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

SHELTON HARPER, an individual, on
behalf of himself and others similarly
situated,

PLAINTIFF,

v.

SAN MAR PROPERTIES; and DOES 1 thru
50, inclusive,

DEFENDANTS.

CASE NO. 21CECG03563

[Case Assigned for All Purposes to Hon.
Jonathan Skiles in Dept. 403]

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

*[Filed concurrently with Declaration of Kelsey
M. Szamet and Proposed Order]*

Date: April 25, 2023

Time: 3:30 P.M.

Dept.: 403

Complaint Filed: December 2, 2021

FAC Filed: February 7, 2022

Trial Date: None Set

1 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on April 25, 2023 at 3:30 P.M. in Department 403 of the
3 above-entitled court, Plaintiff SHELTON HARPER will move the Court for an Order of
4 Preliminary Approval of the Class Action and PAGA Settlement Agreement (“Agreement”), a
5 copy of which is filed concurrently herewith.

6 By this Motion, Plaintiff will request that the Court:

7 (1) Grant preliminary approval of the fully-executed Class Action and PAGA
8 Settlement Agreement (“Settlement” or “Agreement”). A true and correct copy of the Agreement
9 is attached hereto as Exhibit “1”;

10 (2) Approve the proposed Notice to Class Members, a copy of which is attached to the
11 Agreement as Exhibit “A,” and direct that the Notice be sent to Class Members in the manner set
12 forth in the Agreement;

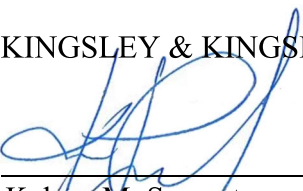
13 (3) Schedule a hearing on final approval of the proposed Settlement and Plaintiff’s
14 counsel’s application for an award of attorney’s fees and litigation costs at which Class Members
15 may be heard (“Final Approval Hearing”).

16 The Motion will be made on the grounds that the proposed Agreement is fair, adequate,
17 reasonable, and in the best interest of the Class and the Parties.

18 The Motion will be based on this Notice of Motion, the attached Memorandum of Points
19 and Authorities, the Declaration of Kelsey M. Szamet the Agreement and Release, all other papers
20 and records on file in this action, and on such oral and documentary evidence as may be presented
21 at the hearing on this Motion.

22 DATED: March 27, 2023

KINGSLEY & KINGSLEY, APC

23
24 By: 

25 Kelsey M. Szamet
26 Attorneys for Plaintiff SHELTON HARPER and the
27 Proposed Class
28

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff SHELTON HARPER (“Plaintiff”) submits this Memorandum of Points and
4 Authorities in support of Plaintiff’s Motion for Preliminary Approval of the Class Action and
5 PAGA Settlement Agreement reached between Plaintiff and Defendant San Mar Properties
6 (“Defendant”) (Plaintiff and Defendant together, the “Parties”).

7 By this Motion, Plaintiff requests that the Court:

8 (1) Grant preliminary approval of the fully-executed Class Action and PAGA
9 Settlement Agreement (“Settlement” or “Agreement”). A true and correct copy of the Agreement
10 is attached hereto as Exhibit “1”;

11 (2) Approve the proposed Notice to Class Members, a copy of which is attached to the
12 Agreement as Exhibit “A,” and direct that the Notice be sent to Class Members in the manner set
13 forth in the Agreement;

14 (3) Schedule a hearing on final approval of the proposed Settlement and Plaintiff’s
15 counsel’s application for an award of attorney’s fees and litigation costs at which Class Members
16 may be heard (“Final Approval Hearing”).

17 An objective evaluation of the Settlement confirms that the relief negotiated on the
18 Settlement Class’s behalf is fair, reasonable, and valuable. The Settlement was negotiated by the
19 Parties at arm’s length with helpful guidance from Judge Patrick O’Hara (Ret.), an experienced
20 and well-respected mediator, and the Settlement confers substantial benefits to Class Members.
21 This relief—averaging approximately \$\$1,114.05 per Class Member from the Net Settlement
22 Amount—is particularly impressive when viewed against the difficulties encountered by plaintiffs
23 pursuing wage and hour cases. Moreover, by settling now rather than proceeding to trial, Class
24 Members will not have to wait (possibly years) for relief, nor will they have to bear the risk of
25 class certification being denied or of Defendant prevailing at trial, or of Plaintiffs prevailing at trial
26 but losing on appeal.

27 As discussed below, the proposed Settlement satisfies all criteria for preliminary settlement
28 approval under California law and falls within the range of reasonableness. Accordingly, Plaintiffs

respectfully request that this Court grant preliminary approval of the Settlement Agreement.

II. FACTUAL BACKGROUND

A. Litigation Overview and Procedural History

On December 2, 2021, Plaintiff filed a Class Action Complaint seeking recovery for: (1) failure to pay wages and/or overtime under Labor Code sections 510, 1194, 1194.2, and 1199; (2) failure to provide meal breaks pursuant to Labor Code sections 512 and 226.7; (3) failure to provide rest breaks pursuant to Labor Code section 226.7; (4) failure to provide accurate itemized wage statements pursuant to Labor Code section 226(a); (5) waiting time penalties pursuant to Labor Code section 203; and, (6) violation of Business & Professions Code section 17200. (Declaration of Kelsey M. Szamet (“Szamet Decl.”) ¶4.) On December 2, 2021, Plaintiff sent a notice letter, pursuant to Labor Code § 2699, et seq., the Private Attorneys General Act (“PAGA”), to the Labor Workforce Development Agency (“LWDA”) regarding his intent to seek civil penalties for the Labor Code violations above. (Szamet Decl. ¶5.) Then, on February 7, 2022, Plaintiff filed a First Amended Class and Representative Action Complaint adding an additional cause of action for penalties pursuant to Labor Code section 2699, et seq. based upon the same alleged Labor Code violations at issue in the Complaint and an additional violation for failure to keep accurate meal period records. (the “Operative Complaint”). (Szamet Decl. ¶6.) Defendant denies the allegations in the Operative Complaint, denies any failure to comply with the laws identified in in the Operative Complaint and denies any and all liability for the causes of action alleged. (Szamet Decl. ¶7.)

B. The Discovery Process and Mediation

On May 24, 2022, the Parties participated in an all-day mediation presided over by the Hon. Patrick O’Hara (Ret.) which led to this Agreement to settle the Action. (Szamet Decl. ¶8.)

Prior to mediation, Plaintiff obtained, through informal discovery, pertinent documents and data for the Class and PAGA Members for mediation purposes only. Prior to mediation, Plaintiff obtained, through informal discovery, pertinent documents and data for the Class and PAGA Members so that the Parties could fully investigate the claims at issue and understand their strengths and weaknesses. (Szamet Decl. ¶9.) Plaintiff’s investigation was sufficient to satisfy the

1 criteria for court approval set forth in *Dunk v. Foot Locker Retail, Inc.* (1996) 48 Cal.App.4th
2 1794, 1801 and *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129-130
3 (“*Dunk/Kullar*”).

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 Plaintiff, and further contends
6 that, for any purpose other than settlement, Plaintiff’s claims are not appropriate for class or
7 representative action treatment. (Szamet Decl. ¶10.) 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 Counsel is of the
11 opinion that the Agreement with Defendant is fair, reasonable and adequate, and in the best interest
12 of the settlement classes in light of all known facts and circumstances, including the risk of
13 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 ¶11.) 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 **III. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED FOR** 20 **SETTLEMENT PURPOSES**

21 Originally creatures of equity, class actions have been statutorily embraced by the
22 Legislature whenever “the question [in a case] is one of a common or general interest, of many
23 persons, or when the parties are numerous, and it is impracticable to bring them all before the
24 court” (Code Civ. Proc. § 382; *see, e.g., Fireside Bank v. Sup. Court* (2007) 40 Cal.4th 1069,
25 1078.) They serve an important function by “establishing a technique whereby the claims of many
26 individuals can be resolved at the same time” thereby “eliminat[ing] the possibility of repetitious
27 litigation and provid[ing] small claimants with a method of obtaining redress.” (*Richmond v. Dart*
28 *Industries, Inc.* (1981) 29 Cal.3d 462, 469.) Public policy supports the use of class actions to

1 enforce wage and overtime laws for the benefit of workers. (*See Sav-on Drug Stores, Inc. v. Sup.*
2 *Court* (2004) 34 Cal.4th 319, 340.)

3 The certification question is “essentially a procedural one that does not ask whether an
4 action is legally or factually meritorious.” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439–
5 440.) A court ruling on a certification motion must determine “whether . . . the issues which may
6 be jointly tried, when compared with those requiring separate adjudication, are so numerous or
7 substantial that the maintenance of a class action would be advantageous to the judicial process
8 and to the litigants.” (*Collins v. Rocha* (1972) 7 Cal.3d 232, 238.)

