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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

CARLOS HERNANDEZ, Individually, and
on behalf of other members of the general
public similarly situated,

Plaintiff,

v.

EAST & WEST ALUM CRAFT INC., a
California Corporation and DOES 1-10,
inclusive

Defendants

CASE NO. 37-2022-00002587-CU-OE-CTL

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF GOOD
FAITH DETERMINATION OF CLASS
ACTION SETTLEMENT**

Date: October 27, 2023

Time: 10:30 a.m.

Judge: Hon. Carolyn Caietti

Dept.: C-70

1 **I. SUMMARY OF MOTION**

2 This matter is a “Wage and Hour” representative (*i.e.*, “PAGA”) *proposed* class action.
3 Plaintiff CARLOS HERNANDEZ (“Plaintiff”) bring Labor Code claims against Defendant EAST &
4 WEST ALUM CRAFT INC. (hereinafter “EAST & WEST” or “Defendant”).

5 After approximately **2 years** of litigation, exchanges of at least 2 sets of formal discovery
6 devices, and a full day Mediation, the parties have agreed to the terms of a proposed class action
7 settlement. The parties have drafted and executed a formal Joint Stipulation of Class and PAGA
8 Action Settlement(the “Agreement,”) lodged as **Exhibit A**¹ to the declaration of Ryan Kuhn decl.
9 Briefly, the proposed terms of the settlement are as follows:

10	Approximate size of class:	87 individuals
11	Notice Period:	30 days from Mailing of Notice
12	Settlement Fund (“GSA”):	\$212,500.00
13	Settlement administration:	\$5,000.00 (or less)
14	Class representative incentive:	\$5,000.00
15	LWDA payment:	\$15,000.00 (75 % Share of \$20,000 allocation)
16	Attorney's fees:	\$70,833.33 (1/3 of total)
17	Litigation costs:	\$10,000.00

18 Estimated average payment (before taxes) to each Class Member based on the above figures
19 will be **\$1,168.58**. This estimate is an “average” only, and do not account for the fact that class
20 members will receive more or less than an “average” share, as the amounts owed are calculated based
21 on the number of workweeks each individual worked for Defendant during the class period.

22 **Please Note:** This is a **non reversionary** settlement, in that the entire net settlement amount,
23 after the awarded costs and fees are deducted, will be automatically disbursed to all class members
24 who do not file a request to “opt-out” of participation in the lawsuit. (Exhibit A at ¶4.4).

25 The parties now move the Court for an order: **(1)** provisionally certifying the proposed class;

26
27 _____
1

28 This Memorandum incorporates by reference the definitions in the Agreement and the terms used herein are intended to have the same meaning as set forth in the Agreement.

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(2) preliminarily approving the proposed class action settlement; (3) directing that Notice (defined below) of the proposed settlement be provided to Class Members; and (4) scheduling a hearing for final approval of the proposed settlement and entry of the parties' proposed Final Order Approving Class Action Settlement.

II. FACTUAL AND PROCEDURAL HISTORY

This matter is a "Wage and Hour" lawsuit, involving claims made on behalf of a proposed Class of East & West installers and helpers/journeymen.

1. The Operative Claims and Investigation and Discovery Conducted

On January 21, 2022 Plaintiff filed a Complaint against East & West Alum Craft, Inc. (Hereinafter, "East & West" or "Defendant"). The Complaint alleged six causes of action brought pursuant to California's Private Attorneys General Act ("PAGA") – Labor Code section 2698 et seq. On May 5, 2022, Plaintiff filed a First Amended Complaint against East & West. The Amended Complaint alleged Class Action allegations based on the same allegations made in the original complaint. (Kuhn decl. ¶3).

On February 21, 2022, Plaintiff Hernandez propounded his first set of written discovery requests on Defendant, including requests for admission, special interrogatories, requests for production of documents, and general and employment form interrogatories. (Kuhn decl. ¶4). Through these requests, Plaintiff sought, among other information and documents, the identities of putative class members, Defendant's compensation policies, employee handbooks, wage statements, payroll records, time records and reimbursement policies. (*Id.*).

Defendant provided discovery responses, documents, and objections to Plaintiff's requests. After a lengthy meet and confer processes, Defendant produced, *inter alia*, Plaintiff's time and wage records, copies of the relevant employee handbooks, copies of all other relevant employee policies, the contents of Plaintiff's employee file, Plaintiff's time records, and itemized wage statements. (Kuhn decl. ¶5). Defendant also propounded 1 set of written discovery on Plaintiff. In total it appears there were at least 6 sets of written discovery exchanged between the parties. (*Id.*).

Following substantive discovery, Defendant (through its counsel), reached out to attempt to explore early resolution of this matter. As part of the settlement discussions, Defendant agreed to

1 produce and verify thousands of pages of documents. The production included all relevant policies and
2 procedures, and a large electronic sampling of class members' time and wage data. (Kuhn decl. ¶6).

3 Plaintiff also requested Defendants provide additional informal discovery so that the parties
4 could experience a meaningful mediation. (Kuhn decl. ¶7). Defendants provided informal discovery
5 which consisted of, *inter alia*, the number of current and former employees in a similar position as
6 Hernandez who worked for Defendants during the limitations period, East & West's current and only
7 published Employee handbook which included policies concerning timekeeping, meal and rest period
8 periods, compensation, and expense reimbursements, signed releases from current East & West
9 employees, and a redacted sampling of employee time records and wage statements. (*Id*). Plaintiff's
10 counsel also spoke with and interviewed numerous putative class members during the litigation. (*Id*).

