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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

11 SERGIO HERNANDEZ, as an individual on
12 behalf of himself and on behalf of all others
13 similarly situated,

14 Plaintiff,

15 v.

16 THE KLINGBEIL COMPANY, an Ohio
17 Corporation; KLINGBEIL CAPITAL
18 MANAGEMENT, LTD., AN OHIO
19 LIMITED LIABILITY COMPANY, an Ohio
20 Limited Liability Company; and DOES 1-100,
21 inclusive,

22 Defendants.

Case No.: CIVSB2208148

Assigned for all Purposes to:
Hon. Joseph Ortiz
Dept. S-17

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

[Filed concurrently with Notice of Motion and
Motion; Declarations of Zachary M. Crosner,
Sergio Hernandez, and Julie Green; [Proposed]
Order]

Date: February 15, 2023
Time: 1:30 p.m.
Dept.: S-17

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1 **I. INTRODUCTION**

2 Plaintiff Sergio Hernandez hereby moves the Court for an order granting preliminary
3 approval to a proposed non-reversionary class action settlement to resolve wage and hour claims
4 on behalf of approximately 154 individuals employed by Defendants The Klingbeil Company and
5 Klingbeil Capital Management, Ltd. (together “TKC” or “Defendant”) as non-exempt employees
6 in California during the period of April 21, 2018 through November 30, 2022. The proposed
7 \$355,000 settlement will provide approximately \$156,667 in cash payments to the class, with an
8 average award estimated at about \$1,017. The balance of approximately \$198,333 will cover
9 reasonable attorney’s fees and actual litigation costs, settlement administration costs, an
10 enhancement award to the named plaintiff, and payment of civil penalties to the State. The
11 settlement is the product of Plaintiff’s pre-filing investigation, a pre-mediation exchange of
12 information, and arms-length negotiations overseen by experienced mediator the Hon. Leo Papas,
13 (Ret.).

14 The proposed settlement is within the “range of reasonableness” for approval and.
15 Plaintiff’s counsel believes the settlement is a fair result for the class given the substantial risks
16 inherent in this matter. Accordingly, Plaintiff requests the Court enter an order: (1) granting
17 preliminary approval to the proposed class action settlement; (2) conditionally certifying the
18 settlement class as defined below; (3) appointing Zachary M. Crosner, Michael Crosner, Jamie
19 Serb, and Nikki Trenner, and Crosner Legal, P.C. as Class Counsel; (4) appointing Plaintiff Sergio
20 Hernandez as the Class Representative; (5) appointing CPT Group, Inc. as the Settlement
21 Administrator; (6) approving the form of notice to the class and the notice procedure; and (7)
22 scheduling a final fairness hearing.

23 **II. FACTUAL BACKGROUND AND PROCEDURAL POSTURE**

24 TKC is a real estate business that builds, operates, and develops real estate properties
25 throughout California and the United States. It offers renovation, rehabilitation, project finance,
26 low floater debt, niche properties, office and residential condominium conversions, and medical
27 office buildings. Plaintiff was employed by TKC as a non-exempt maintenance technician from
28 July to September 2021. Plaintiff typically worked out of TKC’s Copperwood, Claremont, and

1 Rancho Cucamonga properties. During his employment, Plaintiff generally worked eight-hour
2 shifts, five days per week. [Declaration of Zachary M. Crosner (“Crosner Decl.”), ¶ 4.]

3 Plaintiff alleges a number of wage and hour violations by Defendant. First, he alleges TKC
4 required Class Members to record their time entries at the beginning of each shift (i.e., per
5 schedule) and not actual hours worked and, as a result, the time records do not reflect all hours
6 worked by Class Members. He also claims TKC required Class Members to remain on duty during
7 meal breaks to respond to emergencies, but failed to pay Class Members for this time, and that
8 TKC failed to pay Class Members at the correct overtime and sick pay rates by failing to
9 incorporate non-discretionary pay into the regular rate of pay. Plaintiff next alleges TKC has non-
10 compliant meal break policies that fail to relieve Class Members of all duties during meal breaks
11 and fail to provide for second meal breaks in shifts over 10 hours. He next alleges Class Members
12 are required to remain available to receive deliveries (which would typically be delivered during
13 the lunch hour) and respond to their phone for emergencies during their meal breaks. Similarly, he
14 claims class members had to remain available via phone during their rest breaks as well, and that
15 TKC never paid break premiums of any kind. Finally, Plaintiff alleges TKC required Class
16 Members to supply their own tools (required for their daily work activities), use their own
17 cellphones to communicate with TKC (including photograph their work to document the work
18 status and submit to TKC), use their own vehicles to travel between the shop to TKC’s different
19 properties, and maintain their own uniforms, all without reimbursement. [Crosner Decl., ¶ 5.]

