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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF KERN

DONALD HOLLINGSWORTH, an individual;
LUTRICIA RANDOLPH, on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

WESTCARE CALIFORNIA, INC.; and DOES
1 through 20, inclusive,

Defendants.

Case No. BCV-22-100324

Assigned For All Purposes To:
Hon. David Zulfa
Division J

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

Date: June 22, 2023
Time: 8:30 a.m.
Division: J

1 **TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on June 22, 2023, at 8:30 a.m., or as soon thereafter as
3 the matter may be heard in Department J of the above-entitled court, located at 1215 Truxtun
4 Ave, Bakersfield, CA 93301, Plaintiffs DONALD HOLLINGSWORTH and LUTRICIA
5 RANDOLPH (“Plaintiffs”) will hereby move the Court for an order granting Plaintiffs’ Motion
6 for Preliminary Approval of Class Action Settlement. In this unopposed motion, Plaintiffs seek
7 the entry of an order to: (1) preliminarily approve the proposed settlement of this class action; (2)
8 certify a class for settlement purposes only and appoint Shanberg Stafford LLP and Aegis Law
9 Firm PC as class counsel for settlement purposes only (hereinafter “Class Counsel”); (3) approve
10 the substance, form, and method to provide class-wide notice; (4) direct that notice of the
11 proposed settlement be given to all Class Members; and (5) schedule a hearing at which time the
12 following will be considered: (i) the request for final approval of the proposed settlement; (ii) the
13 entry of the Final Judgment; and (iii) approval of Class Counsel’s motion for attorneys’ fees and
costs, and Plaintiffs’ enhancement awards.

14 This Motion is based upon this Notice, the attached Memorandum of Points and
15 Authorities, the Declarations of Ross E. Shanberg, Joseph Szilagyi, Donald Hollingsworth, and
16 Lutricia Randolph, all documents and records on file in this action, and on such other further oral
17 and documentary evidence as may be given at the hearing on this Motion.

18 Dated: May 17, 2023

SHANBERG STAFFORD LLP

20
21 /s/Ross E. Shanberg

Ross E. Shanberg

Shane C. Stafford

Attorneys for Plaintiffs

DONALD HOLLINGSWORTH AND

LUTRICIA RANDOLPH and all others

similarly situated

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1 **I. INTRODUCTION**

2 This class action and PAGA settlement is sought on behalf of approximately 929 current
3 and former non-exempt hourly employees who worked in California for Defendant
4 WESTCARE CALIFORNIA, INC. (“Defendant”), between March 1, 2019, and March 31,
5 2023.

6 The case arises out of Plaintiffs’ allegations that Defendant violated California’s wage
7 and hour laws, including failing to pay all minimum and overtime wages owed, failing to
8 authorize and permit meal and rest periods, failing to reimburse for business expenses, failing to
9 properly maintain and submit wage statements, and failing to timely pay wages owed.

10 After a lengthy mediation session, the parties have agreed to a non-reversionary, all-in
11 common fund settlement of **\$765,000**. See Declaration of Ross E. Shanberg (“Shanberg
12 Decl.”), Exhibit 1. The net amount to be paid to class members (after payment of class counsel
13 fees and expenses, settlement administration costs, Private Attorneys General Act (“PAGA”)
14 penalties to the LWDA, and Plaintiffs’ enhancement awards), is approximately \$420,950. Each
15 class member’s share of the settlement is based on each of their eligible number of workweeks,
16 and shall receive, on average, approximately \$453.00. So long as the class members do not opt
17 out of the settlement, they will receive a settlement payment. For purposes of this settlement
18 only, the parties agree that the proposed Settlement Class satisfies each of the requirements of
19 Code of Civil Procedure section 382. The settlement is fair, reasonable, and confers a
20 substantial monetary benefit to the entire class. Accordingly, Plaintiffs request that the court
21 grant preliminary approval of the Joint Stipulation of Class Action and PAGA Settlement and
22 Release (“Settlement Agreement”) submitted herewith, conditionally certify the Settlement
23 Class, approve the proposed Notice of Pendency of Class Action Settlement and Final Hearing,
24 and set a hearing date for final settlement approval.

25 **II. PRE-TRIAL PROCEEDINGS AND SETTLEMENT**

26 **A. Procedural History**

27 **1. Hollingsworth Case**

28 On February 8, 2022, Plaintiff Hollingsworth’s class action was filed in the Kern County
Superior Court. Plaintiff Hollingsworth alleged claims of failing to pay all minimum wages
owed and overtime, failing to reimburse for business expenses, failing to properly maintain and

1 submit wage statements, failing to timely pay wages owed, and unfair business practices.
2 Plaintiff then amended his complaint to add a PAGA claim. Shanberg Decl ¶ 3.

3 **2. Randolph Case**

4 On March 2, 2022, Plaintiff Randolph filed the related class action case in the Contra
5 Costa County Superior Court and later amended her complaint to allege violations of PAGA on
6 May 10, 2022. Plaintiff Randolph alleged the same claims as Plaintiff Hollingsworth, but also
7 alleged claims of failure to provide proper meal periods and failure to authorize and permit
8 proper rest periods. Shanberg Decl ¶ 4. As part of the settlement of these cases, the parties
9 agreed to file a Second Amended Consolidated Complaint combining all claims and parties into
10 one case in front of this court. See Shanberg Decl ¶ 4, Exhibit 2.

11 **B. Prior Litigation**

12 Defendant previously settled a similar wage and hour case entitled Roach v. WestCare
13 California, Inc. (Kern County Superior Court, Case Number BCV-17-102367-SDS) in 2019.
14 That settlement involved claims for unlawful meal periods, unlawful rest breaks, waiting time
15 penalties, wage statement violations, and PAGA violations. The Roach settlement amount was
16 \$200,000 and covered approximately 550 employees, with a release period from October 11,
17 2013 through February 28, 2019. This settlement is more than three times larger than the Roach
18 settlement despite the much longer class release period. Judgement was entered in Roach on
19 December 11, 2019. Shanberg Decl ¶ 5, Exhibit 3. As such, the Roach case has no impact on
20 this case, other than limiting the release period herein from March 2019 to March 2023.
21 Shanberg Decl ¶ 5.

