

KINGSLEY & KINGSLEY, APC
ERIC B. KINGSLEY, Esq. (SBN 185123)
eric@kingsleykingsley.com
LIANE KATZENSTEIN LY, Esq., (SBN 259230)
liane@kingsleykingsley.com
16133 Ventura Blvd., Suite 1200
Encino, CA 91436
Tel: (818) 990-8300, Fax (818) 990-2903

ABRAMSON LABOR GROUP
WILLIAM ZEV ABRAMSON, Esq. (SBN 289387)
wza@abramsonlabor.com
3580 Wilshire Blvd., Ste 1260
Los Angeles, CA 90010-2513
Tel: (213) 493-6300, Fax: (213) 382-4083

Attorneys for Plaintiff and the proposed class

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

*[Filed concurrently with Declaration of Liane
Katzenstein Ly and Proposed Order]*

Date: TBD

Time: TBD

Dept.: 12

Complaint Filed: October 26, 2021

Trial Date: None Set

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

2 **PLEASE TAKE NOTICE** that on TBD at TBD in Department 12 of the above-entitled
3 court, Plaintiff GILDARDO MOTA STEVENS will move the Court for an Order of Preliminary
4 Approval of the Class Action and PAGA Settlement Agreement (“Agreement”), a copy of which
5 is filed concurrently herewith.

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

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

12 DATED: May 5, 2023

KINGSLEY & KINGSLEY, APC

13
14 By: 

15 Liane Katzenstein Ly
16 Attorneys for Plaintiff GILDARDO MOTA
17 STEVENS and the proposed class
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

I.	INTRODUCTION	7
II.	FACTUAL BACKGROUND.....	7
A.	Litigation Overview and Procedural History	7
B.	The Discovery Process.....	8
III.	THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES	9
A.	The Proposed Classes Are Ascertainable and Sufficiently Numerous	10
1.	Ascertainability	10
2.	Numerosity.....	11
B.	There Is a Well-Defined Community of Interest	11
1.	There Are Predominant Questions of Law and Fact.....	11
2.	The Class Representative Has Claims Typical of the Proposed Class	13
3.	Plaintiff Contends That As The Class Representative He Has and Will Fairly Represent the Interests of the Settlement Class Members	14
C.	The Class Action Vehicle Is Superior to the Alternatives	15
IV.	THE PROPOSED SETTLEMENT.....	13
A.	The Settlement Class.....	16
B.	The Aggrieved Employees.....	16
C.	Gross Settlement Amount	16
D.	Individual Settlement Payments	17
E.	Process for Administering Settlement after Preliminary Approval	18
F.	Process for Settlement Class Members to Respond to Class Notice	18
G.	The Release.....	19
V.	ARGUMENT	19
A.	Plaintiff Requests Approval of This Class Action Settlement.....	19

1	1.	The Strength of Plaintiff's Case.....	20
2	a)	The Risks Associated with the Minimum Wage/Overtime Claim	
3			17
4	b)	The Risks Associated with the Rest Break Claim.....	19
5	c)	The Risks Associated with the Reimbursement Claim.....	20
6	d)	The Risks Associated with the Inaccurate Wage Statement Claim	
7			21
8	e)	The Risks Associated with the Waiting Time Penalty Claim.....	21
9	f)	The Risks Associated with the PAGA Claim.....	22
10	2.	The Risk, Expense, Complexity, and Likely Duration of Further Litigation	
11			26
12	3.	The Risk of Maintaining Class Action Status through Trial.....	26
13	4.	The Amount Offered in Settlement.....	26
14	a)	Plaintiff's Assessment of Defendant's Maximum Exposure.....	24
15	5.	The Experience and Views of Counsel	28
16	6.	The Proposed Plan of Allocation Is Fair and Reasonable.....	28
17	7.	The Proposed Notice Fairly Apprises the Settlement Class Members of the	
18		Terms of the Settlement and of the Class Members' Rights under the	
19		Settlement	28
20	VI.	THE SERVICE AWARD TO THE NAMED PLAINTIFF	29
21	VII.	SUBMISSION TO THE LABOR AND WORKFORCE DEVELOPMENT AGENCY..	30
22	VIII.	CONCLUSION	30

TABLE OF AUTHORITIES

Federal Cases

<i>Gibbs v. TWC Administration, LLC</i> , (S.D. Cal., Jan. 3, 2020, No. 17CV01513DMSAGS) 2020 WL 42768.....	19
<i>Officers for Justice v. Civil Service Comm’n</i> , (9th Cir. 1982) 688 F.2d 615	27

State Cases

<i>Amaral v. Cintas Corp. No. 2</i> , (2008) 163 Cal.App.4th 1157	25
<i>Barnhill v. Robert Saunders & Co.</i> , (1981) 125 Cal.App.3d 1	25
<i>Bell v. Farmers Ins. Exch.</i> , (2004) 115 Cal.App.4th 715	12
<i>Blue Chip Stamps v. Superior Court</i> , (1976) 18 Cal.3d 381	15
<i>Bradley v. Networkers International, LLC</i> , (2012) 211 Cal.App.4th 1129	12
<i>Brinker Restaurant Corp. v. Superior Court</i> , (2012) 53 Cal.4th 1004	10, 12, 22
<i>Carrington v. Starbucks Corporation</i> , (2018) 30 Cal.App.5th 504, 241 Cal.Rptr.3d 647.....	25
<i>Cartt v. Superior Court</i> , (1975) 50 Cal.App.3d 960	29
<i>Classen v. Weller</i> , (1983) 145 Cal.App.3d 27	13
<i>Collins v. Rocha</i> , (1972) 7 Cal.3d 232	10, 11
<i>Dunk v. Foot Locker Retail, Inc.</i> , (1996) 48 Cal.App.4th 1794	9
<i>Fireside Bank v. Sup. Court</i> , (2007) 40 Cal.4th 1069	10
<i>Frlekin v. Apple Inc.</i> , (2020) 8 Cal.5th 1038	20