9 The California Supreme Court has identified three certification requirements: (1) “the
10 existence of an ascertainable and sufficiently numerous class”; (2) “a well-defined community of
11 interest”; and, (3) “substantial benefits from certification that render proceeding as a class superior
12 to the alternatives.” (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021.)
13 The “community of interest” requirement includes three additional requirements: (1) common
14 questions of law or fact predominant over individual questions; (2) the class representatives have
15 claims or defenses typical of the class; and (3) the class representatives can adequately represent
16 the class. (*Ibid, citing Fireside Bank, supra*, 40 Cal.4th at 1089.)

17 Class certification for settlement purposes is proper in this case as the proposed Settlement
18 Class satisfies each of the requirements under Code of Civil Procedure § 382. Accordingly, this
19 Court should certify the putative settlement class.

20 A. Plaintiff Contends That The Proposed Class Is Ascertainable and Sufficiently
21 Numerous

22 1. Ascertainability

23 Putative class members are deemed “ascertainable” when they may be “readily identified
24 without unreasonable expense or time by reference to official records.” (*Rose v. City of Hayward*
25 (1981) 126 Cal.App.3d 926, 932.) In determining whether a class is ascertainable, a court
26 scrutinizes the class definition, the size of the class and the means of identifying class members.
27 (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.)

28 Here, Plaintiff maintains that the proposed settlement class is ascertainable for several

1 reasons: First, Defendant has agreed in the Settlement Agreement to provide a class list to the
2 Administrator containing the name, last known mailing address, last known telephone number,
3 Social Security number, and number of Covered Period Workweek and PAGA Pay Periods for all
4 putative class members after issuance of the preliminary approval order. (Szamet Decl. ¶12; Ex. 1
5 at ¶1.1.8.) Second, the settlement class consist of Defendant’s hourly employees, and Defendant
6 is required to keep records of its hourly employees’ names, home addresses, and Social Security
7 numbers. (See Wage Order 5-2001, subsection 7(c); Szamet Decl. ¶13.) Third and finally,
8 Defendant informally produced Plaintiff’s personnel file and pay statements, relevant policies,
9 sampling shift data, pay data, and wage statements for Class containing class member contact
10 information, which confirms that all Class may be readily identified based on Defendant’s records.
11 (Szamet Decl. ¶14.)

12 2. Numerosity

13 There is no set number that is required as a matter of law to maintain a class action. (See,
14 e.g., *Rose v. City of Hayward*, *supra*, 126 Cal.App.3d at p. 934.) Here, the proposed settlement
15 class contains, based upon information and belief, approximately 198 hourly non-exempt
16 employees in the State of California. (Ex. 1 at ¶4.1.) Therefore, Plaintiff is confident he will be
17 able to establish that the proposed settlement class is ascertainable and sufficiently numerous.
18 (Szamet Decl. ¶15.)

19 B. Plaintiff Contends That There Is a Well-Defined Community of Interest

20 1. There Are Predominant Questions of Law and Fact

21 In deciding whether questions of common or general interest predominate, a court must
22 determine whether “the issues which may be jointly tried, when compared with those requiring
23 separate adjudication, are so numerous or substantial that the maintenance of a class action would
24 be advantageous to the judicial process and to the litigants.” (*Collins v. Rocha* (1972) 7 Cal.3d
25 232, 238; *accord*, *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) As a
26 general matter, if the defendant’s liability can be determined by facts common to all members of
27 the class, a class will be certified even if the members must individually prove their damages.”
28 (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916, 107; *accord*, *Knapp v.*

1 *AT & T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 941.)

2 Here, Plaintiff argues that there are questions of law and fact common to the proposed
3 settlement class that predominate over any questions affecting only individual Class Members.
4 (Szamet Decl. ¶16.) These common questions include:

- 5 1) Whether Defendant failed to pay all wages and/or overtime compensation;
- 6 2) Whether Defendant failed to provide lawfully required meal periods and/or failed
7 to compensate employees one (1) hour's wages in lieu thereof;
- 8 3) Whether Defendant failed to provide lawfully required rest periods and/or failed to
9 compensate employees one (1) hour's wages in lieu thereof;
- 10 4) Whether Defendant failed to provide accurate itemized wage statements;
- 11 5) Whether Defendant failed to pay compensation due and owing upon termination
12 of employment;
- 13 6) Whether Defendant engaged in unfair competition; and,
- 14 7) Whether Defendant violated § 2699, et seq. of the Labor Code by engaging in the
15 acts previously alleged.

16 (Szamet Decl. ¶17.)

17 Plaintiff's challenge to Defendant's uniform policies and practices involves common
18 factual and legal issues that are amenable to class treatment. (Szamet Decl. ¶18.) As the California
19 Supreme Court has emphasized, "[c]aims alleging that a uniform policy consistently applied to a
20 group of employees is in violation of the wage and hour laws are of the sort routinely, and properly,
21 found suitable for class treatment." (*Brinker, supra*, 53 Cal.4th at 1033; *see also Bradley v.*
22 *Networkers International, LLC* (2012) 211 Cal.App.4th 1129, 1141-1146.) Moreover, a class of
23 similarly situated employees may be certified based on common questions of fact or law, even if
24 each employee has to establish the amount of his or her damages. (*See Bell v. Farmers Ins. Exch.*
25 (2004) 115 Cal.App.4th 715, 741; *Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th
26 at 340.)

27 Here, Plaintiff maintains that the proposed Class suffered the same alleged injuries, in the
28 same manner: (1) Class Members were not properly paid all wages/overtime; (2) Class Members

1 did not receive their meal and rest periods as required; (3) Class Members were not provided
2 accurate itemized wage statements; and (4) Class Members were not paid all wages owed upon
3 termination/resignation. (Szamet Decl. ¶19.) Plaintiff alleges that Class worked in the same
4 capacity for the same employer and were subject to the same employment policies and practices,
5 the questions of fact and claims regarding the status of these employees are the same for each
6 member of the settlement class. Accordingly, for purposes of settlement, certification for
7 settlement purposes is appropriate. (Szamet Decl. ¶20.)

8 2. The Class Representative Has Claims Typical of the Proposed Class

9 A putative class representative's claim must be "typical," but not necessarily identical, to
10 the claims of other class members. The test of typicality "is whether other members have the same
11 or similar injury, whether the action is based on conduct which is not unique to the Class
12 Representatives, and whether other class members have been injured by the same course of
13 conduct." (*Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502.) Thus, it is sufficient
14 that the representative is similarly situated so that he or she will have the motive to litigate on
15 behalf of all class members. (*Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502.) Thus,
16 it is sufficient that the representative is similarly situated so that he or she will have the motive to
17 litigate on behalf of all class members. (*See, e.g., Classen v. Weller* (1983) 145 Cal.App.3d 27,
18 45.) It is not necessary that the class representative have personally incurred all of the damages
19 suffered by each of the other class members. (*Wershba v. Apple Computer, Inc.* (2001) 91
20 Cal.App.4th 224, 238.)

21 Plaintiff worked as an "hourly employee" for Defendant as a property manager in Fresno,
22 California. (Szamet Decl. ¶21.) Plaintiff alleges that he: (1) worked without being paid all wages
23 and/or overtime; (2) worked without being provided meal/rest periods as required by law; (3)
24 worked without being provided accurate itemized wage statements; and (4) worked without being
25 paid all wages due upon separation. He also alleges that he experienced derivative claims for
26 unfair business competition (B&P Code §17200) and Labor Code §2699, et seq. (Szamet Decl.
27 ¶22.) Plaintiff also contends that his claims are typical of those of the settlement class. (Szamet
28 Decl. ¶23.)

3. Plaintiff Contends That As The Class Representative He Has and Will
Fairly Represent the Interests of the Class

A putative class representative must show that he can adequately represent the class. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.App.4th 1096, 1104.) The representative, through qualified counsel, must be capable of “vigorously and tenaciously” protecting the interests of the class members. (*Simons v. Horowitz* (1984) 151 Cal.App.3d 834, 846.)

