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9
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF RIVERSIDE**
12

13 FRANCISCO CERVANTES, as an
14 individual and on behalf of all others
15 similarly situated,

16 Plaintiff,

17 v.

18 ALPHA MATERIALS, INC., a California
19 corporation; and DOES 1-100, inclusive,

20 Defendants.
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28

Case No.: Case No.: CVRI2201967

Assigned for All Purposes to:
Hon. Harold Hopp
Dept. 1

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 Nikki Trenner,
Gregory B. Wilbur, Brian Oaks, and Michael
Moore; [Proposed] Order]**

Date: March 12, 2024
Time: 8:30 a.m.
Dept.: 1

Reservation ID: 921633123576

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1 **I. INTRODUCTION**

2 Plaintiff Francisco Cervantes hereby moves the Court for an order granting preliminary
3 approval to a proposed non-reversionary class action settlement to resolve wage and hour claims on
4 behalf of approximately 140 individuals who are or were employed by Defendant Alpha Materials,
5 Inc. (“Alpha” or “Defendant”) in California and classified as a non-exempt employee during the
6 Class Period of May 18, 2018 to November 5, 2023. The proposed \$295,000 settlement will provide
7 about \$148,917 in cash payments to the class, with an average award of about \$1,064. The balance
8 of approximately \$146,083 will cover a modest enhancement award to Plaintiff, reasonable
9 attorney’s fees and actual litigation costs, settlement administration costs, and payment of civil
10 penalties to the State. The settlement is the product of Plaintiff’s pre- and post-filing investigation,
11 a pre-mediation exchange of information, and lengthy arms-length negotiations overseen by
12 experienced mediator Daniel Turner, Esq.

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

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

24 Defendant Alpha Materials is a construction material supplier based in Jurupa Valley. Alpha
25 sells concrete products such as shotcrete and ready-mix concrete. Plaintiff Cervantes was employed
26 by Defendant as a commercial driver for over ten years. During his employment, Plaintiff typically
27 worked shifts between ten and thirteen hours, five days per week. [Declaration of Nikki Trenner
28 (“Trenner Decl.”), ¶ 4.]

1 Plaintiff alleges Alpha violated California wage and hour law in several respects. First, he
2 alleges a failure to pay all minimum and overtime wages by (1) failing to pay Plaintiff and the Class
3 Members for all hours worked by requiring them to don and doff their personal protective equipment
4 before clocking in and after clocking out for their shifts, and (2) failing to pay for rest and recovery
5 time. Next, Plaintiff alleges Alpha also failed to provide compliant meal periods as meal periods
6 were either interrupted or started late due to job demands. He also alleges Defendant failed to
7 provide legally compliant rest periods, rest breaks did not last a net 10 minutes and were no
8 completely free of employer control. He further claims Defendant did not reimburse business
9 expenses incurred by Class Members for the use of their personal cellular phones. Lastly, he alleges
10 Defendant failed to provide accurate, itemized wage statements and failed to pay all wages owed
11 upon the separation of employment. [Trenner Decl.), ¶ 4.]

12 Based on these allegations, on May 17, 2022, Plaintiff filed the underlying class action
13 complaint on behalf of himself and the Class Members, asserting claims for (1) failure to pay
14 minimum wages; (2) failure to pay overtime; (3) failure to provide meal periods; (4) failure to
15 provide rest periods; (5) failure to provide itemized wage statements; (6) failure to reimburse
16 business expenses, (7) failure to pay all wages due at termination; and (8) unfair competition. After
17 exhausting his administrative remedies, Plaintiff filed a First Amended Complaint adding claims
18 under PAGA based on the same alleged Labor Code violations. After his employment with Alpha
19 ended, Plaintiff filed a Second Amended Complaint adding claims for failure to timely pay wages
20 on separation of employment. [Trenner Decl., ¶ 5.]

