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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF CONTRA COSTA**

GILDARDO MOTA STEVENS, an
individual, on behalf of himself and others
similarly situated,

PLAINTIFF,

v.

PURPLE EAGLE LLC; and DOES 1 thru 50,
inclusive,

DEFENDANTS.

CASE NO. MSC21-02204

[Case Assigned for All Purposes to Hon.
Charles S. Treat in Dept. 12]

**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
Liane Katzenstein Ly, William Zev Abramson;
Gildardo Mota Stevens and Lluvia Islas,
Proposed Order, and Judgment]*

Date: October 19, 2023

Time: 9:00 a.m.

Dept.: 12

Complaint Filed: October 26, 2021

Trial Date: None Set

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 19, 2023 at 9:00 a.m. in Department 12 of the above-entitled court, Plaintiff Gildardo Mota Stevens (“Plaintiff” or “Class Representative”) will, and hereby does, move the Court for an Order of Final Approval of the Class Settlement in this case. Plaintiff moves the Court for an order:

1. Granting final approval of the settlement in the case pursuant to the Class Action and PAGA Settlement Agreement (“Settlement” or “Agreement”), a copy of which is attached to the concurrently-filed Declaration of Liane Katzenstein Ly as Exhibit “1”;

2. Affirming Kingsley & Kingsley, APC and Abramson Labor Group as Class Counsel;

3. Affirming Gildardo Mota Stevens as Class Representative and awarding an enhancement award of \$5,000.00;

4. Awarding Phoenix Settlement Administrators claims administration fees of \$10,000.00 for its services as Settlement Administrator; and,

5. Entering judgment.

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

The Motion will be based on this Notice of Motion, the attached Memorandum of Points and Authorities, the Declarations of Liane Katzenstein Ly, William Zev Abramson, Gildardo Mota Stevens, Lluvia Islas, all other papers and records on file in this action, and on such oral and documentary evidence as may be presented at the hearing on this Motion.

DATED: September 27, 2023

KINGSLEY & KINGSLEY, APC

By: 

Liane Katzenstein Ly
Attorneys for Plaintiff and the proposed class

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Gildardo Mota Stevens (“Plaintiff”) submits this Motion for Final Approval of
4 Class 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 (“Settlement” or “Agreement”), a copy of which is attached to the
7 concurrently-filed Declaration of Liane Katzenstein Ly 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
11 \$10,000.00 for its services as settlement Administrator;

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

14 5. Enter judgment.

15 **II. FACTUAL BACKGROUND**

16 **A. Litigation Overview and Procedural History**

17 PURPLE EAGLE LLC (“Defendant”) operates throughout California and Arizona and is
18 the parent company of Hand & Stone Massage and Facial Spa, specializing in providing massages,
19 facials, among other enhancement services to customers. Plaintiff performed work as a
20 “neuromuscular therapist” for Defendant in California from approximately April 24, 2021 through
21 May 10, 2021. Plaintiff and the Proposed Class worked as non-exempt employees who earned
22 hourly wages.

23 On October 26, 2021, Plaintiff filed a putative class action lawsuit entitled *GILDARDO*
24 *MOTA STEVENS v. PURPLE EAGLE LLC* in the Contra Costa County Superior Court, case
25 number MSC21-02204. (Declaration of Liane Katzenstein Ly “Ly Decl.” ¶5.) (Agreement, Ex. 1
26 at ¶1.1.). In the Complaint, Plaintiff alleged six causes of action, alleging that Defendant 1) failed
27 to pay wages and/or overtime as required by the Labor Code and Wage Orders under Labor Code
28 §§510, 1194, and 1199; 2) failed to provide compliant rest breaks pursuant to Labor Code §226.7

1 and IWC Wage Order 2-2001; 3) failed to reimburse for the cost of Plaintiff and the Proposed
2 Class using their personal cellphones for necessary work purposes pursuant to Labor Code §2802;
3 4) failed to issue accurate itemized wage statements showing the total hours worked by Plaintiff
4 and other employees and all applicable hourly rates in effect during the pay period and the
5 corresponding number of hours worked at each hourly rate by the employee pursuant to Labor
6 Code §226(a); 5) failed to pay all wages due upon termination or resignation pursuant to pursuant
7 to Labor Code §§201-203; and 6) is liable for penalties pursuant to Business & Professions Code
8 §17200. (Ly Decl. ¶6.)

9 Also, On October 25, 2021, Plaintiff also provided written notice to the Labor and
10 Workforce Development Agency (“LWDA”) and Defendant setting forth his intent to pursue
11 claims pursuant to Labor Code §2699, et seq. (“PAGA”) for Defendant’s alleged aforementioned
12 violations. (Ly Decl. ¶7.)

13 Plaintiff filed a First Amended Class and Representative Action Complaint on January 3,
14 2022, adding an additional cause of action for penalties pursuant to pursuant to Labor Code § 2699,
15 et seq. based upon the same alleged Labor Code violations at issue in the Complaint. (hereafter,
16 the “Lawsuit” or “Operative Complaint”) (Ly Decl. ¶8.)