20 Based on these allegations, on April 21, 2022, Plaintiff filed a class action complaint
21 against TKC in this Court, alleging claims for TKC’s failure to provide legally compliant meal
22 and rest breaks; failure to pay all minimum and overtime wages; inaccurate record keeping;
23 unreimbursed business expenses; inaccurate wage statements; failure to pay all wages at
24 termination of employment; and violation of the Unfair Competition Law. That same day he also
25 filed a separate action under PAGA based on the same alleged Labor Code violations. [Crosner
26 Decl., ¶ 6; Exh. 2.]

27 TKC has at all times denied Plaintiff’s allegations and maintained its payroll policies and
28 procedures comply with California law, that it paid the class members all wages due, and that its

1 compensation plan properly compensates the class members for all hours worked. TKC also
2 argues its meal and rest break policies are fully compliant, and that it provided class members with
3 the opportunity to take all required breaks, including an hour for lunch, and therefore met its
4 obligations under California law. TKC also alleges employees are offered company phones and
5 provided with all necessary tools and uniforms. Defendant also strongly contends the case cannot
6 be maintained as any kind of class or representative action, arguing determining the amount of any
7 alleged off the clock work, or the number of de facto missed breaks, for each class member would
8 result individualized issues predominating and that a trial on a representative basis would be
9 unmanageable. [Crosner Decl., ¶ 7.]

10 After Plaintiff filed his complaints, the Parties engaged in meeting and conferring
11 regarding discovery and potential law and motion, and ultimately agreed to discuss settlement via
12 an early mediation. The Parties also agreed on a protocol for an exchange of documents and
13 information before the mediation. Consequently, Plaintiff's counsel reviewed payroll records,
14 personnel policies/handbooks, meal and rest break policies, personnel files, and a random of
15 sampling paystubs and time records for the class. Plaintiff had those records analyzed by Berger
16 Consulting Group to look for, inter alia, violation rates for missed, late and/or short meal breaks,
17 potential violations, damages for alleged unpaid time, etc. [Crosner Decl., ¶ 8.]

18 The Parties then engaged the Hon. Leo Papas, (Ret.), a retired federal magistrate with
19 extensive experience mediating wage and hour class/representative actions and, in September
20 2022, they mediated with Judge Papas. Throughout the day, the arms-length negotiations were
21 hard-fought and adversarial as the Parties exchanged extensive information on their legal and
22 factual positions, and made numerous offers and counter-offers. By the end of the day, the Parties
23 reached agreement on all major issues. They then collaboratively drafted the Class Action and
24 PAGA Settlement Agreement and Class Notice ("Settlement Agreement") setting forth the full
25 and final settlement terms now before the Court for approval. [Crosner Decl., ¶ 9.] A true and
26 correct, fully-executed copy of the Settlement Agreement is attached to the Crosner Declaration as
27 Exhibit 1. Further, in order to fully effectuate the Settlement, the Parties stipulated to the filing of
28 a First Amended Complaint in this matter to add a cause of action under PAGA, and the separate

1 PAGA-only action has been dismissed. [Crosner Decl., ¶ 10.]

2 **III. THE PROPOSED SETTLEMENT TERMS**

3 Under the settlement, TKC will pay \$355,000 into a common fund, the Gross Settlement
4 Amount (“GSA”). Attorney’s fees of up to \$118,333 (33.33% of the GSA), litigation costs of up to
5 \$20,000, settlement administration costs of no more than \$15,000 (currently estimated at \$10,000),
6 a service award to Plaintiff of no more than \$10,000, and \$35,000 for alleged civil penalties under
7 PAGA,¹ all will be paid from the GSA. The remainder of around \$156,667 will be allocated pro
8 rata among the Class Members based on their total weeks worked during the Class Period. No
9 portion of the GSA will revert to TKC. [Crosner Decl., ¶ 11.]

10 **A. Certification of the Settlement Class**

11 The settlement provides for conditional certification of a settlement class including all
12 current and former non-exempt employees of that worked either directly or via a staffing agency for
13 TKC at any California location during the Class Period from April 21, 2018 through November 30, 2022.
14 The Settlement Class consists of approximately 154 individuals. [Crosner Decl., ¶ 12.]

