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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

ENRIQUE JOSE MEDINA-RIVERA, an
individual, on behalf of himself, the State of
California, as a private attorney general, and on
behalf of all similarly situated,

Plaintiff,

v.

TREEBEARD LANDSCAPE, INC., a
California corporation; and DOES 1 TO 50,

Defendants.

Case No. 37-2021-00050044-CU-OE-CTL

**NOTICE OF MOTION AND PLAINTIFF'S
MOTION FOR ORDER GRANTING
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT; MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT**

*[Declarations of Jonathan Melmed and Enrique
Jose Medina-Rivera, and [Proposed] Order filed
concurrently herewith]*

Date: March 17, 2023

Time: 9:00 a.m.

Dept: C-73

Judge: Hon. Joel R. Wohlfeil

Complaint Filed: November 29, 2021

FAC Filed: February 28, 2022

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that, on March 17, 2023, at 9:00 a.m., or as soon thereafter as the matter may be heard, in Department C-73 of the Superior Court of California, County of San Diego before the Honorable Joel R. Wohlfeil, pursuant to Cal. Code of Civ. Pro. § 382 and California Rule of Court 3.769(c), plaintiff Enrique Jose Medina-Rivera (“Plaintiff”) individually, and on behalf of all others similarly situated, and on behalf of the Aggrieved Employees (as defined herein) will and does hereby move this Court for entry of an Order:

1. Preliminarily certifying the Class for purposes of settlement;
2. Preliminarily appointing Plaintiff as Class Representative for purposes of settlement;
3. Preliminarily appointing Jonathan Melmed, Laura M. Supanich, Anne Kramer, and Maria Burciaga of Melmed Law Group P.C. as Class Counsel for purposes of settlement;
4. Preliminarily approving the settlement as fair, adequate, and reasonable, based upon the terms set forth in the Parties’ Settlement Agreement and Release of Class Action (the “Settlement Agreement”), including payment by defendant Treebeard Landscape, Inc. (“Defendant”) of the non-reversionary Gross Settlement Amount (“GSA”) of \$260,000.00, plus the employer’s side payroll taxes;
5. Preliminarily approving Class Counsel’s request for up to one third of the GSA as attorneys’ fees (*i.e.*, up to \$86,666.67), plus reimbursement of actual litigation costs up to \$15,000.00;
6. Preliminarily approving an allocation of PAGA penalties of \$20,000.00, including payment to the Labor and Workforce Development Agency for its share of 75% of the PAGA penalties pursuant to PAGA in an amount of \$15,000.00;
7. Preliminarily approving a Class Representative incentive award to Plaintiff Enrique Jose Medina-Rivera in an amount of up to \$7,500.00 from the Gross Settlement Amount to compensate him for the burdens, responsibilities, time, effort and risks involved in coming forward on behalf of the Class;
8. Appointing ILYM Group, Inc. as the third-party Settlement Administrator for mailing notices and for settlement administration, and approving that \$10,000.00 be deducted from the GSA for the costs of settlement administration; and

1 9. Approving the proposed Notice of Proposed Class Action Settlement (“Class Notice”),
2 and ordering they be disseminated to the Class as provided in the Settlement Agreement.

3 This Motion is based upon the supporting Memorandum of Points and Authorities, the
4 Declarations of Jonathan Melmed, Esq., and Plaintiff Enrique Jose Medina-Rivera, the Settlement
5 Agreement, and the [Proposed] Order filed concurrently herewith, along with such evidence and
6 argument of counsel as may be presented at the hearing, and such additional matters as the Court may
7 consider at the hearing on this Motion.

8 Lastly, given the multiplicity of issues addressed in this Motion, and because this Motion is
9 unopposed, Plaintiff believes that there is good cause to exceed the page limit set forth in California
10 Rule of Court 3.764(c)(2), and respectfully requests that the Court consider Plaintiff’s memorandum of
11 points and authorities, which exceeds the statutory page limit.

12
13 Dated: February 23, 2023

Respectfully submitted,

14
15 **MELMED LAW GROUP P.C.**

16
17 By:  _____

Jonathan Melmed, Esq.

Laura Supanich, Esq.

*Attorneys for Plaintiff, the Putative Class and
Aggrieved Employees*

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This Motion seeks preliminary approval of a wage-and-hour class action settlement between
4 Plaintiff and Defendant on behalf of *all individuals who are or were employed by Defendant as non-*
5 *exempt employees in California during the Class Period* (the “Class” or the “Class Members”). The
6 Class Period is defined as the period of time from November 29, 2017 through the date of preliminary
7 approval of the settlement.

8 Defendant has identified 328 Class Members that worked a total of approximately 35,906
9 workweeks in the Class Period. After engaging in substantial independent investigation and hard-fought
10 negotiations, the Parties agreed to a *non-reversionary* gross settlement amount of \$260,000.00 plus the
11 employer-side payroll taxes. Declaration of Jonathan Melmed in Support of Plaintiff’s Motion for
12 Preliminary Approval of Class Action Settlement (“JM Decl.”) ¶ 3.

13 Subject to court approval, after deductions for attorneys’ fees and litigation expenses to Class
14 Counsel, enhancement award payment to the Class Representative, Settlement Administration expenses,
15 and a payment to the Labor Workforce and Development Agency (“LWDA”) under PAGA, the
16 remaining amount (the “Net Settlement Amount”) will be distributed to Class Members who did not opt
17 out of the Settlement as follows:

18

Gross Settlement Amount	\$260,000.00
Attorneys’ Fees (1/3 of the GSA)	(up to \$86,666.67)
Litigation Costs and Expenses	(up to \$15,000.00)
Class Rep. Enhancement Award	(up to \$7,500.00)
Settlement Administration Costs	(up to \$10,000.00)
PAGA Payment to the LWDA	(up to \$15,000.00)
Net Settlement Amount	\$125,833.33

22

23 Through this motion, Plaintiff requests entry of an order: (1) conditionally certifying the Class
24 under Cal. Code of Civil Procedure § 382 and California Rule of Court 3.769(c) for settlement purposes
25 and preliminarily approving the Settlement; (2) approving the proposed Class Notice to be distributed to
26 Class Members pursuant to the Settlement Agreement;¹ (3) appointing ILYM Group, Inc. as the
27

28 ¹ The Notice of Proposed Class Action Settlement (“Class Notice”) and the Share Form are attached to the Settlement Agreement as internal **Exhibits 1** and **2**, respectively. *See*, Melmed Decl. at **Exhibit A.**)

Settlement Administrator; and (4) scheduling a hearing for final approval, for the Court to consider the ultimate fairness of the settlement and the requested fees and costs following distribution of notice to the Class, and examination of the results of the notice process.

II. BACKGROUND

A. Procedural History, Discovery, and Investigation

On November 29, 2021, Plaintiff gave notice to the LWDA and Defendant of his claims for Defendant's violations of Labor Code sections 201, 202, 203, 204, 210, 226, 226.3, 226.7, 510, 512, 1174, 1185, 1194, 1194.2, 1197, 1197.1, 1198, 1198.5, 1199, 2802, 2804 and the IWC Wage Order No. 16-2001 under the Private Attorney General Act ("PAGA"). JM Decl. ¶ 8.

That same day, Plaintiff filed his class action complaint against Defendant alleging causes of action for: (1) failure to pay all minimum wages; (2) failure to pay all overtime wages; (3) failure to provide compliant rest periods and/or pay missed rest period premiums; (4) failure to provide compliant meal periods and/or pay missed meal period premiums; (5) failure to maintain accurate employment records (6) failure to pay wages timely during employment; (7) failure to timely pay wages at separation of employment; (8) failure to reimburse for business expenses; (9) failure to provide accurate itemized wage statements; and (9) violations of California's Unfair Competition Law based on the foregoing. JM Decl. ¶ 9.

On February 28, 2022, Plaintiff filed his First Amended Complaint adding a cause of action for PAGA Penalties. JM Decl. ¶ 10.

Plaintiff's counsel, Melmed Law Group, P.C., ("Class Counsel") has conducted sufficient informal discovery, investigation, and exercised due diligence in the prosecution of the Action. *See*, JM Decl. ¶ 10. This informal discovery, investigation, and prosecution has included, among other things, (a) numerous telephonic conferences with Plaintiff; (b) inspection and analysis of documents and other information produced by Plaintiff and/or Defendant including time sheets, wage statements, and relevant employment policies; (c) analysis of the legal positions and defenses taken by Defendant; (d) investigation into the viability of class treatment and representative nature of the claims asserted in the Action; (e) analysis of potential class-wide damages, including information sufficient to understand Defendant's respective potential defenses to Plaintiff's claims; (f) research of the applicable law with

1 respect to the claims asserted in the Complaint and the potential defenses thereto; and (g) assembling
2 and analyzing of data for calculating damages. *Id* at ¶ 11.

