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9
10 **SUPERIOR COURT OF CALIFORNIA**
11 **IN AND FOR THE COUNTY OF LOS ANGELES**

12 VIJAY SHETH, as an individual and on
behalf of all others similarly situated,

13 Plaintiff,

14 vs.

15 ICON BURGER ACQUISITION LLC, a
Delaware limited liability company;
16 SMASHBURGER ACQUISITION-SO CAL
LLC, a Delaware limited liability company;
17 SMASHBURGER ACQUISITION – SAN
DIEGO LLC, a Delaware limited liability
18 company; SMASHBURGER
ACQUISITION – SACRAMENTO LLC, a
19 Delaware limited liability company; and
DOES 1-100, inclusive,
20

21 and DOES 1-100, inclusive,

22 Defendants.
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CASE NO.: 22STCV09093

Assigned for All Purposes to:
Hon. Yvette M. Palazuelos
Dept SSC-9

**MEMORANDUM OF POINTS &
AUTHORITIES IN SUPPORT OF MOTION
FOR PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

**[Filed concurrently with Notice of Motion and
Motion; Declarations of Chad Saunders, Vijay
Sheth, and Chris Longley; [Proposed] Order]**

DATE: July 10, 2024

TIME: 10:00 a.m.

DEPT.: SSC-9

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1 **I. INTRODUCTION**

2 Plaintiff Vijay Sheth respectfully requests that the Court preliminarily approve the Class
3 Action and PAGA Settlement Agreement and Class Notice (“Agreement”) entered into between
4 Plaintiff and Defendants Icon Burger Acquisition LLC, Smashburger Acquisition-So Cal LLC,
5 Smashburger Acquisition - San Francisco LLC, Smashburger Acquisition - San Diego LLC,
6 Smashburger Acquisition - Sacramento LLC (collectively, “Icon” or “Defendants”). The
7 proposed settlement seeks to resolve claims in this matter in exchange for a non-reversionary
8 \$989,940 Gross Settlement Amount. The settlement class consists of “all current and former non-
9 exempt hourly employees employed by Defendants in California during the Class Period (March
10 14, 2018 to the date of preliminary approval or the total number of workweeks totals 77,781,
11 whichever date is sooner).

12 The Agreement and Notice distribution plan are the products of adversarial, arm’s-length
13 negotiations by informed counsel and parties, facilitated by an experienced mediator. The
14 settlement is fair, reasonable, and adequate to all. Plaintiff has analyzed the strengths and
15 vulnerabilities of the claims with Defendants’ potential exposure and determined the \$989,940
16 proposed settlement is well within the range of reasonableness and is in the Class Members’ best
17 interests. The length and risks of continued litigation and trial that affect the values of the claims
18 were all carefully weighed. In addition, the defenses asserted by Defendants, the uncertainty of
19 class certification, the difficulties of complex litigation, the lengthy process of establishing
20 specific damages and possible delays and appeals, were also considered by Plaintiff and counsel
21 in negotiating the proposed settlement. Further, the proposed settlement satisfies the criteria for
22 preliminary approval under California Rules of Court, Rule 3.769.

23 Accordingly, Plaintiff seeks: (1) preliminary approval of the settlement; (2) provisional
24 certification of the Class; (3) appointment of Plaintiff as Class Representative; (4) appointment of
25 Crosner Legal, PC as Class Counsel; (5) approval of the Parties’ proposed Notice of Class Action
26 Settlement (“Notice”) and method of notifying the Class Members; (6) a hearing date for Plaintiff’s
27 Motion for Final Approval of Class Action Settlement; and (7) entry of an Order Granting
28 Preliminary Approval of Class Action Settlement.

II. BACKGROUND/LITIGATION HISTORY

Defendants own and operate Smashburger restaurants, including at least 12 restaurants in California. During the relevant time frame, Defendants employed Plaintiff as a non-exempt Cook and Front of House Manager at a restaurant in Redondo Beach, although Plaintiff occasionally worked at restaurants in Carson, Manhattan Beach, and San Diego as well. (Declaration of Chad Saunders (“Saunders Decl.”), ¶ 13.)

Plaintiff timely exhausted his administrative remedies with the LWDA by submitting his PAGA notice on March 4, 2022. Plaintiff did not receive notice from the LWDA that it intended to investigate the alleged violations outlined in his PAGA letter. Consequently, Plaintiff filed his class action lawsuit on March 14, 2022, alleging causes of action for unpaid minimum wages, unpaid overtime wages, failure to provide meal and rest breaks, wage statement violations, business expense reimbursements, and unfair competition. Plaintiff filed a separate PAGA lawsuit on May 11, 2022, based on the same alleged Labor Code violations. Both matters were consolidated by stipulation on August 8, 2022, and are currently pending before this Court.¹ (Saunders Decl., ¶ 14; Exh. 4.)

In October 2022, the Parties agreed to pursue an early mediation and to forego formal discovery pending mediation. The Parties then scheduled a mediation with Todd Smith, Esq., a respected wage and hour class action mediator. The Parties mediated with Mr. Smith in January 2024 and, after a full day of arms-length negotiations, finally reached agreement on all major issues. They then reduced the proposed settlement to the Agreement now before the Court for approval. The Agreement has been uploaded to the LWDA. (Saunders Decl., ¶ 15; Exh. 6.)