15 **B. The Benefit Conferred on the Settlement Class**

16 As noted, the settlement obligates TKC to pay \$355,000 to resolve the claims of the
17 Settlement, inclusive of attorney’s fees and costs. A minimum of approximately \$156,667 from
18 the GSA will be distributed to the Participating Class Members. This is a cash settlement that
19 does not require Participating Class Members to submit a claim form to receive their settlement
20 share. Participating Class Members will receive their settlement checks automatically via First
21 Class U.S. Mail. Twenty percent of each settlement share will be allocated to wages and the
22 remaining eighty percent will be allocated to penalties and interest, which allocation is consistent
23 with TKC’s potential liability as discussed below. TKC will pay any and all applicable employer-
24 side payroll taxes separately and in addition to the GSA. Subject to the Court’s approval, any
25 amounts not claimed (because a class member does not cash a settlement check) will be forwarded

26 _____
27 ¹ Per PAGA, this will be allocated \$26,250 (75%) to the Labor & Workforce Development Agency, and the
28 remaining \$8,750 (25%) will go to the Aggrieved Employees (as defined in the Settlement Agreement).
There are approximately 82 individuals employed during the PAGA period of February 15, 2030 to
November 30, 2022. [Crosner Decl., ¶¶ 11-12.]

1 to the California State Controller's Unclaimed Property Fund. [Crosner Decl., ¶ 13.]

2 Each participating Class Member will receive a share of the Net Settlement Amount based
3 on his or her total weeks worked for TKC during the Class Period while employed in a non-
4 exempt position. Thus, each individual Settlement Payment will be calculated using criteria
5 typically used in determining appropriate amounts of unpaid wages, unpaid premium wages for
6 missed meal and rest breaks, and potential statutory penalties under applicable law. These methods
7 will ensure each Class Member receives a portion of the settlement funds corresponding to the
8 relative value of his or her potential claims. The proposed allocation provides a reasonable way to
9 compensate Class Members based on the amount of time they worked for TKC and the number of
10 instances they allegedly missed a meal break and/or rest break, were not provided compensation in
11 lieu of such missed breaks, or lost pay due to improper timekeeping and payroll policies. The
12 average gross award is estimated to be approximately \$1,017 (based on about \$14.92 per work
13 week), and the average PAGA payment will be about \$107 (based on about \$5.65 per pay period).
14 [Crosner Decl., ¶ 14.]

15 As discussed below, the overall settlement amount is reasonable in light of the
16 considerable risks associated with Plaintiff's claims, and the delay and risk posed by continuing to
17 litigate such disputed allegations. In counsel's judgment, the total value recovered for the class is
18 substantial and within the range of reasonableness.

19 **C. Settlement Administration**

20 Subject to the Court's approval, the Parties have agreed on CPT Group, Inc. as the
21 Settlement Administrator. CPT is qualified and has significant experience administering class
22 action settlements, including numerous wage and hour matters. CPT's fees and costs will not
23 exceed \$15,000, and currently are estimated at \$10,000. [Crosner Decl., ¶ 15; Declaration of Julie
24 Green, ¶¶ 2-7.]

25 **D. The Class Notice**

26 The proposed Notice of Class Action Settlement (Exhibit A to the Settlement Agreement)
27 sets out information about this case and explains the basic settlement terms in plain language. The
28 Notice also sets forth the individualized information used to calculate Class Members' Individual

1 Settlement Payments and each Class Member's estimated settlement award. The Notice likewise
2 details the procedures for Class Members to dispute their individual information, the procedure for
3 submitting an objection to the Settlement, the procedure to request exclusion, and the fact that any
4 final judgment will bind all class members who do not opt out. Cal. Rules of Court 3.769(f) and
5 3.766(d). In sum, the Notice provides the Class Members with the information necessary to
6 evaluate the Settlement and decide to participate in, opt out of, or object, and meets all
7 requirements imposed by the California Rules of Court. Coupled with the notice procedure, the
8 Notice provides the best notice practicable. [Crosner Decl., ¶ 16.]

9 **E. Right to Correct Information, Opt Out, or Object**

10 Class Members will have forty five (45) days to dispute the information in their Notice
11 used to calculate their settlement award, and also have 45 days to submit any objections to the
12 settlement or to request exclusion, with additional time if a notice packet has to be remailed. If a
13 Class Member disputes their individual information, the Settlement Administrator will review the
14 Class Member's records and any other information submitted, and make a final determination.
15 [Crosner Decl., ¶ 17.]

