

Eric K. Yaeckel [CSB No. 274608]
yaeckel@sullivanlawgroupapc.com

Ryan T. Kuhn [CSB No. 324538]
ryan@sullivanlawgroupapc.com

SULLIVAN & YAECKEL LAW GROUP, APC
2330 Third Avenue
San Diego, California 92101
(619) 702-6760 * (619) 702-6761 FAX

Attorneys for Plaintiff KASHU XOLA, Individually and on behalf of other members of the general public similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

KASHU XOLA, Individually, and on behalf
of other members of the general public
similarly situated,

Plaintiff,

v.

FULL PACKAGE DELIVERY, LLC, a
California Limited Liability Company;
AMAZON LOGISTICS, INC., a Delaware
Corporation; and DOES 1-10, inclusive

Defendants

CASE NO. 37-2022-00006720-CU-OE-CTL

**MEMORANDUM IN SUPPORT OF
PLAINTIFF'S UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF
SETTLEMENT, AND CERTIFICATION
OF PROVISIONAL SETTLEMENT CLASS**

Date: February 24, 2023
Time: 9:00 a.m.
Dept.: C-60
Judge: Hon. Matthew C. Braner

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I. SUMMARY OF MOTION

This matter is a “Wage and Hour” representative (*i.e.* “PAGA”) and *proposed* class action. Plaintiff KASHU XOLA, in a Representative capacity, and on behalf of other members of the general public similarly situated, (“Plaintiff”) brings Labor Code claims against Defendants FULL PACKAGE DELIVERY, LLC and AMAZON LOGISTICS, INC. (hereinafter, “FPD” or “Defendants”).

Following a full day Mediation, the parties have agreed to the terms of a proposed class and PAGA action settlement. The parties have drafted and executed a Joint “Stipulation of Settlement and Release” (the “Agreement”), lodged as **Exhibit A**¹ to the declaration of Eric K. Yaeckel. Briefly, the parties’ settlement figures are estimated as follows:

Approximate size of class:	288 individuals
Net Settlement Amount (“NSA”):	\$287,290.00
Settlement Administration:	\$7,000.00
Costs/expenses of litigation:	\$12,000.00 (or less)
Class Representative Bonus & Additional Release:	\$20,000
Response Period:	30 days from Mailing of Notice
LWDA payment:	\$18,750.00.00 (75% Share of \$25,000 allocation)
Attorney's fees:	1/3 of NSA (\$95,763.33)

The estimated average payment (before taxes) to each Class Member based on the above figures will be **\$453.22**. These estimates are an “average” only, and do not account for the fact that Class Members will receive more or less than an “average” share, as the amounts owed are calculated based on the number of workweeks each individual worked for Defendants during the class period.

Please Note: This is a **non reversionary** settlement, in that the entire Net Settlement Amount, after the awarded costs, taxes and fees are deducted, will be automatically disbursed to all Class Members who do not file a request to “opt-out” of participation in the lawsuit. (**Exhibit A** at ¶ 48).

Plaintiff now moves the Court for an order: **(1)** preliminarily approving the proposed class

¹ 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.

1 action settlement; (2) provisionally certifying the proposed class; (3) directing that Notice (defined
2 below) of the proposed settlement be provided to Class Members; and (4) scheduling a hearing for
3 final approval of the proposed settlement and entry of the parties' proposed Final Approval Order and
4 Judgment. Defendants do not oppose Plaintiff's motion.

5 II. FACTUAL AND PROCEDURAL HISTORY

6 The putative class is comprised of individuals who previously were employed by Defendant
7 Full Package Delivery, LLC (FPD) in California as non-exempt employees at any time during the
8 period of February 22, 2018 to the date of this preliminary approval.

9 1. The Operative Claims, Investigation and Informal Discovery Conducted

10 On **February 22, 2022**, Plaintiff Xola filed the Complaint in this matter. The original
11 Complaint alleged putative class action claims and PAGA representative action claims, under the
12 California Labor code involving, *inter alia*, (1) failure to pay minimum wages; (2) failure to pay
13 off-the-clock wages; (3) failure to pay proper overtime compensation; (4) failure to provide meal
14 breaks and pay premiums for the same; (5) failure to provide rest breaks and pay premiums for the
15 same; (6) failure to reimburse employees for necessary business expenses; (7) failure to provide
16 accurate itemized wage statements; and (8) failure to pay all wages to upon termination. (Yaeckel
17 Decl. ¶ 3; ROA # 1).

18 On **March 7, 2022**, Plaintiff propounded discovery requests on both Defendants. (Yaeckel
19 decl. ¶ 4). Through these requests, Plaintiff sought, among other information and documents, the
20 identities of putative class members, Defendants' compensation policies, meal and rest period policies,
21 employee handbooks, wage statements, payroll records, time records, job descriptions, and
22 reimbursement policies. (*Id.*).

23 FPD provided discovery responses, documents, and objections to Plaintiff's requests. After a
24 lengthy meet and confer processes, FPD produced, *inter alia*, Plaintiff's time and wage records, copies
25 of the relevant employee handbooks, copies of all other relevant employee policies, the contents of
26 Plaintiff's employee file, Plaintiff's time records, and itemized wage statements. (Yaeckel decl. ¶ 5).

27 Following substantive exchanges, the parties agreed to explore resolution of this matter. As part
28 of the settlement discussions, FPD agreed to voluntarily produce and verify hundreds of pages of

documents. The production included all relevant policies and procedures. It also included large electronic sampling of other class members' time and wage data. (Yaeckel decl. ¶ 6).

