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8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF SANTA CRUZ**

11
12 XAVIER HUNTER, on behalf of himself
13 and others similarly situated,

14 Plaintiff,

15 vs.

16
17 72 HOUR, LLC, a California limited
18 liability company, BOB WONDRIES
19 MOTORS, a California corporation; and
20 DOES 1 to 100, Inclusive,

21 Defendants.

Case No.: 22CV00661

Assigned for all Purposes to:
Hon. Timothy Volkman
Dept. 5

**MEMORANDUM OF POINTS AND
AUTHORITIES MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT**

[Filed concurrently with Memorandum of Points
and Authorities; Declaration of Zachary M.
Crosner; [Proposed] Order]

Date: December 13, 2022
Time: 8:30 a.m.
Dept.: 5

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1 **I. INTRODUCTION**

2 Plaintiff Xavier Hunter hereby moves the Court for an order granting preliminary approval
3 to a proposed non-reversionary class action settlement to resolve wage and hour claims on behalf of
4 approximately 175 individuals employed by Defendant 72 Hour, LLC doing business as
5 Watsonville Ford, Chevrolet of Watsonville, National Truck Sales and Service, Watsonville Buying
6 Center, Monterey Bay Chrysler Dodge Jeep Ram, National Auto Fleet Group, and Mid Bay Ford
7 Lincoln (collectively “72 Hour”), as hourly-paid, non-exempt employees during the period of March
8 30, 2018, through September 19, 2022. The proposed \$388,000 settlement will provide at least
9 \$214,000 in cash payments to the class, with an average award of about \$1,223. The balance of
10 approximately \$174,000 will cover a modest enhancement award to Plaintiff, reasonable attorney’s
11 fees and actual litigation costs, settlement administration costs, and payment of civil penalties to the
12 state. The settlement is the product of Plaintiff’s pre-filing investigation, extensive formal and
13 informal discovery between the Parties, and adversarial, arms-length negotiations overseen by an
14 experienced and well-respected mediator.

15 As demonstrated below, the settlement is within the “range of reasonableness” for
16 preliminary approval. Plaintiff’s counsel believes the settlement is a fair result for the class given
17 the substantial risks inherent in this matter. Accordingly, Plaintiff requests the Court enter an order:
18 (1) granting preliminary approval to the proposed class action settlement; (2) conditionally
19 certifying the settlement class as defined below; (3) appointing Zachary M. Crosner, Michael
20 Crosner, and Jamie Serb, and Crosner Legal, P.C., as Class Counsel; (4) appointing plaintiff Xavier
21 Hunter as the Class Representative; (5) appointing Simpluris, Inc. as the Settlement Administrator;
22 (6) approving the form of notice to the class and the procedure for providing such notice; and (7)
23 scheduling a final fairness hearing.

24 **II. FACTUAL BACKGROUND AND PROCEDURAL POSTURE**

25 Defendant 72 Hour owns and operates a number of auto dealerships and service centers in
26 Santa Cruz and Los Angeles Counties. Plaintiff Xavier Hunter worked for 72 Hour as a non-exempt
27 employee from approximately February 2020 to October 2021. His job title was “Service Advisor,”
28 and he worked at the company’s heavy duty truck center in Watsonville. Plaintiff contends 72 Hour

1 rounded off employee time punches such that employees did not receive fully 30 minute meal
2 periods, and in fact lost compensable time due to the rounding. Information obtained from Plaintiff
3 and review of time and payroll records from 72 Hour also suggests numerous de facto violations
4 where the class members' meal breaks were late or lasted less than 30 minutes, and Plaintiff
5 contends further that meal and rest periods regularly were interrupted by work, as he had to respond
6 to customer phone calls and meet with customers during his breaks. Additionally, review of the
7 records produced by Defendant suggest employees rarely if ever received second lunches when they
8 worked shifts longer than 10 hours. Similarly, Plaintiff alleges regular de facto rest break violations
9 for similar reasons. Thus, per Plaintiff, even if 72 Hour can establish it has legally compliant written
10 meal and rest break policy, its own records indicate potential de facto liability. [Crosner Decl., ¶ 4.]

