

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

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

SULLIVAN & YAECKEL LAW GROUP, APC

2330 Third Avenue
San Diego, California 92101
(619) 702-6760 * (619) 702-6761 FAX

Attorneys for Plaintiffs MARCELINO ORUNO, Individually, and on behalf of other members of the general public similarly situated

BRADLEY/GROMBACHER, LLP

Marcus J. Bradley, Esq. (SBN 174156)
Kiley L. Grombacher, Esq. (SBN 245960)
Corey S. Smith, Esq. (SBN 312002)
Kasra B. Ramez, Esq. (SBN 337470)
31365 Oak Crest Drive, Suite 240
Westlake Village, CA 91361
Telephone: (805) 270-7100
Facsimile: (805) 270-7589
Email: mbradley@bradleygrombacher.com
Email: kgrombacher@bradleygrombacher.com
Email: csmith@bradleygrombacher.com
Email: kramez@bradleygrombacher.com

Attorneys for Plaintiff, ANUAR ROMO on behalf of himself and others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

MARCELINO ORTUNO, Individually, and
on behalf of other members of the general
public similarly situated

Plaintiff

v.

THE HERTZ CORPORATION, a Delaware
Corporation; DTG OPERATIONS, INC., an
Oklahoma Corporation; and DOES 1-10,
inclusive.

Defendants

CASE NO. 37-2022-00006731-CU-OE-CTL

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

Date: December 6, 2024
Time: 1:30 a.m.
Dept.: C-70
Judge: Hon. Carolyn M. Caietti

I. SUMMARY OF MOTION

This matter is a “Wage and Hour” representative (*i.e.*, “PAGA”) and Proposed class action. Plaintiff Marcelino Ortuno, Individually, and on behalf of other members of the general public similarly situated, brings Labor Code claims against Defendants THE HERTZ CORPORATION, and DTG OPERATIONS, INC. (hereinafter, “Hertz” or “Defendant”). This global settlement also includes another pending matter: *Anuar Romo v. The Hertz Corporation*, Case No. 22STCV35379, initiated on November 7, 2022, and pending in the Superior Court of the State of California, County of Los Angeles. As this is the “first filed” matter, the parties have stipulated to the filing of an amended Complaint which adds Romo as a named Plaintiff in this action.

Following approximately **33 months** of formal litigation, exchanges of at least 6 sets of formal discovery devices, multiple depositions, a full-day of Mediation, full briefing of a Motion for Class Certification, and extensive arms length negotiations, the parties agreed to the terms of a class and PAGA action settlement. The parties have drafted and executed a Joint “Stipulation of Settlement and Release” (the “Agreement”), lodged as **Exhibit A¹** to the declaration of Ryan T. Kuhn. Briefly, the parties’ settlement figures are estimated as follows:

Approximate size of class:	4,507 individuals
Notice Period:	30 days from Mailing of Notice
Settlement Fund (“GSA”):	\$3,300,000.00
Settlement administration:	\$21,000.00 (or less)
Class representative incentive:	\$20,000.00 (\$10,000.00 each)
LWDA payment:	\$135,000.00 (75 % Share of \$180,000 allocation)
Attorney's fees:	\$1,100,000.00 (1/3 of total)
Litigation costs:	\$42,500.00

The estimated average payment (before taxes) to each Class Member based on the above figures will be **\$429.66**. These estimates are an “average” only, and do not account for the fact that Class Members will receive more or less than an “average” share, as the amounts owed are calculated

¹ This Memorandum incorporates by reference the definitions in the Agreement and the terms used herein are intended to have the same meaning as set forth in the Agreement.

1 based on the number of workweeks each individual worked for Defendants during the class period.

2 **Please Note:** This is a **non reversionary** settlement, in that the entire Net Settlement Amount,
3 after the awarded costs, taxes and fees are deducted, will be automatically disbursed to all Class
4 Members who do not file a request to “opt-out” of participation in the lawsuit. (**Exhibit A** at ¶ 3.1).

5 Plaintiffs now move the Court for an order: (1) preliminarily approving the proposed class
6 action settlement; (2) directing that Notice (defined below) of the settlement be provided to Class
7 Members; and (3) scheduling a hearing for final approval of the proposed settlement and entry of the
8 parties’ proposed Final Approval Order and Judgment. Defendants do not oppose Plaintiffs’ motion.

9 **II. FACTUAL AND PROCEDURAL HISTORY**

10 The class is comprised of all hourly, non-exempt employees of Defendant who performed work
11 for Defendant in California at any time between June 30, 2021 through the date of Preliminary
12 Approval of this Settlement.

13 **1. The Operative Claims, Investigation and Informal Discovery Conducted**

14 On February 22, 2022, Plaintiff Ortuno filed the Complaint in this matter. The Complaint
15 alleged proposed class claims only, under the California Labor code involving, *inter alia*, (1) failure
16 to pay minimum wages; (2) failure to pay proper overtime compensation; (3) failure to provide meal
17 breaks; (4) failure to provide rest breaks; (5) failure to provide all gratuities owed; (6) failure to
18 reimburse employees for necessary business expenses; (7) failure to provide accurate itemized wage
19 statements; and (8) failure to pay all wages to upon termination. (Kuhn Decl. ¶ 3; ROA # 1). On
20 October 14, 2022, Plaintiff filed a First Amended Complaint, adding representative PAGA claims for
21 penalties based on the same violations asserted in his original complaint. (Kuhn Decl. ¶ 3; ROA #19).