III. INVESTIGATION

For mediation Defendants provided Plaintiff with extensive informal discovery, including Plaintiff’s personnel, time, and payroll records, time records and payroll records for a randomly selected sampling of about 20% of the Class Members,² wage statement exemplars, Defendants’ employee handbooks, including Defendants’ policies and procedures regarding the payment of

¹ Plaintiff uploaded the complaint to the LWDA. (Saunders Decl., Exh. 5.)

² Which sample Plaintiff’s experts at Berger Consulting suggested would be statistically reliable. (Saunders Decl., ¶ 17.)

1 wages, the provision of meal and rest breaks, timekeeping policies (including recording hours),
2 issuance of wage statements, and termination wages, as well as information regarding the number
3 of putative Class Members who are current and former employees, sample arbitration agreements,
4 the number of Aggrieved Employees, the number of workweeks throughout the Class Period, and
5 the number of pay periods throughout the PAGA Period. From this information, Plaintiff analyzed
6 Defendants' potential liability and, with the assistance of Plaintiff's experts at Berger Consulting
7 Group, the potential exposure and damages. (Saunders Decl., ¶ 16.)

8 Based on this informal discovery, Plaintiff contends the Class Members were not paid all
9 minimum or overtime wages, not provided with legally compliant meal and rest periods, did not
10 receive compliant wage statements, did not receive required expense reimbursement, and did not
11 receive all wages due on separation of employment. In considering the reasonableness of the
12 proposed settlement, Plaintiff considered Defendants' many counterarguments, which sharply
13 contested Plaintiff's claims. Plaintiff's Counsel weighed the strength of Defendants' arguments,
14 including the risks of prevailing at class certification and on the merits, and determined the
15 proposed settlement is in the best interests of the Class. Although remaining confident in the
16 strength of the claims, all these factors led Plaintiff to discount the exposure analysis as discussed
17 in detail below. (Saunders Decl., ¶ 17.)

18 **IV. TERMS OF THE PROPOSED SETTLEMENT**

19 **A. Deductions from the Settlement**

20 The Parties have agreed (subject to Court approval) to settle and compromise this matter
21 for the non-reversionary sum of \$989,940.00 ("Gross Settlement Amount" or "GSA") (Agreement,
22 §§ 1.22, 3.1, 4.3). The GSA includes: (a) attorney's fees of up to \$329,947.00 (one-third of the
23 GSA)³ to compensate Class Counsel for work performed and all work remaining to be performed
24 (Agreement, § 3.2.1.); (b) actual litigation expenses not to exceed \$20,000.00⁴ (*Id.*); (c) a service

25 ³ The percentage method, with or without a lodestar cross-check, may be used in common fund cases like
26 this one. *Laffitte v. Robert Half Int'l, Inc.* (2016) 1 Cal.5th 480, 503. In support of their fee request at Final
27 Approval, Class Counsel will provide the Court with lodestar information to permit the Court to do a lodestar
28 cross-check in connection with Class Counsel's request for attorney's fees.

⁴ At Final Approval, Class Counsel will provide documentation regarding actual expenses incurred to
support Class Counsel's request for reimbursement of actual expenses.

award to Plaintiff in an amount not to exceed \$5,000.00; (d) Administration Costs to Atticus Administration, LLC in an amount not to exceed \$19,610.00 (Agreement, § 1.3, 3.2.2); and (e) PAGA penalties to the LWDA of \$18,750.00 (which is 75% of the \$25,000.00 PAGA Payment, with the remaining 25% or \$6,250.00 to Aggrieved Employees) (Agreement, § 3.2.4). Employer-side payroll taxes (including FICA, FUTA, and SDI) will be paid by Defendants separate and apart from the GSA. (Agreement, §§ 3.1, 4.3.)

B. Calculation of the Individual Settlement Payments to Class and Aggrieved Employees

After all Court-approved deductions from the GSA, it is estimated that \$590,350 (“Net Settlement Amount” or “NSA”), less all applicable employee-side taxes, will be distributed to the estimated 2,373⁵ Class Members, with an average individual settlement amount of around \$249.⁶ Additionally, it is estimated that the 25% PAGA Payment (\$6,250.00) will be distributed to the estimated 1,082⁷ Aggrieved Employees, resulting in an average payment of about \$5.77⁸ per Aggrieved Employee. (Saunders Decl., ¶ 19.) Under no circumstances will any portion of the Settlement revert to Defendants. (Agreement, § 3.1.)

Subject to the terms and conditions of the Settlement, Atticus will calculate and issue Individual Settlement Payments to Participating Class Members based on the following formula: (a) dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating Class Members during the Class Period and (b) multiplying the result by each Participating Class Member’s Workweeks. (Agreement, § 3.2.3.)

Additionally, Atticus will calculate and issue payments to Aggrieved Employees based on the following formula: (a) dividing the amount of the Aggrieved Employees’ 25% share of PAGA Penalties (\$6,250.00) by the total number of PAGA Period Pay Periods worked by all Aggrieved Employees during the PAGA Period and (b) multiplying the result by each Aggrieved Employee’s PAGA Period Pay Periods. Therefore, the value of each Aggrieved Employee’s share of the PAGA

⁵ This is based on information provided by Defendants in advance of mediation and separately confirmed by Plaintiff.

