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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

11 **COUNTY OF SAN BERNARDINO**

12 ROMUALDA RAZO, on behalf of herself,
13 the State of California, and others similarly
situated and aggrieved,

14 PLAINTIFF,

15 v.

16 DIVERSE FACILITY SOLUTIONS,
17 INC., an Illinois corporation; and DOES 1-
18 100, inclusive,

19 Defendants.
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Case No.: CIVSB2133307

Assigned for All Purposes to:
Hon. Jessica Morgan
Dept. S26

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

[Filed concurrently with Notice of Motion and
Motion; Declarations of Chad Saunders,
Romualda Raza, and Sean Hartranft; [Proposed]
Order]

Date: December 4, 2023
Time: 8:30 a.m.
Dept. S26

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1 **I. INTRODUCTION**

2 Plaintiff Romualda Razo hereby move the Court for an order granting preliminary
3 approval to a proposed non-reversionary class action settlement to resolve wage and hour claims
4 on behalf of approximately 334 individuals employed by Defendant Diverse Facility Solutions,
5 Inc. (“DFS” or “Defendant”) as non-exempt employees in California during the period of
6 December 7, 2017, to the date of preliminary approval. The proposed \$450,000 settlement will
7 provide at least \$227,000 in cash payments to the settlement class, with an average award of about
8 \$680, plus additional amounts payable under PAGA. The balance of approximately \$223,000 will
9 cover a modest enhancement award to the named Plaintiff, reasonable attorney’s fees and actual
10 litigation costs, settlement administration costs, and payment of civil penalties to the state. The
11 settlement is the product of Plaintiff’s pre- and post-filing investigation, extensive formal and
12 informal discovery, and arms-length and adversarial negotiations overseen by experienced and
13 well-regarded mediator Michael Young, Esq.

14 As demonstrated below, the settlement is within the “range of reasonableness” for
15 preliminary approval. Plaintiff’s counsel believe the settlement is a significant result for the class
16 given the substantial risks inherent in this matter. Accordingly, Plaintiffs request the Court enter
17 an order: (1) granting preliminary approval to the proposed class action settlement; (2)
18 conditionally certifying the settlement class as defined below; (3) appointing Crosner Legal, PC as
19 Class Counsel; (4) appointing plaintiff Romualda Razo as the Class Representative; (5) appointing
20 Apex Class Action LLC as the Settlement Administrator; (6) approving the form of notice to the
21 class and the procedure for providing such notice; and (7) scheduling a final fairness hearing.

22 **II. FACTUAL BACKGROUND AND PROCEDURAL POSTURE**

23 Defendant DFS provides janitorial and maintenance services for airports, schools/colleges,
24 recreation parks, hospitals, and government buildings across the United States (specifically, California,
25 Texas, Illinois, Florida, Michigan, New York and Washington). Plaintiff was employed by DFS as a
26 non-exempt janitor/maintenance worker until separation of her employment in December 2020, and
27 Plaintiff performed janitorial and disinfecting duties at the Ontario International Airport. Plaintiff was
28

1 not provided with her own badge to clock herself in and out for shifts or meal breaks – her supervisor
2 did it for her. [Declaration of Samuel D. Saunders (“Saunders Decl.”), ¶ 4.]

3 Plaintiff alleges a number of wage and hour violations by Defendant. First, she alleges
4 DFS of failing to pay all wages due, including minimum and overtime wages, because DFS
5 rounded employee time punches to the nearest quarter-hour which policy, per Plaintiff, resulted in
6 a significant net loss of compensable time for the class members. Next, Plaintiff alleged DFS
7 failed to provide timely and uninterrupted duty free meal and rest periods. Plaintiffs argued that, in
8 addition to maintaining non-compliant written meal and rest break policies, review of the time and
9 payroll data provided by Defendant suggests significant de facto break violations for late, short, or
10 missed meal breaks and further that second meal breaks were practically non-existent on shifts of
11 10+ hours. Plaintiffs also alleged she and the class members were required to use their personal
12 cell phones for work purposes without any reimbursement. Finally, Plaintiff alleges derivative
13 violations for failing to provide accurate itemized wage statements and failing to timely pay wages
14 upon separation of employment. [Saunders Decl., ¶ 5.]