11 **2. Settlement Efforts**

12 On August 10, 2023, the parties attended a mediation before an experienced wage and hour
13 class action mediator, Hon. Jan Adler. (Kuhn decl. ¶8). Prior to, and during, the mediation, counsel
14 for both parties agreed to the informal exchange of information pertinent to a class-wide settlement.
15 Prior to the mediation, counsel for both parties agreed to the informal exchange of information
16 pertinent to a class-wide settlement. Both parties prepared and exchanged detailed mediation
17 briefs. (*Id*). At the conclusion of mediation, the parties agreed on the key terms of a settlement that
18 would globally resolve all class and representative wage and hour claims asserted in the operative
19 Complaint in this Action. (*Id*).

20 On August 10, 2023, the parties executed memorandum of understanding on the key terms of
21 the settlement. As of **October 4, 2023**, the parties agreed on all final terms of the settlement which was
22 memorialized in the Agreement, which is attached to the declaration of Ryan T. Kuhn as **Exhibit A**.
23 Plaintiff now seeks the Court's preliminary approval of the Agreement. (Kuhn Decl. ¶9).

24 **III. SETTLEMENT TERMS**

25 The Agreement includes the following key terms:

26 **1. Contingent Nature of the Settlement**

27 The parties entered into the Agreement exclusively for the purpose of resolving the action and
28 facilitating the negotiated settlement. Should the Court, for any reason, not preliminarily and/or finally

1 approve the Agreement, or if the Agreement is terminated for any reason, then the parties have agreed
2 that the Agreement will be null and void and this action will revert to its status with respect to any and
3 all matters as they existed prior to the parties signing the Agreement. (Ex. A at ¶12.1).

4 **2. Description of the Settlement Classes**

5 Solely for the purposes of the Agreement, the parties have agreed that the term “Class
6 Member” is defined as:

7 all non-exempt employees of East & West in California from January 21, 2018, through
8 the date of preliminary approval of the settlement
9 (Ex. A at ¶1.5).

10 The parties agree that the Settlement Class consists of approximately eighty-seven (87)
11 individuals, as determined by Defendant’s employment records. (Ex. A at ¶8)

12 **3. Appointment of Settlement Administrator**

13 The parties agreed to use CAC Services Group, LLC, as the “Settlement Administrator” for
14 purposes of providing the Notice to Settlement Class Members, issuing payments pursuant to the
15 Agreement, and to administer the claims. (Ex. A at ¶7). CAC’s sole business has been the
16 administration of class action settlements and class action notices, and has extensive experience.
17 (Kuhn decl.¶ 10).

18 **4. Scope of the Release**

19 For purposes of the Agreement, Class Members release all “Wage and Hour” claims that are
20 either or both: (1) alleged in the First Amended Complaint; or (2) or which relate to or arise out of the
21 allegations and claims asserted in the First Amended Complaint and could have been alleged in the
22 complaint relating in any way to violations of the wage and hour provisions of the California Labor
23 Code or the California Wage Orders, or any other wage and hour provisions of California law. The
24 precise release language is reflected in **Exhibit A** at ¶5.2.

25 **5. Payment and Allocation**

26 The Agreement provides that within 14 days after East & West funds the Gross Settlement
27 Amount, the Administrator will mail checks for all Individual Class and PAGA payments. Class
28 Members will be entitled to an average share of approximately **\$1,168.58**. (Kuhn Decl. ¶11). The

1 actual share will depend on the amount of pay periods they were employed during the limitations
2 period. The Cash Payment will be allocated as follows: twenty percent (20%) constitutes wages
3 (subject to withholdings and deductions and reported as wage income on a Form W-2) and eighty
4 (80%) constitutes non-wage penalties and interest. (**Exhibit A** at ¶3.2.4.1).

5 **6. Proposed Settlement and Notice Program**

6 Subject to Court approval, the Parties agree that, within ten (10) days after the Court enters
7 any Order granting preliminary approval of the Settlement, Defendant will provide to the Settlement
8 Administrator the following information for each Settlement Class Member in the form of a Microsoft
9 Excel spreadsheet: class member names and addresses, telephone numbers, email addresses, social
10 security numbers, and dates of employment during the Collective relevant time period. (*See Exhibit*
11 *A* at ¶4.2). The Settlement Administrator will perform address updates and verifications, as necessary,
12 prior to the first mailing. Within 14 days of receipt of the Class List, the Settlement Administrator will
13 mail the Class Notice (“Notice”) to each Class Member, by first class mail. (*Id.*) The Notice is attached
14 to the declaration of Ryan Kuhn as **Exhibit B**. (Kuhn Decl. ¶12).

15 The Notice is designed to provide Class Members with detailed information about the lawsuit,
16 the Agreement, their rights and benefits, and how to participate, exclude themselves, or object. (*See*
17 **Exhibit B**.) From the date the Notices are mailed, the Class Members will have thirty (30) calendar
18 days to request to be excluded, or file objections. (*See Exhibit “A,”* at ¶7.4-7.5); **Exhibit B**).

19 The Class members will be given notice of the release and information about their expected
20 settlement amount based on the workweeks they were employed with Defendants during the Class
21 period. If they wish to receive a share of the Settlement, class members need not take any additional
22 action. Class Members are also given instructions on how to exclude themselves, file objections, or
23 appear at the final approval hearing to state objections. (**Exhibit A** at ¶7.4 and **Exhibit B**).

24 The Notice program also has additional safeguards. For instance, for Notices returned as non-
25 deliverable, the Class Administrator will perform a skip-trace and re-mail Notice to an updated
26 address (if any), upon receipt of the returned mail. (*See Exhibit A* at ¶7.4.2). It is the intent of the
27 parties that all reasonable means be used to locate Class Members.
28

1 The Notice will inform Class Members of the number of weeks worked during the Class Period
2 (according to Defendant's records) and their estimated settlement amounts. (See **Exhibit A** at ¶3.2.4).
3 Class members will have the opportunity to dispute the workweek calculation by submitting written
4 documentation to the Claims Administrator. (**Exhibit B** at § IV(E)).