17 B. The Discovery Process

18 The Parties have engaged in early stages of discovery and settlement negotiations but have
19 primarily focused their efforts on resolving this case through early mediation. (Ly Decl. ¶9.) On
20 February 10, 2022, Plaintiff served his first set of Special Interrogatories and Requests for
21 Production. (*Id.*) The Parties scheduled a private mediation with Todd A. Smith, Esq. on January
22 25, 2023. In preparation for mediation, Defendant informally produced multiple documents and
23 provided other information necessary to evaluate settlement. (Ly Decl. ¶10.) This included a
24 sample of time and pay data and financial data for mediation. (Ly Decl. ¶11.) The sample was of
25 about 20% of the Class. It included time and pay data for the sample, and Plaintiff retained an
26 expert who was able to analyze and extrapolate that data out to the entire Class. Plaintiff’s
27 investigation was sufficient to satisfy the criteria for court approval set forth in *Dunk v. Foot*
28 *Locker Retail, Inc.* (1996) 48 Cal.App.4th 1794, 1801 and *Kullar v. Foot Locker Retail, Inc.* (2008)

1 168 Cal.App.4th 116, 129-130 (“*Dunk/Kullar*”).

2 Additionally, Defendant provided financial documents to support its argument that its
3 ability to pay should be a factor in the Settlement. (Ly Decl. ¶12.) Plaintiff also retained an
4 accounting expert to review the documents and provide guidance on the financial stability of the
5 company. (Ly Decl. ¶13.) Ultimately, as described below, the financials resulted in a steep
6 discount based on the company’s solvency. (Ly Decl. ¶14.)

7 Defendant denies any liability or wrongdoing of any kind associated with the claims
8 alleged in the Action, disputes the damages and penalties claimed by Plaintiff, and further contends
9 that, for any purpose other than settlement, Plaintiff’s claims are not appropriate for class or
10 representative action treatment. (Ly Decl. ¶15.) Defendant contends, among other things, that, at
11 all times, it has complied with the California Labor Code, and the Industrial Wage Commission
12 Orders. (*Id.*)

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

22 C. Preliminary Approval

23 On July 6, 2023, the Court issued an Order preliminarily approving the settlement in this
24 case, approving the proposed Class Notice, ordering that the Settlement Administrator send notice
25 to the Settlement Class, and setting a date for the Final Approval and Fairness Hearing. (Ly Decl.
26 ¶17.)

27 ///

28 ///

1 **III. THE PRELIMINARILY APPROVED SETTLEMENT**

2 A. The Settlement Class

3 For purposes of Agreement, the settlement class is defined as: “all individuals who are or
4 were employed by Defendant as non-exempt employees in California during the Class Period.”
5 (“Settlement Class Members” or “Settlement Class”). (Ly Decl. ¶18; Agreement, Ex. 1 at ¶1.5.)

6 The Class Period is October 26, 2017 to March 25, 2023. (Ly Decl. ¶19; Ex. 1 at ¶1.12.)
7 The final Settlement Class contained 387 individuals. (Islas Decl. ¶13.)

8 B. The Aggrieved Employees

9 For purposes of the Agreement, the Aggrieved Employees are defined as: “all individuals
10 who were employed by Defendant as non-exempt employees in California during the PAGA
11 Period” (“Aggrieved Employees” or “PAGA Members”) (Ly Decl. ¶20; Settlement, Ex. 1 at ¶1.4.)

12 The PAGA Period is October 26, 2020 through March 25, 2023. (Ly Decl. ¶21; Ex. 1 at
13 ¶1.31.) There are 388 PAGA Members. (Ly Decl. ¶22, Ex. 1 at ¶4.1; Islas Decl. ¶14.)

14 C. Settlement Payments

15 As detailed fully in the Agreement, the Settlement provides for Defendant to pay a Gross
16 Settlement Amount of \$150,000.00, which includes the sum of the Individual Class Payments, the
17 Class Representative service award, the Class Counsel Award, PAGA Payment, and the Settlement
18 Administration Costs. (Ly Decl. ¶23; Ex. 1 at ¶1.22.)

19 The Net Settlement Amount is the Gross Settlement Amount, less Class Counsel Award,
20 Class Representative Enhancement, PAGA Payment, and Settlement Administration Costs. (Ly
21 Decl. ¶24; Ex. 1 at ¶1.28.)

