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individually and on behalf of all others similarly situated

IN THE SUPERIOR COURT OF CALIFORNIA

COUNTY OF HUMBOLDT

DANIELLE DENISE SMALLING, individually and
on behalf of all others similarly situated,

Plaintiff(s),

v.

BIG OIL & TIRE CO.; and DOES 1 through 100,

Defendant(s).

Case No. CV2200387

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION AND
PAGA SETTLEMENT**

Date: July 29, 2024

Time: 10:30 a.m.

Department: 4

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 29, 2024 at 10:30 a.m., or as soon thereafter as the matter may be heard in Department 4 of the Superior Court of California for the County of Humboldt, located at 421 I Street, Eureka, CA 95501, Plaintiff Danielle Denise Smalling will and hereby does move the court for an order granting conditional certification and preliminary approval of the class action and PAGA settlement. Good cause exists for granting the motion in that the proposed settlement is fair, reasonable, and adequate.

The Motion will be based on this Notice of Motion, the Declarations of Theodore Tang and Danielle Denise Smalling, the Memorandum of Points and Authorities, the pleadings on file in this

1 matter, and on such oral and documentary evidence as may be presented at the hearing on the
2 motion.

3
4 Dated: June 20, 2024

FRONTIER LAW CENTER

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7 Theodore Tang
8 Attorney for Plaintiff
9 Danielle Denise Smalling
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TABLE OF CONTENTS

I.	INTRODUCTION	5
II.	BACKGROUND OF THE SETTLEMENT.....	5
A.	Procedural History and Summary of the Allegations.....	5
B.	The Parties Agree to Private Mediation	6
	After the initial pleadings were filed, the Parties began a dialogue about settlement and agreed to go to mediation. The Parties selected mediator David Lowe. In preparation for the mediation, Defendant informally provided Plaintiff with sample time and payroll records for the class, exemplar employee handbooks, Plaintiff's personnel file, and an On Duty Meal Period Agreement. With the mediator's help, the Parties agreed to the Settlement.	6
C.	The Terms of the Settlement.	6
1.	Settlement and Allocation of the Claims.....	6
III.	OVERVIEW OF THE APPROVAL PROCESS	6
A.	Two-Step Approval Process	6
B.	Conditional Certification is Appropriate	7
IV.	THE COURT SHOULD GRANT PRELIMINARY APPROVAL	7
A.	The Settlement is Fair, Reasonable, and Adequate, and Not the Result of Fraud or Collusion	7
B.	The Proposed Settlement Meets the <i>Kullar</i> Factors.	8
2.	Strengths and Weaknesses of the Claims.	8
3.	Maximum Damages and Penalties at Issue	14
C.	An Analysis of the Terms of the Settlement	15
1.	Estimate of Class Members' Recovery	15
2.	Unclaimed Funds.....	15
3.	Scope of the Release.....	15
1.	Notice to Class Members.....	17
2.	Tax Treatment of Settlement Amounts	17
3.	Proposed Payment to Class Representative.....	17
4.	Attorneys' Fees and Costs	17
5.	Class Administration Costs	18
V.	THE PROPOSED CLASS MEETS ALL CERTIFICATION REQUIREMENTS	18
A.	The Class is Ascertainable and Sufficiently Numerous.	18
B.	There Are Common Questions of Law and the Claims Are Typical	18

C.	Plaintiff and Plaintiff’s Counsel Adequately Represent the Class	18
VI.	LWDA HAS BEEN PROVIDED WITH NOTICE OF THIS MOTION	19
VII.	CONCLUSION AND ACTION REQUESTED	19

TABLE OF AUTHORITIES

Cases

<i>Bellinghausen v. Tractor Supply Co.</i> , No. 13-CV-02377-JSC, 2015 WL 1289342, (N.D. Cal. Mar. 20, 2015).....	14
<i>Brinker Restaurant Corp. v. Superior Court</i> (2012) 53 Cal. 4th 1004.....	9
<i>Delgado v. New Albertson's, Inc.</i> , 2010 WL 11507599 (C.D. Cal. March 15, 2010)	12
<i>Dunk v. Ford Motor Co.</i> (1996) 48 Cal. App. 4th 1794.....	7
<i>Duran v. U.S. Bank Nat'l Ass'n</i> , 59 Cal. 4th 1 (2014)	9
<i>Harris v. Vector Mktg. Corp.</i> (N.D. Cal. 2009) 656 F. Supp. 2d 1128	11
<i>In re Mego Fin. Corp. Secs. Litig.</i> (9 th Cir. 2000) 213 F.3d 454.....	14
<i>Kullar v. Foot Locker Retail, Inc.</i> , 168 Cal. App. 4th 116, 130, 133 (2008)	8
<i>LaFace v. Ralphs Grocery Co.</i> (2022) 75 Cal.App.5 th 388.....	13
<i>Lee v. Dynamex, Inc.</i> , 166 Cal. App. 4th 1325, 1334 (2008)	18
<i>Magadia v. Wal-Mart Assocs.</i> (N.D. Cal. 2019) 384 F.Supp.3d 1058.....	12
<i>Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.</i> (7 th Cir. 1987) 834 F.2d 677	8
<i>McGhee v. Bank of Am.</i> (1976) 60 Cal.App.3d 442	19
<i>Naranjo v. Spectrum Sec. Servs., Inc.</i> (2022) 13 Cal.5th 93	12
<i>Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.</i> , 221 F.R.D. 523, 528 (C.D. Cal. 2004)	8
<i>Parr v. Golden State Overnight Delivery Service, Inc.</i> , No. RG12-618103, 2014 WL 11199453 (July 10, 2014).....	12
<i>Priddy v. Edelman</i> , 883 F.2d 438, 447 (6 th Cir. 1989)	7
<i>Richmond v. Dart Industries, Inc.</i> , 29 Cal. 3d 462, 473 (1981)	18
<i>Stephens v. Montgomery Ward & Co.</i> , 193 Cal. App. 3d 411, 421 (1987)	18
<i>Van Ba Ma v. Covidien Holding Inc.</i> , U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014)	15
<i>Villalpando v. Excel Direct Inc.</i> (N.D. Cal. 2014) 303 F.R.D. 588	18
<i>Wershba v. Apple Computer, Inc.</i> , 91 Cal. App. 4th 224, 240 (2001)	7