Plaintiff also requested FPD provide additional informal discovery so that the parties could experience a meaningful mediation. (Yaeckel decl. ¶ 7). FPD provided informal discovery which consisted of, *inter alia*, the number of current and former employees who worked for FPD during the limitations period, meal and rest period premiums paid, pay periods at issue, a redacted sampling of employee time records and wage statements, as well as confirmation that various policies and agreements were standard as to the class. (*Id*).

2. Settlement Discussions

On **October 26, 2022**, the Parties attended a full day mediation before the experienced "Wage and Hour" mediator, Scott Markus. (Yaeckel decl. ¶ 8). Prior to the mediation, counsel for both parties agreed to the informal exchange of information, and case theories and defenses, pertinent to a class-wide settlement. Prior to mediation, plaintiff prepared and provided a detailed mediation brief. (*Id*). At the conclusion of mediation, the parties agreed on the key terms of a settlement that would globally resolve all class and representative wage and hour claims asserted in the operative Complaint and forthcoming First Amended Complaint and executed a Memorandum of Understanding. (*Id*).

The parties continued negotiation over final settlement terms. As of **December 16, 2022**, the parties agreed on all final terms of the settlement which was memorialized in the Agreement, which is attached to the declaration of Eric K. Yaeckel as **Exhibit A**. Plaintiff now seeks the Court's preliminary approval of the Agreement.

III. SETTLEMENT TERMS

The Agreement includes the following key terms:

1. Contingent Nature of the Settlement

The parties entered into the Agreement exclusively for the purpose of resolving the action and facilitating the negotiated settlement. Should the Court, for any reason, not preliminarily and/or finally approve the Agreement, or if the Agreement is terminated for any reason, then the parties have agreed that the Agreement will be null and void and this action will revert to its status with respect to any and all matters as they existed prior to the parties signing the Agreement. (**Ex. A** at ¶ 38).

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

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

4 All individuals who previously were employed by Defendant Full Package
5 Delivery, LLC in California as non-exempt employees at any time during the
6 period of February 22, 2018 to the date of entry of Preliminary Approval of
7 this settlement and who have not previously released their claims against
8 Defendants. (**Exhibit A** at ¶ 12).

9 The parties estimate that as of October 26, 2022, the Settlement Class consisted of
10 approximately two hundred and eighty-eight (288) individuals, as determined by FPD’s employment
11 records. (**Ex. A** at ¶ 12).

12 **3. Appointment of Settlement Administrator**

13 The parties agreed to use CAC Services, LLC, as the “Settlement Administrator” for purposes
14 of providing the Notice of Class Action Settlement, issuing payments pursuant to the Agreement, and
15 carrying out all duties pursuant to the Agreement. (**Ex. A** at ¶33). CAC’s sole business is the
16 administration of class action settlements and class action notices. (Yaeckel decl.¶ 9).

17 **4. Scope of the Release**

18 For purposes of the Agreements, Class Members release all “Wage and Hour” claims that are
19 either or both: (1) alleged in the forthcoming First Amended Complaint (“FAC”)²; or (2) which relate
20 to or arise out of the allegations and claims asserted in the FAC and could have been alleged in the
21 FAC relating in any way to violations of the wage and hour provisions of the California Labor Code
22 or the California Wage Orders, or any wage and hour provisions of California law. The precise release
23 language is reflected in **Exhibit A** at ¶ 43(a).

24 There is a separate release of the PAGA claims for Class Members who worked within the
25 “PAGA Period” of December 2, 2020 through the date of preliminary approval. The Aggrieved
26 Employees will be entitled to an award of a PAGA Penalty. (**Exhibit A** at ¶ 43(c)).

27 **5. Cash Payment and Allocation**

28 The Agreement provides for an automatic Individual Settlement Payment to the members of

² The FAC will be provided via a separate stipulation and proposed order.

1 the Class. No claims need be submitted. Class Members will be entitled to an average share of
2 approximately **\$453.22** (Yaeckel Decl. ¶10). The actual share will depend on the amount of
3 workweeks they were employed during the limitations period. (**Exhibit A** at ¶ 49(c)). The Individual
4 Settlement will be allocated as follows: fifty percent (50%) constitutes wages (subject to withholdings
5 and deductions and reported as wage income on a Form W-2) and fifty percent (50%) constitutes non-
6 wage penalties, and interest. (**Exhibit A** at ¶ 49(c)).

7 There is an additional formula based on employee pay periods worked, to calculate the separate
8 PAGA penalties paid to those employees who worked during the PAGA Period. (**Exhibit A** at ¶ 45).

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

10 Subject to Court approval, the Parties agree that, within fifteen (15) days after the Court enters
11 any Order granting preliminary approval of the Settlement, Defendant Full Package Delivery LLC will
12 provide to the Settlement Administrator the following information for each Settlement Class Member
13 in an electronic format: class member names and last known home addresses, telephone numbers,
14 social security numbers, and weeks worked with Defendants based on Defendants' records, and last
15 known mailing addresses for each member of the Class. (See **Exhibit A** at ¶ 52). The Settlement
16 Administrator will perform address updates and verifications, including running all names through the
17 National Change of Address Database, prior to the first mailing. (See **Exhibit A** at ¶ 54). Within 10
18 days of receipt of the Class List, the Settlement Administrator will mail the Class Notice ("Notice")
19 to each Class Member, by first class mail. (See **Exhibit A**, at ¶ 53). The parties' agreed upon Class
20 Notice is attached to the Declaration of Eric Yaeckel, as **Exhibit B**.