11 Based on these allegations, Plaintiff's FAC¹ asserts class claims for: (i) failure to pay all
12 wages due (including minimum, straight time and overtime wages); (ii) failure to provide legally-
13 compliant meal breaks; (iii) failure to provide legally-compliant rest breaks; (iv) failure to pay all
14 wages due at the time of termination; (v) failure to provide accurate itemized wage statements; (vi)
15 failure to reimburse for business expenses; (vii) violation of the Unfair Competition Law (Bus. &
16 Prof. Code §§ 17200, *et seq.*); and (viii) for penalties under the Private Attorneys General Act.
17 [Crosner Decl., ¶ 5.]

18 72 Hour has at all times denied Plaintiff's allegations and maintained its meal and rest break
19 and payroll policies and procedures comply with California law, and that it provided the class
20 members with required meal and rest breaks. 72 Hour contends that, if an employee missed a break,
21 it was in violation of company policy and would have been for purely personal reasons, to the extent
22 it happened at all. The company further argued it paid the class members for all hours worked at
23 the correct legal rate. It also strongly contends the case cannot be maintained as any kind of class
24 or representative action, arguing that to the extent class members missed meal and/or rest breaks,
25 that such breaks were non-compliant, or that any off the clock work occurred, it was intermittent
26

27 ¹ Plaintiff filed another complaint alleging violations of the Private Attorneys General Act based on the
28 same alleged Labor Code violations (Case No. 22CV01215). As part of the settlement, Plaintiff amended
his initial class action complaint in this matter to add allegations under PAGA, and he dismissed the
PAGA-only case on August 11, 2022.

1 and infrequent and evidence of such missed breaks would be purely anecdotal. Thus, per Defendant,
2 class certification would be inappropriate as individual issues would predominate. [Crosner Decl.,
3 ¶ 6.]

4 After Plaintiff filed his complaint, the parties initiated discovery, began engaging in meet
5 and confer sessions regarding discovery and potential law and motion issues, and eventually agreed
6 to attempt early mediation. The Parties then engaged in substantial informal discovery to facilitate
7 an exchange of information necessary to engage in a meaningful mediation. Consequently, prior to
8 mediation, Plaintiff reviewed payroll records, personnel policies/handbooks, meal and rest break
9 policies, personnel files, paystubs and time records produced by Defendants. Defendant also
10 provided documents regarding its wage and hour policies and practices during the class period, and
11 data regarding the total number of current and former employees, the estimated total amount of
12 workweeks and pay periods they worked, and average hourly pay rates, among other relevant data.
13 Plaintiff had this information reviewed and analyzed by a consulting expert to assist evaluating the
14 amount of time potentially lost to rounding, meal/rest break violation rates, etc. [Crosner Decl., ¶
15 7.]

16 The Parties then engaged Lisa Klerman, Esq., a highly respected mediator with extensive
17 wage and hour class action experience, and participated in a full day mediation with Ms. Klerman
18 in June 2022. Throughout the day, the arms-length negotiations were hard-fought and adversarial,
19 and the Parties exchanged additional information on their legal and factual positions, and made
20 numerous offers and counter-offers. By the end of the day, the parties were ultimately able to agree
21 on the terms of a settlement. Thereafter, the Parties jointly drafted the Settlement Agreement setting
22 forth the full settlement terms now before the Court for approval. [Crosner Decl., ¶ 8.]