Statutes

Civil Code § 1542	16
Labor Code § 226	11
Labor Code § 2699	12, 14

Other Authorities

4 Alba Conte & Herbert B. Newberg, <i>Newberg on Class Actions</i> , § 11.26 (4th ed. 2002)	7, 8
IWC Wage Order 7-2001	13

Treatises

Manual for Complex Litigation (Third) § 30.41	7
The Manual for Complex Litigation (Third) § 30.41	7

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This is a wage and hour class and PAGA action. Plaintiff Danielle Smalling (“Plaintiff”)
4 alleges that she worked as a non-exempt employee for Defendant Big Oil & Tire Co. (“Defendant”)
5 as a cashier in Defendant’s stores. Plaintiff alleges that Defendants violated the Labor Code by the
6 following: 1) failing to provide off-duty meal and rest breaks; 2) failing to pay overtime; 3) failing
7 to pay minimum wages for all hours worked; 4) failing to provide accurate and complete wage
8 statements; 5) failing to pay all wages due timely at termination; and 6) failing to reimburse work
9 related expenses. Plaintiff also alleges UCL and PAGA violations based on the above.

10 Prior to mediation, the Parties engaged in the exchange of informal data and a study of the
11 legal principles applicable to the claims asserted. Defendant provided Plaintiff’s counsel with
12 samples of class time and payroll records, exemplar employee handbooks, Plaintiff’s personnel file,
13 and On Duty Meal Period Agreement.

14 With the experience and expertise of Mediator David Lowe, the parties were ultimately able
15 to come to an agreement on April 19, 2024.

16 The terms provide Defendant shall pay a gross amount of \$195,000, in two installments (one
17 at final approval, one 10 months later). This is non-reversionary, so the class members do not need
18 to submit claim forms.

19 **II. BACKGROUND OF THE SETTLEMENT.**

20 **A. Procedural History and Summary of the Allegations**

21 On January 10, 2022, Plaintiff uploaded a PAGA letter to the LWDA website and sent the
22 letter by certified mail to Defendant, alleging that Defendant violated the Labor Code with regard to
23 Meal Break violations, Rest Break Violations, Wage Statement Violations, and Waiting Time
24 Penalties. On May 4, 2022, Plaintiff uploaded a Supplemental PAGA letter to the LWDA website,
25 and sent via certified mail to Defendant, alleging that Defendant further violated the Labor Code by
26 failing to pay Minimum and Overtime wages for all hours worked, as well as failed to pay
27 reimbursement to employees for work related expenses (namely, uniforms), and failing to provide
28 adequate seating under the wage orders. On March 18, 2022, Plaintiff filed her complaint against

1 Defendant on behalf of herself and a putative class for Meal Period Violations, Rest Period
2 Violations, Failure to pay overtime, Failure to Pay Minimum Wages as well as causes of action for
3 violation of the Unfair Competition Law and PAGA. Plaintiff filed a First Amended Complaint on
4 August 22, 2022, adding a cause of action for PAGA for the above violations (including suitable
5 seating).

6 **B. The Parties Agree to Private Mediation**

7 After the initial pleadings were filed, the Parties began a dialogue about settlement and
8 agreed to go to mediation. The Parties selected mediator David Lowe. In preparation for the
9 mediation, Defendant informally provided Plaintiff with sample time and payroll records for the
10 class, exemplar employee handbooks, Plaintiff's personnel file, and an On Duty Meal Period
11 Agreement. With the mediator's help, the Parties agreed to the Settlement.

12 **C. The Terms of the Settlement.**

13 **1. Settlement and Allocation of the Claims**

14 The Class consists of the following: "all persons who worked for Big Oil & Tire Co. as an
15 hourly paid, non-exempt employee during the Class Period [March 18, 2018, to November 9,
16 2023]." Based upon Defendants' records, the number of Class Members is approximately 10,119.