22 Plaintiff now requests final approval of the allocation of the Gross Settlement Amount to
23 determine the Net Settlement Amount for distribution to the Settlement Class as follows:

Gross Settlement Amount:	\$	150,000.00
Attorneys’ Fees (1/3):	\$	50,000.00
Requested Case Costs:	\$	15,000.00
Claims Administration:	\$	10,000.00
PAGA Penalties:	\$	10,000.00
		<i>(\$7,500.00 to the LWDA; \$2,500.00 to remain in the Net Settlement Amount)</i>

Named Plaintiff Enhancement: \$ 5,000.00
Net Settlement Amount: \$ 62,500.00

D. Individual Settlement Payments

The Individual Class Payment amount of each Participating Settlement Class Member is an individualized amount that is based on the number of compensable workweeks worked by the Participating Settlement Class Member during the Class Period. (Ex. 1 at ¶3.2.4.; *see also* Ex. A to the Agreement [Class Notice].) Specifically, Individual Class Payments will be paid from the Net Settlement Amount and shall be paid pursuant to the settlement formula as follows: (1) First, using the Class Information, the Settlement Administrator will compute the total number of eligible workweeks of all Participating Settlement Class Members collectively during the Class Period; this sum shall be known as the Workweek total; (2) Second, the Settlement Administrator will divide the Net Settlement Amount by the Workweek total to determine the settlement value for each eligible workweek (the “Workweek Value”); and (3) Third, the Settlement Administrator will multiply the number of eligible Workweeks of a Participating Settlement Class Member during the Class Period by the Workweek Value to determine that Settlement Class Member’s Individual Class Payment. (*Id.*)

Twenty percent (20%) of the Gross Settlement Amount to each Participating Settlement Class Member shall be deemed payment for settlement of claims for wages and expenses and will be subject to appropriate deductions and withholdings calculated and made by the Settlement Administrator. (Ex. 1 at ¶3.2.4.1.) Seventy-nine percent (79%) of the Gross Settlement Amount to each Participating Settlement Class Member shall be deemed payment for settlement of claims for interest and other non-wage payments, and One percent (1%) for penalties, not subject to withholdings. (*Id.*)

The Agreement provides for a specific and detailed dispute process regarding Individual Class Payments. (*See* Ex. 1 at, ¶8.6.)

The Individual PAGA Payment will be an equal payment to all PAGA Settlement Group members calculated as follows: twenty-five percent (25%) of the PAGA Payment (or \$2,500.00) divided by the number of PAGA Settlement Group members. (*See* Ex. 1 at ¶3.2.5.)

1 Based on these calculations, the average potential recovery is \$155.04 per Settlement Class
2 Member. (Islas Decl. ¶13.)

3 E. Class Notice

4 The Court approved the proposed Class Notice and directed the mailing of the Notice by
5 first-class mail to Settlement Class Members in accordance with the proposed implementation
6 schedule. (Ly Decl. ¶25) The procedures for giving notice to the Settlement Class Members, as set
7 forth in the Settlement and Plaintiff’s Motion for Preliminary Approval and approved by the Court,
8 have been fully and properly carried out. (Islas Decl. ¶¶2-14.)

9 To date, Phoenix Settlement Administrators received one (1) request to be excluded (“opt-
10 outs”) from the proposed Settlement and no objections. (Islas Decl. ¶¶8-9.)

11 F. Check Mailed Settlement – No Reversion

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

19 G. The Release

20 The Released Claims by Participating Settlement Class Members are defined as: “all claims
21 arising out of or reasonably related to the allegations set forth in the Operative Complaint and/or
22 PAGA notice to the LWDA that arose during the Class Period including, e.g., (a) any and all claims
23 involving any alleged failure to pay wages; (b) failure to provide rest periods; (c) failure to
24 reimburse expenses; (d) failure to provide accurate itemized wage statements; (e) failure to pay all
25 wages due at termination; (f) unfair business practices; and all claims for liquidated damages,
26 penalties, interest, fees, costs based on the foregoing.” (Ex. 1 at ¶6.2.)

27 The Released Claims by Aggrieved Employees are defined as: “all claims for PAGA
28 penalties that were alleged, or reasonably could have been alleged, based on the PAGA Period

facts stated in the Operative Complaint and the PAGA Notice including any and all claims involving any alleged failure to (a) pay overtime and wages, (b) provide proper rest periods, (c) reimburse business expenses, (d) provide proper wage statements, (e) pay all wages due upon termination, and (e) engage in unfair business practices.” (Ex. 1 at ¶6.3.)

IV. THE COURT SHOULD ORDER FINAL APPROVAL OF THE SETTLEMENT

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

A. The Settlement is Entitled to a Presumption of Fairness

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

As to the first *Dunk* factor, this settlement is the result of adversarial, non-collusive, and arm’s-length negotiations overseen by an experienced mediator. All settlement discussions were made by experienced and informed counsel, who believe that this settlement represents a favorable resolution for the Settlement Class Members. (Ly Decl. ¶26.) The settlement negotiations have been, at all times, adversarial and non-collusive, with the aid of a mediator, and no self-dealing or other type of misconduct by either side has taken place. (Ly Decl. ¶27.)

Second, the Parties engaged in informal discovery that permitted Class Counsel to fairly evaluate the strength of the case and the risks associated with ongoing litigation. This included the sampling of time and pay data relevant to Settlement Class Members and financial data. (Ly Decl. ¶28.) Receipt of appropriate discovery allowed Class Counsel to fairly evaluate the exposure and risks associated with each claim alleged in the lawsuit. (Ly Decl. ¶29.)