22 **C. Discovery**

23 Plaintiffs served formal discovery in their respective cases seeking standard class-wide
24 evidence, including Defendant's written policies, the timekeeping records and pay records for
25 Plaintiffs and all Class Members, and the contact information for all Class Members who
26 worked for Defendant in California during the Class Period. Before responses and documents
27 were served, the Parties agreed to a global private mediation early into litigation. Defendant
28 informally produced a sampling of time and payroll records, employment policy documents,
financial records, and related employee data for the parties to have a meaningful mediation.
Shanberg Decl ¶ 6.

1 Plaintiffs hired wage and hour damages expert James Toney to analyze voluminous
2 payroll and related wage data and create a damages model for the various claims alleged in the
3 case. Based upon the analysis of the time records and payroll data produced by Defendant in
4 advance of mediation, Mr. Toney and Class Counsel were able to calculate damage estimates on
a class-wide basis. Shanberg Decl ¶ 7, Exhibit 4.

5 **D. Defendant's Financial Condition**

6 Defendant is a non-profit organization that provides health and human services,
7 including substance abuse treatment, mental health programs, and domestic violence assistance,
8 among other things. Defendant has claimed, from the beginning of this case, that it is suffering
9 from dire financial constraints and, therefore, has very limited resources to fund a settlement.
10 According to Defendant, any revenue generated must be used to provide the services necessary
11 to assist its patients. Shanberg Decl ¶ 8.

12 In support of this claim, Defendant produced financial records in advance of mediation
13 for Plaintiffs' financial expert to review. Plaintiffs hired Certified Public Accountant, Vanessa
14 Hill, who analyzed and evaluated the records on Plaintiffs behalf prior to mediation. These
15 documents included consolidated financial statements, tax returns, profit and loss statements,
16 balance sheets, and related financial information which reflected substantial operating losses in
17 2021 and 2022. Plaintiffs considered this information prior to reaching a settlement with
Defendant. Shanberg Decl ¶ 9.

18 **E. Mediation**

19 The parties agreed to attend mediation with Michal J. Loeb, a prominent, experienced
20 mediator, on December 5, 2022. In advance of Mediation, Defendant produced detailed
21 document and records showing, among other things, the total number of putative class
22 members, the total number of former employees, their dates of employment, their average rates
23 of pay, the total number of workweeks year by year, time records for putative class members,
24 and the corresponding rates of pay for the premiums. Class Counsel thoroughly reviewed,
25 investigated, and analyzed this information in collaboration with their expert Mr. Toney. This
26 informal discovery process occurred over a period of several months and involved extensive
27 meet and confer efforts between counsel for the parties. Shanberg Decl ¶ 10.
28

1 The parties then spent several weeks negotiating the terms of the MOU, and another
2 several weeks negotiating the long-form settlement agreement. The parties fully executed the
3 Settlement Agreement on April 22, 2023. Shanberg Decl. ¶ 2, Exhibit 1.

4 **III. THE OPERATIVE SETTLEMENT TERMS AND PLAN OF ALLOCATION**

5 The class members entitled to the settlement fund are all current and former non-exempt,
6 hourly-paid employees of Defendant WestCare California, Inc. who worked at any time during
7 the Class Period of March 1, 2019 through March 31, 2023. There are approximately 929 Class
8 Members. Shanberg Decl. ¶ 12.

9 The settlement fund is all in (except for the employer's share of payroll taxes, which
10 Defendant shall pay in addition to the \$765,000 settlement), there is no claim form requirement,
11 and no residual will revert to Defendant. Class members will be paid as long as they do not opt
12 out of the settlement. If a Class Member opts out, their share of the Net Settlement Amount will
13 be allocated to other members of the Settlement Class. In the event a class member does not
14 negotiate his or her settlement check, the settlement administrator will forward the check to the
15 State of California, State Controller's Office, where it will remain in the name of the class
16 member until claimed. Shanberg Decl. ¶ 13.

17 The payment to the Class Members will be characterized eighty percent interest and
18 penalties, and twenty percent wages. This allocation is justified because many of the claims
19 alleged contain provisions for penalties, and the vast majority of the alleged violations occurred
20 years before the settlement, implicating significant alleged interest owed. The class
21 administrator will issue W-2 statements for the wage portion of the settlement, and a form 1099
22 for all amounts paid as penalties and interest. Shanberg Decl. ¶ 14.

23 Based upon Class Counsel's independent analysis and investigation in this matter, the
24 Settlement Class will be compensated based on each member's respective number of
25 workweeks during the Class Period. Shanberg Decl. ¶ 14.

26 Based on the settlement terms, there will be a gross settlement fund of \$420,950.
27 Subject to Defendant's review and calculation of precise class member data after preliminary
28 approval, the class member net payouts are, on average, approximately \$453 per class member.

In exchange for their payment, the participating Class Members will agree to the
following release:

1 "Upon the date Defendant transfers the Gross Settlement Amount to the
2 Settlement Administrator, Named Plaintiffs and Participating Class
3 Members who do not opt out of the Settlement release the Released Parties
4 of all claims alleged or could have been alleged based on the theories and
5 facts alleged in the operative complaints in the Actions, which arose during
6 the Class Period, including but not limited to (1) Failure to pay minimum
7 wages; (2) Failure to pay overtime wages; (3) Failure to provide meal
8 periods or provide premiums in lieu thereof; (4) Failure to provide rest
9 periods or provide premiums in lieu thereof; (5) Failure to pay timely
10 wages upon separation of employment; (6) Failure to provide accurate
itemized wage statements; (7) Failure to Reimburse Business Expenses; (8)
Violation of Business and Professions Code § 17200, et seq.; and (9)
Violation of the California Private Attorneys General Act of 2004 (Labor
Code §§ 2698, et seq.), for violations of Labor Code sections 201-204,
210, 226, 226.3, 226.7, 510, 512, 558, 1174, 1174.5, 1182.12, 1194,
1194.2, 1197, 1198, 2698 et seq., 2800, and 2802 ("Released Claims")."

11 (See Settlement Agreement, § 5.01). Furthermore, all Class Members will release PAGA
12 claims. (See Settlement Agreement, § 5.02). The named Plaintiffs will, in addition to releasing
13 claims alleged in the lawsuit, give a general release of all claims pursuant to Civil Code section
14 1542. Shanberg Decl. ¶ 15.

