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on behalf of herself and all others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO – HALL OF JUSTICE

ALEXANDRIA ILENE KABITZKE on behalf
of herself and all others similarly situated,

Plaintiff,

v.

CENTRO DE SALUD DE LA COMUNIDAD
DE SAN YSIDRO d/b/a SAN YSIDRO
HEALTH, a California corporation; and DOES
1 through 50, inclusive,

Defendants.

Case No. 37-2022-00046873-CU-OE-CTL

Judge: Hon. Gregory Pollack
Action Date: November 18, 2022
Trial Date: Not Set

**JOINT NOTICE OF MOTION AND
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION AND
PAGA SETTLEMENT; [PROPOSED]
ORDER**

[Declarations of James R. Hawkins and Maria
C. Roberts Concurrently Filed Herewith]

Date: November 17, 2023
Time: 9:30 a.m.
Dept.: 71

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1 **PLEASE TAKE NOTICE THAT** on November 17, 2023 at 9:30 a.m. in Department 71
2 of the above-entitled court located at 330 W Broadway, San Diego, California 92101, Plaintiff
3 ALEXANDRIA ILENE KABITZKE will and hereby does move the Court for an Order (1)
4 provisionally certifying the Class for Settlement purposes only; (2) provisionally approving
5 James Hawkins, Isandra Fernandez and Lance Dacre from the law firm of James Hawkins,
6 APLC, as Class Counsel for Plaintiff and the Class Members in this matter, (3) provisionally
7 approving ALEXANDRIA ILENE KABITZKE as the Class Representative; (4) approving
8 ILYM, Group Inc. as the Settlement Administrator; (5) preliminarily approving the class action
9 settlement; and (6) approving and directing distribution of Notice of Class Action Settlement and
10 approving the settlement of the claims under Private Attorney General Act of 2004 (“PAGA”)
11 Labor Code section 2699 *et seq.*

12 This unopposed motion is made pursuant to Rule 3.769 of the California Rules of Court
13 and Labor Code section 2699(l)(2), which provides for court approval of the settlement of PAGA
14 claims and class actions and which allows the Court to preliminarily certify a class for settlement
15 purposes. The basis for this motion is that the proposed Settlement is fair, adequate, and
16 reasonable and the procedures proposed by the Parties are adequate to ensure the opportunity of
17 Class Members to participate in, opt out of, or object to the Settlement.

18 This unopposed motion will be based on the Memorandum of Points and Authorities
19 included herein, the declarations of James R. Hawkins and Maria. C. Roberts, the Stipulation of
20 Class Action and PAGA Settlement attached to the Declaration of James R. Hawkins as Exhibit
21 1, and upon the oral arguments of counsel (should there be any) and upon the complete records
22 and file herein.

23 Dated: August 21, 2023

JAMES HAWKINS, APLC

24
25 

26 _____
27 James R. Hawkins
28 Isandra Y. Fernandez
Anthony L. Draper
Lance Dacre
Attorneys for Plaintiff Alexandria Ilene Kabitzke

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. FACTUAL BACKGROUND.....2

 A. Pleadings.....2

 B. Discovery and Mediations.....3

III. SUMMARY OF SETTLEMENT TERMS.....5

 A. Class Members.....5

 B. Allocation of Settlement Amount.....5

 C. Released Claims Summary.....7

 1. Release as to Plaintiff and All Class Members.....7

 2. Aggrieved Employees Release of PAGA Claim.....7

 D. Notice Procedure.....8

IV. CALIFORNIA RULES OF COURT §3.769 APPROVAL PROCESS.....8

V. PRELIMINARY APPROVAL OF SETTLEMENT IS APPROPRIATE.....9

 A. The Terms of the Proposed Settlement are Fair.....10

 1. The Settlement Was Reached Through Extensive Arm’s Length
 Bargaining and Negotiation.....10

 2. Investigation and Discovery were Sufficient for the Parties to
 Evaluate the Risks Intelligently.....10

 3. Plaintiffs’ Counsel is Experienced in Similar Litigation.....11

 B. The Settlement Provides for Reasonable Compensation to Class Members.....11

 a. Defendant’s Binding Arbitration Policy and Class
 Waiver.....12

 b. Failure to Pay Lawful Wages.....13

 c. Meal Period Claim.....14

 d. Rest Period Claim.....15

 e. Failure to Provide Accurate Itemized Wage Statements...15

 f. Failure to Timely Pay Wages.....16

1
2
3
4
5
6
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8
9
10
11
12
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15
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17
18
19
20
21
22
23
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25
26
27
28