1 Third, Class Counsel have significant experience in cases of this type, including several
2 years prosecuting wage, hour, and working condition violations. (Ly Decl. ¶30.) Class Counsel is
3 thus qualified to evaluate the class claims and viability of the defenses. Class Counsel believes that
4 the settlement is fair, reasonable, adequate, and in the best interests of the class and that the average
5 recovery for each Settlement Class Member of over \$155.00 is substantial, given the risks inherent
6 in litigation and the defenses asserted. (Ly Decl. ¶31.)

7 Finally, the fourth *Dunk* factor considers the percentage of objectors. Here, there was one
8 (1) request to be excluded and no objectors. (Islas Decl. ¶¶8-9.) As all of the *Dunk* factors are
9 satisfied, this settlement is entitled to a presumption of fairness.

10 B. The Court Should Approve This Class Action Settlement Because it Satisfies Each
11 of the *Kullar* Factors

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

19 In *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal. App. 4th 399,
20 409, the court clarified that a *Kullar* showing does not require the parties to submit the outer
21 reaches of maximum possible recovery without taking into account the actual risks of certification,
22 decertification, dispositive motions, and trial, so long as there is a record which allows "an
23 understanding of the amount that is in controversy and the realistic range of outcomes of the
24 litigation." *Munoz*, 186 Cal. App. 4th at 409.

25 The proposed settlement satisfies each of these factors. Class Counsel conducted extensive
26 informal discovery before entering into meaningful settlement negotiations in this matter. (*Id* at
27 Ly Decl. ¶¶9-16; ¶32.) This discovery permitted Class Counsel to fairly evaluate the strength of
28 the case and the risks associated with ongoing litigation. (Ly Decl. ¶33.) Class Counsel is

experienced in handling wage and hour class actions and, after weighing all of the following factors, supports this Agreement. (Ly Decl. ¶34.)

1. The Strength of Plaintiffs' Case

a) The Risks Associated with the Wages/Overtime Claim

California employees are entitled to compensation for all hours worked, which means “the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.” (Title 8 Cal. Code of Regs., § 11050(2)(K); See *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 845, as modified on denial of reh’g (Aug. 29, 2018).) Time is compensable if an employee is “subject to the control of an employer” even if not working, or if an employee “is suffered or permitted to work” even if not “under the employer’s control, provided the employer has or should have knowledge of the employee’s work.” (*Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038, 1046, reh'g denied (May 13, 2020) (citations omitted.) An employer controls an employee if the employer directs an employee and the employee is unable to use their time how they wish. (*Id.* at p. 1047.) Other factors courts may consider include whether the activity is required, “the location of the activity, the degree of the employer’s control, whether the activity primarily benefits the employee or employer, and whether the activity is enforced through disciplinary measures.” (*Id.* at p. 1056; *Cf. Gibbs v. TWC Administration, LLC* (S.D. Cal., Jan. 3, 2020, No. 17CV01513DMSAGS) 2020 WL 42768, at *9(denying Defendant’s motion for summary judgment when plaintiff-employees conducted off-the-clock pre-shift activity in preparation to start work right when they clocked in).)

In *Troester*, employees spent four to ten minutes completing tasks to close up the store, such as setting the alarm and locking the door. (*Troester*, 5 Cal.5th 829 at p. 843.) The Court held that California law prohibits employers from requiring employees to work off the clock, even for minutes, without compensation. (*Id.* at p. 848.) The Court explained:

An employer that requires its employees to work minutes off the clock on a regular basis or as a regular feature of the job may not evade the obligation to compensate the employee for that time by invoking the de minimis doctrine. As the facts here demonstrate, a few extra minutes of work each day can add up. . . . What Starbucks calls “de minimis” is not de minimis at all to many ordinary people who work for hourly wages.

(*Id.* at p. 847.)

1 Additionally, California workers are statutorily entitled to overtime compensation, unless
2 they are properly classified as falling within one of the narrow exemption categories. Under
3 California law, “[a]ny work in excess of eight hours in one workday and any work in excess of 40
4 hours in any one workweek...shall be compensated at the rate of no less than one and one-half
5 times the regular rate of pay for an employee.” (Lab. Code, § 510, subd. (a).)

6 Throughout the relevant time, Plaintiff and the Proposed Class were subject to the control
7 of Defendant prior their scheduled start times, without being compensated for those “hours
8 worked.” (Ly Decl. ¶35.)

9 Despite being off the clock, Defendant required employees to report to the job site
10 approximately 15 to 20 minutes before the schedule start of each shift despite knowing Plaintiff
11 and the Proposed Class were not “clocked” in. (Ly Decl. ¶36.) Plaintiff and Class Members were
12 required to prepare each spa room prior to their shift because Defendant scheduled appointments
13 at to start exactly at the start of their shifts. (Ly Decl. ¶37.) All of this was done with the knowledge
14 and direction of Defendant, thus Plaintiff and the Proposed Class are certainly entitled to be
15 compensated for this time worked. (Ly Decl. ¶38.) Thus, Defendant is liable for unpaid wages
16 and/or overtime.