17 The payments to each Class Member will depend on the number of workweeks worked by
18 during the Class Period. Additionally, \$20,000 is allocated to settle PAGA claims. In addition,
19 \$65,000 (1/3 of the gross settlement) is attributed to attorney fees, \$19,000 is attributed to costs,
20 \$7,750 for settlement administration, and \$10,000 is the requested class representative
21 enhancement.

22 This means that of the \$195,000 gross settlement, after the deductions above, the net
23 settlement amount is \$73,250.00, with an additional \$5,000 in individual PAGA Payments to the
24 Aggrieved Employees.

25 **III. OVERVIEW OF THE APPROVAL PROCESS**

26 **A. Two-Step Approval Process**

27 A settlement of a class action lawsuit must be reviewed and approved by the Court. This is
28 done in two steps: (1) an early (preliminary) review by the trial court, and (2) a final review after

1 notice has been distributed to the class members for their comment or objections. The Manual for
2 Complex Litigation (Third) § 30.41 states:

3
4 If the preliminary evaluation of the proposed settlement does not disclose grounds to
5 doubt its fairness or other obvious deficiencies, such as unduly preferential treatment
6 of class representatives or of segments of the class, or excessive compensation for
7 attorneys, and appears to fall within the range of possible approval, the court should
8 direct that notice ... be given to the class members of a formal fairness hearing, at
9 which arguments and evidence may be presented in support of and in opposition to
10 the settlement.

11 Thus, the preliminary approval by the trial court is simply a conditional finding that the
12 settlement appears to be within the range of acceptable settlements. As Professor Newberg
13 commented, “The strength of the findings made by a judge at a preliminary hearing or conference
14 concerning a tentative settlement proposal may vary. The court may find that the settlement
15 proposal contains some merit, is within the range of reasonableness required for a settlement offer,
16 or is presumptively valid subject only to any objections that may be raised at a final hearing.” 4
Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 11.26 (4th ed. 2002).

17 **B. Conditional Certification is Appropriate**

18 The parties also may, at the preliminary approval stage, request that the court provisionally
19 certify class—conditional upon final approval of the settlement. “Pre-certification settlements are
20 routinely approved if found to be fair and reasonable.” (*Wershba v. Apple Computer, Inc.* (2001) 91
21 Cal. App. 4th 224, 240; accord *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1803
22 (although the settlement was reached before any adversary certification, the court was satisfied that
23 it was fair, adequate and reasonable).

24 **IV. THE COURT SHOULD GRANT PRELIMINARY APPROVAL**

25 **A. The Settlement is Fair, Reasonable, and Adequate, and Not the Result of Fraud**
26 **or Collusion**

27 Courts presume the absence of fraud or collusion in the negotiation of settlement unless
28 evidence to the contrary is offered. (*Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447; *Mars*

1 *Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.* (7th Cir. 1987) 834 F.2d 677, 682. Courts
2 do not substitute their judgment for that of the proponents, particularly where a settlement was
3 reached with the participation of experienced counsel familiar with the litigation. (*Nat'l Rural*
4 *Telecomms. Coop. v. DIRECTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 528 (C.D. Cal. 2004).

5 While the recommendations of counsel proposing the settlement are not conclusive, the
6 Court can take them into account, particularly where they were involved in discovery and
7 negotiations for some period of time, appear to be competent, have experience with this type of
8 litigation, and have exchanged evidence from the opposing party. *See Newberg on Class Actions*,
9 *supra*, at § 11.47; *Nat'l Rural Telecomms. Coop.*, *supra*, 221 F.R.D. at p. 528 (quoting *In re Paine*
10 *Webber Ltd. P'ships Litig.* (S.D.N.Y. 1997) 171 F.R.D. 104, 125 ("So long as the integrity of the
11 arm's length negotiation process is preserved [] a strong initial presumption of fairness attaches to
12 the proposed settlement...[citations] and great weight is accorded to the recommendations of
13 counsel, who are most closely acquainted with the facts of the underlying litigation"))).

14 Here, both Plaintiffs' counsel and Defendants' counsel have a great deal of experience in
15 wage and hour class action litigation, as demonstrated in the attached declaration. Moreover,
16 Plaintiff's counsel investigated of the allegations and consulted with an expert to formulate a
17 damages model. This information was incorporated into the arms-length negotiations.

18 The settlement for each Class Member is fair, reasonable, and adequate, given the inherent
19 risks of litigation, including the substantial risks relative to class certification, and the costs of
20 pursuing such litigation, discussed further below. Of course, class members may still opt out of the
21 settlement, and the class members will be apprised of their right to attend the fairness hearing and
22 submit objections to the proposed settlement.

23 **B. The Proposed Settlement Meets the *Kullar* Factors.**

24 As explained in *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 130, 133, a
25 class action settlement should be approved when the plaintiff has conducted discovery and the
26 settlement is reasonable in light of the strengths and weaknesses of the claims.