Plaintiff believes that he is capable of fairly representing and adequately protecting the interests of the proposed Class. (Szamet Decl. ¶24.) Plaintiff’s interests in this litigation are coextensive with the interests of the proposed Class. The members of the proposed settlement class all worked for Defendant during the relevant time period and incurred the same type of alleged damages with regard to Defendant’s alleged violations of the law. (Szamet Decl. ¶25.) Moreover, Plaintiff has retained qualified Counsel who is experienced in prosecuting wage and hour class actions and agreed to serve as Class Representative to bring these claims not just on his own behalf, but on behalf of all Class Members. (Szamet Decl. ¶26.) This demonstrates his commitment to bringing about the best possible results for the benefit of the proposed Settlement Class. (Szamet Decl. ¶27.) Plaintiff has provided his Counsel with all necessary and pertinent information. (Szamet Decl. ¶28.) He has been an active participant in the litigation including having frequent contact with Class Counsel and other Class Members, working closely with Class Counsel to develop the theories of liability, and providing his Counsel with all necessary and pertinent information. (Szamet Decl. ¶29.) He also made himself available for the full-day mediation in this matter and was informed of and involved in all of the Settlement negotiations. (Szamet Decl. ¶30.) Therefore, Plaintiff believes that he has and will continue to adequately represent the proposed Class. (Szamet Decl. ¶31.) Plaintiff has provided his Counsel with all necessary and pertinent information. (Szamet Decl. ¶32.)

C. Plaintiff Contends That The Class Action Vehicle Is Superior to the Alternatives

“The ultimate question in every case of this type is whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process

1 and to the litigants.” (*Lockheed Martin, supra*, 29 Cal.App.4th at 1104–1105.) The California
2 Supreme Court has directed the courts to utilize the class action device to fashion “an effective
3 and inclusive group remedy.” (*Richmond v. Dart Indus., Inc.* (1981) 29 Cal.3d 462, 469.)
4 Normally, in making its class certification decision, the Court must determine that a class action
5 would be superior to alternate means for a fair and efficient adjudication. If the causes of action
6 may be adjudicated in a single proceeding, thereby saving time, reducing waste, and limiting
7 duplication of effort, class certification is superior to individual litigation. (*See, e.g., Vasquez v.*
8 *Superior Court* (1971) 4 Cal.3d 800, 816.) Since the Parties agreed to a settlement in principal
9 and now seek Court approval of that Settlement, Plaintiff submits that there is not as much need
10 as there would be in an ordinary motion for class certification for the Court to determine that the
11 case can be manageably tried.

12 Plaintiff maintains that class treatment would be the superior method of managing this case.
13 A class action is superior to individual litigation “when numerous parties suffer injury of
14 insufficient size to warrant individual action and when denial of class relief would result in unjust
15 advantage to the wrongdoer.” (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.) In
16 cases such as this, where individual damages may be small, the class action device is the most
17 feasible method of recovery. (*See, e.g. Lockheed Martin, supra*, 29 Cal.4th at 1131.) In this regard,
18 the superiority of class treatment is evident here because individual pursuit of class members’
19 claims may not be economically viable. (Szamet Decl. ¶33.) The only alternative to certification
20 would be to force over 198 employees to join this action, file individual, uniform actions, or
21 abandon their legal rights altogether. (Szamet Decl. ¶34.) Plaintiff maintains that this economic
22 reality would result in a windfall for Defendant if this case were not certified. (Szamet Decl. ¶35.)

23 **IV. THE PROPOSED SETTLEMENT**

24 **A. The Settlement Class**

25 For purposes of Settlement, the Settlement Class is defined as: “all non-exempt employees
26 who are employed or have been employed by SAN MAR PROPERTIES, INC., in the State of
27 California who worked one or more pay periods during the Covered Period.” (“Class”) (Szamet
28 Decl. ¶36; Agreement, Ex. 1 at ¶1.1.5.)

1 The Covered Period is December 2, 2017 through May 31, 2022. (Szamet Decl. ¶37; Ex.
2 1 at ¶1.1.12.) Based on documents and other information produced by Defendant, there are 198
3 Class Members and 6,526 total Workweeks during the Covered Period. (Szamet Decl. ¶38; Ex. 1
4 at ¶9.)

5 B. The Aggrieved Employees

6 For purposes of the Agreement, the Aggrieved Employees are defined as: “all non-exempt
7 employees who are employed or have been employed by SAN MAR PROPERTIES, INC., in the
8 State of California who worked one or more pay periods during the PAGA Period.” (“Aggrieved
9 Employees” or “PAGA Members”) (Szamet Decl. ¶39; Settlement, Ex. 1 at ¶1.1.4.)

10 The PAGA Period is December 2, 2020 through May 31, 2022. Szamet Decl. ¶40; Ex. 1
11 at ¶1.1.31.) Based on documents and other information produced by Defendant, there are
12 approximately 116 PAGA Members. (Szamet Decl. ¶41, Ex. 1 at ¶9)

13 C. Gross Settlement Amount

14 As detailed fully in the Agreement, the Settlement provides for Defendant to pay a Gross
15 Settlement Amount of \$325,000.00, which includes the sum of the Individual Class Payments, the
16 Class Representative service award, the Class Counsel Award, PAGA Payment, and the Settlement
17 Administration Costs. (Szamet Decl. ¶42; Ex. 1 at ¶1.1.22.)

18 The Net Settlement Amount is the Gross Settlement Amount, less Class Counsel Award,
19 Class Representative Enhancement, PAGA Payment, and Settlement Administration Costs.
20 (Szamet Decl. ¶43; Ex. A at ¶3.3.)

21 Plaintiff estimates the amount of the Net Settlement Amount as follows:

22	Gross Settlement Amount:	\$	325,000.00
23	Less Class Representative Enhancement:	\$	5,000.00
24	Less Class Counsel’s Fees:	\$	108,333.33
25	Less Class Counsel’s Costs:	\$	10,000.00
26	Less PAGA Payment:	\$	10,000.00
			<i>(\$7,500.00 to the LWDA and</i>
			<i>\$2,500.00 to PAGA Members)</i>
	<u>Less Administrator Costs:</u>	\$	15,000.00
27	Anticipated Net Settlement Amount	\$	220,583.33

28 (Ex. 1 at ¶3.)

1 D. Individual Settlement Payments

2 The amount of each Participating Class Member's Individual Class Payment is an
3 individualized amount that is based on the number of compensable workweeks worked by the
4 Participating Class Member during the Covered Period. (Ex. 1 at ¶1.1.5; *see also* Ex. A to the
5 Agreement at [Class Notice].) This individual amount shall be determined according to the
6 settlement payment formula set forth in the Agreement. (*See* Ex. 1 at ¶3.2.4; *Id.* at Ex. A to the
7 Agreement [Class Notice].) The Agreement provides for a specific and detailed Workweeks
8 dispute process. (*See* Ex. 1 at ¶1.1.23.) The average Individual Class Payment will be \$1,114.05
9 (\$220,583.33/198 Class Members). (Szamet Decl. ¶44.)

10 The individual PAGA settlement amount of each PAGA Member will be paid from the
11 twenty-five percent (25%) of the PAGA Payment to be paid to aggrieved employees (or \$2,500.00)
12 and is an individualized amount that is based on the number of Workweeks worked by the
13 Aggrieved Employee during the PAGA Period. (*See* Ex. 1 at ¶3.2.5.)

14 E. Process for Administering Settlement after Preliminary Approval

15 The Parties have agreed to use a reputable third-party claims administrator, ILYM Group,
16 Inc., to administer the Agreement. (Ex. 1 at ¶1.1.2.). The detailed Notice Procedure established by
17 the Agreement will efficiently and accurately ensure that Notice is provided to the Class. (Ex. 1
18 at ¶8.4.)

19 F. Process for Class Members to Respond to Class Notice

20 As detailed in the Agreement, Class Members will have an opportunity to request exclusion
21 from the Agreement (i.e. opt out) and to object to the Agreement at the Final Approval Hearing.
22 (*See* Ex. 1 at ¶¶8.5; 8.7; *see also* Ex. A to the Agreement at pp. 2-5; 7-8 [Class Notice].) The
23 Agreement and Class Notice contain details about the process to request exclusion or object. (*Id.*)

24 PAGA Members will not be provided with the opportunity to opt out of the PAGA
25 Settlement. If the Court approves the PAGA Payment, the Claims Administrator will mail out
26 checks and the PAGA Letter, which shall explain the PAGA Payment, to the PAGA Members at
27 the same time the Settlement Class Members are mailed their Individual PAGA Payments.