17 Defendant denied that these allegations were true. (Ly Decl. ¶39.) Defendant argued that
18 no employees were required to report early, and if they did report early they could clock in early
19 and receive payment. (Ly Decl. ¶40.)

20 Given that this time was “off the clock” and not captured by the time clock, and given that
21 Defendant’s counter-argument, Plaintiff applied a discount to this claim. (Ly Decl. ¶41.)

22 b) The Risks Associated with the Rest Break Claim

23 Labor Code section 226.7, subdivision (c), requires an employer to pay an additional hour
24 of compensation for each workday the employer fails to provide a rest period according to law.
25 Employees are entitled to a paid ten (10) minute rest break for every four (4) hours worked, or
26 major fraction thereof. (Cal. Code Regs., tit. 8, § 11050, subd. 12(A).)

27 Plaintiff and the Proposed Class’s rest period claims arise from a common course of
28 conduct wherein Defendant did not provide employees with the opportunity to take a second 10-

1 minute rest break for shifts between 6-8 hours in compliance with California law. (Ly Decl. ¶42.)
2 The California Supreme Court has held: “Employees are entitled to 10 minutes’ rest for shifts from
3 three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10
4 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on.” (*Brinker Rest. Corp.*
5 *v. Superior Court*, supra, 53 Cal.4th at 1029.) In an eight-hour workday, being denied the two paid
6 rest breaks in a day is “essentially perform[ing] 20 minutes of ‘free’ work.” (*Murphy v. Kenneth*
7 *Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1104.)

8 The Court also clarified what steps an employer has to take to “make available” rest breaks
9 to its employees. Under *Brinker*,

10 An employer is required to authorize and permit the amount of rest break
11 time called for under the wage order for its industry. If it does not—if, for
12 example, it adopts a uniform policy authorizing and permitting only one rest
13 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.

14 (*Brinker Rest. Corp. v. Superior Court*, supra, 53 Cal.4th at 1033 (emphasis added).)

15 Employers must authorize and permit a net ten-minute paid rest period for every four hours,
16 or major fraction thereof, of work for its employees. If an employer does not, then the employer
17 must pay the employee one hour of pay at the employee’s regular rate of pay for each workday
18 that the rest period is not provided. (Cal. Code Regs., tit. 8, § 11050, subd. 12(B).)

19 Plaintiff and the Class Members consistently worked shifts of 6+ hours and were not
20 authorized or permitted to take second rest breaks. (Ly Decl. ¶43.) Therefore, for each rest period
21 Plaintiff and the Class Members were not provided with, Defendant is liable for one (1) additional
22 hour of pay at the employee’s regular rate of compensation. (Lab. Code, § 226.7, subd. (b).) (Ly
23 Decl. ¶44.)

24 Again, Defendant disagreed and maintained that there was accurate rest period policy and
25 employees took their breaks. (Ly Decl. ¶45.) Given that rest period claims can be difficult to
26 certify, Plaintiff factored in a discount for this claim. (Ly Decl. ¶46.)

27 ///

28 ///

1 c) The Risks Associated with the Reimbursement Claim

2 Labor Code section 2802 provides that an employer must “indemnify his or her employee
3 for all necessary expenditures or losses incurred by the employee in direct consequence of the
4 discharge of his or her duties” (Lab. Code, § 2802, subd. (a).)

5 Here, Defendant has failed to reimburse Plaintiff and the Proposed Class for business-
6 related expenses, including for use of their cell phones, necessary in executing the Proposed
7 Class’s duties under Defendant’s employ. (Ly Decl. ¶47.) Plaintiff and the Proposed Class phone
8 applications on their personal cell phones and consistently use these personal cell phones for
9 necessary work-related purposes such as, but not limited to, clocking in, communicating with
10 management, and managing client documents. (Ly Decl. ¶48.) These cell phones were not
11 provided by Defendant and Defendant failed to reimburse Plaintiff and the Proposed Class for the
12 costs associated with using these personal cell phones. (Ly Decl. ¶49.) Pursuant to Labor Code
13 section 2802, Defendant is required to reimburse Plaintiff and the Class for all out-of-pocket
14 expenses incurred by them in the performance of their job duties. At minimum, they should be
15 reimbursed for a proportion of their cell phones, respective cell phone bills, and any/all purchased
16 applications.

17 Defendant argued that each location also had a physical time clock and employees could
18 choose whether to clock in and clock out on their personal phones or the store computer. (Ly Decl.
19 ¶50.)