15 Based on these allegations, Plaintiff filed her lawsuit on December 7, 2021, alleging causes
16 of action for unpaid minimum wages, unpaid overtime wages, failure to provide meal and rest
17 breaks, wage statement violations, waiting time penalties, business expense reimbursements,
18 unfair competition, and civil penalties under the Private Attorneys General Act (“PAGA”).
19 Plaintiff exhausted her administrative remedies under PAGA. [Saunders Decl., ¶ 6; Exh. 2.]

20 DFS has at all times denied Plaintiff’s allegations and maintained its meal break and
21 payroll policies and procedures comply with California law, that it provided its employees with
22 required meal and rest breaks, that it properly tracked employee time and paid Plaintiff and all
23 other employees all wages due, and that any use of personal cell phones was for the employee’s
24 own convenience and not reimbursable as a necessary business expense. Additionally, Defendant
25 strongly contends the case cannot be maintained as any kind of class or representative action,
26 arguing that to the extent class members missed meal breaks, that such breaks were non-
27 compliant, or that any unpaid “off the clock” work occurred, whether by rounding our otherwise, it
28 was intermittent and infrequent, against company policy, and done without the company’s

1 knowledge. Thus, per DFS, evidence of such violations would be purely anecdotal and therefore
2 individualized issues predominate and trial would be unmanageable. [Saunders Decl., ¶ 7.]

3 Since Plaintiff filed the complaint, she initiated formal written discovery. After agreeing to
4 mediation, the Parties also undertook additional informal discovery to facilitate an exchange of
5 information necessary to engage in a meaningful mediation. Consequently, Plaintiff's counsel
6 reviewed payroll records, personnel policies/handbooks, meal and rest break policies, personnel
7 files, and a random sampling of paystubs and time records produced by DFS for about __% of the
8 class. Defendant also provided documents and information reflecting the estimated total amount
9 of workweeks and pay periods the class members worked, and average hourly pay rates, among
10 other relevant data. Plaintiff had that data reviewed and analyzed by Berger Consulting Group to
11 assist with determining potential break violation rates, amount of underpaid rest and recovery time
12 and unproductive time, etc., and preparing a damages model. [Saunders Decl., ¶ 8.]

13 The Parties then engaged Michael Young, Esq., a highly respected mediator with extensive
14 wage and hour class action experience and, in April 2023, participated in a full-day mediation with
15 Mr. Young. On April 11, 2023, and June 14, 2023, the Parties participated in mediations presided
16 over by Michael Young, Esq. which led to this Agreement to settle the Action after the Parties
17 accepted a mediator's proposal Throughout the day, the arms-length negotiations were hard-fought
18 and adversarial as the Parties exchanged extensive information on their legal and factual positions,
19 and made numerous offers and counter-offers. After a full day of negotiations, the Parties reached
20 agreement on all major issues. They then collaboratively drafted the Class Action and PAGA
21 Settlement Agreement ("Settlement Agreement") setting forth the full and final settlement terms,
22 and a true and correct, fully-executed copy of the Settlement Agreement is attached to the
23 Saunders Declaration as Exhibit 1. [Saunders Decl., ¶ 9.]

24 **III. THE PROPOSED SETTLEMENT TERMS**

25 Under the proposed settlement, DFS will pay \$450,000.00 into a common fund, the Gross
26 Settlement Amount ("GSA"). Reasonable attorney's fees of up to one-third of the GSA, or
27 \$150,000, actual litigation costs of up to \$15,000, a modest enhancement award of up to \$5,000
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1 for plaintiff, settlement administration costs of no more than \$8,000, and \$45,000 for alleged civil
2 penalties under PAGA,¹ all will be paid from the GSA. The remainder of approximately \$227,000
3 will be allocated among the Participating Class Members based on their total weeks worked
4 during the Class Period. No portion of the GSA will revert to Defendant. [Saunders Decl., ¶ 10.]

5 **A. Certification of the Settlement Class**

6 The settlement provides for conditional certification of a settlement class including all
7 individuals who worked for Defendant as a non-exempt employee in California during the Class
8 Period, which runs from December 7, 2017 through preliminary approval. DFS estimates the
9 Settlement Class consists of approximately 334 individuals. [Saunders Decl., ¶ 11.]