15 The parties further agree to appoint an experienced settlement administrator, ILYM
16 Group, Inc., to prepare and send notice to the class, receive and process objections, and prepare
17 and mail settlement checks to Settlement Class Members. The settlement administrator will
18 conduct skip-tracing for any Settlement Class Member whose address cannot be found.
Shanberg Decl. ¶ 16.

19 The Class Notice provides instructions for Class Members who choose to exclude
20 themselves from the Settlement. To opt out, Class Members are instructed to submit a request
21 for exclusion to the Settlement Administrator by a specified date (45 days after the date of
22 mailing of the Class Notice). Class Members do not need to submit a claim form to participate
23 in the Settlement. Class Members will be informed of how they can object to the Settlement,
24 and the Class Notice informs Class Members of the date, time, and location of the final fairness
25 and approval hearing so that they can appear in person. Accordingly, the content of the Class
26 Notice complies with the requirements of Cal. R. Ct. 3.766(d). Shanberg Decl. ¶17.

27 The all-in settlement fund will also include all of the attorneys' fees and costs allowed
28 by this Court. The attorneys' fees shall not exceed thirty-five percent of the settlement fund, or

1 \$267,750. Defendant will also pay class counsel's costs, not to exceed \$25,000.00, as well as
2 actual settlement administration costs not to exceed \$12,550, out of the common fund. Shanberg
3 Decl. ¶ 18.

4 The PAGA allocation of the settlement is \$25,000, of which \$18,750 (75%) will be
5 distributed to the Labor Workforce and Development Agency (LWDA), with the remaining
6 portion - \$6,250 (25%) - going to PAGA Members (all allegedly aggrieved persons who worked
7 for Defendant as non-exempt employees in California, at any time from February 8, 2021 to
8 March 31, 2023. Shanberg Decl. ¶ 19.

9 The settlement also includes Plaintiffs' class representative enhancements. Based on
10 Plaintiffs' work in connection with this case, including connecting Class Counsel with other
11 witnesses, meeting and conferring with Class Counsel regarding legal strategies, and assisting
12 with developing the claims and theories in this case, and attending Mediation, Plaintiffs
13 collectively seek \$20,000 (\$10,000 per Plaintiff). Shanberg Decl. ¶ 20; Hollingsworth Decl. ¶
14 8-22; Randolph Decl. ¶ 4-13.

15 **In summary, the settlement fund is allocated as follows:**

- 16 (1) A net settlement fund of approximately \$420,950.
- 17 (2) Attorney's fees and costs: \$267,750 in attorneys' fees and up to \$25,000 in
18 costs.
- 19 (3) Settlement administrator expenses not to exceed \$12,550.
- 20 (4) PAGA payment to the LWDA: \$18,750.
- 21 (5) Class representative enhancements of \$10,000 each for the two named Plaintiffs.
22 Shanberg Decl. ¶ 21.

23 **IV. NATURE OF CLAIMS**

24 Plaintiff Hollingsworth was employed at the WestCare - Martin Luther King Campus in
25 Fresno from approximately June of 2020 until April of 2021 where he worked as a residential
26 cook. Hollingsworth Decl. ¶ 2.

27 Plaintiff Randolph was employed from approximately November of 2021 until February
28 of 2022 and worked as a Counselor Tech at Defendant's facility in Richmond. Randolph Decl.
¶ 3.

Plaintiffs' Second Amended Consolidated Class Action Complaint alleges claims for 1)
Failure to Pay Minimum Wages; 2) Failure to Pay Overtime Wages; 3) Failure to Provide Meal

1 Periods; 4) Failure to Authorize and Permit Proper Rest Periods; 5) Failure to Reimburse
2 Business Expenses; 6) Failure to Properly Maintain and Submit Itemized Wage Statements; 7)
3 Waiting Time Penalties; 8) Unfair Business Practices; and 9) Violation of Labor Code § 2699
4 (PAGA). Plaintiffs further allege that they and the Class are entitled to damages, restitution,
5 wages, attorneys' fees, and interest, among other remedies. Shanberg Decl. ¶ 22.

6 Pursuant to Kullar v. Footlocker Retail Inc., 168 Cal.App.4th 116 (2008) and Dunk
7 v. Ford Motor Co., 48 Cal.App.4th 1794 (1996), the following describes the settlement's
8 reasonableness. Plaintiffs recognize the expense and length of continued proceedings necessary
9 to continue the litigation against Defendant through trial and through any possible appeals.
10 Plaintiffs have also taken into account the uncertainty and risk of denial of motion for class
11 certification and the uncertain outcomes resulting from further litigation, and the difficulties and
12 delays inherent in such litigation. Plaintiffs are also aware of the burdens of proof necessary to
13 establish liability for the claims asserted in this case, Defendant's defenses thereto, and the
14 difficulties in establishing damages for the Plaintiffs and Class Members. Shanberg Decl. ¶ 23.

15 Based on the foregoing, Plaintiffs have determined that the settlement is a fair, adequate
16 and reasonable settlement and is in the best interests of the Class Members. Shanberg Decl. ¶
17 24. A settlement does not have to provide 100% of the damages sought to be considered a fair
18 and reasonable settlement. Rebney v. Wells Fargo Bank, 220 Cal. App. 3d 1117, 1139 (1991).
19 Rather, compromise is expected. Wershba v. Apple Computer, Inc., 91 Cal. App. 4th 224, 250
20 (2001). The reasonable exposure and the reasonable settlement value for each of the alleged
21 claims are as follows:

22 **A. Unpaid Minimum Wage and Overtime Wages**

23 Plaintiffs' claim for failure to pay minimum wages and overtime wages arises out of
24 Plaintiff's primary contention that they frequently worked off the clock, and worked in excess
25 of 8 hours per day, and 40 hours per week, on a regular basis, in violation of California law. See
26 Labor Code §§ 510, 1194. For instance, Plaintiff Randolph worked the graveyard shift, from 12
27 am to 8am, however, she frequently worked late when staff members showed up late to relieve
28 her. She also was unable to take meal and rest breaks. She was not compensated for this time
in violation of the California Labor Code. Troester v. Starbucks Corp., 5 Cal. 5th 829, 847
(2018) ("An employer that requires its employees to work minutes off the clock on a regular

1 basis or as a regular feature of the job may not evade the obligation to compensate the employee
2 for that time by invoking the de minimis doctrine.”).