22 On November 7, 2022, Romo filed his Complaint, in the County of Los Angeles Superior
23 Court, Case No. 22STCV35379, alleging meal and rest period violations, minimum wage and overtime
24 violations, wage statement and final pay violations, and failure to pay all accrued sick pay and vacation
25 time. Romo filed a First Amended Complaint on February 17, 2023. (Bradley decl. ¶¶ 14-16).

26 **Please Note:** As part of this settlement, and prior to preliminary approval, Plaintiff Ortuno will
27 file a Second Amended Complaint (the “Operative Complaint”), (1) adding Plaintiff Romo as a
28 plaintiff, and (2) amending the class definition to include certain claims that are the subject of this

1 global Settlement. (**Exhibit A** at Recitals: § 2.1)

2 On March 14, 2022, Plaintiff propounded discovery requests on Hertz. (Kuhn decl. ¶4).
3 Through these requests, Plaintiff sought, among other information and documents, the identities of
4 putative class members, compensation policies, Meal and Rest Period policies, employee handbooks,
5 wage statements, payroll records, time records, job descriptions, and reimbursement policies. (*Id*).

6 Hertz provided discovery responses, documents, and objections to Plaintiff's requests. After
7 a lengthy meet and confer processes, Hertz produced, *inter alia*, Plaintiff's time and wage records,
8 copies of the relevant employee handbooks, copies of all other relevant employee policies, the contents
9 of Plaintiff's employee file, Plaintiff's time records, and itemized wage statements. (Kuhn decl. ¶5).

10 Defendant also propounded several sets of written discovery on Plaintiff. In total, there were
11 at least 9 separate sets of written discovery exchanged between the parties. (Kuhn decl.¶ 6).

12 Following further substantive exchanges of discovery and litigation, the parties agreed to
13 explore resolution. As part of the settlement discussions, Hertz agreed to voluntarily produce and
14 verify thousands of pages of documents. The production included all relevant policies. It also included
15 a large electronic sampling of other class members' time and wage data. (Kuhn Decl. ¶7).

16 Hertz provided informal discovery which consisted of, *inter alia*, the number of current and
17 former employees who worked under the Hertz umbrella during the limitations period, meal and rest
18 period premiums paid, pay periods at issue, a redacted sampling of employee time records and wage
19 statements, as well as confirmation that various policies were standard as to the class. (Kuhn Decl. ¶8).

20 On October 2, 2023, the Parties attended a Mediation before experienced "Wage and Hour"
21 Mediator, Steve Serratore, Esq. (Kuhn Decl. ¶9). The case did not settle on this date. (*Id*).

22 Subsequent to mediation, the parties conducted depositions, including the depositions of (1)
23 the Person(s) Most Knowledgeable for Hertz, and (2) Plaintiff Ortuno. Further, the Parties fully briefed
24 a Motion for Class Certification, which was never heard. (Kuhn Decl. ¶10).

25 **2. Settlement Discussions**

26 On October 2, 2023, the Parties attended a full day mediation before the experienced "Wage
27 and Hour" mediator, Steve Serratore. (Kuhn decl. ¶11). Prior to mediation, counsel for both parties
28 agreed to the informal exchange of information, and case theories and defenses pertinent to a class-

1 wide settlement. Prior to mediation, plaintiff prepared and provided a detailed mediation brief. (*Id.*)

2 Subsequent to the October 2, 2023 Mediation, the parties continued to litigate the case. To wit,
3 the Parties fully briefed a Motion for Class Certification. (Kuhn Decl. ¶12). However, the parties also
4 continued settlement discussions directly between counsel, and at times, facilitated through the
5 Mediator. *Id.* Through these discussions, the Parties agreed on key terms of a settlement that would
6 globally resolve all class and representative “Wage and Hour” claims asserted in the operative
7 complaint in this Action and the related Romo Action.

8 As of November 21, 2024, the parties agreed on all final terms of the settlement which was
9 memorialized in the Agreement, which is attached to the declaration of Ryan T. Kuhn as **Exhibit A**.
10 (Kuhn Decl. ¶13). Plaintiff now seeks the Court’s preliminary approval of the Agreement. (*Id.*)

11 **III. SETTLEMENT TERMS**

12 The Agreement includes the following key terms:

13 **1. Contingent Nature of the Settlement**

14 This Agreement is contingent upon preliminary and final approval by the Court. If for any
15 reason the Settlement does not become final, the Parties will be returned to their positions with
16 respect to the Action as if the Agreement had not been entered into. Should the Settlement not
17 become final, for whatever reason, Defendant reserves the right to move to contest certification
18 should this Settlement be reversed on appeal or otherwise not become final. (**Ex. A** at ¶3.1).

19 **2. Description of the Settlement Class**

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

22 all nonexempt employees of Hertz in California from June 30, 2021 through the
23 date of Preliminary Approval of the Settlement. (**Exhibit A** at ¶1.5).