28 ///

1 G. The Proposed Settlement Fully Resolves Plaintiff's and the Class' Claims

2 The Release by Participating Class Members Who Are Not Aggrieved Employees are
3 defined as: “any and all claims, debts, liabilities, demands, obligations, penalties, guarantees, costs,
4 expenses, attorney’s fees, damages, action or causes of action of whatever kind or nature, whether
5 known or unknown, contingent or accrued, that are alleged, or that reasonably could have arisen
6 out of the same facts alleged in the Action, including: (1) failure to pay wages and/or overtime
7 under Labor Code sections 510, 1194, 1194.2, and 1199; (2) failure to provide meal breaks
8 pursuant to Labor Code sections 512 and 226.7; (3) failure to provide rest breaks pursuant to Labor
9 Code section 226.7; (4) failure to provide accurate itemized wage statements pursuant to Labor
10 Code section 226(a);(5) waiting time penalties pursuant to Labor Code section 203; (6) violation
11 of Business & Professions Code section 17200; and (7) penalties pursuant to Labor Code section
12 2699. (collectively, the “Released Claims”). Except as set forth in Section 6.3 of the Settlement
13 Agreement, Participating Class Members do not release any other claims, including claims for
14 vested benefits, wrongful termination, violation of the Fair Employment and Housing Act,
15 unemployment insurance, disability, social security, workers’ compensation, or claims based on
16 facts occurring outside the Covered Period.” (Ex. 1 at ¶6.2.)

17 The Release by Non-Participating Class Members Who Are Aggrieved Employees is
18 defined as: any and “all claims for PAGA penalties that were alleged, or reasonably could have
19 been alleged, based on the PAGA Period facts stated in the Operative Complaint, the PAGA Notice
20 and ascertained in the course of the Action including, violations of Labor Code sections 201, 202,
21 203, 226(a), 226.7, 510, 512, 551, 1194, 1194.2, and 1199.” (Ex. 1 at ¶6.3.)

22 **V. ARGUMENT**

23 A. Plaintiff Requests Approval of This Class Action Settlement

24 California Rule of Court (“Rule”), Rule 3.769 requires litigants to obtain court approval of class
25 action settlements. Approval occurs in two steps: (1) an early “preliminary” review by the trial court; and
26 (2) a subsequent “final” review after notice of the settlement has been distributed to class members for
27 their comments and objections. Cal. R. Ct. 3.769(c)-(g); *Cellphone Termination Fee Cases*, 180 Cal.
28 App. 4th 1110, 1118 (2010) (the court first “preliminarily approves the settlement” and later “conducts a

1 final approval hearing to inquire into the fairness of the proposed settlement”). The motion for
2 preliminary approval must be accompanied by (1) the settlement agreement, (2) proposed notice to the
3 class, and (3) the proposed order. *Id.* at 3.769(c). The motion must also identify any agreement
4 concerning the payment of attorneys’ fees. *Id.* at 3.769(b).

5 If the trial court grants preliminary approval of a settlement, Rule 3.769(f) requires the court to (1)
6 schedule a final approval hearing and (2) approve the method by which the parties are to provide notice to
7 the class of the hearing and “an explanation of the proposed settlement.” The court must also approve a
8 procedure for class members to file objections to the settlement. *Id.* at 3.769(f). At the final approval
9 hearing, the court must conduct an inquiry into the fairness of the proposed settlement. *Id.* at 3.769(g).

10 Although Rule 3.769 does not provide detail as to the scope of review of the proposed settlement,
11 preliminary approval is warranted if the settlement falls within a “reasonable range.” *See North County*
12 *Contractor’s Assn., Inc. v. Touchstone Ins. Services*, 27 Cal. App. 4th 1085, 1089-90 (1994); Conte &
13 Newberg, *Newberg on Class Actions*, §§ 11.26 (4th ed. 2002) (“Newberg”).

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

21 The proposed settlement satisfies each of these factors. (Szamet Decl. ¶45.) Class Counsel
22 conducted extensive informal discovery before entering into meaningful settlement negotiations
23 in this matter. (*Id.* at Szamet Decl. ¶¶8-12.) This discovery permitted Class Counsel to fairly
24 evaluate the strength of the case and the risks associated with ongoing litigation. (Szamet Decl.
25 ¶46.) Class Counsel is experienced in handling wage and hour class actions and, after weighing
26 all of the following factors, supports this Agreement. (Szamet Decl. ¶47.)

27 ///

28 ///

1 1. The Strength of Plaintiff's Case

2 a) The Risks Associated with Minimum Wage/Overtime Claim

3 California employees are entitled to compensation for all hours worked, which means “the
4 time during which an employee is subject to the control of an employer, and includes all the time
5 the employee is suffered or permitted to work, whether or not required to do so.” (Title 8 Cal. Code
6 of Regs., § 11050(2)(K); see *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 845, as modified
7 on denial of reh’g (Aug. 29, 2018).) Time is compensable if an employee is “subject to the control
8 of an employer” even if not working, or if an employee “is suffered or permitted to work” even if
9 not “under the employer’s control, provided the employer has or should have knowledge of the
10 employee’s work.” (*Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038, 1046, reh'g denied (May 13, 2020)
11 (citations omitted.) An employer controls an employee if the employer directs an employee and
12 the employee is unable to use their time how they wish. (*Id.* at p. 1047.) Other factors courts may
13 consider include whether the activity is required, “the location of the activity, the degree of the
14 employer’s control, whether the activity primarily benefits the employee or employer, and whether
15 the activity is enforced through disciplinary measures.” (*Id.* at p. 1056; *Cf. Gibbs v. TWC*
16 *Administration, LLC* (S.D. Cal., Jan. 3, 2020, No. 17CV01513DMSAGS) 2020 WL 42768, at *9
17 (denying Defendant’s motion for summary judgment when plaintiff-employees conducted off-the
18 clock pre-shift activity in preparation to start work right when they clocked in).)

19 In *Troester*, employees spent four to ten minutes completing tasks to close up the store,
20 such as setting the alarm and locking the door. (*Troester*, 5 Cal.5th 829 at p. 843.) The Court held
21 that California law prohibits employers from requiring employees to work off the clock, even for
22 minutes, without compensation. (*Id.* at p. 848.) The Court explained:

23 An employer that requires its employees to work minutes off the clock on a
24 regular basis or as a regular feature of the job may not evade the obligation
25 to compensate the employee for that time by invoking the de minimis
26 doctrine. As the facts here demonstrate, a few extra minutes of work each
day can add up. . . . What Starbucks calls “de minimis” is not de minimis
at all to many ordinary people who work for hourly wages.

27 (*Id.* at p. 847.)

28 Additionally, California workers are statutorily entitled to overtime compensation, unless

1 they are properly classified as falling within one of the narrow exemption categories. Under
2 California law, “[a]ny work in excess of eight hours in one workday and any work in excess of 40
3 hours in any one workweek...shall be compensated at the rate of no less than one and one-half
4 times the regular rate of pay for an employee.” (Lab. Code, § 510, subd. (a).) Furthermore, “[a]ny
5 work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the
6 regular rate of pay for an employee.” (Lab. Code, § 510, subd. (a).)

7 Throughout the relevant period, Plaintiff maintains that he and other Class Members were
8 subject to the control of Defendant during their meal breaks, without being compensated for those
9 “hours worked.” (Szamet Decl. ¶48.) As such, Plaintiff contends he was working off the clock
10 during that time and is owed wages. (Szamet Decl. ¶49.) Plaintiff alleges that Defendant had
11 knowledge, as it was company policy for employees to clock out and continue performing their
12 work duties during that uncompensated time. (Szamet Decl. ¶50.)

13 First, Defendant vehemently denied this claim and argued that its labor policies prohibit off-the-
14 clock work, all meal periods were provided and Class Members were not working off the clock during
15 meal periods. (Szamet Decl. ¶51.) Second, Defendant argued that Plaintiff’s theory of liability would be
16 extremely difficult to prove on a classwide basis because the time records will show compliant meal
17 periods. (Szamet Decl. ¶52.) Defendant argued that this case would devolve into a series of mini-trials
18 wherein each Class Member would have to testify as to whether he or she clocked out, but actually worked
19 through their meal periods. (Szamet Decl. ¶53.) Of course, Defendant argued that this would defeat class
20 certification altogether. (Szamet Decl. ¶54.) *See Brinker*, 53 Cal. 4th at 1051-52 (holding that in the
21 absence of a uniform, companywide policy, proof of liability is individual); *Amey v. Cinemark USA Inc.*,
22 No. 13-CV-05669-WHO, 2015 WL 2251504, at *12 (N.D. Cal. May 13, 2015) (denying certification of
23 off-the-clock claim because plaintiffs’ work requirements depended on the manager); *Brewer v. Gen.*
24 *Nutrition Corp.*, No. 11-CV-3587 YGR, 2014 WL 5877695, at *12 (N.D. Cal. Nov. 12, 2014) (denying
25 certification based on policy requiring employees to finish closing duties within 30 minutes, because the
26 court would still be left with numerous individual issues); *Pryor v. Aerotek Scientific, LLC*, 278 F.R.D. 516,
27 532-33 (C.D. Cal. 2011) (denying certification of off-the-clock claim).