21 The Notice is designed to provide Class Members with detailed information about the lawsuit,
22 the Agreement, their rights and the settlement benefits, and how to participate, exclude themselves,
23 or object. (See **Exhibit B**). The Class Members will have thirty (30) calendar days (from the date of
24 notice) to request to be excluded, or file objections. (See **Exhibit A**, at ¶ 32; **Exhibit B** at § V(B)).

25 The Class Members will be given notice of the release, and information about the expected
26 settlement amount based on the workweeks employed with Defendants during the Class Period. If they
27 wish to receive a share of the Settlement, Class Members need not take any additional action. Class
28

1 Members are also given instructions on how to exclude themselves, object to the Settlement, or appear
2 at the final approval hearing to state objections. (See **Exhibit A** at ¶ 59 and ¶ 61; **Exhibit B** at § V).

3 The Notice process also has additional safeguards. For instance, for Notices returned as non-
4 deliverable, the Settlement Administrator will perform a skip-trace and mail or re-mail Notice to an
5 updated address (if any), upon receipt of the returned mail. (See **Exhibit A** at ¶ 56.) It is the intent of
6 the parties that all reasonable means be used to locate Class Members.

7 The Notice will inform Class Members of the number of weeks worked during the Class Period
8 (according to Defendant's records) and their estimated settlement amounts. Class Members will have
9 the opportunity to dispute the workweek calculation by submitting written documentation to the
10 Settlement Administrator. (See **Exhibit A** at ¶ 57 and **Exhibit B** at IV(D)).

11 PAGA Members do **not** require notice prior to a settlement, nor may they opt out of the PAGA
12 penalty portion of the settlement. *Robinson v. S. Ctys. Oil*, (2020) 53 Cal. App. 5th 476, 482–83, (Nov.
13 24, 2020). PAGA members are nonetheless informed of the Settlement and estimated payments.
14 PAGA members who are Class Members can opt-out of the Class Settlement to retain all claims in
15 their individual capacities. These rights are explained in the Class Notice. (**Exhibit B** at § IV(F)).

16 **7. Contingent Costs**

17 The Agreement provides for Ninety Five Thousand and Seven Hundred Sixty Three Dollars
18 and Thirty Three cents in Attorneys' Fees, which is one-third (1/3%) of the total Settlement, and up
19 to Twelve Thousand Dollars (\$12,000.00) in litigation costs. (See **Exhibit A** at ¶ 41). For costs
20 incurred in administrating the Settlement, the Agreement provides for an estimated Seven Thousand
21 Dollars (\$7,000.00). (See **Exhibit A** at ¶ 44).

22 The Agreement also provides for Twenty Five Thousand Dollars to be allocated for Plaintiff's
23 PAGA claims with 75% of the amount, or Eighteen Thousand and Seven Hundred Fifty Thousand
24 Dollars (\$18,750.00) being paid to the LWDA, and 25%, or \$6,250.00, being distributed amongst the
25 PAGA Penalty Class. (See **Exhibit A** at ¶ 45).

26 The Agreement also provides payment to Plaintiff Xola of Twenty Thousand Dollars
27 (\$20,000.00), which represents (1) a Class Representative Enhancement Payment in consideration for
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1 his services as Class Representative, and, (2) his agreement to sign a separate broader release of claims
2 beyond the scope of the Class Member release in this action. (See **Exhibit A** at ¶ 42). Further details
3 justifying said payment will be provided via Plaintiff’s declaration at final approval. Plaintiff would
4 have initiated a separate individual arbitration against Defendants had mediation failed. This class is
5 being notified of this payment to Xola. (See Ex. B at § IV(B)).

6 The Class Representative Enhancement Payment was part of good faith negotiations and is
7 intended to recognize that it was the Class Representative (Mr. Xola) who initiated the lawsuit,
8 initiated the PAGA claims, provided critical documents and witnesses to his attorneys, and worked
9 with her attorney to propound and prepare written discovery, all in an effort to obtain moneys allegedly
10 owed not only to himself, but to hundreds of other employees. (Yaeckel Decl. ¶12).

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

12 Counsel hereby submits estimates and calculations for the total potential value of all claims
13 so this Court may evaluate if the amount to be paid to the class ultimately could be determined to be
14 fair and reasonable when balanced against the probable outcome of the future litigation. *Kullar v. Foot*
15 *Locker Retail, Inc.*, (2008) 168 Cal. App. 4th 116, 133.

16 Concerning the strength of the plaintiff’s case, the California Court of Appeal has said that the
17 “merits of the underlying class claims are not a basis for upsetting the settlement of a class action; the
18 operative word is ‘settlement.’” *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85
19 Cal. App. 4th 1135, 1150 [citing, *inter alia*, *City of Detroit v. Grinnell Corp.* (2d Cir. 1974) 495 F.2d
20 448,455 (“The fact that a proposed settlement may only amount to a fraction the potential recovery
21 does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be
22 disapproved”); see also *Linney v. Cellular Alaska P’ship.* (9th Cir. 1998) 151 F.3d 1234, 1242 (“This
23 court has aptly held that ‘it is the very uncertainty of outcome in litigation and avoidance of wasteful
24 and expensive litigation that induce consensual settlements’”); *Officers for Justice v. Civil Servo Com.*
25 (9th Cir. 1982) 688 F.2d 615, 625 (“The proposed settlement is not to be judged against a hypothetical
26 or speculative measure of what might have been achieved by the negotiators.”)]