g. Bus. & Prof. Code § 17200 Claim.....17

h. Lab. Code §2699 (PAGA Claim).....17

i. Failure to Reimburse Employee Expenses.....18

C. The Class Representative Service Payments and Class Counsel Fees Are
Reasonable And Should be Awarded.....20

VI. PRELIMINARY CLASS CERTIFICATION IS APPROPRIATE.....20

A. The Proposed Class is Ascertainable.....21

B. Numerosity of the Proposed Settlement Class is Satisfied21

C. Common Questions of Law and Fact Apply to the Proposed Settlement Class....21

D. The Typicality Requirement is Met as to the Proposed Settlement Class.....22

E. The Adequacy Requirement is Met as to the Proposed Settlement Class.....22

F. Common Issues Predominate and Class-wide Settlement is Superior to Other
Available Methods of Resolution.....23

VII. THE PROPOSED CLASS NOTICE IS APPROPRIATE.....23

A. The Proposed Class Notice Satisfies Due Process.....24

B. The Proposed Class Notice Is Accurate and Informative.....24

VIII. CONCLUSION.....25

TABLE OF AUTHORITIES

CASES

Bell v Farmers Ins. Exchange

(2004) 115 Cal.App.4th 715.....18,23

Brinker Rest. Corp. v. Super. Ct.,

(2012) 53 Cal. 4th 1004.....4,14,15

Cardenas v. McLane Foodservice, Inc.,

2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011).....18

Cartt v. Superior Court

(1975) 50 Cal.App.3d 960.....24

Clark v American Residential Services, LLC

(2009) 175 Cal. App. 4th. 785.....9

Clark v. Superior Court,

(2010) 50 Cal. 4th 605.....17

Class Plaintiffs v. City of Seattle

(9th Cir. 1992) 955 F.2d 1268.....9

Cortez v. Purolator Air Filtration Prods. Co.,

(2000) 23 Cal. 4th 163.....17

Dunk v. Ford Motor Company

(1996) 48 Cal.App.4th 1794.....passim

Fleming v. Covidien,

2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011).....17

Gomez v. Jacobo Farm Labor Contractor, Inc.,

(2019) 334 FRD. 234.....7

Hanlon v Chrysler Corp.

(9th Cir. 1998) 150 F.3d 1011.....passim

Hebberd v. Colgrove

(1972) 28 Cal.App.3d 1017.....21

III

TABLE OF CONTENTS AND AUTHORITIES

1	<i>In re Taco Bell Wage & Hour Actions</i> ,	
2	2016 U.S. Dist. LEXIS 48557, *40 43 (E.D. Cal. Apr. 6, 2016).....	18
3	<i>Kullar v. Foot Locker Retail, Inc.</i> ,	
4	168 Cal. App. 4th 116 (2008).....	11,12
5	<i>Makabi v. Gedalia</i> ,	
6	2016 Cal. App. Unpub. 1489, *5 7 (2nd Dist. Ct. of App. Mar. 6, 2016).....	17
7	<i>McGhee .v Bank of America</i>	
8	(1976) 60 Cal. App.3d 442.....	22
9	<i>Munoz v. BCI Coca-Cola Bottling Co.</i> ,	
10	186 Cal. App. 4th 399 (2010).....	12
11	<i>North County Contractor’s Ass. Inc. v. Touchstone Ins. Svcs.</i>	
12	(1994) 27 Cal. App. 4th 1085.....	9
13	<i>Officers for Justice v. Civil Serv. Comm’n of City & Cty. of San Francisco</i> ,	
14	688 F.2d 615 (9th Cir. 1982).....	11
15	<i>Potter v Pacific Coast Lumber Company</i>	
16	(1951) 37 Cal. 2d. 592.....	9
17	<i>Richmond v. Dart Industries, Inc.</i>	
18	(1981) 29 Cal.3d 462.....	23
19	<i>Rose v. City of Hayward</i>	
20	(1981) 126 Cal. App. 3d 926.....	21
21	<i>Sav-On Drug Stores, Inc. v Superior Court</i>	
22	(2004) 34 Cal. 4th 319.....	23
23	<i>Wershba v Apple Computer, Inc.</i>	
24	(2001) 91 Cal. App. 4th 224.....	8,9
25	<i>Wherner v. Syntex</i>	
26	(N.D. Cal. 1987) 117 F.R.D. 641.....	22