28 Plaintiff acknowledges that this can be a highly difficult type of claim to prove because there are

no time records to substantiate or evaluate the claim. (Szamet Decl. ¶55.) Instead, Defendant would argue that if there was any such issue of working off the clock during meal periods, it would necessitate speaking to each and every Settlement Class Member about their experiences day to day and whether any off the clock time was ever worked and if so, why it was worked. (Szamet Decl. ¶56.) This type of inquiry, Defendants would argue, makes its very difficult to establish liability based on common proof. (Szamet Decl. ¶57.) Based on this acute risk, Plaintiff believed it was appropriate to discount this claim for settlement purposes. (Szamet Decl. ¶58.)

b) The Risks Associated with the Meal Break Claim

California law requires employers to provide employees a duty-free, uninterrupted thirty (30) minute meal period when an employee works more than five (5) hours in a workday, and it must be provided within the first five (5) hours the employee works. Lab. Code 512; IWC Wage Order 5-2001, §11(A) and (C); *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004. Employers must also provide employees with a second duty-free, uninterrupted thirty (30) minute meal period when an employee works more than (10) hours in a workday, and it must be provided before the end of the 10th hour of work. *Ibid.* Meal periods can be waived, but only under the following circumstances: (1) if an employee's total work period in a day is over five (5) hours but no more than six (6) hours, the required meal period may be waived by mutual consent of the employer and employee, and (2) if an employee's total work period in a day is over ten (10) hours but no more than twelve (12) hours, the required second meal period may be waived by mutual consent of the employer and employee, but only if the first meal period was not waived. *Ibid.*

Employers covered by Industrial Welfare Commission ("IWC") Wage Order 5-2001 have an obligation to both (1) relieve their employees for at least one meal period for shifts over five hours (see above), and (2) to record having done so. If the employer fails to properly record a valid meal period, it is presumed that no meal period was provided. IWC Wage Order 5-2001, §7(A)(3) ("Meal periods . . . shall also be recorded"); *Brinker*, supra, 53 Cal.4th 1004, 1052-1053, citing §7(A)(3) ("If an employer's records show no meal period for a given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided").

1 Employers must pay employees an additional hour of wages at the employees’ regular rate
2 of pay for each missed or improper (e.g., less than 30 minutes, interrupted meal period, first meal
3 period provided after 5 hours, second meal period provided after 10 hours) meal period. Lab. Code
4 §226.7; IWC Wage Order 5-2001, §11(B) (“If an employer fails to provide an employee a meal
5 period in accordance with the applicable provisions of this order, the employer shall pay the
6 employee one (1) hour of pay at the employee’s regular rate of compensation for each workday
7 that the meal period is not provided”); *Brinker*, supra, 53 Cal.4th 1004.

8 Plaintiff contends that Defendant violated California’s meal break laws by not allowing
9 Plaintiff and other Class Members to take actual daily meal breaks. (Szamet Decl. ¶59.) Indeed,
10 Plaintiff further contends that due to the hectic nature of the job, Plaintiff was rarely able to ever
11 take a meal break. (*Id.*) Because Plaintiff and Class Members were required to complete calls and
12 other work-related duties throughout their shifts, they contend that they had no time to take lawful
13 uninterrupted meal periods if they were to complete their required assignments. (*Id.*) Plaintiff
14 alleges that if Plaintiff or Class Members ever failed to remain on-call, they would be subject to
15 potential discipline up to and including termination. (*Id.*) Thus, Plaintiff and Class Members argue
16 that they were routinely discouraged and prevented from taking uninterrupted meal periods in
17 order to complete their assignments and avoid the imposition of potential disciplinary measures.
18 (*Id.*) Plaintiff asserts that Defendant further violated California’s meal period laws by not paying
19 Plaintiff and Class Members an extra hour of wages for each missed or improper meal period.
20 (Szamet Decl. ¶60.)

21 In response, first and foremost, Defendant argued that Class Members were provided with legally
22 compliant meal periods. (Szamet Decl. ¶61.) As with the wage claim, Defendant argued that Plaintiff’s
23 theory of liability would be extremely difficult to prove on a classwide basis because the time records will
24 show compliant meal periods so Defendant would be entitled to inquire of each class member, on each day
25 whether or not they were provided with compliant meal periods. (Szamet Decl. ¶62.) Of course, Defendant
26 argued that such an inquiry would defeat class certification altogether. (Szamet Decl. ¶63.) In its defense,
27 Defendant would have argued that it has no obligation to “guarantee” or “ensure” that meal periods are
28 taken by all employees at all times. *Brinker Rest. Corp. v. Superior Ct.*, 53 Cal. 4th 1004, 1040 (2012)

(employers are “not obligated to police meal breaks and ensure no work thereafter is performed”). Rather, an employer satisfies (as Defendant would argue) its obligation to provide meal periods if “it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so.” *Id.* Defendant argued that there is no “basis in the wage order or statute” for the notion “that an employer must ensure that no work is done – i.e., prohibit work” during a meal period. *Id.* at 1038; *see also* *Murphy*, 40 Cal. 4th at 1104 (finding a violation occurs only if the employee is “forced to forgo his or her meal period”).

Defendant would have argued at trial that “to assert a meal break claim, the employee must show that he was **forced to forego** his meal breaks as opposed to merely showing that he did not take them.” *Nguyen v. Baxter Healthcare Corp.*, No. 8:10-CV-01436-CJC, 2011 WL 6018284, at *5 (C.D. Cal. Nov. 28, 2011) (emphasis in original); *see also* *Brinker*, 53 Cal. 4th at 1034; *Dailey v. Sears, Roebuck & Co.*, 214 Cal. App. 4th 974, 1000-02 (2013); *Gonzalez v. Officemax N. Am.*, No. CV 07-04839 JVS MLGX, 2012 WL 5473764, at *5 (C.D. Cal. Nov. 5, 2012). Thus, Defendant would have argued that courts reject certifying meal break claims where no common policy denies breaks on a class-wide basis. *See, e.g.*, *Purnell v. Sunrise Senior Living Mgmt., Inc.*, No. SA CV10-00897 JAK, 2012 WL 1951487, at *8 (C.D. Cal. Feb. 27, 2012); *Washington v. Joe’s Crab Shack*, 271 F.R.D. 629, 641 (N.D. Cal. 2010) (denying certification because “an individualized inquiry will be required to determine whether any employee failed to take a meal break because he/she was too busy”); *Salazar v. Avis Budget Grp., Inc.*, 251 F.R.D. 529, 533 (S.D. Cal. 2008); *Ordonez v. Radio Shack, Inc.*, No. CV 10-7060-CAS JCGX, 2013 WL 210223, at *8 (C.D. Cal. Jan. 17, 2013); *Gonzalez*, 2012WL 5473764, at *5 (holding that “[why] any particular employee missed any particular break requires, ineluctably, individualized fact finding”).

Plaintiff was confident that Defendant would attempt to gather testimonial evidence from class members indicating that the records were accurate and either they took compliant meal breaks as reflected in the records or were paid a meal period premium in lieu thereof. (Szamet Decl. ¶64.) Though Plaintiff does not believe this was the case, Plaintiff must acknowledge it poses risks for the Class. (Szamet Decl. ¶65.) There is risk as to both sides as to what declarations and depositions of class members might reveal. (Szamet Decl. ¶66.) Indeed, Plaintiff had to consider that Defendant could secure declarations from Class Members that all complaint breaks were

“provided”, but that Class Members chose to take late breaks or miss breaks on occasion. (Szamet Decl. ¶67.)

Taken together, Plaintiff acknowledged there was significant risk as to establishing liability on the meal period claim. (Szamet Decl. ¶68.) Considering this risk, Plaintiff believes it is fair and reasonable to discount the meal period claim for settlement purposes. (Szamet Decl. ¶69.)

c) The Risks Associated with the Rest Break Claim

Under IWC Wage Order No. 16, every employer shall authorize and permit all employees to take rest periods. Employees are entitled to a paid ten-minute rest break for every four hours worked, or major fraction thereof. (Cal. Code Regs., tit. 8, § 11160, subd. 11(A).)

The *Brinker* court clarified what steps an employer must take to make rest breaks available to its employees:

An employer is required to authorize and permit the amount of rest break time called for under the wage order for its industry. If it does not—if, for example, it adopts a uniform policy authorizing and permitting only one rest break for employees working a seven-hour shift when two are required—it *has violated the wage order and is liable*. No issue of waiver ever arises for a rest break that was required by law but never authorized; if a break is not authorized, an employee has no opportunity to decline to take it.