16 **F. Release of Claims**

17 All Participating Class Members will release TKC from all claims alleged in the operative
18 complaint, or that could have been brought based on the factual allegations in the operative
19 complaint, including PAGA claims, during the Class Period. The release is limited to the claims
20 that were actually pleaded or could have been pleaded based on the alleged facts in the operative
21 complaint. [Crosner Decl., ¶ 18.]

22 **G. Attorney's Fees and Costs**

23 The terms of the Parties' settlement also allow Plaintiff's counsel to apply for an award of
24 attorney's fees of up to 33.33% of the GSA, or \$118,333, and reimbursement of actual costs and
25 expenses of up to \$20,000.00. In advance of the Final Approval Hearing, Plaintiff's counsel will
26 submit a motion for attorney's fees and actual litigation costs per the terms of the Settlement
27 Agreement and applicable law, and will provide the Court with appropriate information and
28

evidence regarding hourly rates, tasks performed, and time expended on the case. [Crosner Decl., ¶ 19.]

H. PAGA Claims and Notice to the LWDA

The Parties allocated \$35,000 of the GSA to payment of civil penalties under PAGA, as addressed below. Per Labor Code section 2699(l)(2), Plaintiff gave notice of the settlement and the approval hearing to the LWDA via its online portal. [Crosner Decl., ¶ 20; Exh. 3.]

IV. ARGUMENT

A. Standard of Review for a Class Action Settlement

The law favors settlement, particularly in class actions where substantial resources can be conserved by avoiding the time, costs and rigors of formal litigation. H. Newberg & A. Conte, 4 Newberg on Class Actions (4th ed. 2002) § 11.41; Class Plaintiffs v. City of Seattle (9th Cir. 1992) 955 F.2d 1268, 1276, cert. denied, 506 U.S. 953; Potter v. Pacific Coast Lumber Co. (1951) 37 Cal.2d 592, 602. Nevertheless, to ensure the rights of absent class members are not unjustly compromised, settlement of a class action requires court approval. Cal. Rule of Court. 3.769; Wershba v. Apple Computer (2001) 91 Cal.App.4th 224, 245; Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1801. This judicial review protects against fraud or collusion, and ensures fairness to the absent class members. Dunk, 48 Cal.App.4th at 1800-01. Judicial review occurs via a two-step process to determine, under all the circumstances, if the proposed settlement is fair, reasonable and adequate. Id. at 1801; Wershba, 91 Cal.App.4th at 245.

The first step is a motion for preliminary approval, through which the parties present the court with the proposed settlement and seek a determination that it is sufficiently fair and reasonable to warrant notice to the class and further proceedings as to its fairness and adequacy. Cal. Rule of Court 3.769(c). This preliminary evaluation determines if the proposed settlement is within the “range of reasonableness” and if notice should be provided to the class regarding the settlement’s proposed terms and conditions, and whether a final fairness hearing should be scheduled. Wershba, 91 Cal.App.4th at 234-35; North County Contractors Ass’n, Inc. v. Touchstone Ins. Servs. (1994) 27 Cal.App.4th 1085, 1089-90. Considering the strong judicial policy favoring settlement of class actions, courts generally apply a presumption of fairness to

1 class action settlements when (1) the settlement results from arms-length bargaining, (2)
2 investigation and discovery are sufficient to allow counsel and the court to act intelligently, (3)
3 counsel is experienced in similar litigation, and (4) the percentage of objectors is small. Dunk, 48
4 Cal.App.4th at 1802; Wershba, 91 Cal.App.4th at 245.

5 If the court grants preliminary approval, it then orders the class be given notice in an
6 appropriate manner, establishes a schedule and procedures for class members to request exclusion
7 or object, and sets the matter for a final fairness hearing. Typically, any motion for attorney's fees
8 and costs is filed subsequent to preliminary approval and heard with the motion for final approval,
9 as part of the second step of the two-step approval process. Dunk, 48 Cal.App.4th at 1800;
10 Wershba, 91 Cal.App.4th at 232. The proposed settlement in this matter warrants preliminary
11 approval under the liberal standard discussed above, as it is fair, reasonable and adequate under all
12 the circumstances, and represents a favorable result for the class.

13 **B. The Proposed Settlement Class Should Be Conditionally Certified**

14 The purpose of conditional class certification for purposes of settlement is to facilitate
15 provision of notice of the proposed settlement's terms, and the date and time of the final fairness
16 hearing. In this context, courts apply lesser scrutiny than they would otherwise in the context of
17 certifying a class. Dunk, 48 Cal.App.4th at 1807, n.19; Global Minerals & Metals Corp. v.
18 Superior Court (2003) 113 Cal.App.4th 836, 839 ("[I]t is well established that trial courts should
19 use different standards to determine the propriety of a settlement class.")

