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8

9 **SUPERIOR COURT OF CALIFORNIA**
10 **IN AND FOR THE COUNTY OF SANTA CRUZ**
11

12 JEFFREY HOXSIE, as an individual and on
13 behalf of all others similarly situated and
14 aggrieved,

15 Plaintiff,

16 v.

17 HOUSING MATTERS, a California Nonprofit
18 Corporation; and DOES 1 to 100, inclusive,

19 Defendants.
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Case No.: 22CV01797

**MEMORNADUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

[Filed concurrently with Notice of Motion
and Motion; Declarations of Michael Jones,
Jeffrey Hoxsie, and Michael Sutherland;
[Proposed] Order

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Dept.: 10

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1 **I. INTRODUCTION**

2 Plaintiff Jeffrey Hoxsie hereby move 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
4 of approximately 125 individuals employed by Defendant Housing Matters (“HM” or
5 “Defendant”) as non-exempt employees in California during the period of August 19, 2018
6 through June 28, 2023. The proposed \$180,000 settlement will provide at least \$68,634 in cash
7 payments to the settlement class, with an average award of about \$550. The balance of
8 approximately \$111,366 will cover a modest enhancement award to the named Plaintiff,
9 reasonable attorney’s fees and actual litigation costs, settlement administration costs, and
10 payment of civil penalties to the state. The settlement is the product of Plaintiff’s pre- and post-
11 filing investigation, extensive formal and informal discovery, and arms-length and adversarial
12 negotiations overseen by experienced and well-regarded mediator the Hon. Brian Walsh (Ret.).

13 As demonstrated below, the settlement is within the “range of reasonableness” for
14 preliminary approval. Plaintiff’s counsel believe the settlement is a significant result for the class
15 given the substantial risks inherent in this matter. Accordingly, Plaintiff requests the Court enter
16 an order: (1) granting preliminary approval to the proposed class action settlement; (2)
17 conditionally certifying the settlement class as defined below; (3) appointing Crosner Legal, PC
18 as Class Counsel; (4) appointing plaintiff Jeffrey Hoxsie as the Class Representative; (5)
19 appointing ILYM Group, Inc. as the Settlement Administrator; (6) approving the form of notice
20 to the class and the procedure for providing such notice; and (7) scheduling a final fairness
21 hearing.

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

23 Defendant HM is the largest nonprofit in Santa Cruz County dedicated exclusively to the
24 issue of homelessness. Defendant operates three emergency shelters on its campus located in
25 Santa Cruz, where it can provide temporary housing to nearly 200 individuals. Further, Defendant
26 operates another 57-bed, low-barrier shelter called The Loft, a 12-individual capacity medical
27 respite program named the Recuperative Care Center, and the Rebele Family Center, which can
28 house up to 28 households, or approximately 90 individuals. In addition to offering shelter to

1 individuals experiencing homelessness (and medical care through the Recuperative Care Center),
2 Defendant offers numerous programs to aid clients in obtaining employment, receiving various
3 support services, and obtaining more permanent housing. Plaintiff worked for Defendant at Santa
4 Cruz campus from approximately March 2020 to August 2021. He started as a janitor, and then
5 became a cook. At all times HM classified him as a non-exempt employee and paid him an
6 hourly wage for time counted by HM as hours worked. [Declaration of Michael Jones (“Jones
7 Decl.”), ¶ 4.]

8 Plaintiff alleges a number of wage and hour violations by Defendant. First, he alleges HM
9 of failing to pay all wages due, including minimum and overtime wages, because HM rounded
10 employee time punches to the nearest quarter-hour. Per Plaintiff, this policy resulted in a
11 significant net loss of compensable time for the class members. Next, Plaintiff alleged HM failed
12 to provide timely and uninterrupted duty free meal and rest periods. Plaintiffs argued that, in
13 addition to maintaining non-compliant written meal and rest break policies, review of the time
14 and payroll data provided by Defendant suggests significant de facto break violations for late,
15 short, or missed meal breaks. Plaintiff also alleged she and the class members were required to
16 use their personal cell phones for work purposes without any reimbursement. Finally, Plaintiff
17 alleges derivative violations for failing to provide accurate itemized wage statements and failing
18 to timely pay wages upon separation of employment. [Jones Decl., ¶ 5.]