21 Alpha has at all times denied Plaintiff's allegations and maintained its meal and rest break
22 and payroll policies and procedures comply with California law, and that it provided the class
23 members with required meal and rest breaks. Additionally, Alpha contends its timekeeping and
24 payroll policies accurately track and pay for all hours worked by its employees and at the correct
25 rates of pay. It also strongly contends the case cannot be maintained as any kind of class or
26 representative action, arguing for example that to the extent class members missed meal and/or rest
27 breaks, or that such breaks were non-compliant, it was intermittent and infrequent and evidence of
28

1 such missed breaks would be purely anecdotal, and therefore individualized issues predominate and
2 trial on a representative basis would be unmanageable. [Trenner Decl., ¶ 6.]

3 Since Plaintiff filled the initial complaint, and after agreeing to participate in early mediation,
4 the Parties engaged in formal and informal discovery to facilitate an exchange of information
5 necessary to engage in a meaningful mediation. Consequently, Plaintiff's counsel reviewed payroll
6 records, personnel policies/handbooks, meal and rest break policies, personnel files, and a random
7 of sampling paystubs and time records for about 25% of the pay periods at issue. Defendant also
8 provided documents reflecting its wage and hour policies and practices, and data regarding the total
9 number of current and former employees, the estimated total amount of workweeks and pay periods
10 they worked, and average hourly pay rates, among other relevant data. Plaintiff had that information
11 reviewed and analyzed by Berger Consulting Group to assist with evaluating things such as time
12 allegedly lost to due rounding, meal period violation rates, etc., and to prepare a damages model.
13 [Trenner Decl., ¶ 7.]

14 The Parties then engaged Louis Marlin, Esq., a highly respected mediator with extensive
15 wage and hour class action experience and, in August 2023, participated in a full day mediation with
16 Mr. Marlin. Throughout the day, the arms-length negotiations were hard-fought and adversarial as
17 the Parties exchanged extensive information on their legal and factual positions, and made numerous
18 offers and counter-offers. After a full day of negotiations, the Parties reached agreement on all
19 major issues and thereafter prepared the Settlement Agreement now before the Court for approval.
20 [Trenner Decl., ¶ 8.]

21 **III. THE PROPOSED SETTLEMENT TERMS**

22 Under the settlement, Alpha will pay \$295,000.00 into a common fund, the Gross Settlement
23 Amount. Reasonable attorney's fees of up to \$98,333.33 (1/3 of the GSA), litigation costs of up to
24 \$20,000, an enhancement award to Plaintiff of up to \$5,000,¹ settlement administration costs of no
25 more than \$7,750, and \$15,000 for civil penalties under PAGA (of which 75%, or \$11,750, will go
26 to the Labor & Workforce Development Agency, and 25%, or \$3,250 will go to the Aggrieved
27 Employees) all will be paid from the Gross Settlement Amount. The remainder of approximately

28 _____
¹ Plaintiff also entered into a separate individual settlement agreement. [Trenner Decl., ¶ 10.]

1 \$146,083 will be allocated among the Participating Class Members based on their total weeks
2 worked during the Class Period. No portion of the Gross Settlement Amount will revert to Alpha.
3 [Trenner Decl., ¶ 10.]

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

5 The settlement provides for conditional certification of a settlement class including all
6 persons who are or were employed by Defendant in California and classified as a non-exempt
7 employee during the Class Period of May 18, 2018 to November 5, 2023. The Settlement Class
8 consists of approximately 140 individuals.² [Trenner Decl., ¶ 11.]

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

10 This is a cash settlement that does not require Participating Class Members to submit a claim
11 form to receive their settlement share. Participating Class Members will receive their settlement
12 checks automatically via First Class U.S. Mail. Eighty percent of each settlement share will be
13 allocated to wages and the remaining twenty percent will be allocated to expenses reimbursement,
14 penalties and interest. Alpha will pay any and all applicable employer-side payroll taxes separately
15 and in addition to the Gross Settlement Amount. Subject to the Court's approval, any amounts not
16 claimed (because a class member does not cash his or her settlement check) will be forwarded to
17 the State Controller's Unclaimed Property Fund. [Trenner Decl., ¶ 12.]