24 The parties estimate that as of November 21, 2024, the Settlement Class consisted of
25 approximately Four Thousand Five Hundred and Seven (4,507) individuals, as determined by
26 Defendant’s employment records. (**Ex. A** at ¶4.1).

27 **3. Appointment of Settlement Administrator**

28 The parties agreed to use CAC Services, LLC, as the “Settlement Administrator” for purposes

1 of providing the Notice of Class Action Settlement, issuing payments pursuant to the Agreement, and
2 carrying out all duties pursuant to the Agreement. (**Ex. A** at ¶7.1). CAC’s sole business is the
3 administration of class action settlements and class action notices. (Kuhn decl.¶14).

4 **4. Scope of the Release**

5 For purposes of the Agreement, Class Members release all claims that are either or both: (1)
6 alleged in the forthcoming Second Amended Complaint (“SAC”); or (2) which relate to or arise out
7 of the allegations and claims asserted in the SAC and could have been alleged in the SAC relating in
8 any way to violations of the wage and hour provisions of the California Labor Code or the California
9 Wage Orders, or any wage and hour provisions of California law. The precise release language is
10 reflected in **Exhibit A** at ¶ 5.2.

11 **5. Cash Payment and Allocation**

12 The Agreement provides for an automatic Individual Settlement Payment to the members of
13 the Class. No claims need be submitted. Class Members will be entitled to an average share of
14 approximately **\$429.66**. (Kuhn Decl. ¶15). The actual share will depend on the amount of workweeks
15 they were employed during the limitations period. (**Exhibit A** at ¶ 3.2.4). The Individual Settlement
16 will be allocated as follows: twenty percent (20%) constitutes wages (subject to withholdings and
17 deductions and reported as wage income on a Form W-2) and eighty percent (80%) constitutes non-
18 wage penalties, and interest. (**Exhibit A** at ¶3.2.4.1).

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

20 Subject to Court approval, the Parties agree that, within ten (10) days after the Court enters any
21 Order granting preliminary approval of the Settlement, Defendant Hertz will provide to the Settlement
22 Administrator the following information for each Settlement Class Member in a readable Microsoft
23 Office Excel spreadsheet: class member names and last known addresses, social security numbers,
24 number of workweeks, and number of PAGA period workweeks. (See **Exhibit A** at ¶4.2). The
25 Settlement Administrator will perform address updates and verifications, including running all names
26 through the National Change of Address Database, prior to the first mailing. (See **Exhibit A** at ¶4.2).
27 Using best efforts to perform as soon as possible, and in no event later than 7 days after receiving the
28 class data, the Settlement Administrator will mail the Class Notice (“Notice”) to each Class Member,

1 by first class mail. (See **Exhibit A**, at ¶7.4.2). The parties' agreed upon Class Notice is attached to the
2 Declaration of Ryan T. Kuhn, as **Exhibit B**. (Kuhn Decl. ¶16).

3 The Notice is designed to provide Class Members with detailed information about the lawsuit,
4 the Agreement, their rights and settlement benefits, and how to participate, exclude themselves, or
5 object. (**Exhibit B**). The Class Members will have thirty (30) calendar days (from the date of notice)
6 to request to be excluded, or file objections. This deadline will be extended an additional 14 days if
7 notice is re-mailed. (**Exhibit A**, at ¶7.5, 7.7; **Exhibit B** at § V(B-C)).

8 The Class Members will be given notice of the release, and information about the expected
9 settlement amount based on the workweeks employed with Defendants during the Class Period. If they
10 wish to receive a share of the Settlement, Class Members need not take any additional action. Class
11 Members are also given instructions on how to exclude themselves, object to the Settlement, or appear
12 at the final approval hearing to state objections. (See **Exhibit A**, at ¶7.5, 7.7; **Exhibit B** at § V(A-C)).

13 The Notice process also has additional safeguards. For instance, for Notices returned as non-
14 deliverable, the Settlement Administrator will perform a skip-trace and mail or re-mail Notice to an
15 updated address (if any), upon receipt of the returned mail. (See **Exhibit A** at ¶7.4.3.) It is the intent
16 of the parties that all reasonable means be used to locate Class Members.

17 The Notice will inform Class Members of the number of weeks worked during the Class Period
18 (according to Defendant's records) and their estimated settlement amounts. Class Members will have
19 the opportunity to dispute the workweek calculation by submitting written documentation to the
20 Settlement Administrator. (See **Exhibit A** at ¶ 7.6 and **Exhibit B** at IV(E)).

21 PAGA Members do **not** require notice prior to a settlement, nor may they opt out of the PAGA
22 penalty portion of the settlement. *Robinson v. S. Ctys. Oil*, (2020) 53 Cal. App. 5th 476, 482–83,
23 2020). PAGA members are nonetheless informed of the Settlement and estimated payments. PAGA
24 members can opt-out of the Class Settlement to retain all non-PAGA claims in their individual
25 capacities. These rights are explained in the Class Notice. (**Exhibit B** at § IV(H)).