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

21 California Labor Code §226(a) requires Defendant to provide its employees with an
22 accurate, itemized written wage statement that shows, in relevant part, all applicable hourly rates
23 and the corresponding number of hours worked. An employee “suffering injury,” like Plaintiff and
24 Class Members, can recover penalties for an employer’s “knowing and intentional failure” to
25 comply with Labor Code §226(a). See Labor Code § 226(e)(1). Under the statute, an employee is
26 deemed to “suffer injury” if the employer does not provide accurate and complete information
27 required by Labor Code § 226(a) and the employee cannot “promptly and easily determine” from
28 the wage statement alone the amount of gross wages or net wages paid to the employee or other

1 information specified by Labor Code § 226(a). See Labor Code § 226(e)(2)(B).

2 Plaintiff contends that Defendant issued wage statements that undeniably violate Labor
3 Code §§ 226(a)(2) and (9). Labor Code § 226(a) specifically requires that the employer shall,
4 semimonthly or at the time of each payment of wages, furnish each of his or her employees, an
5 accurate itemized statement in writing showing all applicable hourly rates in effect during the pay
6 period and the corresponding number of hours worked at each hourly rate by the employee (Ly
7 Decl. ¶51.) As a result of the claims alleged above, Defendant violated this statute.

8 As this is a derivative claim, the same risks present for the above claims were present for
9 this claim. (Ly Decl. ¶52.)

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

11 Labor Code section 203 provides that if an employer fails to provide wages at the time of
12 an employee's termination or within 72 hours of his/her resignation, then such employee's wages
13 shall continue as a penalty for up to thirty (30) days. "If an employer willfully fails to pay . . . any
14 wages of an employee who is discharged or who quits, the wages of the employee shall continue
15 as a penalty from the due date thereof at the same rate until paid . . . but the wages shall not continue
16 for more than 30 days." (Lab. Code, § 203, subd. (a).)

17 Here, many Class Members, including Plaintiff, are no longer employed by Defendant.
18 Defendant has failed to pay employees wages immediately or within 72 hours of termination
19 and/or resignation by not paying all wages and overtime owed. (Ly Decl. ¶53.) Therefore, under
20 California Law, "waiting time" penalties would be triggered for each former employee in the class.
21 Labor Code section 203 reflects a public policy concern that favors the full and prompt payment
22 of earned wages. (See, e.g., *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7;
23 *Mamika v. Barca* (1998) 68 Cal.App.4th 487, 492.)

24 Defendant may attempt to argue that a good-faith belief applies here and that its actions
25 were not willful. However, the well-settled meaning of "willful," as used in Labor Code section
26 203, is that an employer has intentionally failed or refused to perform an act which was required
27 to be done. (*Amaral v. Cintas Corp.* No. 2 (2008) 163 Cal.App.4th 1157, 1201.) Given that the
28 underlying wage claims were relatively small in value, Defendant's defense was considered when

determining a fair settlement value. (Ly Decl. ¶54.)

f) The Risks Associated with the PAGA Claim

California’s Private Attorneys General Act (“PAGA”), Labor Code § 2698, *et seq.*, permits private litigants to recover civil penalties for violations of the Labor Code. PAGA provides that plaintiffs may recover previously established civil penalties (section 2699(a)) or, if none were established, plaintiffs may recover default penalties provided in section 2699(f) in the amount of \$100 per employee per pay period for the initial violation and \$200 for subsequent violations. In addition, the statute provides that “[a]ny employee who prevails in any action shall be entitled to an award of reasonable attorney’s fees and costs.” (Labor Code § 2699(g)(1).)

The Parties discounted the PAGA claim for multiple reasons. (Ly Decl. ¶55.) First, the aggrieved employees’ PAGA claims are derivative of all the foregoing class claims. (Ly Decl. ¶56.) Second, a court has discretion to award less than the maximum penalty. (Ly Decl. ¶57.) 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). Finally, the Settlement Class is compensated for these violations in the proposed Agreement, and thus any PAGA recovery for these same violations would be duplicative. (Ly Decl. ¶58.) As such, the Agreement’s contemplated PAGA payment of \$10,000.00 is appropriate. (Ly Decl. ¶59.) *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. (Ly Decl. ¶60.) If the Court did eventually certify a class, trial of a case involving 388 Settlement Class Members would require the retention of expensive expert witnesses, the accrual of extensive litigation costs, and a significant time overlay by the parties. (Ly Decl. ¶61.) 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. (Ly Decl. ¶62.) An appeal would result in further delay for the Settlement Class Members who are waiting for a resolution in this matter. (*Id.*)

3. The Risk of Maintaining Class Action Status through Trial

This case has not been certified to be tried as a class action. (Ly Decl. ¶63.) While Plaintiff believes there is strong evidence to support certification of several possible subclasses, certification is always hard fought and subject to judicial discretion. Moreover, in class actions, decertification is always a possibility. (*Id.*) In attempting to certify a class, the parties would need to conduct multiple depositions, including of the Class Representative and of several person(s) most knowledgeable regarding Defendant's wage and hour policies. (*Id.*) There is a risk for both sides as to what these depositions will reveal and whether they will support class certification to the extent expected. (*Id.*)

4. The Amount Offered in Settlement

It was very difficult for the Parties to reach this Settlement of \$150,000.00. (Ly Decl. ¶64.) This Settlement is the result of adversarial, non-collusive, and arms-length negotiations. (Ly Decl. ¶65.) The Parties arrived at it after extensive investigation and discovery, careful evaluation of the law, risks, and all information substantiating the amount of penalties reasonably likely to be awarded to the class were the trier of fact to find Defendant liable, and the assistance of an experienced mediator, Todd A. Smith, Esq. (*Id.*)

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

Plaintiff assessed full value of the Minimum Wage/Overtime claim, without any discount, at approximately \$159,527.00. (Ly Decl. ¶66.) Plaintiff used an hourly average rate of \$20.00 and utilized an average shift length of 6.2 hours. (Ly Decl. ¶67.)