23 **III. THE PROPOSED SETTLEMENT TERMS**

24 Under the settlement, 72 Hour will pay \$388,000.00 into a common fund, the Total
25 Maximum Settlement Amount. Attorney's fees of up to \$129,333.33 (1/3 of the TMSA), litigation
26 costs of up to \$10,000, an enhancement award to Plaintiff of up to \$7,500, settlement administration
27 costs of no more than \$7,000, and \$20,000 for PAGA penalties, all will be paid from the TMSA.
28 The remainder of approximately \$214,000 (the "Net Settlement Amount") will be allocated among

1 the Participating Class Members based on their total weeks worked during the Class Period. The
2 \$5,000 PAGA Payment allocated to the PAGA Group Members likewise will be distributed based
3 on their total weeks worked during the PAGA Period. No monies will revert to 72 Hour. [Crosner
4 Decl., ¶ 9.]

5 **A. Certification of the Settlement Class**

6 The settlement provides for conditional certification of a settlement class including all
7 individuals who worked for 72 Hour as an hourly-paid, non-exempt employee during the Class
8 Period, which runs from March 30, 2018, through September 19, 2022. The Settlement Class
9 consists of approximately 175 individuals.² [Crosner Decl., ¶ 10.]

10 **B. The Benefit Conferred on the Settlement Class**

11 As noted, the settlement obligates 72 Hour to pay \$388,000 to resolve the Settlement Class
12 claims, inclusive of attorney's fees and costs. At least \$214,000 from the Total Maximum Settlement
13 Amount will be distributed to the Participating Class Members. This is a cash settlement that does
14 not require Participating Class Members to submit a claim form to receive their settlement share.
15 Participating Class Members will receive their settlement checks automatically via First Class U.S.
16 Mail. Twenty percent (20%) of each settlement share will be allocated to wages and the remaining
17 eighty percent (80%) will be allocated to penalties and interest, which allocation is consistent with
18 72 Hour's potential liability as discussed below. 72 Hour will pay any and all applicable employer-
19 side payroll taxes separately and in addition to the Total Maximum Settlement Amount. Subject to
20 the Court's approval, any amounts not claimed (because a class member does not cash his or her
21 settlement check) will be forwarded to the California State Controller's Unclaimed Property Fund.
22 [Crosner Decl., ¶ 11.]

23 Each Participating Class Member will receive a share of the Net Settlement Amount based
24 on his or her total weeks worked for 72 Hour during the Class Period while employed in a non-
25 exempt position. Thus, each Class Member's Individual Settlement Payment will be calculated
26 using criteria typically used in determining appropriate amounts of unpaid wages, unpaid premium
27

28 ² The PAGA Group consists of about 112 individuals employed by Defendant as hourly-paid, non-exempt employees during the period of March 22, 2021 to September 19, 2022.

1 wages for missed meal and rest breaks, and potential statutory penalties. These methods are intended
2 to ensure each Class Member receives a portion of the available settlement funds corresponding to
3 the relative value of his or her potential claims. The average class settlement award currently is
4 estimated to be about \$1,223, while the average payment to the PAGA Group will be about \$44.
5 [Crosner Decl., ¶ 12.]

6 **C. Settlement Administration**

7 Subject to the Court's approval, the Parties have agreed on Phoenix Settlement
8 Administrators ("Phoenix") as the Settlement Administrator. Phoenix is qualified and has significant
9 experience administering class action settlements, including numerous wage and hour matters.
10 Phoenix has agreed to cap its fees and costs at \$7,000.00. If the Court approves less than the above
11 amount, the difference will remain in the Net Settlement Amount for distribution to the Participating
12 Class Members. [Crosner Decl., ¶ 13; Exh. 2.]

13 **D. The Class Notice**

14 The proposed Notice (Exhibit A to the Settlement Agreement) sets out information about
15 this case and explains the basic settlement terms in plain language, and will be issued in English and
16 Spanish. The Notice also sets forth the individualized information used to calculate Class Members'
17 Individual Settlement Payments and each Class Member's estimated settlement award. The Notice
18 likewise details the procedures for Class Members to dispute their individual information, the
19 procedure for submitting an objection to the Settlement, and the procedure to request exclusion. In
20 sum, the Notice provides the Class Members with the information necessary to evaluate the
21 Settlement and provides fair opportunity to participate in, opt out of, or object to the proposed
22 Settlement, and meets all criteria required by California Rules of Court 3.766(d) and 3.769. Coupled
23 with the notice procedure, the Notice provides the Settlement Class with the best notice practicable.
24 [Crosner Decl., ¶ 14.]