26 7. Contingent Costs

27 The Agreement provides for One Million, One Hundred Thousand (\$1,100,000.00) in
28 Attorneys' Fees, which is one-third (1/3%) of the total Settlement, and up to Forty Two Thousand Five

1 Hundred Dollars (\$42,500.00) in litigation costs. (See **Exhibit A** at ¶3.2.2). For costs incurred in
2 administrating the Settlement, the Agreement provides for an estimated Twenty One Thousand Dollars
3 (\$21,000.00), or less. (See **Exhibit A** at ¶ 3.2.3).

4 The Agreement also provides for One Hundred Thousand Dollars (\$180,000.00) to be allocated
5 for Plaintiff's PAGA claims with 75% of the amount, or One Hundred Thirty Five Thousand Dollars
6 (\$135,000.00) being paid to the LWDA, and 25%, or \$45,000.00, being distributed amongst the PAGA
7 Members. (See **Exhibit A** at ¶3.2.5).

8 The Agreement also provides payments to Plaintiffs Ortuno and Romo of Ten Thousand
9 Dollars (\$10,000.00) each, which represents a Class Representative Enhancement Payment in
10 consideration for their services as Class Representatives. (See **Exhibit A** at ¶ 3.2.1). The class is being
11 notified of the payments to Plaintiffs. (See **Ex. B** at § IV(B)).

12 The Class Representative Enhancement Payments were part of good faith negotiations and are
13 intended to recognize that it was the Class Representatives (Mr. Ortuno and Romo) who initiated the
14 lawsuits, initiated the PAGA claims, provided critical documents and witnesses to their attorneys, and
15 worked with their attorneys to propound and prepare written discovery, all in an effort to obtain money
16 allegedly owed not only to themselves, but to hundreds of other employees. (Kuhn Decl. ¶17).

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

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

22 Concerning the strength of the plaintiff's case, the California Court of Appeal has said that the
23 "merits of the underlying class claims are not a basis for upsetting the settlement of a class action; the
24 operative word is 'settlement.'" *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85
25 Cal. App. 4th 1135, 1150 [citing, *inter alia*, *City of Detroit v. Grinnell Corp.* (2d Cir. 1974) 495 F.2d
26 448,455 ("The fact that a proposed settlement may only amount to a fraction the potential recovery
27 does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be
28 disapproved"); see also *Linney v. Cellular Alaska P'ship.* (9th Cir. 1998) 151 F.3d 1234, 1242 ("This

1 court has aptly held that ‘it is the very uncertainty of outcome in litigation and avoidance of wasteful
2 and expensive litigation that induce consensual settlements’’); *Officers for Justice v. Civil Servo Com.*
3 (9th Cir. 1982) 688 F.2d 615, 625 (“The proposed settlement is not to be judged against a hypothetical
4 or speculative measure of what might have been achieved by the negotiators.”)

5 Each of the primary claims also had risks to maintaining class certification and a finding of
6 liability. If Defendants’ defenses were successful, the class would not receive anything. Asset forth
7 below, Plaintiff submits that the most realistic “best case” scenario would be an average recovery per
8 class member of approximately **\$2,371.92**, and a worst case scenario would be a recovery of \$0, by
9 way of decertification or defense verdict. (Kuhn decl. ¶18). Given all the risks on each claim, the
10 estimated **\$429.66** average recovery secured via this settlement is a reasonable compromise and is in
11 the best interests of the class given all the risks of continued litigation. (Kuhn decl. ¶19).

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

13 Plaintiff’s unpaid wages (and overtime) claims were based on the allegation that employees
14 were performing unpaid work due to the Hertz timekeeping system, which required employees to
15 record their “scheduled” (not “actual”) work times. Moreover, Hertz timekeeping system took
16 “minutes worked” and transferred that amount to a decimal, causing other losses due to certain alleged
17 “transitional math errors” caused by the payroll system. Plaintiff alleged this resulted in regular time
18 and overtime pay being owed where Defendants were on notice of work being performed without pay.

19 Defendants also denied that any unpaid work occurred, and even if some did occur, Defendants
20 claimed it was not on notice of these alleged Labor Code violations and had a strict written prohibition
21 against off-the-clock work and a mandate that all time worked must be accurately recorded.
22 Defendants asserted proof of these alleged violations would require individualized inquiries, which
23 could preclude class certification and make any PAGA claims unmanageable. (Kuhn decl. ¶28).

24 Based on Class Counsels’ analysis, this claim was worth as little as \$0 (a defense verdict) or
25 as much as **\$4,732,350.00**. (Kuhn decl. ¶ 20).

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

27 Plaintiffs were able to identify hundreds of examples of missing or late Meal Periods without
28 the provision of a Meal Period penalty payment. Defendants argued that these records do not

1 conclusively show whether (1) Defendants actually failed to provide the Meal Period, (2) there was
2 a voluntary waiver, (3) employees forgot to clock out, (4) employees voluntarily chose to skip or take
3 them late even though they were provided, or (5) whether the individual was working on a federal
4 enclave and therefore lacked standing to bring a Meal and Rest period claim. Defendant further argued
5 that evidence existed that rebutted any presumption that the same records could be used as a basis for
6 determining liability. Additionally, in light of the written Meal and Rest Period policy, Hertz
7 contended there was no uniform policy or practice of denying Meal and Rest Periods, requiring
8 individualized inquiries that would make any PAGA claims unmanageable. (Kuhn decl. ¶ 29).