19 Based on these allegations, Plaintiff filed his class lawsuit on August 19, 2022, alleging
20 causes of action for unpaid minimum wages, unpaid overtime wages, failure to provide meal and
21 rest breaks, wage statement violations, waiting time penalties, failure to reimburse business
22 expenses, and unfair competition., and civil penalties under the Private Attorneys General Act
23 (“PAGA”). After exhausting the required administrative remedies under PAGA, On October 20,
24 2022, Plaintiff amended his Complaint to a cause of action for penalties under the PAGA based
25 on the alleged Labor Code violations. [Jones Decl., ¶ 6; Exh. 2.]

26 HM has at all times denied Plaintiff’s allegations and maintained its meal break and
27 payroll policies and procedures comply with California law, that it provided its employees with
28 required meal and rest breaks, that it properly tracked employee time and paid Plaintiff and all

1 other employees all wages due, and that any use of personal cell phones was for the employee's
2 own convenience and not reimbursable as a necessary business expense. Additionally, Defendant
3 strongly contends the case cannot be maintained as any kind of class or representative action,
4 arguing that to the extent class members missed meal breaks, that such breaks were non-
5 compliant, or that any unpaid "off the clock" work occurred, whether by rounding our otherwise,
6 it was intermittent and infrequent, against company policy, and done without the company's
7 knowledge. Thus, per HM, evidence of such violations would be purely anecdotal and therefore
8 individualized issues predominate and trial would be unmanageable. [Jones Decl., ¶ 7.]

9 After Plaintiff filed the complaint, he initiated formal written discovery. The Parties then
10 engaged in several meet and confer discussions regarding discovery, case management, and
11 potential law and motion, and ultimately agreed to mediation. After agreeing to mediate, the
12 Parties also undertook additional informal discovery to facilitate an exchange of information
13 necessary to engage in a meaningful mediation. Consequently, Plaintiff's counsel reviewed
14 payroll records, personnel policies/handbooks, meal and rest break policies, personnel files, and a
15 random sampling of paystubs and time records produced by HM for 100% of the class.
16 Defendant also provided documents and information reflecting the estimated total amount of
17 workweeks and pay periods the class members worked, and average hourly pay rates, among
18 other relevant data. Plaintiff had that data reviewed and analyzed by Berger Consulting Group to
19 assist with determining potential break violation rates, amount of underpaid rest and recovery
20 time and unproductive time, etc., and preparing a damages model. [Jones Decl., ¶ 8.]

21 The Parties then engaged the Hon. Brian Walsh (Ret.), a highly respected mediator with
22 extensive wage and hour class action experience and, in June 2023, participated in a full-day
23 mediation with Judge Walsh and, throughout the day, the arms-length negotiations were hard-
24 fought and adversarial as the Parties exchanged extensive information on their legal and factual
25 positions, and made numerous offers and counter-offers. After a full day of negotiations, the
26 Parties reached agreement on all major issues. They then collaboratively drafted the Class Action
27 and PAGA Settlement Agreement ("Settlement Agreement") setting forth the full and final
28 settlement terms, and a true and correct, fully-executed copy of the Settlement Agreement is

1 attached to the Jones Declaration as Exhibit 1. [Jones Decl., ¶ 9.]

2 **III. THE PROPOSED SETTLEMENT TERMS**

3 Under the proposed settlement, HM will pay \$180,000.00 into a common fund, the Total
4 Maximum Settlement Amount (“TMSA”). Reasonable attorney’s fees of up to one-third of the
5 TMSA, or \$60,000, actual litigation costs of up to \$20,000, a Named Plaintiff Award of up to
6 \$10,000 for plaintiff, an Administration Payment of no more than \$6,366, and \$15,000 PAGA
7 Payment for alleged civil penalties under PAGA,¹ all will be paid from the TMSA. The
8 remainder of approximately \$68,634 will be allocated among the Participating Class Members
9 based on their total weeks worked during the Class Period. No portion of the TMSA will revert
10 to Defendant. [Jones Decl., ¶ 10.]

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

12 The settlement provides for conditional certification of a settlement class including all
13 individuals employed by Defendant in California as an hourly-paid, non-exempt employee during
14 the Class Period, which runs from August 19, 2018 through June 28, 2023. HM estimates the
15 Settlement Class consists of approximately 125 individuals. [Jones Decl., ¶ 11.]