1	<u>Hicks v. Kaufman & Broad Home Corp.</u> ,	
2	(2001) 89 Cal.App.4th 908	12
3	<u>Knapp v. AT & T Wireless Services, Inc.</u> ,	
4	(2011) 195 Cal.App.4th 932	12
5	<u>Kullar v. Foot Locker Retail, Inc.</u> ,	
6	(2008) 168 Cal.App.4th 116 (“Dunk/Kullar”).....	9, 19, 20
7	<u>Linder v. Thrifty Oil Co.</u> ,	
8	(2000) 23 Cal.4th 429	10
9	<u>Lockheed Martin Corp. v. Superior Court</u> ,	
10	(2003) 29 Cal.App.4th 1096	14, 15
11	<u>Mamika v. Barca</u> ,	
12	(1998) 68 Cal.App.4th 487	25
13	<u>Miller v. Woods</u> ,	
14	(1983) 148 Cal.App.3d 862	11
15	<u>Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles</u> ,	
16	(2010) 186 Cal. App. 4th 399	19, 20
17	<u>Murphy v. Kenneth Cole Productions, Inc.</u> ,	
18	(2007) 40 Cal.4th 1094	22
19	<u>Nordstrom Commissions Cases</u> ,	
20	186 Cal.App.4th 576 (2010)	26
21	<u>Richmond v. Dart Industries, Inc.</u> ,	
22	(1981) 29 Cal.3d 462	10, 15
23	<u>Rose v. City of Hayward</u> ,	
24	(1981) 126 Cal.App.3d 926	10, 11
25	<u>Sav-on Drug Stores, Inc. v. Sup. Court</u> ,	
26	(2004) 34 Cal.4th 319	10, 12
27	<u>Seastrom v. Neways, Inc.</u> ,	
28	(2007) 149 Cal.App.4th 1496	13
	<u>Simons v. Horowitz</u> ,	
	(1984) 151 Cal.App.3d 834	14
	<u>Troester v. Starbucks Corp.</u> ,	
	(2018) 5 Cal.5th 829	20, 21
	<u>Trotsky v. L.A. Fed. Sav. & Loan Ass’n</u> ,	
	(1975) 48 Cal.App.3d 134	29

1	<i>Vasquez v. Superior Court</i> ,	
2	(1971) 4 Cal.3d 800	15
3	<i>Wershba v. Apple Computer, Inc.</i> ,	
4	(2001) 91 Cal.App.4th 224	13, 28
5	<u>State Statutes</u>	
6	Business & Professions Code §17200	8, 14
7	Civil Code Section 1542	30
8	Code Civil Procedure § 382	10
9	Labor Code § 201.....	8
10	Labor Code § 202.....	8
11	Labor Code § 203.....	8, 24, 25, 27
12	Labor Code, § 203, subd. (a).....	24
13	Labor Code §226(a)	8, 24
14	Labor Code §§ 226(a)(2) and (9)	24
15	Labor Code § 226(e)(1)	24, 27
16	Labor Code § 226(e)(2)(B)	24
17	Labor Code §226.7.....	8
18	Labor Code, § 226.7, subd. (b)	23
19	Labor Code § 226.7, subd. (c).....	22
20	Labor Code §510.....	8
21	Labor Code, § 510, subd. (a).....	21
22	Labor Code § 1194.....	8
23	Labor Code § 1199.....	8
24	Labor Code §2802.....	8, 23
25	Labor Code, § 2802, subd. (a).....	23
26	Labor Code § 2698.....	25
27	Labor Code §2699.....	8, 12, 14
28		

Labor Code § 2699(g)(1)	25
-------------------------------	----

State Regulations

Title 8 Cal. Code of Regs., § 11050(2)(K)	20, 22, 23
---	------------

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff GILDARDO MOTA STEVENS (“Plaintiff”) submits this Memorandum of
4 Points and Authorities in support of Plaintiff’s Motion for Preliminary Approval of the Class
5 Action and PAGA Settlement Agreement reached between Plaintiff and PURPLE EAGLE LLC
6 (“Defendant”) (Plaintiff and Defendant together, the “Parties”).

7 By this Motion, Plaintiff requests that the Court:

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

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

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

17 **II. FACTUAL BACKGROUND**

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

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

25 On October 26, 2021, Plaintiff filed a putative class action lawsuit entitled *GILDARDO*
26 *MOTA STEVENS v. PURPLE EAGLE LLC* in the Contra Costa County Superior Court, case
27 number MSC21-02204. (Declaration of Liane Katzenstein Ly “Ly Decl.” ¶4.) (Agreement, Ex. 1
28 at ¶1.1.). In the Complaint, Plaintiff alleged six causes of action, alleging that Defendant 1) failed

1 to pay wages and/or overtime as required by the Labor Code and Wage Orders under Labor Code
2 §§510, 1194, and 1199; 2) failed to provide compliant rest breaks pursuant to Labor Code §226.7
3 and IWC Wage Order 2-2001; 3) failed to reimburse for the cost of Plaintiff and the Proposed
4 Class using their personal cellphones for necessary work purposes pursuant to Labor Code
5 §2802; 4) failed to issue accurate itemized wage statements showing the total hours worked by
6 Plaintiff and other employees and all applicable hourly rates in effect during the pay period and
7 the corresponding number of hours worked at each hourly rate by the employee pursuant to
8 Labor Code §226(a); 5) failed to pay all wages due upon termination or resignation pursuant to
9 pursuant to Labor Code §§201-203; and 6) is liable for penalties pursuant to Business &
10 Professions Code §17200. (Ly Decl. ¶5.)

11 Also, On October 25, 2021, Plaintiff also provided written notice to the Labor and
12 Workforce Development Agency (“LWDA”) and Defendant setting forth his intent to pursue
13 claims pursuant to Labor Code §2699, et seq. (“PAGA”) for Defendant’s alleged aforementioned
14 violations. (Ly Decl. ¶6.)

15 Plaintiff filed a First Amended Class and Representative Action Complaint on January 3,
16 2022, adding an additional cause of action for penalties pursuant to pursuant to Labor Code §
17 2699, *et seq.* based upon the same alleged Labor Code violations at issue in the Complaint.
18 (hereafter, the “Lawsuit” or “Operative Complaint”) (Ly Decl. ¶7.)

