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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF HUMBOLDT**

GABRIEL GOMEZ, an individual, on behalf
of the State of California, as a private attorney
general; BARON QUIROS, and individual,
on behalf of himself and others similarly
situated,

PLAINTIFFS,

v.

WAHID OF PENNSYLVANIA LLC; and
DOES 1 thru 50, inclusive,

DEFENDANTS.

CASE NO. CV2200078

[Case Assigned for All Purposes to Dept. 4]

**NOTICE OF MOTION AND MOTION FOR
FINAL APPROVAL OF CLASS ACTION
AND PAGA SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

*[Filed concurrently with Motion for Approval
of Attorneys' Fees and Costs; Declarations of
Kelsey M. Szamet, Gabriel Gomez, and Baron
Quiros; Proposed Order, and Judgment]*

Date: October 23, 2023

Time: 10:30 A.M.

Dept.: 4

Complaint Filed: January 14, 2022

Trial Date: None Set

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 23, 2023 at 10:30 A.M. in Department 4 of the above-entitled court, Plaintiffs Gabriel Gomez and Baron Quiros (“Plaintiffs”) will, and hereby does, move the Court for an Order of Final Approval of the Class Settlement in this case. Plaintiffs move the Court for an order:

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

2. Affirming Kingsley & Kingsley, APC as Class/PAGA Counsel;

3. Affirming Gabriel Gomez as PAGA Representative and awarding an enhancement award of \$2,500.00;

4. Affirming Baron Quiros as Class Representative and awarding an enhancement award of \$2,500.00;

5. Awarding Phoenix Class Action Administration Solutions claims administration fees of 5,000.00 for its services as Administrator; and,

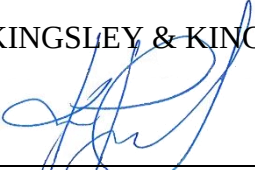
6. Entering judgment.

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

The Motion will be based on this Notice of Motion, the attached Memorandum of Points and Authorities, the Declarations of Kelsey M. Szamet Gabriel Gomez, Baron Quiros, and Taylor Mitzner, all other papers and records on file in this action, and on such oral and documentary evidence as may be presented at the hearing on this Motion.

DATED: September 29, 2023

KINGSLEY & KINGSLEY, APC

By: 

Kelsey M. Szamet
Attorneys for Plaintiffs, the proposed class, and the
aggrieved employees

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Gabriel Gomez and Baron Quiros (“Plaintiffs”) submit this Motion for Final
4 Approval of Class Settlement and requests that the Court:

5 1. Grant final approval of the settlement in this case pursuant to the Class Action and
6 PAGA Settlement Agreement (“Agreement”), a copy of which is attached to the concurrently-filed
7 Declaration of Kelsey M. Szamet as Exhibit “1”;

8 2. Award attorneys’ fees and costs as detailed in the concurrently-filed Motion for
9 Attorneys’ Fees and Costs;

10 3. Award Phoenix Class Action Administration Solutions claims administration fees
11 of \$5,000.00 for its services as Administrator;

12 4. Affirm named Plaintiff Gabriel Gomez as PAGA Representative and award a
13 cumulative PAGA Representative payment of \$2,500.00;

14 5. Affirm named Plaintiff Baron Quiros as Class Representative and award a
15 cumulative Class Representative payment of \$2,500.00; and

16 6. Enter judgment.

17 **II. FACTUAL BACKGROUND**

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

19 On November 3, 2021, Plaintiff Gabriel Gomez filed a Class and Representative Action
20 Complaint seeking recovery for: (1) failure to pay wages and/or overtime under Labor Code
21 sections 510, 1194, 1194.2, and 1199; (2) failure to provide meal breaks pursuant to Labor Code
22 sections 226.7 and 512; (3) failure to provide rest breaks pursuant to Labor Code section 226.7;
23 (4) failure to provide accurate itemized wage statements pursuant to Labor Code section 226(a);
24 (5) penalties under Labor Code section 203; and (6) violation of Business & Professions Code
25 section 17200. (Declaration of Kelsey M. Szamet (“Szamet Decl.”) ¶5.) Also on November 3,
26 2021, Plaintiff Gabriel Gomez sent a notice letter, pursuant to Labor PAGA, to the Labor
27 Workforce Development Agency (“LWDA”) regarding his intent to seek civil penalties for the
28

1 same Labor Code violations above, including an additional claim for Labor Code section 204(d)
2 and 210. (Szamet Decl. ¶6.)

3 Plaintiffs' Counsel later learned that Gabriel Gomez had entered into an individual
4 settlement with Defendant with representation by the Abramson Firm. (Szamet Decl. ¶7.) Another
5 potential class representative stepped forward around the same time, so on December 22, 2021,
6 Plaintiff Gomez dismissed his action without prejudice. (Szamet Decl. ¶8.)

7 On January 14, 2022, Plaintiffs Gabriel Gomez and Baron Quiros filed a Class and
8 Representative Action Complaint seeking recovery for: (1) failure to pay wages and/or overtime
9 under Labor Code sections 510, 1194, 1194.2, and 1199; (2) failure to provide meal breaks
10 pursuant to Labor Code sections 226.7 and 512; (3) failure to provide rest breaks pursuant to Labor
11 Code section 226.7; (4) failure to provide accurate itemized wage statements pursuant to Labor
12 Code section 226(a); (5) penalties under Labor Code section 203; (6) violation of Business &
13 Professions Code section 17200; and (7) penalties pursuant to Labor Code § 2699, et seq., the
14 Private Attorneys General Act ("PAGA"). (Szamet Decl. ¶9.)