5 PAGA Members do not require notice prior to a settlement nor may they opt out of the PAGA
6 penalty portion of the settlement. *Robinson v. S. Ctys. Oil Co.*, (2020) 53 Cal. App. 5th 476, 482–83,
7 review denied (Nov. 24, 2020). However, all PAGA members are also Class Members and can opt-out
8 to retain their individual claims. This is explained in the Class Notice. (**Exhibit B** at § IV(H)).

9 **7. Contingent Costs**

10 Defendant agrees to pay Seventy Thousand Eight Hundred Thirty Three Dollars and Thirty
11 Three cents (**\$70,833.33**) in attorneys' fees, which is thirty-three and one-third (33 1/3%) of the total
12 settlement, and up to Ten Thousand and Dollars (\$10,000.00) in litigation costs. (See **Exhibit A** at ¶
13 3.2.2). For costs incurred in administrating the settlement, Defendant will pay no more than Five
14 Thousand Dollars (\$5,000.00). (See **Exhibit A** at ¶3.2.3).

15 Defendant also agrees to allocate Twenty Thousand Dollars (\$20,000.00) to Plaintiff's PAGA
16 claims with 75% of the amount, or \$15,000.00, being paid to the LWDA, and 25%, or \$5,000.00,
17 being distributed amongst the class members. (See **Exhibit A** at ¶3.2.5).

18 Defendant also agrees to pay Plaintiff Carlos Hernandez Five Thousand Dollars (\$5,000.00)
19 as an enhancement award in consideration for his service as Class Representative. (See **Exhibit A** at
20 ¶3.2.1). The enhancement awards were decided pursuant to good faith negotiations and is intended to
21 recognize that it was the class representative who initiated the lawsuit, initiated the PAGA claims,
22 provided critical documents and witnesses to his attorneys, and worked with his attorney to propound
23 and prepare written discovery, all in an effort to obtain moneys allegedly owed not only to himself, but
24 to the other employees. (Kuhn Decl. ¶13).

25 **IV. SUMMARY OF CLAIMS AND ESTIMATES OF POTENTIAL DAMAGES**

26 Counsel hereby submits estimates and calculations for the total potential value of all claims
27 so this Court may evaluate if the amount to be paid to the class ultimately could be determined to be
28

1 fair and reasonable when balanced against the probable outcome of the future litigation. *Kullar v. Foot*
2 *Locker Retail, Inc.*, (2008) 168 Cal. App. 4th 116, 133.

3 Concerning the strength of the plaintiff's case, the California Court of Appeal has said that the
4 "merits of the underlying class claims are not a basis for upsetting the settlement of a class action; the
5 operative word is 'settlement.'" *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85
6 Cal. App. 4th 1135, 1150 [citing, *inter alia*, *City of Detroit v. Grinnell Corp.* (2d Cir. 1974) 495 F.2d
7 448,455 ("The fact that a proposed settlement may only amount to a fraction the potential recovery
8 does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be
9 disapproved"); see also *Linney v. Cellular Alaska P'ship.* (9th Cir. 1998) 151 F.3d 1234, 1242 ("This
10 court has aptly held that 'it is the very uncertainty of outcome in litigation and avoidance of wasteful
11 and expensive litigation that induce consensual settlements'"); *Officers for Justice v. Civil Servo Com.*
12 (9th Cir. 1982) 688 F.2d 615, 625 ("The proposed settlement is not to be judged against a hypothetical
13 or speculative measure of what might have been achieved by the negotiators.")

14 Each of the primary claims also had risks to obtaining both class certification and a finding of
15 liability. If Defendants' asserted defenses were successful, the class would not receive anything. As
16 is set forth below, Plaintiff submits that the most realistic "best case" scenario would be an average
17 recovery per class member of approximately \$4,957.50. and a worst case scenario would be a recovery
18 of \$0, by way of denial of class certification or defense verdict. (Kuhn Decl. ¶14).

19 Given all the risks on each claim, the estimated **\$1,168.58** average recovery secured via this
20 settlement is a reasonable compromise and is in the best interests of the class given all the risks of
21 continued litigation. (Kuhn Decl. ¶15).

22 **A. THE ALLEGATIONS OF "FAILURE TO PAY ALL COMPENSATION"**

23 Plaintiff's unpaid wages (and unpaid overtime) claims were based on the allegation that
24 employees were performing unpaid work due to the East & West's standard timekeeping system which
25 "rounded" employee time entries and caused other losses due to certain alleged "transitional math
26 errors" caused by the payroll system. Plaintiff alleged this resulted in regular time and overtime pay
27 being owed where Defendants were on notice of work being performed without pay.
28

1 Defendants argued that rounding of total hours worked has been recognized under California
2 law. Defendants also denied that any unpaid work occurred, and even if some did occur, East & West
3 claimed it was not on notice of these alleged Labor Code violations and had a strict written prohibition
4 against off-the-clock work and a mandate that all time worked must be accurately recorded. East &
5 West asserted proof of these alleged violations would require individualized inquiries, which could
6 preclude class certification and make any PAGA claims unmanageable. (Kuhn decl. ¶ 24).

7 Based on Class Counsels' analysis, this claim was worth as little as \$0 (a defense verdict or
8 denial of class certification) or as much as \$104,400.00. (Kuhn decl. ¶16).

9 **B. THE "MEAL AND REST PERIOD CLAIMS"**

10 Plaintiff was able to identify hundreds of examples of missing or late meal periods without the
11 provision of a meal period penalty payment. However, Defendant argued that these records do not
12 conclusively show whether (1) East & West actually failed to provide the meal period, (2) there was
13 a voluntary waiver, (3) employees forgot to clock out, or (4) employees voluntarily chose to skip or
14 take them late even though they were provided. Additionally, in light of East & West's written meal
15 period policy and the wide variations in alleged violations and departments, Defendants contended
16 there was no uniform policy or practice, requiring individualized inquiries that would preclude class
17 certification and make any PAGA claims unmanageable. (Kuhn decl. ¶ 25).