10 **B. The Benefit Conferred on the Settlement Class**

11 As noted, the settlement obligates DFS to pay \$450,000 to resolve the Settlement Class's
12 claims, inclusive of attorney's fees and costs. At least \$227,000 from the GSA will be distributed
13 to the Participating Class Members. This is a cash settlement that does not require Participating
14 Class Members to submit a claim form to receive their settlement share. Participating Class
15 Members will receive their settlement checks automatically via First Class U.S. Mail. Twenty
16 percent of each settlement share will be allocated to wages and the remaining eighty percent will
17 be allocated to penalties and interest. DFS will pay any and all applicable employer-side payroll
18 taxes separately and in addition to the GSA. Subject to the Court's approval, any amounts not
19 claimed (because a class member does not cash his or her settlement check) will be forwarded to
20 the California State Controller's Unclaimed Property Fund. [Saunders Decl., ¶ 12.]

21 Each Participating Class Member will receive a share of the Net Settlement Amount based
22 on his or her position held and total weeks worked for DFS during the Class Period while
23 employed as a non-exempt employee. Thus, each Class Member's Individual Settlement Payment
24 will be calculated using criteria typically used in determining appropriate amounts of alleged
25 unpaid wages, unpaid premium wages for missed meal breaks, and potential statutory penalties

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27 ¹ Consistent with PAGA, \$33,750 of that amount will go the LWDA for the State's share of the civil
28 penalties, and the remaining \$11,250 will be distributed pro rata to the Aggrieved Employees (defined as
all individuals employed as non-exempt employees during the PAGA period of October 3, 2020 to
Preliminary Approval).

1 under applicable law. These methods are intended to ensure each Class Member receives a portion
2 of the available settlement funds corresponding to the relative value of his or her potential claims.
3 The proposed allocation provides a reasonable way to compensate Class Members based on the
4 amount of time they worked for Defendant, and the number of instances they missed a break, were
5 not provided compensation in lieu of such missed breaks, or lost wages due to Defendant's alleged
6 improper payroll practices. The average class settlement award is estimated to be around \$680.
7 Per DFS, there are approximately 210 Aggrieved Employees, and their average PAGA award will
8 be about \$53. [Saunders Decl., ¶ 13.]

9 As discussed below, the overall settlement amount is reasonable in light of the
10 considerable risks associated with Plaintiffs' claims as well as the delay and risk posed by
11 continuing to litigate such disputed allegations. In Plaintiff's counsel's judgment, the total value
12 recovered for the class is substantial and in the range of reasonableness.

13 **C. Settlement Administration**

14 Subject to the Court's approval, the Parties have agreed on Apex Class Action LLC as the
15 Settlement Administrator. Apex is qualified and has significant experience administering class
16 action settlements, including numerous wage and hour matters. Apex's fees will not exceed
17 \$8,000. [Saunders Decl., ¶ 14; Declaration of Sean Hartranft, ¶¶ ___, Exhs. A-B.]

18 **D. The Class Notice**

19 The proposed Notice (Exhibit A to the Settlement Agreement) sets out information about
20 this case and explains the basic settlement terms in plain language. The Notice also sets forth the
21 individualized information used to calculate Class Members' Individual Settlement Payments and
22 each Class Member's estimated settlement award. The Notice likewise details the procedures for
23 Class Members to dispute their individual information, the procedure for submitting an objection
24 to the Settlement, and the procedure to request exclusion. In sum, the Notice provides the Class
25 Members with the information necessary to evaluate the Settlement, provides fair opportunity to
26 participate in, opt out of, or object to the proposed Settlement, and otherwise complies with
27 California Rules of Court 3.769(f) and 3.766(d). Coupled with the notice procedure, the proposed
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1 Notice provides the Class with the best notice practicable. [Saunders Decl., ¶ 15.]

2 **E. Right to Correct Information, Opt Out, or Object**

3 Class Members will have forty-five (45) days to dispute the information in their Notice
4 used to calculate their settlement award, and also have 45 days to submit any objections to the
5 settlement or to request exclusion. In the event a Class Member disputes their individual
6 information, the Settlement Administrator will review the Class Member's records as well as any
7 additional information submitted, and make a final determination. [Saunders Decl., ¶ 16.]