19 B. The Discovery Process

20 The Parties have engaged in early stages of discovery and settlement negotiations but
21 have primarily focused their efforts on resolving this case through early mediation. (Ly Decl.
22 ¶8.) On February 10, 2022, Plaintiff served his first set of Special Interrogatories and Requests
23 for Production. (*Id.*) The Parties scheduled a private mediation with Todd A. Smith, Esq. on
24 January 25, 2023. In preparation for mediation, Defendant informally produced multiple
25 documents and provided other information necessary to evaluate settlement. (Ly Decl. ¶9.) This
26 included a sample of time and pay data and financial data for mediation. (Ly Decl. ¶10.) The
27 sample was of about 20% of the Class. It included time and pay data for the sample, and
28 Plaintiff retained an expert who was able to analyze and extrapolate that data out to the entire

1 Class. Plaintiff's investigation was sufficient to satisfy the criteria for court approval set forth in
2 *Dunk v. Foot Locker Retail, Inc.* (1996) 48 Cal.App.4th 1794, 1801 and *Kullar v. Foot Locker*
3 *Retail, Inc.* (2008) 168 Cal.App.4th 116, 129-130 ("*Dunk/Kullar*").

4 Additionally, Defendant provided financial documents to support its argument that its
5 ability to pay should be a factor in the Settlement. (Ly Decl. ¶11.) Plaintiff also retained an
6 accounting expert to review the documents and provide guidance on the financial stability of the
7 company. (Ly Decl. ¶12.) Ultimately, as described below, the financials resulted in a steep
8 discount based on the company's solvency. (Ly Decl. ¶13.)

9 Defendant denies any liability or wrongdoing of any kind associated with the claims
10 alleged in the Action, disputes the damages and penalties claimed by Plaintiff, and further
11 contends that, for any purpose other than settlement, Plaintiff's claims are not appropriate for
12 class or representative action treatment. (Ly Decl. ¶14.) Defendant contends, among other
13 things, that, at all times, it has complied with the California Labor Code, and the Industrial Wage
14 Commission Orders. (*Id.*)

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

24 **III. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED FOR** 25 **SETTLEMENT PURPOSES**

26 Originally creatures of equity, class actions have been statutorily embraced by the
27 Legislature whenever "the question [in a case] is one of a common or general interest, of many
28 persons, or when the parties are numerous, and it is impracticable to bring them all before the

1 court” (Code Civ. Proc. § 382; *see, e.g., Fireside Bank v. Sup. Court* (2007) 40 Cal.4th
2 1069, 1078.) They serve an important function by “establishing a technique whereby the claims
3 of many individuals can be resolved at the same time” thereby “eliminat[ing] the possibility of
4 repetitious litigation and provid[ing] small claimants with a method of obtaining redress.”
5 (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 469.) Public policy supports the use of
6 class actions to enforce wage and overtime laws for the benefit of workers. (*See Sav-on Drug*
7 *Stores, Inc. v. Sup. Court* (2004) 34 Cal.4th 319, 340.)

8 The certification question is “essentially a procedural one that does not ask whether an
9 action is legally or factually meritorious.” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439–
10 440.) A court ruling on a certification motion must determine “whether . . . the issues which may
11 be jointly tried, when compared with those requiring separate adjudication, are so numerous or
12 substantial that the maintenance of a class action would be advantageous to the judicial process
13 and to the litigants.” (*Collins v. Rocha* (1972) 7 Cal.3d 232, 238.)

14 The California Supreme Court has identified three certification requirements: (1) “the
15 existence of an ascertainable and sufficiently numerous class”; (2) “a well-defined community of
16 interest”; and, (3) “substantial benefits from certification that render proceeding as a class
17 superior to the alternatives.” (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th
18 1004, 1021.) The “community of interest” requirement includes three additional requirements:
19 (1) common questions of law or fact predominant over individual questions; (2) the class
20 representatives have claims or defenses typical of the class; and (3) the class representatives can
21 adequately represent the class. (*Ibid, citing Fireside Bank, supra*, 40 Cal.4th at 1089.)

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

25 A. The Proposed Classes Are Ascertainable and Sufficiently Numerous

26 1. Ascertainability

27 Putative class members are deemed “ascertainable” when they may be “readily identified
28 without unreasonable expense or time by reference to official records.” (*Rose v. City of Hayward*

(1981) 126 Cal.App.3d 926, 932.) In determining whether a class is ascertainable, a court scrutinizes the class definition, the size of the class and the means of identifying class members. (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.)

Here, Plaintiff maintains that the proposed Settlement Class is ascertainable for several reasons: First, Defendant has agreed in the Agreement to provide a class list to the Settlement Administrator containing the name, last known mailing address, last known telephone number, social security number, and number of Class Period Workweeks and PAGA Pay Periods for all putative class members after issuance of the preliminary approval order. (Ly Decl. ¶16; Ex. 1 at ¶1.8.) Second, Settlement Class Members consist of Defendant's hourly employees, and Defendant is required to keep records of its hourly employees' names, home addresses, and social security numbers. (*See* Wage Order 2-2001, subsection 7(c); Ly Decl. ¶17.) Third and finally, Defendant informally produced sampling time and pay data for Settlement Class Members containing class member contact information, which confirms that all Settlement Class Member may be readily identified based on Defendant's records. (Ly Decl. ¶18.)

2. Numerosity

There is no set number that is required as a matter of law to maintain a class action. (*See, e.g., Rose v. City of Hayward, supra*, 126 Cal.App.3d at p. 934.) Here, the proposed Settlement Class contains, based upon information and belief, approximately 351 hourly non-exempt employees in the State of California. (Ex. 1 at ¶4.1.) Therefore, Plaintiff is confident he will be able to establish that the proposed Settlement Class is ascertainable and sufficiently numerous. (Ly Decl. ¶19.)