9 Plaintiff alleges that the Rest Period policy (1) contained patently illegal language restricting
10 employees to the work premises, and (2) lacks additional required statutory language. Plaintiff also
11 alleged the Defendant's written policies improperly restricted class members from leaving the premises
12 during their Rest Periods, among other deficiencies. Hertz pointed out that it provided for adequate
13 breaks and argued that witness testimony would demonstrate that in practice, no restriction on Rest
14 Periods was ever enforced. Hertz also contended individualized inquiries abound as to why individual
15 employees may have failed to take appropriate Meal or Rest Periods. (Kuhn decl. ¶30).

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

20 Based on counsels' analysis, these claims were worth as little as \$0 (a defense verdict) or as
21 much as **\$4,732,350.00**. (Kuhn decl. ¶20).

22 **C. PLAINTIFF'S WAGE STATEMENT CLAIMS**

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

25 Hertz argued that the failure to list gross and net wages are derivative of other claims that may
26 ultimately fail and as a result there is no "knowing and intentional failure" to list information, which
27 triggers liability under Labor Code §226(e). (Kuhn decl. ¶31).

28 The California Supreme Court has recently held that the failure to pay meal and rest period

1 premiums *may* give rise to a claim for inaccurate wage statements (or waiting time penalties).
2 However, such derivative liability is not automatic and the Plaintiff still must show a “knowing and
3 intentional” or “wilful” failure to comply with the Labor Code. See *Naranjo v. Spectrum Security*
4 *Services, Inc.* (2022) 13 Cal.5th 93,109. Defendants (as with the underlying Meal and Rest Period
5 claims) maintained individualized inquires would abound as to why breaks were missed and whether
6 meal and rest period premiums should have been paid, requiring individualized inquiries that would
7 make any PAGA claims unmanageable. (Kuhn decl. ¶ 32).

8 Based on counsels’ analysis, this claim was worth as little as \$0 (a defense verdict) or as much
9 as \$11,745,150.00. (Kuhn decl. ¶ 20).

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

11 Plaintiff contended that Hertz violated Labor Code section 2802 by failing to reimburse its
12 employees for certain costs. Hertz contended that Plaintiffs’ (and others’) position did not require the
13 use of a personal cell phone. (Kuhn decl. ¶ 33). Based on counsels’ analysis, this claim was worth as
14 little as \$0 (a defense verdict or as much as \$45,070.00. (Kuhn decl. ¶ 20).

15 **E. OTHER “DERIVATIVE” CLAIMS**

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

18 Additionally, Defendant failed to pay Plaintiffs and members of the Class sick pay at the
19 correct rate. Plaintiffs received compensation in addition to hourly wages, but those additional amounts
20 were not included when calculating sick pay wages. For example, Plaintiff ROMO received shift
21 differentials in addition to his hourly wages while employed by Defendant, which was not factored into
22 his sick pay wages. By failing to pay Plaintiffs and Class Members for sick pay at the correct rate,
23 Defendant willfully violated Labor Code section 246. The value of this claim was included in the
24 calculation of the total value of the Labor Code 203 claim. (Kuhn Decl.¶52).

25 The parties agreed to allocate \$180,000.00 to the PAGA claims, which is 5.45% of the total
26 settlement. This PAGA allocation is in the range routinely approved by California Courts. See *Garcia*
27 *v. Gordon Trucking, Inc.* (E.D. Cal., Oct. 31, 2012, No. 1:10-CV-0324 AWISKO) 2012 WL 5364575,
28 at *7 (approving \$10,000 PAGA penalty for a California class with a \$3.7 million gross settlement

1 payment); *Syed v. M-I, L.L.C.* (E.D. Cal., Feb. 22, 2017, No. 112CV01718DADMJS) 2017 WL
2 714367, at *13 (approving 2.53% of the estimated \$3.95 million Net Settlement Amount allocated to
3 the California class); *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No.
4 15-CV-02198-EMC) 2016 WL 5907869 (approving allocation of \$20,000 to the PAGA claim (**0.15%**
5 of its total value of \$12,952,000) as reasonable in the context of the settlement as a whole); *In re Uber*
6 *FCRA Litigation* (N.D. Cal., June 29, 2017, No. 14-CV-05200-EMC) 2017 WL 2806698 (approving
7 a settlement agreement of \$7.5 million, where the amount allocated to the PAGA claims was only
8 \$7,500.00 – .01% of the total settlement amount).

9 Based on Class Counsel's analysis, the PAGA and Labor Code § 203 claims were worth as little
10 as \$0 (a PAGA defense verdict or denial of certification of the § 203 claim) or as much as
11 \$1,792,725.00 and \$1,785,000.00 respectively. (Kuhn decl. ¶ 20).

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

13 Plaintiff concedes he would be highly unlikely to ever be awarded an amount approaching the
14 maximum damages set forth above. To wit, the majority of the recovery would be "derivative"
15 penalties under PAGA, Labor Code § 203 and Labor Code § 226. The Court would have great
16 discretion to mitigate any penalties awarded. *Thurman v. Bayshore Transit Management, Inc.* (2012)
17 203 Cal.App.4th 1112, 1135 (disapproved on other grounds).