8 **F. Release of Claims**

9 All Participating Class Members will be deemed to release Defendant from all class claims
10 alleged in the operative complaint, or that could have been brought based on the allegations in the
11 operative complaint from September 13, 2016, through the Preliminary Approval Date, and the
12 PAGA Members will release all claims under PAGA for the PAGA Period of May 10, 2020,
13 through the Preliminary Approval Date. The releases are limited to the claims that were actually
14 pleaded or could have been pleaded based on the alleged facts in the operative complaint.
15 [Saunders Decl., ¶ 17.]

16 **G. Attorney's Fees and Costs, and Plaintiff's Enhancement Award**

17 The settlement provides Defendant will not oppose a request for reasonable attorney's fees
18 not to exceed one-third of the Gross Settlement Amount, or \$150,000.00, nor will it oppose a
19 request for reimbursement of actual litigation costs and expenses of up to \$15,000.00. Defendant
20 also will not oppose a request for an enhancement award to Plaintiff of not more than \$5,000.00 in
21 recognition of her time spent on this matter, the risks she undertook on behalf of the class, and the
22 benefit conferred to the class. Plaintiff's counsel will provide the Court with appropriate
23 summaries and evidence of their efforts and time records in anticipation of the Final Approval
24 Hearing, and Plaintiff has submitted a declaration herewith. If the Court approves less than the
25 above amounts, the difference will remain in the Net Settlement Amount for distribution to the
26 Participating Class Members. [Saunders Decl., ¶ 18.]

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1 **H. PAGA Claims and Notice to the LWDA**

2 The Parties allocated \$45,000 to payment of civil penalties under PAGA for such claims
3 against DFS, as addressed in more detail below. As required by Labor Code section 2699(l)(2),
4 Plaintiff gave notice of the settlement and preliminary approval hearing to the LWDA via its
5 online portal. [Saunders Decl., ¶ 19; Exh. 3.]

6 **IV. ARGUMENT**

7 **A. Standard of Review for a Class Action Settlement**

8 The law favors settlement, particularly in class actions where substantial resources can be
9 conserved by avoiding the time, costs and rigors of formal litigation. H. Newberg & A. Conte, 4
10 Newberg on Class Actions (4th ed. 2002) § 11.41; Class Plaintiffs v. City of Seattle (9th Cir.
11 1992) 955 F.2d 1268, 1276, cert. denied, 506 U.S. 953; Potter v. Pacific Coast Lumber Co. (1951)
12 37 Cal.2d 592, 602. Nevertheless, to ensure the rights of absent class members are not unjustly
13 compromised, settlement of a class action requires court approval. Cal. Rule of Court. 3.769;
14 Wershba v. Apple Computer (2001) 91 Cal.App.4th 224, 245; Dunk v. Ford Motor Co. (1996) 48
15 Cal.App.4th 1794, 1801. This judicial review protects against fraud or collusion and ensures
16 fairness to the absent class members. Dunk, 48 Cal.App.4th at 1800-01. Judicial review occurs
17 via a two-step process to determine, under all the circumstances, if the proposed settlement is fair,
18 reasonable and adequate. Id. at 1801; Wershba, 91 Cal.App.4th at 245.

19 The first step is a motion for preliminary approval, through which the parties present the
20 court with the proposed settlement and seek a determination if it is sufficiently fair and reasonable
21 to warrant notice to the class and further proceedings as to its fairness and adequacy. Cal. Rule of
22 Court 3.769(c). This preliminary evaluation determines if the proposed settlement is within the
23 “range of reasonableness” and if notice should be provided to the class regarding the settlement’s
24 proposed terms and conditions, and whether a final fairness hearing should be scheduled.
25 Wershba, 91 Cal.App.4th at 234-35; North County Contractors Ass’n, Inc. v. TouchTWC Ins.
26 Servs. (1994) 27 Cal.App.4th 1085, 1089-90. Considering the strong judicial policy favoring
27 settlement of class actions, courts generally apply a presumption of fairness to class action
28 settlements when (1) the settlement results from arms-length bargaining, (2) investigation and

1 discovery are sufficient to allow counsel and the court to act intelligently, (3) counsel is
2 experienced in similar litigation, and (4) the percentage of objectors is small. Dunk, 48
3 Cal.App.4th at 1802; Wershba, 91 Cal.App.4th at 245.