18 Each Participating Class Member will receive a share of the Net Settlement Amount based
19 on his or her total weeks worked for Alpha during the Class Period while employed in a non-exempt
20 position. Thus, each Class Member's Individual Settlement Payment will be calculated using criteria
21 typically used in determining appropriate amounts of unpaid wages, unpaid premium wages for
22 missed meal and rest breaks, and potential statutory penalties under applicable law. These methods
23 are intended to ensure each Class Member receives a portion of the available settlement funds
24 corresponding to the relative value of his or her potential claims. The proposed allocation provides
25 a reasonable way to compensate Class Members based on the amount of time they worked for Alpha
26 and the number of instances they missed a meal break and/or rest break, were not provided

27 ² The "Aggrieved Employees" for purposes of PAGA include all persons who are or were employed by
28 Defendant in California and classified as a non-exempt employee during the PAGA Period of May 2, 2021
to November 5, 2023. There are approximately 85 PAGA Employees. [Trenner Decl., ¶ 11.]

1 compensation in lieu of such missed breaks, or lost pay due to the alleged rounding and regular rate
2 issues. [Trenner Decl., ¶ 13-14.]

3 The average class settlement award will be approximately \$1,064, and that the class awards
4 will range from about \$11 on the low end (for Class Members with one work week) to over \$3,275
5 on the high end (for Class Members employed for the entire Class Period). The estimated average
6 PAGA award will be about \$44, and PAGA awards will range from about \$1.30 to \$87. [Trenner
7 Decl., ¶ 15.]

8 **C. Settlement Administration**

9 Subject to the Court's approval, and after obtaining multiple bids, the Parties agreed on
10 Phoenix Settlement Administrators ("Phoenix") as the Settlement Administrator. [Trenner Decl., ¶
11 16.] Phoenix is qualified and has significant experience administering class action settlements,
12 including numerous wage and hour matters. Phoenix has agreed to cap its fees and costs at
13 \$7,750.00. If the Court approves less than the above amount, the difference will remain in the Net
14 Settlement Amount for distribution to the Participating Class Members. [Declaration of Michael
15 Moore, ¶¶ 2-17; Exhs. A-B.]

16 **D. The Class Notice**

17 The proposed Notice (Exhibit 2 to the Trenner Declaration) sets out information about this
18 case and explains the basic settlement terms in plain language, and meets all requirements under
19 California Rules of Court 3.769(f) and 3.766(d). The Notice also sets forth the individualized
20 information used to calculate Individual Settlement Payments and each Class Member's estimated
21 settlement award. The Notice likewise details the procedures for Class Members to dispute their
22 individual information, for submitting an objection to the Settlement, and to request exclusion.
23 Further, each notice packet will include a Request for Exclusion form and Objection Form (Exhibits
24 3 and 4 to the Trenner Declaration). In sum, the Notice provides the Class Members with the
25 information necessary to evaluate the Settlement and provides fair opportunity to participate in, opt
26 out of, or object to the proposed Settlement. Many Class Members are more comfortable in Spanish
27 and accordingly the notice documents will be translated into Spanish in addition to English.
28

[Declaration of Brian Oaks, ¶ 5.] Coupled with the notice procedure, the proposed Notice provides the Class with the best notice practicable. [Trenner Decl., ¶ 17.]

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

Class Members will have forty-five (45) days to dispute the information in their Notice used to calculate their settlement award, and also have 45 days to submit any objections to the settlement or to request exclusion. In the event a Class Member disputes their individual information, the Settlement Administrator will review the Class Member's records as well as any additional information submitted, and make a final determination. [Trenner Decl., ¶ 18.]