⁶ \$585,350 NSA / 2,373 Class Members

⁷ This information is also based on data provided by Defendants in advance of mediation.

⁸ \$6,250 (25% PAGA Payment) / 1,082 Aggrieved Employees.

1 Payment ties directly to the amount of pay periods that he or she worked. (Agreement, § 3.2.5.1)

2 The number of pay periods and weeks worked by each Participating Class Member and
3 Aggrieved Employee will be derived from Defendants' records. (Agreement, § 1.8.) Each Class
4 Member's gross settlement award will be apportioned as follows: 20% wages and 80% non-
5 statutory damages and interest. (Agreement, § 3.2.4.1). Atticus will be responsible for issuing Form
6 W-2s for amounts deemed "wages" and Form 1099s for the portions allocated to penalties and
7 interest. (Agreement, § 3.2.4.1.)

8 **C. Uncashed Funds to Unclaimed Property Fund**

9 Settlement checks must be cashed or deposited within 180 days after the checks are mailed
10 to them. (Agreement, § 4.4.1.) In the event a settlement check remains uncashed, such uncashed
11 funds shall be transmitted to the State Controller's Office Unclaimed Property Fund in the name of
12 the Participating Class Member and/or Aggrieved Employee for later claim. (Agreement, § 4.4.3.)
13 Because this lawsuit benefits Class Members/Aggrieved Employees who release claims by
14 participating in the lawsuit, the funds representing their settlement payments should remain their
15 property. By sending the uncashed funds to the Unclaimed Property Fund in the name of the Class
16 Member/Aggrieved Employee, he or she can claim his or her property at a future date convenient
17 to the Class Member. Therefore, there will be no unpaid residue or unclaimed or abandoned Class
18 Member funds under California Code of Civil Procedure section 384(a). (Saunders Decl., ¶ 23.)

19 **D. Notice and Extended Response Deadline for Re-Mailed Notices**

20 Within fifteen days after entry of the Preliminary Approval Order, Defendants will provide
21 Atticus with the Class Data, containing each Class Member's first and last name, last known
22 mailing address, Social Security number, total number of weeks worked during the Class Period,
23 and total number of pay periods worked during the PAGA Period. (Agreement, § 4.2.) Atticus will
24 maintain the Class Data as private and confidential, but Class Counsel will have access to the Class
25 Data so that nothing shall impede Class Counsel from discharging their fiduciary duties to the Class.
26 (Agreement, § 4.2.)

27 Prior to mailing, Atticus will perform a search for updated addresses in the National Change
28 of Address Database. (Agreement, § 7.4.2.) Atticus will use the NCOA and skip traces to attempt

1 to find current addresses for any Notice returned as undeliverable. For any re-mailed Notice, Atticus
2 will extend the Class Member's Response Deadline by 14 calendar days. (Agreement, § 7.4.3-4.)
3 If Atticus is unable to obtain a better address for a Class Member, the Notice will be deemed
4 undeliverable. (Agreement, § 7.4.3-4.) Within 14 days after receipt of the class data, Atticus will
5 mail via regular First-Class mail the Notice to all Class Members. (Agreement, § 7.4.2.)

6 The contents of the Notice are consistent with the terms of the Agreement. The Notice
7 informs Class Members how and when to request exclusion from or object to the settlement and of
8 their estimated payment amount which they will automatically receive a settlement payment if they
9 do nothing. The Notice further advises Class Members of the Court's COVID-19 procedures, how
10 to obtain documents filed in the case from the Court, Atticus or Class Counsel, how to check the
11 Court's website to find out whether the Final Approval hearing date/location has been changed,
12 directs the Class Member to Atticus's website and the Court's website to find out whether final
13 judgment has been entered. (Saunders Decl., Exh. 3.)

14 **E. Responses to the Settlement and Deadline Thereon**

15 Class Members will have 45 days from the initial mailing of the Notice to respond to the
16 settlement by submitting a challenge to the number of weeks or pay periods attributed to them,
17 submitting an objection, or requesting to be excluded from the settlement and the consequences of
18 each choice. (Agreement, 7.4.4.) Class Members can object to the settlement in writing via mail or
19 fax by submitting a document with their name, the words "Notice of Objection" or "Formal
20 Objection" and a description of the arguments supporting their objection. Class Members are
21 informed that the Court will hear any objections from any Class Member who attends the Final
22 Approval Hearing. (Agreement, § 7.7.)

23 Class Members can also submit a written request for exclusion from the settlement by
24 mailing or faxing a written request, including his or her name, address, and phone number, and a
25 statement demonstrating his or her intent to opt out of the settlement. (Agreement, § 7.5.)

26 The Notice also informs the Class Member/Aggrieved Employees that they can dispute the
27 number of weeks/pay periods allotted to them to calculate their settlement payments by contacting
28 Atticus before the Response Deadline and include any documentation supporting the dispute.

Atticus will investigate the dispute, request additional information from Defendants, and make a final decision as to the number of eligible work weeks/pay periods. (Agreement, § 7.6.)