4 If the court grants preliminary approval, it then orders the class be given notice in an
5 appropriate manner, establishes a schedule and procedures for class members to request exclusion
6 or object, and sets the matter for a final fairness hearing. Typically, any motion for attorney's fees
7 and costs, and any enhancement for the class representative(s), is filed subsequent to preliminary
8 approval and heard with the motion for final approval, as part of the second step of the two-step
9 approval process. Dunk, 48 Cal.App.4th at 1800; Wershba, 91 Cal.App.4th at 232.

10 The proposed settlement in this matter warrants preliminary approval under the liberal
11 standard discussed above, as it is fair, reasonable and adequate under all the circumstances, and
12 represents a favorable result for the class.

13 **B. The Proposed Settlement Class Should Be Conditionally Certified**

14 The purpose of conditional class certification for purposes of settlement is to facilitate
15 provision of notice of the proposed settlement's terms, and the date and time of the final fairness
16 hearing. In this context, courts apply lesser scrutiny than they would otherwise in the context of
17 certifying a class. Dunk, 48 Cal.App.4th at 1807, n.19; Global Minerals & Metals Corp. v.
18 Superior Court (2003) 113 Cal.App.4th 836, 839 ("[I]t is well established that trial courts should
19 use different standards to determine the propriety of a settlement class.")

20 In the present matter, conditional certification is proper since this matter satisfies all
21 requirements for class certification under Code of Civil Procedure section 382. First, the class is
22 both sufficiently numerous, consisting of approximately 334 individuals, and ascertainable by
23 reference to Defendant's personnel and payroll records. [Saunders Decl., ¶ 20.] Next, Plaintiff is
24 an adequate class representative, as her claims do not conflict with and are not antagonistic to the
25 claims of other class members. Further, her claims are typical given she is a member of the class
26 and her respective claims arise from the same employment practices and course of conduct giving
27 rise to the claims of the other class members. [Saunders Decl., ¶ 21; Declaration of Romualda
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1 Razo, ¶¶ 2-9.] Lastly, Plaintiff’s counsel are experienced and adequate class counsel. [Saunders
2 Decl., ¶¶ 35-41.]

3 Next, common questions of law and fact predominate – particularly for purposes of a
4 settlement class – as the Class Members all were subject to the same meal rest break policies, the
5 same alleged policy that shorted them on hours worked. Since the focus of the claims against
6 DFS concerns the legality of common policies applied uniformly to the entire class, common
7 issues predominate over individualized inquiries concerning liability. DFS’s alleged rounding
8 policy is company-wide policy applied equally and consistently to all class members, and this
9 policy is either compliant with California law or it is not. Regardless of that determination, it will
10 decide liability for all class members one way or another. Similarly, whether DFS properly paid
11 for rest and recovery time present another common issue. [Saunders Decl., ¶ 22.]

12 By now it is well-settled that a theory of recovery asserting the existence of a uniform
13 policy violating California law is sufficient to satisfy the requirements for class certification. Jones
14 v. Farmers Ins. Exch. (2013) 221 Cal.App.4th 986, 996 (“Claims alleging that a uniform policy
15 consistently applied to a group of employees is in violation of the wage and hour laws are of the
16 sort routinely, and properly, found suitable for class treatment”); Williams v. Superior Court
17 (2013) 221 Cal.App.4th 1353 (“A company-wide practice can sustain a common question of fact
18 or law that supports commonality for class certification”). Lastly, a class action is superior to
19 other means for the fair and efficient adjudication of this controversy. [Saunders Decl., ¶ 23.]