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STATE RULES AND STATUTES

California Business and Professions Code §17200.....passim

California Code of Civil Procedure § 382.....20,21

California Rules of Court 3.760.....24

California Rules of Court 3.766(d).....25

California Rules of Court 3.769.....8

Industrial Welfare Commission (“IWC”) Wage Order No.1-2001.....15,22

Labor Code § 201, 202, 204, 221, 225, 226.7, 510,512, 558, 1174, 1194, 1198, 1199.8,16

Labor Code § 203.....16

Labor Code § 226.....passim

Labor Code § 226(a).....8

Labor Code § 226(e).....15

Labor Code § 226.3.....8

Labor Code § 226.7.....14,15

Labor Code § 2698.....8

Labor Code § 2699.....17

Labor Code § 2699(e)(2).....17

Private Attorney General Act, Lab. Code § 2698 *et seq.* (“PAGA”).....passim

SECONDARY SOURCES

MANUAL at §30.21.....25

Newberg, § 8.39.....25

Newberg, § 11.25 at 11-36-379

Newberg, § 11.41.....9

FEDERAL RULES

Wright & Miller, Fed. Practice & Procedure § 1797.6.....24

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 On September 8, 2022, Plaintiff ALEXANDRA ILENE KABITZKE (“Plaintiff”) filed a
4 putative wage and hour class action complaint on behalf of herself and all employees employed
5 by, or formerly employed by, Defendant Centro de Salud de la Comunidad de San Ysidro, doing
6 business as San Ysidro Health (“Defendant” and/or “San Ysidro Health”), who held non-exempt
7 hourly positions in the state of California. The lawsuit seeks recovery of alleged unpaid wages,
8 premium wages and penalties pursuant to California Labor Code, California Industrial Welfare
9 Commission (“IWC”) Wage Order No.5-2001, Bus. & Prof. Code § 17200. On November 18,
10 2022, Plaintiff filed a separate lawsuit against Defendant alleging violations of under PAGA,
11 Defendant denies the claims pled in these cases and disputes liability for the damages sought.

12 After engaging in extensive informal exchange of documents and information and
13 participating in a full day mediation and post-mediation dialogue subject to court approval,
14 Plaintiff and Defendant (collectively the “Parties”) have reached a settlement of both the putative
15 class action and the PAGA lawsuit asserted on behalf of the putative class and all aggrieved
16 employees for a total of Two Million Nine Hundred Thousand Dollars (\$2,900,000.00),
17 (“Maximum Settlement Amount”). The Maximum Settlement Amount (“MSA”) includes the
18 individual settlement payments to the class members and aggrieved employees, attorneys’ fees
19 and costs, named plaintiff/class representative enhancement payment, the costs of the settlement
20 administrator, and payment to the California Labor Workforce Development Agency (“LWDA”)
21 under PAGA (the “Settlement”).

22 **This is a non-reversionary cash settlement.** Every Class Member who does not opt out
23 of the Settlement will automatically be mailed an individual settlement payment. However, every
24 Class Member who is also within the PAGA group will be mailed their respective individual
25 settlement payment associated with the PAGA penalty portion of the settlement amount
26 regardless of opt-out status. There is no claim filing process, and Class Members do not have to
27 file a claim to be mailed a payment.
28

As discussed more thoroughly below, the proposed Settlement satisfies all of the criteria for preliminary settlement approval under California law and the mandates of PAGA and falls well within the range of proper approval. As such, Plaintiff moves this court to: (i) provisionally certify the proposed Class; (ii) provisionally approve James R. Hawkins, Isandra Fernandez, and Lance Dacre of James Hawkins APLC, as class counsel for Plaintiff and the Class in this matter; (iii) provisionally approve Alexandra Ilene Kabitzke (“Plaintiff”) as Class Representative; (iv) appoint ILYM Group, Inc. as the settlement administrator; (v) grant preliminary approval of the Stipulation of Class Action and PAGA Settlement (“Settlement Agreement”); (vi) direct distribution of the Notice of Class Action Settlement (“Class Notice”) on the terms and conditions set forth in the Settlement Agreement; and (vii) schedule a final approval hearing.