3 Defendant administered a corporate policy regarding both staffing levels, duties, and
4 responsibilities of Defendant’s employees that required Class Members to work overtime
5 without proper premium overtime pay and/or the regular rate of pay. Defendant regularly left
6 the facilities short staffed, which resulted in Class Members working in excess of 8 hours per
7 day without compensation. Class Members worked off-the-clock during their meal periods to
8 complete their job duties, including times when their lunches were interrupted to complete their
9 job duties. Class Members also had to clock out at the end of their work shifts and continue
10 working off-the-clock to provide adequate shift coverage until another Class Member began
11 their shift. None of this time was recorded and compensated.

12 Defendant also required Class Members to undergo COVID health screenings prior to
13 beginning their shifts and before clocking in. Class Members were not compensated for any of
14 this time.

15 Defendant contends that Class Members were never required to work off the clock, and
16 in fact were not prohibited from being on the clock while undergoing the COVID screenings.
17 Moreover, Defendant argues that this claim is too individualized for class treatment. And, as
18 noted above, Defendant claims it was suffering a dire financial condition; however, Plaintiffs’
19 expert reviewed the financial documents provided by Defendant and the parties dispute the
20 status of Defendant’s financial condition. Decl. Shanberg ¶ 24.

21 Prior to mediation, Plaintiffs’ retained expert determined that the total exposure on the
22 failure to pay proper minimum wage and overtime was approximately **\$5,220,069**. Plaintiffs
23 estimate a 25% chance of prevailing on the merits of this claim. As such, Plaintiffs estimate the
24 real exposure on this claim to be approximately **\$1,305,017**.

25 **B. Meal and Rest Period Claims**

26 **1. Meal period liability and damages**

27 Plaintiffs contend that Defendant failed to provide duty-free meal periods to the Class
28 Members, who suffered short, late and missed meal periods on a regular basis. In Brinker
Restaurant Corp. v. Superior Court, 53 Cal. 4th 1004 (2012), the California Supreme Court held
that “under ... Labor Code section 512, subdivision (a), an employer must relieve the employee
of all duty for the designated period but need not ensure that the employee does no work”

1 during the meal period. Brinker, 53 Cal. 4th at 1034. However, "...an employer may not
2 undermine a formal policy of providing meal breaks by pressuring employees to perform their
3 duties in ways that omit breaks. Cicairos v. Summit Logistics, Inc., 133 Cal. App. 4th 949,
4 962–963 (2005); see also Jaimez v. DAIHHS USA, Inc., 181 Cal. App. 4th 1286, 1304–1305
5 (2010) [proof of common scheduling policy that made taking breaks extremely difficult would
6 show violation]; Dilts v. Penske Logistics, LLC, 267 F.R.D. 625, 638 (S.D.Cal.2010)
7 [indicating informal anti-meal-break policy "enforced through 'ridicule' or 'reprimand' " would
8 be illegal].) The wage orders and governing statute do not countenance an employer's exerting
9 coercion against the taking of, creating incentives to forego, or otherwise encouraging the
10 skipping of legally protected breaks.” Brinker, 53 Cal. 4th at 1040.

11 Plaintiffs allege that the failure to provide meal periods was based primarily on the fact
12 that Defendant regularly understaffed its facilities. Defendant produced some data that showed
13 repeated meal period violations throughout the class period. Plaintiffs’ expert found the data
14 showed approximately 25% of all shifts included a late, short, or missed first or second lunches.

15 Defendant, on the other hand, contends that it has fully compliant meal period policies,
16 and that to the extent any employee is not provided a proper meal break they are paid the
17 resulting premium when appropriate. Further, Defendant believes that the meal period claim
18 cannot be certified because of the existence of individualized issues as to the why meal periods
19 were not taken, among other reasons.

20 Class Counsel and their expert calculated the meal break claims to be approximately
21 **\$2,269,236**. This calculation is based on the assumption that each late, missed or short meal
22 period was the result of Defendant’s interference with class members abilities to take duty-free
23 meal periods, and assumed a 50% violation rate for purposes of mediation. Based on
24 discussions with Plaintiffs and interviews of other class members, and the fact that Defendant
25 contends it has facially compliant meal period policies, Plaintiffs believe they had a ten percent
26 probability of recovering on these claims Accordingly, Plaintiffs contend the reasonable
27 exposure of the meal break claim is approximately **\$226,923**.

28 **2. Rest period liability and damages**

Labor Code § 226.7(b) provides that “[a]n employer shall not require an employee to
work during a meal or rest or recovery period mandated under an applicable statute, or
applicable regulation, standard, or order of the Industrial Welfare Commission, the

Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.”

Plaintiffs contend Defendant failed to provide lawful rest breaks to Class Members by requiring them to work through breaks. Employers must relieve employees of all duties and relinquish control over how employees spend their time during rest breaks. Augustus v. ABM Security Services, Inc., 5 Cal.5th 257 (2016). Defendant’s rest break practice failed.

Due to the round-the-clock care provided to clients and Defendant’s failure to provide adequate staffing, Class Members regularly worked straight through their shift without being provided rest breaks. The few times rest breaks were provided, they were not compliant with California law.

Defendant contends, on the other hand, that liability is tenuous at best because Defendant had a compliant rest period policy, it paid premiums for missed rest breaks, and that Plaintiffs would not be able to succeed on this claim because of numerous individual issues regarding why rest periods were not taken. Plaintiffs acknowledge the difficulty in proving the rest period violations as a result of an absence of objective evidence.

Plaintiffs’ expert computed the total violations across the class, multiplied by an average rate of pay for the class members, and calculated the value of the rest period claims to be **\$4,885,895**. Based on the difficulty of proving rest period violations on a classwide basis, and the lack of objective evidence proving such violations, Plaintiffs believe they had a ten percent chance of recovering all of the rest period damages. As such, Plaintiffs believe the reasonable exposure of the rest break claim is approximately **\$488,589**.