20 C. **The Proposed Settlement Meets the Dunk and Kullar Factors and is**
21 **within the Range of Reasonableness**

22 The proposed settlement resulted from serious, arms-length negotiations facilitated by
23 respected mediator Michael Young, Esq., who has extensive experience mediating wage and hour
24 class actions. [Saunders Decl., ¶ 9.] Plaintiff’s counsel Zach Crosner, Jamie Serb, and Chad
25 Saunders, and Crosner Legal, PC, all have years of litigation experience, including litigating wage
26 and hour class actions. Plaintiffs’ counsel are well-qualified to evaluate the risks and benefits of
27 pursuing further litigation or settling the matter. [Saunders Decl., ¶¶ 35-41.]

1 California law recognizes several factors bearing on the fairness, adequacy, and
2 reasonableness of a proposed class settlement. Kullar v. Foot Locker Retail, Inc. (2008) 168
3 Cal.App.4th 116, 128. In relevant part, these factors include: 1) the amount offered in settlement 2)
4 the strength of plaintiff's case; 3) the risk, expense, complexity, and likely duration of further
5 litigation; 4) the risk of maintaining class action status throughout trial; 5) the experience and views
6 of counsel; and 6) the reaction of the class members to the proposed settlement. Id. As demonstrated
7 below, the proposed settlement satisfies these requirements.

8 Prior to mediation, the parties engaged in extensive formal informal discovery to facilitate
9 settlement discussions. As a result, Plaintiff reviewed documents and information regarding DFS's
10 payroll practices, pay stubs and time records for a sampling of class members, meal and rest break
11 policies, etc., and information from Defendant regarding class size and breakdown of job positions,
12 work weeks, rates of pay, and other information used to formulate a damages model. This extensive
13 information then was analyzed by a consulting expert to look for meal and rest break violation rates,
14 time spent working off the clock due to donning/doffing, security checks, etc., and other issues
15 relevant to liability and damages. Plaintiff's counsel are confident they obtained sufficient
16 information to enable them to understand the law and facts of this case and make an informed
17 decision regarding the proposed settlement and whether it is in the best interests of the class.
18 [Saunders Decl., ¶¶ 8, 24.]

19 Next, the proposed settlement falls within the range of reasonableness warranting
20 preliminary approval. The proposed settlement involves a significant sum that, when distributed,
21 will confer direct monetary benefits on the class members. As described above, each class member
22 will be entitled to a monetary payment without having to file a claim and each payment will be
23 relative to the value of his or her potential claims.

24 Plaintiff's analysis was supported by the pre-mediation production described above, which
25 permitted Plaintiffs' counsel to estimate potential damages on various theories of liability. Using
26 that data, Plaintiff ran various calculations and estimated DFS's likely maximum exposure on the
27 class claims at approximately \$3,648,000, including \$355,000 on the unpaid wage claims,
28 \$1,000,000 on the meal break claims, \$1,190,000 on the rest break claims, \$46,000 on the expense

1 reimbursement claim, \$286,000 on the wage statement claims, and \$771,000 on the waiting time
2 penalty claims. [Saunders Decl., ¶¶ 25-26.] Plaintiff and her counsel substantially discounted the
3 value of these claims, however, in light of Defendant’s multi-layered defenses on both class
4 certification and on the merits, and the multiple and considerable risks posed by proceeding with
5 the litigation.

6 The unpaid wage claims focus primarily on DFS’s alleged policy of rounding employee
7 time punches off to the nearest quarter-hour. Per Plaintiff, this policy unduly favored DFS as the
8 majority of time punches were rounded down and resulted in class members losing compensable
9 hours worked. In response, DFS argued its payroll policies are fully compliant, that it properly
10 tracked and paid for all hours worked at the appropriate hourly wage. Defendant also emphasized
11 time rounding is permissible under California law so long it has an overall neutral effect on
12 employee time and compensation. See’s Candy Shops, Inc. v. Superior Court (2012) 210
13 Cal.App.4th 889. Finally, Defendant argued the issue would not be certifiable since it would
14 require individualized inquiries whether any compensable “off the clock” work occurred if an
15 employee clocked in a few minutes early or late, and why it was or was not documented and paid
16 for. [Saunders Decl., ¶ 27.]

