onus is on the employer to clearly communicate the authorization and permission [to take meal and rest breaks] to its employees.”)

Here, similar to the meal break violations, Plaintiff alleged that Defendants maintained a consistent policy of failing to provide Plaintiff and the Class members with rest breaks of not less than ten (10) minutes per four (4) hour work period or major fraction thereof. (Szamet Decl. ¶61.) Plaintiff maintains that he and the Class members were unable to take compliant rest breaks due to work volume and the general inability to take a rest break while performing on-site work, or traveling to or from a site. (Szamet Decl. ¶62.)

1 The same risk analysis does not apply as with the meal periods, though, because there
2 generally are no records associated with rest periods. (Szamet Decl. ¶63.) As such, Plaintiff does
3 not believe that he would be able to invoke the *Donahue* burden shifting in the same way. (Szamet
4 Decl. ¶64.) Plaintiff had to acknowledge that it could potentially be easier for Defendant to defeat
5 certification of this claim if it was able to gather testimonial evidence from class members
6 indicating that they were able to take all required rest breaks each day. (Szamet Decl. ¶65.) Though
7 Plaintiff does not believe this was the case, Plaintiff must acknowledge it poses risks for the Class.
8 (Szamet Decl. ¶66.) Just as with meal periods, there is risk as to both sides as to what declarations
9 and depositions of class members might reveal. (Szamet Decl. ¶67.)

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

11 California Labor Code § 226(a) requires that employers furnish to his or her employee,
12 either as a detachable part of the check, draft, or voucher paying the employee's wages, or
13 separately if wages are paid by personal check or cash, an accurate itemized statement in writing
14 showing (1) gross wages earned, (2) total hours worked by the employee, (3) the number of piece
15 rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all
16 deductions, provided that all deductions made on written orders of the employee may be
17 aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the period for
18 which the employee is paid, (7) the name of the employee and only the last four digits of his or her
19 social security number or an employee identification number other than a social security number,
20 (8) the name and address of the legal entity that is the employer, and (9) all applicable hourly rates
21 in effect during the pay period and the corresponding number of hours worked at each hourly rate
22 by the employee. (Labor Code §§ 226(a).)

23 Plaintiff contends that Defendants failed to issue him and the Class members accurate
24 itemized wage statements showing all applicable hourly rates in effect during the pay period and
25 the corresponding number of hours worked at each hourly rate by the employee. (Szamet Decl.
26 ¶68.)

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

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

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

7 As Plaintiff alleges that Defendants regularly knowingly and intentionally failed to issue
8 Plaintiff and the Class members accurate itemized wage statements, Plaintiff and the Class contend
9 that they are “deemed to suffer injury” because the information required to be contained in wage
10 statements is not easily ascertainable elsewhere. (Szamet Decl. ¶69.) An employee suffering injury
11 as a result of a knowing and intentional failure by an employer to comply with Labor Code § 226(a)
12 is entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period
13 in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a
14 subsequent pay period, not exceeding an aggregate penalty of four thousand dollars (\$4,000) and
15 is entitled to an award of costs and reasonable attorneys’ fees.

16 Here, Plaintiff anticipated that Defendants would argue its conduct was not “knowing and
17 intentional” and all required information was show on the paystubs and if there were ever any
18 errors it was the result of clerical error, omission, or oversight. (Szamet Decl. ¶70.) It was
19 anticipated that Defendant would argue that Plaintiffs claims were merely derivative of the
20 underlying wage and meal period claims, but that all record of payment actually received by a
21 Class Member was shown on the paystubs as required. (Szamet Decl. ¶71.)

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

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

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

Under Labor Code § 203, a “‘willful’ failure to pay wages ... occurs when an employer

1 intentionally fails to pay wages to an employee when those wages are due.” Cal. Code Regs., tit.
2 8, § 13520; see also *Diaz v. Grill Concepts Services, Inc.* (2018) 23 Cal.App.5th 859 (“willful”
3 simply means that “the employer intentionally failed or refused to perform an act which was
4 required to be done[.] Willful ... does not necessarily imply anything blameable, or any malice or
5 wrong toward the other party”).