15 Plaintiff Quiros brings the Class Action on behalf of a proposed class defined as follows:

16 "All non-management employees of Wahid of Pennsylvania LLC, in the
17 State of California who worked one or more pay periods since four (4) years
18 prior to the filing of this action to the present." (Hereafter, "Class
Members".)

19 (Szamet Decl. ¶10.)

20 Plaintiff Gomez brings the Representative Action on behalf of a group of aggrieved
21 employees defined as follows:

22 "All non-management employees of Wahid of Pennsylvania LLC, in the
23 State of California who worked one or more pay periods since one (1) year
24 prior to the date of Plaintiff Gomez's PAGA notice letter and continuing to
the present." (Hereafter, "Aggrieved Employees".)

25 (Szamet Decl. ¶11.)

26 B. The Discovery Process and Mediation

27 Although the Court stayed formal discovery and the Parties continued the discovery stay
28 pending mediation, the Parties engaged in informal discovery to assess potential liability, risks,
and to arrive at the Settlement now presented to the Court for preliminary approval. (Szamet Decl.
¶12.) Defendant informally produced its findings regarding a sampling of time and pay data and

1 wage statements for mediation purposes only. (Szamet Decl. ¶13.) Thereafter, the Parties attended
2 a full-day mediation with respected wage and hour mediator Todd A. Smith, Esq. (Szamet Decl.
3 ¶14.)

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

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

19 C. Preliminary Approval

20 On April 26, 2023, the Court issued an Order preliminarily approving the settlement in this
21 case, approving the proposed Class Notice, ordering that the Administrator send notice to the
22 Class, and setting a date for the Final Approval and Fairness Hearing. (Szamet Decl. ¶17.)

23 **III. THE PRELIMINARILY APPROVED SETTLEMENT**

24 A. The Settlement Class

25 For purposes of Agreement, the Settlement Class is defined as: "all non-management
26 employees of Wahid of Pennsylvania LLC, in the State of California who worked one or more pay
27 periods during the Class Settlement Period." ("Class") The "Settlement Class Members" means a
28 member of the Class, as either a Participating Class Member or Non-Participating Class Member

(including a Non-Participating Class Member who qualifies as an Aggrieved Employee). (Szamet Decl. ¶18; Agreement, Ex. 1 at ¶1.5.)

The Class Settlement Period is November 1, 2020 through December 13, 2022. (Szamet Decl. ¶19; Ex. 1 at ¶1.12.) As of October 14, 2022 (the date of mediation), based on documents and other information produced by Defendant, there are approximately 81 Settlement Class Members. (Szamet Decl. ¶20; Ex. 1 at ¶9.)

The final Class contained 82 individuals. (Mitzner Decl. ¶11.)

B. The Aggrieved Employees

For purposes of Agreement, the Aggrieved Employees or PAGA Members are defined as “all non-management employees of Wahid of Pennsylvania LLC, in the State of California who worked one or more pay periods during the PAGA Settlement Period. (Szamet Decl. ¶21; Ex. 1 at ¶1.4.)

The PAGA Settlement Period is November 3, 2020 through December 13, 2022. (Szamet Decl. ¶22; Ex. 1 at ¶1.31.)

C. Settlement Payments

As detailed fully in the Agreement, the Settlement provides for Defendant to pay a Gross Settlement Amount of \$90,000.00, which includes the sum of the Individual Class Payments, the Class Representative service award, the Class/PAGA Counsel Award, PAGA Payment, and the Settlement Administration Costs. (Szamet Decl. ¶23; Ex. 1 at ¶3.1.)

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

Plaintiffs now request final approval of the allocation of the Gross Settlement Amount to determine the Net Settlement Amount for distribution to the Class as follows:

Gross Settlement Amount:	\$	90,000.00
Less Class Representative Enhancement:	\$	5,000.00
Less Class/PAGA Counsel’s Fees:	\$	30,000.00
Less Class/PAGA Counsel’s Costs:	\$	15,000.00
Less PAGA Payment:	\$	5,000.00
		(\$3,750.00 to the LWDA; \$1,250.00

Less Administrator Costs:	\$	5,000.00	to Aggrieved Employees)
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Anticipated Net Settlement Amount: \$ 31,250.00

D. Individual Settlement Payments

The amount of each Participating Class Member's Individual Class Payment is an individualized amount that is based on the number of compensable workweeks worked by the Participating Class Member during the Class Settlement Period. (Ex. 1 at ¶1.23; see also Ex. A to the Agreement at pp. 4 [Class Notice].) This individual amount shall be determined by (a) dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating Class Members during the Class Settlement Period and (b) multiplying the result by each Participating Class Member's Workweeks (See Ex. 1 at ¶3.2.4; Id. at Ex. A to the Agreement [Class Notice].) The Agreement provides for a specific and detailed Workweek dispute process. (See Ex. 1 at ¶8.8.4.)

The Individual PAGA Payment will be the Aggrieved Employee's pro rata share of 25% of the PAGA Penalties calculated according to the number of PAGA Pay Periods worked during the PAGA Settlement Period. (See Ex. 1 at ¶1.24.)