27 Each of the primary claims also had risks to obtaining both class certification and a finding of
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1 liability. If Defendants’ defenses were successful, the class would not receive anything. Further, FPD
2 contends that there was an enforceable arbitration agreement and if it had been deemed valid and
3 enforceable, Plaintiff would only be able to recover on behalf of himself and no class relief would be
4 possible. As is set forth below, Plaintiff submits that the most realistic “best case” scenario would be
5 an average recovery per class member of approximately **\$1,327.54** and a worst case scenario would
6 be a recovery of \$0, by way of denial of class certification or defense verdict. (Yaeckel decl. ¶ 14).
7 Given all the risks on each claim the estimated **\$453.22** average recovery secured via this settlement,
8 is a reasonable compromise and is in the best interests of the class given all the risks of continued
9 litigation. (Yaeckel decl. ¶ 23).

10 **A. FAILURE TO PAY ALL COMPENSATION CLAIMS**

11 Plaintiff’s unpaid wages (and unpaid overtime) claims were based on the allegation that
12 employees were performing unpaid work due to the Full Package Delivery’s timekeeping system
13 which took “minutes worked” and transferred that amount to a decimal and caused other losses due
14 to certain alleged “transitional math errors” caused by the payroll system. Plaintiff alleged this resulted
15 in regular time and overtime pay being owed where Defendants were on notice of work being
16 performed without pay.

17 Defendants also denied that any unpaid work occurred, and even if some did occur, Defendants
18 claimed it was not on notice of these alleged Labor Code violations and had a strict written prohibition
19 against off-the-clock work and a mandate that all time worked must be accurately recorded.
20 Defendants asserted proof of these alleged violations would require individualized inquiries, which
21 could preclude class certification and make any PAGA claims unmanageable. (Yaeckel decl. ¶ 25).

22 Based on Class Counsels’ analysis, this claim was worth as little as \$0 (a defense verdict or
23 denial of class certification) or as much as \$11,718.00. (Yaeckel decl. ¶ 16).

24 **B. MEAL AND REST PERIOD CLAIMS**

25 Plaintiff was able to identify hundreds of examples of missing or late meal periods without the
26 provision of a meal period penalty payment. However, Defendants argued that these records do not
27 conclusively show whether (1) Defendants actually failed to provide the meal period, (2) there was a
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1 voluntary waiver, (3) employees forgot to clock out, or (4) employees voluntarily chose to skip or take
2 them late even though they were provided. Additionally, in light of Full Package Delivery’s written
3 meal and rest period policy, Defendants contended there was no uniform policy or practice of denying
4 meal and rest periods, requiring individualized inquiries that would preclude class certification and
5 make any PAGA claims unmanageable. (Yaeckel decl. ¶ 26).

6 Plaintiff alleges that the rest period policy lacks the required statutory language and there was
7 no written meal policy until 2021. Plaintiff also alleged the Defendants written policies improperly
8 restricted class members from leaving the premises during their rest breaks among other deficiencies.
9 Defendants pointed out that the policy contained no such restriction, provided for adequate breaks and
10 argued that witness testimony would demonstrate that in practice, no restriction on rest breaks were
11 ever enforced. Defendants also contended individualized inquiries will abound as to why individual
12 employees may have failed to take appropriate meal periods or rest breaks. (Yaeckel decl. ¶ 29).

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

17 Based on counsels’ analysis, these claims were worth as little as \$0 (a defense verdict or denial
18 of class certification) or as much as \$146,475.00. (Yaeckel decl. ¶ 16).

19 **C. PLAINTIFF’S WAGE STATEMENT CLAIMS**

20 Plaintiff acknowledges that these claims are largely derivative, in that both the gross and net
21 wages could be found to be inaccurate, due to the above-referenced claims.

22 FPD argued that the failure to list gross and net wages are derivative of other claims that may
23 ultimately fail and as a result there is no “knowing and intentional failure” to list information, which
24 triggers liability under Labor Code §226(e). (Yaeckel decl. ¶ 28).

25 The California Supreme Court has recently held that the failure to pay meal and rest period
26 premiums *may* give rise to a claim for inaccurate wage statements (or waiting time penalties).
27 However, such derivative liability is not automatic and the Plaintiff still must show a “knowing and
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1 intentional” or “wilful” failure to comply with the Labor Code. See *Naranjo v. Spectrum Security*
2 *Services* (2022) 2022 Cal. LEXIS 2878. Defendants (as with the underlying meal and rest period
3 claims) maintained individualized inquires would abound as to why breaks were missed and whether
4 meal and rest period premiums should have been paid, requiring individualized inquiries that would
5 preclude class certification and make any PAGA claims unmanageable. (Yaeckel decl. ¶ 28.)

6 Based on counsels’ analysis, this claim was worth as little as \$0 (a defense verdict or denial
7 of class certification) or as much as \$47,775.00. (Yaeckel decl. ¶ 18).