F. Release of Claims

All Participating Class Members will release Alpha from all claims alleged in the operative FAC, or that could have been brought based on the factual allegations in the FAC during the Class Period. Plaintiffs and the LWDA will release those PAGA claims alleged in the PAGA notice to the extent alleged in the FAC. The Class and PAGA releases are limited to the claims that were actually pleaded or could have been pleaded based on the alleged facts in the FAC, and PAGA notice for the PAGA claims. Only Plaintiff will provide a full general release of all claims. [Trenner Decl., ¶ 19.]

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

The settlement provides Defendant will not oppose a request for attorney's fees not to exceed 1/3 of the Gross Settlement Amount, or \$98,333.33, nor will it oppose a request for reimbursement of litigation costs and expenses of up to \$20,000.00. Defendant also will not oppose a request for an enhancement award to Plaintiff of not more than \$5,000.00 in recognition of his time spent on this matter, the risks he undertook on behalf of the class, and the benefit conferred to the class, as set forth in his declaration filed herewith. Plaintiff's counsel will provide the Court with appropriate summaries and evidence of their efforts and time records in anticipation of the Final Approval Hearing. If the Court approves less than the above amounts, the difference will remain in the Net Settlement Amount for distribution to the Participating Class Members. [Trenner Decl., ¶ 20.]

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1 **IV. ARGUMENT**

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

3 The law favors settlement, particularly in class actions where substantial resources can be
4 conserved by avoiding the time, costs and rigors of formal litigation. H. Newberg & A. Conte, 4
5 Newberg on Class Actions (4th ed. 2002) § 11.41; Class Plaintiffs v. City of Seattle (9th Cir. 1992)
6 955 F.2d 1268, 1276, cert. denied, 506 U.S. 953; Potter v. Pacific Coast Lumber Co. (1951) 37
7 Cal.2d 592, 602. Nevertheless, to ensure the rights of absent class members are not unjustly
8 compromised, settlement of a class action requires court approval. Cal. Rule of Court. 3.769;
9 Wershba v. Apple Computer (2001) 91 Cal.App.4th 224, 245; Dunk v. Ford Motor Co. (1996) 48
10 Cal.App.4th 1794, 1801. This judicial review protects against fraud or collusion, and ensures
11 fairness to the absent class members. Dunk, 48 Cal.App.4th at 1800-01. Judicial review occurs via
12 a two-step process to determine, under all the circumstances, if the proposed settlement is fair,
13 reasonable and adequate. Id. at 1801; Wershba, 91 Cal.App.4th at 245.

14 The first step is a motion for preliminary approval, through which the parties present the
15 court with the proposed settlement and seek a determination that it is sufficiently fair and reasonable
16 to warrant notice to the class and further proceedings as to its fairness and adequacy. Cal. Rule of
17 Court 3.769(c). This preliminary evaluation determines if the proposed settlement is within the
18 “range of reasonableness” and if notice should be provided to the class regarding the settlement’s
19 proposed terms and conditions, and whether a final fairness hearing should be scheduled. Wershba,
20 91 Cal.App.4th at 234-35; North County Contractors Ass’n, Inc. v. Touchstone Ins. Servs. (1994)
21 27 Cal.App.4th 1085, 1089-90. Considering the strong judicial policy favoring settlement of class
22 actions, courts apply a presumption of fairness to class action settlements when (1) the settlement
23 results from arms-length bargaining, (2) investigation and discovery are sufficient to allow counsel
24 and the court to act intelligently, (3) counsel is experienced in similar litigation, and (4) the
25 percentage of objectors is small. Dunk, 48 Cal.App.4th at 1802; Wershba, 91 Cal.App.4th at 245.

26 If the court grants preliminary approval, it then orders the class be given notice in an
27 appropriate manner, establishes a schedule and procedures for class members to request exclusion
28 or object, and sets the matter for a final fairness hearing. Typically, any motion for attorney’s fees

1 and costs, and any enhancement for the class representative(s), is filed subsequent to preliminary
2 approval and heard with the motion for final approval, as part of the second step of the two-step
3 approval process. Dunk, 48 Cal.App.4th at 1800; Wershba, 91 Cal.App.4th at 232.