F. Funding and Distribution of the Settlement

Defendants shall fund the settlement within 14 days of the Effective Date. (Agreement, § 4.3.). Atticus shall disburse all payments required under this Settlement within 14 calendar days funding. (Agreement, § 4.4.)

G. Release of Claims

Upon Defendants' payment funding the GSA, Participating Class Members shall forever release the Released Parties⁹ for the Released Claims for the Class Period. (Agreement, § 5.) The Released Claims are:

(i) all claims that were alleged, or reasonably could have been alleged, based on the facts stated in the Operative Complaint during the Class Period. Participating Class Members' only release these claims for the duration of the Class Period. Except as set forth in Section 5.3 of this Agreement, Participating Class Members do not release any other claims, including claims for vested benefits, wrongful termination, violation of the Fair Employment and Housing Act, unemployment insurance, disability, social security, workers' compensation, or claims based on facts occurring outside the Class Period

(Agreement, § 5.2.) Likewise, upon Defendants' funding of the GSA, Plaintiff, the Aggrieved Employees, and the State of California shall forever release the Released Parties for the PAGA Released Claims for the PAGA Period. (Agreement, § 5.) The PAGA Released Claims are:

all claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the facts stated in the Operative Complaint and the PAGA Notice during the PAGA Period. Aggrieved Employees only release these claims for the duration of the PAGA Period.

(Agreement, § 5.3.)

H. Plaintiff's Enhancement Award

Pursuant to the terms of the settlement, at final approval Plaintiff will seek a modest incentive award of \$5,000 each for his service in bringing these claims on behalf of the Class. This

⁹ "Released Parties" means Icon Burger Acquisition LLC, Smashburger Acquisition – So Cal LLC, Smashburger Acquisition - San Francisco LLC, Smashburger Acquisition - San Diego LLC, Smashburger Acquisition - Sacramento LLC, and each of their former and present directors, officers, shareholders, owners, members, managing agents, attorneys, insurers, predecessors, successors, assigns, subsidiaries, affiliates. (Agreement, § 1.42.)

1 request is reasonable given the risks he undertook on behalf of the Class Members. By contacting
2 and retaining counsel to pursue these claims, Plaintiff helped make this settlement possible for the
3 absent Class Members (plus the aforementioned true up payments), while shouldering the risk of
4 being liable for Defendants' litigation costs. Plaintiff also exposed himself to unwanted notoriety
5 related to filing a public lawsuit (discoverable even through a simple google search) for the benefit
6 of other employees, placing themselves at risk of discrimination by future prospective employers.
7 As set forth in more detail in his declaration submitted herewith, among taking many other actions
8 assisting in the successful litigation of this case, Plaintiff provided substantial factual information
9 and documents to counsel, attended numerous meetings/phone conferences with counsel to discuss
10 the case, and kept abreast of all significant developments. [Declaration of Vijay Sheth, ¶¶ 2-10.]

11 As discussed below, Plaintiff's Counsel is convinced that the proposed settlement is in the
12 Class Members' best interests based on the negotiations and a detailed knowledge of the issues
13 present in this action. The length and risks continued litigation that affect the value of the claims
14 were all carefully weighed. In addition, the affirmative defenses asserted by Defendants, the
15 uncertainty of class certification, the difficulties of complex litigation, the lengthy process of
16 establishing specific damages and various possible delays and appeals were also carefully
17 considered by Plaintiff's Counsel in arriving at the proposed settlement. (Saunders Decl., ¶ 32.)

18 **IV. ARGUMENT**

19 In deciding whether to approve a proposed class action settlement under Code of Civil
20 Procedure section 382, the Court must find that a proposed settlement is "fair, adequate and
21 reasonable." *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801 [quoting *Officers for*
22 *Justice v. Civil Serv. Comm'n* (9th Cir. 1982) 688 F.2d 615, 625, cert. den. (1983) 459 U.S.
23 1217]. A proposed class action settlement is **presumed** fair under the following circumstances:
24 (1) the parties reached settlement after arms-length negotiations; (2) investigation and discovery
25 were sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in
26 similar litigation; and (4) the percentage of objectors is small. *Id.* at 1802. As the following
27 shows, all of these elements are present here and the Court should grant of preliminary approval.

28 /////

1 **A. The Settlement was Reached as a Result of Arm’s Length Negotiations**

2 The proposed settlement was reached as a result of arm’s-length negotiations. Though
3 cordial and professional, the settlement negotiations have been, at all times, adversarial and non-
4 collusive in nature. Following mediation, Counsel for the Parties further negotiated regarding the
5 settlement terms memorialized in the Agreement. (Saunders Decl., ¶ 33.)

6 While Plaintiff believes in the merits of his case, she also recognizes the inherent risks of
7 litigation and understand the benefit of Class Members receiving significant settlement funds
8 immediately as opposed to risking continued litigation in achieving class certification, the merits
9 of the case before and after trial, the damages awarded and/or an appeal that can take several more
10 years to litigate. (Saunders Decl., ¶ 34.)