20 In the present matter, conditional certification is proper since this matter satisfies all
21 requirements for class certification under Code of Civil Procedure section 382. First, the class is
22 both sufficiently numerous, consisting of at least 154 individuals, and ascertainable by reference
23 to Defendant's personnel and payroll records. [Crosner Decl., ¶ 21.] Next, Plaintiff is an adequate
24 class representative, as his claims do not conflict with and are not antagonistic to the claims of
25 other class members. Further, his claims are typical given he is a member of the class and his
26 claims arise from the same employment practices giving rise to the claims of the other class
27 members. [Crosner Decl., ¶ 22; Declaration of Sergio Hernandez ("Hernandez Decl."), ¶¶ 2-5.]
28 Lastly, his counsel are experienced and adequate class counsel. [Crosner Decl., ¶¶ 39-45.]

1 Next, common questions of law and fact predominate – particularly for purposes of a
2 settlement class – as the Class Members all were subject to the same payroll scheme and policies
3 that Plaintiff contends violates California labor law. Since the focus of the claims against TKC
4 concerns the legality of common policies applied uniformly to the entire class, common issues
5 predominate over individualized inquiries concerning liability. For instance, whether TKC’s meal
6 period policies are non-compliant and deprived class members of required meal periods will
7 decide liability for all class members one way or another. Similarly, whether TKC’s policy of
8 requiring employees to use their personal phones without reimbursement either violates the Labor
9 Code or it does not, and determination of that issue will help decide liability for all Class
10 Members. [Crosner Decl., ¶ 23.]

11 By now it is well-settled a theory of recovery asserting the existence of a uniform policy
12 violating California law is sufficient to satisfy the requirements for class certification. Jones v.
13 Farmers Ins. Exch. (2013) 221 Cal.App.4th 986, 996 (“Claims alleging that a uniform policy
14 consistently applied to a group of employees is in violation of the wage and hour laws are of the
15 sort routinely, and properly, found suitable for class treatment”); Williams v. Superior Court
16 (2013) 221 Cal.App.4th 1353 (“A company-wide practice can sustain a common question of fact
17 or law that supports commonality for class certification”). Lastly, a class action is superior to
18 other means for the fair and efficient adjudication of this controversy. [Crosner Decl., ¶ 24.]

19 **C. The Proposed Settlement Meets the Kullar Factors and is within the Range of**
20 **Reasonableness**

21 The proposed settlement resulted from serious, arms-length negotiations facilitated by a
22 respected mediator, the Hon. Leo Papas, (Ret.), who has considerable experience mediating wage
23 and hour class action cases. [Crosner Decl., ¶ 9.] Plaintiff’s counsel Michael Crosner, Zachary M.
24 Crosner, Jamie Serb, and Nikki Trenner of Crosner Legal, P.C. have years of experience litigating
25 wage and hour class actions. Plaintiff’s counsel are well-qualified to evaluate the risks and benefits
26 of further litigation versus settling the matter. [Crosner Decl., ¶¶ 39-45.]

27 Next, California law recognizes several factors bearing on the fairness, adequacy, and
28 reasonableness of a proposed class settlement. Kullar v. Foot Locker Retail, Inc. (2008) 168

1 Cal.App.4th 116, 128. In relevant part, these factors include: 1) the amount offered in settlement 2)
2 the strength of plaintiff's case; 3) the risk, expense, complexity, and likely duration of further
3 litigation; 4) the risk of maintaining class action status throughout trial; and 5) the experience and
4 views of counsel. Id. Here, the proposed settlement satisfies these requirements.

5 Prior to mediation, the parties engaged in informal discovery to facilitate settlement
6 discussions. Thus, Plaintiff reviewed documents and information regarding TKC's payroll practices,
7 a random sampling of pay stubs and time records for sampling of class members, applicable
8 compensation plans, etc., and information from Defendant regarding class size and breakdown,
9 work weeks/pay periods, rates of pay, and other relevant information. Plaintiff then had that
10 information analyzed by a consulting expert to assist in determining potential violation rates and
11 other data used to formulate a damages model. Plaintiff's counsel are confident they obtained
12 sufficient information to understand the law and facts of this case and make an informed decision
13 regarding the proposed settlement. [Crosner Decl., ¶¶ 8, 25.]