27 **2. Strengths and Weaknesses of the Claims.**

28 Although Plaintiff's counsel believes the claims are meritorious, they are experienced and

1 realistic, and understand the possibility of non-certification on one or more of the theories alleged.
2 Plaintiffs' counsel further recognizes that the outcome of a trial, any appeal that could follow, are
3 inherently uncertain. These risks on are compounded by the Supreme Court's holding in *Duran v.*
4 *U.S. Bank Nat'l Ass'n* (2014) 59 Cal.4th 1 (use of statistical evidence regarding certification). Any
5 analysis of the strengths and weaknesses of the Claims must also consider the size and scope of
6 those claims. Based on the sample data provided for 57 employees, Plaintiff extrapolates that there
7 are (as of the date of mediation) 285 class members who have worked 10,119 work weeks (or 5,225
8 pay periods) and 51,195 individual shifts, of which about 35,121.

9 **a. Meal and Rest Break Claims**

10 Employers must allow their employees to take 30-minute meal periods after every five hours
11 of work (unless the entire shift is 6 hours or less). (*Brinker Restaurant Corp. v. Superior Court*
12 (2012) 53 Cal. 4th 1004, 1037-1038. Such meal periods must be unfettered — *i.e.*, when taking
13 such meal periods, the employee must be relieved of all duty during the entire 30-minute meal
14 period. IWC Wage Order No. 5 § 11(A) (emphasis added). Indeed, this has been well settled since
15 being affirmed by the California Supreme Court in *Brinker*, supra, 53 Cal. 4th at 1040-41 n. 19
16 (“The employer that refuses to relinquish control over employees during an owed meal period
17 violates the duty to provide the meal period and owes compensation”). Similarly, employees' rest
18 break must be taken off-duty and unfettered by the employer; Labor Code section 226.7 provides
19 for an additional hour of pay at the regular rate for each meal period missed and/or day in which a
20 rest break was denied.

21 Plaintiff alleges that Defendant required class members to remain on the store premises at all
22 times while the stores were in operation, since there was frequently only one person working in the
23 store at any given time. Plaintiff concedes there were overlaps in some shifts, but the overlap was
24 only long enough to allow the outgoing employee to perform their end-of-shift tasks, such as
25 restocking coolers and counting down tills, and did not allow for a meal period. In all the above
26 situations, Plaintiff alleges that Defendant required class members to record that full and compliant
27 breaks were nevertheless taken. In addition to the alleged policy concerns, Plaintiff extrapolates
28

1 from the data that the actual time records revealed 9,989 meal periods that were either late, short, or
2 missed entirely.

3 Defendants deny any liability or wrongdoing of any kind. First, Defendant contends that it
4 was written and understood policy that employees were permitted to lock the store and close if they
5 were alone in order to take their meal periods. Second, a significant percentage of employees who
6 worked overnight shifts in relatively remote locations signed On Duty Meal Period Agreements,
7 such that those employees were given paid, on duty meal breaks.¹ These employees constitute the
8 majority of employees who recorded late, short, or skipped meal periods. Plaintiff anticipates
9 Defendant would be able to produce at least some declarations from its employees stating that all
10 meal breaks were provided on time, and that any late, short, or skipped meal periods were because
11 the employee chose to do so, and not because the Defendant required or encouraged it. Finally, the
12 fact that Defendant actually paid out meal and rest break premiums in some cases creates the
13 inference that class members knew how to report missing breaks and did so when they were
14 actually missed.

15 The facts above comprised risks for certification, since there could be a possibility that only
16 individual questions would predominate, and no method of proof would show a uniform lack of
17 breaks at all locations.

18 Based on these numbers and deducting for the 848 estimated missed meal premiums
19 Defendant voluntarily paid out, Plaintiff's retained expert estimated the total damages on meal
20 premiums to be about \$172,673. However, given the risks stated above, Plaintiff does not believe
21 this amount is an accurate reflection of what Plaintiff could reasonably expect to achieve at trial.
22 The amount Plaintiff could reasonably expect to recover at trial if successful on this claim, or the
23 Risk Adjusted Value ("RAV"), is about 25%, or \$43,168.25.

24 Plaintiff's expert calculated the maximum amount of rest break violation damages to be
25 \$823,717. However, this assumes that every rest break for every employee and every shift (over 3.5
26 hours) during the Class period was non-complaint (due to the alleged policy that employees could

27 ¹ Defendant also points out that the DLSE manual cites a clerk alone at a convenience store as a
28 literal example of when On Duty Meal Periods are permissible, and is extremely confident that such
waivers will be upheld as valid.

1 not leave during their rest breaks). However, Plaintiff acknowledges that different locations had
2 differing staffing and levels of business. Plaintiff therefore estimates the total RAV of the rest break
3 claim to be 50% or \$411,858.50.