II. FACTUAL BACKGROUND

A. Pleadings

On September 8, 2022, Plaintiff Kabitzke filed a putative wage and hour class action complaint against Defendant, in San Diego Superior Court, alleging the following causes of action: (1) Failure to Pay Lawful Wages; (2) Failure to Provide Lawful Meal Periods or Compensation in Lieu Thereof; (3) Failure to Provide Lawful Rest Periods or Compensation in Lieu Thereof; (4) Failure to Pay Employee Expenses; (5) Failure to Timely Pay Wages During Employment; (6) Failure to Timely Pay Wages at Termination; (7) Failure to Provide Accurate, Itemized Wage Statements; and (8) Violations of the Unfair Competition Law. (Declaration of James R. Hawkins (“Hawkins Decl.”), ¶2; Declaration of Maria Roberts (“Roberts Decl.”) ¶2.)

On November 9, 2022, Defendant removed this case to the United States District Court for the Southern District of California under CAFA, Case No. 3:22-cv-01752-H-BGS (hereafter referred to as the “Class Case”). On November 18, 2022, Plaintiff filed a separate complaint asserting a single cause of action for Labor Code violations and seeking penalties under PAGA in San Diego Superior Court against Defendant. (Hawkins Decl, ¶ 2.)

Throughout this litigation, Defendant has denied Plaintiff’s allegations and raised defenses to her claims, individually and on a class wide basis. Defendant maintains that its policies and practices meet the requirements of the Labor Code and applicable Wage Orders.

(Hawkins Decl. ¶3; Roberts Decl., ¶3.) To date, no motion for class certification has been filed in this case, no class has been certified, and the Court has not made any findings that Defendant engaged in any wrongdoing or in violation of any state law, rule or regulation, with respect to the issues presented in the litigation. (Hawkins Decl. ¶ 4.)

B. Discovery and Mediations¹

Through exchange of informal discovery, Defendant produced to Plaintiff more than 100,000 pages of documents, including all of San Ysidro Health’s policies, handbooks, the time and wage records for more than 1,100 putative class members dating back as far as 2016, copies of Defendant’s arbitration policies, and copies of all of the pleadings, motions, court orders, depositions, discovery requests and responses and everything produced in discovery in two other pending cases involving overlapping putative class and PAGA claims against San Ysidro Health, as well as a list of pay rates and dates of employment for the approximate 3700 putative class members, as well as the alleged aggrieved employees.² San Ysidro Health also produced nearly 100 affidavits signed by current and former nonexempt employees and others, which supported Defendant's position that the wage and hour /PAGA claims pled against it were not supported. (Hawkins Decl. ¶ 5; Roberts Decl., ¶4.) Defendant also provided all briefing and a related court order issued by the San Diego Superior Court in early 2023 denying certification on all putative class claims pled in a similar wage and hour class action and PAGA case.³ (Roberts Decl., ¶5.)

After conducting extensive informal discovery, exchanging relevant documents, having that information reviewed and analyzed by Plaintiff’s counsel and by their experts, and engaging in numerous discussions regarding the claims alleged, on March 21, 2023, the Parties attended mediation with Hon. Ronald M. Sabraw (Ret.), an experienced wage and hour class action mediator and former Supervising Judge of the Complex Division of the Alameda Superior Court. (Hawkins Decl. ¶ 6.) In the mediation process, the Parties exchanged further information and

² The two cases are *Audrey Heredia v. San Ysidro Health*, SD Superior Court Case No. 37-2020-00046387; and *Jacqueline Hernandez v. San Ysidro Health*, SD Superior Court Case No. 37-2021-00017369. (Roberts Decl., ¶ 2.)

³ In *Hernandez v. San Ysidro Health*, the Court, (Hon. Eddie Sturgeon) granted Defendant’s motion to deny class certification as to all putative class claims pled and dismissed all of those class claims. (Exh. 2.)

1 documentation concerning the putative class and PAGA claims and Defendant's defenses, but
2 were unable to reach a settlement, but the dialogue continued, and a mediator's proposal was
3 made and accepted in principle on March 24, 2023. (Hawkins Decl. ¶ 7; Roberts Decl., ¶¶ 4-7.)

4 Notably, the March 2023 mediation with Judge Ronald Sabraw followed efforts by
5 Defendant in 2022 to settle the two earlier filed cases, *Heredia v. San Ysidro Health* and
6 *Hernandez v. San Ysidro Health*, with the assistance of mediator, Hon. William Pate (ret.) over a
7 seven-month period. Despite these efforts (which cost Defendant more than \$50,000 in fees and
8 costs) and Defendant's willingness to pay millions of dollars to buy its peace in cases in which it
9 denies liability, the plaintiff lawyers in *Heredia* and *Hernandez* did not negotiate in good faith
10 and refused to accept a mediator's proposal made by Judge Pate. (Roberts Decl., ¶ 6.)