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

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

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

14 In the present matter, conditional certification is proper since this matter satisfies all
15 requirements for class certification under Code of Civil Procedure section 382. First, the class is
16 both sufficiently numerous, consisting of approximately 140 individuals, and ascertainable by
17 reference to Defendant's personnel and payroll records. [Trenner Decl., ¶ 21.] Next, Plaintiff is an
18 adequate class representative, as his claims do not conflict with and are not antagonistic to the claims
19 of other class members. In this regard, the settlement of his individual claims is not an obstacle to
20 his ability to serve as class representative for several reasons. First, his independent claim in no way
21 impacted negotiation of the final class settlement which, as noted, was achieved via negotiations
22 facilitated by a professional neutral and which negotiations took into account Plaintiff's individual
23 claims – in other words, the settlement amount represents a professional neutral's independent
24 evaluation of the value of the case. Second, Plaintiff is seeking a modest enhancement award in
25 recognition of the fact he is receiving additional monies for his individual non-wage and hour
26 claims. Thus, Plaintiff has in no way “sold out” the class members for his own personal benefit but
27 instead has simply received fair value for his separate claims in addition to securing a positive result
28 for the absent class members. For these reasons, Plaintiff contends he is an adequate class

1 representative. Further, his claims are typical given he is a member of the class and their claims
2 arise from the same employment practices and course of conduct giving rise to the claims of the
3 other class members. [Trenner Decl., ¶ 22.] Lastly, Plaintiff’s counsel are experienced and adequate
4 class counsel. [Trenner Decl., ¶¶ 37-42.]

5 Next, Plaintiff is an adequate class representative, as his claims do not conflict with and are not
6 antagonistic to the claims of other class members.

7 Next, common questions of law and fact predominate – particularly for purposes of a
8 settlement class – as the Class Members all were subject to the same meal and rest break policy, and
9 likewise were subject to the same time rounding policies. Since the focus of the claims against Alpha
10 concerns the legality of common policies applied uniformly to the entire class, common issues
11 predominate over individualized inquiries concerning liability. For instance, Alpha’s meal and rest
12 break policy is company-wide policy applied equally and consistently to all class members, and this
13 policy is either compliant with California law or it is not. Regardless of that determination, it will
14 decide liability for all class members one way or another. Similarly, whether Alpha correctly
15 calculated and paid overtime and double time wages raises a question common to all class members.
16 [Trenner Decl., ¶ 23.]

17 By now it is well-settled a theory of recovery asserting the existence of a uniform policy
18 violating California law is sufficient to satisfy the requirements for class certification. Jones v.
19 Farmers Ins. Exch. (2013) 221 Cal.App.4th 986, 996 (“Claims alleging that a uniform policy
20 consistently applied to a group of employees is in violation of the wage and hour laws are of the
21 sort routinely, and properly, found suitable for class treatment”); Williams v. Superior Court (2013)
22 221 Cal.App.4th 1353 (“A company-wide practice can sustain a common question of fact or law
23 that supports commonality for class certification”). Lastly, a class action is superior to other means
24 for the fair and efficient adjudication of this controversy. [Trenner Decl., ¶ 24.]

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

27 The proposed settlement resulted from serious, arms-length negotiations facilitated by
28 respected mediator, Louis Marlin, Esq., who has extensive experience mediating wage and hour

1 class actions. [Trenner Decl., ¶ 8.] Plaintiffs' counsel Zachary M. Crosner, Jamie Serb, and Nikki
2 Trenner, all have years of experience litigating wage and hour class actions. Plaintiff's counsel are
3 well-qualified to evaluate the risks and benefits of pursuing further litigation or settling the matter.
4 [Trenner Decl., ¶¶ 37-42.]