14 Next, the proposed settlement falls within the range of reasonableness warranting
15 preliminary approval. The proposed settlement involves a significant sum that, when distributed,
16 will confer direct monetary benefits on the class members. Each class member will be entitled to a
17 monetary payment without having to file a claim and each payment will be relative to the value of
18 his or her potential claims. Through the information exchanged and analysis undertaken, Plaintiff
19 weighed the risks of continued litigation against the benefits of the proposed settlement and
20 determined settlement to be the most reasonable option.

21 Using that data, Plaintiff estimated TKC's likely maximum exposure on the class claims at
22 approximately \$3,012,000, including approximately \$123,000 on the off the clock claims, \$81,000
23 for the regular rate/underpaid overtime and sick time claims, \$971,000 on the meal period claim,
24 \$988,000 on the rest break claim, \$273,000 on the expense reimbursement claims, \$128,000 in
25 statutory penalties on the wage statement claim, and \$448,000 in waiting time penalties for the
26 alleged failure to pay wages on separation of employment. [Crosner Decl., ¶¶ 26-27.] These
27 numbers represent the maximum amounts achievable if Plaintiff is able to shoot the moon and win
28 outside liability on all wage and non-PAGA penalty claims, which outcomes, as discussed below,

1 are unlikely and carry significant, tangible risks. Plaintiff's counsel thus substantially discounted
2 the value of these claims in light of the multiple and considerable risks posed by proceeding with
3 the litigation, as Defendant raised numerous defenses and vigorously defended against these
4 claims.

5 On the unpaid wages issue, Plaintiff claims that he and class members were not paid for all
6 hours worked because TKC required "off the clock" work by forcing employees to "record" their
7 time at the beginning of a shift with the scheduled hours rather than accurately tracking the actual
8 hours worked, and by requiring de facto "on duty" meal periods. Additionally, Plaintiff alleges
9 TKC underpaid overtime and sick pay by failing to include non-hourly pay in the regular rate
10 calculation. In response, TKC argued its timekeeping and payroll practices comply with California
11 law, that it properly and accurately tracked hours worked, and that it properly calculated and paid
12 overtime. It further noted all bonuses were completely discretionary and therefore did not have to
13 be included in the regular rate calculation. Additionally, it argued any "off the clock" work was
14 done against company policy and without the knowledge or consent of management, and
15 innumerable individual inquiries would be necessary to resolve those allegations thereby
16 rendering class certification impossible. [Crosner Decl., ¶ 28.]

17 On the meal period claims, Plaintiff alleged Defendant's policies were deficient because they
18 did not properly inform employees when meal periods should be taken, did not mention second meal
19 breaks, and did not emphasize meal breaks should be free from all duties. Further, review and
20 analysis of the time records produced showed large numbers of de facto violations for missed, late
21 and short meal periods, particularly for second meal periods of shifts longer than 10 hours. Thus,
22 even if Defendant establishes legally compliant written meal and rest break policies, Plaintiff
23 believes the employer's own records will establish significant de facto liability. Lastly, Plaintiff
24 alleges meal periods were "on duty" because of the need to be available to receive deliveries and be
25 available by phone in case of emergencies. [Crosner Decl., ¶ 29.]

26 Defendant proffered multiple potential defenses against this claim. For instance, it argued
27 all written policies are fully compliant, that it always provided the class members/aggrieved
28 employees with the opportunity to take their meal breaks and thus met the requirements imposed by

1 California law, and that if provided one hour meal periods to ensure employees received a fully
2 compliant lunch. Per Defendant, if individuals did not take a meal period, if a meal period was
3 taken late in a shift, or lasted less than the required 30 minutes, it was in violation of company policy
4 and a multitude of individual inquiries would be necessary to determine if the potential violation
5 occurred due to an employee's personal choice or for some other reason. Thus, per Defendant, class
6 certification would be impossible on this claim, and any trial under PAGA completely
7 unmanageable. Similarly, TKC argued employees were relieved of all duty for their meal periods
8 and there was no de facto policy mandating availability during breaks. [Crosner Decl., ¶ 30.]

9 Plaintiff's theory of Defendant's rest period liability is similar, as he argues the policy is
10 non-compliant because it only allows for 2 breaks per shift regardless of the number of hours
11 worked, and he also alleges de facto violations where class members missed rest breaks due to work
12 constraints and didn't receive the mandated premium wage. On the other hand, as with meal breaks,
13 Defendant argued the written policies complied with California law and authorized and permitted
14 employees to take all required rest breaks. Defendant further contended that, since it is not required
15 to maintain a record of rest periods, any evidence of a failure to authorize rest periods and/or
16 discouragement from taking rest periods would be purely anecdotal and since individual issues
17 would predominate and class certification would be impossible. Defendant also may contend that
18 it is only liable if Plaintiff can prove, on a shift-by-shift basis, employees actually did not take a rest
19 break. This arguably would make a proof of damages more difficult since the number of instances
20 a Class Member was denied a rest period specifically due to the absence of a compliant policy, as
21 opposed to some other reason, is impossible to reliably quantify since employers are not required to
22 maintain records of rest periods. Thus, it is entirely possible a jury or the Court could decline to
23 award any amounts for missed or non-compliant rest periods. [Crosner Decl., ¶ 31.]