18 Plaintiff also alleged the East & West written policies improperly restricted class members
19 from leaving the premises during their Meal and Rest Periods. While there was language to that effect
20 in East & West's policy, East & West argued that witness testimony would demonstrate that - in
21 practice - East & West restricted its employees from "leave the premises" during Rest Periods. East
22 & West also contended individualized inquiries abound as to why individual employees may have
23 failed to take appropriate Meal or Rest Periods. (Kuhn decl. ¶ 26)

24 Plaintiff alleges the Rest Period policy lacks the required statutory language. Plaintiff also
25 alleges the Defendants written policies improperly restricted class members from leaving the premises
26 during their Rest Periods. Defendants pointed out that they provided for adequate breaks and argued
27 that witness testimony would demonstrate that in practice, no restriction on rest breaks were ever
28

1 enforced. Defendants also contended individualized inquiries will abound as to why individual
2 employees may have failed to take appropriate meal periods or rest breaks. (Kuhn decl. ¶ 27)

3 While there are time records to support the existence of meal period violations, there are no
4 corresponding rest period records, making this aspect of the claim much harder to prove. Some Courts
5 have been disinclined to accept survey evidence that may have been needed to help establish rest
6 period violations. See e.g. *Duran v. U.S. Bank National Assn.* (2018) 19 Cal.App.5th 630.

7 Based on counsels' analysis, this claim was worth as little as \$0 (a defense verdict or denial
8 of class certification) or as much as \$261,000.00. (Kuhn decl. ¶16).

9 **C. THE "ITEMIZED WAGE STATEMENT" CLAIMS**

10 Plaintiffs acknowledge that the "Itemized Wage Statement" claims are largely derivative, in
11 that both the gross and net wages could be found to be inaccurate, due to the above-referenced claims.

12 East & West argued that the failure to list gross and net wages are derivative of other claims
13 that may ultimately fail and as a result there is no "knowing and intentional failure" to list information,
14 which triggers liability under Labor Code §226(e). (Kuhn decl. ¶28).

15 The California Supreme Court has recently held that the failure to pay meal and rest period
16 premiums *may* give rise to a claim for inaccurate wage statements (or waiting time penalties).
17 However, such derivative liability is not automatic and the Plaintiff still must show a "knowing and
18 intentional" or "wilful" failure to comply with the Labor Code. See *Naranjo v. Spectrum Security*
19 *Services*, (2022) 13 Cal.5th 93. Defendant (as with the underlying meal and rest period claims)
20 maintained individualized inquiries would abound as to why breaks were missed and whether meal
21 period premiums should have been paid in the first place, requiring individualized inquiries that would
22 preclude class certification and make any PAGA claims unmanageable. (Kuhn decl. ¶29).

23 As is broken down further in the declaration of Ryan T. Kuhn, this claim was valued at as little
24 as \$0.00 and as much as \$6,650.00. (Kuhn decl. ¶16).

25 **D. THE REIMBURSEMENT CLAIMS**

26 Plaintiff contends that East & West violated Labor Code section 2802 by failing to reimburse
27 its employees for certain costs, including cellular phone costs, purchase of tools, and mileage. East &
28

1 West countered that it has a comprehensive written policy for expense reimbursements in its employee
2 handbook. The majority of East & West employees were not able to do remote work due the nature
3 of the work (Kuhn decl. ¶30). As stated in the declaration of Ryan T. Kuhn, this claim was valued at
4 as little as \$0.00 and as much as \$870.00. (Kuhn decl. ¶ 16).

5 **E. THE “DERIVATIVE” CLAIMS (PAGA, LABOR CODE SECTION 203)**

6 The remaining claims are derivative in that PAGA and Labor Code § 203 penalties would only
7 be permissible if the above claims are proven.

8 The parties agreed to allocate \$20,000 to the PAGA claims, which is 9.4% of the total
9 settlement. This PAGA allocation is in the range routinely approved by California Courts. *See Garcia*
10 *v. Gordon Trucking, Inc.* (E.D. Cal., Oct. 31, 2012, No. 1:10-CV-0324 AWISKO) 2012 WL 5364575,
11 at *7 (approving \$10,000 PAGA penalty for a California class with a \$3.7 million gross settlement
12 payment); *Syed v. M-I, L.L.C.* (E.D. Cal., Feb. 22, 2017, No. 112CV01718DADMJS) 2017 WL
13 714367, at *13 (approving 2.53% of the estimated \$3.95 million gross settlement amount allocated
14 to the California class); *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No.
15 15-CV-02198-EMC) 2016 WL 5907869 (approving allocation of \$20,000 to the PAGA claim (0.15%
16 of its total value of \$12,952,000) as reasonable in the context of the settlement as a whole); *In re Uber*
17 *FCRA Litigation* (N.D. Cal., June 29, 2017, No. 14-CV-05200-EMC) 2017 WL 2806698 (approving
18 a settlement agreement of \$7.5 million, where the amount allocated to the PAGA claims was only
19 \$7,500 – .01% of the total settlement amount).

20 Based on Class Counsel's analysis, the PAGA and Labor Code § 203 claims were worth as little
21 as \$0 (a PAGA defense verdict or denial of certification of the § 203 claim) or as much as
22 \$3,417,300.00 and \$867,825.00 respectively. (Kuhn decl. ¶ 16).

23 Based on the above, a best case recovery (which would be admittedly highly unlikely, given
24 the factors set forth below) would be a total judgment of \$4,000,820. (Kuhn decl. ¶ 17).