B. There Is a Well-Defined Community of Interest

1. There Are Predominant Questions of Law and Fact

In deciding whether questions of common or general interest predominate, a court must determine whether "the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." (*Collins v. Rocha* (1972) 7 Cal.3d 232, 238; *accord, Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319,

326.) As a general matter, if the defendant’s liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.” (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916, 107; accord, *Knapp v. AT & T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 941.)

Here, Plaintiff argues that there are questions of law and fact common to the proposed Settlement Class that predominate over any questions affecting only individual Class Members. (Ly Decl. ¶20.) These common questions include:

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

(Ly Decl. ¶21.)

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

1 Here, Plaintiff maintains that the proposed Settlement Class Members suffered the same
2 injuries, in the same manner: (1) Settlement Class Members were not properly paid all
3 wages/overtime; (2) Settlement Class Members did not receive their rest periods as required; (3)
4 Settlement Class Members were not provided accurate itemized wage statements; (4) Settlement
5 Class Members were not reimbursed for business-related expenses; and (5) Settlement Class
6 Members were not paid all wages owed upon termination/resignation. (Ly Decl. ¶23.) Plaintiff
7 alleges that Settlement Class Members worked in the same capacity for the same employer and
8 were subject to the same employment policies and practices, the questions of fact and claims
9 regarding the status of these employees are the same for each member of the Settlement Class.
10 Accordingly, for purposes of settlement, certification for settlement purposes is appropriate. (Ly
11 Decl. ¶24.)

12 2. The Class Representative Has Claims Typical of the Proposed Class

13 A putative class representative's claim must be "typical," but not necessarily identical, to
14 the claims of other class members. The test of typicality "is whether other members have the
15 same or similar injury, whether the action is based on conduct which is not unique to the Class
16 Representatives, and whether other class members have been injured by the same course of
17 conduct." (*Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502.) Thus, it is sufficient
18 that the representative is similarly situated so that he or she will have the motive to litigate on
19 behalf of all class members. (*Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502.)
20 Thus, it is sufficient that the representative is similarly situated so that he or she will have the
21 motive to litigate on behalf of all class members. (*See, e.g., Classen v. Weller* (1983) 145
22 Cal.App.3d 27, 45.) It is not necessary that the class representative have personally incurred all
23 of the damages suffered by each of the other class members. (*Wershba v. Apple Computer, Inc.*
24 (2001) 91 Cal.App.4th 224, 238.)

25 Plaintiff worked as an hourly "neuromuscular therapist" for Defendant in the State of
26 California. (Ly Decl. ¶25.) Plaintiff alleges that he: (1) worked without being paid all wages
27 and/or overtime; (2) worked without being provided rest periods as required by law; (3) worked
28 without being reimbursed for costs associated with personal cell-phone usage; (4) worked

1 without being provided accurate itemized wage statements; and (5) worked without being paid
2 all wages due upon separation. Plaintiff also alleges that he experienced derivative claims for
3 unfair business competition (B&P Code §17200) and Labor Code §2699, et seq. (Ly Decl. ¶26.)
4 Plaintiff also contends that his claims are typical of those of the Settlement Class. (Ly Decl. ¶27.)

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

7 A putative class representative must show that they can adequately represent the class.
8 (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.App.4th 1096, 1104.) The
9 representative, through qualified counsel, must be capable of “vigorously and tenaciously”
10 protecting the interests of the class members. (*Simons v. Horowitz* (1984) 151 Cal.App.3d 834,
11 846.)

12 Plaintiff believes that he is capable of fairly representing and adequately protecting the
13 interests of the proposed Settlement Class Members. (Ly Decl. ¶28.) Plaintiff’s interests in this
14 litigation are coextensive with the interests of the proposed Settlement Class Members. The
15 members of the proposed Settlement Class all worked for Defendant during the relevant time
16 period and incurred the same type of alleged damages with regard to Defendant’s alleged
17 violations of the law. (Ly Decl. ¶29.) Moreover, Plaintiff has agreed to serve as Class
18 Representative and has retained qualified Counsel who is experienced in prosecuting wage and
19 hour class actions. (Ly Decl. ¶30.) This demonstrates his commitment to bringing about the best
20 possible results for the benefit of the proposed Settlement Class. (Ly Decl. ¶31.) Plaintiff has
21 provided his Counsel with all necessary and pertinent information. (Ly Decl. ¶32.) Plaintiff has
22 been a very active participant in the litigation including having frequent contact with Settlement
23 Class Members, working closely with Class Counsel to develop the theories of liability, and
24 providing his Counsel with all necessary and pertinent information. (Ly Decl. ¶33.) He also
25 made himself available for the full-day mediation in this matter and was informed of and
26 involved in all of the Settlement negotiations. Therefore, Plaintiff believes that he has and will
27 continue to adequately represent the proposed Settlement Class Members. (Ly Decl. ¶34.)
28 Plaintiff has provided his Counsel with all necessary and pertinent information. (Ly Decl. ¶35.)

1 C. The Class Action Vehicle Is Superior to the Alternatives

2 “The ultimate question in every case of this type is whether . . . the issues which may be
3 jointly tried, when compared with those requiring separate adjudication, are so numerous or
4 substantial that the maintenance of a class action would be advantageous to the judicial process
5 and to the litigants.” (*Lockheed Martin, supra*, 29 Cal.App.4th at 1104–1105.) The California
6 Supreme Court has directed the courts to utilize the class action device to fashion “an effective
7 and inclusive group remedy.” (*Richmond v. Dart Indus., Inc.* (1981) 29 Cal.3d 462, 469.)
8 Normally, in making its class certification decision, the Court must determine that a class action
9 would be superior to alternate means for a fair and efficient adjudication. If the causes of action
10 may be adjudicated in a single proceeding, thereby saving time, reducing waste, and limiting
11 duplication of effort, class certification is superior to individual litigation. (*See, e.g., Vasquez v.*
12 *Superior Court* (1971) 4 Cal.3d 800, 816.) Since the Parties agreed to a settlement in principal
13 and now seek Court approval of that Settlement, Plaintiff submits that there is not as much need
14 as there would be in an ordinary motion for class certification for the Court to determine that the
15 case can be manageably tried.