(*Ibid.*)

The California Supreme Court further refined requirements for rest periods, holding that employees must be relieved of all duty and employer control and free to leave the premises during rest breaks. (*Augustus v. ABM Sec. Servs., Inc.*, 2 Cal. 5th 257, 270 (2016) [“[A] rest period means an interval of time free from labor, work, or any other employment-related duties. And employees must not only be relieved of work duties, but also be freed from employer control over how they spend their time.”].)

The 10-minute rest break must be a net 10-minutes in a suitable rest area. None of the time allotted for rest breaks can be consumed by the time it takes to get to a suitable rest area. *See Augustus v. ABM Security Services, Inc.*, 2 Cal.5th 257, 267-268 (2016) (relying on 1/3/86 and 2/22/02 DLSE Letters wherein the DLSE ruled that the net ten-minute language for rest breaks means 10-minutes of time in a rest area and cannot include time it takes to get to and from the rest area). The employer must show that it clearly articulates the right to rest periods and rest periods

1 of net ten minutes, which means it must clearly communicate “net” ten minutes means and that,
2 regardless of what happens along the way to or from the rest area, employees are entitled to a full
3 ten-minutes in the rest area. See *Bufile v. Dollar Fin. Grp., Inc.* (2008) 162 Cal.App.4th 1193, 1199
4 (the “onus is on the employer to clearly communicate the authorization and permission [to take
5 meal and rest breaks] to its employees.”)

6 Here, similar to the meal break violations, Plaintiff alleged that Defendants maintained a
7 consistent policy of failing to provide Plaintiff and the Class members with rest breaks of not less
8 than ten (10) minutes per four (4) hour work period or major fraction thereof. (Szamet Decl. ¶70.)
9 Plaintiff maintains that he and the Class members were unable to take compliant rest breaks due
10 to work volume and the general inability to take a rest break while performing on-site work, or
11 traveling to or from a site. (Szamet Decl. ¶71.)

12 In its defense, Defendant would have argued that Plaintiffs’ rest period claim was even less
13 appropriate for certification than their meal period claim because California law does not require
14 employees to record rest periods. Absent a shift-by-shift, break-by-break, employee-by-employee
15 inquiry, Defendant would have argued that there was simply no way to know (1) whether a break
16 was taken; and (2) if not, why not. (Szamet Decl. ¶72.) For each instance where an employee did
17 not take a 10-minute rest period by the end of the fourth hour of work, the trier of fact would still
18 have to determine why that particular employee had less than their full allotment of rest time.
19 Defendant accordingly would have argued that rest break claims are inherently individualized in
20 nature because employers only need to “authorize and permit” breaks; they need not ensure that
21 rest breaks are taken. *Brinker*, 53 Cal. 4th at 1004. To succeed, “[a]n employee must show that the
22 employer prevented the employee from taking breaks; mere proof of knowledge that the employee
23 was forgoing breaks is insufficient.” As such, Plaintiff had to acknowledge that it could potentially
24 be easy for Defendant to defeat certification of this claim if it was able to gather testimonial
25 evidence from class members indicating that they were able to take all required rest breaks each
26 day. (Szamet Decl. ¶73.) Though Plaintiff does not believe this was the case, Plaintiff must
27 acknowledge it poses risks for the Class. (Szamet Decl. ¶74.) Just as with meal periods, there is
28 risk as to both sides as to what declarations and depositions of class members might reveal.

1 (Szamet Decl. ¶75.)

2 d) The Risks Associated with the Inaccurate Wage Statement Claim

3 California Labor Code §226(a) requires Defendant to provide its employees with an accurate,
4 itemized written wage statement that shows, in relevant part, all applicable hourly rates and the
5 corresponding number of hours worked. An employee “suffering injury,” like Plaintiff and Class Members,
6 can recover penalties for an employer’s “knowing and intentional failure” to comply with Labor Code
7 §226(a). See Labor Code § 226(e)(1). Labor Code section 226(a) provides, in pertinent part, that an
8 employer must provide an “accurate itemized” wage statement showing net and gross wages earned. Cal.
9 Lab. Code § 226(a). “[A]n employee has a statutory right to an accurate pay stub.”¹ Based on the preceding
10 allegations, Plaintiffs allege that Defendant issued Class Members incorrectly itemized wage statements.
11 Penalties for wage statement violations are calculated according to the formula provided by Labor Code
12 section 226(e)(1): An employee suffering injury as a result of a knowing and intentional failure by an
13 employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty
14 dollars (\$50) for the initial pay period in which a violation occurs and one hundred dollars (\$100) per
15 employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of \$4,000.

16 However, Defendant would have argued that the “subsequent” penalty applies only after a
17 determination that the employer has violated the Labor Code. *See Amaral v. Cintas Corp. No. 2*, 163 Cal.
18 App. 4th 1157, 1209 (2008) (“Although common sense might suggest a “subsequent” violation is nothing
19 more than a violation that occurs at a later point in time after an “initial” violation, this definition is
20 inadequate because the statutes provide for multiple penalties for “each failure to pay each employee”
21 incurred in an initial violation . . . Until the employer has been notified that it is violating a Labor Code
22 provision (whether or not the Commissioner or court chooses to impose penalties), the employer cannot be
23 presumed to be aware that its continuing underpayment of employees is a “violation” subject to penalties.”).

24 Additionally, although wage statement claims are readily certifiable, they are vulnerable to an

26 ¹ *Jaimez v. Daihatsu USA, Inc.*, 181 Cal. App. 4th 1286, 1306 (2010) (“*Jaimez*”); *see also*
27 *Kisliuk v. ADT Sec. Servs.*, 263 F.R.D. 544, 548 (C.D. Cal. 2008). “The purpose of the wage
28 statement requirement is to provide transparency as to the calculation of wages. A complying
wage statement accurately reports most of the information necessary for an employee to verify if
he or she is being properly paid in accordance with the law and that deductions from wages are
proper.” DLSE Opinion Letter 2006.07.06 at 2.

unfavorable disposition on summary judgment as defendants commonly argue that, without more, wage statement claims are nothing but technical violations for which Class Members suffer no injury. Before Section 226(e) was amended, the dispositive issue was whether “suffering injury” was satisfied by the deprivation of a legal right (i.e., an employer’s provision of non-compliant wage statements), or by consequential damages caused by the non-compliant wage statements. Employers had frequently prevailed in arguing for the latter interpretation. Even after the enactment of section 226(e), some courts have held that this amendment merely clarifies existing law and have held that plaintiffs must demonstrate actual injury. *See Loud v. Eden Med. Ctr.*, 2013 U.S. Dist. LEXIS 122873, **36-53 (N.D. Cal. Aug. 28, 2013) (granting summary judgment on wage statement claim because plaintiff could not show injury due to defects and that incorrect wage information is not willful).

e) The Risks Associated with the Waiting Time Penalty Claim

This claim alleges that Defendant failed to pay all wages due and owing upon termination or resignation. Labor Code § 203(a) provides:

If an employer willfully fails to pay ... any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days.

Under Labor Code § 203, a “‘willful’ failure to pay wages ... occurs when an employer intentionally fails to pay wages to an employee when those wages are due.” Cal. Code Regs., tit. 8, § 13520; *see also Diaz v. Grill Concepts Services, Inc.* (2018) 23 Cal.App.5th 859 (“willful” simply means that “the employer intentionally failed or refused to perform an act which was required to be done[.] Willful ... does not necessarily imply anything blameable, or any malice or wrong toward the other party”).

Here, Plaintiff contends that Defendant failed to properly pay overtime for any work in excess of eight (8) hours per day and/or any work in excess of forty (40) hours per week. (Szamet Decl. ¶76.) The risk analysis for the section 203 claim flows from the risk analysis for the underlying wage claim discussed above as derivative waiting-time penalties are only as strong as the underlying predicate claims, and are subject to good faith defenses. (Szamet Decl. ¶77.) If Defendant could prove, as it contends, that class members were properly paid for all hours worked,

1 there would be no recovery of wages and no waiting time penalties that flow therefrom. (Szamet
2 Decl. ¶78.)

3 Plaintiff also alleged that Defendant owes waiting time penalties by not paying former
4 alleged employees all wages owed and all premium payments for non-compliant meal or rest
5 periods, Labor Code § 226.7. Pursuant to *Murphy v. Kenneth Cole Productions, Inc.* (2002) 40
6 Cal.4th 1094, 1120, Plaintiff contended that break premium payments constitute “wages” under
7 Labor Code § 203. (“We hold that section 226.7’s plain language, the administrative and
8 legislative history, and the compensatory purpose of the remedy compel the conclusion that the
9 ‘additional hour of pay’ is a premium wage, not a penalty”). (Szamet Decl. ¶79.)