25 **F. CASE LAW SUPPORTS A FURTHER REDUCTION ON ANY RECOVERY**

26 Plaintiff concedes he would be highly unlikely to ever be awarded an amount approaching the
27 maximum damages set forth above. To wit, the majority of the recovery would be "derivative"
28

1 penalties under PAGA, Labor Code § 203 and Labor Code § 226. (Kuhn decl. ¶ 18). The Court would
2 have great discretion to mitigate any penalties awarded. *Thurman v. Bayshore Transit Management,*
3 *Inc.* (2012) 203 Cal.App.4th 1112, 1135 (disapproved on other grounds).

4 In a recent trial involving Class Counsel, the Court found liability, but then significantly
5 reduced the PAGA penalties, down to \$5 a violation. See *Carrington v. Starbucks Corp.* (2018) 30
6 Cal.App.5th 504; See accord *Fleming v. Covidien, Inc.*, No. ED-CV-10-1487-RGK(OPx), 2011 WL
7 7563047 at *4 (C.D. Cal. Aug. 12, 2011) (reducing PAGA penalties by over 82%, in part because
8 employer was "not aware" of violations). And in *Carrington*, the Court also noted that other trial courts
9 have declined to "stack" (impose multiple) penalties based on the same underlying Labor Code
10 violation. See *Ruelas v. Costco Wholesale Corporation* (N.D. Cal. 2014) 67 F.Supp.3d 1137.

11 Class Counsel believes a mitigation of the damages and potential PAGA penalties would be
12 warranted here. As in the *Carrington* case, there was evidence that East & West attempted to provide
13 meal and rest periods in practice, and the written policies contained no facially non-compliant terms.
14 (Kuhn decl. ¶ 20).

15 Given this, it is likely that some of the violations by East & West were not "willful." Finally,
16 given the defenses raised by Defendant, there was a significant risk that many of the claims would not
17 have been certified or, if they were, certification could not have been maintained through trial and
18 appeal. (*Id.*).

19 The Parties agree the failure to pay "ex employees" under § 203 is derivative of the other
20 claims. As East & West asserts a "good faith dispute" for withholding any unpaid wages, it would be
21 difficult to establish any liability for a "willful" failure to pay wages owed. (Kuhn decl. ¶21).

22 Based on the above, it would be likely that PAGA penalties would be reduced to approximately
23 \$5 per violation and the Court would find no basis for imposing Labor Code §§ 203 or 226 penalties.
24 (Kuhn decl. ¶22).

25 If this occurred, the realistic anticipated "best case" judgment following trial would be
26 approximately \$876,650.00. Discounting 40% for contingent costs (fees and costs award, enhancement
27 bonus, administration, etc.), as well as court mitigation, the average class member's share of this
28

1 recovery would be \$4,030.57. Given our office’s analysis, I submit this number is the most likely “best
2 case” recovery per class member. Given all the risks on each claim, the estimated **\$1,168.58** average
3 recovery secured via this settlement is a reasonable compromise and is in the best interests of the class
4 given all the risks of continued litigation. (Kuhn decl. ¶23).

5 **V. PROVISIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE**

6 Under California law, a class action is appropriate when the class is ascertainable and there is
7 “a well defined community of interest in the questions of law and fact involved affecting the parties
8 to be represented.” Cal. Code Civ. Proc. § 382; *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34
9 Cal. 4th 319, 341. State law requirements under California Code of Civil Procedure § 382 for class
10 certification mirror those of federal law under Rule 23 of the Federal Rules of Civil Procedure:
11 numerosity, typicality of the class representatives’ claims, adequacy of representation, predominance
12 of common issues, and superiority. See Fed. R. Civ. P. 23(a); see also *Hanlon v. Chrysler Corp.* (9th
13 Cir. 1998) 150 F.3d 1011, 1019. Thus, for settlement purposes, each of these elements must be
14 present. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 237-38.

15 **A. THE PROPOSED SETTLEMENT CLASS IS ASCERTAINABLE**

16 The proposed class is ascertainable because all Class Members currently or formerly worked
17 for Defendant as a nonexempt employee and will be identified through Defendant’s employment
18 records. See *Rose v. City of Hayward*, 126 Cal.App.3d 926 (1981) (finding that “Class Members are
19 ‘ascertainable’ where they may be readily identified without unreasonable expense or time by reference
20 to official records”). Thus, the ascertainability requirement is met.

21 **B. THE PROPOSED SETTLEMENT CLASS IS SUFFICIENTLY NUMEROUS**

22 The numerosity requirement is met if the class is so large that joinder of all members would
23 be impracticable. *In re Tobacco II Cases* (2009) 46 Cal. 4th 298, 318. Here, Defendant’s records
24 show that approximately **87** class members worked for the company during the limitations period.
25 (Kuhn decl. ¶32). Thus, joinder of all members of the class would be impracticable.

26 **C. THE COMMONALITY REQUIREMENT WAS MET**

27 The commonality requirement is met if there are questions of law and fact common to the class.
28

1 *See Hanlon, supra*, 150 F.3d at 1019. Here, for purposes of the Settlement, the parties agree the claims
2 of Class Members all involve the same questions of law and fact. (**Ex. A** at 12.1). Namely, all class
3 members were subject to the same employment policies and practices of Defendant. (Kuhn decl. ¶ 33).
4 The common question exists as to whether the policies and practices Class Members were subjected
5 to are illegal. Under these circumstances, the commonality requirement is satisfied. *See Hanlon, supra*,
6 150 F.3d at 1019-20.

7 **D. THE TYPICALITY REQUIREMENT IS MET**

8 The typicality requirement is met if the class representatives and class counsel have no interests
9 adverse to the interests of the proposed Class Members and are committed to vigorously prosecuting
10 the case on behalf of the class. See *Wehner v. Syntex Corp.*, 117 F.R.D. 641, 644 (N.D. Cal. 1987).