25 **E. Right to Correct Information, Opt Out, or Object**

26 Class Members will have forty five (45) days to dispute the information in their Notice used
27 to calculate their settlement award, and also have 45 days to submit any objections to the settlement
28 or to request exclusion. If a Class Member disputes their individual information, the Settlement

1 Administrator will review the Class Member's records and any other information submitted, and
2 make a determination subject to review by the Court. [Crosner Decl., ¶ 15.]

3 **F. Release of Claims**

4 All Participating Class Members will release 72 Hour from all claims alleged in the operative
5 complaint, or that could have been brought based on the factual allegations in the FAC, including
6 PAGA claims, during the Class Period. The release is limited to the claims that were actually pleaded
7 or could have been pleaded based on the alleged facts in the FAC. [Crosner Decl., ¶ 16.]

8 **G. Attorney's Fees and Costs, and Plaintiff's Enhancement Award**

9 The settlement provides Defendant will not oppose a request for attorney's fees not to exceed
10 one-third of the Total Maximum Settlement Amount, or \$129,333.33, nor will it oppose a request
11 for reimbursement of litigation costs and expenses of up to \$10,000.00. Defendant also will not
12 oppose a request for an enhancement award to Plaintiff of not more than \$7,500.00 in recognition
13 of his time spent on this matter, the risk he undertook on behalf of the class, and the benefit conferred
14 to the class. Plaintiff and Plaintiff's counsel will provide the Court with appropriate summaries and
15 evidence of their efforts and time records in anticipation of the Final Approval Hearing. If the Court
16 approves less than the above amounts, the difference will remain in the Net Settlement Amount for
17 distribution to the Participating Class Members. [Crosner Decl., ¶ 17.]

18 **H. Notice to the LWDA**

19 As required by Labor Code section 2699(l)(2), Plaintiff gave notice of the settlement and the
20 approval hearing to the LWDA via its online portal. [Crosner Decl., ¶ 18; Exh. 3.]

21 **IV. ARGUMENT**

22 **A. Standard of Review for a Class Action Settlement**

23 The law favors settlement, particularly in class actions where substantial resources can be
24 conserved by avoiding the time, costs and rigors of formal litigation. H. Newberg & A. Conte, 4
25 Newberg on Class Actions (4th ed. 2002) § 11.41; Class Plaintiffs v. City of Seattle (9th Cir. 1992)
26 955 F.2d 1268, 1276, cert. denied, 506 U.S. 953; Potter v. Pacific Coast Lumber Co. (1951) 37
27 Cal.2d 592, 602. Nevertheless, to ensure the rights of absent class members are not unjustly
28 compromised, settlement of a class action requires court approval. Cal. Rule of Court. 3.769;

1 Wershba v. Apple Computer (2001) 91 Cal.App.4th 224, 245; Dunk v. Ford Motor Co. (1996) 48
2 Cal.App.4th 1794, 1801. This judicial review protects against fraud or collusion, and ensures
3 fairness to the absent class members. Dunk, 48 Cal.App.4th at 1800-01. Judicial review occurs via
4 a two-step process to determine, under all the circumstances, if the proposed settlement is fair,
5 reasonable and adequate. Id. at 1801; Wershba, 91 Cal.App.4th at 245.