17 On the meal and rest break claims, Plaintiff contends DFS’s written policies are not fully
18 compliant, and Plaintiff’s review of the time and payroll records provided suggested these
19 deficiencies in the written policies affected employee breaks and resulted in substantial “de facto”
20 violations. For example, Plaintiffs’ analysis showed an overall 85% violation rate for meal
21 periods with a least one unique violation, and a 100% violation for second meal periods. Plaintiff
22 also contends she and the class members were consistently required to work in excess of four
23 hours without receiving lawful ten minute rest periods. Even when they were provided an
24 opportunity to take such a break within each four hour period, they were consistently denied
25 compliant rest periods because such rest periods were interrupted and/or cut short by management
26 and other employees requiring assistance, and management would insist the work be done
27 immediately rather than after the rest period or they would be required to perform more work than
28 could possibly performed in their allotted time order to take such breaks. [Saunders Decl., ¶ 28.]

1 In response, DFS argued its written policies are fully compliant, that it provided
2 employees with the opportunity to receive all required breaks, and that many class members
3 waived their second meal periods. Defendant further maintained that, in light of its compliant
4 policies, whether a class member missed a meal period, received a late meal period, or missed a
5 rest break would have been aberrational and against company policy. Thus, per DFS, these issues
6 are not amenable to class or representative treatment since their resolution would require
7 individualized inquiries as to why a break was missed or non-compliant. [Saunders Decl., ¶ 29.]

8 On the expense reimbursement claim, Plaintiff alleges use of personal cellular phones was
9 necessary and consequential to employment duties for purposes of group messaging, and receiving
10 work-related calls and texts, and that some employees used their phones to clock in and out. Cochran
11 v. Schwan's Home Services, Inc. (2014) 228 Cal.App.4th 1137, 1144. In response, DFS argued it
12 provided employees with all tools and equipment necessary to perform their job duties and, to the
13 extent employees used their own phones, it was purely for personal convenience, was not necessary
14 to their employment, and therefore was not reimbursable. [Saunders Decl., ¶ 30.]

15 The claims under Labor Code sections 203 and 226 are derivative of the primary unpaid
16 wage claims, and accordingly are subject to the same risks and uncertainties plus additional risks
17 posed by the need to take into account the discretionary nature of such awards and the “good
18 faith” and other defenses available to Defendant. Amaral v. Cintas Corp. No. 2 (2008) 163
19 Cal.App.4th 1157, 1203-4 (employer did not willfully fail to pay wages under Labor Code § 203
20 even though class prevailed on underlying claim for failure to pay living wages). Thus, while
21 these claims largely are derivative of the unpaid wage claim, they also are subject to additional
22 defenses. [Saunders Decl., ¶ 31.]

23 As far as potential PAGA liability, the allegedly aggrieved employees theoretically are
24 entitled to penalties totaling over \$2.6 million in civil penalties should Plaintiffs prevail on all claims
25 and establish violations of the multiple Labor Code sections at issue. [Saunders Decl., ¶ 32.] As
26 with the class claims, Plaintiff discounted the potential PAGA penalties based on Defendant's
27 various defenses on the merits and also accounted for the Court's wide discretion to reduce such
28 penalties, or to decline to award penalties at all. Labor Code § 2699(e)(2); Carrington v. Starbucks

1 Corp. (2018) 30 Cal.App.5th 504 (trial court awarded penalties of \$5 per pay period after a bench
2 trial, which decision was upheld on appeal); In re Taco Bell Wage and Hour Actions (E.D. Cal. Apr.
3 8, 2016) 2016 U.S. Dist. LEXIS 48557 (PAGA penalties denied after trial). Accordingly, the Parties
4 allocated \$45,000 to PAGA penalties, and Plaintiffs submit this amount is reasonable under the
5 circumstances and in line with comparable settlements in other wage and hour class actions in
6 California. *E.g.*, Van Kempen v. Matheson Tri-Gas, Inc. (N.D. Cal. Aug. 25, 2017) 2017 U.S. Dist.
7 LEXIS 137182 (granting final approval of \$5,000 PAGA penalty from \$370,000 settlement, or 1.4
8 percent of total settlement); Slavkov v. First Water Heater Partners I (N.D. Cal. July 25, 2017) 2017
9 U.S. Dist. LEXIS 116303 (finding a \$7,500 PAGA payment reasonable when measured against the
10 overall settlement of \$345,000 and the possible weaknesses in Plaintiffs' case, or 2.2 percent of total
11 settlement). Additionally, the LWDA has been informed of the terms of the PAGA portion of the
12 settlement, and will be able to weigh in as necessary. Jennings v. Open Door Mktg. Inc. (N.D. Cal.
13 Oct. 3, 2018) 2018 U.S. Dist. LEXIS 171356, at *27 (approving settlement with PAGA penalties of
14 0.6% where "[p]laintiffs [have] submitted the settlement agreement to the LWDA, and the LWDA
15 has not objected to the settlement.