3 The Class Representative has vigorously prosecuted this case, and Defendant has vigorously
4 contested it. JM Decl. ¶ 12. The Parties engaged in sufficient investigation and discovery to assess the
5 relative merits of the claims of the Class and of Defendant’s defenses to them. *Id*.

6 **B. Mediation and Settlement**

7 In consideration thereof, and in advance of sinking substantial costs into further contested
8 proceedings, the Parties agreed to attend private mediation on November 8, 2022 before experienced
9 and respected employment law neutral Marc J. Feder, Esq. JM Decl. ¶ 13. Prior to and during
10 mediation, the Parties exchanged further information and discussed all aspects of the case, including the
11 risks and delays posed by additional litigation, the risks to both Parties for proceeding with a motion for
12 class certification, along with the evolving legal landscape and evidentiary challenges to establishing
13 respective claims and defenses. *Id*. These were contentious issues because of the factual and legal
14 complexity of the case. *Id*. However, the Parties were able to reach a settlement, which was
15 memorialized in a memorandum of understanding (“MOU”). *Id*.

16 The settlement negotiations were hard-fought and conducted in good faith and at arm’s length
17 between attorneys with substantial experience litigating class action and wage-and-hour cases. JM Decl.
18 ¶ 14. The settlement was the product of a non-collusive settlement process in which the Parties were
19 forced to make significant compromises in the interest of reaching a full and complete settlement of the
20 action. *Id*. The final settlement amount was reached as a result of reasonable compromises in light of
21 these considerations. *Id*. The Parties entered into a long form Settlement Agreement which is now
22 presented for Court approval. *Id*.

23 From Class Counsel’s review of the facts, strengths, and weaknesses of the case, the risks and
24 delays posed by further litigation, and Class Counsel’s own prior litigation experience, Class Counsel
25 believe that the recovery for each Settlement Class Member is fair and reasonable taking into
26 consideration the amounts received in other wage and hour class actions, the risks inherent in litigation
27 of this genre, and the reasonable tailoring of each Settlement Class Member’s claims to the settlement
28 award he or she will receive. JM Decl. ¶ 15.

To Plaintiff's knowledge, there are no other actions, whether in the pre-filing LWDA stage, or pending in court, that may be affected by this settlement.

III. SUMMARY OF THE PARTIES' CLAIMS AND DEFENSES

In the operative First Amended Complaint, Plaintiff, individually and on behalf of the putative Class alleges causes of actions for: **(1)** failure to pay minimum wage (Labor Code §§ 1194, 1194.2, 1197); **(2)** failure to pay overtime wages (Labor Code §§ 510); **(3)** failure to provide compliant rest periods and/or pay missed rest break premiums (Labor Code § 226.7 and the applicable IWC Wage Orders); **(4)** failure to provide compliant meal periods and/or pay missed meal period premiums (Labor Code §§ 512, 226.7 & the applicable IWC Wage Orders); **(5)** failure to maintain accurate employment records in violation of Labor Code section 1174; **(6)** failure to pay timely wages during employment in violation of Labor Code sections 204, 210; **(7)** failure to pay all wages due and owing at separation in violation of Labor Code sections 201, 202, and 203; **(8)** failure to reimburse business expenses in violation of Labor Code sections 2802 and 2804; **(9)** failure to provide complete and accurate wage statements in violation of Labor Code sections 226 and 226.3; **(10)** deceptive, fraudulent, or otherwise unlawful business practices based on the foregoing in violation of California's Unfair Competition Law (Bus. & Prof. Code, §§ 17200–17210); and **(11)** statutory penalties based on the foregoing pursuant to PAGA (Lab. Code, §§ 2698-2699.6). JM Decl. ¶ 16.

As used herein for ease of reference to the reader, the term “Plaintiff and the Class” shall refer to Plaintiff, the putative Class Members, and the Aggrieved Employees.

A. Plaintiff's Minimum Wage Claim

Labor Code § 1197 states the California requirement that employees must be paid at least the minimum wage fixed by the Commission, and any payment of less than the minimum wage is unlawful. JM Decl. ¶ 17. Similarly, Labor Code § 1194 entitles “any employee receiving less than the legal minimum wage...to recover in a civil action the unpaid balance of the full amount of this minimum wage.” Further, the IWC Wage Order obligates employers to pay each employee minimum wages for all hours worked. *Id.*

These minimum wage standards apply to each hour employees worked for which they were not paid. JM Decl. ¶ 18. Therefore, an employer's failure to pay for any particular hour of time worked by

an employee is unlawful, even if averaging an employee's total pay over all hours worked, paid or not, results in an average hourly wage above minimum wage. *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 324. *Id.*

Here, Plaintiff alleged that Defendant maintained a consistent policy of rounding shift start and end times. As a result of this practice, Plaintiff and the Class Members were and are not compensated for all the hours worked and all overtime hours worked. JM Decl. ¶ 19. The Court in *See's Candy Shops v. Superior Court* (2012) 210 Cal. App. 4th 889, 907, held that rounding time policies can be lawful, "if the rounding policy is fair and neutral on its face and 'it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked,' (29 C.F.R. § 785.48; see DLSE Manual, *supra*, §§ 47.1, 47.2.)."

Further, Plaintiff alleged that even though he and the Class Members regularly took on-duty and/or missed their meal periods entirely, Defendant automatically deducted a half hour from their wages as though they had taken a full 30-minute off-duty meal period, even when they did not. Plaintiff and the Class were not paid at least minimum wage for all hours worked because they were not paid for time spent on-duty during their meal periods, for which Defendant automatically deducted 30 minutes from their times records. JM Decl. ¶ 20. As a result, Plaintiff argued, they were not compensated for all hours worked. *Id.*

B. Plaintiff's Overtime Claim

Labor Code section 510 states, "[e]ight hours of labor constitutes a day's work. Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee." JM Decl. ¶ 21.

Plaintiff alleged that he and the Class Members were required to report to Defendant's headquarters in El Cajon, California to pick up equipment for the day's work and were then bused to their worksite. JM Decl. ¶ 21. After finishing their day at the work site, Plaintiff and the Class Members were then bused back to Defendant's headquarters. However, Plaintiff and the Class Members were

1 required to clock out at exactly their scheduled shift end time on their phones, regardless of whether
2 they remained on the bus. Plaintiff and the Class Members typically remained on the bus and under
3 Defendant's custody and control for an additional 15-30 minutes before reaching Defendant's
4 headquarters. Because Plaintiff and the Class Members were clocked in for 8 hours, this unpaid time
5 should have been compensated at the overtime rate. *Id.* Instead, no compensation was paid at all. *Id.* As
6 a result, Plaintiff argued that he and the Class Members were not paid all overtime hours owed. *Id.*

7 **C. Plaintiff's Rest Period Claims**

8 Pursuant to the IWC Wage Order, an employer must authorize and permit all employees to take
9 ten (10) minute duty free rest periods for every major fraction of four hours worked. JM Decl. ¶ 23.
10 Labor Code § 226.7 provides "an employer shall not require an employee to work during a meal or rest
11 or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or
12 order of the Industrial Welfare Commission ("IWC"). See *Augustus v. ABM Security Services, Inc.*
13 (2016) 2 Cal. 5th 257, 269 (concluding that "during rest periods employers must relieve employees of all
14 duties and relinquish control over how employees spend their time."). *Id.*

15 Here, Plaintiff alleged that Defendant failed to inform Plaintiff and the Class Members of their
16 right to take duty-free rest periods of not less than ten (10) minutes for every major fraction of four (4)
17 hours worked. JM Decl. ¶ 24. Additionally, Defendant required Plaintiff and the Class Members to
18 remain on duty at all times throughout their rest periods. *Id.* Thus, Defendant failed to provide Plaintiff
19 and the Class Members duty-free rest periods. *Id.*

20 In addition to failing to authorize and permit compliant rest periods, Plaintiff and the Class
21 Members were not compensated with one (1) hour's worth of pay at their regular rate of compensation
22 when they were not provided with a compliant rest period in accordance with Labor Code § 226.7(b).
23 JM Decl. ¶ 25.