4 **b. Wage and Hour Violations**

5 Plaintiff alleges Defendants required class members to remain on site and on duty, even after
6 scheduled shift hours (and therefore without pay) until the next scheduled worker in the same
7 position arrived to relieve them. There were times during the class period in which a relief would
8 arrive late, on a given shift. Despite having to remain on duty, Plaintiff alleges the class members
9 were not paid for this time, instead rounding time cards to the scheduled end of shift.

10 Yet, there was no written policy indicating that class members had to perform off the clock
11 work. To the extent that a manager verbally required a class member to remain late until a relief
12 arrived, Defendants contend class members were instructed to report this extra time so they could
13 get paid for it. In addition, Defendant will likely be able to show that employees were able to leave
14 early at least as often as they stayed late if a store was slow and the next shift had already arrived.
15 Ultimately, individual issues would be abundant, not only as to the different locations, shifts, and
16 job positions, but also as to each individual class member's reasons for not reporting time actually
17 worked.

18 Plaintiff's expert estimated that the damages from this rounding policy were approximately
19 \$3,557. Plaintiff estimates the RAV of this claim to be approximately 50%, or \$1,778.50.

20 **c. Wage Statement Violations**

21 The wage statement violations are derivative of the unpaid time and meal and rest break
22 violations. Thus, Defendants could counter that any alleged omission of information from the wage
23 statements was not knowing and intentional, which could negate wage statement penalties. (See
24 *Harris v. Vector Mktg. Corp.* (N.D. Cal. 2009) 656 F. Supp. 2d 1128, 1145-46 (summary
25 adjudication warranted on Section 226(e) claim where dispute existed as to whether plaintiff was
26 independent contractor, and record lacked evidence that conduct was knowing or willful).

27 Plaintiff's expert estimated there to be approximately 2,634 wage statements that would
28 have contained inaccurate information, for \$237,110 in penalties. However, as the entire claim is

1 derivative of the other claims above, Plaintiff also reduces the estimate of the RAV of this claim to
2 50%, or \$118,555.

3 **d. Waiting Time Penalties**

4 Similarly, the waiting time penalties are derivative from the off the clock and missed break
5 allegations, which are theoretically recoverable consistent with *Naranjo v. Spectrum Sec. Servs.,*
6 *Inc.* (2022) 13 Cal.5th 93. On the other hand, Defendants might argue that any lack of payment was
7 not willful and therefore waiting time penalties would not apply.

8 Given the number of violations and the number of class members who are no longer
9 employees, Plaintiff's expert estimated waiting time penalties to be approximately \$575,253.
10 However, since this is also a derivative claim, Plaintiff reduces the estimated RAV by 50%, to
11 \$287,626.50.

12 **e. PAGA Penalties**

13 The trial court has the discretion to reduce PAGA penalties if, based on the facts and
14 circumstances of the case, to do otherwise would result in an award that is unjust, arbitrary and
15 oppressive, or confiscatory. (Lab. Code, § 2699(e)(2); see also *Delgado v. New Albertson's, Inc.*,
16 2010 WL 11507599 at *7 (C.D. Cal. March 15, 2010) (explaining that court's discretion to reduce
17 penalties under PAGA protects defendants from unconstitutionally excessive penalties).

18 PAGA penalties could potentially be reduced based on the above. The following are some
19 examples of PAGA awards which were awarded after an actual trial - in the matter of *Magadia v.*
20 *Wal-Mart Assocs.* (N.D. Cal. 2019) 384 F.Supp.3d 1058, while the trial court imposed substantial
21 PAGA penalties, it still represented reductions of 67% and 80% of the potential PAGA penalties.

22 Likewise, in the matter of *Parr v. Golden State Overnight*, Judge Carville of the Alameda
23 Superior Court assessed PAGA penalties upon the defendant of approximately 7% of the total
24 maximum penalties—again, this was only after plaintiff had prevailed at trial. (*Parr v. Golden State*
25 *Overnight Delivery Service, Inc.*, No. RG12-618103, 2014 WL 11199453 (July 10, 2014).)

26 Plaintiff applies the same reductions on the RAV of the PAGA claims as used for the
27 underlying individual claims they are based on.

1	PAGA Claim	Estimated PAGA Maximum	Risk Adjusted Value
2	Meal Period Violations ²	\$484,384	\$121,096 (25%)
3	Rest Break Violations	\$503,342	\$251,671 (50%)
4	Wage and Hour	\$9,563	\$4,781.50 (50%)
5	Wage Statements	\$508,250	\$254,125 (50%)
6	Suitable Seating ³	\$503,342	\$125,835.50 (25%)
7	Total PAGA	\$2,008,881	\$757,509.00

8
9 There is no private right of action on the suitable seating claim. These claims are premised
10 on Section 14 of IWC Wage Order 7-2001, and actionable via PAGA through Labor Code section
11 1198, which makes the conditions for labor set forth in the wage orders the minimum conditions
12 allowed by law. Thus, a violation of Section 14 of the Wage Order is a violation of Labor Code
13 section 1198 actionable through PAGA.