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

17 As noted, the settlement obligates HM to pay \$180,000 to resolve the Settlement Class’s
18 claims, inclusive of attorney’s fees and costs. At least \$68,634 from the GSA will be distributed
19 to the Participating Class Members. This is a cash settlement that does not require Participating
20 Class Members to submit a claim form to receive their settlement share. Participating Class
21 Members will receive their settlement checks automatically via First Class U.S. Mail. One-third
22 of each settlement share will be allocated to wages and the remaining two-thirds will be allocated
23 to penalties, unreimbursed expenses, and interest. HM will pay any and all applicable employer-
24 side payroll taxes separately and in addition to the TMSA. Subject to the Court’s approval, any
25 amounts not claimed (because a class member does not cash his or her settlement check) will be

26 _____
27 ¹ Consistent with PAGA, \$11,250 of that amount will go the LWDA for the State’s share of the civil
28 penalties, and the remaining \$3,750 will be distributed pro rata to the PAGA Group (defined as all
individuals employed by HM as non-exempt employees during the PAGA Period of August 16, 2020 to
June 28, 2023).

1 forwarded to the California State Controller's Unclaimed Property Fund. [Jones Decl., ¶ 12.]

2 Each Participating Class Member will receive a share of the Net Settlement Sum based on
3 his or her position held and total weeks worked for HM during the Class Period while employed
4 as a non-exempt employee. Thus, each Class Member's Individual Settlement Payment will be
5 calculated using criteria typically used in determining appropriate amounts of alleged unpaid
6 wages, unpaid premium wages for missed meal breaks, and potential statutory penalties under
7 applicable law. These methods are intended to ensure each Class Member receives a portion of
8 the available settlement funds corresponding to the relative value of his or her potential claims.
9 The proposed allocation provides a reasonable way to compensate Class Members based on the
10 amount of time they worked for Defendant, and the number of instances they missed a break,
11 were not provided compensation in lieu of such missed breaks, or lost wages due to Defendant's
12 alleged improper payroll practices. The average class settlement award is estimated to be around
13 \$550. Per HM, there are approximately 84 Aggrieved Employees, and their average PAGA award
14 will be about \$45. [Jones Decl., ¶ 13.]

15 As discussed below, the overall settlement amount is reasonable in light of the
16 considerable risks associated with Plaintiff's claims as well as the delay and risk posed by
17 continuing to litigate such disputed allegations. In Plaintiff's counsel's judgment, the total value
18 recovered for the class is substantial and in the range of reasonableness.

19 **C. Settlement Administration**

20 Subject to the Court's approval, the Parties have agreed on ILYM Group, Inc. as the
21 Settlement Administrator. ILYM is qualified and has significant experience administering class
22 action settlements, including numerous wage and hour matters. ILYM's fees will not exceed
23 \$6,366. [Jones Decl., ¶ 14; Declaration of Michael Sutherland, ¶¶ 3-6, Exhs. A-C.]

24 **D. The Class Notice**

25 The proposed Notice (Exhibit A to the Settlement Agreement) sets out information about
26 this case and explains the basic settlement terms in plain language. The Notice also sets forth the
27 individualized information used to calculate Class Members' Individual Settlement Payments and
28 each Class Member's estimated settlement award. The Notice likewise details the procedures for

1 Class Members to dispute their individual information, the procedure for submitting an objection
2 to the Settlement, and the procedure to request exclusion. In sum, the Notice provides the Class
3 Members with the information necessary to evaluate the Settlement, provides fair opportunity to
4 participate in, opt out of, or object to the proposed Settlement, and otherwise complies with
5 California Rules of Court 3.769(f) and 3.766(d). Coupled with the notice procedure, the proposed
6 Notice provides the Class with the best notice practicable. [Jones Decl., ¶ 15.]

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

8 Class Members will have forty-five (45) days to dispute the information in their Notice
9 used to calculate their settlement award, and also have 45 days to submit any objections to the
10 settlement or to request exclusion. In the event a Class Member disputes their individual
11 information, the Settlement Administrator will review the Class Member's records as well as any
12 additional information submitted, and make a final determination. [Jones Decl., ¶ 16.]