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

26 Class Counsel believes a mitigation of the damages and potential PAGA penalties would be
27 warranted here. As in the *Carrington* case, there was evidence that Hertz attempted to provide meal
28 and rest periods in practice, and the written policies contained no facially non-compliant terms. Given

1 this, it is likely that some of the violations by Hertz were not "willful." Finally, given the defenses
2 raised by Defendants, there was a significant risk that many of the certified claims would not have been
3 maintained through trial and appeal.

4 The Parties agree the failure to pay "former employees" under § 203 is derivative of the other
5 claims. As Hertz asserts a "good faith dispute" for withholding any unpaid wages, it would be difficult
6 to establish any liability for a "willful" failure to pay wages owed.

7 Based on the above, it is possible that PAGA penalties could be reduced to approximately \$5
8 per violation and the Court would find no basis for imposing Labor Code §§ 203 or 226 penalties.
9 Given those risks, the penalties were discounted by 75 %. If this occurred, the average class member's
10 pre-tax share of a realistic best case recovery would be **\$2,371.92**. (Kuhn decl. ¶ 26).

11 Class Counsel submits the **\$429.66** average recovery secured via this Settlement, is a
12 reasonable compromise and in the best interests of the Class. (Kuhn decl. ¶19).

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

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

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

24 The proposed class is ascertainable because all Class Members currently or formerly worked
25 for Defendant as a nonexempt employee and will be identified through Defendant's employment
26 records. See *Rose v. City of Hayward*, 126 Cal.App.3d 926 (1981) (finding that "Class Members are
27 'ascertainable' where they may be readily identified without unreasonable expense or time by reference
28 to official records"). Thus, the ascertainability requirement is met. (Kuhn Decl. ¶35).

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

2 The numerosity requirement is met if the class is so large that joinder of all members would
3 be impracticable. *In re Tobacco II Cases* (2009) 46 Cal. 4th 298, 318. Here, Defendant’s records show
4 that approximately **4,507 class members** worked for the company during the limitations period. (Kuhn
5 Decl. ¶35). Thus, joinder of all members of the class would be impracticable.

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

7 The commonality requirement is met if there are questions of law and fact common to the class.
8 See *Hanlon, supra*, 150 F.3d at 1019. Here, for purposes of the Settlement, the parties agree the claims
9 of Class Members all involve the same questions of law and fact. Namely, all class members were
10 subject to the same employment policies and practices of Defendant. (Kuhn decl. ¶ 36). The common
11 question exists as to whether the policies and practices Class Members were subjected to are illegal.
12 Therefore, the commonality requirement is satisfied. See *Hanlon, supra*, 150 F.3d at 1019-20.

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

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

17 Here, there are no such adverse interests. Plaintiffs have claims substantially the same as all
18 the other Class Members. (Kuhn decl. ¶37). Factual differences may exist between the class
19 representatives and the Class Members so long as the claims arise from the same events or course of
20 conduct and are based on the same legal theories. See *Hanlon*, 150 F.3d at 1020; see also 1 *Newberg*
21 § 53.13 at 3-76-77 (“When it is alleged that the same unlawful conduct was directed at or affected both
22 the named plaintiff and the class sought to be represented, the typicality requirement is usually met
23 irrespective of varying fact patterns which under lie individual claims.”)

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

25 The adequacy of representation component of the community of interest requirement for class
26 certification “comes into play when the party opposing certification brings forth evidence indicating
27 widespread antagonism to the class suit.” *Capitol People First v. Dep’t of Develop. Servs.* (2007) 155
28 Cal. App. 4th 676, 696-97. The adequacy inquiry “serves to uncover conflicts of interest between

1 named parties and the class they seek to represent.” *Id.* To assure “adequate” representation, the “class
2 representative’s [...] claim must not be inconsistent with the claims of other members of the class.” *Id.*
3 Here, no such “inconsistencies” exist. Each Plaintiff will be compensated based on the same “pay
4 period” formula as all other members of the Class. (Kuhn decl. ¶ 37)

5 Additionally, any Class Member who wishes to “opt out” of the Settlement may do so and
6 retain all of their individual rights. (Kuhn decl. ¶ 38). There is therefore no conflict of interest between
7 the Class Representatives and the Class Members. (*Id.*) Thus, at least for settlement purposes, the
8 adequacy prong is met. (*Id.*)

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

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

14 The proposed class in this case is sufficiently cohesive because, for purposes of the Settlement
15 only, the parties have stipulated that all class certification elements are met. (Kuhn Decl. ¶51). All
16 members of the Class worked under the same conditions and experienced the same policies and
17 practices of Defendant. (See section IV, *supra*). Thus, the class is sufficiently cohesive.

18 Further, it is preferable to resolve all of the Class Members’ claims by means of a classwide
19 settlement than to require each Class Member to litigate individual claims. (Kuhn decl. ¶39).