Based on these calculations, the average potential recovery is \$365.85 per Settlement Class Member and \$15.06 per Aggrieved Employee. (Mitzner Decl. ¶¶14-15.)

E. Class Notice

The Court approved the proposed Class Notice, and directed the mailing of the Notice by first-class mail to Settlement Class Members in accordance with the proposed implementation schedule. (Szamet Decl. ¶25.) The procedures for giving notice to the Settlement Class Members, as set forth in the Agreement and Plaintiffs' Motion for Preliminary Approval and approved by the Court, have been fully and properly carried out. (Mitzner Decl. ¶2.)

To date, Phoenix Class Action Administration Solutions received one (1) request to be excluded (“opt-outs”) from the proposed Agreement and zero (0) objections. (Mitzner Decl. ¶¶8-9.)

F. Check Mailed Settlement – No Reversion

The Parties agreed to, and the Court preliminary approved, a checks-mailed settlement

without the possibility of reversion of settlement funds to Defendant. Under the Agreement, every Class Member will receive a settlement check and Class Members do not need to submit a claim in order to receive a settlement check. (Ex. 1 at ¶4.4.1.) Each check will prominently state the date when the check will be voided, which will not be less than 120 days after the date of mailing. (Ex. 1 at ¶4.4.1.) Any funds that remain uncashed after the void date shall be turned over by the Administrator, with information for each Class Member who failed to timely cash his/her settlement check, to the State of California Controller's Office Unclaimed Property Fund. (Ex. 1 at ¶4.4.3.)

IV. THE COURT SHOULD ORDER FINAL APPROVAL OF THE SETTLEMENT

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

A. The Settlement is Entitled to a Presumption of Fairness

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

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

Second, the Parties engaged in informal discovery that permitted Class/PAGA Counsel to

1 fairly evaluate the strength of the case and the risks associated with ongoing litigation. In addition,
2 Defendant produced additional data and documents informally for purposes of settlement. This
3 included Plaintiffs' personnel file and pay statements and a sampling of shift data, pay data, and
4 wage statements for Class Members containing class member contact information. (Szamet Decl.
5 28.) Receipt of appropriate discovery allowed Class/PAGA Counsel to fairly evaluate the
6 exposure and risks associated with each claim alleged in the lawsuit. (Szamet Decl. ¶29.)

7 Third, Class/PAGA Counsel have significant experience in cases of this type, including
8 several years prosecuting wage, hour, and working condition violations. (Szamet Decl. ¶30.)
9 Class/PAGA Counsel is thus qualified to evaluate the class claims and viability of the defenses.
10 Class/PAGA Counsel believes that the settlement is fair, reasonable, adequate, and in the best
11 interests of the class and that the average recovery for each Settlement Class Member of \$365.85
12 is substantial, given the risks inherent in litigation and the defenses asserted. (Szamet Decl. ¶31.)

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

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

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

25 The proposed settlement satisfies each of these factors. (Szamet Decl. ¶32.) Class/PAGA
26 Counsel conducted meaningful informal discovery before entering into good faith settlement
27 negotiations in this matter. (*Id.* at Szamet Decl. ¶¶12-16.) This discovery permitted Class/PAGA
28 Counsel to fairly evaluate the strength of the case and the risks associated with ongoing litigation.

(Szamet Decl. ¶33.) Class/PAGA Counsel is experienced in handling wage and hour class actions and, after weighing all of the following factors, supports this Agreement. (Szamet Decl. ¶34.)

1. The Strength of Plaintiffs' Case

a) Plaintiff Quiros Alleges That Defendant Failed to Pay Proper Wages and Overtime By Not Blending Commission Pay Into the Regular Rate of Pay for Overtime Purposes

“Under state and federal law, overtime compensation is based on an employee's ‘regular rate’” of pay. (Huntington Memorial Hosp. v. Superior Court (2005) 131 Cal.App.4th 893, 902.) “California Labor Code section 510, subdivision (a) provides, as relevant here, [that] an employee is entitled to overtime pay at one and one-half times the ‘regular rate’ for work in excess of eight hours in one day and twice the ‘regular rate’ for work in excess of 12 hours in one day.” (Ibid.) For hourly employees, the regular rate is generally the employee’s straight-time hourly rate. (Huntington, supra, 131 Cal.App.4th at p. 905.) However, in any pay period where an hourly employee earns other includable compensation in addition to hourly wages—such as a non-discretionary bonus, commission, or shift differential—her or his regular rate is computed by dividing the employee’s total compensation in the period in which the other compensation is earned by the total hours worked in that period. (Marin v. Costco Wholesale Corp. (2008) 169 Cal.App.4th 804, 807.)

Here, Plaintiff Quiros alleges that he and the Class Members earned commission pay for each sale that they closed. (Szamet Decl. ¶35.) The operative Complaint alleges that Defendant failed to include their commission pay in the regular rate calculation. (Szamet Decl. ¶36.) Thus, Plaintiff Quiros contends that Defendant underpaid Plaintiff Quiros and the Class Members whenever they worked overtime and earned commission pay in the same pay period because Defendant did not blend commission pay into the regular rate of pay when calculating overtime. (Szamet Decl. ¶37.) As a result, Plaintiff Quiros contends that Defendant owes unpaid overtime wages to Plaintiff Quiros and the Class Members. (Szamet Decl. ¶38.) Because this claim can be readily analyzed from Defendant’s time and pay records, Plaintiff Quiros felt confident that this claim was certifiable and that he would likely prevail on the merits at trial. (Szamet Decl. ¶39.)