8 **D. PLAINTIFF’S REIMBURSEMENT CLAIMS**

9 Plaintiff contended that FPD violated Labor Code section 2802 by failing to reimburse its
10 employees for certain costs, including cellular phone costs. FPD countered that it has a policy for
11 expense reimbursements in its employee handbook. Full Package Delivery further contended that Mr.
12 Xola’s (and others’) position did not require the use of a personal cell phone. (Yaeckel decl. ¶ 29).

13 Based on counsels’ analysis, this claim was worth as little as \$0 (a defense verdict or denial
14 of class certification) or as much as \$2,880. (Yaeckel decl. ¶ 16).

15 **E. OTHER “DERIVATIVE” CLAIMS (PAGA, LABOR CODE SECTION 203)**

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

18 The parties agreed to allocate \$25,000 to the PAGA claims, which is 8.7% of the total
19 settlement. This PAGA allocation is in the range routinely approved by California Courts. *See Garcia*
20 *v. Gordon Trucking, Inc.* (E.D. Cal., Oct. 31, 2012, No. 1:10-CV-0324 AWISKO) 2012 WL 5364575,
21 at *7 (approving \$10,000 PAGA penalty for a California class with a \$3.7 million gross settlement
22 payment); *Syed v. M-I, L.L.C.* (E.D. Cal., Feb. 22, 2017, No. 112CV01718DADMJS) 2017 WL
23 714367, at *13 (approving 2.53% of the estimated \$3.95 million Net Settlement Amount allocated to
24 the California class); *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No.
25 15-CV-02198-EMC) 2016 WL 5907869 (approving allocation of \$20,000 to the PAGA claim (**0.15%**
26 of its total value of \$12,952,000) as reasonable in the context of the settlement as a whole); *In re Uber*
27 *FCRA Litigation* (N.D. Cal., June 29, 2017, No. 14-CV-05200-EMC) 2017 WL 2806698 (approving
28

1 a settlement agreement of \$7.5 million, where the amount allocated to the PAGA claims was only
2 \$7,500 – .01% of the total settlement amount).

3 Based on Class Counsel's analysis, the PAGA and Labor Code § 203 claims were worth as little
4 as \$0 (a PAGA defense verdict or denial of certification of the § 203 claim) or as much as \$441,000.00
5 and \$1,036,800.00 respectively. (Yaeckel decl. ¶ 16).

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

7 Plaintiff concedes he would be highly unlikely to ever be awarded an amount approaching the
8 maximum damages set forth above. To wit, the majority of the recovery would be "derivative"
9 penalties under PAGA, Labor Code § 203 and Labor Code § 226. The Court would have great
10 discretion to mitigate any penalties awarded. *Thurman v. Bayshore Transit Management, Inc.* (2012)
11 203 Cal.App.4th 1112, 1135 (disapproved on other grounds).

12 In a recent trial involving Class Counsel in this case, the Court found liability, but then reduced
13 the PAGA penalties by 90%, from \$50 per violation down to \$5 a violation. See *Carrington v.*
14 *Starbucks Corp.* (2018) 30 Cal.App.5th 504; See accord *Fleming v. Covidien, Inc.*, No.
15 ED-CV-10-1487-RGK(OPx), 2011 WL 7563047 at *4 (C.D. Cal. Aug. 12, 2011) (reducing PAGA
16 penalties by over 82%, in part because employer was "not aware" of violations). And in *Carrington*,
17 the Trial Court declined to award penalties under Labor Code §§ 203 and 226, noting that other trial
18 courts have declined to "stack" (impose multiple) penalties based on the same underlying Labor Code
19 violation. See *Ruelas v. Costco Wholesale Corporation* (N.D. Cal. 2014) 67 F.Supp.3d 1137.

20 Class Counsel believes a mitigation of the damages and potential PAGA penalties would be
21 warranted here. As in the *Carrington* case, there was evidence that Full Package Delivery attempted
22 to provide meal and rest periods in practice, and the written policies contained no facially
23 non-compliant terms. Given this, it is likely that some of the violations by Full Package Delivery were
24 not "willful." Finally, given the defenses raised by Defendants, there was a significant risk that many
25 of the claims would not have been certified or, if they were, certification could not have been
26 maintained through trial and appeal.

27 The Parties agree the failure to pay "former employees" under § 203 is derivative of the other
28

1 claims. As Full Package Delivery asserts a "good faith dispute" for withholding any unpaid wages,
2 it would be difficult to establish any liability for a "willful" failure to pay wages owed.

3 Based on the above, it is possible that PAGA penalties could be reduced to approximately \$5
4 per violation and the Court would find no basis for imposing Labor Code §§ 203 or 226 penalties.
5 Given those risks, the penalties were discounted by 75 %. If this occurred, the average class member's
6 pre-tax share of a realistic best case recovery would be \$1,327.54. (Yaeckel decl. ¶ 23).

7 Accordingly, Class Counsel submits the **\$453.22** average recovery secured via this Settlement,
8 is a reasonable compromise and is in the best interests of the Class given all the risks of continued
9 litigation. (Yaeckel decl. ¶¶ 23-30).

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

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

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

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

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

27 The numerosity requirement is met if the class is so large that joinder of all members would
28

1 be impracticable. *In re Tobacco II Cases* (2009) 46 Cal. 4th 298, 318. Here, Defendants' records
2 show that approximately **288 class members** worked for the company during the limitations period
3 as of October 26, 2022. (Yaeckel decl. ¶ 31). Joinder of all Class members would be impracticable.

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

5 The commonality requirement is met if there are questions of law and fact common to the class.
6 *See Hanlon, supra*, 150 F.3d at 1019.