11 **B. The Settlement is the Result of Thorough Investigation and Discovery**

12 The Parties thoroughly investigated and evaluated the factual strengths and weaknesses of
13 their arguments before reaching the proposed settlement, and engaged in sufficient investigation,
14 research and discovery, referenced above, to support the settlement. The proposed settlement was
15 only possible following significant analysis and evaluation of Defendants’ relevant policies and
16 procedures, as well as the data it produced for the putative Class, which permitted Plaintiff’s
17 Counsel and expert to engage in a comprehensive analysis of liability and potential damages to
18 prepare for mediation. (Saunders Decl., ¶ 35.) This litigation has reached the stage where “the
19 Parties certainly have a clear view of the strengths and weaknesses of their cases” sufficient to
20 support the Settlement. *Boyd v. Bechtel Corp.* (N.D. Cal. 1979) 485 F. Supp. 610, 617.

21 **C. Counsel for the Parties are Experienced in Similar Litigation**

22 Counsel for the Parties are particularly experienced in wage and hour employment law,
23 class actions and PAGA actions. Plaintiff’s Counsel has prosecuted numerous cases on behalf of
24 employees for wage and hour violations and thus are experienced and qualified to evaluate the class
25 and PAGA claims, evaluate settlement versus trial on a fully informed basis, and to evaluate the
26 viability of the defenses. This experience informed Plaintiff’s Counsel on the risks and uncertainties
27
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1 of further litigation and guided their determination to endorse the proposed settlement.¹⁰ (Saunders
2 Decl. ¶¶ 6-12.)

3 **D. The Proposed Settlement is a Reasonable Compromise of Claims**

4 An understanding of the amount in controversy is an important factor into whether the
5 settlement “of the class members” claims is reasonable in light of the strengths and weaknesses of
6 the claims and the risks of the particular litigation.” *Kullar v. Foot Locker Retail, Inc.* (2008) 168
7 Cal.App.4th 116; 129; *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186
8 Cal.App.4th 399, 409. The most important factor in this regard is “the strength of the case for
9 plaintiffs on the merits, balanced against the amount offered in settlement.” *Kullar*, 168
10 Cal.App.4th at 129.

11 In weighing the strength of Plaintiff’s case, *Kullar* instructs that the court is not to “decide
12 the merits of the case or to substitute its evaluation of the most appropriate settlement for that of
13 the attorneys.” 168 Cal.App.4th at 133. Further, this analysis does not require an explicit statement
14 of the maximum amount the plaintiff class could recover if it prevailed on all its claims, provided
15 there is a record which allows “an understanding of the amount that is in controversy and the
16 realistic range of outcomes of the litigation.” *Munoz*, 186 Cal. App. 4th at 409. Put differently, “as
17 the court does when it approves a settlement as in good faith under Code of Civil Procedure section
18 877.6, the court must at least satisfy itself that the class settlement is within the ‘ballpark’ of
19 reasonableness.” *Kullar*, 168 Cal. App. 4th at 133 citing *Tech-Bilt v. Woodward-Clyde &*
20 *Associates* (1985) 38 Cal. 3d 488, 499-500. As shown below, the Parties’ investigation and
21 discovery revealed several reasons to discount claims and agree to this settlement.

22 **E. The Settlement is Fair and Reasonable Based on the Strengths of Plaintiff’s**
23 **Case and the Risks and Costs of Further Litigation**

24 The proposed settlement was only possible following significant analysis and evaluation of
25 Defendants’ relevant policies and procedures, as well as the data that Defendants produced for the

26
27 ¹⁰ The final factor mentioned in *Dunk* - the number of objectors - is not determinable until the Notice of
28 Class Action Settlement has been provided to the Class and they have had an opportunity to respond. This
information will be provided to the Court in conjunction with the Motion for Final Approval of Class Action
Settlement.

1 Class. This permitted Plaintiff's Counsel to engage in a comprehensive analysis of liability and
2 potential damages. The discovery conducted resulted in Plaintiff's central theories of liability,
3 which are based on Plaintiff's claims that Defendants failed to provide compliant meal and rest
4 periods, failed to pay all minimum and overtime wages, failed to provide accurate, itemized wage
5 statements and failed to pay all wages due on separation of employment As explained above,
6 Defendants maintain that the discovery produced demonstrates that it would succeed at both class
7 certification and on the merits. (Saunders Decl., ¶ 36.)

8 Plaintiff believes this case is suitable for certification on the claimed basis that there are
9 company-wide policies that Plaintiff contends violate California law and uniformly affect the Class
10 Members. However, Defendants' counterarguments raise uncertainties with respect to both class
11 certification and success on the merits. As the California Supreme Court emphasized in *Sav-On v.*
12 *Superior Court* (2004) 34 Cal.4th 319 (2004), class certification is always a matter of the trial
13 court's sound discretion, and decisions following *Sav-On* have reached different conclusions with
14 respect to certification of wage and hour claims.¹¹ While remaining confident in the strengths of
15 his claims, all of these factors led Plaintiff to discount the following maximum potential damage
16 claims. (Saunders Decl., ¶ 37.)

17 Defendants provided Plaintiff with class-wide data from which Plaintiff's Counsel could
18 extrapolate a damage analysis in preparation of mediation. Prior to mediation, there were a total of
19 about 2,373 Class Members (1,724 formerly employed in the limitations period) and 70,710 work
20 weeks in the Class Period. There are also approximately 1,082 aggrieved employees and 14,542
21 pay periods within the PAGA Period. (Saunders Decl. ¶ 37.)