6 The first step is a motion for preliminary approval, through which the parties present the
7 court with the proposed settlement and seek a determination that it is sufficiently fair and reasonable
8 to warrant notice to the class and further proceedings as to its fairness and adequacy. Cal. Rule of
9 Court 3.769(c). This preliminary evaluation determines if the proposed settlement is within the
10 “range of reasonableness” and if notice should be provided to the class regarding the settlement’s
11 proposed terms and conditions, and whether a final fairness hearing should be scheduled. Wershba,
12 91 Cal.App.4th at 234-35; North County Contractors Ass’n, Inc. v. Touchstone Ins. Servs. (1994)
13 27 Cal.App.4th 1085, 1089-90. Considering the strong judicial policy favoring settlement of class
14 actions, courts generally apply a presumption of fairness to class action settlements when (1) the
15 settlement results from arms-length bargaining, (2) investigation and discovery are sufficient to
16 allow counsel and the court to act intelligently, (3) counsel is experienced in similar litigation, and
17 (4) the percentage of objectors is small. Dunk, 48 Cal.App.4th at 1802; Wershba, 91 Cal.App.4th
18 at 245.

19 If the court grants preliminary approval, it then orders the class be given notice in an
20 appropriate manner, establishes a schedule and procedures for class members to request exclusion
21 or object, and sets the matter for a final fairness hearing. Typically, any motion for attorney’s fees
22 and costs, and any enhancement for the class representative(s), is filed subsequent to preliminary
23 approval and heard with the motion for final approval, as part of the second step of the two-step
24 approval process. Dunk, 48 Cal.App.4th at 1800; Wershba, 91 Cal.App.4th at 232.

25 The proposed settlement in this matter warrants preliminary approval under the liberal
26 standard discussed above, as it is fair, reasonable and adequate under all the circumstances, and
27 represents a favorable result for the class.
28

1 **B. The Proposed Settlement Class Should Be Conditionally Certified**

2 The purpose of conditional class certification for purposes of settlement is to facilitate
3 provision of notice of the proposed settlement’s terms, and the date and time of the final fairness
4 hearing. In this context, courts apply lesser scrutiny than they would otherwise in the context of
5 certifying a class. Dunk, 48 Cal.App.4th at 1807, n.19; Global Minerals & Metals Corp. v. Superior
6 Court (2003) 113 Cal.App.4th 836, 839 (“[I]t is well established that trial courts should use different
7 standards to determine the propriety of a settlement class.”)

8 In the present matter, conditional certification is proper since this matter satisfies all
9 requirements for class certification under Code of Civil Procedure section 382. First, the class is
10 both sufficiently numerous, consisting of approximately 175 individuals, and ascertainable by
11 reference to Defendant’s personnel and payroll records. [Crosner Decl., ¶ 19.] Next, Plaintiff is an
12 adequate class representative, as his claims do not conflict with and are not antagonistic to the claims
13 of other class members. Further, his claims are typical given he is a member of the class and his
14 claims arise from the same employment practices and course of conduct giving rise to the claims of
15 the other class members. [Crosner Decl., ¶ 20.] Lastly, his counsel is experienced and adequate
16 class counsel. [Crosner Decl., ¶¶ 34-39.]

17 Next, common questions of law and fact predominate – particularly for purposes of a
18 settlement class – as the Class Members all were subject to the policy with respect to calculating
19 overtime pay, and further subject to the same meal and rest break policy. Since the focus of the
20 claims against 72 Hour concerns the legality of common policies applied uniformly to the entire
21 class, common issues predominate over individualized inquiries concerning liability. For instance,
22 72 Hour’s meal and rest break policy is company-wide policy applied equally and consistently to
23 all class members, and this policy is either compliant with California law or it is not. Regardless of
24 that determination, it will decide liability for all class members one way or another. Similarly,
25 whether Defendant correctly calculated employee overtime raises commons questions. [Crosner
26 Decl., ¶ 21.]

27 By now it is well-settled a theory of recovery asserting the existence of a uniform policy
28 violating California law is sufficient to satisfy the requirements for class certification. Jones v.