7 For purposes of the Settlement only, the parties agree the claims of Class Members all involve
8 the same questions of law and fact. (Yaeckel decl. at ¶ 32). Namely, all class members were subject
9 to the same employment policies and practices of Defendants. (*Id.*) The common question exists as
10 to whether the policies and practices Class Members were subjected to are illegal. Under these
11 circumstances, the commonality requirement is satisfied. *See Hanlon, supra*, 150 F.3d at 1019-20.

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

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

16 Here, there are no such adverse interests. Plaintiff has the same claims that are substantially
17 the same as the other Class Members. (Yaeckel decl. ¶ 33). Factual differences may exist between the
18 class representatives and the Class, so long as the claims arise from the same events or course of
19 conduct and are based on the same legal theories. *See Hanlon*, 150 F.3d at 1020; see also 1 *Newberg*
20 § 53.13 at 3-76-77 ("When it is alleged that the same unlawful conduct was directed at or affected both
21 the named plaintiff and the class sought to be represented, the typicality requirement is usually met
22 irrespective of varying fact patterns which under lie individual claims.") Thus, the typicality
23 requirement is also satisfied.

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

25 The adequacy of representation component of the community of interest requirement for class
26 certification "comes into play when the party opposing certification brings forth evidence indicating
27 widespread antagonism to the class suit." *Capitol People First v. Dep't of Develop. Servs.* (2007) 155
28

1 Cal. App. 4th 676, 696-97. The adequacy inquiry “serves to uncover conflicts of interest between
2 named parties and the class they seek to represent.” *Id.* To assure “adequate” representation, the “class
3 representative’s [...] claim must not be inconsistent with the claims of other members of the class.” *Id.*

4 Here, no such “inconsistencies” exist. The Plaintiff will be compensated based on the same
5 weeks worked formula as all other members of the Class. (Yaeckel decl. ¶ 33).

6 Additionally, any Class Member who wishes to “opt out” of the Settlement may do so and
7 retain all of their individual rights. (Yaeckel decl. ¶ 34). There is therefore no conflict of interest
8 between the Class Representatives and the Class Members. (*Id.*) Thus, at least for settlement purposes,
9 the adequacy prong is met. (*Id.*)

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

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

15 The proposed class in this case is sufficiently cohesive because, for purposes of the Settlement
16 only, the parties have stipulated that all class certification elements are met. (**Exhibit A** at ¶ 37).
17 Plaintiff contends all members of the Class worked under the same conditions and experienced the
18 same policies and practices of Defendant. Thus, the Class is sufficiently cohesive.

19 Further, it would be preferable to resolve all of the Class Members’ claims by means of a class-
20 wide settlement than to require each Class Member to litigate individual claims. (Yaeckel decl. ¶ 35).

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

22 The trial court has broad discretion to determine whether a class action settlement is fair and
23 reasonable. *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 723. Fairness is presumed where
24 (1) the settlement is reached through arm’s-length bargaining; (2) investigation and discovery are
25 sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar
26 litigation; and (4) the percentage of objectors is small. *Chaves v. Netflix, Inc.* (2008) 162 Cal.App.4th
27 43, 52; *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802. But, even where it appears the
28 settlement is fair, the court must still determine on the record before it whether the settlement should

1 be approved after considering “the strengths and weaknesses of the claims and risks of the particular
2 litigation.” *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129. The courts will
3 consider: (i) the strength of the plaintiff’s case; (ii) the risks, expense, complexity and likely duration
4 of further litigation; (iii) the risk of maintaining class action status throughout the trial; (iv) the amount
5 offered in settlement; (v) the extent of discovery completed; (vi) the stage of the proceedings; (vii) the
6 experience and views of counsel; (viii) the presence of a governmental participant; and (ix) any
7 reaction of putative class members to the proposed settlement. *Dunk*, 48 Cal.App.4th, at 1800-1801;
8 *In re Microsoft I-V Cases*, 135 Cal.App.4th, at 723.

9 When evaluating these factors, the court “must stop short of the detailed and thorough
10 investigation that it would undertake if it were actually trying the case,” but nonetheless it “must
11 eschew any rubber stamp approval in favor of an independent evaluation.” *Kullar*, 168 Cal.App.4th,
12 at 130. Ultimately, the court approves the proposed class action settlement when the settlement is fair
13 and falls “within the range of reasonableness.” *Hernandez v. Vitamin Shoppe Indus., Inc.* (2009) 174
14 Cal.App.4th 1441, 1446.

15 **A. FAIRNESS OF THE SETTLEMENT**

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

20 The proposed settlement in this action meets these criteria, and merits preliminary approval.
21 As discussed above, the parties only entered into the Agreement after engaging in a full day of
22 mediation with an experienced mediator who routinely handles “wage and hour” class action litigation.
23 (Yaeckel Decl. ¶ 8). The mediation was preceded by discovery, investigation of claims at issue,
24 interviews of Class Members, disclosure and review of documents detailing company-wide policies
25 and practices, informal information exchanges for mediation purposes, and ongoing discussions about
26 the merits between the parties’ counsel during the span of the litigation. (Yaeckel Decl. ¶¶ 3-8).
27 Thereafter, the parties memorialized the details of this Settlement via the Agreement. (**Ex. A**).
28

When negotiating the Settlement, both sides took into account the strengths and weaknesses
Memorandum of Points and Authorities

1 of their opponent's positions as pointed out by Scott Markus, the data available to evaluate liability
2 and damages, the lack of data or evidence on certain issues, and the substantial and evolving law
3 applicable to the merits of the claims. The Agreement was only agreed to after extensive arms-length
4 negotiations resulting in a unique compromise that permits all parties to move forward and bring this
5 action to close. Despite a mutual desire to resolve this action, the negotiations remained at all times
6 adversarial. (Yaeckel Decl. ¶ 36).