22 Plaintiff first asserts Defendants' failed to pay for all hours worked, and particularly that
23 Defendants frequently "edited" employee time punches to reduce hours worked in order to avoid
24 paying overtime and/or meal break premiums. The practice of editing Class Members' actual hours
25

26 ¹¹ *E.g., Harris v. Superior Court*, 154 Cal.App.4th 164 (2007) (reversing decertification of class claiming
27 misclassification and ordering summary adjudication in favor of employees), *review granted*, 171 P.3d 545 (2007) (not
28 cited as precedent, but rather for illustrative purposes only); *Walsh v. IKON Solutions, Inc.*, 148 Cal.App.4th 1440
(2007) (affirming decertification of class claiming misclassification); *Aguilar v. Cintas Corp. No. 2*, 144 Cal.App.4th
121 (2006) (reversing denial of certification); *Dunbar v. Albertson's Inc.*, 141 Cal.App.4th 1422 (2006) (affirming
denial of certification).

1 worked systematically underpaid them for both regular and overtime hours. Plaintiff contends the
2 evidence showing unpaid hours worked will be presumed accurate and Defendants' records
3 showing edits made to their time will support that presumption, which Defendants will be unable
4 to rebut. *Hernandez v. Mendoza* (1988) 199 Cal. App. 3d 721. On the other hand, Defendants
5 argued their time keeping policies fully complied with the law, that they accurately recorded and
6 paid for all hours worked and, that to the extent any changes were made to employee time, it was
7 rare and done for legitimate reasons such as correcting employee errors, correcting instances when
8 employees forgot to clock out, etc. Without considering any of Defendants' defenses to certification
9 or on the merits, and assuming one hour of "off the clock" work per week, Plaintiff's expert
10 calculated Defendants' maximum exposure here at about \$936,900. (Saunders Decl., ¶ 38.)

11 Plaintiff next contends Defendants failed to provide legally compliant meal and rest breaks.
12 Specifically, although employees consistently worked shifts of at least five and a half hours or
13 more, they did not receive legally compliant meal periods for several reasons. For example, the
14 time records show that for 85.1% of shifts between 5-6 hours do not reflect a meal period and there
15 is no evidence of waiver. Plaintiff also contends class members frequently had to work through
16 part or all their meal periods due to understaffing, pressure to complete their job duties before
17 having a meal, and instructions from supervisors to take short meal periods or to skip meal periods
18 completely, and again that Defendants altered time records to avoid paying meal period premiums.
19 (Saunders Decl., ¶ 39.)

20 Defendants deny Plaintiff's contentions, claiming they made meal and rest breaks available
21 to Class Members in compliance with California law. Defendants contend their meal and rest break
22 policies are lawful and that Class Members were frequently reminded via training and supervisors
23 that they were required to take all meal and rest breaks. Defendants also contend that time records
24 demonstrate that Class Members took duty-free, timely meal and rest breaks. They further
25 emphasized employees can and did verbally waive meal periods, particularly when working less
26 than a six hour shift. Defendants contend their meal and rest break policies and practices comported
27 with the flexibility the *Brinker* court held was integral to California's meal and rest period
28 requirements. Finally, Defendants argue that Plaintiff's meal and rest break claims are not

1 susceptible to common proof, as the claims would require individualized inquiry, including whether
2 there was an unlawful companywide policy, whether employees had the opportunity to take meal
3 and rest periods, whether they voluntarily chose to waive meal and rest periods, and whether
4 Defendants ever prevented them from taking meal and rest periods. Accordingly, Defendants
5 contend these claims are vulnerable to a ruling that class treatment is not appropriate. Without
6 taking into consideration any of Defendants' defenses to certification or on the merits, Plaintiff
7 calculated Defendants' maximum exposure for the meal and rest break claims as approximately
8 \$926,500. (Saunders Decl., ¶ 40.)

9 Plaintiff also contends Defendants required Plaintiff and the Class Members to use their
10 personal cell phones for work related purposes including communicating with supervisors before
11 and after their shifts. However, Defendants failed to reimburse employees for the use of their
12 personal cell phones *Cochran v. Schwan's Home Service, Inc.* (2014) 228 Cal.App.4th 1137, it was
13 held that § 2802 requires employers to always reimburse employees who are required to use
14 personal cell phones for work-related calls for a reasonable percentage of their cell phone bills. On
15 the other hand, Defendants argued there was no reason for employees to use their own phones while
16 working, and any other use was purely for personal preference and therefore not reimbursable.
17 Without taking into consideration any of Defendants' defenses to certification or on the merits,
18 Plaintiff calculated Defendants' maximum exposure for expense reimbursement as about \$87,500.
19 (Saunders Decl., ¶ 41.)

20 Plaintiff's claims for inaccurate wage statements and waiting time penalties are derivative
21 of the unpaid wage claims. Should those claims fail, Plaintiff's claim for inaccurate wage
22 statements and waiting time penalties would also fail. Defendants also contend they would not be
23 liable for waiting time penalties because a "good faith dispute" exists over the payment of past
24 wages. Cal. Code Regs. Tit. 8 § 13520; *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157,
25 1201. Further, Defendants contend Plaintiff would have to prove that Defendants "willfully" failed
26 to pay Class Members appropriate wages due upon separation of employment. Defendants contend
27 that any failure to pay wages upon separation was not willful. Without taking into consideration
28 any of Defendants' defenses to certification or on the merits, Plaintiff calculated Defendants'

1 maximum exposure for wage statement penalties as \$966,700 and waiting time penalties as
2 \$2,391,600. (Saunders Decl., ¶ 42.)