5 Next, California law recognizes several factors bearing on the fairness, adequacy, and
6 reasonableness of a proposed class settlement. Kullar v. Foot Locker Retail, Inc. (2008) 168
7 Cal.App.4th 116, 128. In relevant part, these factors include: 1) the amount offered in settlement 2)
8 the strength of plaintiff's case; 3) the risk, expense, complexity, and likely duration of further
9 litigation; 4) the risk of maintaining class action status throughout trial; 5) the experience and views
10 of counsel; and 6) the reaction of the class members to the proposed settlement. Id. As demonstrated
11 below, the proposed settlement satisfies these requirements.

12 Prior to mediation, the parties engaged in both formal and informal discovery to facilitate
13 settlement discussions. As a result, Plaintiff reviewed documents and information regarding Alpha's
14 payroll practices, a representative sampling of pay stubs and time records for about 25% of the class
15 members, applicable compensation plans, meal and rest break policies, etc., and information from
16 Defendant regarding class size and breakdown, number of work weeks/pay periods, average rates
17 of pay, and other information used to formulate a damages model. Plaintiff then had that information
18 reviewed with the assistance of a consulting expert. Plaintiff's counsel are confident they obtained
19 sufficient information to understand the law and facts of this case and make an informed decision
20 regarding the proposed settlement and whether it is fair and reasonable. [Trenner Decl., ¶¶ 7, 25.]

21 Next, the proposed settlement falls within the range of reasonableness warranting
22 preliminary approval. The proposed settlement involves a significant sum that, when distributed,
23 will confer direct monetary benefits on the class members. As described above, each class member
24 will be entitled to a monetary payment without having to file a claim and each payment will be
25 relative to the value of his or her potential claims. Through the information exchanged and analysis
26 undertaken, Plaintiff and counsel weighed the risks of continued litigation against the benefits of the
27 proposed settlement and determined settlement to be the most reasonable option.

1 Using the data obtained from Defendant, Plaintiff ran various calculations and estimated
2 Alpha's likely maximum exposure on the class claims at approximately **\$3.944** million, including
3 about \$ on the unpaid wage/rounding claim, \$3,631,460 on the meal and rest break claims, \$148,300
4 on the unreimbursed expense claim, \$752,000 on the wage statement claims, and \$612,500 on the
5 waiting time penalty claims. [Trenner Decl., ¶ 26.]

6 First, on their unpaid wage claims, Plaintiffs allege Alpha failed to pay for all hours worked
7 because it required employees to don and doff protective equipment and take care of other pre- and
8 post-shift work off the clock and without compensation. Plaintiff also contends that, for employees
9 paid by piece rate, Alpha failed to compensate for non-productive time and required rest and
10 recovery periods. As a result, per Plaintiff, he and the class members lost as much as 90+ minutes
11 of compensable time each week due to this off the clock and uncompensated work. Plaintiff's
12 experts calculated this resulted in a loss of some 32,800 compensable hours worked, resulting in
13 some **\$735,000** in unpaid wages over the Class Period. In response, Defendant argued its
14 timekeeping and payroll policies accurately tracked and paid for all employee time and. It also
15 argued that its policies prohibited any "off the clock" work and, accordingly, if any off the clock
16 work occurred it was intermittent and infrequent, against company policy, and done without the
17 employer's knowledge or consent. For these reasons, per Alpha, class certification of this issue
18 would be impossible because innumerable individual inquires would be required to determine
19 whether any compensable "off the clock" work occurred. [Trenner Decl., ¶¶ 27-28.]

20 On the meal period claims, Plaintiff alleged several violations. First, he argued that meal
21 periods frequently were started late and/or interrupted and cut short by work circumstances, even
22 though employees were required to write down that they had received a timely, full 30-minute meal
23 period regardless. Further, Plaintiff contends he and the class members had to be available to
24 respond to work-related texts and phone calls while on their meal periods, and thus never really
25 were fully relieved of all duties. Assuming a 95% violation rate, Plaintiff calculated Defendant's
26 meal period exposure at about **\$1,211,340** in meal period premiums. [Trenner Decl., ¶ 29.]