11 Here, there are no such adverse interests. Plaintiff has claims substantially the same as all the
12 Class Members. (Kuhn decl. ¶ 34). Factual differences may exist between the class representatives and
13 the Class Members so long as the claims arise from the same events or course of conduct and are based
14 on the same legal theories. See *Hanlon*, 150 F.3d at 1020; also 1 *Newberg* § 53.13 at 3-76-77 (“When
15 it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and
16 the class sought to be represented, the typicality requirement is usually met irrespective of varying fact
17 patterns which under lie individual claims.”) The the typicality requirement is also satisfied.

18 **E. THE ADEQUACY REQUIREMENT IS MET**

19 The adequacy of representation component of the community of interest requirement for class
20 certification “comes into play when the party opposing certification brings forth evidence indicating
21 widespread antagonism to the class suit.” *Capitol People First v. Dep’t of Develop. Servs.* (2007) 155
22 Cal. App. 4th 676, 696-97. The adequacy inquiry “serves to uncover conflicts of interest between
23 named parties and the class they seek to represent.” *Id.* To assure “adequate” representation, the “class
24 representative’s [...] claim must not be inconsistent with the claims of other members of the class.” *Id.*

25 Here, no such “inconsistencies” exist. Plaintiff will be compensated based on the same “pay
26 period” formula as all other members of the Class. (Kuhn decl. ¶ 34).

27 Additionally, any Class Member who wishes to “opt out” of the Settlement may do so and
28

1 retain all of their individual rights. (Kuhn decl. ¶ 35). There is therefore no conflict of interest between
2 the Class Representative and the Class Members. (*Id.*) Thus, at least for settlement purposes, the
3 adequacy prong is met. (*Id.*)

4 **F. COMMON ISSUES PREDOMINATE AND CLASS-WIDE SETTLEMENT IS**
5 **SUPERIOR TO OTHER AVAILABLE METHODS OF RESOLUTION**

6 Class certification is authorized where common questions of law and fact predominate over
7 individual questions, and where class-wide treatment of a dispute is superior to individual litigation.
8 See *Richmond v. Dart Indus., Inc.*, 29 Cal.3d 462, 469 (1981).

9 The proposed class in this case is sufficiently cohesive because, for purposes of the Settlement
10 only, the parties have stipulated that all class certification elements are met. (**Exhibit A** at ¶12.1). All
11 members of the Class worked under the same conditions and experienced the same policies and
12 practices of Defendant. Thus, the class is sufficiently cohesive.

13 Further, it would be preferable to resolve all of the Class Members' claims by means of a class-
14 wide settlement than to require each Class Member to litigate individual claims. (Kuhn decl. ¶36).

15 **VI. PRELIMINARY APPROVAL OF THE CLASS ACTION SETTLEMENT IS PROPER**

16 The trial court has broad discretion to determine whether a class action settlement is fair and
17 reasonable. *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 723. Fairness is presumed where
18 (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are
19 sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar
20 litigation; and (4) the percentage of objectors is small. *Chaves v. Netflix, Inc.* (2008) 162 Cal.App.4th
21 43, 52; *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802. But, even where it appears the
22 settlement is fair, the court must still determine on the record before it whether the settlement should
23 be approved after considering "the strengths and weaknesses of the claims and risks of the particular
24 litigation." *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129. The courts will
25 consider: (i) the strength of the plaintiff's case; (ii) the risks, expense, complexity and likely duration
26 of further litigation; (iii) the risk of maintaining class action status throughout the trial; (iv) the amount
27 offered in settlement; (v) the extent of discovery completed; (vi) the stage of the proceedings; (vii) the
28 experience and views of counsel; (viii) the presence of a governmental participant; and (ix) any

1 reaction of putative class members to the proposed settlement. *Dunk*, 48 Cal.App.4th, at 1800-1801;
2 *In re Microsoft I-V Cases*, 135 Cal.App.4th, at 723.

3 **A. FAIRNESS OF THE SETTLEMENT**

4 For preliminary approval purposes, a proposed class action settlement is *presumed* to be fair
5 where, as here, (1) the settlement is reached through arm's-length bargaining; (2) investigation and
6 discovery are sufficient to allow counsel and the court to act intelligently; and (3) counsel is
7 experienced in similar litigation. *Chaves, supra*, 162 Cal.App.4th at 52.

8 The proposed settlement in this action meets these criteria, and merits preliminary approval.
9 As discussed above, the parties only entered into the Agreement after engaging in a full day of
10 mediation with experienced an mediator who routinely handle "wage and hour" class action litigation,
11 Hon. Jan Adler. (Kuhn Decl. ¶8). The mediation was preceded by substantial discovery, investigation
12 into the claims at issue, interviews of numerous Class Members, disclosure and review of documents
13 detailing company-wide policies and practices, informal information exchanges for mediation
14 purposes, and ongoing discussions about the merits between the parties' counsel during the span of
15 the litigation. (Kuhn Decl. ¶¶ 4-9). Thereafter, the parties memorialized the details of this settlement
16 via the Agreement. (**Ex. A**).

17 When negotiating the settlement, both sides took into account the strengths and weaknesses
18 of their opponent's positions as pointed out by Hon. Jan Adler, the data available to evaluate liability
19 and damages, the lack of data or evidence on certain issues, and the substantial and evolving law
20 applicable to the merits of the claims. The Agreement was only agreed to after extensive arms-length
21 negotiations resulting in a unique compromise that permits all parties to move forward and bring this
22 action to close. In spite of a mutual desire to resolve this action, the negotiations remained at all times
23 adversarial. (Kuhn Decl. ¶ 37). As set forth below in section H, *infra.*, counsel for both parties have
24 extensive experience in litigating wage and hour class action lawsuits. Based on this experience,
25 counsel have determined that the settlement is fair, adequate, and reasonable. (Kuhn decl. ¶31).