6 Here, Plaintiff contends that Defendants failed to properly pay overtime for any work in
7 excess of eight (8) hours per day and/or any work in excess of forty (40) hours per week. (Szamet
8 Decl. ¶72.) The risk analysis for the section 203 claim flows from the risk analysis for the
9 underlying wage claim discussed above. (Szamet Decl. ¶73.) If Defendants could prove, as it
10 contends, that Class members were properly paid for all hours worked, there would be no recovery
11 of wages and no waiting time penalties that flow therefrom. (Szamet Decl. ¶74.)

12 Plaintiff also alleged that Defendants owe waiting time penalties by not paying former
13 alleged employees all wages owed and all premium payments for non-compliant meal or rest
14 periods. Labor Code § 226.7. Pursuant to *Murphy v. Kenneth Cole Productions, Inc.* (2002) 40
15 Cal.4th 1094, 1120, Plaintiff contended that break premium payments constitute “wages” under
16 Labor Code § 203. (“We hold that section 226.7’s plain language, the administrative and legislative
17 history, and the compensatory purpose of the remedy compel the conclusion that the ‘additional
18 hour of pay’ is a premium wage, not a penalty”). (Szamet Decl. ¶75.) However, the Court in
19 *Naranjo* recently held that unpaid break premiums do not entitle employees to additional remedies
20 under the California Labor Code for waiting time penalties. *Naranjo, et al. v. Spectrum Security*
21 *Services, Inc.* (2019) 40 Cal.App.5th 444.

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

27 ///

28 ///

1 f) The Risks Associated with the PAGA Claim

2 As a result of Defendant's conduct alleged above, Plaintiff seeks PAGA penalties available
3 for violations under Labor Code sections 201, 202, 203, 226(a), 226.7, 510, 512, 1194, and 1199.
4 In addition to the wage, meal period, rest period, itemized wage statement, and penalty claims
5 alleged in detail above, Plaintiff also alleges a record keeping violation as the basis for a PAGA
6 claim on behalf of the Aggrieved Employees. (Szamet Decl. ¶76.)

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

13 Here, Plaintiff contends that Defendants did not maintain accurate records of meal periods
14 for Plaintiff and the Aggrieved Employees and have violated IWC Wage Order 4, ¶7 with respect
15 to Plaintiff and all Aggrieved Employees. Defendants required Plaintiff and the Aggrieved
16 Employees to work under conditions of labor prohibited by an order of the Industrial Welfare
17 Commission (IWC) by violating, refusing, and neglecting to comply with the commission's orders
18 regarding working conditions. (Szamet Decl. ¶77.)

19 Defendants violated IWC Wage Order 4-2001 by failing to maintain accurate records of
20 meal periods for Plaintiff and Aggrieved Employees pursuant to Industrial Welfare Commission
21 Wage Order 4-2001. (Szamet Decl. ¶78.) Defendant's violation of IWC Wage Order 4-2001 was
22 all done on a regular and consistent basis.

23 California's Private Attorneys General Act ("PAGA"), Labor Code § 2698, et seq., permits
24 private litigants to recover civil penalties for violations of the Labor Code. PAGA provides that
25 plaintiffs may recover previously established civil penalties (section 2699(a)) or, if none were
26 established, plaintiffs may recover default penalties provided in section 2699(f) in the amount of
27 \$100 per employee per pay period for the initial violation and \$200 for subsequent violations.