7 As set forth below in section H, *infra.*, counsel for both parties have extensive experience in
8 litigating wage and hour class action lawsuits. Based on this experience, Class Counsel has determined
9 that the settlement is fair, adequate, and reasonable. (Yaeckel decl. ¶ 30).

10 **B. STRENGTH OF PLAINTIFFS' CASE**

11 The most important factor courts consider when evaluating the fairness of the class action
12 settlement is the strength of the plaintiffs' case balanced against the amount offered in settlement.
13 *Kullar*, 168 Cal.App.4th, at 130.

14 All of Plaintiff's claims – individual, PAGA, and class claims – presented hurdles including
15 obtaining class certification, in addition to a substantial risk of a defense verdict by way of summary
16 judgment motion or at trial. (Yaeckel Decl. ¶¶ 24-29).

17 The exchange of mediation briefs, the assistance of an experienced “wage and hour” mediator,
18 and the parties' ongoing negotiations all helped the parties realize the strengths and weaknesses of
19 their case, as well as the risks and expenses of continuing litigation.

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

25 **C. THE RISK, EXPENSE, COMPLEXITY, AND LIKELY DURATION OF FURTHER** 26 **LITIGATION**

27 Plaintiff's Counsel's effectiveness in prosecuting this case has translated into tangible monetary
28 and non-monetary benefits for the Settlement Class Members in the following respects: (1) a

1 guaranteed favorable result; (2) guaranteed monetary recovery over a reasonably short period of time,
2 as opposed to possibly waiting additional years for a potentially worse result; and (3) significant
3 savings in attorneys' fees and costs, which would have increased had the case progressed through trial
4 and possible appeals. (Yaeckel decl. ¶ 37).

5 Without entering into the Agreement, there existed a significant chance that Defendants would
6 prevail on the merits of some or all claims and that Class Members would receive nothing. Through
7 the Agreement, participating Class Members receive guaranteed cash, and this action has also been
8 the catalyst for programmatic relief. (Yaeckel decl. ¶ 38).

9 If the litigation were to proceed in lieu of settlement, additional and substantial attorneys fees
10 and costs, expert witnesses fees would quickly accumulate. Given the numerous claims being litigated,
11 the parties may be required to hire multiple experts each (as many as 8 total). This would result in not
12 only the production of eight expert reports, but eight depositions as well. And, based on previous
13 discussions between counsel regarding the remaining claims (including the PAGA claims), Plaintiff
14 anticipated at least one motion to compel, a motion for class certification and two dueling motions for
15 summary judgment / adjudication (one from each side). (Yaeckel decl. ¶ 39).

16 Importantly, even after engaging in all of the potential continued and protracted litigation set
17 forth above, the putative class would continue to have no guarantee of success on any of the claims
18 advanced in this case. Thus, the parties and their counsel believe in good faith that the proposed
19 resolution is a fair, reasonable, and adequate compromise. (Yaeckel decl. ¶ 40).

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

21 Plaintiff had not filed a Motion for Class Certification at the time settlement was reached.
22 (Yaeckel decl. ¶ 41). Defendants presented multiple different defenses to certification during mediation
23 and throughout litigation. Even assuming Plaintiff did obtain class certification of the claims, each
24 claim is subject to substantial risk of a Defense verdict at trial. (*Id.*)

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

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

2 After deduction from the total “Settlement Amount” of the projected costs of administration,
3 proposed class representative service awards, potential attorney fees and costs, the “Net Settlement
4 Amount (“NSA”) will be distributed to all Class Members who do not file a request for exclusion.
5 Participating Class Members will receive their share of the NSA based on the total amount of time they
6 worked during the Class and PAGA Period. (**Exhibit A**, ¶ 49).

7 Based on the current proposed figures, each Class Member will receive an average of **\$453.22**
8 although the actual amount will vary based on the amount of pay periods s employed. The Class Notice
9 will list each individual class member’s actual share. (See **Ex. B.**) Plaintiffs’ counsel maintains this
10 recovery was significant in light of the circumstances of the case. (Yaeckel Decl. ¶30).

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

12 Plaintiff propounded written discovery devices on Defendants, including requests for
13 admission, special interrogatories, requests for production of documents, and general and employment
14 form interrogatories. (Yaeckel Decl. ¶ 4). Through these requests, Plaintiffs sought, among other
15 information and documents, the identities of putative class members, Defendants’ compensation
16 policies, meal and rest period policies, employee handbooks, wage statements, time records, job
17 descriptions, and reimbursement policies. *Id.*

18 Defendants provided detailed substantive responses detailing all relevant employment policies,
19 in addition to producing thousands of pages of documents. The document production also included a
20 large sampling of other putative class members time and wage records. (Yaeckel Decl. ¶¶ 4-6). In total
21 it appears there were at least 2 separate sets of written discovery exchanged between the parties.
22 (Yaeckel Decl. ¶ 5). Plaintiff’s counsel has also interviewed several Class Members in the course of
23 investigating and litigating this matter. (Yaeckel decl. ¶ 42). Counsel has also reviewed hundreds of
24 pages of documents produced by Defendants, Plaintiffs, and Class Members. (*Id.*)

25 This information, along with documents and information obtained through formal discovery
26 and from Class Members, allowed Plaintiffs’ counsel to prepare a detailed Mediation Brief. (*Id.*) The
27 Brief was provided to opposing counsel and contained a breakdown of potential damages based on all
28

1 of the information obtained from all Parties. (*Id.*) FPD also provided a detailed mediation brief,
2 outlining its defenses to both class certification and liability. (*Id.*)

3 Thus, sufficient discovery, both formal and informal, has been conducted to allow the parties
4 to participate in an informed, arms-length negotiation process.