24 On the expense reimbursement claims, Plaintiff alleges TKC failed to provide
25 reimbursement to employees for the business use of their cell phones, tools, uniforms, and use of
26 their personal vehicles. In response, TKC argued that all employees are offered use of a company
27 phone for work purposes, and that it provided all necessary tools and uniforms. Thus, if any
28

1 employee used their own phone or their own tools, it was purely for personal convenience and was
2 not necessary to perform their job duties. Crosner Decl., ¶ 32.]

3 The claims under Labor Code sections 201, *et seq.* (waiting time penalties) and 226
4 (inaccurate wage statements) are derivative of the primary unpaid wage claims, and accordingly are
5 subject to the same risks and uncertainties plus additional risks posed by the need to take into
6 account the discretionary nature of such awards and the “good faith” and other defenses available
7 to Defendants. Amaral v. Cintas Corp. No. 2 (2008) 163 Cal.App.4th 1157, 1203-4 (employer did
8 not willfully fail to pay wages under Labor Code § 203 even though class prevailed on underlying
9 claim for failure to pay living wages). Thus, these claims also are subject to additional defenses,
10 and all of these considerations resulted Plaintiff applying in substantial discounts to the value of
11 these claims. [Crosner Decl., ¶ 33.]

12 As far as potential PAGA liability, the theoretical penalties totaled at least \$800,000 should
13 Plaintiff prevail on all claims and establish the alleged Labor Code violations for all pay periods at
14 issue. [Crosner Decl., ¶ 34.] As with the class claims, Plaintiff discounted the potential PAGA
15 penalties for the multi-layered defenses proffered by Defendant on the merits, and further
16 discounted these claims since the Court possesses wide discretion to reduce such penalties even if
17 Plaintiff ultimately prevailed. Labor Code § 2699(e)(2); Fleming v. Covidien (C.D. Cal. 2011)
18 2011 U.S. Dist. LEXIS 154590, *8-9 (court reduced the potential penalties by over 82% after a
19 bench trial); Carrington v. Starbucks Corp. (2018) 30 Cal.App.5th 504 (after a bench trial, the trial
20 court awarded penalties of just \$5 per pay period, a 90% reduction, which decision was upheld on
21 appeal); In re Taco Bell Wage and Hour Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. Lexis
22 48557 (PAGA penalties denied after trial).

23 Accordingly, the Parties allocated \$35,000 to PAGA penalties, which amount is reasonable
24 and in line with comparable settlements in other class actions in California. Van Kempen v.
25 Matheson Tri-Gas, Inc. (N.D. Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182 (granting final
26 approval of \$5,000 PAGA penalty from \$370,000 settlement, or 1.4 percent of total settlement);
27 Slavkov v. First Water Heater Partners I (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS 116303
28 (finding a \$7,500 PAGA payment reasonable when measured against the overall settlement of

1 \$345,000 and the possible weaknesses in plaintiffs' case, or 2.2 percent of total settlement).
2 Additionally, the LWDA has been informed of the terms of the PGA portion of the settlement,
3 and will be able to weigh in as necessary. Jennings v. Open Door Mktg. Inc. (N.D. Cal. Oct. 3,
4 2018) 2018 U.S. Dist. LEXIS 171356, at *27 (approving settlement with PGA penalties of 0.6%
5 where "[p]laintiffs [have] submitted the settlement agreement to the LWDA, and the LWDA has
6 not objected to the settlement").

7 Thus, Defendant raised various defenses to each of Plaintiff's claims, any one of which, if
8 successful, could have derailed Plaintiff's case. Accordingly, Plaintiff faced risky issues going
9 forward with this litigation, and given the need to secure class certification, try the case, and deal
10 with post-trial appeals, it would have taken years to realize any recovery in this action, which
11 already has been pending for over three years. Plaintiff's counsel discounted the value of the class
12 claims consistent with the risks discussed above, and carefully weighed the likelihood of the class
13 receiving substantially greater benefit if the litigation continued. Plaintiff's counsel concluded –
14 in light of these very real and substantial risks – settlement on the proposed terms and without
15 prolonged and costly litigation was in the best interests of the class. The overall \$355,000
16 recovery represents a significant percentage of Defendant's potential exposure and given these
17 risks addressed above, a total recovery for the class of \$355,000, with an average award of over
18 \$1,000, is a fair result within the range of reasonableness considering all potential outcomes.
19 [Crosner Decl., ¶¶ 35-37.]