27 In response, Defendant argued its break policies were fully compliant with California law,
28 and that it provided all required meal periods and thereby met its obligations under the Labor Code

1 and applicable Wage Order. Further, Defendant argued to the extent employees missed a break or
2 took a non-compliant break, any such discrepancies were aberrational and against company policy
3 and a myriad of individual issues would be required to determine whether the potential violation
4 resulted from employee choice or some other reason. Consequently, per Defendant, individualized
5 inquiries would dominate on this issue and render class certification inappropriate. [Trenner Decl.,
6 ¶ 30.]

7 For the rest break claim, Plaintiff similarly argued that Defendant frequently provided non-
8 compliant rest breaks, as the Class Members often had to skip rest breaks or received shortened rest
9 breaks due to the hectic nature of the work, had to be available to respond to texts/phone calls, and
10 further were not completely relieved of all employer control. As with meal breaks, Defendant argued
11 its rest break policies complied with California law and that it authorized and permitted employees
12 to take all required rest breaks. Defendant further contended that, in light of the fact that it is not
13 required to maintain a record of rest breaks, any evidence of failure to authorize and permit rest
14 breaks and/or discouragement from taking rest breaks would be purely anecdotal and individual
15 issues would predominate. Assuming a 95% violation rate, Defendant's exposure here was
16 estimated at about **\$1,262,340**. [Trenner Decl., ¶ 31.]

17 On the expense reimbursement claim, Plaintiff alleges that use of his personal cellular phone
18 was necessary and consequential to his employment duties for purposes of group messaging, and
19 receiving work-related calls and texts. Defendant did not reimburse employees for the cost
20 associated with the use of the personal cellular phones for Defendant's benefit. Cochran v. Schwan's
21 Home Serv. (2014) 228 Cal.App.4th 1137, 1144. In response, Alpha argued it provided employees
22 with all tools and equipment necessary to perform their job duties and, to the extent employees used
23 their own phones, it was purely for personal convenience, was not necessary to their employment,
24 and therefore was not reimbursable. Without taking into consideration any of Defendant's defenses
25 to certification or on the merits, Plaintiffs' experts calculated Defendant's maximum exposure for
26 this claim at about **\$63,755**, based on \$5/work week per class member in unreimbursed expenses.
27 [Trenner Decl., ¶ 31.]
28

1 Plaintiff next alleged Alpha's wage statements violated Labor Code § 226 on their face by,
2 inter alia, failing to include the employer name and address, and the employees' social security
3 number/employee ID number. He also alleged derivative claims under Labor Code § 226 and §§
4 201-203 (waiting time penalties). These derivative claims are based on the unpaid wage claims and
5 will rise or fall along with those primary claims, in addition to being subject to "good faith" and
6 other defenses available to Defendant. E.g., Amaral v. Cintas Corp. No. 2 (2008) 163 Cal.App.4th
7 1157, 1203-04 (holding employer did not willfully fail to pay wages under Labor Code § 203 even
8 though the class prevailed on the merits on the underlying claim for failing to pay living wages).
9 Defendant argued further that the wage statements accurately contained all required information,
10 and that acted in good faith all times with respect to payment of wages. Plaintiff estimated the
11 exposure on these claims at about Accordingly, Plaintiff discounted these claims significantly in
12 light of these multiple potential defenses. Plaintiff's experts estimated the exposure here at about
13 **\$340,000** on the wage statement claims (based on 6,322 pay periods in the limitations period and
14 accounting for the \$4,000 per employee cap), and **\$331,200** on the waiting time penalty claims
15 based on 69 terminated employees in the limitations period. [Trenner Decl., ¶ 32.]