1 However, Defendant argued that it did properly blend, but to the extent that a trier of fact found
2 that it did not, the core wage exposure was quite minimal because any alleged failure to blend
3 would only result in only a few dollars being owed to any given Class Member during a specific
4 pay period when they worked overtime and also earned commission pay in the same pay period.
5 (Szamet Decl. ¶40.)

6 b) Plaintiff Quiros Alleges That Defendant Failed to Provide Lawful
7 Meal

8 Under California Labor Code section 512 and IWC Wage Order No. 7, no employer shall
9 employ any person for a work period of more than five hours without providing a meal period of
10 not less than thirty minutes. The first meal period must be permitted to commence no later than
11 after five hours of work, or the start of the sixth hour of work (5.0 hours on the clock). (*Brinker*
12 *Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1049.) The second meal period must be
13 permitted to commence no later than after ten hours of work, or the start of the eleventh hour of
14 work (10.0 hours on the clock). (Ibid.) The California Supreme Court succinctly described Section
15 512’s mandate: “Employers must afford employees uninterrupted half-hour periods in which they
16 are relieved of any duty or employer control and are free to come and go as they please.” (*Brinker*
17 *Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1037.)

18 It is well settled that if an employer fails to maintain a uniform policy that authorizes and
19 permits the meal periods or rest breaks called for under the law (as specified in the applicable
20 Wage Order), “it has violated the wage order and is liable.” (See *Brinker*, 53 Cal.4th at p. 1033.)
21 Following *Brinker*, California courts have confirmed that liability for meal and rest period
22 violations arises when an employer adopts a uniform policy that fails to comply with the Labor
23 Code. (See *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220, 235, [“In
24 *Faulkinbury I*, we concluded that even if [defendant]’s on-duty meal break policy was unlawful,
25 [defendant] would be liable only when it actually failed to provide a required off-duty meal break.
26 *Brinker* leads us now to conclude [defendant] would be liable upon a determination that
27 [defendant]’s uniform on-duty meal break policy was unlawful.” (emphasis added)]; accord
28 *Bradley v. Networkers International LLC* (2012) 211 Cal.App.4th 1129; *Benton v. Telecom*

1 *Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 725–726 [finding that the employer would
2 become liable upon a showing that it failed to maintain a policy authorizing required breaks, which
3 does not require an individual technician to provide he or she actually missed breaks as a result of
4 the employer’s policies. Rather, “the Wage Order . . . imposes an affirmative obligation on every
5 employer to authorize and provide legally-required meal and rest breaks; if it fails to do so, it has
6 violated the law and is liable.”].)

7 Here, Plaintiff Quiros alleges that he and the Class Members consistently worked shifts
8 over five (5) hours and Defendant failed to provide compliant meal periods of not less than thirty
9 (30) minutes as required by the Labor Code during the relevant time period. (Szamet Decl. ¶41.)
10 Specifically, Plaintiff Quiros alleges that Defendant informs employees that any “downtime” they
11 have during the day counts as their meal period, requires its employees to forgo meal periods to
12 attend to customers and/or require them to give up their commission pay if they do not forgo meal
13 periods, and routinely interrupted meal periods. (Szamet Decl. ¶42.)

14 In addition, Plaintiff Quiros alleges Defendant has a consistent policy of failing to pay
15 Plaintiff Quiros and the Class Members one (1) hour of pay at the employees’ regular rate of
16 compensation for each workday that the first meal period was not provided within the first (5)
17 hours of the shift in violation of Labor Code §§ 226.7 and 512. (Szamet Decl. ¶43.) On July 15,
18 2021, in *Ferra v. Loews Hollywood Hotel, LLC*, the California Supreme Court set forth the formula
19 for calculating the one extra hour of premium pay that employees are owed if an employer fails to
20 provide a compliant meal period or rest break. Specifically, the Court held that those premium
21 payments must include the hourly value of any nondiscretionary earnings (such as commission
22 pay), and cannot simply be paid at an employee’s base hourly rate. Here, Plaintiff Quiros contends
23 that when Defendant paid meal period premiums, it did not pay them at the properly blended rate.
24 (Szamet Decl. ¶44.)

25 In response, first and foremost, Defendant argued that Class Members were provided with
26 legally compliant meal periods. (Szamet Decl. ¶45.) In addition, Plaintiff Quiros anticipated that
27 Defendant would assert that such an argument would pose individual issues and Defendant would
28 be entitled to inquire of each class member, on each day whether or not they were provided with

1 compliant meal periods. (Szamet Decl. ¶46.) Plaintiff Quiros was confident that Defendant would
2 attempt to gather testimonial evidence from class members indicating that Class Members were
3 provided and took compliant meal breaks or that Class Members chose to take late breaks or miss
4 breaks on occasion. (Szamet Decl. ¶47.) Though Plaintiff Quiros does not believe this was the
5 case, Plaintiff Quiros must acknowledge it certainly poses risks for the Class. (Szamet Decl. ¶48.)
6 There is risk as to both sides as to what declarations and depositions of class members might reveal.
7 (Szamet Decl. ¶49.) Indeed, Plaintiff Quiros had to consider that Defendant could secure
8 declarations from Class Members giving Defendant an opportunity to disprove the allegations.
9 (Szamet Decl. ¶50.)