20 Importantly, the mere fact that a settlement does not provide the same recovery as might be
21 achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and
22 adequate. Wershba, 91 Cal.App.4th at 246, 250 ("even if the relief afforded by the proposed
23 settlement is substantially narrower than it would be if the suits were to be successfully litigated,
24 this is no bar to a class settlement because the public interest may indeed be served by a voluntary
25 settlement in which each side gives ground in the interest of avoiding litigation"); 7-Eleven
26 Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135, 1150 ("The fact that
27 a proposed settlement may amount to only a fraction of the potential recovery does not, in and of
28 itself, mean that the proposed settlement is grossly inadequate and should be disapproved"); Lane

1 v. Facebook, Inc. (9th Cir. 2012) 696 F.3d 811, 819 ("[T]he question whether a settlement is
2 fundamentally fair . . . is different from the question whether the settlement is perfect in the
3 estimation of the reviewing court"); White v. Experian Information Solutions, Inc. (C.D. Cal.
4 2011) 803 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable even
5 though it represented 99% discount off the maximum value of the claims). Importantly as well,
6 the proposed settlement is non-reversionary and will provide benefits to the Class Members
7 without a claims process. White, 803 F.Supp.2d at 1098; c.f., Federal Judicial Center, Managing
8 Class Action Litigation: A Pocket Guide for Judges (3d ed. 2010) at 20, available at
9 www.fjc.gov/sites/default/files/2012/ClassGd3.pdf (reversionary provisions and/or cumbersome
10 claims process may indicate lack of fairness). Plaintiff and her counsel submit the settlement is
11 within the "range of reasonableness," and is fair and adequate for the Class.

12 **V. PLAINTIFF'S ENHANCEMENT**

13 A modest incentive award for Plaintiff is appropriate under applicable law. See Staton v.
14 Boeing (9th Cir. 2003) 327 F.3d 938, 977 (collecting cases awarding class representatives service
15 and incentive payments ranging from \$2,000 to \$25,000). He devoted time and resources to the
16 litigation, provided documents, assisted Class Counsel with investigating the claims asserted and
17 in preparing for mediation. The service payment provided to Plaintiff as the class representative is
18 typical in class action cases and reasonable. Rodriguez v. W Publ'g Corp. (9th Cir. 2009) 563 F.3d
19 948, 958-59 (incentive awards are "intended to compensate class representatives for work done on
20 behalf of the class, to make up for financial or reputational risk undertaken in bringing the action,
21 and, sometimes, to recognize their willingness to act as a private attorney general.").

22 Here, the Settlement Agreement provides for an enhancement of up to \$10,000.00 to
23 Plaintiff. This request is reasonable given the risks he undertook on behalf of the Class Members.
24 By contacting and retaining counsel to pursue these claims, Plaintiff helped make this settlement
25 possible for the absent Class Members, while shouldering the risk of being liable for Defendant's
26 litigation costs. Plaintiff also exposed himself to unwanted notoriety related to filing a public
27 lawsuit (discoverable even through a simple google search) for the benefit of other employees,
28 placing herself at risk of discrimination by future prospective employers. Among taking many

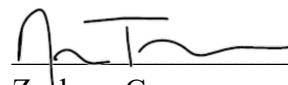
1 other actions assisting in the successful litigation of this case, Plaintiff provided substantial factual
2 information and documents to counsel, attended numerous meetings/phone conferences with
3 counsel to discuss the case, and kept abreast of all significant developments. Finally, Plaintiff is
4 fully aware of his duties as a fiduciary to the class and at all times has been ready to, and has in
5 fact, fulfilled those duties. [Crosner Decl., ¶ 38; Hernandez Decl., ¶¶ 2-9.]

6 **VI. CONCLUSION**

7 For all the foregoing reasons, Plaintiff respectfully requests that the Court grant this motion,
8 conditionally certify the settlement class, grant preliminary approval to the proposed class action
9 settlement, and enter the [Proposed] Order filed herewith.

10
11 Dated: January 13, 2023

CROSNER LEGAL, P.C.

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13 

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