10 The bigger risk that Plaintiff analyzed, however, is that to establish liability for waiting
11 time penalties, Plaintiff would have to establish not only that the underlying violations occurred,
12 but also that Defendant’s conduct was “willful.” (Labor Code § 203; Szamet Decl. ¶80.) If
13 Defendant could establish that any alleged failure to blend was the result of mistake or oversight
14 and not “willful”, then it is possible that Plaintiff would not be able to recover penalties for this
15 claim. (Szamet Decl. ¶81.) Because of this risk, Plaintiff determined that accepting a discount for
16 settlement purposes was appropriate. (Szamet Decl. ¶82.)

17 f) The Risks Associated with the PAGA Claim

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 Plaintiff discounted the PAGA claim for multiple reasons. (Szamet Decl. ¶83.) First, the
24 aggrieved employees’ PAGA claims are derivative of all the foregoing class claims. (Szamet Decl.
25 ¶84.) If Plaintiff cannot establish liability on the underlying claim (taking into account the risks
26 discussed above), then the derivative PAGA claim will also necessarily fail. (*Id.*) Second, a court
27 has discretion to award less than the maximum penalty. (Szamet Decl. ¶85.) (Labor Code §
28 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). Third, the likelihood of the Court reducing the PAGA damages awarded to Plaintiffs and the aggrieved employees – assuming liability is proven as to each of Plaintiffs’ claims – is also higher in this case where these same individuals will also be receiving money for the same unlawful conduct under the class claims. (Szamet Decl. ¶86.) (*see Avila v. Cold Spring Granite Co.* (E.D. Cal. Jan. 12, 2018) Case No. 1:16-cv-001533-AWI-SKO, 2018 U.S. Dist. LEXIS 6142 *17 (“Because the PAGA penalties sought are at least partially duplicative of penalties granted by the underlying Labor Code violations, see, e.g., Cal. Lab. Code §§ 203, 226, 558(a), 1194.2, and because a Court has discretion in whether and in what amount to award PAGA penalties, see Cal. Lab. Code § 2699(e)(2), Plaintiff recognizes that the potential PAGA penalties are highly uncertain.”); and see *Nordstrom Commissions Cases*, 186 Cal.App.4th 576, 589 (2010) (affirming settlement allocating \$0 of \$6.4 million settlement to PAGA penalties).

g) Solvency Concerns

The final, but very significant, consideration for purposes of resolution is Defendant’s financial status. Defendant is a local family who manages (and owns) some apartment complexes. (Szamet Decl. ¶87.) Defendant is not a large and sophisticated statewide landlord that can withstand a significant judgment against it. (Szamet Decl. ¶88.) Plaintiff’s main concern was working with the mediator to come to a reasonable resolution that puts real money in the pockets of Class Members, but is an amount that Defendant can actually manage to pay. (Szamet Decl. ¶89.) Relying on the expert guidance of Judge O’Hara, the Parties came to a Settlement that is a true compromise, but also fair and reasonable based on the risks discussed and the exposure analysis to follow. (Szamet Decl. ¶90.)

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. ¶91.) If the Court did eventually certify a class, trial of a case involving approximately 198 Class would require

1 the retention of expensive expert witnesses, the accrual of extensive litigation costs, and a
2 significant time overlay by the parties. (Szamet Decl. ¶92.) Moreover, given the complexity and
3 unsettled nature of the issues in this case it is likely that any outcome at trial would have resulted
4 in a lengthy and costly appeal. (Szamet Decl. ¶93.) An appeal would result in further delay for
5 the Class who are waiting for a resolution in this matter. (*Id.*)

6 3. The Risk of Maintaining Class Action Status through Trial

7 This case has not been certified to be tried as a class action. (Szamet Decl. ¶94.) While
8 Plaintiff believes there is strong evidence to support certification of several possible subclasses,
9 certification is always hard fought and subject to judicial discretion. Moreover, in class actions,
10 decertification is always a possibility. (*Id.*) In attempting to certify a class, the parties would need
11 to conduct multiple depositions, including of the Class Representative and of several person(s)
12 most knowledgeable regarding Defendant's meal and rest policies and practices. (*Id.*) There is a
13 risk for both sides as to what these depositions will reveal and whether they will support class
14 certification to the extent expected. (*Id.*)

15 4. The Amount Offered in Settlement

16 It was very difficult for the Parties to reach this Settlement of \$325,000.00. (Szamet Decl.
17 ¶95.) This Settlement is the result of adversarial, non-collusive, and arms-length negotiations.
18 (Szamet Decl. ¶96.) The Parties arrived at it after extensive investigation and discovery, careful
19 evaluation of the law, risks, and all information substantiating the amount of penalties reasonably
20 likely to be awarded to the class were the trier of fact to find Defendant liable, and the assistance
21 of an experienced mediator, Judge Patrick J. O'Hara (Ret.). (*Id.*)

22 Based on their analysis of documents and class data produced by Defendant (including a
23 sample of time and pay records and Defendant's written labor policies and procedures handbooks),
24 Plaintiffs' Counsel were able to realistically assess the value of Plaintiffs' claims and intelligently
25 engage defense counsel in settlement discussions that culminated in the proposed settlement now
26 before the Court.

27 ///

28 ///

a) Plaintiff's Assessment of Defendant's Maximum Exposure

Plaintiff assessed the full value of the minimum wage without any discount, at approximately \$104,416. (Szamet Decl. ¶98.) This calculation was based off of expert analysis of the data provided by Defendant and assumed there were 15 minutes of unpaid wages per shift, per Class Member. (Szamet Decl. ¶99.) Plaintiff also analyzed the potential unpaid overtime claim due to the alleged failure to blend bonuses into the overtime rate. (Szamet Decl. ¶100.) This violation could potentially only occur during pay periods where overtime was worked and a bonus was also paid. (Szamet Decl. ¶101.) Plaintiff assessed the full value of this overtime claim, without any discount, at approximately \$3,976. (Szamet Decl. ¶102.)

Plaintiff assessed the full value of the meal period claim, without any discount at \$244,725. (Szamet Decl. ¶103.) This amount assumes a 50% meal period violation record for the entire Class. (Szamet Decl. ¶104.) Of course, if the meal period violation rate was found to be significantly lower, this number would decrease dramatically. (Szamet Decl. ¶105.)

The same analysis is true for rest periods. (Szamet Decl. ¶106.) Plaintiff assessed the full value of the rest period claim, without any discount, at \$244,725. (Szamet Decl. ¶107.) This amount assumes a 50% rest period violation record for the entire Class. (Szamet Decl. ¶108.) Of course, if the meal period violation rate was found to be significantly lower, this number would decrease dramatically. (Szamet Decl. ¶109.)

Plaintiff valued the Wage Statement Claim, without discount, at \$254,400. (Szamet Decl. ¶110.) In the data, there were 100 Class Members who worked during the relevant liability period for Labor Code §226(a). (Szamet Decl. ¶111.)

Plaintiff valued the Waiting Time Claim, tied to the alleged unpaid wages claim, at \$324,000. (Szamet Decl. ¶112.) In the data, there were 90 Class Members whose employment ended during the relevant liability period for Labor Code §203. (Szamet Decl. ¶113.) Considering the derivate nature of Labor Code §203 and the dispute over whether class members were owed any wages, Plaintiff determined that accepting a discount on this claim was appropriate. (Szamet Decl. ¶114.)

Finally, Plaintiff calculated the value of the PAGA claim at \$259,400 for Class Members

(using \$100 per pay period). (Szamet Decl. ¶115.) There were 2,594 pay periods in the data during the relevant liability period for Labor Code §2699, et seq. (Szamet Decl. ¶116.) The main risk taken into account with PAGA is the discretionary nature of the penalty award. (Szamet Decl. ¶117.) A judge can award the statutory maximum of \$100 for the initial violation and \$200 thereafter or – in theory – one cent per wage statement. (Szamet Decl. ¶118.) While there is a dearth of available authority, in Plaintiff’s view, were he to succeed on any of the underlying Labor Code violations, it is not likely that a Judge would also award a large amount of penalties of top of any damages recovered. (Szamet Decl. ¶119)

Per Plaintiff’s assessment, the maximum potential value of all of Plaintiff’s and the Class’ claims was approximately \$1,435,642. (Szamet Decl. ¶120.) A settlement value of \$325,500 represents 23% of the potential maximum exposure. (Szamet Decl. ¶121.) Such a settlement is well within the range of reasonableness and as a result of the forgoing risks on the merits, Class Counsel believes the proposed Gross Settlement Amount is fair and reasonable.² (Szamet Decl. ¶122.)