10 c) Plaintiff Quiros Contends That Defendant Did Not Provide Class
11 Members with Lawful Rest Breaks

12 Labor Code section 226.7, subdivision (c), requires an employer to pay an additional hour
13 of compensation for each workday the employer fails to provide a rest period according to law.
14 Employees are entitled to a paid ten (10) minute rest break for every four (4) hours worked, or
15 major fraction thereof. (Cal. Code Regs., tit. 8, § 11070, subd. 12(A).)

16 Plaintiff Quiros contends that the Class Members' rest period claims arise from a common
17 course of conduct wherein Defendant did not provide employees with the opportunity to take first
18 or second 10-minute rest breaks in compliance with California law. (Szamet Decl. ¶51.) Plaintiff
19 Quiros alleges that he and the Class Members' consistently worked shifts of 3.5+ hours and were
20 not authorized or permitted to take rest breaks therefore Defendant violated Labor Code §226.7.
21 (Szamet Decl. ¶52.)

22 The same risk analysis does not apply as with the meal periods, though, because there
23 generally are no records associated with rest periods. (Szamet Decl. ¶53.) As such, Plaintiff
24 Quiros had to acknowledge that it could potentially be easier for Defendant to defeat certification
25 of this claim if it was able to gather testimonial evidence from class members indicating that they
26 were able to take all required rest breaks each day. (Szamet Decl. ¶54.) Though Plaintiff Quiros
27 does not believe this was the case, Plaintiff Quiros must acknowledge it poses risks for the Class.
28 (Szamet Decl. ¶55.) Just as with meal periods, there is risk as to both sides as to what declarations

1 and depositions of class members might reveal. (Szamet Decl. ¶56.)

2 d) Plaintiff Quiros Contends That Defendant Failed to Issue Lawful
3 Itemized Wage Statements

4 California Labor Code §226(a) requires Defendant to provide its employees with an
5 accurate, itemized written wage statement that shows, in relevant part, all applicable hourly rates
6 and the corresponding number of hours worked. Plaintiff Quiros contends that Defendant issued
7 wage statements that violate Labor Code §§ 226(a)(2) and (9). (Szamet Decl. ¶57.) Labor Code §
8 226(a) requires that the employer shall, semimonthly or at the time of each payment of wages,
9 furnish each of his or her employees, an accurate itemized statement in writing showing all
10 applicable hourly rates in effect during the pay period and the corresponding number of hours
11 worked at each hourly rate by the employee. Plaintiff Quiros contends that he and Class Members
12 are issued wage statements that do not include the applicable overtime rate and the number of
13 hours worked at the corresponding rate. (Szamet Decl. ¶58.)

14 Here, Plaintiff Quiros anticipated that Defendants would argue its conduct was not
15 “knowing and intentional” and all required information was show on the paystubs and if there were
16 ever any errors it was the result of clerical error, omission, or oversight. (Szamet Decl. ¶59.) It
17 was anticipated that Defendant would argue that Plaintiff Quiros’s claims were merely derivative
18 of the underlying wage and meal period claims, but that all record of payment actually received
19 by a Class Member was shown on the paystubs as required. (Szamet Decl. ¶60.)

20 e) The Risks Plaintiff Quiros Contends That Defendant Failed to
21 Provide All Wages Due at the Time of Termination

22 Under Labor Code section 203, if an employer fails to provide wages at the time of an
23 employee’s termination or within seventy-two (72) hours of resignation, then the employee’s
24 wages shall continue as a penalty for up to thirty (30) days. (Labor Code § 203.) Section 203
25 reflects a public policy that favors the full and prompt payment of earned wages. (See, e.g.,
26 *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7; *Mamika v. Barca* (1998) 68
27 Cal.App.4th 487, 492.)

28 Here, Plaintiff Quiros alleges that he and numerous Class Members are no longer employed

1 by Defendant. (Szamet Decl. ¶61.) Due to Defendant’s failure to pay all wages and meal and rest
2 period premiums as detailed above, Plaintiff Quiros alleges that Defendant failed to pay all wages
3 owed and due upon their termination and/or resignation. (Szamet Decl. ¶62.) Plaintiff Quiros
4 contends that Defendant’s actions were willful, as they have intentionally failed or refused to
5 perform an act which was required to be done. (Szamet Decl. ¶63; see *Amaral v. Cintas Corp. No.*
6 *2* (2008) 163 Cal.App.4th 1157, 1201.) “The failure to pay is willful if the employer ‘knows what
7 [it] is doing [and] intends to do what [it] is doing’, and does not also require proof that the employer
8 acted with “a deliberate evil purpose to defraud work[ers] of wages which the employer knows to
9 be due.”’ (*Diaz v. Grill Concepts Services, Inc.* (2018) 23 Cal.App.5th 859, 868.)

10 However, to establish liability for waiting time penalties, Plaintiff Quiros would have to
11 establish not only that the underlying violations occurred, but also that Defendants’ conduct was
12 “willful.” Labor Code § 203. Plaintiff Quiros contends that Defendants were fully aware of its
13 payment policies and practices and intended to carry out said policies and practices, but this would
14 certainly be a vigorously contested issue. (Szamet Decl. ¶64.) Therefore, Plaintiff Quiros believed
15 that discounting this claim was appropriate for settlement purposes. (Szamet Decl. ¶65.)