C. Wage Statement Claim

Labor Code § 226(a) states in pertinent part: “Every employer shall, semimonthly or at the time of each payment of wages, furnish each of his or her employees, either as a detachable part of the check, draft, or voucher paying the employee’s wages, or separately when wages are paid by personal check or cash, an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, ... (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number, (8) the name and address

1 of the legal entity that is the employer..., and (9) all applicable hourly rates in effect during the
2 pay period and the corresponding number of hours worked at each hourly rate by the
3 employee... .”

4 Plaintiffs’ theory of liability with respect to the paystub claim is that Defendant failed to
5 record and pay Class Members for all hours worked, therefore the pay stubs were inaccurate.
6 Moreover, Defendant failed to record and pay all premium payments for meal and rest period
7 violations. In Naranjo v. Spectrum Security Servs., Inc., 13 Cal.5th 93 (2022), the California
8 Supreme Court held that an employer’s obligation to report wages includes an obligation to
9 report premium pay for meal and rest break violations. Plaintiffs therefore contend that any
time Defendant failed to do so here should result in paystub penalties.

10 Defendant argues that, even assuming there are any violations, which it denies,
11 Defendant presents evidence of a good faith dispute as to any violation. Hurst v. Buczek
12 Enters., LLC, 870 F.Supp.2d 810, 829 (N.D. Cal. 2012) (no section 226 violation where the
13 employer "makes a good faith claim" in its defense); Harris v. Vector Mktg. Corp., 656
14 F.Supp.2d 1128, 1146 (2009) (the "employer did not knowingly and intentionally fail to provide
itemized wage statements" where there was a "good faith dispute").

15 Pursuant to Labor Code section 226, subd. (e)(1), employees are entitled to \$50 for the
16 initial pay period in which a violation occurs, and \$100 per pay period for subsequent
17 violations. Nevertheless, pursuant to Amaral v. Cintas Corp. No. 2, 163 Cal.App.4th 1157, 1209
18 (2008), the heightened penalty amount is not recoverable unless there is a showing of a prior
19 citation or in the absence of a good faith dispute. Bernstein v. Virgin America, Inc., 3 F.4th
20 1127, 1144 (9th Cir. 2021). Because there is no evidence here that Defendant has previously
21 been cited with Labor Code violations, Class Counsel believes the \$50 penalty to be applicable
22 for all violations.

23 Based on the pay periods at issue here, Plaintiffs’ expert calculated wage statement
24 penalties by multiplying the total employee count during the statutory period by the total
25 number of pay periods during that period, and calculated paystub penalties in the amount of are
26 approximately **\$881,250**. Plaintiffs believe they have a ten percent chance of recovering all of
27 those penalties, or **\$88,125**, based on the risks set forth above and Defendant’s defenses.
28

1 **D. Waiting Time Penalties**

2 Labor Code § 203 provides that if an employer willfully fails to pay, without abatement
3 or reduction, in accordance with Labor Code §§ 201 and 202, any wages of an employee who is
4 discharged or who quits, the wages of the employee shall continue at the same rate, for up to
5 thirty (30) days from the due date thereof, until paid or until an action therefore is commenced.

6 In Naranjo, the Court held that failing to pay meal and rest period premium payments
7 constituted “wages” for purposes of waiting time penalties. Naranjo, 13 Cal.5th at 117.

8 Defendant denies any violations whatsoever, and that even if such violations are proven, that
9 Defendant has a good faith dispute regarding whether such wages are owed.

10 Plaintiffs’ expert determined that the total value of this claim is approximately
11 **\$2,312,536**, based on termination counts provided, multiplied by the average daily rate per
12 terminated employee and the maximum 30-day waiting time period. Class Counsel believes the
13 reasonable settlement value is far less than the maximum amount because of the willfulness
14 standard for proving such penalties. Plaintiffs believe they have a ten percent possibility of
15 proving all such penalties. As such, Plaintiffs believe the realistic value of the waiting time
16 penalties are **\$231,253**.

17 **E. Violation of Labor Code § 2802**

18 California Labor Code section 2802(a) provides: An employer shall indemnify his or
19 her employee for all necessary expenditures or losses incurred by the employee in direct
20 consequence of the discharge of his or her duties. Cal. Lab. Code § 2802. Plaintiffs contend
21 that Defendant failed to comply with LC 2802 by failing to reimburse Plaintiffs for using their
22 personal cell phone to carry out their job functions.

23 Throughout the class period it was Defendant’s practice to have Class Members use the
24 PayCom application on their personal cell phones each shift to clock-in and clock-out for their
25 shifts and for meal periods. When COVID screening was implemented in 2020, Defendant also
26 allowed Class Members to perform the screening using an application on their cell phone.
27 Plaintiffs estimated a reimbursement amount of \$20/month.

28 Defendant contends employees were not required to use their phones to clock in or out,
that was the employees’ option if they chose to do so. Defendant further contends it provided
cell phones to employees as needed. Finally, Defendant disputes that amount Plaintiffs claim
they are entitled to each month as being excessive.

1 Plaintiffs' expert determined that the total exposure on this claim was approximately
2 **\$296,794**. Plaintiffs estimate an 50% probability of succeeding on the merits. Thus, Plaintiffs
3 estimate this claim to be valued at **\$148,397**. (Shanberg Decl., ¶ 24.)

4 **F. PAGA**

5 Plaintiffs contend that PAGA penalties are owed based on the numerous alleged Labor
6 Code violations identified above. Once a PAGA violation is found, a court must award civil
7 penalties. Amaral v. Cintas Corp. No. 2, 163 Cal.App.4th 1157, 1211-1213 (2008).

8 Nevertheless, a court has discretion to reduce the award of civil penalties if it finds that "based
9 on the facts and circumstances of the particular case, to do otherwise would result in an award
10 that is unjust, arbitrary and oppressive, or confiscatory." Cal. Lab. Code § 2699(e)(2).