1 Farmers Ins. Exch. (2013) 221 Cal.App.4th 986, 996 (“Claims alleging that a uniform policy
2 consistently applied to a group of employees is in violation of the wage and hour laws are of the sort
3 routinely, and properly, found suitable for class treatment”); Williams v. Superior Court (2013) 221
4 Cal.App.4th 1353 (“A company-wide practice can sustain a common question of fact or law that
5 supports commonality for class certification”). Lastly, a class action is superior to other means for
6 the fair and efficient adjudication of this controversy. [Crosner Decl., ¶ 22.]

7 **C. The Proposed Settlement Meets the Kullar Factors and is within the Range of**
8 **Reasonableness**

9 The proposed settlement resulted from arms-length negotiations between the Parties
10 overseen by Lisa Klerman, Esq., a well-regarded professional neutral with extensive experience
11 mediating wage and hour class actions. [Crosner Decl., ¶ 8.] Plaintiff’s counsel Zachary M. Crosner,
12 Michael Crosner, and Jamie Serb have years of experience litigating wage and hour class actions.
13 Plaintiff’s counsel is well-qualified to evaluate the risks and benefits of pursuing further litigation
14 or settling the matter. [Crosner Decl., ¶¶ 34-39.]

15 Next, California law recognizes several factors bearing on the fairness, adequacy, and
16 reasonableness of a proposed class settlement. Kullar v. Foot Locker Retail, Inc. (2008) 168
17 Cal.App.4th 116, 128. In relevant part, these factors include: 1) the amount offered in settlement 2)
18 the strength of plaintiff’s case; 3) the risk, expense, complexity, and likely duration of further
19 litigation; 4) the risk of maintaining class action status throughout trial; and 5) the experience and
20 views of counsel. Id. As demonstrated below, the proposed settlement satisfies these requirements.

21 Prior to reaching agreement on the proposed settlement terms, the Parties engaged in
22 significant formal and informal discovery to facilitate settlement discussions. Thus, Plaintiff
23 reviewed documents and information regarding 72 Hours’s payroll practices, a random sampling of
24 pay stubs and time records, applicable compensation/commission plans, meal and rest break
25 policies, etc., and information from Defendant regarding class size and breakdown, work weeks/pay
26 periods, rates of pay, and other information used to formulate a damages model. Plaintiff’s counsel
27 is confident they obtained sufficient information to understand the law and facts of this case and
28

1 make an informed decision regarding the proposed settlement and whether it is fair and reasonable.
2 [Crosner Decl., ¶¶ 7, 23.]

3 Through the information exchanged and analysis undertaken, Plaintiff weighed the risks of
4 continued litigation against the benefits of the proposed settlement and determined settlement to be
5 the most reasonable option. Using that data and with the assistance of a consulting expert, Plaintiff
6 ran various calculations and estimated 72 Hour's likely maximum exposure on the class claims at
7 approximately \$4,212,000 including about \$157,300 on the underpaid wage/off the clock issue,
8 \$1,270,300 in unpaid meal period premiums, \$2,174,800 in unpaid rest period premiums, \$218,500
9 in statutory penalties for wage statement violations, and about \$390,900 in waiting time penalties.³
10 [Crosner Decl., ¶¶ 24-25.] Plaintiff's counsel substantially discounted the value of these claims,
11 however, in light of the multiple and considerable risks posed by proceeding with the litigation, as
12 Defendant raised numerous defenses and vigorously defended against these claims.

13 First, On the unpaid wage and rounding claims, Plaintiff alleged Defendants' rounding
14 policy favored the employer overall, caused employees to lose hours worked and corresponding pay
15 over time, and noted numerous instances in the pay records showing a loss of several minutes per
16 shift due to rounding. On the other hand, Stone argued its time keeping and rounding policy is
17 entirely neutral in effect and did not deprive class members of compensable hours worked over time
18 and, accordingly, does not violate California law. See's Candy Shops, Inc. v. Super. Ct. (2012) 210
19 Cal. App. 4th 889, 901. While Plaintiff believes this is one of his stronger claims, he also notes the
20 employees typically lose only a minute or two per shift and thus the aggregate damages aren't all
21 that great even the class prevails. [Crosner Decl., ¶ 26.]