24 **D. Plaintiff's Meal Period Claim**

25 Under California Labor Code Section 512 and the IWC Wage Order, no employer shall employ
26 any person for a work period of more than five (5) hours without providing a meal period of not less
27 than thirty (30) minutes. JM Decl. ¶ 26. During this meal period of not less than thirty (30) minutes, the
28 employee is to be completely free of the employer's control and must not perform any work for the

1 employer. *Id.* If the employee does perform work for the employer during the thirty (30) minute meal
2 period, the employee has not been provided a meal period in accordance with the law. *Id.* Also, the
3 employee is to be compensated for any work performed during the thirty (30) minute meal period. *Id.*
4 Finally, an employer may not employ an employee for a work period of more than ten (10) hours a day
5 without providing the employee with another meal period of not less than thirty (30) minutes. *Id.*

6 Plaintiff alleged that Defendant violated Labor Code § 512 and the IWC Wage Order because
7 Plaintiff and the Class Members were not provided off duty meal periods on or before their fifth hour of
8 work. JM Decl. ¶ 27. Additionally, Plaintiff alleged that Defendant engaged in a common policy and
9 practice of automatically deducting thirty (30) minutes from Plaintiff and the Class Members' time for
10 shifts worked in excess of five (5) hours in day regardless of whether or not the employee took or
11 reported taking a meal period. *Id.* As a result, Plaintiff and the Class Members were often subject to
12 automatic deductions of at least thirty (30) minutes from their hours worked even when they reported
13 that they did not receive a meal period. *Id.*

14 In addition to failing to authorize and permit compliant meal periods, Plaintiff and the Class
15 Members were not compensated with one (1) hour's worth of pay at their regular rate of compensation
16 when they were not provided with a compliant meal period in accordance with Labor Code § 226.7. JM
17 Decl. ¶ 28.

18 **E. Plaintiff's Claim for Failure to Maintain Accurate Records**

19 Labor Code section 1174 states, "[e]very person employing labor in this state shall... [k]eep, at a
20 central location in the state or at the plants or establishments at which employees are employed, payroll
21 records showing the hours worked daily by and the wages paid to, ..., employees employed at the
22 respective plants or establishments." JM Decl. ¶ 29. The "Records" section of the applicable IWC Wage
23 Order states that every employer shall keep accurate information with respect to each one of its
24 employees, including time records showing when the employee begins and ends each work period and
25 meal period, total hours worked in the payroll period and applicable rates of pay, and total wages paid
26 each payroll period. *Id.*

27 Further, Labor Code section 1174.5 imposes a civil penalty of \$500 for an employer's failure to
28 maintain accurate and complete records. This civil penalty is in addition to the civil penalty of \$100 per

1 pay period, per aggrieved employee that would be imposed pursuant to Labor Code section 2699 for a
2 violation of Labor Code section 1174(d). JM Decl. ¶ 30.

3 Plaintiff alleged that Defendant violated these requirements by failing to accurately record
4 employee hours worked including, but not limited to, Defendant's failure to record the proper beginning
5 and end of each work period and each meal period taken, the applicable rates of pay, and the wages paid.
6 JM Decl. ¶ 31.

7 **F. Plaintiff's Claim for Untimely Wages During Employment**

8 Labor Code § 204 expressly requires employers who pay employees on a weekly, biweekly, or
9 semimonthly basis to pay all wages "not more than seven calendar days following the close of the
10 payroll period." JM Decl. ¶ 32. Here, Plaintiff alleged that due to Defendant's failure to pay to Plaintiff
11 and the Class Members minimum wage and overtime compensation and meal and rest period premiums
12 as described above, Defendant failed to timely pay its employees within seven calendar days following
13 the close of payroll in accordance with Labor Code § 204 on a regular and consistent basis. *See Parson*
14 *v. Golden State FC, LLC*, 2016 U.S. Dist. LEXIS 58299, 2016 WL 1734010, at *3-5 (N.D. Cal. May 2,
15 2016) (finding after *Ling vs. P.F. Chang's China Bistro, Inc.* that a failure to pay rest period premiums
16 can support claims under Labor Code §§ 203 and 204). *Id.*

17 **G. Plaintiff's Waiting Time Penalty Claim**

18 Sections 201-203 of the Labor Code provides that former employees must be paid all wages due
19 on termination of employment. JM Decl. ¶ 33. If departing employees do not receive all wages due, then
20 they can recover penalties up to thirty days' worth of wages against their former employer. *Id.* Here,
21 Defendant failed to pay all meal and rest period premiums and minimum and overtime wages owed to
22 Class Members whose employment ended within the last three years prior to the filing of the Complaint
23 in connection with their final paychecks. *Id.*

24 **H. Plaintiff's Reimbursement Claim**

25 Plaintiff and the Class Members, at the direction of Defendant and/or with Defendant's
26 knowledge and acquiescence, have been required to use their personal cell phones for work-related
27 purposes. JM Decl. ¶ 34. Defendant required that Plaintiff and the Class Members clock in and out
28 through the ADP phone application using their personal cell phones and data. *Id.* Defendant requires

1 Plaintiff and the Class Members to shoulder the cost associated with business use of their personal cell
2 phones and personal devices. *Id.*

3 Plaintiff argued that Defendant's policies and/or practices require and expect, and/or with
4 Defendant's knowledge thereof permit, Plaintiff and the Class Members to use their personal cell phones
5 for work related purposes without reimbursement in full by Defendant for such expenses as required by
6 *Cochran v. Schwan's Home Service, Inc.*, 228 Cal.App.4th 1137 (Cal. Aug. 12, 2014) ("We hold that
7 when employees must use their personal cell phones for work related calls, Labor Code section 2802
8 requires the employer to reimburse them. Whether the employees have cell phone plans with unlimited
9 minutes or limited minutes, the reimbursement owed is a reasonable percentage of their cell phone
10 bills.") (reversing denial of class certification in cell phone reimbursement class action and setting forth
11 the applicable law for these claims); *Aguilar v. Zep, Inc.*, 2014 WL 4245988 *17 (N.D. Cal. Aug. 27,
12 2014) (granting plaintiffs' motion for partial summary judgment on the plaintiffs' cell phone
13 reimbursement claim); *Ritchie v. Blue Shield of California*, 2014 WL 6982943, at *21 (N.D. Cal. Dec. 9,
14 2014) (Hon. Edward Chen) (certifying class of cell phone reimbursement claim and adopting the logic
15 of *Cochran*). JM Decl. ¶ 35. To the contrary, Plaintiff argued that although he and the Class used their
16 personal cell phones for necessary work-related purposes to perform their job duties with the knowledge
17 of and/or acquiescence of Defendant, Defendant did not reimburse Plaintiff and the Class in any amount
18 for any such expenses incurred. *Id.*

19 **I. Plaintiff's Wage Statement Claim**

20 Labor Code § 226(e) provides that an employee is entitled to recover \$50 for initial day period in
21 which a violation of Labor Code §226 occurs and \$100 for each subsequent pay period, not to exceed
22 \$4,000.00, as well as an award of costs and reasonable attorneys' fees, for all such pay periods. JM Decl.
23 ¶ 36.

24 An employee suffering injury as a result of a knowing and intentional failure by an employer to
25 comply with Labor Code § 226(a) is entitled to recover the greater of all actual damages or fifty dollars
26 (\$50) for the initial pay period in which a violation occurs and one hundred dollars (\$100) per employee
27 for each violation in a subsequent pay period, not exceeding an aggregate penalty of four thousand
28 dollars (\$4,000), and is entitled to an award of costs and reasonable attorney's fees." *Id.* § 226(e). JM

Decl. ¶ 37.

Plaintiff argued that due to Defendant's failure to provide Plaintiff and the Class with lawful off-duty meal and rest periods and/or pay meal and rest period premiums, and failure to pay minimum and overtime wages, the wage statements issued by Defendant do not indicate the correct amount of gross wages earned, total hours worked, net wages earned, or the applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate in violation of Labor Code § 226(a)(1), (2), (5) and (9). JM Decl. ¶ 38.