26 **B. STRENGTH OF PLAINTIFF'S CASE**

27 The most important factor courts consider when evaluating the fairness of the class action
28

1 settlement is the strength of the plaintiffs' case balanced against the amount offered in settlement.
2 *Kullar*, 168 Cal.App.4th, at 130.

3 All of Plaintiff's claims – individual, PAGA, and class claims – presented hurdles including
4 obtaining class certification, in addition to a substantial risk of a defense verdict by way of summary
5 judgment motion or at trial. (Kuhn Decl. ¶¶ 24-31). The exchange of mediation briefs, the assistance
6 of an experienced “wage and hour” mediator, and the parties' ongoing negotiations all helped the
7 parties realize the strengths and weaknesses of their case, as well as the risks and expenses of
8 continuing litigation.

9 Additionally, as trial approaches, each party's monetary risk increases significantly as
10 substantial additional attorney hours and expert witness hours would have to be devoted to this case
11 by each party. Each party bears a real risk at trial, and considering the balance of the strengths of
12 Plaintiff's claims versus the risks inherent in trial and the consideration given to settle now, the
13 settlement reflects a fair and adequate resolution to this action.

14 **C. THE RISK, EXPENSE, COMPLEXITY, AND LIKELY DURATION OF LITIGATION**

15 Plaintiff's Counsel's effectiveness in prosecuting this case has translated into tangible monetary
16 and non-monetary benefits for the Settlement Class Members in the following respects: (1) a
17 guaranteed favorable result; (2) guaranteed monetary recovery over a reasonably short period of time,
18 as opposed to possibly waiting additional years for a potentially worse result; and (3) significant
19 savings in attorneys' fees and costs, which would have increased had the case progressed through trial
20 and possible appeals. (Kuhn decl. ¶38).

21 Without entering into the Agreement, there existed a significant chance that Defendant would
22 prevail on the merits of some or all claims and that Class Members would receive nothing. Through
23 the Agreement, participating Class Members receive guaranteed cash, and this action has also been
24 the catalyst for programmatic relief. (Kuhn decl. ¶39).

25 If the litigation were to proceed in lieu of settlement, additional and substantial attorneys fees
26 and costs, expert witnesses fees would quickly accumulate. Given the numerous claims being litigated,
27 the parties may be required to hire multiple experts each (as many as 8 total). This would result in not
28

1 only the production of eight expert reports, but eight depositions as well. And, based on previous
2 discussions between counsel regarding the remaining claims (including the PAGA claims), the parties
3 anticipated at least one motion to compel, a motion for class certification and two dueling motions for
4 summary judgment / adjudication (one from each side). (Kuhn decl. ¶40).

5 Importantly, even after engaging in all of the potential continued and protracted litigation set
6 forth above, the putative class would continue to have no guarantee of success on any of the claims
7 advanced in this case. Thus, the parties and their counsel believe in good faith that the proposed
8 resolution is a fair, reasonable, and adequate compromise. (Kuhn decl. ¶41).

9 **D. THE RISK OF MAINTAINING CLASS ACTION STATUS THROUGH THE TRIAL**

10 Plaintiffs had not filed a Motion for Class Certification at the time of settlement. (Kuhn decl.
11 ¶42). Defendant presented multiple different defenses to certification during mediation and throughout
12 litigation. Even assuming Plaintiff did obtain class certification of the claims, each claim is subject to
13 substantial risk of a Defense verdict at trial. (*Id.*)

14 Regarding the representative (PAGA) claims, there is also a substantial risk that, at trial,
15 Plaintiffs will either fail to obtain a favorable judgment on one or more of these claims, or that a
16 favorable award on one or more PAGA claims may be reduced. *See Thurman v. Bayshore Transit*
17 *Mgmt., Inc.* (2012) 203 Cal.App.4th 1112, 1135 (reversed on other grounds).

18 **E. THE AMOUNT OFFERED IN THE SETTLEMENT**

19 After deduction from the total “Settlement Amount” of the projected costs of administration,
20 proposed class representative service awards, potential attorney fees and costs, the “Net Settlement
21 Amount (“NSA”) will be distributed to all Class Members who do not file a request for exclusion.
22 Participating Class Members will receive their share of the NSA based on the total pay-periods they
23 worked during the Class Period. (**Exhibit A**, ¶3.2.4).

24 Based on the proposed figures, each Participating Class Member will receive an average of
25 **\$1,168.58**. The actual amount will vary based on the amount of pay periods at issue, per employee. The
26 Class Notice will list each individual class member’s actual expected share. (See **Ex. B.**) The recovery
27 amounts are significant, in light of the circumstances of the case. (Kuhn Decl. ¶31).
28

1 **F. THE EXTENT OF DISCOVERY COMPLETED**

2 Plaintiffs propounded 6 sets of separate written discovery devices on Defendant, including
3 requests for admission, special interrogatories, requests for production of documents, and general and
4 employment form interrogatories. (Kuhn Decl. ¶ 5). Through these requests, Plaintiffs sought, among
5 other information and documents, the identities of putative class members, Defendants' compensation
6 policies, meal and rest period policies, employee handbooks, wage statements, time records, job
7 descriptions, and reimbursement policies. *Id.*

8 Defendant provided detailed substantive responses detailing all relevant employment policies,
9 in addition to producing thousands of pages of responsive documents. The document production also
10 included a large sampling of other putative class members time and wage records. (Kuhn Decl. ¶ 6-8).