13 **F. Release of Claims**

14 All Participating Class Members will be deemed to release Defendant from all class
15 claims alleged in the operative complaint, or that could have been brought based on the
16 allegations in the operative complaint from August 19, 2018 to June 28, 2023, and the PAGA
17 Group will release all claims under PAGA for the PAGA Period of August 16, 2021 to June, 28.
18 2023. The releases are limited to the claims that were actually pleaded or could have been pleaded
19 based on the alleged facts in the operative complaint. [Jones Decl., ¶ 17.]

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

21 The settlement provides Defendant will not oppose a request for reasonable attorney's
22 fees not to exceed one-third of the Total Maximum Settlement Amount, or \$60,000.00, nor will it
23 oppose a request for reimbursement of actual litigation costs and expenses of up to \$20,000.00.
24 Defendant also will not oppose a request for an enhancement award to Plaintiff of not more than
25 \$10,000.00 in recognition of his time spent on this matter, the risks he undertook on behalf of the
26 class, and the benefit conferred to the class. Plaintiff's counsel will provide the Court with
27 appropriate summaries and evidence of their efforts and time records in anticipation of the Final
28 Approval Hearing, and Plaintiff has submitted a declaration herewith. If the Court approves less

1 than the above amounts, the difference will remain in the Net Settlement Sum for distribution to
2 the Participating Class Members. [Jones Decl., ¶ 18.]

3 **H. PAGA Claims and Notice to the LWDA**

4 The Parties allocated \$15,000 to payment of civil penalties under PAGA for such claims
5 against HM, as addressed in more detail below. As required by Labor Code section 2699(l)(2),
6 Plaintiff gave notice of the settlement and preliminary approval hearing to the LWDA via its
7 online portal. [Jones Decl., ¶ 19; Exh. 3.]

8 **IV. ARGUMENT**

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

10 The law favors settlement, particularly in class actions where substantial resources can be
11 conserved by avoiding the time, costs and rigors of formal litigation. H. Newberg & A. Conte, 4
12 Newberg on Class Actions (4th ed. 2002) § 11.41; Class Plaintiffs v. City of Seattle (9th Cir.
13 1992) 955 F.2d 1268, 1276, cert. denied, 506 U.S. 953; Potter v. Pacific Coast Lumber Co.
14 (1951) 37 Cal.2d 592, 602. Nevertheless, to ensure the rights of absent class members are not
15 unjustly compromised, settlement of a class action requires court approval. Cal. Rule of Court.
16 3.769; Wershba v. Apple Computer (2001) 91 Cal.App.4th 224, 245; Dunk v. Ford Motor Co.
17 (1996) 48 Cal.App.4th 1794, 1801. This judicial review protects against fraud or collusion and
18 ensures fairness to the absent class members. Dunk, 48 Cal.App.4th at 1800-01. Judicial review
19 occurs via a two-step process to determine, under all the circumstances, if the proposed settlement
20 is fair, reasonable and adequate. Id. at 1801; Wershba, 91 Cal.App.4th at 245.

21 The first step is a motion for preliminary approval, through which the parties present the
22 court with the proposed settlement and seek a determination if it is sufficiently fair and reasonable
23 to warrant notice to the class and further proceedings as to its fairness and adequacy. Cal. Rule of
24 Court 3.769(c). This preliminary evaluation determines if the proposed settlement is within the
25 “range of reasonableness” and if notice should be provided to the class regarding the settlement’s
26 proposed terms and conditions, and whether a final fairness hearing should be scheduled.
27 Wershba, 91 Cal.App.4th at 234-35; North County Contractors Ass’n, Inc. v. TouchTWC Ins.
28 Servs. (1994) 27 Cal.App.4th 1085, 1089-90. Considering the strong judicial policy favoring

1 settlement of class actions, courts generally apply a presumption of fairness to class action
2 settlements when (1) the settlement results from arms-length bargaining, (2) investigation and
3 discovery are sufficient to allow counsel and the court to act intelligently, (3) counsel is
4 experienced in similar litigation, and (4) the percentage of objectors is small. Dunk, 48
5 Cal.App.4th at 1802; Wershba, 91 Cal.App.4th at 245.