5. The Experience and Views of Counsel

Finally, counsel’s experience and success in similar class actions also weigh in favor of preliminary approval. *See Wershba, supra*, 91 Cal.App.4th at 245. Kingsley & Kingsley, APC is very experienced in prosecuting complex employment litigation, and the firm has focused its practice since the year 2000 on complex wage, hour, and working condition violations. (Szamet Decl. ¶¶123-125.) The firm is well versed in class action litigation and has diligently and

² “It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery will not per se render the settlement inadequate or unfair.” *See Officers for Justice v. Civil Serv. Comm’n of City & Cty. of San Francisco*, 688 F.2d 615, 628 (9th Cir. 1982). “The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators.” *Id.* at 625. “Estimates of a fair settlement figure are tempered by factors such as the risk of losing at trial, the expense of litigating the case, and the expected delay in recovery (often measured in years).” *In re Toys R Us-Delaware, Inc.-- Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 453 (C.D. Cal. 2014). In other words, in valuing the claims within a realistic *range* of outcomes, the settling plaintiff should discount the value of the settled claims for risks such as changes in the law, the probability of success, and other factors. Overall, “the most important factor” in determining “whether a settlement is fair and reasonable” is the “strength of the case for plaintiffs on the merits, balanced against the amount offered in the settlement.” *Id.* at 409 n.6 (quoting *Kullar*, 168 Cal. App. 4th at 130).

1 aggressively pursued this action. (*Id.*) Kingsley & Kingsley, APC currently serves as Class
2 Counsel for dozens of pending class action lawsuits in Northern, Central, and Southern California.
3 (*Id.*) A list of representative cases that Kingsley & Kingsley, APC has handled is included in the
4 accompanying declaration of Kelsey M. Szamet (*Id.*) After factoring in the risks explained above,
5 Class Counsel believes that the proposed settlement is fair and reasonable. (Szamet Decl. ¶126.)

6 6. The Proposed Plan of Allocation Is Fair and Reasonable

7 Plans of allocation are subject to the same standard of review as class action settlements;
8 they must be “fair, adequate and reasonable.” (*See, e.g., Officers for Justice v. Civil Service*
9 *Comm’n* (9th Cir. 1982) 688 F.2d 615, 624–625, 629–630.) Here, the proposed plan of allocation
10 compensates Class pro rata based on the number of Workweeks worked by the Class during the
11 Covered Period. The lump sum payment to each Class not excluding him/ herself will be
12 determined on an individualized basis based upon the Workweeks worked by the Class. (Ex. 1 at
13 ¶3.2.4.) This allocation distributes Agreement funds proportionally to each class member’s
14 potential damages and should therefore be approved as fair, adequate, and reasonable. (Szamet
15 Decl. ¶127.)

16 7. The Proposed Notice Fairly Apprises the Class of the Terms of the
17 Settlement and of the Class Members’ Rights under the Settlement

18 Plaintiff requests that the Court approve the proposed plan and form of Class Notice. The
19 standard for determining the adequacy of notice is whether the notice has “a reasonable chance of
20 reaching a substantial percentage of the class members.” (*Cartt v. Superior Court* (1975) 50
21 Cal.App.3d 960, 974.) Pursuant to the Agreement, the Notice will be sent to the last known address
22 of all Class, or to an updated address if one is located in the National Change of Address Database.
23 (Ex. 1 at ¶4.4.1). If any Notices are returned as undeliverable, the Administrator will undertake
24 another reasonable address verification measure to locate a valid mailing address and will promptly
25 send the Notice to the new address. (*Id.*) As such, the Notice is likely to reach most, if not all,
26 Class.

27 With respect to the contents of the Notice, the “notice given to the class must fairly apprise
28 the class members of the terms of the proposed compromise and of the options open to dissenting

class members.” (*Trotsky v. L.A. Fed. Sav. & Loan Ass’n* (1975) 48 Cal.App.3d 134, 151–52.) The purpose of a class notice is to give class members sufficient information to decide whether they should accept the benefits offered, opt out and pursue their own remedies, or object to the settlement. (*Ibid.*)

Here, the Notice clearly explains the proposed Agreement and the options to opt out of the Settlement or object to it at the Final Approval Hearing. (Ex. 1 at ¶8.4-8.7; *see also* Ex. A to the Agreement at pp. 2-5, 8 [Class Notice].) In short, the Court should approve the proposed Class Notice because it describes the proposed settlement with enough specificity to allow Class to make an informed choice regarding whether to participate.

VI. THE SERVICE AWARD TO THE NAMED PLAINTIFF

The Class Representative is entitled to an enhancement for his valiant effort and time expended in this matter. (Szamet Decl. ¶128.) The time spent by Shelton Harper is significant and includes researching and retaining competent counsel; providing information to Class Counsel regarding the nature of the work at Defendant; compiling relevant documents; working closely with Class Counsel to develop the theories of liability and martial relevant evidence; regularly discussing the status of the case with Class Counsel; discussing the case via telephone with Class Members; making himself available for a full-day of mediation as necessary; and responding promptly to Class Counsel’s communications regarding settlement. (*Id.*) Thus, in addition to the sums paid to Class, Plaintiff requests a proposed litigation enhancement in the amount of \$5,000.00, to be paid from the Gross Settlement Amount. (Ex. 1 at ¶3.2.1.) As set forth in the Agreement, Plaintiff will also be entering into a general release of liability pursuant to Civil Code Section 1542. (Szamet Decl. ¶129; Ex. 1 at ¶6.)

Class Counsel considers this to be a fair and reasonable enhancement. (Szamet Decl. ¶130.) The enhancement takes into consideration the time, effort, and expense incurred by Plaintiff in coming forward to litigate this matter on behalf of all Class. (*Id.*) Plaintiff will provide a detailed declaration with the Final Approval Motion detailing his participation and further justification for the enhancement. (*Id.*)

///

1 **VII. SUBMISSION TO THE LABOR AND WORKFORCE DEVELOPMENT AGENCY**

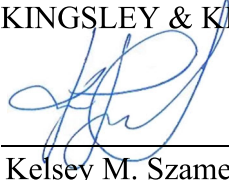
2 As indicated on the Proof of Service, Plaintiff's Motion for Approval of Class Action
3 Settlement ("Motion") will be concurrently uploaded to the Labor and Workforce Development
4 Agency's ("LWDA") website on the date this Motion is filed as required by statute. Proof of
5 submission of Plaintiff's Motion, all related documents, and copy of the email from the LWDA
6 confirming receipt is attached to the Declaration of Kelsey M. Szamet as Exhibit "2." (Szamet
7 Decl. ¶131.)

8 **VIII. CONCLUSION**

9 Plaintiff respectfully submits that the proposed Agreement is fair, adequate, reasonable,
10 and in the best interest of the Class. Therefore, the Parties respectfully request that the Court (1)
11 grant preliminary approval of the Class Action and PAGA Settlement Agreement, and all of its
12 terms; (2) approve the proposed form of notice, and direct that the Notice be sent to Class in the
13 manner set forth in the Class Action and PAGA Settlement Agreement; and (3) schedule a hearing
14 on final approval of the Agreement and Class Counsel's application for an award of attorney's fees
15 and litigation costs.

16
17 DATED: March 27, 2023

KINGSLEY & KINGSLEY, APC

18
19 By: 

20 Kelsey M. Szamet
21 Attorneys for Plaintiff SHELTON HARPER and the
22 proposed class
23
24
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26
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 March 27, 2023, I served all interested parties in this action the following documents described as: **NOTICE OF MOTION AND MOTION FOR PRELIMINARY 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:

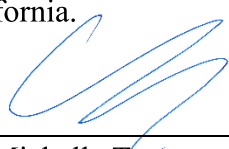
SUTTON HAGUE LAW CORPORATION, P.C. S. Brett Sutton brett@suttonhague.com Jared Hague jared@suttonhague.com Jonathan W. Black jonathan@suttonhague.com Brady Briggs brady@suttonhague.com 5200 N. palm Ave., Ste 203 Fresno, CA 93704 <i>Attorneys for Defendant</i>	ABRAMSON LABOR GROUP William Zev Abramson Wza@abramsonlabor.com 3580 Wilshire Blvd., Ste 1260 Los Angeles, CA 90010-2513 <i>Attorneys for Plaintiff</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 MAIL TRANSMISSION): 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/308>) and service was completed by electronic means by transmittal of the documents referenced herein on the EF System.

[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 March 27, 2023, at Woodland Hills, California.



Michelle Tanzer