16 The settlement obviates the significant risk that this Court may find any kind of class or
17 representative resolution unachievable or deny certification of all or some of Plaintiff's claims.
18 Furthermore, even if Plaintiff obtained certification of all or some of the claims, continued
19 litigation would be lengthy and expensive as the parties pursued merits discovery, a probable
20 motion to decertify, as well as trial and possible appeals, and would further and substantially delay
21 any recovery by the class with no assurance of recovering significantly more than the proposed
22 settlement. While Plaintiff is confident in the merits of these claims, legitimate controversies exist
23 regarding each one of them. Plaintiff also recognizes proving the amount of wages and penalties
24 due each Class Member would be an expensive, time-consuming, and uncertain proposition.
25 [Saunders Decl., ¶ 33.]

26 Plaintiff and her counsel discounted the value of the class claims consistent with the risks
27 discussed above, and carefully weighed the likelihood of the class receiving substantially greater
28 benefit if the litigation continued. Plaintiff and counsel concluded – in light of these very real and

1 substantial risks – settlement on the proposed terms and without prolonged and costly litigation
2 was in the best interests of the class, and the overall \$450,000 recovery represents a significant
3 percentage of Defendant’s potential exposure. Given these risks, a total recovery for the class of
4 \$450,000, which will result in average award of some \$680 per class member, is a significant
5 result well within the range of reasonableness considering all potential outcomes, and it will
6 provide monetary awards to all Class Members without further delay. [Saunders Decl., ¶ 34.]

7 Importantly, the mere fact that a settlement does not provide the same recovery as might be
8 achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and
9 adequate. Wershba, 91 Cal.App.4th at 246, 250 (“Compromise is inherent and necessary in the
10 settlement process...even if the relief afforded by the proposed settlement is substantially
11 narrower than it would be if the suits were to be successfully litigated, this is no bar to a class
12 settlement because the public interest may indeed be served by a voluntary settlement in which
13 each side gives ground in the interest of avoiding litigation”); Lane v. Facebook, Inc. (9th Cir.
14 2012) 696 F.3d 811, 819 (“[T]he question whether a settlement is fundamentally fair . . . is
15 different from the question whether the settlement is perfect in the estimation of the reviewing
16 court”); 7-Eleven Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135,
17 1150 (“The fact that a proposed settlement may amount to only a fraction of the potential recovery
18 does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be
19 disapproved”); White v. Experian Information Solutions, Inc. (C.D. Cal. 2011) 803 F.Supp.2d
20 1086, 1098 (rejecting contention settlement was not fair and reasonable even though it represented
21 99% discount off the maximum value of the claims). Importantly as well, the proposed settlement
22 is non-reversionary and will provide timely benefits to the Class Members without a claims
23 process. White, 803 F.Supp.2d at 1098; c.f., Federal Judicial Center, Managing Class Action
24 Litigation: A Pocket Guide for Judges (3d ed. 2010) at 20, available at [http://](http://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf)
25 www.fjc.gov/sites/default/files/2012/ClassGd3.pdf (reversionary provisions and/or cumbersome
26 claims process may indicate lack of fairness). Plaintiffs and their counsel submit the settlement is
27 within the “range of reasonableness,” and is fair and adequate for the Class.

28 ////

1 **V. CONCLUSION**

2 For all the foregoing reasons, Plaintiff respectfully requests that the Court grant this motion,
3 conditionally certify the settlement class, grant preliminary approval to the proposed class action
4 settlement, and enter the [Proposed] Order filed herewith.
5

6 Dated: September 27, 2023

CROSNER LEGAL, PC

7
8 By: 
9 Chad Saunders

Attorneys for Plaintiff ROMUALDA RAZO