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

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

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

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

22 In the present matter, conditional certification is proper since this matter satisfies all
23 requirements for class certification under Code of Civil Procedure section 382. First, the class is
24 both sufficiently numerous, consisting of approximately 125 individuals, and ascertainable by
25 reference to Defendant's personnel and payroll records. [Jones Decl., ¶ 20.] Next, Plaintiff is an
26 adequate class representative, as his claims do not conflict with and are not antagonistic to the
27 claims of other class members. Further, his claims are typical given he is a member of the class
28 and his respective claims arise from the same employment practices and course of conduct giving

1 rise to the claims of the other class members. [Jones Decl., ¶ 21; Declaration of Jeffrey Hoxsie,
2 ¶¶ 2-9.] Lastly, Plaintiff's counsel are experienced and adequate class counsel. [Jones Decl., ¶¶
3 35-40.]

4 Next, common questions of law and fact predominate – particularly for purposes of a
5 settlement class – as the Class Members all were subject to the same meal rest break policies, the
6 same alleged time rounding policy that allegedly shorted them on hours worked, etc. Since the
7 focus of the claims against HM concerns the legality of common policies applied uniformly to the
8 entire class, common issues predominate over individualized inquiries concerning liability. HM's
9 alleged rounding policy is company-wide policy applied equally and consistently to all class
10 members, and this policy is either compliant with California law or it is not. Regardless of that
11 determination, it will decide liability for all class members one way or another. Similarly,
12 whether HM was required to reimburse employees for use of their personal phones presents
13 another common issue. [Jones Decl., ¶ 22.]

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

22 C. **The Proposed Settlement Meets the Dunk and Kullar Factors and is**
23 **within the Range of Reasonableness**

24 The proposed settlement resulted from serious, arms-length negotiations facilitated by
25 respected mediator the Hon. Brian Walsh (Ret.), who has extensive experience mediating wage
26 and hour class actions. [Jones Decl., ¶ 9.] Plaintiff's counsel Zach Crosner, Jamie Serb, and
27 Michael Jones, and Crosner Legal, PC, all have years of litigation experience, including litigating
28

1 wage and hour class actions. Plaintiff's counsel are well-qualified to evaluate the risks and
2 benefits of pursuing further litigation or settling the matter. [Jones Decl., ¶¶ 35-40.]

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

10 Prior to mediation, the parties engaged in extensive formal and informal discovery to
11 facilitate settlement discussions. As a result, Plaintiff reviewed documents and information
12 regarding HM's payroll practices, pay stubs and time records for a sampling of class members,
13 meal and rest break policies, etc., and information from Defendant regarding class size and
14 breakdown of job positions, work weeks, rates of pay, and other information used to formulate a
15 damages model. This extensive information then was analyzed by a consulting expert to look for
16 meal and rest break violation rates, time spent working off the clock due to donning/doffing,
17 security checks, etc., and other issues relevant to liability and damages. Plaintiff's counsel are
18 confident they obtained sufficient information to enable them to understand the law and facts of
19 this case and make an informed decision regarding the proposed settlement and whether it is in
20 the best interests of the class. [Jones Decl., ¶¶ 8, 24.]

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
24 member will be entitled to a monetary payment without having to file a claim and each payment
25 will be relative to the value of his or her potential claims.

26 Plaintiff's analysis was supported by the pre-mediation production described above, which
27 permitted Plaintiffs' counsel to estimate potential damages on various theories of liability. Using
28 that data, Plaintiff ran various calculations and estimated HM's likely maximum exposure on the

1 class claims at approximately \$3,648,000, including \$355,000 on the unpaid wage claims,
2 \$1,000,000 on the meal break claims, \$1,190,000 on the rest break claims, \$46,000 on the
3 expense reimbursement claim, \$286,000 on the wage statement claims, and \$771,000 on the
4 waiting time penalty claims. [Jones Decl., ¶¶ 25-26.] Plaintiff and his counsel substantially
5 discounted the value of these claims, however, in light of Defendant's multi-layered defenses on
6 both class certification and on the merits, and the multiple and considerable risks posed by
7 proceeding with the litigation.

8 The unpaid wage claims focus primarily on HM's alleged policy of rounding employee
9 time punches off to the nearest quarter-hour. Per Plaintiff, this policy unduly favored HM as the
10 majority of time punches were rounded down and resulted in class members losing compensable
11 hours worked. In response, HM argued its payroll policies are fully compliant, that it properly
12 tracked and paid for all hours worked at the appropriate hourly wage. Defendant also emphasized
13 time rounding is permissible under California law so long it has an overall neutral effect on
14 employee time and compensation. See's Candy Shops, Inc. v. Superior Court (2012) 210
15 Cal.App.4th 889. Finally, Defendant argued the issue would not be certifiable since it would
16 require individualized inquiries whether any compensable "off the clock" work occurred if an
17 employee clocked in a few minutes early or late, and why it was or was not documented and paid
18 for. [Jones Decl., ¶ 27.]