22 For the meal and rest break claims, Defendant offered multiple defenses. First, it emphasized
23 its written meal and rest break policy was compliant, and it authorized and permitted all necessary
24 breaks. Given that the time records Plaintiff reviewed suggested nearly all eligible shifts at least
25 had a recorded meal break, there was some validity to this position. Plaintiff's review of the time
26 records, however, suggested a substantial violation rate for late and short meal breaks, as well as a

27 ³ Plaintiff's complaint includes claims for unpaid overtime and reimbursement of business expenses, but after
28 investigation it was determined there was little evidence of systemic violations in this regard, and Plaintiff accorded
no value to these claims.

1 failure to provide second meal breaks on shifts of 10+ hours. Defendant countered that even if this
2 occurred, it was in violation of company policy and would require significant individual inquiries
3 to determine the reasons underlying any such alleged violations and whether it was by employee
4 choice or some other reason, and whether class members waived a second meal period. Thus, per
5 72 Hour, certification on this issue would be impossible. [Crosner Decl., ¶ 27.]

6 As with meal breaks, Defendant argues its rest break policies complied with California law
7 and authorized and permitted employees to take all required breaks. Defendant further contended
8 that, in light of the fact that it is not required to maintain a record of rest periods, any evidence of
9 failure to authorize rest periods and/or discouragement from taking rest periods would be purely
10 anecdotal and individual issues would predominate on liability. Defendant also may contend that it
11 is only liable if Plaintiff can prove, on a shift-by-shift basis, the aggrieved employees actually did
12 not receive a fully compliant rest break. This arguably would make a trial unmanageable since the
13 number of instances an employee missed a rest break would have to be tested on a case by case basis
14 to determine if there was compliance. [Crosner Decl., ¶ 28.]

15 Plaintiff also alleged derivative violations of Labor Code § 226 (wage statement
16 violations) and §§ 201-203 (waiting time penalties). These claims were based on the “off the clock”
17 unpaid wage claims and will rise or fall along with that primary claim, in addition to being subject
18 to “good faith” and other defenses available to Defendant. E.g., Amaral v. Cintas Corp. No. 2 (2008)
19 163 Cal.App.4th 1157, 1203-04 (holding employer did not willfully fail to pay wages under Labor
20 Code § 203 even though the class prevailed on the merits on the underlying claim for failing to pay
21 living wages). Accordingly, Plaintiff had to discount the value of these derivative claims
22 significantly in light of these multiple potential defenses. [Crosner Decl., ¶ 29.]

23 As far as potential PAGA liability, the PAGA Group was theoretically entitled to penalties
24 totaling at least \$1.1 million should Plaintiff prevail on all claims and establish violations of the
25 multiple Labor Code sections at issue. As with the class claims, Plaintiff discounted the potential
26 PAGA penalties based on Defendant’s various defenses on the merits, and further took into account
27 the Court’s wide discretion to reduce such penalties, or to decline to award penalties at all. Labor
28 Code section 2699(e)(2). Accordingly, the Parties allocated \$20,000 to PAGA penalties, and

1 Plaintiff submits this amount is reasonable under the circumstances and in line with comparable
2 settlements in other wage and hour class actions in California. Van Kempen v. Matheson Tri-Gas,
3 Inc. (N.D. Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182 (granting final approval of \$5,000
4 PAGA penalty from \$370,000 settlement, or 1.4 percent of total settlement); Slavkov v. First Water
5 Heater Partners I (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS 116303 (finding a \$7,500 PAGA
6 payment reasonable when measured against the overall settlement of \$345,000 and the possible
7 weaknesses in Plaintiffs' case, or 2.2 percent of total settlement). Additionally, the LWDA has been
8 informed of the terms of the PAGA portion of the settlement, and will be able to weigh in as
9 necessary. Jennings v. Open Door Mktg. Inc. (N.D. Cal. Oct. 3, 2018) 2018 U.S. Dist. LEXIS
10 171356, at *27 (approving settlement with PAGA penalties of 0.6% where "[p]laintiffs [have]
11 submitted the settlement agreement to the LWDA, and the LWDA has not objected to the
12 settlement"). [Crosner Decl., ¶ 30.]