14 Section 14 has two parts. Under Section 14 (A) all workers must be provided with a suitable
15 seat when the nature of the work reasonably permits the use of seats. Under Section 14 (B) seats
16 must be provided within reasonable proximity even when the nature of the work requires standing
17 to be used during lulls in operation when it does not interfere with the performance of their duties

18 While these cases are actionable, *no Plaintiff has ever won a suitable seating case at trial in*
19 *California*. Further, in *LaFace v. Ralphs Grocery Co.* (2022) 75 Cal.App.5th 388, a case also
20 involving cashiers, the court found that where cashiers were instructed to perform additional duties
21 when they were not checking out a customer, and those duties could not be performed while seated,
22 such as restocking and cleaning, no action under Section 14 (B) exists because their use would
23 interfere with the performance of those other duties. While Plaintiff maintains that an action under
24 Section (A) is still viable, and there are distinctions that can be drawn between the present case and
25 *LaFace*, there is significant risk that the Court could find enough similarity to apply *LaFace* here.

26
27 ² Although PAGA penalties are usually assessed on a per pay period basis, Plaintiff's expert
28 extrapolated out from the PAGA penalties calculated from the sample data provided by Defendant.
The resulting extrapolated figures reflect this extrapolation.

³ See below for analysis of the suitable seating claim.

1 As such, Plaintiff estimates the RAV to be about 25% of the total possible PAGA penalty as found
2 by Plaintiff's expert using the number of pay periods and number of employees alone. This
3 adjustment reflects only the risk in proving up the claim, and does not take into consideration the
4 power of the Court to reduce PAGA penalties pursuant to Labor Code Section 2699 Subd. (e)(2).

5 **3. Maximum Damages and Penalties at Issue**

6 Based on the data provided, Plaintiffs' counsel's expert estimated maximum total damages
7 and penalties (including PAGA) to be approximately \$6,571,374 prior to mediation. The total RAV,
8 as discussed above, is approximately \$1,620,495.75. Thus, the settlement of \$195,000 is about 12%
9 of the total estimated liability. However, even this adjusted value does not reflect all risks in the
10 case. First, there is the time value of money – i.e. the value added in getting a fixed amount now
11 rather than continue the litigation for years. Since prejudgment interest is only permitted when the
12 amount at issue is certain from the outset, it is entirely possible that Plaintiff would not recover
13 anything for that time. Second, there are all the unknowable variables that can hamper litigation that
14 have nothing to do with the merits – key witnesses may suddenly become unavailable, or prove
15 uncooperative, natural disasters may destroy key documents, memories fade... even the tone of a
16 witnesses voice when giving testimony, influenced by a lack of sleep the night before, can create
17 the assumption of a lack of credibility in the finder of fact. Third, even if Plaintiff were to succeed
18 on the merits the PAGA claim is subject to reduction under Labor Code Section 2699 Subd (e)(2).

19 Numerous courts have held that gross settlements approximating between only 8 and 25% of
20 the defendant's potential exposure are fair and reasonable. (*See, e.g., In re Mego Fin. Corp. Secs.*
21 *Litig.* (9th Cir. 2000) 213 F.3d 454, 459 holding that class action settlement recovering 16% of
22 potential exposure was fair and reasonable; "It is well-settled law that a cash settlement amounting
23 to only a fraction of the potential recovery does not per se render the settlement inadequate or
24 unfair.)

25 Rather, the fairness and the adequacy of the settlement should be assessed relative to risks of
26 pursuing the litigation to judgment"; *Bellinghausen v. Tractor Supply Co.*, No. 13-CV-02377-JSC,
27 2015 WL 1289342, at *6 (N.D. Cal. Mar. 20, 2015) (holding that class action settlement recovering
28 between 8.5% and 25% of the defendant's potential exposure was fair); *Van Ba Ma v. Covidien*

1 *Holding Inc.*, U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014) (court granted preliminary
2 approval of wage and hour class settlement which obtained 9.1% of projected damages, given the
3 risks of continued litigation.)

4 **C. An Analysis of the Terms of the Settlement**

5 **1. Estimate of Class Members' Recovery**

6 The amount allocated to each Class Member is based on the number of workweeks worked
7 during the Class Period. Based on the Net Settlement Amount of \$73,250 the average payment for
8 the class members is \$257.02, a significant benefit to the class.⁴

9 **2. Unclaimed Funds**

10 Any individual settlement payments that remain uncashed within 180 days of the mailing of
11 settlement payment checks by the settlement administrator will be paid to the State Controller via
12 the usual unclaimed funds process.