28 Plaintiff discounted the PAGA claim for multiple reasons. (Szamet Decl. ¶79.) First, the

aggrieved employees' PAGA claims are derivative of all the foregoing class claims. (Szamet Decl. ¶80.) If Plaintiff cannot establish liability on the underlying claim (taking into account the risks discussed above), then the derivative PAGA claim will also necessarily fail. (*Id.*) Second, a court has discretion to award less than the maximum penalty. (Szamet Decl. ¶81.) (Labor Code § 2699(e)(2) ("a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory"). See e.g., *Carrington v. Starbucks Corporation* (2018) 30 Cal.App.5th 504, 241 Cal.Rptr.3d 647, 669 (affirming award of 10% of maximum PAGA penalty). Third, the likelihood of the Court reducing the PAGA damages awarded to Plaintiffs and the aggrieved employees – assuming liability is proven as to each of Plaintiffs' claims – is also higher in this case where these same individuals will also be receiving money for the same unlawful conduct under the class claims. (Szamet Decl. ¶82.) (see *Avila v. Cold Spring Granite Co.* (E.D. Cal. Jan. 12, 2018) Case No. 1:16-cv-001533-AWI-SKO, 2018 U.S. Dist. LEXIS 6142 *17 ("Because the PAGA penalties sought are at least partially duplicative of penalties granted by the underlying Labor Code violations, see, e.g., Cal. Lab. Code §§ 203, 226, 558(a), 1194.2, and because a Court has discretion in whether and in what amount to award PAGA penalties, see Cal. Lab. Code § 2699(e)(2), Plaintiff recognizes that the potential PAGA penalties are highly uncertain."); and see *Nordstrom Commissions Cases*, 186 Cal.App.4th 576, 589 (2010) (affirming settlement allocating \$0 of \$6.4 million settlement to PAGA penalties).

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

There is significant expense associated with the class certification process, which the Parties can avoid by entering into the contemplated Agreement now. (Szamet Decl. ¶83.) If the Court did eventually certify a class, trial of a case involving approximately 179 Class members would require the retention of expensive expert witnesses, the accrual of extensive litigation costs, and a significant time overlay by the parties. (Szamet Decl. ¶84.) Moreover, given the complexity and unsettled nature of the issues in this case it is likely that any outcome at trial would have resulted in a lengthy and costly appeal. (Szamet Decl. ¶85.) An appeal would result in further delay for the Class members who are waiting for a resolution in this matter. (*Id.*)

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

2 This case has not been certified to be tried as a class action. (Szamet Decl. ¶86.) While
3 Plaintiff believes there is strong evidence to support certification of several possible subclasses
4 certification is always hard fought and subject to judicial discretion. Moreover, in class actions,
5 decertification is always a possibility. (*Id.*) In attempting to certify a class, the parties would need
6 to conduct multiple depositions, including of the Class Representative and of several person(s)
7 most knowledgeable regarding Defendants' policies. (*Id.*) There is a risk for both sides as to what
8 these depositions will reveal and whether they will support class certification to the extent
9 expected. (*Id.*)

10 4. The Amount Offered in Settlement

11 It was very difficult for the Parties to reach this Settlement of \$750,000.00. (Szamet Decl.
12 ¶87.) This Settlement is the result of adversarial, non-collusive, and arms-length negotiations.
13 (Szamet Decl. ¶88.) The Parties arrived at it after extensive investigation and discovery, careful
14 evaluation of the law, risks, and all information substantiating the amount of penalties reasonably
15 likely to be awarded to the class were the trier of fact to find Defendants liable, and the assistance
16 of an experienced mediator, Tripper Ortman. (*Id.*)

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

18 Plaintiff assessed full value of the Minimum Wage/Overtime claim, without any discount,
19 at approximately \$364,542. (Szamet Decl. ¶89.) This calculation assumed that each Class member
20 worked 10 minutes of unpaid overtime per shift. (Szamet Decl. ¶90.)