19 On the meal and rest break claims, Plaintiff contends HM's written policies are not fully
20 compliant, and Plaintiff's review of the time and payroll records provided suggested these
21 deficiencies in the written policies affected employee breaks and resulted in substantial "de facto"
22 violations. For example, Plaintiffs' analysis showed an overall 32% violation rate for meal
23 periods with a least one unique violation, and a 88% violation for second meal periods. Per
24 Plaintiff, even minor violations such as meal period being just a few minutes short, resulted in a
25 violation and required payment of the necessary premium wage. Kaanaana v. Barret Business
26 Services, Inc. (2018) 29 Cal.App.5th 778. Plaintiff also contends she and the class members were
27 consistently required to work in excess of four hours without receiving lawful ten minute rest
28 periods. Even when they were provided an opportunity to take such a break within each four hour

1 period, they were consistently denied compliant rest periods because such rest periods were
2 interrupted and/or cut short by management and other employees requiring assistance, and
3 management would insist the work be done immediately rather than after the rest period or they
4 would be required to perform more work than could possibly performed in their allotted time
5 order to take such breaks. [Jones Decl., ¶ 28.]

6 In response, HM argued its written meal and rest break policies are fully compliant, that
7 it provided employees with the opportunity to receive all required breaks, and that many class
8 members waived their second meal periods. Defendant further maintained that, in light of its
9 compliant policies, whether a class member missed a meal period, received a late meal period, or
10 missed a rest break would have been aberrational and against company policy. Thus, per HM,
11 these issues are not amenable to class or representative treatment since their resolution would
12 require individualized inquiries as to why a break was missed or non-compliant. [Jones Decl., ¶
13 29.]

14 On the expense reimbursement claim, Plaintiff alleges use of personal cellular phones was
15 necessary and consequential to employment duties for purposes of group messaging, and
16 receiving work-related calls and texts while on duty. Per Plaintiff, HM was obligated to
17 reimburse for such use of personal phones. Cochran v. Schwan's Home Services, Inc. (2014) 228
18 Cal.App.4th 1137, 1144. In response, HM argued it provided employees with all tools and
19 equipment necessary to perform their job duties and, to the extent employees used their own
20 phones, it was purely for personal convenience, was not necessary to their employment, and
21 therefore was not reimbursable. [Jones Decl., ¶ 30.]

22 The claims under Labor Code sections 203 and 226 are derivative of the primary unpaid
23 wage claims, and accordingly are subject to the same risks and uncertainties plus additional risks
24 posed by the need to take into account the discretionary nature of such awards and the “good
25 faith” and other defenses available to Defendant. Amaral v. Cintas Corp. No. 2 (2008) 163
26 Cal.App.4th 1157, 1203-4 (employer did not willfully fail to pay wages under Labor Code § 203
27 even though class prevailed on underlying claim for failure to pay living wages). Thus, while
28 these claims largely are derivative of the unpaid wage claim, they also are subject to additional

1 defenses. [Jones Decl., ¶ 31.]

2 As far as potential PAGA liability, the allegedly aggrieved employees theoretically are
3 entitled to penalties totaling over \$676,000 in civil penalties should Plaintiff prevail on all claims
4 and establish violations of the multiple Labor Code sections at issue. [Jones Decl., ¶ 32.] As with
5 the class claims, Plaintiff discounted the potential PAGA penalties based on Defendant's various
6 defenses on the merits and also accounted for the Court's wide discretion to reduce such
7 penalties, or to decline to award penalties at all. Labor Code § 2699(e)(2); Carrington v.
8 Starbucks Corp. (2018) 30 Cal.App.5th 504 (trial court awarded penalties of \$5 per pay period
9 after a bench trial, which decision was upheld on appeal); In re Taco Bell Wage and Hour
10 Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. LEXIS 48557 (PAGA penalties denied after
11 trial). Accordingly, the Parties allocated \$45,000 to PAGA penalties, and Plaintiffs submit this
12 amount is reasonable under the circumstances and in line with comparable settlements in other
13 wage and hour class actions in California. *E.g.*, Van Kempen v. Matheson Tri-Gas, Inc. (N.D.
14 Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182 (granting final approval of \$5,000 PAGA
15 penalty from \$370,000 settlement, or 1.4 percent of total settlement); Slavkov v. First Water
16 Heater Partners I (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS 116303 (finding a \$7,500
17 PAGA payment reasonable when measured against the overall settlement of \$345,000 and the
18 possible weaknesses in Plaintiffs' case, or 2.2 percent of total settlement). Additionally, the
19 LWDA has been informed of the terms of the PAGA portion of the settlement, and will be able to
20 weigh in as necessary. Jennings v. Open Door Mktg. Inc. (N.D. Cal. Oct. 3, 2018) 2018 U.S. Dist.
21 LEXIS 171356, at *27 (approving settlement with PAGA penalties of 0.6% where "[p]laintiffs
22 [have] submitted the settlement agreement to the LWDA, and the LWDA has not objected to the
23 settlement.