16 Plaintiff maintains that class treatment would be the superior method of managing this
17 case. A class action is superior to individual litigation “when numerous parties suffer injury of
18 insufficient size to warrant individual action and when denial of class relief would result in
19 unjust advantage to the wrongdoer.” (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381,
20 385.) In cases such as this, where individual damages may be small, the class action device is the
21 most feasible method of recovery. (*See, e.g. Lockheed Martin, supra*, 29 Cal.4th at 1131.) In this
22 regard, the superiority of class treatment is evident here because individual pursuit of class
23 members’ claims may not be economically viable. (Ly Decl. ¶36.) The only alternative to
24 certification would be to force over 351 employees to join this action, file individual, uniform
25 actions, or abandon their legal rights altogether. (Ly Decl. ¶37.) Plaintiff maintains that this
26 economic reality would result in a windfall for Defendant if this case were not certified. (Ly
27 Decl. ¶38.)

28 ///

1 **IV. THE PROPOSED 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. ¶39; Agreement, Ex. 1 at ¶1.5.)

6 The Class Period is October 26, 2017 to March 25, 2023, or the date that the total number
7 of workweeks totals 9,025, whichever is first. (Ly Decl. ¶40; Ex. 1 at ¶1.12.) As of January 25,
8 2023 (the date of mediation) and based on documents and other information produced by
9 Defendant, there are approximately 351 Settlement Class Members. (Ly Decl. ¶41; Ex. 1 at
10 ¶4.1.)

11 B. The Aggrieved Employees

12 For purposes of the Agreement, the Aggrieved Employees are defined as: “all individuals
13 who were employed by Defendant as non-exempt employees in California during the PAGA
14 Period” (“Aggrieved Employees” or “PAGA Members”) (Ly Decl. ¶42; Settlement, Ex. 1 at
15 ¶1.4.)

16 The PAGA Period is October 26, 2020 through March 25, 2023, or the date that the total
17 number of workweeks totals 9,025, whichever is first. (Ly Decl. ¶43; Ex. 1 at ¶1.31.) Based on
18 documents and other information produced by Defendant, there are approximately 351 PAGA
19 Members. (Ly Decl. ¶44, Ex. 1 at ¶4.1)

20 C. Gross Settlement Amount

21 As detailed fully in the Agreement, the Settlement provides for Defendant to pay a Gross
22 Settlement Amount of \$150,000.00, which includes the sum of the Individual Class Payments,
23 the Class Representative service award, the Class Counsel Award, PAGA Payment, and the
24 Settlement Administration Costs. (Ly Decl. ¶45; Ex. 1 at ¶1.22.)

25 The Net Settlement Amount is the Gross Settlement Amount, less Class Counsel Award,
26 Class Representative Enhancement, PAGA Payment, and Settlement Administration Costs. (Ly
27 Decl. ¶46; Ex. 1 at ¶1.28.)

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

Gross Settlement Amount:	\$	150,000.00
Less Class Representative Enhancement:	\$	5,000.00
Less Class Counsel's Fees:	\$	50,000.00
Less Class Counsel's Costs:	\$	15,000.00
Less PAGA Payment:	\$	10,000.00
		<i>(\$7,500.00 to the LWDA and \$2,500.00 to remain in the Net Settlement Amount)</i>
<u>Less Settlement Administrator Costs:</u>	<u>\$</u>	<u>10,000.00</u>
Anticipated Net Settlement Amount	\$	62,500.00

(Ex. 1 at ¶3.)

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.*)

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

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

6 E. Process for Administering Settlement after Preliminary Approval

7 The detailed Notice Procedure established by the Agreement will efficiently and
8 accurately ensure that Notice is provided to the Settlement Class Members. (Ex. 1 at ¶8.4.) The
9 Parties have agreed to use a reputable third-party claims administrator, Phoenix Settlement
10 Administrators, to administer the Agreement. (Ex. 1 at ¶8.1.)

11 F. Process for Settlement Class Members to Respond to Class Notice

12 Settlement Class Members will have an opportunity to request exclusion from the
13 Settlement Class (i.e. opt out) and to object to the Settlement at the Final Approval Hearing. (Ex.
14 1 at ¶8.5; ¶8.7., *see also* Ex. A to the Agreement at pp. 2-5; 7-8 [Class Notice])

15 Settlement Class Members who do not opt out of the Settlement Class may object to the
16 Agreement by mailing written objections to the Settlement Administrator no later than sixty (60)
17 calendar days after the mailing of the Notice Packet. (Ex. 1 at ¶8.7.2.) This deadline applies
18 notwithstanding any argument regarding alleged late receipt or non-receipt of the Notice Packet.
19 (Ex. 1 at ¶8.7.) Any Settlement Class Member who fails to timely mail written objections in this
20 manner shall be deemed to have waived any objections and shall be foreclosed from making any
21 objection to the Agreement and from filing any appeal from any order granting final approval
22 issued by the Court. (*Ibid.*)

23 Settlement Class Member who timely and validly return a Request for Exclusion from the
24 Agreement shall have no right to object and shall be foreclosed from making any objection to the
25 Agreement. (*Ibid.*) The Settlement Administrator shall promptly provide any such objections to
26 Class Counsel and Defendant's Counsel, who in turn shall file them with the Court in connection
27 with the final approval motion. (*Ibid.*)

28 Any Settlement Class Member wishing to appear at the final approval hearing to object to

1 the Agreement shall expressly indicate this in his or her written objections. (*Ibid.*) The making
2 of an objection to this Agreement does not affect the Settlement Class Members' ability to return
3 a valid Claim Form and become a Qualified Claimant if the Agreement is finally approved.
4 (*Ibid.*)

5 G. The Release

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

13 The Released Claims by Aggrieved Employees are defined as: "all claims for PAGA
14 penalties that were alleged, or reasonably could have been alleged, based on the PAGA Period
15 facts stated in the Operative Complaint and the PAGA Notice including any and all claims
16 involving any alleged failure to (a) pay overtime and wages, (b) provide proper rest periods, (c)
17 reimburse business expenses, (d) provide proper wage statements, (e) pay all wages due upon
18 termination, and (e) engage in unfair business practices." (Ex. 1 at ¶6.3.)