The full value of the Rest Period claim (with an assumption that 50% of the shifts resulted in a missed rest period), was approximately \$281,478.00. (Ly Decl. ¶68.)

With regard to the Reimbursement Claim analysis, Plaintiff believed that it was reasonable to value the potential reimbursement at \$15.00 per month, per employee, for reimbursement of personal cell phone usage. This brought the damages for this claim to \$32,400.00. (Ly Decl. ¶69.)

1 Plaintiff valued the Wage Statement Claim, without discount, at \$406,150.00. (Ly Decl.
2 ¶70.) This figure is overstated because Labor Code §226(e)(1) uses \$50 for the initial pay period
3 (not \$100) and puts a \$4,000 cap on wage statement penalties per employee. (Ly Decl. ¶71.)

4 Plaintiff valued the Waiting Time Claim at \$958,432.00. (Ly Decl. ¶72.) Considering the
5 derivate nature of Labor Code §203 and the dispute over whether class members were owed any
6 wages, Plaintiff determined that accepting a discount on this claim was appropriate. (Ly Decl.
7 ¶73.)

8 Finally, Plaintiff calculated the value of the PAGA claim at \$812,300.00 for Settlement
9 Class Members. (Ly Decl. ¶74.)

10 Factoring in all of the risks indicated above, and factoring in the financial risks after
11 reviewing the financial documents, Plaintiff felt a steep discount was warranted.

12 Per Plaintiff's assessment, the maximum potential value of all of Plaintiff's and the
13 Settlement Class Members' claims was approximately \$2,650,287.00. (Ly Decl. ¶75.) The value
14 of the actual underlying claims (without penalties) was \$473,405.00. However, as a result of the
15 forgoing risks on the merits, Class Counsel believes the Gross Settlement Amount of \$150,000.00
16 is fair and reasonable. (Ly Decl. ¶76.)

17 5. The Extent of Discovery Completed and Stage of the Proceedings

18 As outlined above, Class Counsel conducted a thorough investigation into the facts of the
19 claims alleged. (Ly Decl. ¶77.) The agreement to settle did not occur until Class Counsel
20 exchanged and possessed sufficient information to make an informed judgement regarding the
21 likelihood of success on the merits and the results that could be obtained through further litigation.
22 (*Id.*)

23 6. The Experience and Views of Counsel

24 Kingsley & Kingsley is very experienced in prosecuting employment litigation, and the
25 firm has focused its practice since 2000 on wage, hour, and working condition violations. (Ly
26 Decl. ¶¶78-79.) The firm is well versed in class action litigation and has diligently and aggressively
27 pursued this action. (*Ibid.*) Kingsley & Kingsley, APC currently serves as Class Counsel for
28 dozens of pending class action lawsuits in Northern, Central, and Southern California. (*Ibid.*) A

list of representative cases that Kingsley & Kingsley, APC has handled is included in the accompanying declaration of Liane Katzenstein Ly. (*Id at Ly Decl. ¶¶78-79.*) After factoring in the risks explained above, Class Counsel believes that the proposed settlement is fair and reasonable. (Ly Decl. ¶80.)

7. The Presence of a Governmental Participant

There is no governmental participant in this action. (Ly Decl. ¶81.)

8. The Proposed Plan of Allocation Is Fair and Reasonable

Plans of allocation are subject to the same standard of review as class action settlements; they must be “fair, adequate and reasonable.” (*See, e.g., Officers for Justice v. Civil Service Comm’n* (9th Cir. 1982) 688 F.2d 615, 624–625, 629–630.) Here, the proposed plan of allocation compensates Settlement Class Members pro rata based on the number of Workweeks worked by the Settlement Class Member during the Class Period. The lump sum payment to each member of the Settlement Class not excluding him/ herself will be determined by dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating Settlement Class Members during the Class Period and then multiplying the result by each Participating Settlement Class Member’s Workweeks as determined by the Settlement Administrator. This allocation distributes Settlement funds proportionally to each class member’s damages, and should therefore be approved as fair, adequate, and reasonable. (Ex. 1 at ¶3.2.4.)

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

To date, there was one (1) request to be excluded from the proposed Settlement and no objections. (Islas Decl. ¶¶8-9.) Such indicates that the reaction of Settlement Class Members on the whole is positive and weighs in favor of approval.