J. Plaintiff's Unfair Competition Claim

Plaintiff contended that by committing the above-described Labor Code violations, Defendant engaged in unlawful, unfair, and/or fraudulent business practices in violation of Cal. Bus. & Profs. Code §§ 17200-17204 and is liable for restitution to the Plaintiff and the Class. JM Decl. ¶ 39. Moreover, this cause of action lengthens the statute of limitations of the Class's claims to four years preceding the filing of the Complaint. *Id.*

K. Plaintiff's PAGA Claim

The Private Attorney General Act of 2004 ("PAGA" - Labor Code §§ 2699-2699.5) allows an aggrieved employee to bring suit against an employer for violations of most Labor Code provisions. Suits brought under PAGA do not affect the employee's right to recover other remedies under state or federal law. *See* Labor Code § 2699(g); *Caliber Bodyworks, Inc. v. Superior Court*, 134 Cal. App. 4th 365, 375 (2005). JM Decl. ¶ 40. Wherever the Labor Code gives the Labor and Workforce Development Agency discretion to assess a civil penalty, a court is authorized to exercise the same discretion. Labor Code § 2699(e)(1). The statute of limitations for PAGA suits is one year. An employee who prevails in an action brought under PAGA is entitled to an award of reasonable attorney's fees and costs. The penalties available under PAGA are those provided in the underlying Labor Code provision that is violated or, if no penalty is listed, those provided by PAGA itself. Where the Labor Code does not provide for a penalty, PAGA establishes a civil penalty of \$100 for each aggrieved employee per pay period for the initial violation and \$200 for each aggrieved employee per pay period for each subsequent violation. Labor Code § 2699(f). For any civil penalties collected under PAGA, seventy-five percent of the penalties are distributed to the LWDA for enforcement and education, and twenty-five percent is

distributed to the aggrieved employees. *Id.*

Plaintiff alleged that by virtue of each of Defendant’s foregoing Labor Code violations, Plaintiff and the Class are, in addition to other remedies, entitled to civil penalties under PAGA. JM Decl. ¶ 41. This cause of action opens Defendant to additional penalties for the Labor Code violations, in additions to attorneys’ fees and costs. *Id.*

L. Defendant’s Total Denial of Liability and Its Legal and Factual Defenses

Defendant denied and continues to deny generally the claims and contentions alleged in the Complaint. JM Decl. ¶ 42.

First, Defendant argued that its rounding policy is neutral on its face and not illegal. Thus, Defendant argued, this claim was entirely without merit. JM Decl. ¶ 43. Further, Defendant argued that it paid Plaintiff and the Class Members at least minimum wage for all hours worked from the time they arrived for their shifts and inclusive of any “pre-shift” or “post-shift” activities. JM Decl. ¶ 43. Specifically, Defendant argued that Plaintiff and the Class Members were instructed to clock in upon arrival at the shop and before preparing their equipment for the shift. *Id.* They were further instructed to clock out only when they completed their work. *Id.* Defendant argued the Class Members had various ways to track their time, including a retina scanner, the ADP phone app, handwritten timesheets, and a GPS system. *Id.* Defendant argued that if there was a discrepancy between any of these systems, Defendant paid the Class Members based on whichever was most favorable to the employee. *Id.*

Second, Defendant argued that it did not promulgate an unlawful meal break policy. JM Decl. ¶ 44. In *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, the California Supreme Court held an employer is required only to “provide” breaks, but is not required (and, in its context, simply cannot as a practical matter) to ensure that they are taken. *Id.* Defendant argued that meal periods for the Class Members were scheduled, and operations ceased during this scheduled period, rendering Plaintiff’s claims without merit. *Id.* Therefore, any late or missed meal periods were, at most, sporadic such that the resulting inquiries are entirely individual and would overwhelm any class-wide questions. *Id.* Separate mini trials would have to determine both *liability* (i.e., whether Defendant prevented a particular employee from taking meal breaks they knew they were entitled to take) and *damages* (i.e., how often Defendant prevented a particular employee from taking a meal break). *Id.*

1 **Third**, Defendant argued that Plaintiff and Class Members were authorized or permitted to take
2 compliant rest periods. JM Decl. ¶ 45. Defendant asserted that no documentary evidence demonstrated
3 that Defendant deprived Plaintiff and Class Members of timely and complete rest periods. *Id.* Likewise,
4 Defendant argued that Plaintiff will be unable to certify a rest period class because his theory of
5 recovery—that employees were subjected to a policy requiring them to remain on duty during their rest
6 breaks—is not based on facts common to all putative class members. *Id.* Defendant argued that
7 Plaintiff’s rest period claim was not “likely to prove amenable to class treatment.” (*Brinker Rest. Corp.*
8 *v. Superior Court* (2012) 53 Cal.4th 1004, 1021.) *Id.*

9 **Fourth**, Defendant argued that Plaintiff’s reimbursement claim was without merit as Plaintiff
10 and the Class Members were not required to use their personal cell phones. JM Decl. ¶ 46. Further,
11 Defendant argued that there were multiple individualized liability issues related to the expense
12 reimbursement claims. *Id.* Defendant, relying on *Dugan v. Ashley Furniture Industries, Inc.* (C.D. Cal.,
13 Nov. 29, 2016, No. SACV161125PAFFMX) 2016 WL 9173459, and *Morgan v. Wet Seal, Inc.* (2012)
14 210 Cal.App.4th 1341, contended that those issues included whether phones were made available, the
15 motivation of each employee who opted to use his or her own cell phone, whether any expenses claimed
16 were necessary or reasonable, and whether individual employees chose not to seek reimbursement. *Id.*

17 **Fifth**, Defendant argued that PAGA penalties would be limited. Defendant argued that even if
18 Plaintiff prevailed, the recoverable penalties under PAGA are minimal. JM Decl. ¶ 47. First, courts to
19 consider the issue have refused to “stack” PAGA penalties. *See Carrington v. Starbucks Corporation*
20 (Cal. Ct. App. Nov. 27, 2018) No. D072392 (published Dec. 19, 2018) (approving PAGA penalty
21 reduction to \$5 per pay period); accord *Atempa v. Pedrazzani* (2018) 27 Cal.App.5th 809. Moreover,
22 Defendant argued that Plaintiff is not entitled to recover PAGA penalties at the subsequent violation rate
23 of \$200 per pay period. JM Decl. ¶ 47. California’s appellate courts have held that “[u]ntil the employer
24 has been notified that it is violating a Labor Code provision (whether or not the commissioner or court
25 chooses to impose penalties), the employer cannot be presumed to be aware [of the violation]” and
26 therefore, until a Court or the Commissioner issues a finding of a violation, the initial \$100 violation rate
27 applies for each pay period in which the alleged violation occurred. *Amaral v. Cintas Corp. No. 2* (2008)
28 163 Cal.App.4th 1157, 1209; accord *Amalgamated Transit Union Local 1309 v. Laidlaw Transit*

1 *Service, Inc.* (S.D. Cal. Aug. 10, 2009) 2009 WL 2448430, at *9 (“[u]nder California law, courts have
2 held that employers are not subject to heightened penalties for subsequent violations unless and until a
3 court or commissioner notifies the employer that it is in violation of the Labor Code”). Thus, Defendant
4 argued that even if the Plaintiff was able to establish any violation of the Labor Code, the PAGA
5 penalties assessed for these violations will be computed at the \$100 rate, as opposed to the \$100 per pay
6 period rate at maximum, and there is a likelihood that a further reduction of the penalty to \$5 per pay
7 period as approved in *Carrington* would apply given Defendant’s compliance with the Labor Code as
8 discussed above. JM Decl. ¶ 47. Defendant further argued that even if Plaintiff was able to recover some
9 PAGA penalties on behalf of other aggrieved employees, courts frequently use their discretion under
10 Section 2699(e)(2) to significantly reduce PAGA penalties where such penalties would be unjust,
11 arbitrary and improper. (*See, e.g., Stuart v. RadioShack Corp.* (N.D. Cal. 2009) 641 F. Supp. 2d 901,
12 902–03; *Hernandez v. BCI Coca-Cola Bottling Co.* (C.D. Cal. Apr. 12, 2012) 2012 WL 12272348, at
13 *2, *judgment entered*, 2012 WL 12092593 (C.D. Cal. May 9, 2012), and *aff’d*, 554 F. App’x 661 (9th
14 Cir. 2014).) JM Decl. ¶ 47. Defendant maintains that given its good faith attempts to comply with the
15 Labor Code, and *de minimis* defenses, this Court would exercise its discretion to substantially reduce
16 any PAGA penalties if it were to find Defendant liable for any of Plaintiff’s claims. *Id.* *See also*, Labor
17 Code §§ 203, 2699(e)(2); *Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203 Cal.App.4th 1112, 1135
18 (affirming reduction of PAGA penalties for wage statement violations from \$2,800,000 to \$500,000,
19 because “the aggrieved employees suffered no injury” as a result of the violations, the defendants “were
20 not aware” their wage statements violated the law, and the defendants “took prompt steps to correct all
21 violations once notified.”); *Fleming v. Covidien, Inc.* (C.D. Cal. Aug. 12, 2011, No. (OPX)) 2011 WL
22 7563047, at *4 (reducing PAGA penalties from \$2.8 million to \$500,000). *Id.*