16 f) Defendant Is Liable for Penalties Pursuant to the Private Attorneys
17 General Act of 2004 (“PAGA”)

18 California’s Private Attorneys General Act (“PAGA”), Labor Code § 2698, et seq., permits
19 private litigants to recover civil penalties for violations of the Labor Code. PAGA provides that
20 plaintiffs may recover previously established civil penalties (section 2699(a)) or, if none were
21 established, plaintiffs may recover default penalties provided in section 2699(f) in the amount of
22 \$100 per employee per pay period for the initial violation and \$200 for subsequent violations.

23 In addition to the wage, meal period, rest period, itemized wage statement, and penalty
24 claims alleged in detail above, Plaintiff Gomez also alleges an additional violation for timely
25 wages under Labor Code sections 204(d) and 210 as the basis for a PAGA claim on behalf of the
26 aggrieved employees. (Szamet Decl. ¶66.) Plaintiff Gomez alleges that Defendant did not pay
27 Plaintiff Gomez and the aggrieved employees. (Szamet Decl. ¶67.) As such, Plaintiff Gomez
28 seeks PAGA penalties available for violations under Labor Code sections 201, 202, 203, 204, 210,

226(a), 226.7, 510, 512, 1194, 1194.2, and 1199.

Plaintiff Gomez discounted the PAGA claim for multiple reasons. First, the aggrieved employees' PAGA claims are derivative of all the foregoing class claims. Second, a court has discretion to award less than the maximum penalty. Labor Code § 2699(e)(2) ("a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory"). See e.g., *Carrington v. Starbucks Corporation* (2018) 30 Cal.App.5th 504, 241 Cal.Rptr.3d 647, 669 (affirming award of 10% of maximum PAGA penalty). Finally, the settlement class is compensated for these violations in the proposed Agreement, and thus any PAGA recovery for these same violations would be duplicative. As such, the Agreement's contemplated PAGA payment of \$5,000.00 is appropriate. (Szamet Decl. ¶68.) See *Nordstrom Commissions Cases*, 186 Cal.App.4th 576, 589 (2010) (affirming settlement allocating \$0 of \$6.4 million settlement to PAGA penalties).

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

There is significant expense associated with the class certification process, which the Parties can avoid by entering into the contemplated Agreement now. (Szamet Decl. ¶69.) If the Court did eventually certify a wage or meal period class, trial of a case involving approximately 81 Settlement Class Members would require the retention of expensive expert witnesses, the accrual of extensive litigation costs, and a significant time overlay by the parties. (Szamet Decl. ¶70.) Moreover, given the complexity and unsettled nature of the issues in this case it is likely that any outcome at trial would have resulted in a lengthy and costly appeal. (Szamet Decl. ¶71.) An appeal would result in further delay for the Settlement Class Members who are waiting for a resolution in this matter. (*Id.*)

3. The Risk of Maintaining Class Action Status through Trial

This case has not been certified to be tried as a class action. (Szamet Decl. ¶72.) While Plaintiff Gomez believes there is strong evidence to support certification of several possible subclasses, certification is always hard fought and subject to judicial discretion. Moreover, in class actions, decertification is always a possibility. (*Id.*) In attempting to certify a class, the parties

1 would need to conduct multiple depositions, including of the Class Representative and of several
2 person(s) most knowledgeable regarding Defendant's wage, meal, and rest policies. (*Id.*) There is
3 a risk for both sides as to what these depositions will reveal and whether they will support class
4 certification to the extent expected. (*Id.*)

5 4. The Amount Offered in Settlement

6 It was very difficult for the Parties to reach this Settlement of \$90,000.00. (Szamet Decl.
7 ¶73.) This Settlement is the result of adversarial, non-collusive, and arms-length negotiations.
8 (Szamet Decl. ¶74.) The Parties arrived at it after extensive investigation and discovery, careful
9 evaluation of the law, risks, and all information substantiating the amount of penalties reasonably
10 likely to be awarded to the class were the trier of fact to find Defendant liable, and the assistance
11 of an experienced mediator, Todd A. Smith. (*Id.*)

12 a) Plaintiffs' Assessment of Defendant's Maximum Exposure

13 Plaintiff Quiros assessed the full value of the wage/overtime claim, without any discount,
14 at approximately \$4,204. (Szamet Decl. ¶75.) This calculation was determined by looking at
15 allegedly unpaid wages in the data stemming from commission pay earned during the same pay
16 period as overtime. (Szamet Decl. ¶76.) As set forth above, Plaintiff Quiros acknowledges that
17 any actual wages in dispute would be relatively small. (Szamet Decl. ¶77.)

18 Plaintiff Quiros assessed the full value of the meal period claim, without any discount, at
19 approximately \$35,248. (Szamet Decl. ¶78.) This amount is comprised of allegedly non-compliant
20 meal periods (missed, late short) in the data. (Szamet Decl. ¶79.) The data showed that Defendant
21 paid meal period premiums totaling \$4,709. (Szamet Decl. ¶80.)

22 Plaintiff Quiros assessed the full value of the rest period claim, without any discount, at
23 approximately \$32,871.80. (Szamet Decl. ¶81.) This amount assumes each Class Member had a
24 rest period violation on 20% of shifts worked. (Szamet Decl. ¶82.)