5 **G. THE STAGE OF THE PROCEEDINGS**

6 Plaintiff already had possession of all written discovery needed for a class certification motion.
7 Additional depositions would have followed and then a motion for class certification would have been
8 filed. Depending on that motion, Plaintiff may have lost his ability to negotiate a class-wide or
9 representative settlement agreement on certain issues. Alternatively, Defendants stood to lose a key
10 negotiating tool in the event the Motions were decided in Plaintiff's favor. Therefore, the parties
11 achieved a settlement agreement at a point when neither side had a stated advantage in the litigation.

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

13 Class Counsel has considerable experience in wage and hour and class action litigation.
14 William Sullivan has over 28 years of experience, 27 years of which has been devoted to both
15 prosecuting and defending class action litigation. Mr. Yaeckel has over 11 years of experience in class
16 action litigation. (Yaeckel Decl. ¶ 43).

17 Plaintiff's counsel considers the Agreement to represent a fair, adequate and reasonable
18 settlement that is well within the accepted range of recoveries for similar cases. Counsel further
19 believes the Agreement is in the best interests of the Settlement Class Members. (Yaeckel Decl. ¶ 44).

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

21 Although the State is not directly involved in this action, Plaintiff "stands in the shoes" of the
22 Labor and Workforce Development Agency ("LWDA") by bringing his PAGA action. Consideration
23 has been made to compensate to Labor Workforce Development Agency ("LWDA") in the amount
24 of \$18,750, even though the LWDA declined to prosecute the claims itself. (*See* Exhibit "A," at ¶ 21
25 and ¶ 45). To confirm, 75% of the total allocation of \$25,000 amount, or **\$18,750.00**, is being paid
26 to the LWDA, and 25%, or **\$6,250.00**, being distributed amongst the class members. (*Id.*). Counsel
27 for the parties believe this is a fair, reasonable, and adequate allocation. (Yaeckel Decl. ¶ 45).

28 ///

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

2 Prior to preliminary approval, what can be said of the reaction the class members is limited.
3 However, Plaintiff's counsel has spoken to some Class Members since the parties reached a proposed
4 settlement agreement, and all were in favor of the Settlement. (Yaeckel Decl. ¶ 48).

5 As explained in the Agreement, the Settlement Claims Administrator will send a Notice to the
6 Settlement Class Members. (See Exhibit A at ¶ 56). The negotiated Class Notice form is attached to
7 the declaration of Eric K. Yaeckel as **Exhibit B**.

8 The proposed Notice advises the Settlement Class Members of their anticipated recovery under
9 the Agreement, how to object, how to exclude themselves, the amount of fees and costs sought by
10 Class Counsel, the amount of enhancement payment sought on behalf of the Class Representative, and
11 the date of the final approval hearing. (See Exhibit "B.") Thus, the proposed Notice complies with the
12 notice requirements set forth in CRC Rule 3.766(d) and Rule 3.769(f).

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

14 Assuming the Settlement merits Preliminary Approval from the Court, Plaintiffs request that
15 the Court set a Final Approval Hearing in accordance with the chronology of events set forth in the
16 Agreement:

- 17 1. Within 15 calendar days of the Court's Preliminary Approval: Defendants will provide to the
18 Settlement Administrator the Class List including Class Members' names, last known
19 addresses, social security numbers, and the dates of employment during the Class Period;
20
- 21 2. Within 10 calendar days after receipt of the class list: Settlement Administrator will mail the
22 Notice Packets to Class Members;
- 23 3. 30 Calendar Days After Settlement Administrator has mailed the Notice Packets to Class
24 Members: Deadline for Class Members to postmark and submit all disputes of pay period
25 information, Requests for Exclusion, or to file written objections to the Settlement;
26
- 27 4. Approximately 7 Calendar days after the conclusion of the Notice and Response Period:
28 Plaintiffs will file a Motion for Final Approval; and

5. 16 Court days after the filing of the Final Approval motion: the Court can conduct the Final Approval Hearing.

Based on this timeline, Plaintiff requests a Final Approval hearing that is approximately 80 days (or the first available court date thereafter) after the date the Court enters an Order granting preliminary approval of the Settlement.

VI. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court issue an Order:

- i. Certifying the Proposed Settlement Class;
- ii. Preliminarily approving the Settlement as set forth in the Agreement; and
- iii. Approving the proposed Notice Packet to be directed to the Settlement Class.

Dated: January 18, 2023

SULLIVAN & YAECKEL LAW GROUP, APC

Eric Yarbush

Eric K. Yaeckel

Ryan T. Kuhn

Attorneys for Plaintiff KASHU XOLA, Individually,
and on behalf of other members of the general public
similarly situated