23 ***Sixth***, Defendant asserted that any violations of the Labor Code were unintentional, and that
24 Plaintiff would have difficulty proving willfulness or intentionality for penalty purposes, including
25 claims for civil penalties under PAGA and claims for waiting time penalties. JM Decl. ¶ 48. Defendant
26 further argued that Plaintiff would be unable to prove “injury” for purposes of recovering penalties
27 under Labor Code 226(e). *Id.*

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1 In considering these significant risks and others, as well as the time, expense and cost of
2 litigation, trial and appeals, the Parties agreed that Settlement was appropriate, and that the Settlement
3 here is fair and reasonable. JM Decl. ¶ 49.

4 **M. Fair Valuation of Plaintiff's Claims**

5 In coming to a determination that this settlement is fair and reasonable and in the best interests of
6 the Class, Plaintiff took into consideration the risk of the court not certifying the class; the risk that the
7 Court may not award wage statement penalties, PAGA penalties, or waiting time penalties based on a
8 lack of willfulness or difficulties in establishing bad faith; and other potential defenses of Defendant on
9 the merits. JM Decl. ¶ 51. If Defendant prevailed on any of these defenses, the claims of the Class would
10 potentially be worth **nothing**. *Id.* The settlement, given the risks, is fair and reasonable. *Id.* A detailed
11 claim-by-claim analysis followed by a risk discount analysis of Defendant's defenses analysis of the fair
12 valuation of Plaintiff's claims is set forth in the JM Decl. ¶ 50.

13 The estimated 328 Class Members will enjoy substantial monetary recovery amounting to an
14 average recovery per class member of approximately \$383.64 net and an approximate maximum
15 recovery of \$767.28 net. JM Decl. ¶ 57.

16 **IV. SUMMARY OF BASIC SETTLEMENT TERMS**

17 The Settlement Agreement entered into by the parties is attached as Exhibit 1 to the JM Decl.
18 and incorporated herein by reference in its entirety. The following is a summary of the principal terms of
19 the Settlement Agreement:

20 **A. The Settlement Sum, Attorneys' Fees, Costs, and Representative Award**

21 The non-reversionary Gross Settlement Amount ("GSA") of \$260,000.00 to be paid by
22 Defendant in full settlement includes: (1) Class Counsel's attorney's fees in a sum of up to one third of
23 the GSA as attorneys' fees (*i.e.*, up to \$86,666.67); (2) litigation costs of up to \$15,000.00; (3) the
24 California Labor Workforce and Development Agency PAGA Penalties in the sum of \$15,000.00; (4)
25 settlement administration costs to ILYM Group, Inc. in the sum of \$10,000.00; and (5) the Class
26 Representative service award (\$7,500.00). Settlement Agreement, at § 8.1.

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1 **B. Net Funds Available to Class Claimants**

2 After all Court-approved deductions from the non-reversionary GSA, it is estimated that
3 **\$125,833.33** (the “Net Settlement Amount” or “NSA”) will be distributed to the Class Members. The
4 Net Settlement Amount shall be distributed pro rata on a “checks cashed” basis based on the
5 proportional number of weeks worked by each Class Member during the Class Period. Settlement
6 Agreement, at 8.2.

7 Class Members will be provided with notice of the settlement, its terms and their right to opt out,
8 object, appear at the fairness hearing. Settlement Agreement, at § 7.2.

9 **C. Release**

10 Upon final approval of the settlement, the Class Members who do not seek to be excluded from
11 the settlement release those claims arising out of or related to the allegations set forth in the operative
12 complaint and/or PAGA notice to the California Labor and Workforce Development Agency that arose
13 during the Class Period and/or PAGA Period, including claims for: **(1)** failure to pay minimum wage for
14 all hours worked in violation of Labor Code sections 1194 and 1194.2, and the applicable IWC Wage
15 Order(s); **(2)** failure to pay proper overtime wages in violation of Labor Code sections 510, 1197, and
16 1198, and the applicable IWC Wage Order(s); **(3)** failure to provide compliant rest periods and pay
17 missed rest break premiums in violation of Labor Code section 226.7 and the applicable IWC Wage
18 Order(s); **(4)** failure to provide compliant meal periods and pay missed meal period premiums in
19 violation of Labor Code sections 226.7 and 512, and the applicable IWC Wage Order(s); **(5)** failure to
20 maintain accurate employment records in violation of Labor Code section 1174; **(6)** failure to pay timely
21 wages during employment in violation of Labor Code sections 204, 210; **(7)** failure to pay all wages due
22 and owing at separation in violation of Labor Code sections 201, 202, and 203; **(8)** failure to reimburse
23 business expenses in violation of Labor Code sections 2802 and 2804; **(9)** failure to provide complete
24 and accurate wage statements in violation of Labor Code sections 226 and 226.3; **(10)** deceptive,
25 fraudulent, or otherwise unlawful business practices based on the foregoing in violation of California’s
26 Unfair Competition Law (Bus. & Prof. Code, §§ 17200–17210); **(11)** statutory penalties based on the
27 foregoing pursuant to PAGA (Lab. Code, §§ 2698-2699.6); and **(12)** all claims for liquidated damages,
28 penalties, interest, fees, costs based on the foregoing. Settlement Agreement, at § 1.34.

1 No other claims are released other than those claims specifically plead in the Complaint or
2 otherwise specifically identified herein. The Settlement Agreement will not release any person, party, or
3 entity from claims, if any, by Class Members for workers compensation, unemployment, or disability
4 benefits of any nature. Nor does it release any claims, actions, or causes of action which may be
5 possessed by Class Members under state or federal discrimination statutes, including, without limitation,
6 the California Fair Employment and Housing Act (Gov. Code, §§ 12900–12996); the Unruh Civil Rights
7 Act (Civ. Code, § 51); the California Constitution; Title VII of the Civil Rights Act of 1964 (42 U.S.C. §
8 2000, et seq.); the Americans with Disabilities Act (42 U.S.C. § 12101, et seq.); the Employee
9 Retirement Income Security Act of 1974 (29 U.S.C. § 1001 et seq.); and all of their implementing
10 regulations and interpretive guidelines. *Id.*

11 **D. Class Notice and Administration**

12 Subject to Court approval, the parties agree to engage ILYM Group, Inc., who will be
13 responsible for mailing the Class Notice and Share Form to Class Members; posting notice of entry of
14 final order and judgment certifying the Class Settlement and approving this Settlement Agreement;
15 handling inquiries from Class Members concerning the Class Notice; determining Individual Settlement
16 Amounts; determining individual payments to members of the PAGA Settlement Class; maintaining the
17 settlement funds in an appropriate interest-bearing account; preparing, administering, and distributing
18 Individual Settlement Amounts to Class Participants; preparing, administering, and distributing
19 individual payments to members of the PAGA Settlement Class; distributing the portion of the PAGA
20 Payment payable to the LWDA; issuing a final report and performing such other duties as the Parties
21 may direct. Additionally, the Settlement Administrator will handle all tax document preparation and
22 reporting, including state and federal tax forms, if any. Settlement Agreement § 7.1.