11 After a settlement was reached in principle, the Parties spent months in continued
12 negotiations about the specific settlement terms and, in the process, exchanged additional
13 detailed information pertinent to the settlement. (Hawkins Decl., ¶ 8; Roberts Decl., ¶7.)
14 Beginning in early April 2023, the Parties exchanged numerous drafts of the long-form
15 settlement agreement and notice and engaged in multiple telephonic and e-mail communications
16 regarding the terms of the documents and revisions thereto. (Hawkins Decl. ¶ 9.) The principal
17 terms and provisions of the settlement were finally approved by the Parties on or about July 25,
18 2023, and a settlement agreement was fully executed as of August 7, 2023. (Hawkins Decl.
19 ¶ 10.) It is this Settlement Agreement that is now before this Court for preliminary approval.
20 (Hawkins Decl. ¶ 11, Exhibit 1- Settlement Agreement.)

21 Based on their own respective independent investigations and evaluations and after
22 considering the sharply disputed factual and legal issues involved in this matter, the risks
23 attending further prosecution in light of certification issues faced due to the *Brinker Rest. Corp.*
24 *v. Super. Ct.*, (2012) 53 Cal. 4th 1004 ("*Brinker*") decision, the discovery, and investigation
25 conducted to date and the benefits received under the settlement, Class Representative and her
26 counsel are of the opinion that settlement for the consideration and on the terms set forth in the
27 Settlement Agreement is fair, reasonable, and adequate and is in the best interests of the Class
28 Representatives and the Class Members. (Hawkins Decl. ¶ 12.)

1 **III. SUMMARY OF SETTLEMENT TERMS¹**

2 **A. Class Members**

3 “Class” means all persons employed by San Ysidro, and classified as an hourly paid, non-
4 exempt employee from December 15, 2016, to March 24, 2023 (the “Class Period”), which
5 includes the PAGA Period from April 20, 2020 through March 24, 2023 (the “PAGA Period”).
6 (Exh. 1, p. 2, ¶ 8, p. 4, ¶ 26.)

7 **B. Allocation of Settlement Amount**

8 1. The total maximum amount of settlement is Two Million Nine Hundred Thousand
9 Dollars (\$2,900,000) to be paid by Defendant pursuant to this Settlement (“Maximum Settlement
10 Amount”). The Maximum Settlement Amount includes, but is not limited to Individual
11 Settlement Payments, Attorneys’ Fees and Costs, the Class Representative Service Award,
12 Settlement Administration Costs, and the PAGA Payment, including the LWDA Payment,
13 subject to Court approval and the terms of this Stipulation. (Settlement Agreement p. 3, ¶ 21.)
14 The Maximum Settlement Amount shall not include Defendant’s share of taxes on the wages
15 portion of Individual Settlement Payments, which will be paid by Defendant separately and in
16 addition to the Maximum Settlement Amount. (Exh. 1.)

17 2. Subject to Court approval, Class Counsel shall be paid Nine Hundred Sixty-Six
18 Thousand, Five Hundred and Seventy Dollars (\$966,570) in attorneys’ fees (i.e., 33.33% of the
19 Maximum Settlement Amount) and actual costs not to exceed \$50,000. (Exh. 1, p. 17, ¶ 56(c).)

20 3. Subject to Court approval, the Named Plaintiff Alexandra Kabitzke (“Class
21 Representative,”) shall be paid a Class Representative Service Award not to exceed \$10,000 for
22 her time and effort in bringing and presenting the Action and releasing her Released Claims.
23 (Exh. 1, p. 17, ¶ 56(b).)

24 4. Subject to Court approval, \$30,000 will be set aside from the Maximum
25 Settlement Amount to cover the Settlement Administrator’s costs of administering this
26 Settlement (“Administrator Expenses Payment”). (Exh. 1, p.18, ¶ 56(e).)

27
28 ¹ To effectuate the settlement reached, the Parties have stipulated that, for purposes of the settlement, Plaintiff will
file an amended complaint in this case to add the putative class claims being resolved and to ensure all claims being
resolved match the claims pled. (Hawkins Decl., ¶ 18.)

1 5. Subject to Court approval, \$100,000 will be set aside from the Maximum
2 Settlement Amount for the PAGA Penalties, out of which 75% (\$75,000) will be paid to the
3 LWDA and 25% (\$25,000) will be distributed among the Aggrieved Employees (“Individual
4 PAGA Payment”). (Exh. 1, pp.15-16, ¶ 54(a)(ii).)