21 Plaintiff assessed the full value of the meal period claim, without any discount, at
22 approximately \$320,380. (Szamet Decl. ¶91.) This calculation was based upon unique (alleged)
23 meal period violations in the records meaning missed first or second break, late break, or short
24 breaks. (Szamet Decl. ¶92.) Of course, if these violations were reduced by Defendant gathering
25 testimonial evidence per Donohue that breaks were "provided" but take late or missed for other
26 reasons, this number would go down. (Szamet Decl. ¶93.)

27 Plaintiff assessed the full value of the rest period claim, without any discount, at
28 approximately \$1,559,427. (Szamet Decl. ¶94.) This assumes a 100% violation rate of 5 rest period

1 violations per workweek per Settlement Class Members. (Szamet Decl. ¶95.) If Plaintiff assumed
2 there were only 2.5 meal period violations on average per workweek per Class Member for the
3 purposes of assessing maximum potential liability that number drops in half to \$779,713.50.
4 (Szamet Decl. ¶96.) In the settlement context and accounting for the risk discussed above, Plaintiff
5 determined that the lower number was more appropriate for settlement valuation purposes.
6 accepting a discount of the full amount of the rest period claim was appropriate. (Szamet Decl.
7 ¶97.)

8 Plaintiff assessed the full value of the wage statement claim pursuant to Labor Code
9 §226(a) at \$440,000. (Szamet Decl. ¶98.) This calculation was based on the number of class
10 members who received wage statements during the relevant recovery period (110) using \$50/\$100
11 for each of the allegedly violative wage statements. (Szamet Decl. ¶99.) Considering the derivate
12 nature of Labor Code §226, Plaintiff determined that accepting a discount on this claim was
13 appropriate. (Szamet Decl. ¶100.)

14 Plaintiff assessed the full value of the waiting time claim for penalties pursuant to Labor
15 Code §203 at \$527,553. (Szamet Decl. ¶101.) This calculation was based on the number of former
16 employees in the data who are allegedly owed any unpaid wages at the time of separation. (Szamet
17 Decl. ¶102.) Considering the derivate nature of Labor Code §203 and the unresolved nature of
18 whether Section 203 penalties are available for alleged meal and rest period violations, Plaintiff
19 determined that accepting a discount on this claim was appropriate. (Szamet Decl. ¶103.)

20 Finally, Plaintiff calculated the value of the PAGA claim at \$1,257,600 for Settlement
21 Class Members (using \$100 per pay period) for one alleged underlying Labor Code violation for
22 each of the 12,576 pay periods in the relevant time period. (Szamet Decl. ¶104.) As the law is
23 unsettled regarding whether PAGA penalties can be awarded for each of the underlying Labor
24 Code violations (i.e. “stacked”) for the purposes of assessing the maximum penalty amount,
25 Plaintiff calculated the exposure at one penalty of \$100 per person per pay period. (Szamet Decl.
26 ¶105.) The main risk taken into account with PAGA is the discretionary nature of the penalty
27 award. (Szamet Decl. ¶106.) A judge can award the statutory maximum of \$100 for the initial
28 violation and \$200 thereafter or – in theory – one cent per wage statement. (Szamet Decl. ¶107.)

1 While there is a dearth of available authority, in Plaintiff's view, were he to succeed on any of the
2 underlying Labor Code violations, it is not likely that a Judge would also award a large amount of
3 penalties of top of any damages recovered. (Szamet Decl. ¶108.)

4 Using the figures set forth above, per Plaintiff's assessment, the maximum potential value
5 of all of Plaintiff's and the Settlement Class Members' claims was approximately \$3,689,789.
6 (Szamet Decl. ¶109.) As a result of the forgoing risks on the merits discussed extensively above,
7 Class Counsel believes the Gross Settlement Amount of \$750,000.00 is fair and reasonable.
8 (Szamet Decl. ¶110.)