23 On a weekly basis, the Settlement Administrator will provide reports to Class Counsel and
24 Defense Counsel with summary information updating them as to the number of validated and timely
25 objections and Opt Out requests. The Settlement Administrator will serve on Class Counsel and Defense
26 Counsel via e-mail date-stamped copies of the original Opt Out requests and objections no later than
27 seven (7) days after their receipt. The Settlement Administrator will provide Class Counsel with proof of
28 mailing of the Class Notice, without listing individual Class Member names which the Settlement

1 Administrator will file with the Court at the time Class Counsel files its motion in support of the Court's
2 Final Approval and Fairness Hearing. *Id.* No later than seven (30) days prior to the Final Approval and
3 Fairness Hearing, the Settlement Administrator will compile and deliver to Class Counsel and Defense
4 Counsel a report with summary information regarding: (a) the total amount of final Individual
5 Settlement Amounts of each Class Participant, without any identifying personal information; (b) the
6 number of Class Participants to receive such payments, and (c) the final number of Opt-Outs and
7 objections. *Id.*

8 The Class Notice will inform Class Members of their estimated share of the settlement and the
9 number of workweeks they worked during the Class Period. Settlement Agreement § 7.2. Class
10 Members may dispute their workweeks if they believe they worked more weeks in the Class Period than
11 Defendant's records show by submitting information to the Settlement Administrator no later than forty-
12 five (45) days after being mailed the Class Notice and Share Form by the Settlement Administrator,
13 which is the defined Response Deadline. *Id.* The Settlement Administrator will jointly work with
14 Plaintiff and Defendant to resolve the dispute in good faith. *Id.* If Plaintiff and Defendant cannot agree
15 over the workweeks to be credited, the Settlement Administrator shall make the final decision based on
16 the information presented by the Class Member and Defendant. *Id.*

17 ILYM Group, Inc. has administered thousands of class action settlements and is qualified to
18 administer the settlement. Information about ILYM Group, Inc. is available at
19 <https://ilymgroup.com/about/>.

20 **E. Notice Process**

21 Class Members will have forty-five (45) calendar days from the date the Notice Packets (*i.e.*, the
22 Class Notice, and Share Form) are mailed by the Settlement Administrator to postmark their requests for
23 exclusion and/or objections. Settlement Agreement § 7.2. The date of the postmark on the return
24 envelope shall be exclusive means used to determine whether a participating Class Member has "timely"
25 disputed the calculation or application of the formula for determining Settlement Awards. *Id.*

26 The Settlement Administrator will certify jointly to Class Counsel and Defense Counsel the
27 number of exclusions. Settlement Administrator shall be responsible for calculation of the Settlement
28 Sums, issuance of checks, as well as withholding and remitting, all required state and federal taxes, and

1 for communicating this information to Defense Counsel. *See* Settlement Agreement § 7.1. Within two
2 hundred and ten (210) days of mailing the Individual Settlement Amounts to Class Participants, the
3 Settlement Administrator shall file with the Court and provide to Class Counsel a declaration of
4 payment. Settlement Agreement § 8.7. Any funds associated with checks that have not been cashed
5 within 180 days from date of issuance, will become void and the Individual Settlement Amount
6 associated with the un-cashed check shall be paid to the State of California Unclaimed Wage or Property
7 Fund in the name of the individual whose check was uncashed, pursuant to CCP Section 384, and
8 subject to approval by the Court. Settlement Agreement § 8.8.

9 **F. Tax Treatment**

10 For the purpose of calculating Employee's Taxes and Required Withholding for the Individual
11 Settlement Amounts for Class Participants (including any payments to the Class Representative but
12 exclusive of his Incentive Award), the Parties agree that 25% of each Individual Settlement Amount
13 shall constitute payment in the form of wages (and each Class Participant will be issued an IRS Form
14 W-2 for such payment to him or her), and 75% of each Individual Settlement Amount shall constitute
15 penalties and interest (and each Class Participant will be issued an IRS Form 1099 for such payment to
16 him or her). *See* Settlement Agreement, § 5.5. With respect to the PAGA Payment and any payments
17 made to individual members of the PAGA Settlement Class, all such payments shall be treated as
18 payments owing for penalties and interest thereon and shall not be considered wages. The Settlement
19 Administrator shall issue to members of the PAGA Settlement Class an IRS Form 1099 reflecting such
20 payment. Members of the PAGA Settlement Class shall be solely responsible for the payment of all
21 taxes with respect to any PAGA payments made to them. *Id.*

22 **V. PROVISIONAL CERTIFICATION OF THE SETTLEMENT CLASS UNDER THE**
23 **LESSER STANDARD OF SCRUTINY FOR SETTLEMENT-ONLY CERTIFICATION**
24 **IS APPROPRIATE FOR PURPOSES OF SETTLEMENT**

25 California Rule of Court 3.769(d) provides that the Court may make an order approving
26 certification of a provisional settlement class at the preliminary approval stage. It is well-established that
27 trial courts should use a "lesser standard of scrutiny" for determining the propriety of certifying a
28 settlement class, as opposed to a litigation class. *Dunk v. Ford Motor Co.* 9 ("Dunk"), 48 Cal. App. 4th

1 1794, 1807 n.19 (1996). The reasons include that no trial is anticipated in a settlement class, so the case
2 management issues inherent in determining if the class should be certified need not be confronted; and
3 the trial court’s fairness review of the settlement protects the interests of the non-representative class
4 members. (*Id.*); *see also Officers for Justice*, 690 F.2d at 633 (“Th[e] relationship between the
5 certification determination and the merits of the case is further attenuated within the context of the
6 settlement evaluation process[C]ertification issues raised by class action litigation that is resolved
7 short of a decision on the merits must be viewed in a different light.”); *Amchem Prods., Inc. v. Windsor*,
8 521 U.S. 591, 620 (1987) (“Confronted with a request for settlement-only class certification, a district
9 court need not inquire whether the case, if tried, would present intractable management problems . . .
10 .for the proposal is that there be no trial.”). As discussed below, for the purposes of this settlement only,
11 the parties ask this Court to provisionally certify the Class, as defined above, under section 382 of the
12 Code of Civil Procedure.

13 **A. Numerosity and Ascertainability**

14 Numerosity is met if a proposed class is so large that joinder of all members would be
15 impracticable. *See* Cal. Code Civ. Proc. § 382. A proposed settlement class is ascertainable if the class
16 members can be objectively identified and given notice of the litigation without unreasonable time or
17 expense. *See Medrazo v. Honda of N. Hollywood*, 166 Cal. App. 4th 89, 101 (2008). Here, the Parties
18 have determined that the size of the Class is approximately 328 Class Members. JM Decl. ¶ 3.

19 **B. Well-Defined Community of Interest**

20 **1. Commonality**

21 To justify certification, the class proponent must show that questions of law or fact common to
22 the class predominate over the questions affecting the individual members. *See Arenas v. El Torito*
23 *Rests., Inc.*, 183 Cal. App. 4th 723, 732 (2010) (citing *Washington Mut. Bank v. Superior Court*, 24 Cal.
24 4th 906, 913 (2001). While the Parties dispute whether a class would be appropriate if the litigation were
25 to continue, they agree, for the purposes of this settlement only, that the Class is subject to common
26 compensation policies, and common policies regarding the provision of meal and rest breaks, and
27 reimbursement policies. JM Decl. ¶¶ 16-48.

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1 **2. Typicality**

2 Typicality “focuses on whether there exists a relationship between the plaintiff’s claims and the
3 claims alleged on behalf of the class.” *Newberg*, § 3:13. Again, the Parties dispute whether Plaintiff’s
4 claims are typical of the Class for the purposes of any continued litigation of the Action, but agree for
5 the purposes of this settlement only, that Plaintiff asserts claims regarding Defendant’s compensation
6 practices, meal and rest break practices, and reimbursement policies are at the core of the lawsuit. JM
7 Decl. ¶¶ 16-48.

8 **3. Adequacy of Representation**

9 The proposed class representative must establish that he or she will adequately represent the
10 proposed class. *See Barboza v. West Coast Digital GSM, Inc.*, 179 Cal. App. 4th 540, 546 (2009).
11 Specifically, Plaintiff is adequate to represent the class because he was employed by Defendant during
12 the Class Period, experienced the same wage and hour practices as the rest of the class, understood his
13 duties as a class representative, has been willing to undergo the risk of litigation, and has no conflict of
14 interest with the other Class Members.

15 Adequacy may be established by the fact that counsel are experienced practitioners. *See Local*
16 *Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th
17 Cir. 2001). Here, Plaintiff alleges, and Defendant does not dispute, for purposes of this settlement, that
18 Plaintiff and the Class are represented by counsel with extensive experience in wage-and-hour litigation.
19 JM Decl. ¶¶ 58-62.

20 **4. Superiority**

21 Certification of the Class for settlement purposes is superior here because there will be a global
22 resolution of all claims at once, which fosters judicial economy. Class certification is also vastly
23 superior to litigation of numerous individual claims because most of the claims are too small to litigate
24 outside of the class context.