13 Thus, Defendant raised various and multi-layered defenses to each of Plaintiff's claims,
14 anyone of which, if successful, could have decimated Plaintiff's case. And Defendant vowed to raise
15 all these defenses in opposition to class certification and at trial. Accordingly, Plaintiff faced risky
16 issues going forward with this litigation, and given the need to certify the class, maintain
17 certification through trial, try the case on the merits, and deal with post-trial appeals, it would have
18 taken years to realize any recovery in this action. [Crosner Decl., ¶¶ 31-33.]

19 Plaintiff's counsel discounted the value of the class claims consistent with the risks discussed
20 above, and carefully weighed the likelihood of the class receiving substantially greater benefit if the
21 litigation continued Plaintiff's counsel concluded – in light of these very real and substantial risks –
22 settlement on the proposed terms and without prolonged and costly litigation was in the best interests
23 of the class. The overall \$388,000 recovery represents a significant percentage of Defendant's
24 potential exposure. Given these risks, a total recovery for the class of \$388,000 with an average
25 award of some \$1,223 per class member (plus additional amounts to the PAGA Group), is a fair
26 result within the range of reasonableness considering all potential outcomes and will provide direct
27 awards to all Class Members without further delay. [Crosner Decl., ¶ 33.]

1 Importantly, the mere fact that a settlement does not provide the same recovery as might be
2 achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and adequate.
3 Wershba, 91 Cal.App.4th at 246, 250 (“Compromise is inherent and necessary in the settlement
4 process...even if the relief afforded by the proposed settlement is substantially narrower than it
5 would be if the suits were to be successfully litigated, this is no bar to a class settlement because the
6 public interest may indeed be served by a voluntary settlement in which each side gives ground in
7 the interest of avoiding litigation”); 7-Eleven Owners for Fair Franchising v. Southland Corp. (2000)
8 85 Cal.App.4th 1135, 1150 (“The fact that a proposed settlement may amount to only a fraction of
9 the potential recovery does not, in and of itself, mean that the proposed settlement is grossly
10 inadequate and should be disapproved”); White v. Experian Information Solutions, Inc. (C.D. Cal.
11 2011) 803 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable even
12 though it represented 99% discount off the maximum value of the claims); Lane v. Facebook, Inc.
13 (9th Cir. 2012) 696 F.3d 811, 819 (“[T]he question whether a settlement is fundamentally fair . . . is
14 different from the question whether the settlement is perfect in the estimation of the reviewing
15 court”). Importantly as well, the proposed settlement is non-reversionary and will provide benefits
16 to the Class Members without a claims process. White, 803 F.Supp.2d at 1098; c.f., Federal Judicial
17 Center, Managing Class Action Litigation: A Pocket Guide for Judges (3d ed. 2010) at 20, available
18 at [http:// www.fjc.gov/sites/default/files/2012/ClassGd3.pdf](http://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf) (reversionary provisions and/or
19 cumbersome claims process may indicate lack of fairness). Plaintiff and his counsel submit the
20 settlement is within the “range of reasonableness,” and is fair and adequate for the Class.

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1 **V. CONCLUSION**

2 For all the foregoing reasons, Plaintiff respectfully requests that the Court grant this motion,
3 conditionally certify the settlement class, grant preliminary approval to the proposed class action
4 settlement, and enter the [Proposed] Order filed herewith.
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6 Dated: November 14, 2022

CROSNER LEGAL, P.C.

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8 By: _____



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