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

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

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

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

A. FAIRNESS OF THE SETTLEMENT

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

The proposed settlement here meets these criteria, and merits preliminary approval. As discussed above, the parties only entered into the Agreement after engaging in a full day of mediation with an experienced mediator who routinely handles “wage and hour” class action litigation. (Kuhn Decl. ¶ 11-12). The mediation was preceded by extensive discovery, investigation of claims at issue, interviews of Class Members, disclosure and review of documents detailing company-wide policies and practices, informal information exchanges for mediation purposes, and ongoing discussions about the merits between the parties’ counsel during the span of the litigation. (Kuhn Decl. ¶¶ 4-12). Thereafter, the parties memorialized the details of this Settlement via the Agreement. (**Ex. A**).

When negotiating the Settlement, both sides took into account the strengths and weaknesses of their opponent’s positions as pointed out by mediator Steve Serratore, the data available to evaluate liability and damages, the lack of data or evidence on certain issues, and the substantial and evolving

1 law applicable to the merits of the claims. The Agreement was only agreed to after extensive arms-
2 length negotiations resulting in a unique compromise that permits all parties to move forward and bring
3 this action to close. Despite a mutual desire to resolve this action, the negotiations remained at all times
4 adversarial. (Kuhn Decl. ¶40).

5 As set forth below in section H, *infra.*, counsel for both parties have extensive experience in
6 litigating wage and hour class action lawsuits. Based on this experience, Class Counsel has determined
7 that the settlement is fair, adequate, and reasonable. (Kuhn decl. ¶33).

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

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

12 All of Plaintiffs' claims — individual, PAGA, and class— presented hurdles including a
13 substantial risk of a defense verdict by way of summary judgment, or at trial. (Kuhn Decl. ¶¶28-33).

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

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

22 **C. THE RISK, EXPENSE, COMPLEXITY, AND LIKELY DURATION OF FURTHER** 23 **LITIGATION**

24 Plaintiffs' Counsel's effectiveness in prosecuting this case has translated into tangible monetary
25 and non-monetary benefits for the Settlement Class Members in the following respects: **(1)** a
26 guaranteed favorable result; **(2)** guaranteed monetary recovery over a reasonably short period of time,
27 as opposed to possibly waiting additional years for a potentially worse result; and **(3)** significant
28 savings in attorneys' fees and costs, which would have increased had the case progressed through trial

1 and possible appeals. (Kuhn decl. ¶41).

2 Without entering into the Agreement, there existed a significant chance that Defendants would
3 prevail on the merits of some or all claims and that Class Members would receive nothing. Through
4 the Agreement, participating Class Members receive guaranteed cash, and this action has also been
5 the catalyst for programmatic relief. (Kuhn decl. ¶42).

6 If the litigation were to proceed in lieu of settlement, additional and substantial attorneys fees
7 and costs, expert witnesses fees would quickly accumulate. Given the numerous claims being litigated,
8 the parties may be required to hire multiple experts each (as many as 8 total). This would result in not
9 only the production of eight expert reports, but eight depositions as well. And, based on previous
10 discussions between counsel regarding the remaining claims (including the PAGA claims), Plaintiff
11 anticipated at least one motion to compel, and two dueling motions for summary judgment /
12 adjudication (one from each side). (Kuhn decl. ¶43).

13 Importantly, even after engaging in all of the potential continued and protracted litigation set
14 forth above, the putative class would continue to have no guarantee of success on any of the claims
15 advanced in this case. Thus, the parties and their counsel believe in good faith that the proposed
16 resolution is a fair, reasonable, and adequate compromise. (Kuhn decl. ¶44).

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

18 The parties had fully briefed a Motion for Class Certification at the time of settlement. (Kuhn
19 decl. ¶45). Defendant presented multiple different defenses to certification. As the Court never ruled
20 on the Motion, neither side had a decided advantage in the litigation. Even if Plaintiff did obtain class
21 certification of the claims, each claim is subject to substantial risk of a Defense verdict at trial. (*Id.*)

22 Regarding the representative (PAGA) claims, there is also a substantial risk that, at trial,
23 Plaintiff will either fail to obtain a favorable judgment on some of these claims, or that a favorable
24 award on one or more PAGA claims may be greatly reduced, as these claims are subject to mitigation
25 by the Court. *See Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203 Cal.App.4th 1112, 1135.

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

27 After deduction from the total “Settlement Amount” of the projected costs of administration,
28 proposed class representative service awards, potential attorney fees and costs, the “Net Settlement

1 Amount (“NSA”) will be distributed to all Class Members who do not file a request for exclusion.
2 Participating Class Members will receive their share of the NSA based on the total amount of time they
3 worked during the Class and PAGA Period. (**Exhibit A**, ¶3.2).

4 Based on the current proposed figures, each Class Member will receive an average of **\$429.66**
5 although the actual amount will vary based on the amount of pay periods employed. The Class Notice
6 will list that individual class member’s actual share. (See **Ex. B.**) Plaintiff’s counsel maintains this
7 recovery was significant in light of the circumstances of the case. (Kuhn Decl. ¶48).