11 Significantly, moreover, because the law is unsettled in many areas of the law alleged by
12 Plaintiffs herein, there is a very real possibility that a court would substantially reduce the
13 penalties, even if they are proven. See, e.g., Fleming v. Covidien, Inc., 2011 WL 7563047, *3-4
14 (C.D. Cal. 2011) (reducing penalties from \$2.8 million to \$500,000 based on wage statement
15 violations because to assess full penalties would be unjust and arbitrary); Thurman v. Bayshore
16 Transit Mgmt., Inc., 203 Cal.App.4th 1112, 1134 (2012) (reduction of PAGA penalties by 30%
17 affirmed on appeal).

18 Plaintiffs' expert calculated the maximum value of the PAGA penalties to be
19 **\$7,320,316**, based on assumed violations of Labor Code §§ 510, 1174, 1194, 512, 226.7, 226,
20 and 2802, violations for every pay period at issue, stacking of penalties, heightened subsequent
21 penalties, and a 100% violation rate. Plaintiffs believe recovering all these penalties is highly
22 unlikely and, based on the Court's discretion to reduce such penalties, Plaintiffs believe they
23 had the chance of recovering five percent of those penalties, or **\$366,015**.

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1 **G. Total Damage Exposure¹**

2 Plaintiffs believe that the **\$765,000** settlement achieved in this case is excellent for the
3 class members. Based upon a realistic exposure of approximately \$2,854,319, the settlement
4 represents approximately 27% of that total value. Given the many defenses raised, the
5 uncertainty of the certifiability of any class, the difficulty in proving the claims, and
6 Defendant's apparent poor financial condition, Class Counsel believes this settlement is fair and
7 reasonable result for the class.

8 **V. THE CLASS ACTION SETTLEMENT MEETS THE REQUIREMENTS FOR**
9 **PRELIMINARY APPROVAL**

10 When a proposed class action settlement is reached, the settlement must be submitted to
11 the court for approval. H. Newberg & A. Conte, Newberg on Class Actions at § 11.41, p. 11-87
12 (3d ed. 1992). Review of a proposed class action settlement involves two hearings. First, the
13 settlement must be preliminarily approved by the court. Second, a final settlement approval
14 hearing is set, where evidence and argument are submitted concerning the fairness, adequacy,
15 and reasonableness of the settlement, and class members may be heard regarding the settlement.
16 See Manual for Complex Litigation, Fourth §§ 21.632-21.633 (2004).

17 The question presented on a motion for preliminary approval of a proposed class action
18 settlement is whether the proposed settlement is "within the range of possible approval."
19 Manual for Complex Litigation, Fourth, § 21.632 at 321; Gautreaux v. Pierce, 690 F.2d 616,
20 621 n.3 (7th Cir. 1982). Preliminary approval is merely the prerequisite to giving notice so that
21 "the proposed settlement...may be submitted to members of the prospective Class for their
22 acceptance or rejection." Philadelphia Housing Authority v. American Radiator & Standard
23 Sanitary Corp., 323 F.Supp. 364, 372 (E.D. Pa. 1970). The court must determine whether the
24 settlement is fair, adequate, and reasonable. See Dunk v. Ford Motor Co., 48 Cal. App. 4th
25 1794, 1801 (1996) citing Officers for Justice v. Civil Service Com'n, 688 F.2d 615, 625 (9th

26 ¹ The Unfair Competition claim is subsumed into the *Kullar* analysis above. The Unfair
27 Competition claim is based upon the wage and hour violations, and adds an extra year of
28 damages, and is included within the above analysis.

1 Cir. 1982) and Fed. R. Civ. Proc. 23(e). There is an initial presumption of fairness when a
2 proposed settlement, which was negotiated at arm's length by counsel for the Class, is presented
3 for court approval. Newberg, §11.41, p. 11-88. However, the ultimate question of whether the
4 proposed settlement is fair, reasonable and adequate is made after notice of the settlement is
5 given to the class members and a final settlement hearing is held by the court.

6 **A. The Role Of The Court In Preliminary Approval Of A Class Action**
7 **Settlement**

8 The approval of a proposed settlement of a class action suit is a matter within the broad
9 discretion of the trial court. Wershba v. Apple Computer, Inc., 91 Cal. App. 4th 224, 234-235
10 (2001); Dunk, 48 Cal. App. 4th at 1801. Preliminary approval does not require the trial court to
11 answer the ultimate question of whether a proposed settlement is fair, reasonable and adequate.
12 That determination is made only after notice of the settlement has been given to the class
13 members and after they have been given an opportunity to voice their views of the settlement or
14 to be excluded from the settlement. See, e.g., J. Moore, Moore's Federal Practice §§ 23.80-
15 23.85 (2003). With regard to class action settlements, the opinions of counsel should be given
16 considerable weight both because of counsel's familiarity with the litigation and previous
17 experience with cases such as these. See Officers for Justice, 688 F.2d at 625.

18 **B. Factors To Consider In Granting Preliminary Approval**

19 Preliminary approval is warranted if the settlement falls within a "reasonable range."
20 See North County Contractor's Ass'n., Inc. v. Touchstone Ins. Servs., 27 Cal. App. 4th 1085,
21 1089-90 (1994); Conte & Newberg, *Newberg on Class Actions*, § 11.26 (4th ed. 2002). In
22 reviewing the fairness of a class action settlement, due regard should be given to what is
23 "otherwise a private consensual agreement between the parties." Cellphone Termination Fee
24 Cases, 186 Cal. App. 4th 1380, 1389 (2010). The inquiry "must be limited to the extent
25 necessary to reach a reasoned judgment that the agreement is not the product of fraud or
26 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken
27 as a whole, is fair, reasonable and adequate to all concerned." *Ibid*.

28 A number of factors are to be considered in evaluating a settlement for purposes of
preliminary approval. No one factor should be determinative, but rather all factors should be
considered. These criteria have been summarized as follows:

1 If the proposed settlement is the product of serious, informed, noncollusive negotiations,
2 has no obvious deficiencies, does not improperly grant preferential treatment to class
3 representatives or segments of the class, and falls within the range of possible approval, the
4 court should direct notice to be given to the class members of a formal fairness hearing, at
5 which evidence may be presented in support of and in opposition to the settlement. Manual of
Complex Litigation, Second §30.44, at 229. This settlement meets all of these criteria.