24 The settlement obviates the significant risk that this Court may find any kind of class or
25 representative resolution unachievable or deny certification of all or some of Plaintiff's claims.
26 Furthermore, even if Plaintiff obtained certification of all or some of the claims, continued
27 litigation would be lengthy and expensive as the parties pursued merits discovery, a probable
28 motion to decertify, as well as trial and possible appeals, and would further and substantially

1 delay any recovery by the class with no assurance of recovering significantly more than the
2 proposed settlement. While Plaintiff is confident in the merits of these claims, legitimate
3 controversies exist regarding each one of them. Plaintiff also recognizes proving the amount of
4 wages and penalties due each Class Member would be an expensive, time-consuming, and
5 uncertain proposition. [Jones Decl., ¶ 33.]

6 Plaintiff and his counsel discounted the value of the class claims consistent with the risks
7 discussed above, and carefully weighed the likelihood of the class receiving substantially greater
8 benefit if the litigation continued. Plaintiff and counsel concluded – in light of these very real and
9 substantial risks – settlement on the proposed terms and without prolonged and costly litigation
10 was in the best interests of the class, and the overall \$180,000 recovery represents a significant
11 percentage of Defendant’s potential exposure. Given these risks, a total recovery for the class of
12 \$180,000, which will result in average award of some \$550 per class member, plus additional
13 amounts under PAGA, is a significant result well within the range of reasonableness considering
14 all potential outcomes, and it will provide direct monetary awards to all Class Members without
15 further delay. [Jones Decl., ¶ 34.]

16 Importantly, the mere fact that a settlement does not provide the same recovery as might
17 be achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and
18 adequate. Wershba, 91 Cal.App.4th at 246, 250 (“Compromise is inherent and necessary in the
19 settlement process...even if the relief afforded by the proposed settlement is substantially
20 narrower than it would be if the suits were to be successfully litigated, this is no bar to a class
21 settlement because the public interest may indeed be served by a voluntary settlement in which
22 each side gives ground in the interest of avoiding litigation”); Lane v. Facebook, Inc. (9th Cir.
23 2012) 696 F.3d 811, 819 (“[T]he question whether a settlement is fundamentally fair . . . is
24 different from the question whether the settlement is perfect in the estimation of the reviewing
25 court”); 7-Eleven Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135,
26 1150 (“The fact that a proposed settlement may amount to only a fraction of the potential
27 recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and
28 should be disapproved”); White v. Experian Information Solutions, Inc. (C.D. Cal. 2011) 803

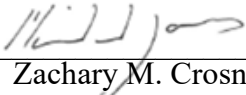
1 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable even though it
2 represented 99% discount off the maximum value of the claims). Importantly as well, the
3 proposed settlement is non-reversionary and will provide timely benefits to the Class Members
4 without a claims process. White, 803 F.Supp.2d at 1098; c.f., Federal Judicial Center, Managing
5 Class Action Litigation: A Pocket Guide for Judges (3d ed. 2010) at 20, available at [http://](http://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf)
6 www.fjc.gov/sites/default/files/2012/ClassGd3.pdf (reversionary provisions and/or cumbersome
7 claims process may indicate lack of fairness). Plaintiffs and their counsel submit the settlement is
8 within the “range of reasonableness,” and is fair and adequate for the Class.

9 **V. CONCLUSION**

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

13
14 Dated: September 14, 2023

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15
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