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

9 Plaintiffs propounded 9 sets of separate written discovery devices on Defendant, including
10 requests for admission, special interrogatories, requests for production of documents, and general and
11 employment form interrogatories. (Kuhn Decl. ¶6). Through these requests, Plaintiffs sought, among
12 other information and documents, the identities of putative class members, Defendants’ compensation
13 policies, meal and rest period policies, employee handbooks, wage statements, time records, job
14 descriptions, and reimbursement policies. *Id.*

15 After significant meet and confer efforts, Defendants provided detailed substantive responses
16 detailing all relevant employment policies, in addition to producing thousands of pages of documents.
17 The document production also included a large sampling of other putative class members time and
18 wage records. (Kuhn Decl. ¶¶ 4-8). In total, there were at least 9 set of written discovery exchanged
19 between the parties. (Kuhn Decl. ¶6). Plaintiff’s counsel has also interviewed several Class Members
20 in the course of investigating and litigating this matter. (Kuhn decl. ¶ 46). Counsel has also reviewed
21 hundreds of pages of documents produced by Defendants, Plaintiffs, and Class Members. (*Id.*)

22 This information, along with documents and information obtained through formal discovery
23 and from Class Members, allowed Plaintiff’s counsel to prepare a detailed Mediation Brief. (*Id.*) The
24 Brief was provided to opposing counsel and contained a breakdown of potential damages based on all
25 of the information obtained from all Parties. (*Id.*) Hertz also provided a detailed mediation brief,
26 outlining its defenses to both class certification and liability. (*Id.*)

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

1 **G. THE STAGE OF THE PROCEEDINGS**

2 Plaintiff had already obtained the majority of written discovery, taken depositions, and sought
3 a ruling granting class certification on several claims. The parties were familiar with Plaintiff’s central
4 allegations and Defendant’s defenses thereto. The next phase of this litigation would have been to
5 complete class discovery, prepare expert reports and then prepare for Trial.

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

7 Class Counsel has considerable experience in wage and hour and class action litigation.
8 William Sullivan has over 30 years of experience, 29 years of which has been devoted to both
9 prosecuting and defending class action litigation. Mr. Yaeckel has over 14 years of experience in “class
10 litigation.” Mr. Kuhn has 6 years of experience in class action litigation. (Kuhn Decl. ¶47).

11 Plaintiff Romo’s counsel is also well qualified to act on behalf of a class, based on the firms
12 extensive class action experience. (Bradley decl. ¶¶ 3-13).

13 Plaintiff’s counsel considers the Agreement to represent a fair, adequate and reasonable
14 settlement that is well within the accepted range of recoveries for similar cases. Counsel further
15 believes the Agreement is in the best interests of the Settlement Class Members. (Kuhn Decl. ¶48).

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

17 Although the State is not directly involved in this action, Plaintiff “stands in the shoes” of the
18 Labor and Workforce Development Agency (“LWDA”) by bringing his PAGA action. Consideration
19 has been made to compensate to Labor Workforce Development Agency (“LWDA”) in the amount
20 of \$180,000.00, even though the LWDA declined to prosecute the claims itself. (*See* Exhibit “A,” at
21 ¶3.2.5). To confirm, 75% of the total allocation of \$180,000 amount, or **\$135,000.00**, is being paid to
22 the LWDA, and 25%, or **\$45,000.00**, being distributed amongst the class members. (*Id.*). Counsel for
23 the parties believe this is a fair, reasonable, and adequate allocation. (Kuhn Decl. ¶ 49).

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

25 Prior to preliminary approval, what can be said of the reaction the class members is limited.
26 However, Plaintiff’s counsel has spoken to some Class Members since the parties reached a proposed
27 settlement agreement, and all were in favor of the Settlement. (Kuhn Decl.¶ 50).

28 As explained in the Agreement, the Settlement Claims Administrator will send a Notice to the

1 Settlement Class Members. (See Exhibit A at ¶7.4). The negotiated Class Notice form is attached to
2 the declaration of Ryan T. Kuhn as **Exhibit B**.

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

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

9 Assuming the Settlement merits Preliminary Approval from the Court, Plaintiffs request that
10 the Court set a Final Approval Hearing in accordance with the chronology of events set forth below:

- 11 1. Within ten (10) calendar days of Preliminary Approval, Defendant will provide to the
12 Settlement Administrator the Class List including Class Members’ names, last known
13 addresses, social security numbers, and the dates of employment;
- 14 2. Within five (5) calendar days of receiving the Class List, the Settlement Administrator will
15 perform an NCOA check for information to update and correct for any known or identifiable
16 address changes and shall mail a Notice Packet to all Class Members via regular First-Class
17 U.S. Mail, using the most current, known mailing addresses identified in the Class List;
- 18 3. 30 calendar days after Settlement Administrator has mailed the Notice Packets to Class
19 Members: Deadline for Class Members to postmark and submit all disputes of pay period
20 information, request exclusion, or file written objection to the Settlement;
- 21 4. Approximately 7 Calendar days after the conclusion of the Notice and Response Period:
22 Plaintiffs will file a Motion for Final Approval; and
- 23 5. 16 Court days after the filing of the Final Approval motion: the Court can conduct the Final
24 Approval Hearing.

25 Dated: November 22, 2024

SULLIVAN & YAECKEL LAW GROUP, APC

26 

27 Eric K. Yaeckel

Ryan T. Kuhn

28 Attorneys for Plaintiff MARCELINO ORTUNO, in a
Representative Capacity only, and on behalf of the Class