6 **1. The Proposed Class is Numerous and Ascertainable**

7 California law authorizes conditional class certification for settlement purposes when the
8 moving party proves the class is ascertainable and sufficiently numerous, a well-defined
9 community of interest exists among class members, and certification is a fair and efficient
10 means of adjudicating the action, rendering proceeding as a class superior to alternative means.
11 Brinker Restaurant Corp. v. Superior Court, 53 Cal.4th 1004, 1021 (2012). For settlement
12 purposes only, the Parties have stipulated and agreed that the requisites for establishing class
13 certification have indeed been met. (*See* Settlement Agreement, § 2.01).

14 Whether a class is “ascertainable” within the meaning of Code of Civil Procedure
15 section 382 is “determined by examining (1) the class definition, (2) the size of the class, and
16 (3) the means available for identifying class members.” Reyes v. Bd. of Supervisors, 196
17 Cal.App.3d 1263, 1271 (1987). Here, the Class consists of approximately 929 current and
18 former non-exempt hourly employees who worked in California for Defendant between March
19 1, 2019, and March 31, 2023. Further, the Class is readily ascertainable from Defendant’s
20 business records because all Class Members are current or former employees of Defendant.
Shanberg Decl. ¶ 26.

21 **2. The settlement is the product of serious, informed, and**
22 **non-collusive negotiations**

23 This settlement is the result of extensive and hard-fought negotiations. Defendant has
24 denied and continues to deny all of the claims and contentions alleged in this case. Nonetheless,
25 Defendant has agreed to settle this case in the manner and upon the terms and conditions set
26 forth in the Settlement Agreement to avoid the expense, inconvenience, and burden of further
27 legal proceedings, and the uncertainties of trial and appeals. Shanberg Decl. ¶ 27.

28 Plaintiffs and Class Counsel recognize the expense of continuing to litigate and trying
this case against Defendant through possible appeals which could take several years. As such,

1 settlement is particularly advantageous to both parties here. Class Counsel are also mindful of
2 and recognize the inherent problems of proof under, and alleged defenses to, the claims asserted
3 in the case. Based upon their evaluation, Plaintiffs and Class Counsel have determined that the
4 settlement set forth in the Settlement Agreement is in the best interest of the Class Members.
Shanberg Decl. ¶ 28.

5 Here, the litigation has been hard fought and displayed capable and experienced
6 advocacy on both sides. Shanberg Decl. ¶ 29. “There is likewise every reason to conclude that
7 settlement negotiations were vigorously conducted at arm’s length and without any suggestion
8 of undue influence.” In re Wash. Public Power Supply System Sec. Litig., 720 F. Supp. 1379,
9 1392 (D. AZ 1989).

10 **3. The settlement has no “obvious deficiencies” and falls**
11 **within the range for approval**

12 The proposed settlement herein also has “no obvious deficiencies” and is well within the
13 range of permissible compromise. This settlement, which represents approximately 27% of the
14 claimed exposure faced by Defendant, is entitled to preliminary approval. See, e.g., Glass v.
15 UBS Fin. Servs., 2007 WL 221862, *4 (N.D. Cal. Jan. 26, 2007) (approving settlement of
16 unpaid overtime wages where the settlement amount constituted approximately 25- 35% of the
17 estimated actual loss to the class). Each Class Member will receive the same opportunity to
18 participate in and receive payment. Clearly, the goal of this litigation, to seek redress for the
Class, has been met. Shanberg Decl. ¶ 29.

19 Where both sides face significant uncertainty, the attendant risks favor settlement.
20 Hanlon v. Chrysler Com., 150 F.3D 1011, 1026 (9th Cir. 1998). Here, Defendant has
21 maintained that its wage and hour policies comply with California law due, in large part, to
22 changes Defendant implemented after resolving a prior class action in 2019 alleging similar
23 claims and violations. Nevertheless, after arms-length negotiations, including via a mediation
24 with an experience mediator, the parties reached a proposed settlement of \$765,000, where each
25 member of the Class will receive payment unless the class member opts out of the settlement.
Shanberg Decl. ¶ 30.

26 **4. No preferential treatment is given to the class representatives**
27 **or other members of the class**

1 All of the class members will share in the settlement according to the number of
2 workweeks worked during their employment with Defendant. The compensation formula is
3 objective, justified, and reasonable in this case, and does not improperly grant preferential
4 treatment to any class member. Shanberg Decl. ¶ 31.

5 **5. The parties engaged in adequate discovery prior to settlement**

6 The agreement to settle did not occur until Class Counsel possessed sufficient
7 information to make an informed judgment regarding the likelihood of success on the merits
8 and the results that could be obtained through further litigation. Class Counsel developed
9 strong legal theories for their case, and initially pursued formal discovery, which was stayed so
10 that the parties could attend mediation. However, prior to mediation, Defendant provided
11 substantial payroll records, policy documents, financial documents, and related documentation
12 to Plaintiff's counsel to review and thoroughly analyze prior to agreeing to attend mediation.
Shanberg Decl. ¶ 32.

13 Based on the foregoing data and their own independent investigation and evaluation,
14 Class Counsel is of the opinion that the settlement with Defendant for the consideration and on
15 the terms set forth in the Settlement Agreement is fair, reasonable, and adequate and is in the
16 best interest of the class in light of all known facts and circumstances, including the risk of
17 significant delay, defenses asserted by Defendant, and numerous issues that could be raised on
18 appeal and potential appeals down the road. Defendant and its counsel also agree that the
settlement is fair and in the best interest of the Class Members. Shanberg Decl. ¶ 33.

19 **6. Plaintiffs' Counsel is experienced in similar litigation**

20 Plaintiffs are represented by Aegis Law Firm, PC and Shanberg Stafford LLP ("Class
21 Counsel"). Class Counsel prosecute wage and hour class actions on behalf of employees and
22 others who have had their rights violated. Shanberg Decl. ¶¶ 35, 39-46; Szilagyi Decl. ¶¶ 11-23.
23 The attorneys working on this case have been appointed class counsel in many cases, through
24 both contested motions and settlement approval motions. *Ibid.* Plaintiffs' Counsel are currently
25 representing employees in dozens of other wage and hour cases. Shanberg Decl. ¶ 42; Szilagyi
26 Decl. ¶ 13. Thus, Plaintiffs' Counsel have extensive experience in similar litigation and should
27 be appointed as Class Counsel.
28

1 **7. The class representatives' service payments are reasonable**

2 Courts routinely approve class representative service payments, also known as incentive
3 awards, to compensate named plaintiffs for the services they provide and the risks they incur
4 during class action litigation. See In re Cellphone Fee Termination Cases, 186 Cal. App. 4th
5 1380, 1393 (2010); see also Bell v. Farmers Ins. Exch., 115 Cal. App. 4th 715, 726 (2004)
6 (upholding "service payments" to named plaintiffs for efforts in bringing the case); Manual for
7 Complex Litigation, § 21.62, n. 971 (noting that such awards "may sometimes be warranted for
8 time spent meeting with Class Members, monitoring cases, or responding to discovery").