13 **3. Scope of the Release**

14 The scope of the release, as listed below, is identified in the Settlement at section 5, as well
15 as in the Notice Packet that will be sent to Class Members and is limited to the claims in the
16 complaint:

17 Plaintiff's Release. Plaintiff and her respective former and present spouses,
18 representatives, agents, attorneys, heirs, administrators, successors and assigns
19 generally, release and forever discharge Released Parties from any and all past, present,
20 and future claims, demands, obligations, actions, causes of action, rights, damages, losses of
services, wages, costs, expenses, and compensation whatsoever, occurring from the
beginning of time to Plaintiff's execution of this agreement, including, but not
limited to:

- 21 (a) all claims that were, or reasonably could have been, alleged, based on the
facts contained, in the Operative Complaint and
22 (b) all PAGA claims that were, or reasonably could have been, alleged based on
facts contained in the Operative Complaint, and Plaintiff's PAGA Notice, as well
23 as ("Plaintiff's Release.") Plaintiff's Release does not extend to any claims or
24 actions to enforce this Agreement, or to any claims for vested benefits,
unemployment benefits, disability benefits, social security benefits, workers'
25 compensation benefits that arose at any time, or based on occurrences outside the

26
27 ⁴ Calculated by dividing the Net Settlement Amount by the number of class members. Actual
28 average recovery will vary based on each Class Members workweek's worked, as well as the
number of Class Members who opt out. This also does not include the employee's portion of the
PAGA payment.

1 Class Period. Plaintiff acknowledges that Plaintiff may discover facts or law
2 different from, or in addition to, the facts or law that Plaintiff now knows or
3 believes to be true but agrees, nonetheless, that Plaintiff's Release shall be and
4 remain effective in all respects, notwithstanding such different or additional facts
5 or Plaintiff's discovery of them.

6 **1. Plaintiff's Waiver of Rights Under Civil Code Section 1542. For purposes**
7 **of Plaintiff's Release, Plaintiff expressly waives and relinquishes the**
8 **provisions, rights, and benefits, if any, of section 1542 of the Civil Code,**
9 **which reads:**

10 **A general release does not extend to claims that the creditor or releasing**
11 **party does not know or suspect to exist in his or her favor at the time of**
12 **executing the release, and that if known by him or her would have materially**
13 **affected his or her settlement with the debtor or Released Party**

14 Release by Participating Class Members:

15 All Participating Class Members, on behalf of themselves and their respective former
16 and present representatives, agents, attorneys, heirs, administrators, successors and
17 assigns, release Released Parties from (i) all claims that were alleged, or reasonably
18 could have been alleged under the Labor Code and IWC Wage Orders, based on the
19 Class Period facts stated in the Operative Complaint including e.g., any and all
20 claims involving (a) Meal Period Violations, (b) Rest Period Violations, (c) Failure
21 to Pay Overtime Wages, (d) Failure to Pay Minimum Wage, (e) Waiting Time
22 Penalties, (f) Wage Statement Penalties, (g) Violations of the Unfair Competition
23 Law, (h) work expense reimbursement violations, and (i) failure to provide suitable
24 seating. Except as set forth in Section 5.3 of this Agreement, Participating Class
25 Members do not release any other claims, including claims for vested benefits,
26 wrongful termination, violation of the Fair Employment and Housing Act,
27 unemployment insurance, disability, social security, workers' compensation or
28 claims based on facts occurring outside the Class Period.

29 Release by Non-Participating Class Members Who Are Aggrieved Employees:

30 All Non-Participating Class Members who are Aggrieved Employees are deemed to
31 release, on behalf of themselves and their respective former and present
32 representatives, agents, attorneys, heirs, administrators, successors and assigns, the
33 Released Parties from all claims for PAGA penalties that were alleged, or
34 reasonably could have been alleged, based on the PAGA Period facts stated in the
35 Operative Complaint and the PAGA Notice, including, e.g., any and all claims for
36 PAGA Penalties for (a) Meal Period Violations, (b) Rest Period Violations, (c)
37 Failure to Pay Overtime Wages, (d) Failure to Pay Minimum Wages, (e) Failure to
38 Pay Wages Promptly During Employment and/or Upon Termination, (f) Failure to
39 Provide Accurate Wage Statements, (g) Failure to Reimburse Work Related
40 Expenses, and (h) Failure to Provide Suitable Seating.

1 **1. Notice to Class Members**

2 Within 21 days of preliminary approval, Defendants will transmit to the Settlement
3 Administrator the following: each Class Members Member's full name; last known mailing address;
4 social security number; the number of Class Period Workweeks and PAGA Pay Periods. (See
5 Settlement, at §§ 1.8, 4.2.)

6 Within 14 days after receiving the Class List and Data, the Settlement Administrator shall
7 mail Notice Packets to all Class Members via regular First-Class U.S. Mail, using the most current,
8 known mailing addresses. (See Settlement, at § 7.4.1.) With respect to any returned envelopes, the
9 Settlement Administrator shall re-mail to the forwarding address affixed thereto. If no forwarding
10 address is provided, the Settlement Administrator shall promptly attempt to determine a correct
11 address by use of skip-tracing, or other search using the name, address and/or social security
12 number of the respective Class Member, and shall then perform a re-mailing, if another mailing
13 address is identified by the Settlement Administrator.

14 Class Members will be provided 60 days to opt out, challenge the number of workweeks, or
15 object to the settlement. (See Settlement, at §7.5.) Further, Class Members will be notified of the
16 time, date, and place of the final approval hearing and of their right to appear at the fairness hearing.