11 Defendant also propounded 1 of its own separate set of written discovery, requiring Plaintiff's
12 response. (Kuhn Decl. ¶ 5). Plaintiff's counsel has also interviewed at least 5 Class Members in the
13 course of investigating and litigating this matter. (Kuhn decl. ¶43). Counsel has also reviewed
14 thousands of pages of documents produced by Defendant, Plaintiff, and Class Members. (*Id.*)

15 This information, along with documents and information obtained through formal discovery
16 and from Class Members, allowed Plaintiff's counsel to prepare a detailed Mediation Brief. (*Id.*) The
17 Brief was provided to opposing counsel and contained a breakdown of potential damages based on all
18 of the information obtained. (*Id.*) Thus, sufficient discovery, both formal and informal, has been
19 conducted to allow the parties to participate in an informed, arms-length negotiation process.

20 **G. THE STAGE OF THE PROCEEDINGS**

21 Plaintiff already had possession of all written discovery needed for a class certification motion.
22 Depositions would have followed and then a motion for class certification would have been filed.
23 Depending on that motion, Plaintiff may have lost his ability to negotiate a class-wide or representative
24 settlement agreement on certain issues. Alternatively, Defendant stood to lose a key negotiating tool
25 in the event the Motions were decided in Plaintiff's favor. Therefore, the parties achieved a settlement
26 agreement at a point when neither side had a stated advantage in the litigation.

27 ////
28

1 **H. THE EXPERIENCE AND VIEWS OF COUNSEL**

2 Class Counsel has considerable experience in wage and hour and class action litigation.
3 William Sullivan has over 29 years of experience, 28 years of which has been devoted to both
4 prosecuting and defending class action litigation. Mr. Yaeckel has over 11 years of experience in “class
5 litigation.” Mr. Kuhn has 5 years of experience in “class litigation.” (Kuhn Decl. ¶ 44).

6 Plaintiff’s counsel considers the Agreement to represent a fair, adequate and reasonable
7 settlement that is well within the accepted range of recoveries for similar cases. Counsel further
8 believes the Agreement is in the best interests of the Settlement Class Members. (Kuhn Decl. ¶45).

9 **I. PRESENCE OF A GOVERNMENTAL ACTOR**

10 Although the State is not directly involved in this action, Plaintiff “stands in the shoes” of the
11 Labor and Workforce Development Agency (“LWDA”) by bringing his PAGA action. Consideration
12 has been made to compensate to Labor Workforce Development Agency (“LWDA”) in the amount
13 of \$20,000, even though the LWDA declined to prosecute the claims itself. (*See Ex. A* at ¶3.2.5). To
14 confirm, 75% of the total allocation of \$20,000 amount, or \$15,000.00, is being paid to the LWDA,
15 and 25%, or \$5,000.00, being distributed amongst the class members. (*Id.*). Counsel for the parties
16 believe this is a fair, reasonable, and adequate allocation. (Kuhn Decl. ¶46).

17 **J. REACTION OF THE CLASS MEMBERS TO THE PROPOSED SETTLEMENT**

18 Prior to preliminary approval, what can be said of the reaction the class members is limited.
19 However, Plaintiff’s counsel has spoken to some Class Members since the parties reached a proposed
20 settlement agreement, and all were in favor of the settlement. (Kuhn Decl. ¶ 47). As explained in the
21 Agreement, the Settlement Claims Administrator will send a Notice to the Settlement Class Members.
22 (Exhibit A at ¶7.4). The Notice form is attached to the declaration of Ryan T. Kuhn as **Exhibit B**.

23 The proposed Notice Packet advises the Settlement Class Members of their anticipated
24 recovery under the Agreement, how they can object, how they can exclude themselves, the amount of
25 fees and costs sought by Settlement Class Counsel, the amount of enhancement payment sought on
26 behalf of the class representative, and the date of the final approval hearing. (*See Exhibit “B”*). The
27 proposed Notice complies with the notice requirements set forth in CRC Rules 3.766(d) and 3.769(f).

28 ////

1 **VII. PROPOSED TIMELINE OF EVENTS AND FINAL APPROVAL**

2 Plaintiff also requests that the Court set a Final Approval Hearing in accordance with the
3 chronology of events set forth in the Settlement Agreement:

- 4 • Within 10 calendar Days of the Court's Preliminary Approval: EAST & WEST will provide
5 to the Claims Administrator Class Members' names, last known addresses, social security
6 numbers, and the and the total number of workweeks each Class Member was employed during
7 the class period;
- 8 • Within 7 days of receipt of the Class member data from Defendants, the Claims Administrator
9 will mail the Notice Packet to Class Members;
- 10 • 30 Calendar Days After Claims Administrator Has Mailed the Notice Packets to Class
11 Members: Deadline for Class Members to postmark and submit all Requests for Exclusions,
12 or to file written objections to the settlement with the Court;
- 13 • Approximately 7 days after the conclusion of the Notice and Claims Period, and at least 16
14 Court days before the hearing, Plaintiff will file an *Unopposed* Motion for Final Approval; and
- 15 • Consistent with the above, Plaintiff requests a final approval hearing that is approximately 100
16 days (January 26, 2024, or the first available Court date thereafter) after the date the Court
17 enters an Order granting preliminary approval of the Settlement.
- 18 • Within the Final Approval Motion Plaintiff will also request approval of (1) Plaintiff's
19 Requested Attorneys Fees, and (2) Class Representative Awards, to be heard concurrently with
20 the Final Approval Motion.

21 **VIII. CONCLUSION**

22 Plaintiff respectfully requests that the Court issue an Order: (1) Certifying the Proposed
23 Settlement Class; (2) Preliminarily approving the settlement as set forth in the Agreement; (3)
24 Approving the proposed Class Notice; and (4) Providing the parties with a Final Approval Hearing.

25 Dated: October 5, 2023

SULLIVAN & YAECKEL LAW GROUP, APC

Ryan Kuhn

Ryan T. Kuhn

Attorneys for Plaintiff CARLOS HERNANDEZ, Individually,
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