19 V. **ARGUMENT**

20 A. Plaintiff Requests Approval of This Class Action Settlement

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

28 In *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal. App. 4th 399,

409, the court clarified that a *Kullar* showing does not require the parties to submit the outer reaches of maximum possible recovery without taking into account the actual risks of certification, decertification, dispositive motions, and trial, so long as there is a record which allows “an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.” *Munoz*, 186 Cal. App. 4th at 409.

The proposed settlement satisfies each of these factors. Class Counsel conducted extensive informal discovery before entering into meaningful settlement negotiations in this matter. (*Id.* at Ly Decl. ¶¶8-15; ¶48.) This discovery permitted Class Counsel to fairly evaluate the strength of the case and the risks associated with ongoing litigation. (Ly Decl. ¶48.) Class Counsel is experienced in handling wage and hour class actions and, after weighing all of the following factors, supports this Agreement. (Ly Decl. ¶49.)

1. The Strength of Plaintiff’s Case

a) The Risks Associated with Minimum Wage/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

1 judgment when plaintiff-employees conducted off-the-clock pre-shift activity in preparation to
2 start work right when they clocked in.)

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

7 An employer that requires its employees to work minutes off the
8 clock on a regular basis or as a regular feature of the job may not
9 evade the obligation to compensate the employee for that time by
10 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.

11 (*Id.* at p. 847.)

12 Additionally, California workers are statutorily entitled to overtime compensation, unless
13 they are properly classified as falling within one of the narrow exemption categories. Under
14 California law, “[a]ny work in excess of eight hours in one workday and any work in excess of
15 40 hours in any one workweek...shall be compensated at the rate of no less than one and one-
16 half times the regular rate of pay for an employee.” (Lab. Code, § 510, subd. (a).)

17 Throughout the relevant time, Plaintiff and the Proposed Class were subject to the control
18 of Defendant prior their scheduled start times, without being compensated for those “hours
19 worked.” (Ly Decl. ¶50.)

20 Despite being off the clock, Defendant required employees to report to the job site
21 approximately 15 to 20 minutes before the scheduled start of each shift despite knowing Plaintiff
22 and the Proposed Class were not “clocked” in. (Ly Decl. ¶51.) Plaintiff and Class Members
23 were required to prepare each spa room prior to their shift because Defendant scheduled
24 appointments at to start exactly at the start of their shifts. (Ly Decl. ¶52.) All of this was done
25 with the knowledge and direction of Defendant, thus Plaintiff and the Proposed Class are
26 certainly entitled to be compensated for this time worked. (Ly Decl. ¶53.) Thus, Defendant is
27 liable for unpaid wages and/or overtime.

28 Defendant denied that these allegations were true. (Ly Decl. ¶54.) Defendant argued that

1 no employees were required to report early, and if they did report early they could clock in early
2 and receive payment. (Ly Decl. ¶55.)

3 Given that this time was “off the clock” and not captured by the time clock, and given
4 that Defendant’s counter-argument, Plaintiff applied a discount to this claim. (Ly Decl. ¶56.)

5 b) The Risks Associated with the Rest Break Claim

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

10 Plaintiff and the Proposed Class’s rest period claims arise from a common course of
11 conduct wherein Defendant did not provide employees with the opportunity to take a second 10-
12 minute rest break for shifts between 6-8 hours in compliance with California law. (Ly Decl. ¶57.)
13 The California Supreme Court has held: “Employees are entitled to 10 minutes’ rest for shifts
14 from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to
15 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on.” (*Brinker Rest.*
16 *Corp. v. Superior Court*, supra, 53 Cal.4th at 1029.) In an eight-hour workday, being denied the
17 two paid rest breaks in a day is “essentially perform[ing] 20 minutes of ‘free’ work.” (*Murphy v.*
18 *Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1104.)

19 The Court also clarified what steps an employer has to take to “make available” rest
20 breaks

21 to its employees. Under *Brinker*,

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

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

Employers must authorize and permit a net ten-minute paid rest period for every four

1 hours,

2 or major fraction thereof, of work for its employees. If an employer does not, then the employer
3 must pay the employee one hour of pay at the employee's regular rate of pay for each workday
4 that the rest period is not provided. (Cal. Code Regs., tit. 8, § 11050, subd. 12(B).)

5 Plaintiff and the Class Members consistently worked shifts of 6+ hours and were not
6 authorized or permitted to take second rest breaks. (Ly Decl. ¶58.) Therefore, for each rest
7 period Plaintiff and the Class Members were not provided with, Defendant is liable for one (1)
8 additional hour of pay at the employee's regular rate of compensation. (Lab. Code, § 226.7,
9 subd. (b).) (Ly Decl. ¶59.)

10 Again, Defendant disagreed and maintained that there was accurate rest period policy and
11 employees took their breaks. (Ly Decl. ¶60.) Given that rest period claims can be difficult to
12 certify, Plaintiff factored in a discount for this claim. (Ly Decl. ¶61.)

13 c) The Risks Associated with the Reimbursement Claim

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

17 Here, Defendant has failed to reimburse Plaintiff and the Proposed Class for business-
18 related expenses, including for use of their cell phones, necessary in executing the Proposed
19 Class's duties under Defendant's employ. (Ly Decl. ¶62.) Plaintiff and the Proposed Class phone
20 applications on their personal cell phones and consistently use these personal cell phones for
21 necessary work-related purposes such as, but not limited to, clocking in, communicating with
22 management, and managing client documents. (Ly Decl. ¶63.) These cell phones were not
23 provided by Defendant and Defendant failed to reimburse Plaintiff and the Proposed Class for
24 the costs associated with using these personal cell phones. (Ly Decl. ¶64.) Pursuant to Labor
25 Code section 2802, Defendant is required to reimburse Plaintiff and the Class for all out-of-
26 pocket expenses incurred by them in the performance of their job duties. At minimum, they
27 should be reimbursed for a proportion of their cell phones, respective cell phone bills, and any/all
28 purchased applications.