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VI. **THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT, WHICH IS
FAIR, ADEQUATE, AND REASONABLE**

A. **Class Action Settlements Are Subject to Judicial Review and Approval Under the
California Rules of Court**

The law favors settlements. *Bush v. Superior Court*, 10 Cal. App. 4th 1374, 1382 (1992). This is particularly true in class actions where substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation. However, a class action may not be dismissed, compromised, or settled without the Court's approval. Cal. R. Ct. 3.769(a). The California Rules of Court set forth the procedures for court approval of a class action settlement: (1) the Court preliminarily approves the settlement; (2) class members receive notice as directed by the Court; and (3) the Court conducts a final approval hearing to inquire into the fairness of the proposed settlement. Cal. R. Ct. 3.769(c), (e)-(g).

The decision to approve or reject a proposed settlement lies within the Court's sound discretion. *See Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 234-35 (2001). Nevertheless, in considering a potential settlement for approval, a court is not to turn the approval hearing "into a trial or rehearsal for trial on the merits. . . .[or] to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute." *Officers for Justice v. Civil Serv. Comm'n*, 690 F.2d 615, 625 (9th Cir. 1982).

The Court's ultimate duty is to determine whether the settlement is fair, adequate, and reasonable. *See Dunk*, 48 Cal. App. 4th at 1801 (setting forth the "fair, adequate, and reasonable" standard) (citing *Officers for Justice*, 690 F.2d at 625); *Cho v. Seagate Tech. Holdings, Inc.*, 177 Cal. App. 4th 734, 742-43 (2009) (a trial court must approve a class action settlement agreement, but only after determining that it is "fair, adequate and reasonable," considering factors such as the "risk, expense, [and] complexity" of continued litigation). The Court enjoys broad discretion in making its fairness determination, and should consider factors including but not limited to:

[T]he strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel . . . and the reaction of the class members to the proposed settlement.

Dunk, 48 Cal. App. 4th at 1801 (setting forth a non-exhaustive list of factors for the court's consideration at final approval).

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1 The above factors are not exclusive, “. . . and the court is free to engage in a balancing and
2 weighing of factors depending on the circumstances of each case.” *Wershba*, 91 Cal. App. 4th at 245.
3 However, in doing so, the Court must give “[due] regard to what is otherwise a private consensual
4 agreement between the parties.” *Id.* The inquiry must be limited “to the extent necessary to reach a
5 reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion
6 between, the negotiating parties.” *Id.* (citation and internal quotation marks omitted).

7 At the preliminary approval stage, the Court need only determine that the settlement falls within
8 the “range of possible judicial approval,” so that notice to the class and the scheduling of the fairness
9 hearing are worthwhile. *See* Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* (“*Newberg*”)
10 § 11:25 (4th ed. 2002). Indeed, the Court should grant preliminary approval if there are no “grounds to
11 doubt its fairness or other obvious deficiencies . . . and [the settlement] appears to fall within the range
12 of possible approval.” *Manual For Complex Litigation* (Third) § 30.41 (1995); *see Dunk*, 48 Cal. App.
13 4th at 1802. A “presumption of fairness exists where: (1) the settlement is reached through arm’s-length
14 bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act
15 intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is
16 small.” *Dunk*, 48 Cal. App. 4th at 1802 (citing *Newberg* § 11:41). As shown below, the settlement falls
17 well within the range of approval because there are no grounds to doubt its fairness.

18 **B. The Settlement Is the Result Of Serious, Informed, Non-Collusive Negotiations and**
19 **Reflects a Fair Compromise of Claims and Risk Factors**

20 The settlement was the product of extensive arm’s-length negotiations. JM Decl. ¶ 14, 54.
21 Through cordial and professional, the settlement negotiation was adversarial and non-collusive in nature.
22 *Id.* The settlement reached is the product of substantial effort by the parties and their counsel. *See*
23 generally, JM Decl.

24 Although Plaintiff and his counsel believed that there was a strong possibility of certifying the
25 claims, they recognized the potential risk, expense, and complexity posed by litigation, such as
26 unfavorable decisions on class certification, summary judgment, at trial and/or on the damages awarded,
27 and/or on an appeal that can take several more years to litigate. JM Decl. ¶ 54. Plaintiff and his counsel
28 further recognized the very real risk of recovering nothing if this case proceeded with expensive

1 protracted litigation. *Id.*

2 The resulting Settlement was based on calculations, risk assessment, and non-collusive
3 negotiation; it takes the risks identified above and others into account in arriving at the non-reversionary
4 settlement amount of \$260,000.00. JM Decl. ¶ 55.

5 **C. The Extent of The Informal Discovery and Investigation Was More Than Sufficient**
6 **To Permit Preliminary Approval Of The Settlement**

7 The parties thoroughly investigated and evaluated the factual and legal strengths and weaknesses
8 of this case before reaching the settlement. JM Decl. ¶ 56. As described above, the settlement was
9 reached after extensive investigation and research, thorough calculations and risk evaluation, substantial
10 exchanges of documents, a thorough evaluation of data for the Class, and an exchange of information
11 required to evaluate Defendant’s defenses. *Id.* The settlement came only after the case was thoroughly
12 investigated by Plaintiff’s counsel. *Id.*

13 **D. The Risks Inherent in Continued Litigation Are Great**

14 To assess the fairness, adequacy, and reasonableness of a class action settlement, the Court also
15 should consider “[t]he strength of plaintiff’s case, the risk, expense, complexity and likely duration of
16 further litigation, [and] the risk of maintaining class action status.” *See Dunk*, 48 Cal. App. 4th at 1801.
17 As described above, Defendant has strong defenses to Plaintiff’s claims, which create a real possibility
18 that the claims might not be certified and/or might fail on the merits. JM Decl. ¶¶ 42-48. Proceeding
19 with litigation would impose a significant risk of no recovery as well as ongoing, substantial additional
20 expenditures of time and resources. *Id.* If settlement were not achieved, continued litigation of the
21 claims would take a substantial amount time and possibly confer no benefit on Class Members. *Id.* By
22 contrast, the settlement will yield a prompt, certain, and substantial recovery for the Class, which also
23 benefits the parties and the Court. *Id.*

24 Another risk inherent in continued litigation is the risk of non-certification and/or maintaining
25 class action status through trial, and appeal. JM Decl. ¶ 51. In considering these risks, the choice was
26 overwhelmingly in favor of settlement. *Id.*

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1 **E. The Class Notice Plan Conforms to All Applicable Statutes and Rules**

2 The proposed Class Notice should be approved, as it fully informs the Class Members of the
3 nature of the lawsuit and each Class Member's rights under the terms of the Settlement Agreement and
4 applicable law. *See Exhibit 1.* The manner in which the Class Notice shall be disseminated, as outlined
5 above, will ensure that all or nearly all of the Class Members will be properly notified of the proposed
6 settlement.

7 The Court has wide discretion in approving the means of providing notice, so long as the class
8 representative "provide(s) meaningful notice in a form that should have a reasonable chance of reaching
9 a substantial percentage of class members." *Archibald v. Cinerama Hotels*, 15 Cal. 3d 853, 861 (1976).
10 Here, the Parties' notice plan is that notice of the Settlement will be disseminated directly to the Class
11 Members by first class mail by the settlement administrator within 28 days of preliminary approval.
12 Settlement Agreement § 7.2.

13 The notice plan and the Class Notice satisfy the requirements of Rule of Court 3.766 and afford
14 Settlement Class Members with all due process protections required by the United States Constitution.
15 Moreover, the contents of the Class Notice are in compliance with Cal. R. Ct. 3.766(d), because the
16 Notice includes, without limitation (1) a detailed explanation of the case, including the basic contentions
17 or denials of the parties; (2) a statement that the court will exclude the member from the class if the
18 member so requests by a specified date; (3) a procedure for the member to follow in requesting
19 exclusion from the class; (4) a statement that the judgment, whether favorable or not, will bind all
20 members who do not request exclusion; and (5) a statement that any member who does not request
21 exclusion may, if the member so desires, enter an appearance through counsel. *See Settlement*
22 *Agreement, Exhibit 1.* The 45-calendar day deadline for Class Members to exclude themselves or
23 challenge their weeks worked is reasonable, as it provides Class Members with sufficient time to do so
24 and, if they so choose, to seek independent legal advice in the interim.