3 As far as potential PAGA liability, the theoretical civil penalties likely exceed \$5 million
4 should Plaintiff prevail on all claims and establish violations of the multiple Labor Code sections
5 at issue. (Saunders Decl., ¶ 43.) As with the class claims, Plaintiff discounted the potential PAGA
6 penalties based on Defendants' various defenses on the merits and also accounted for the Court's
7 wide discretion to reduce such penalties, or to decline to award penalties at all. Labor Code §
8 2699(e)(2); *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504 (trial court awarded penalties
9 of \$5 per pay period after a bench trial, which decision was upheld on appeal); *In re Taco Bell*
10 *Wage and Hour Actions* (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. LEXIS 48557 (PAGA penalties
11 denied after trial). Accordingly, the Parties allocated \$10,000 to PAGA penalties.

12 Plaintiff submits this amount is reasonable under the circumstances and in line with
13 comparable settlements in other wage and hour class actions in California. *E.g.*, *Van Kempen v.*
14 *Matheson Tri-Gas, Inc.* (N.D. Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182 (granting final
15 approval of \$5,000 PAGA penalty from \$370,000 settlement, or 1.4 percent of total settlement);
16 *Slavkov v. First Water Heater Partners I* (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS 116303
17 (finding a \$7,500 PAGA payment reasonable when measured against the overall settlement of
18 \$345,000 and the possible weaknesses in plaintiffs' case, or 2.2 percent of total settlement).
19 Additionally, the LWDA has been informed of the terms of the PAGA portion of the settlement,
20 and will be able to weigh in as necessary. *Jennings v. Open Door Mktg. Inc.* (N.D. Cal. Oct. 3,
21 2018) 2018 U.S. Dist. LEXIS 171356, at *27 (approving settlement with PAGA penalties of 0.6%
22 where "[p]laintiffs [have] submitted the settlement agreement to the LWDA, and the LWDA has
23 not objected to the settlement.

24 Thus, Plaintiff and her counsel discounted the value of the class claims consistent with the
25 risks discussed above, as well as the potential applicability of arbitration agreements signed by
26 many class members. They carefully weighed the likelihood of the class receiving substantially
27 greater benefit if the litigation continued, and concluded – in light of these very real and substantial
28 risks – settlement on the proposed terms and without prolonged and costly litigation was in the best

1 interests of the class. The overall \$350,000 recovery represents a significant percentage of
2 Defendants' potential exposure and, given Defendants' multi-layered defenses and all other
3 potential risks of continued litigation, a total recovery for the class of \$989,947, which will result
4 in average award of some \$249 per class member, plus additional sums under PAGA, is a
5 significant result well within the range of reasonableness considering all potential outcomes, and it
6 will provide direct monetary awards to all Class Members without further delay. [Saunders Decl.,
7 ¶¶ 44.]

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

1 **V. PROVISIONAL CLASS CERTIFICATION SHOULD BE GRANTED**

2 A class action is appropriate when the class is ascertainable and there is “a well-defined
3 community of interest in the questions of law and fact involved affecting the parties to be
4 represented.” Code Civ. Proc. § 382. Class certification requirements under Section 382 follow
5 Rule 23 of the Federal Rules of Civil Procedure, and require: numerosity, typicality of the class
6 representatives’ claims, adequacy of representation, predominance of common issues, and
7 superiority. Fed.R.Civ.Pro. 23(b)(3); *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011,
8 1019. While a court must certify a class for settlement purposes if a class has not already been
9 certified, “it is well established that trial courts should use different standards to determine the
10 propriety of a settlement class, as opposed to a litigation class certification. Specifically, a lesser
11 standard of scrutiny is used for settlement cases.” *Glob. Minerals & Metals Corp. v. Superior Court*
12 (2013) 113 Cal.App.4th 836, 859 *citing Dunk*, Cal.App.4th 1794, 1807, n.19; *Wershba v. Apple*
13 *Computer* (2001) 91 Cal.App.4th 224, 237-38.

14 Here, Plaintiff seeks approval of the following Class for settlement purposes only: “all
15 current and former non-exempt hourly employees employed by Defendants in California during
16 the Class Period” of March 14, 2018 to the date of preliminary approval or the total number of
17 workweeks totals 77,781, whichever date is sooner.” (Agreement, §§ 1.5, 1.12).

18 First, the class is both sufficiently numerous, consisting of approximately 2,373 individuals,
19 and ascertainable by reference to Defendants’ personnel and payroll records. (Saunders Decl., ¶
20 45.) “There is no set number required to maintain a class action, and the statutory test is whether a
21 class is so numerous that ‘it is impracticable to bring them all before the court.’” *Hebbard v.*
22 *Colgrove* (1972) 28 Cal. App. 3d 1017, 1030 (noting that there is no set minimum to meet the
23 numerosity prerequisite, but that a class of as few as 28 is acceptable); *Bowles v. Superior Court*
24 (1995) 44 Cal. 2d 574 (upholding a class of ten members); *Rose v. City of Hayward* (1981) 126
25 Cal. App. 3d 926, 932 (finding that “Class Members are ‘ascertainable’ where they may be readily
26 identified without unreasonable expense or time by reference to official records.”). Thus, the
27 ascertain ability requirement is met.