5 6. Individual PAGA Payment to each Class Member: Each Participating Class
6 Member will be entitled to a *pro rata* share of the portion of the PAGA Payment allocated to
7 aggrieved employees. The Settlement Administrator shall divide a 25% portion of the PAGA
8 Payment amount by the total number of Compensable pay periods during the PAGA Period.
9 (“Pay Period Value”). The Settlement Administrator shall then multiply the number of
10 Compensable pay periods for each Aggrieved Employee by the Pay Period Value. (Exh. 1,
11 pp.15-16, ¶ 54(a)(ii).)

12 7. Tax allocation of Individual Class Payments shall be: one-fourth (1/4) as wages
13 subject to all applicable tax withholdings, one-half (1/2) as non-wage penalties not subject to
14 payroll tax withholdings, and one-fourth (1/4) non-wage interest not subject to payroll tax
15 withholdings. The Settlement Administrator shall issue an IRS Form W-2 to each Class Member
16 for the portion of each Individual Settlement Payment allocated as wages and subject to all
17 applicable tax withholdings. The Settlement Administrator shall issue an IRS Form 1099 to each
18 Class Member for the portions of each Individual Settlement Payment allocated as non-wage
19 penalties and interest and not subject to payroll tax withholdings. (Exh. 1, p.16, 54(a)(iv).)

20 Here, there are approximately 3,700 putative Class Members and thus the average net
21 recovery is estimated to be \$480.65¹ if the Court approves the amounts set forth above. This
22 average recovery is significantly more than other wage and hour class action settlements
23 approved by California state and federal courts. (*See, e.g., Ressler v. Federated Department*
24 *Stores, Inc.*, Case No. BC335018 (L.A. County Super. Ct.) (average net recovery of about \$90);
25 *Doty v. Costco Wholesale Corp.*, Case No. CV05-3241 FMC-JWJx (C.D. Cal.) (average net
26 recovery of approximately \$65); *Sorenson v. Defendants, Inc.*, Case No. 2:06-CV-02674-JAM-

27 ¹ This figure is calculated based on the NSA (\$1,768,430) divided by the number of putative Class Members
28 (3,700). The NSA is calculated by starting with \$2,900,000 and subtracting: (1) \$10,000 (for Plaintiff’s Service
Award); (2) \$30,000 (for estimated settlement administration costs); (3) \$966,570 (for attorney’s fees), (4) \$50,000
(for litigation costs), and (5) \$75,000 (for recovery paid to the LWDA).

DAD (E.D.Cal.) (average net recovery of approximately \$60); *Lim v. Victoria's Secret Stores, Inc.*, Case No. 04CC00213 (Orange County Super. Ct.) (average net recovery of approximately \$35); *Gomez v. Amadeus Salon, Inc.*, Case No. BC392297 (L.A. Super. Ct.) (average net recovery of approximately \$20); and *Jones v. Bath& Body Works, Inc.*, No. 2:13-cv-05206-FMO-AJW (C.D. Cal.) (average net recovery of approximately \$50).)

C. Released Claims Summary

1. Release as to Plaintiff and All Class Members.

Upon the Effective Date, Plaintiff and all Participating Class Members shall be deemed to have fully released the Released Parties from any and all claims, wages, penalties, interest, debts, demands, rights, liabilities, costs, compensation, damages, attorneys' fees, actions, and/or causes of action that were pleaded or could have been pleaded based upon the factual allegations set forth by Plaintiff in her original and/or FAC filed in this Action and arising at any time during the Class Period, including any and all claims for and/or related to the causes of action pled for alleged: (1) Failure to Pay Lawful Wages; (2) Failure to Provide Lawful Meal Periods or Compensation in Lieu Thereof; (3) Failure to Provide Lawful Rest Periods or Compensation in Lieu Thereof; (4) Failure to Pay Employee Expenses; (5) Failure to Timely Pay Wages During Employment; (6) Failure to Timely Pay Wages at Termination; (7) Failure to Provide Accurate, Itemized Wage Statements; and (8) Violations of the UCL (Exh. 1, p. 10, ¶ 51.)