25 Plaintiff Quiros valued the wage statement claim, without discount, at \$98,950. (Szamet
26 Decl. ¶83.) Plaintiff Quiros's analysis uses \$50 for the initial pay period and \$100 for each wage
27 statement issued with a \$4,000 cap on wage statement penalties per employee pursuant to Labor
28 Code §226(e)(1). (Szamet Decl. ¶84.)

1 Plaintiff Quiros valued the waiting time penalty claim (Labor Code §203), without
2 discount, at \$232,581. (Szamet Decl. ¶85.) This calculation assumes 65 former employees during
3 the relevant three-year statutory period. (Szamet Decl. ¶86.)

4 Finally, Plaintiff Gomez calculated the value of the PAGA claim at \$197,900 for aggrieved
5 employees using \$100 for the initial per pay period and \$200 thereafter. (Szamet Decl. ¶87.) The
6 main risk taken into account with PAGA is the discretionary nature of the penalty award. (Szamet
7 Decl. ¶88.) A judge can award the statutory maximum of \$100 for the initial violation and \$200
8 thereafter or – in theory – one cent per wage statement. (Szamet Decl. ¶89.) While there is a dearth
9 of available authority, in Plaintiff Gomez’s view, were they to succeed on any of the underlying
10 Labor Code violations, it is not likely that a Judge would also award a large amount of penalties
11 of top of any damages recovered. (Szamet Decl. ¶90.)

12 Based on the above, per Plaintiffs’ assessment, the maximum potential value of all of the
13 Settlement Class Members’ claims was approximately \$601,754.80. (Szamet Decl. ¶91.)
14 However, as a result of the forgoing risks on the merits, Class/PAGA Counsel believes the Gross
15 Settlement Amount of \$90,000.00 is fair and reasonable. (Szamet Decl. ¶92.) One of the main
16 risks taken into account and not already discussed above, was the solvency issue. (Szamet Decl.
17 ¶93.) Defendant operates a small chain of wireless/cellular phone stores. (Szamet Decl. ¶94.) The
18 business operates locally and the Parties worked with the mediator to come to a Settlement that
19 was fair and reasonable, but that could be paid by Defendant’s and still allow the company to
20 operate. (Szamet Decl. ¶95.)

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

22 As outlined above, Class/PAGA Counsel conducted a thorough investigation into the facts
23 of the claims alleged. (Szamet Decl. ¶96.) The agreement to settle did not occur until Class/PAGA
24 Counsel exchanged and possessed sufficient information to make an informed judgement
25 regarding the likelihood of success on the merits and the results that could be obtained through
26 further litigation. (*Id.*)

27 6. The Experience and Views of Counsel

28 Kingsley & Kingsley is very experienced in prosecuting and defending employment

litigation, and the firm has focused its practice since 2000 on wage, hour, and working condition violations. (Szamet Decl. ¶¶97-98.) The firm is well versed in class action litigation and has diligently and aggressively pursued this action. (*Ibid.*) Kingsley & Kingsley, APC currently serves as Class/PAGA Counsel for dozens of pending class action lawsuits in Northern, Central, and Southern California. (*Ibid.*) After factoring in the risks explained above, Class/PAGA Counsel believes that the proposed settlement is fair and reasonable. (Szamet Decl. ¶99.)

7. The Presence of a Governmental Participant

There is no governmental participant in this action. (Szamet Decl. ¶100.)

8. The Proposed Plan of Allocation Is Fair and Reasonable

Plans of allocation are subject to the same standard of review as class action settlements; they must be “fair, adequate and reasonable.” (*See, e.g., Officers for Justice v. Civil Service Comm’n* (9th Cir. 1982) 688 F.2d 615, 624–625, 629–630.) Here, the proposed plan of allocation compensates Settlement Class Members pro rata by (a) dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating Class Members during the Class Settlement Period and (b) multiplying the result by each Participating Class Member’s Workweeks. (Ex. 1 at ¶3.2.4.) This allocation distributes Agreement funds proportionally to each class member’s potential damages and should therefore be approved as fair, adequate, and reasonable. (Szamet Decl. ¶101.)

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

To date, there is one (one) request to be excluded from the proposed Agreement and zero (0) objections. (Mitzner Decl. ¶¶7-8.) Such indicates that the reaction of Settlement Class Members on the whole is positive and weighs in favor of approval.

V. ENHANCEMENT TO PLAINTIFFS

Plaintiffs’ Counsel requests an enhancement of \$2,500.00 to the Class Representative Baron Quiros for his work on behalf of the Class and an enhancement of \$2,500.00 to the PAGA Representative Gabriel Gomez for his work on behalf of the Aggrieved Employees. (Szamet Decl. ¶141.) “Courts routinely approve incentive awards to compensate named plaintiffs for the services they provide and the risks they incurred during the course of the class action litigation.” *Ingram v.*

1 *The Coca-Cola Company*, 200 F.R.D. 685, 694 (N.D. Ga 2001) (internal quotations and citations
2 omitted); *see also Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995).
3 In *Coca-Cola*, the Court approved service awards of \$300,000 to each named plaintiff in
4 recognition of the services they provided to the class by responding to discovery, participating in
5 the mediation process, and taking the risk of stepping forward on behalf of the class. *Coca-Cola*,
6 200 F.R.D. at 694; *see also, e.g. Van Vranken*, 901 F. Supp. at 299 (approving \$50,000
7 participation award to plaintiffs); *Glass v. UBS Financial Services, Inc.*, Case No. C-06-4068
8 MMC, 2007 WL 227862, at *17 (N.D. Cal. Jan. 26, 2007) (approving \$25,00 enhancement to each
9 named plaintiff).