28 The typicality requirement is met if the claims of the named representative are typical of

1 those of the Class, though, “they need not be substantially identical.” *Classen v. Weller* (1983) 145
2 Cal.App.3d 27, 46-47. Here, Plaintiff contends his claims are typical of the Class Members’ claims
3 because they arise from the same factual basis and are based on the same legal theories applicable
4 to the Class Members. Plaintiff further contends Defendants’ policies applied to all Class Members
5 and each Class Member is challenging the same policies and practices. As such, the typicality
6 requirement is satisfied for purposes of settlement. (Sheth Decl., ¶¶ 2-3; Saunders Decl. ¶ 46.)

7 Adequacy requires that the Plaintiff have no interests adverse to the interests of the proposed
8 Class Members and be committed to vigorously prosecuting the case on behalf of the Class.
9 *McGhee v. Bank of America* (1976) 70 Cal.App.3d 442, 450-51. Plaintiff has been and will continue
10 to be committed to vigorously prosecuting this case, and she has no conflicts of interest with the
11 Class. Plaintiff has been and will continue to be committed to vigorously prosecuting this case, and
12 he has no conflicts of interest with the Class. For these reasons, Plaintiff contends he is an adequate
13 class representative. (Sheth Decl., ¶¶ 3-7; Saunders Decl., ¶ 47.)

14 Next, common questions of law and fact predominate – particularly for purposes of a
15 settlement class – as the Class Members all were subject to the same meal and rest break policies
16 and alleged “de facto” policies resulting in meal period violations, and similarly subject to the same
17 improper “editing” of their work time. Since the focus of the claims against Defendants concerns
18 the legality of common policies applied uniformly to the entire class, common issues predominate
19 over individualized inquiries concerning liability. For instance, Defendants’ meal and rest break
20 policy is company-wide policy applied equally and consistently to all class members, and this
21 policy is either compliant with California law or it is not. Regardless of that determination, it will
22 decide liability for all class members one way or another. [Saunders Decl., ¶ 48.]

23 By now it is well-settled a theory of recovery asserting the existence of a uniform policy
24 violating California law is sufficient to satisfy the requirements for class certification. Jones v.
25 Farmers Ins. Exch. (2013) 221 Cal.App.4th 986, 996 (“Claims alleging that a uniform policy
26 consistently applied to a group of employees is in violation of the wage and hour laws are of the
27 sort routinely, and properly, found suitable for class treatment”); Williams v. Superior Court (2013)
28 221 Cal.App.4th 1353 (“A company-wide practice can sustain a common question of fact or law

1 that supports commonality for class certification”). Lastly, a class action is superior to other means
2 for the fair and efficient adjudication of this controversy. [Saunders Decl., ¶ 53.]

3 **A. Atticus Should be Appointed as the Settlement Administrator**

4 The Parties agreed to use Atticus Administration, LLC as the Settlement Administrator in
5 this matter. (Agreement, § 1.2). Atticus is highly qualified and experienced as a settlement
6 administrator, committed to the security of data, carries insurance for the theft of money or data,
7 and has no relationship with Counsel. (Declaration of Chris Longley, ¶¶ 2-13, Exhs. 1-3; Saunders
8 Decl., ¶ 49.)

9 **B. Notice to Class Members Complies With California Rule of Court 3.769(f)**

10 California Rule of Court 3.769(f), provides: “If the court has certified the action as a class
11 action, notice of the final approval hearing must be given to class members in the manner specified
12 by the court. The notice must contain an explanation of the proposed settlement and procedures for
13 class members to follow in filing written objections to it and in arranging to appear at the settlement
14 hearing and state any objections to the proposed settlement.” Here, the proposed Notice meets all
15 of these requirements, as it advises Class Members of their rights to participate in the settlement,
16 how to and when to object to or request exclusion from the settlement, and the date, time, and
17 location of the final approval hearing. Class Members need not do anything to receive their *pro*
18 *rata* share of the settlement. (Saunders Decl., ¶ 51, Exh. 3.)

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1 **V. CONCLUSION**

2 Plaintiff respectfully submits that the proposed settlement is in the best interests of the Class
3 Members, as it is fair, adequate, and reasonable. Plaintiff accordingly requests the Court certify the
4 class for settlement purposes, appoint Plaintiff as Class Representatives, appoint Plaintiff's Counsel
5 as Class Counsel, appoint Atticus as Settlement Administrator, approve the method of notice and
6 the Notice to be sent to the Class, preliminarily approve the Settlement Agreement, enter the
7 proposed order filed herewith, and set a Final Approval hearing date.

8
9 Dated: April 15, 2024

CROSNER LEGAL, P.C.

10
11 
12 Chad Saunders
13 Zachary Crosner
14 Jamie Serb
15 Attorneys for Plaintiff VIJAY SHETH