9 5. The Extent of Discovery Completed and Stage of the proceedings

10 As outlined above, Class Counsel conducted a thorough investigation into the facts of the
11 claims alleged. (Szamet Decl. ¶111.) The agreement to settle did not occur until Class Counsel
12 exchanged and possessed sufficient information to make an informed judgement regarding the
13 likelihood of success on the merits and the results that could be obtained through further litigation.
14 (*Id.*)

15 6. The Experience and Views of Counsel

16 Kingsley & Kingsley is very experienced in prosecuting and defending employment
17 litigation, and the firm has focused its practice since 2000 on wage, hour, and working condition
18 violations. (Szamet Decl. ¶¶112-114.) The firm is well versed in class action litigation and has
19 diligently and aggressively pursued this action. (*Ibid.*) Kingsley & Kingsley, APC currently serves
20 as Class Counsel for dozens of pending class action lawsuits in Northern, Central, and Southern
21 California. (*Ibid.*) A list of representative cases that Kingsley & Kingsley, APC has handled is
22 included in the accompanying declaration of Kelsey M. Szamet. (Szamet Decl. ¶¶112-113.) After
23 factoring in the risks explained above, Class Counsel believes that the proposed settlement is fair
24 and reasonable. (Szamet Decl. ¶114.)

25 7. The Presence of a Governmental Participant

26 There is no governmental participant in this action except arguably the LWDA. (Szamet
27 Decl. ¶115.)
28

1 8. The Proposed Plan of Allocation Is Fair and Reasonable

2 Plans of allocation are subject to the same standard of review as class action settlements;
3 they must be “fair, adequate and reasonable.” (See, e.g., *Officers for Justice v. Civil Service*
4 *Comm’n* (9th Cir. 1982) 688 F.2d 615, 624–625, 629–630.) Here, the proposed plan of allocation
5 compensates Class members pro rata based on the number of Compensable Work Weeks worked
6 by the Settlement Class Member during the Class Settlement Period. The lump sum payment to
7 each Settlement Class Member not excluding him/ herself will be determined on an individualized
8 basis based upon the Compensable Work Weeks worked by the Settlement Class Member. (Ex. 1
9 at ¶¶1.23 and 3.2.4.) This allocation distributes Agreement funds proportionally to each class
10 member’s potential damages and should therefore be approved as fair, adequate, and reasonable.
11 (Szamet Decl. ¶116.)

12 9. The Reaction of the Class Members to the Proposed Settlement

13 To date, there are zero (0) requests to be excluded from the proposed Agreement and zero
14 (0) objections. (Burns Decl. ¶¶8-9.) Such indicates that the reaction of Settlement Class Members
15 on the whole is positive and weighs in favor of approval.

16 **V. ENHANCEMENT TO PLAINTIFF**

17 Plaintiff’s Counsel request an enhancement of \$5,000.00 to the Class Representative
18 Robert Dell for his work on behalf of the Class. (Szamet Decl. ¶159.) “Courts routinely approve
19 incentive awards to compensate named plaintiffs for the services they provide and the risks they
20 incurred during the course of the class action litigation.” *Ingram v. The Coca-Cola Company*, 200
21 F.R.D. 685, 694 (N.D. Ga 2001) (internal quotations and citations omitted); *see also Van Vranken*
22 *v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995). In *Coca-Cola*, the Court
23 approved service awards of \$300,000 to each named plaintiff in recognition of the services they
24 provided to the class by responding to discovery, participating in the mediation process, and taking
25 the risk of stepping forward on behalf of the class. *Coca-Cola*, 200 F.R.D. at 694; *see also, e.g.*
26 *Van Vranken*, 901 F. Supp. at 299 (approving \$50,000 participation award to plaintiffs); *Glass v.*
27 *UBS Financial Services, Inc.*, Case No. C-06-4068 MMC, 2007 WL 227862, at *17 (N.D. Cal.
28 Jan. 26, 2007) (approving \$25,00 enhancement to each named plaintiff).

1 Mr. Dell is an adequate class representative because he has diligently, adequately and fairly
2 represented the Class and has not placed his interests above any member of the Class. (*see*
3 Declaration of Robert Dell (“Dell Decl.”) ¶¶3-11.)