9 The class representatives collectively have spent many hours reviewing documents
10 produced by Defendant, conferring with Class Counsel, and attending mediation, to achieve the
11 result herein. But for the class representatives, this settlement would not have been reached. In
12 addition, Plaintiffs are releasing all claims, not just wage and hour claims, as part of their
13 releases in this case. As such, Plaintiffs' release includes a waiver of unknown claims and their
14 rights under California Civil Code § 1542. The proposed class representative service award
15 payments for Plaintiffs are intended to recognize their initiative, risk, and efforts on behalf of
16 the Settlement Class. Shanberg Decl. ¶ 34; Hollingsworth Decl ¶ 9-23; Randolph Decl ¶ 3-13.

17 **8. Plaintiffs' counsel's attorney's fees and costs are reasonable**

18 California courts have recognized that an appropriate method for determining an award
19 of attorneys' fees is based on a percentage of the total value of benefits to class members by the
20 settlement. Serrano v. Priest, 20 Cal.3d 25, 34 (1977); Vincent v. Hughes Air West, Inc., 557
21 F.2d 759, 769 (9th Cir. 1977). The purpose of this equitable doctrine is to avoid unjust
22 enrichment of counsel and to "spread litigation costs proportionally among all the beneficiaries
23 so that the active beneficiary does not bear the entire burden alone." Vincent, 557 F.2d at 769.

24 Trial courts have "wide latitude" in assessing the value of attorneys' fees and their
25 decisions will "not be disturbed on appeal absent a manifest abuse of discretion." Lealao v.
26 Beneficial Cal., Inc. 82 Cal. App 4th 19, 41 (2000). California law provides that attorney fee
27 awards should be equivalent to fees paid in the legal marketplace to compensate for the result
28 achieved and risk incurred. Laffitte v. Robert Half Int'l, Inc. 1 Cal. 5th 480, 503 (2016).
Historically, courts have awarded fees as high as fifty percent (50%) of the settlement,
depending on the circumstances of the case. Conte & Newberg, *Newberg on Class Actions* (4th
Ed., 2002) § 14.03.

1 Class Counsel has extensive experience in employment litigation and has successfully
2 handled wage and hour class actions. Class Counsel seeks up to thirty-five percent of the
3 Settlement Amount for attorney's fees. Shanberg Decl ¶¶ 35, 39-46; Szilagyi Decl ¶¶ 11-23.
4 Given the work performed in this matter, the extensive information exchange, and substantial
5 recovery obtained on behalf of Plaintiff and the Class, Plaintiff's Counsel achieved a settlement
6 through efficient and diligent work and the requested fee is reasonable. Moreover, Class
7 Counsel seeks reimbursement of actual costs not to exceed \$25,000, which Defendant has
8 agreed to pay out of the Gross Settlement Amount. All such costs, as well as the class
9 administrator's expenses to oversee the class notice procedure and remit the settlement fund to
10 the class, are reasonably necessary in prosecuting this action. Shanberg Decl ¶ 36.

11 At final approval, Plaintiff's Counsel will fully brief the merits of the requested
12 attorneys' fees and costs.

13 **9. Administration costs are reasonable**

14 All administration costs incurred by the Settlement Administrator shall be paid out of
15 the Gross Settlement Amount. An application will be submitted to the Court to approve the
16 allocation of Settlement Administration Costs for no greater than \$12,550. Shanberg Decl ¶ 36.

17 **VI. THE PROPOSED CLASS NOTICE IS FAIR AND APPROPRIATE**

18 The method and content of a Notice of Settlement to class members should be designed
19 to fairly apprise them of the terms of the proposed settlement and options available to them.
20 See Philadelphia Housing Authority v. American Radiators & Standard Sanitary Corp., 323 F.
21 Supp. 364, 378 (E.D. Pa. 1970). An appropriate notice is one which has a reasonable chance of
22 reaching a substantial percentage of the class members. See Cartt v. Superior Court, 50 Cal.
23 App. 3d 960, 974 (1975).

24 The proposed Notice of Class Settlement is fair and reasonable in this case. It describes
25 the nature of the lawsuit, the Settlement Class, the settlement amount, the proposed plan of
26 allocation of the settlement amount, and the attorneys' fees that Class Counsel may receive.
27 The proposed notice also describes the Settlement Agreement in sufficient detail to allow the
28 Settlement Class Members to make an informed choice to accept or reject it. The proposed
Notice also contains information on opting out of the Class, objecting to the settlement, and sets
forth the schedule for the final approval hearing. Shanberg Decl ¶ 37.

Moreover, the parties propose that the Notice be mailed by the Settlement Administrator to all Class members at the last known address maintained by Defendant, and updated by the Settlement Administrator, if necessary, after accessing the National Change of Address database. In the event the Notice of Settlement is returned as undeliverable, the Settlement Administrator will perform a skip-trace procedure, and if such procedure reveals a new address, the Settlement Administrator will re-mail the Notice within five days. The proposed notice describes the proposed settlement with enough specificity to permit class members to make an informed decision whether to participate in the settlement. Shanberg Decl ¶ 38.

VII. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that this Court preliminarily approve the Settlement, approve the Notice of Settlement, and set the date and time for the Final Approval Hearing.

Dated: May 17, 2023

SHANBERG STAFFORD LLP

/s/Ross E. Shanberg

Ross E. Shanberg
Shane C. Stafford
Attorneys for Plaintiffs
DONALD HOLLINGSWORTH AND
LUTRICIA RANDOLPH and all others
similarly situated