17 **2. Tax Treatment of Settlement Amounts**

18 The Settlement provides that 25% of each Individual Settlement Payment shall be allocated
19 as payment for alleged unpaid wages, and 75% shall be allocated as alleged penalties and interest.
20 The Settlement Administrator will issue appropriate IRS tax forms.

21 **3. Proposed Payment to Class Representative**

22 Plaintiff requests an individual enhancement payment of \$10,000, which will be discussed in
23 detail in the motion for final approval.

24 **4. Attorneys' Fees and Costs**

25 The attorney fees and costs will be discussed in detail in the motion for final approval. On a
26 high level, counsel has already expended over 145 hours on the case, for a total loadstar of over
27 \$75,000. Thus, the requested attorney fee of \$65,000 is reasonable.

28 ///

1 **5. Class Administration Costs**

2 Similarly, reimbursement of the settlement administrator’s costs will be discussed in the
3 final approval motion. However, the bid for settlement administration is attached to the Declaration
4 of Theodore Tang. For the court’s review.

5 **V. THE PROPOSED CLASS MEETS ALL CERTIFICATION REQUIREMENTS**

6 **A. The Class is Ascertainable and Sufficiently Numerous.**

7 The Class that Plaintiff seeks to conditionally certify is ascertainable. “Class members are
8 ascertainable where they may be readily identified without unreasonable expense or time by
9 reference to official records.” (*Lee v. Dynamex, Inc.* (2008) 166 Cal. App. 4th 1325, 1334.)

10 Furthermore, the Class is sufficiently numerous. Courts generally find that numerosity is
11 satisfied if the class includes forty or more members. (*See Villalpando v. Excel Direct Inc.* (N.D.
12 Cal. 2014) 303 F.R.D. 588, 605-606.) The sample data provided by Defendants included 57
13 individuals alone. Tang Decl. ¶x.

14 **B. There Are Common Questions of Law and the Claims Are Typical**

15 The commonality requirement is met when there are questions of law and fact common to
16 the class. (*Hanlon v. Chrysler Corp.* (1998) 150 F.3d 1011, 1019 (“The existence of shared legal
17 issues with divergent legal factual predicates is sufficient, as is a common core of salient facts
18 couple with disparate legal remedies within the class”). Commonality requires only that some
19 common legal or factual questions exist; the plaintiff need not show that all issues in the litigation
20 are identical. (*See Richmond v. Dart Industries, Inc.* (1981) 29 Cal. 3d 462, 473 (1981) Where the
21 employer’s conduct is uniformly directed at a class of employees, as it is here, the class-wide
22 impact of the policies satisfies the commonality requirement. (*See Stephens v. Montgomery Ward &*
23 *Co.* (1987) 193 Cal. App. 3d 411, 421.)

24 The claims outlined above were arguably common to all class members, and Plaintiff was
25 subjected to the violations, satisfying the typicality requirement.

26 **C. Plaintiff and Plaintiff’s Counsel Adequately Represent the Class**

27 The adequacy requirement is also met. “Adequacy of representation depends on whether the
28 plaintiff’s attorney is qualified to conduct the proposed litigation and the plaintiff’s interests are not

1 antagonistic to the interests of the class.” (*McGhee v. Bank of Am.* (1976) 60 Cal.App.3d 442, 450.)

2 Correspondingly, Plaintiff does not have any interests adverse to the class.

3 As detailed in the attached declaration, Plaintiff’s counsel are experienced and well-
4 qualified class action attorneys who have settled a variety wage and hour matters. The work done to
5 prepare for the mediation was fastidious and methodical, which yielded a successful result.

6 **VI. LWDA HAS BEEN PROVIDED WITH NOTICE OF THIS MOTION**

7 The settlement will be uploaded to the LWDA website on the same day the motion is filed.

8 **VII. CONCLUSION AND ACTION REQUESTED**

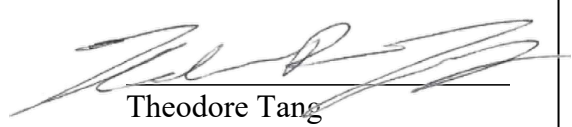
9 Plaintiff submits that the proposed settlement is fair, adequate, and reasonable. It will result
10 in both substantial monetary benefits to Class Members and the PAGA portion of the settlement
11 will also benefit the State of California.

12 The settlement was reached after informed, extensive, and arms’ length negotiations
13 conducted by counsel for respective parties who are experienced in wage and hour class action
14 litigation, who were able to research the issues and develop a convincing damages model.

15 Out of the gross settlement of \$195,000, after the deductions for attorney fees, costs,
16 settlement administration, the PAGA allocation, and Plaintiff’s enhancement payment, a net
17 settlement amount of \$73,250 will be provided for the class members, a definite benefit.

18
19 Date: June 20, 2024

FRONITER LAW CENTER

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22 
23 Theodore Tang
24 Attorney for Plaintiff
25 Danielle Denise Smalling.
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