16 As far as potential PAGA liability, the alleged aggrieved employees theoretically are entitled
17 to penalties totaling about \$3.1 million should Plaintiff prevail on all claims, establish violations of
18 the multiple Labor Code sections at issue, and secure the maximum penalty on all issues. [Trenner
19 Decl., ¶ 33.] As with the class claims, Plaintiff discounted the potential PAGA penalties based on
20 Defendant's various defenses on the merits and also accounted for the Court's wide discretion to
21 reduce such penalties, or to decline to award penalties at all. Labor Code § 2699(e)(2); Carrington
22 v. Starbucks Corp. (2018) 30 Cal.App.5th 504 (trial court awarded penalties of \$5 per pay period
23 after a bench trial, which decision was upheld on appeal); In re Taco Bell Wage and Hour Actions
24 (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. LEXIS 48557 (PAGA penalties denied after trial).
25 Accordingly, the Parties allocated \$15,000 to PAGA penalties. Accordingly, the Parties negotiated
26 a PAGA allocation of \$15,000 from the GSA. [Trenner Decl., ¶ 34.]

27 Plaintiff submits this amount is reasonable under the circumstances and in line with
28 comparable settlements in other wage and hour class actions in California. *E.g., Van Kempen v.*

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

11 Taking into account all of the above-discussed risk factors, Plaintiff calculated Defendant's
12 exposure on the class claims at around **\$789,000** on a risk-discounted basis and, accordingly, the
13 settlement represents a little under 40% of the estimated recovery after trial. Given Defendant's
14 multi-layered defenses and all other potential risks of continued litigation, a total recovery for the
15 class of \$295,000, which will result in average award of over \$1,060 per class member, is a
16 significant result well within the range of reasonableness considering all potential outcomes, and it
17 will provide direct monetary awards to all Class Members without further delay. [Trenner Decl., ¶¶
18 35-36.]

19 Importantly, the mere fact that a settlement does not provide the same recovery as might be
20 achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and adequate.
21 Wershba, 91 Cal.App.4th at 246, 250 ("Compromise is inherent and necessary in the settlement
22 process...even if the relief afforded by the proposed settlement is substantially narrower than it
23 would be if the suits were to be successfully litigated, this is no bar to a class settlement because the
24 public interest may indeed be served by a voluntary settlement in which each side gives ground in
25 the interest of avoiding litigation"); 7-Eleven Owners for Fair Franchising v. Southland Corp. (2000)
26 85 Cal.App.4th 1135, 1150 ("The fact that a proposed settlement may amount to only a fraction of
27 the potential recovery does not, in and of itself, mean that the proposed settlement is grossly
28 inadequate and should be disapproved"); White v. Experian Information Solutions, Inc. (C.D. Cal.

1 2011) 803 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable even
2 though it represented 99% discount off the maximum value of the claims); Lane v. Facebook, Inc.
3 (9th Cir. 2012) 696 F.3d 811, 819 ("[T]he question whether a settlement is fundamentally fair . . .
4 is different from the question whether the settlement is perfect in the estimation of the reviewing
5 court"). Importantly as well, the proposed settlement is non-reversionary and will provide
6 immediate benefits to the Class Members without a claims process. White, 803 F.Supp.2d at 1098;
7 c.f., Federal Judicial Center, Managing Class Action Litigation: A Pocket Guide for Judges (3d ed.
8 2010) at 20, available at [http:// www.fjc.gov/sites/default/files/2012/ClassGd3.pdf](http://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf) (reversionary
9 provisions and/or cumbersome claims process may indicate lack of fairness). Plaintiff and his
10 counsel submit the settlement is within the "range of reasonableness," and is fair and adequate for
11 the Class.

12 **D. Notice to the LWDA**

13 As required by Labor Code section 2699(l)(2), Plaintiff gave notice of the settlement and
14 the approval hearing to the LWDA via its online portal. [Trenner Decl., ¶ 43; Exh. 6.]

15 **V. CONCLUSION**

16 For all the foregoing reasons, Plaintiff respectfully requests that the Court grant this motion,
17 conditionally certify the settlement class, grant preliminary approval to the proposed class action
18 settlement, and enter the [Proposed] Order filed herewith.

20 Dated: February 13, 2024

CROSNER LEGAL, PC

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