25 **F. Plaintiff's Counsel Are Experienced in Similar Wage-And-Hour Litigation.**

26 Plaintiff's Counsel are experienced in wage-and-hour class actions. Numerous state and federal
27 courts have certified them as adequate and competent class counsel in such class actions. JM Decl. ¶¶
28 58-62.

1 The Parties' counsel agree that this settlement is fair and reasonable in light of the nature of the
2 claims, realistic risk adjusted value of damages, complexities of the case, the state of the law, and
3 uncertainties of class certification and litigation. *See, generally* JM Decl. Given the risks inherent in
4 litigation and the defenses asserted, this settlement is fair, adequate, and reasonable and in the best
5 interests of Class Members and should be preliminarily approved. *Id.*

6 Experienced counsel, operating at arm's length, have weighed the strengths and risks of the case,
7 and endorse the proposed settlement. *See* JM Decl. ¶ 56. The view of the attorneys actively conducting
8 the litigation is entitled to significant weight in deciding whether to approve the settlement. *Ellis v.*
9 *Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*, 661 F.2d 939 (9th Cir. 1981);
10 *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 128 (2008) (court must take into account "the
11 experience and view of counsel").

12 **G. The Attorneys' Fees Under the Settlement Agreement Are Fair**

13 Under the terms of the Settlement Agreement, Class Counsel is requesting \$86,666.67 in
14 attorneys' fees. JM Decl. ¶ 63. This amount is one-third (1/3) of the \$260,000.00 agreed upon by the
15 parties as the non-reversionary Gross Settlement Amount. *See Id.*

16 As the California Supreme Court has made clear, 1/3 of the common fund is a reasonable
17 percentage for a trial court to award as attorney fees in a class action where a common fund was
18 generated as a result of the case. *See Laffitte v. Robert Half International* (2016), I Cal. 5th 480, 506
19 (Cal. Aug. 11, 2016) ("We therefore agree with the Court of Appeal below that 'the percentage of fund
20 method survives in California class action cases, and the trial court did not abuse its discretion in using
21 it, in part, to approve the fee request [of 1/3 of the common fund] in this class action"). The California
22 Supreme Court further clarified that trial courts "have discretion to conduct a lode-star cross check on a
23 percentage fee, as the court did here; they also retain the discretion to forgo a lodestar cross check and
24 use other means to evaluate the reasonableness of a requested percentage fee.").²

25 In similar class action cases, numerous courts have approved fees of up to 1/3 of the common
26 fund. *See e.g., Martin v. FedEx Ground Package System, Inc.*, 2008 WL 5478576, at *8 (N.D. Cal. Dec.

27 ² Once the Court grants preliminary approval of the Settlement Agreement and Class Notice is disseminated, Plaintiff's
28 Counsel will later submit a comprehensive motion for attorneys' fees and costs to be heard at the same time as the final
approval hearing.

31, 2008) (federal district court approved attorneys' fees of 1/3 of common fund); *Stuart v. RadioShack Corp.*, No. C-07-4499 EMC, 2010 WL 3155645 (N.D. Cal. Aug. 9, 2010) (approving fee award of 1/3 of the total maximum settlement and noting that the fee award of 1/3 of the total settlement was "well within the range of percentages which courts have upheld as reasonable in other class action lawsuits"); *Wilson v. Kiewit Pacific Co.*, No. 09-cv-03630, ECF No. 119 (N.D. Cal. 2012) (approving fee award of 1/3 of the common fund and noting that such award is fair, reasonable and appropriate); *Romero v. Producers Dairy Foods, Inc.*, No. 1:05cv0484 DLB, 2007 WL 3492841, at *4 (E.D. Cal. Nov. 14, 2007) (awarding fees of 1/3 of common fund in a wage and hour class action, noting: "[f]ee awards in class actions average around one-third of the recovery."); Significantly, the Retainer Agreement in this case provides fees up to one-third of the amount obtained. *See Id.* Accordingly, preliminary approval of attorneys' fees of one-third of the common fund are reasonable and should be conditionally approved here.

H. The Class Representative Incentive Award is Fair and Appropriate

The parties request payment of an Incentive Award from the non-reversionary Gross Settlement Amount to the Class Representative in the amount of \$7,500.00, in addition to whatever payment he is otherwise entitled to receive as a Class Member. The proposed Incentive Award is reasonable compensation given the time and effort that the named Plaintiff devoted to this case; the valuable assistance he provided to Class Counsel; and the fact that he entered into a general release of claims that is broader than the release of the Class. JM Decl. ¶¶ 65-67.

Plaintiff provided invaluable assistance to Class Counsel and the Class in this case, including providing factual background for mediation and the class complaints; reviewing the relevant documents and complaint; participating in phone calls with his lawyers to discuss litigation and settlement strategy; participating in mediation by telephone; and reviewing the settlement documents. Plaintiff agreed to participate in this case with no guarantee of personal benefit. *Id.*

Further, Plaintiff agreed to undertake the financial risk of serving as a Class Representative and exposed himself to the risk of negative publicity by anyone who opposed this case. *Id.* Moreover, the requested \$7,500.00 Incentive Award for the Class Representative falls within the range of incentive payments typically awarded to Class Representatives in similar class actions. *See e.g. Bond v. Ferguson*

1 *Enterprises, Inc.*, No. 1:09-cv-1662 OWW MJS, 2011 WL 2648879 (E.D. Cal. June 30, 2011)
2 (approving \$11,250 service award to each of the two class representatives in a trucker meal break class
3 action; *Ross v. US Bank National Association*, No. C 07-02951 SI, 2010 WL 3833922, at *2 (N.D. Cal.
4 Sept. 29, 2010) (approving \$20,000 enhancement award to Class Representative in California wage-and-
5 hour class action settlement); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 493 (E.D. Cal.
6 2010) (approving service awards in the amount of \$10,000 each from a \$300,000 settlement fund in a
7 wage/hour class action); *West v. Circle K Stores, Inc.*, NO. CIV. S-04-0438 WBS GGH, 2006 U.S. Dist.
8 LEXIS 76558, at *28 (E.D. Cal. Oct. 19, 2006) (“the court finds plaintiffs' enhancement payments of \$
9 15,000 each to be reasonable.”); *Glass v. UBS Fin. Servs.*, No. C-06-4068 MMC, 2007 U.S. Dist.
10 LEXIS 8476, at *52 (N.D. Cal. Jan. 26, 2007) (finding “requested payment of \$ 25,000 to each of the
11 named plaintiffs is appropriate” in wage and hour settlement); *Louie v. Kaiser Found. Health Plan, Inc.*,
12 CASE NO. 08cv0795 IEG RBB, 2008 U.S. Dist. LEXIS 78314, at *18 (S.D. Cal. Oct. 6, 2008)
13 (approving “\$25,000 incentive award for each Class Representative” in wage an hour settlement);
14 *Garner v. State Farm Mut. Auto. Ins. Co.*, No. CV 08 1365 CW (EMC), 2010 WL 1687832, at *17 n.8
15 (N.D. Cal. Apr. 22, 2010) (“Numerous courts in the Ninth Circuit and elsewhere have approved
16 incentive awards of \$20,000 or more where, as here, the class representative has demonstrated a strong
17 commitment to the class”). *Id.*

18 **VII. THE COURT SHOULD APPOINT ILYM GROUP, INC. AS SETTLEMENT**
19 **ADMINISTRATOR**

20 The parties propose that the Court appoint ILYM Group, Inc. to serve as the Settlement
21 Administrator. JM Decl. ¶ 68. ILYM Group, Inc. is experienced in administering class action
22 settlements. *Id.*, as **Exhibit B**.

23 **VIII. THE COURT SHOULD SCHEDULE A FINAL APPROVAL HEARING**

24 The last step in the approval process is the final approval hearing, whereby proponents of the
25 settlement may explain and describe its terms and conditions and offer argument in support of approval,
26 and Class Members or their counsel may be heard in support of or in opposition to the settlement. The
27 parties propose that the Court schedule a hearing for final approval of the settlement, including
28 Plaintiff's request for attorneys' fees, costs and the service award, for July 2023.

1 **IX. CONCLUSION**

2 For all of the foregoing reasons, the parties respectfully request that the Court grant their motion
3 for preliminary approval of the Parties' settlement.

4 Respectfully submitted,

5 Dated: February 23, 2023

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10 *Attorneys for Plaintiff, the Putative Class and*
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