1 Defendant argued that each location also had a physical time clock and employees could
2 choose whether to clock in and clock out on their personal phones or the store computer. (Ly
3 Decl. ¶65.)

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

5 California Labor Code §226(a) requires Defendant to provide its employees with an
6 accurate, itemized written wage statement that shows, in relevant part, all applicable hourly rates
7 and the corresponding number of hours worked. An employee “suffering injury,” like Plaintiff
8 and Class Members, can recover penalties for an employer’s “knowing and intentional failure” to
9 comply with Labor Code §226(a). See Labor Code § 226(e)(1). Under the statute, an employee
10 is deemed to “suffer injury” if the employer does not provide accurate and complete information
11 required by Labor Code § 226(a) and the employee cannot “promptly and easily determine” from
12 the wage statement alone the amount of gross wages or net wages paid to the employee or other
13 information specified by Labor Code § 226(a). See Labor Code § 226(e)(2)(B).

14 Plaintiff contends that Defendant issued wage statements that undeniably violate Labor
15 Code §§ 226(a)(2) and (9). Labor Code § 226(a) specifically requires that the employer shall,
16 semimonthly or at the time of each payment of wages, furnish each of his or her employees, an
17 accurate itemized statement in writing showing all applicable hourly rates in effect during the
18 pay period and the corresponding number of hours worked at each hourly rate by the employee
19 (Ly Decl. ¶66.) As a result of the claims alleged above, Defendant violated this statute.

20 As this is a derivative claim, the same risks present for the above claims were present for
21 this claim. (Ly Decl. ¶67.)

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

23 Labor Code section 203 provides that if an employer fails to provide wages at the time of
24 an employee’s termination or within 72 hours of his/her resignation, then such employee’s wages
25 shall continue as a penalty for up to thirty (30) days. “If an employer willfully fails to pay . . .
26 any wages of an employee 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 paid . . . but the wages shall
28 not continue for more than 30 days.” (Lab. Code, § 203, subd. (a).)

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

8 Defendant may attempt to argue that a good-faith belief applies here and that its actions
9 were not willful. However, the well-settled meaning of “willful,” as used in Labor Code section
10 203, is that an employer has intentionally failed or refused to perform an act which was required
11 to be done. (*Amaral v. Cintas Corp.* No. 2 (2008) 163 Cal.App.4th 1157, 1201.) Given that the
12 underlying wage claims were relatively small in value, Defendant’s defense was considered
13 when determining a fair settlement value. (Ly Decl. ¶69.)

14 f) The Risks Associated with the PAGA Claim

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

22 The Parties discounted the PAGA claim for multiple reasons. (Ly Decl. ¶70.) First, the
23 aggrieved employees’ PAGA claims are derivative of all the foregoing class claims. (Ly Decl.
24 ¶71.) Second, a court has discretion to award less than the maximum penalty. (Ly Decl. ¶72.)
25 Labor Code § 2699(e)(2) (“a court may award a lesser amount than the maximum civil penalty
26 amount specified by this part if, based on the facts and circumstances of the particular case, to do
27 otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory”). See
28 e.g., *Carrington v. Starbucks Corporation* (2018) 30 Cal.App.5th 504, 241 Cal.Rptr.3d 647, 669

1 (affirming award of 10% of maximum PAGA penalty). Finally, the Settlement Class is
2 compensated for these violations in the proposed Agreement, and thus any PAGA recovery for
3 these same violations would be duplicative. (Ly Decl. ¶73.) As such, the Agreement's
4 contemplated PAGA payment of \$10,000.00 is appropriate. (Ly Decl. ¶74.) *See Nordstrom*
5 *Commissions Cases*, 186 Cal.App.4th 576, 589 (2010) (affirming settlement allocating \$0 of
6 \$6.4 million settlement to PAGA penalties).

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

8 There is significant expense associated with the class certification process, which the
9 Parties can avoid by entering into the contemplated Agreement now. (Ly Decl. ¶75.) If the Court
10 did eventually certify a class, trial of a case involving approximately 351 Settlement Class
11 Members would require the retention of expensive expert witnesses, the accrual of extensive
12 litigation costs, and a significant time overlay by the parties. (Ly Decl. ¶76.) Moreover, given
13 the complexity and unsettled nature of the issues in this case it is likely that any outcome at trial
14 would have resulted in a lengthy and costly appeal. (Ly Decl. ¶77.) An appeal would result in
15 further delay for the Settlement Class Members who are waiting for a resolution in this matter.
16 (*Id.*)

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

18 This case has not been certified to be tried as a class action. (Ly Decl. ¶78.) While
19 Plaintiff believes there is strong evidence to support certification of several possible subclasses,
20 certification is always hard fought and subject to judicial discretion. Moreover, in class actions,
21 decertification is always a possibility. (*Id.*) In attempting to certify a class, the parties would
22 need to conduct multiple depositions, including of the Class Representative and of several
23 person(s) most knowledgeable regarding Defendant's wage and hour policies. (*Id.*) There is a
24 risk for both sides as to what these depositions will reveal and whether they will support class
25 certification to the extent expected. (*Id.*)

26 4. The Amount Offered in Settlement

27 It was very difficult for the Parties to reach this Settlement of \$150,000.00. (Ly Decl.
28 ¶79.) This Settlement is the result of adversarial, non-collusive, and arms-length negotiations.

(Ly Decl. ¶80.) 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. ¶81.) Plaintiff used an hourly average rate of \$20.00 and utilized an average shift length of 6.2 hours. (Ly Decl. ¶82.)

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. ¶83.)

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. ¶84.)

Plaintiff valued the Wage Statement Claim, without discount, at \$406,150.00. (Ly Decl. ¶85.) This figure is overstated because Labor Code §226(e)(1) uses \$50 for the initial pay period (not \$100) and puts a \$4,000 cap on wage statement penalties per employee. (Ly Decl. ¶86.)