2. Aggrieved Employees Release of PAGA Claim

Upon entry of Final Judgment and funding of the Gross Settlement Amount, all Aggrieved Employees (regardless of whether they are Participating Class Members or Non-Participating Class Members) will be deemed to release, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, the Released Parties from all claims for PAGA penalties that were alleged in the complaints in the Actions and those based solely upon the facts alleged in the complaints in the Actions, including, e.g., PAGA penalties for meal break violations, rest break violations, unpaid wages, off the clock work, wage statement violations, failure to reimburse necessary expenses, failure to keep required records, waiting time penalties and failure to pay or to timely pay all

wages due during employment and/or upon termination, and California Labor Code sections 201-204, 210, 221, 223, 224, 225.5, 226, 226(a), 226.3, 226.7, 510, 512, 558, 558.1, 1174, 1174.5, 1194, 1194.2, 1197, 1197.1, 1198, 2802, and 2698, *et seq.* The release by Aggrieved Employees who are also Non-Participating Class Members is limited to claims under the PAGA arising during the PAGA Period. (Exh. 1, pp. 10-11, ¶ 52.)

D. Notice Procedure

Subject to Court approval of the Settlement, within 14 days after entry of the Preliminary Approval Order, Defendant shall provide the Settlement Administrator with Class Information for purposes of mailing Class Notices to Class Members. (Exh. 1, p. 11, ¶ 53 (a).) Upon receipt of the Class Information, the Settlement Administrator shall perform a search based on National Change of Address Database maintained by the United States Postal Service to update and correct any known or identifiable address changes. Any Class Notice returned to the Settlement Administrator as non-delivered on or before the Response Deadline shall be re-mailed to the forwarding address affixed thereto or any updated address obtained through the use of skip-tracing, or other type of automated search, the deadlines for Class Members' written Objections and Requests for Exclusion is forty-five (45) days ("Response Deadline"). Class Members who are sent a re-mailed Class Notice shall have their Response Deadline extended by fifteen (15) days from the date the Settlement Administrator re-mails the Notice. (Exh. 1, p.5, ¶ 34 (a-b).)

The Class Notice informs the Class Members about the terms of the Settlement, the date and location of the final approval hearing, and the deadline and requirements to object to the Settlement. Moreover, the Class Notice informs Class Members of their right to opt out of the Settlement and the process for doing so, the deadline to opt out, and provides list of frequently asked questions and responses related to the Settlement and process. (Exh. 1, pp.11- 14 ¶ 53.)

IV. CALIFORNIA RULES OF COURT § 3.769 APPROVAL PROCESS

A class action may not be dismissed, compromised or settled without approval of the Court. (*Wershba v Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 240; Cal. Rules of Court, Rule 3.769.) The approval or rejection of the proposed settlement is committed to this Court's sound discretion. (*Wershba*, 91 Cal.App.4th at pp. 234-235.) A court's decision to approve a

1 class action settlement may be reversed only upon a strong showing of “clear abuse of
2 discretion.” (*Class Plaintiff v. City of Seattle* (9th Cir. 1992) 955 F.2d 1268, 1276.) The purpose
3 of the court’s preliminary evaluation of the proposed settlement is to determine whether it is
4 within the “range of reasonableness” and thus, whether the notice to the class is appropriate.
5 (NEWBERG, §11.25 at 11-36-37.)

6 According to this procedure, Plaintiff request that this Court provisionally certify the
7 proposed Class for settlement purposes – conditional upon final approval of the settlement. The
8 practical purpose of provisional class certification is to facilitate distribution to all Class
9 Members of notice of the terms of the proposed Settlement and the date and time of the final
10 approving hearing. Additionally, Plaintiff request this Court to preliminarily approve the
11 Settlement as fair, adequate and reasonable as set forth below.

12 **V. PRELIMINARY APPROVAL OF SETTLEMENT IS APPROPRIATE**

13 The law favors settlement, particularly in class actions and other complex cases in which
14 substantial resources can be conserved by avoiding the time, cost and rigors of formal litigation.
15 (*City of Seattle* 955 F.2d at p. 1276; *Potter v Pacific Coast Lumber Company* (1951) 37 Cal. 2d.
16 592, 602-603; 4 NEWBERG § 11.41.) To grant preliminary approval of this class settlement,
17 the Court need find only that the settlement falls within the range of reasonableness. (*North Cty.*
18 *Contractor’s Ass. Inc. v. Touchstone Ins. Svcs.* (1994) 27 Cal. App. 4th 1085, 1089-1090.) In
19 determining whether a class settlement is fair, adequate and reasonable, courts must consider the
20 following relevant factors: the strength of the plaintiff’s case, the risk, expense, complexity and
21 likely duration of further litigation, the risk of maintaining class action status through trial, the
22 amount of offered settlement, the extent of discovery completed and range of the proceedings,
23 and experience and views of counsel. (*Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794,
24 1801; *Clark v American Resid. Svcs. LLC* (2009) 175 Cal. App. 4th. 785, 799.) The list of factors
25 is not exclusive, and courts are free to balance and weigh factors depending on the circumstances
26 of each case. (*Clark*, 175 Cal. App. 4th at p. 799; *Wershba*, 91 Cal. App. 4th at p. 245.)