10 Mr. Gomez is an adequate PAGA representative because he has diligently, adequately and
11 fairly represented the Aggrieved Employees and has not placed his interests above any member of
12 the Aggrieved Employees. (See Declaration of Gabriel Gomez (“Gomez Decl.”) ¶¶2-14.) Mr.
13 Quiros is an adequate class representative because he has diligently, adequately and fairly
14 represented the Class Members and has not placed his interests above any member of the Class.
15 (See Declaration of Baron Quiros (“Quiros Decl.”) ¶¶2-14.)

16 Here, Class/PAGA Counsel requests an enhancement for Mr. Gomez’s and Mr. Quiros’s
17 valiant effort and time expended in this matter. The time spent by Gabriel Gomez and Baron
18 Quiros is significant and includes researching and retaining competent counsel; providing
19 information to Class/PAGA Counsel regarding the nature of the work at Defendant; compiling
20 relevant documents; working closely with Class/PAGA Counsel to develop the theories of liability
21 and material relevant evidence; regularly discussing the status of the case with Class/PAGA
22 Counsel; discussing the case via telephone with many Settlement Class Members; making
23 themselves available to attend a full-day of mediation; and responding promptly to Class/PAGA
24 Counsel’s communications regarding settlement. (Szamet Decl. ¶142; Gomez Decl. ¶¶5-9; Quiros
25 Decl. ¶¶5-9.) As set forth in the Agreement, Plaintiffs will also be entering into a general release
26 of liability pursuant to Civil Code Section 1542. (Szamet Decl. ¶143; Ex. 1 at ¶6.)

27 Class/PAGA Counsel considers this to be a fair and reasonable enhancement. (Szamet
28 Decl. ¶144.) The enhancement takes into consideration the time, effort, and expense incurred by

1 Mr. Quiros in coming forward to litigate this matter on behalf of all Settlement Class Members
2 and Mr. Gomez in coming forward to litigate this matter on behalf of all Aggrieved Employees.
3 (Szamet Decl. ¶145.) Additionally, the Class Representative and the PAGA Representative was
4 at risk for paying for Defendant's legal fees and costs in the event that Defendant prevailed at trial.
5 (Szamet Decl. ¶146.)

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

7 As indicated on the Proof of Service, Plaintiffs' Motion for Final Approval of Class Action
8 Settlement ("Motion") will be concurrently uploaded to the Labor and Workforce Development
9 Agency's ("LWDA") website on the date this Motion is filed as required by statute. Proof of
10 submission of Plaintiffs' Motion, all related documents, and copy of the email from the LWDA
11 confirming receipt is attached to the Declaration of Kelsey M. Szamet as Exhibit "6." (Szamet
12 Decl. ¶152.)

13 **VII. CONCLUSION**

14 Plaintiffs respectfully submit that the proposed Agreement is fair, adequate, reasonable,
15 and in the best interest of the Settlement Class Members. Therefore, Plaintiffs respectfully request
16 that the Court (1) grant Final Approval of the Agreement and all of its terms; (2) award attorneys'
17 fees and costs in the amount detailed in the concurrently filed Motion for Attorneys' Fees and
18 Costs; (3) award Phoenix Class Action Administration Solutions claims administration fees of
19 \$5,000.00; (4) award the Class Representative an enhancement of \$2,500 and the PAGA
20 Representative and enhancement of \$2,500; and (5) enter judgment.

21 DATED: September 29, 2023

KINGSLEY & KINGSLEY, APC

22
23 By: 

24 Kelsey M. Szamet
25 Attorneys for Plaintiffs, the proposed class and the
26 aggrieved employees
27
28

(PROOF OF SERVICE)
[CCP 1013(a)(3)]
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

On September 29, 2023, I served all interested parties in this action the following documents described as: **NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

BOUTIN JONES INC. Bruce M. Timm btimm@boutinjones.com Kimberly A. Lucia KLucia@boutinjones.com Andrew Ducart aducart@boutinjones.com 555 Capitol Mall, Suite 1500 Sacramento, CA <i>Attorneys for Defendant</i>	ABRAMSON LABOR GROUP William Zev Abramson Wza@abramsonlabor.com 11846 Ventura Blvd., Suite 100 Studio City, CA 91604 <i>Attorneys for Plaintiffs</i>
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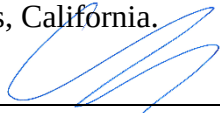
[] (BY MAIL) I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage fully prepaid at Encino, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[XX] BY ELECTRONIC SERVICE: I caused a true and correct copy thereof to be electronically filed using the Labor and Workforce Development Agency Electronic Filing ("EF") System (<https://dir.tfaforms.net/315>) and service was completed by electronic means by transmittal of the documents referenced herein on the EF System.

[XX] BY ELECTRONIC MAIL TRANSMISSION: I caused the document to be send to the persons at the e-mail address(es) listed on the attached service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. A pdf copy of which was sent via email to the below email address(es).

[XX] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 29, 2023, at Woodland Hills, California.



Michelle Tanzer