Plaintiff valued the Waiting Time Claim at \$958,432.00. (Ly Decl. ¶87.) Considering the derivative nature of Labor Code §203 and the dispute over whether class members were owed any wages, Plaintiff determined that accepting a discount on this claim was appropriate. (Ly Decl. ¶88.)

Finally, Plaintiff calculated the value of the PAGA claim at \$812,300.00 for Settlement Class Members. (Ly Decl. ¶89.)

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

Per Plaintiff's assessment, the maximum potential value of all of Plaintiff's and the Settlement Class Members' claims was approximately \$2,650,287.00. (Ly Decl. ¶90.) The value of the actual underlying claims (without penalties) was \$473,405.00. However, as a result of the

1 forgoing risks on the merits, Class Counsel believes the Gross Settlement Amount of
2 \$150,000.00 is fair and reasonable. (Ly Decl. ¶¶91.)

3 5. The Experience and Views of Counsel

4 Finally, counsel's experience and success in similar class actions also weigh in favor of
5 preliminary approval. *See Wershba, supra*, 91 Cal.App.4th at 245. Kingsley & Kingsley, APC is
6 very experienced in prosecuting complex employment litigation, and the firm has focused its
7 practice since the year 2000 on complex wage, hour, and working condition violations. (Ly Decl.
8 ¶¶92-94.) The firm is well versed in class action litigation and has diligently and aggressively
9 pursued this action. (*Id.*) Kingsley & Kingsley, APC currently serves as Class Counsel for
10 dozens of pending class action lawsuits in Northern, Central, and Southern California. (*Id.*) A
11 list of representative cases that Kingsley & Kingsley, APC has handled is included in the
12 accompanying declaration of Liane Katzenstein Ly. (*Id.*) After factoring in the risks explained
13 above, Class Counsel believes that the proposed settlement is fair and reasonable. (Ly Decl. ¶¶95.)

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

15 Plans of allocation are subject to the same standard of review as class action settlements;
16 they must be "fair, adequate and reasonable." (*See, e.g., Officers for Justice v. Civil Service*
17 *Comm'n* (9th Cir. 1982) 688 F.2d 615, 624-625, 629-630.) Here, the proposed plan of
18 allocation compensates Settlement Class Members pro rata based on the number of Workweeks
19 worked by the Settlement Class Member during the Class Period. The lump sum payment to
20 each member of the Settlement Class not excluding him/ herself will be determined by dividing
21 the Net Settlement Amount by the total number of Workweeks worked by all Participating
22 Settlement Class Members during the Class Period and then multiplying the result by each
23 Participating Settlement Class Member's Workweeks as determined by the Settlement
24 Administrator. This allocation distributes Settlement funds proportionally to each class
25 member's damages, and should therefore be approved as fair, adequate, and reasonable. (Ex. 1 at
26 ¶3.2.4.)

27 7. The Proposed Notice Fairly Apprises the Settlement Class Members of the
28 Terms of the Settlement and of the Class Members' Rights under the

1

2

2

8

23

24

1 the status of the case with Class Counsel; discussing the case via telephone with many
2 Settlement Class Members; making himself available for a full-day mediation as necessary; and
3 responding promptly to Class Counsel's communications regarding settlement. (*Id.*) Thus, in
4 addition to the sums paid to Settlement Class Members, Plaintiff requests a proposed litigation
5 enhancement in the amount of \$5,000.00, to be paid from the Gross Settlement Amount. (Ex. 1
6 at ¶3.2.1.) As set forth in the Agreement, Plaintiff will also be entering into a general release of
7 liability pursuant to Civil Code Section 1542. (Ly Decl. ¶97; Ex. 1 at ¶6.1)

8 Class Counsel considers this to be a fair and reasonable enhancement. (Ly Decl. ¶98.)
9 The enhancement takes into consideration the time, effort, and expense incurred by Plaintiff in
10 coming forward to litigate this matter on behalf of all Settlement Class Members. (*Id.*) Plaintiff
11 will provide a detailed declaration with the Final Approval Motion detailing his participation and
12 further justification for the enhancement. (*Id.*)

13 **VII. SUBMISSION TO THE LABOR AND WORKFORCE DEVELOPMENT** 14 **AGENCY**

15 As indicated on the Proof of Service, Plaintiff's Motion for Approval of Class Action
16 Settlement ("Motion") will be concurrently uploaded to the LWDA's website on the date this
17 Motion is filed as required by statute. Proof of submission of Plaintiff's Motion, all related
18 documents, and copy of the email from the LWDA confirming receipt is attached to the
19 Declaration of Liane Katzenstein Ly as Exhibit "2." (Ly Decl. ¶99.)

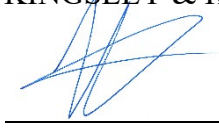
20 **VIII. CONCLUSION**

21 Plaintiff respectfully submits that the proposed Agreement is fair, adequate, reasonable,
22 and in the best interest of the Settlement Class Members. Therefore, the Parties respectfully
23 request that the Court (1) grant preliminary approval of the Class Action and PAGA Settlement
24 Agreement, and all of its terms; (2) approve the proposed form of notice, and direct that the
25 Notice be sent to Settlement Class Members in the manner set forth in the Class Action and
26 PAGA Settlement Agreement; and (3) schedule a hearing on final approval of the Agreement
27 and Class Counsel's application for an award of attorney's fees and litigation costs.
28

1 DATED: May 5, 2023

KINGSLEY & KINGSLEY, APC

2
3 By:



4 Liane Katzenstein Ly
5 Attorneys for Plaintiff and the proposed class
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
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 May 5, 2023, I served all interested parties in this action the following documents described as: **NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

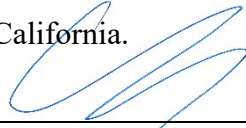
Ann K. Smith
Sarkis A. Atoyan
ATKINSON, ANDELSON, LOYA, RUUD & ROMO
12800 Center Court Driver South, Suite 300
Cerritos, CA 90703-9364
Sarkis.atoyan@aalrr.com
asmith@aalrr.com

[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: On interested parties set forth on the attached service list.

[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 May 5, 2023, at Woodland Hills, California.



Michelle Tanzer