4 Here, Class Counsel requests an enhancement for Mr. Dell’s valiant effort and time
5 expended in this matter. The time spent by Robert Dell is significant and includes: researching
6 and retaining competent counsel; providing information to Class Counsel regarding the nature of
7 the work at Defendants; compiling relevant documents; working closely with Class Counsel to
8 develop the theories of liability and martial relevant evidence; regularly discussing the status of
9 the case with Class Counsel; discussing the case via telephone with many Class members; and,
10 responding promptly to Class Counsel’s communications regarding settlement. (Szamet Decl.
11 ¶160; Dell Decl. ¶¶6-7.) As set forth in the Agreement, Plaintiff will also be entering into a general
12 release of liability pursuant to Civil Code Section 1542. (Szamet Decl. ¶161; Ex. 1 at § ¶3.2.1 and
13 ¶6.1.)

14 Class Counsel considers this to be a fair and reasonable enhancement. (Szamet Decl. ¶162.)
15 The enhancement takes into consideration the time, effort, and expense incurred by Mr. Dell in
16 coming forward to litigate this matter on behalf of all Settlement Class Members. (Szamet Decl.
17 ¶163.) Additionally, the Class Representative was at risk for paying for Defendant’s legal fees
18 and costs in the event that Defendant prevailed at trial. (Szamet Decl. ¶164.)

19 **VI. SUBMISSION TO THE LABOR AND WORKFORCE DEVELOPMENT AGENCY**

20 As indicated on the Proof of Service, Plaintiff’s Motion for Final Approval of Class Action
21 Settlement (“Motion”) will be concurrently uploaded to the Labor and Workforce Development
22 Agency’s (“LWDA”) website on the date this Motion is filed as required by statute. Proof of
23 submission of Plaintiff’s Motion, all related documents, and copy of the email from the LWDA
24 confirming receipt is attached to the Declaration of Kelsey M. Szamet as Exhibit “6.” (Szamet
25 Decl. ¶169.)

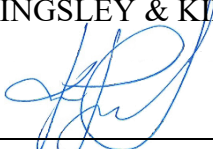
26 **VII. CONCLUSION**

27 Plaintiff respectfully submits that the proposed Agreement is fair, adequate, reasonable,
28 and in the best interest of the Settlement Class Members. Therefore, Plaintiff respectfully requests

1 that the Court (1) grant Final Approval of the Agreement and all of its terms; (2) award attorneys'
2 fees and costs in the amount detailed in the concurrently filed Motion for Attorneys' Fees and
3 Costs; (3) award Phoenix Settlement Administrators claims administration fees of \$7,000.00; and
4 (4) award the Class Representative an enhancement of \$5,000.00; and (5) enter judgment.

5 DATED: September 13, 2023

KINGSLEY & KINGSLEY, APC

6
7 By: 

Kelsey M. Szamet

8 Attorneys for Plaintiff ROBERT DELL and the
9 proposed class

(PROOF OF SERVICE)
[CCP 1013(a)(3)]
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

On September 13, 2023, I served all interested parties in this action the following documents described as: **NOTICE OF MOTION AND MOTION FOR FINAL 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:

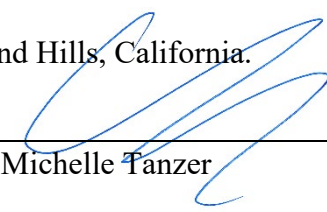
Jason Geller, Esq.
Nathan Low, Esq.
Abby Harrington, Esq.
jgeller@fisherphillips.com
nlow@fisherphillips.com
aharrington@fisherphillips.com
lhamann@fisherphillips.com
nlarios@fisherphillips.com
FISHER & PHILLIPS LLP
1 Montgomery Street, Suite 3400
San Francisco, CA 94104

[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 below 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 September 13, 2023, at Woodland Hills, California.



Michelle Tanzer