V. ENHANCEMENT TO PLAINTIFF

Plaintiff’s Counsel request an enhancement of \$5,000.00 to the Class Representative GILDARDO MOTA STEVENS for his work on behalf of the Settlement Class. (Ly Decl. ¶127.) “Courts routinely approve incentive awards to compensate named plaintiffs for the services they provide and the risks they incurred during the course of the class action litigation.” *Ingram v. The Coca-Cola Company*, 200 F.R.D. 685, 694 (N.D. Ga 2001) (internal quotations and citations

omitted); *see also Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995). In *Coca-Cola*, the Court approved service awards of \$300,000 to each named plaintiff in recognition of the services they provided to the class by responding to discovery, participating in the mediation process, and taking the risk of stepping forward on behalf of the class. *Coca-Cola*, 200 F.R.D. at 694; *see also, e.g. Van Vranken*, 901 F. Supp. at 299 (approving \$50,000 participation award to plaintiffs); *Glass v. UBS Financial Services, Inc.*, Case No. C-06-4068 MMC, 2007 WL 227862, at *17 (N.D. Cal. Jan. 26, 2007) (approving \$25,00 enhancement to each named plaintiff).

Mr. Stevens is an adequate class representative because he has diligently, adequately and fairly represented the Settlement Class and has not placed his interests above any member of the Settlement Class. (*see Declaration of Gildardo Mota Stevens* (“Stevens Decl.”) ¶¶3-14.)

Here, Class Counsel requests an enhancement for Mr. Stevens’s valiant effort and time expended in this matter. The time spent by Mr. Stevens includes researching and retaining competent counsel; providing information to Class Counsel regarding the nature of the work at Defendant; compiling relevant documents; working closely with Class Counsel to develop the theories of liability and martial relevant evidence; regularly discussing the status of the case with Class Counsel; discussing the case via telephone with many Settlement Class Members; making himself available for a full-day mediation as necessary; and responding promptly to Class Counsel’s communications regarding settlement. (Ly Decl. ¶128; Stevens Decl. ¶¶3-10; 14.) Thus, in addition to the sums paid to Settlement Class Members, Plaintiff requests a proposed litigation enhancement in the amount of \$5,000.00, to be paid from the Gross Settlement Amount. (Ex. 1 at ¶3.2.1.) As set forth in the Agreement, Plaintiff will also be entering into a general release of liability pursuant to Civil Code Section 1542. (Ly Decl. ¶129; Ex. 1 at ¶6.1)

Class Counsel considers this to be a fair and reasonable enhancement. (Ly Decl. ¶130.) The enhancement takes into consideration the time, effort, and expense incurred by Mr. Stevens in coming forward to litigate this matter on behalf of all Settlement Class Members. (Ly Decl. ¶131.) Additionally, the Class Representative was at risk for paying for Defendant’s legal fees and costs in the event that Defendant prevailed at trial. (Ly Decl. ¶132.)

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

2 As indicated on the Proof of Service, Plaintiff's Motion for Final Approval of Class Action
3 Settlement ("Motion") will be concurrently uploaded to the Labor and Workforce Development
4 Agency's ("LWDA") website on the date this Motion is filed as required by statute. Proof of
5 submission of Plaintiff's Motion, all related documents, and copy of the email from the LWDA
6 confirming receipt is attached to the Declaration of Liane Katzenstein Ly as Exhibit "7." (Ly Decl.
7 ¶137.)

8 **VII. CONCLUSION**

9 Plaintiff respectfully submits that the proposed Settlement is fair, adequate, reasonable, and
10 in the best interest of the Settlement Class Members. Therefore, Plaintiff respectfully requests that
11 the Court (1) grant Final Approval of the Settlement and all of its terms; (2) award attorneys' fees
12 and costs in the amount detailed in the concurrently filed Motion for Attorneys' Fees and Costs;
13 (3) award Phoenix Settlement Administrators claims administration fees of \$10,000.00; and (4)
14 award the Class Representative an enhancement of \$5,000.00; and (5) enter judgment.

15
16 DATED: September 27, 2023

KINGSLEY & KINGSLEY, APC

17
18 By: 

19 Liane Katzenstein Ly
20 Attorneys for Plaintiff and the proposed class
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25
26
27
28

(PROOF OF SERVICE)

[CCP 1013(a)(3)]

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

On September 27, 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:

Ann K. Smith
Sarkis A. Atoyan
**ATKINSON, ANDELSON,
LOYA, RUUD & ROMO**
12800 Center Court Driver South, Suite 300
Cerritos, CA 90703-9364
Sarkis.atoyan@aalrr.com
asmith@aalrr.com

ABRAMSON LABOR GROUP

William Zev Abramson
wza@abramsonlabor.com
11846 Ventura Blvd., Suite 100
Studio City, CA 91604

[] (BY MAIL) I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage fully prepaid at Encino, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[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 27, 2023, at Encino, California.


Michelle Tanzer