27 Furthermore, courts must give “proper deference to the private consensual decision of the
28 parties,” since “the court’s intrusion upon what is otherwise a private consensual agreement

1 negotiated between the Parties to a lawsuit must be limited to the extent necessary to reach a
2 reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion
3 between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and
4 adequate to all concerned.” (*Hanlon v Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1027.)

5 **A. The Terms of the Proposed Settlement Are Fair**

6 A review of the terms of the Settlement Agreement demonstrates that it is fair and
7 reasonable. By law, a presumption of fairness exists where: 1) the settlement is reached through
8 arms-length negotiations; 2) investigation and discovery are sufficient to allow counsel and the
9 court to act intelligently; 3) counsel is experienced in similar litigation; and 4) the percentage of
10 objectors is small. (*Dunk v. Ford Motor Co.*, supra, at p. 1802.) The first three of these factors
11 apply at preliminary approval stage; the percentage of objectors is made at final approval stage.

12 1. The Settlement Was Reached By Extensive Arm’s Length Negotiation

13 As discussed herein, the Parties have conducted informed, good faith, arm's-length
14 negotiations after exchanging more than 100,000 pages of documents related to the claims and
15 defenses to the claims pled by Plaintiff and as pled in the two other pending cases alleging
16 similar claims, almost 100 employee declarations that refute the claims pled against San Ysidro
17 Health, and after engaging in pre-mediation and post-mediation discussions aimed at settling
18 their dispute. After engaging in informal discovery, the Parties participated in a full day
19 mediation on March 21, 2023, with Hon. Ronald Sabraw (Ret.). (Hawkins Decl. ¶ 6; Roberts
20 Decl., ¶ 7.) Following an unsuccessful mediation, the Parties received and accepted a mediator’s
21 proposal for resolution of the claims. (Hawkins Decl. ¶ 7; Roberts Decl., ¶ 7).

22 In sum, armed with all of the relevant information and with the help of the mediator,
23 counsel for the Parties participated in lengthy, serious, and meaningful negotiations which has
24 resulted in the proposed Settlement Agreement before this Court for preliminary approval.

25 2. Investigation and Extensive Informal Discovery Were Sufficient for the Parties to
26 Evaluate the Risks Intelligently

27 As discussed herein, Plaintiff conducted significant investigation of the facts, evidence
28 and law both before and since this case was filed. Defense counsel provided voluminous

documents (more than 100,000 pages of time and wage records, policies, handbooks, arbitration agreements, almost 100 employee affidavits, many motions, pleadings, court orders, hundreds of pages of discovery requests and responses, depositions taken in other related cases) for Plaintiff's review in preparation for the mediation. (Hawkins Decl. ¶ 5.) Plaintiff also had many of the records obtained analyzed by an expert. (*Id.*)

3. Plaintiff's Counsel is Experienced in Similar Litigation

Moreover, counsel for Plaintiff and Defendant have represented, mediated, and settled many other class actions filed by employees alleging wage and hour violations and have knowledge of the strengths and weaknesses of the claims pled and defenses available in this case and the benefits of the proposed Settlement under the circumstances of the case. (Hawkins Decl. ¶¶ 19-21; Roberts Decl., ¶1.)

B. The Settlement Provides for Reasonable Compensation to Class Members

In seeking approval, a settling party must provide sufficient information to "enable the court to make an independent assessment of the adequacy of the settlement terms." *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 131-32 (2008). However, "[i]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery will not per se render the settlement inadequate or unfair." *See Officers for Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco*, 688 F.2d 615, 628 (9th Cir. 1982). "The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Id.* at 625. "Estimates of a fair settlement figure are tempered by factors such as the risk of losing at trial, the expense of litigating the case, and the expected delay in recovery (often measured in years)." *In re Toys R Us-Delaware, Inc.-- Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 453 (C.D. Cal. 2014). In other words, in valuing the claims within a realistic range of outcomes, the settling plaintiff should discount the value of the settled claims for risks such as changes in the law, the probability of success, and other factors.

Settling parties are not, however, required to partake in a hypothetical accounting exercise: "**Kullar does not ... require any such explicit statement of [maximum] value;** it requires a record which allows 'an understanding of the amount that is in controversy and the

1 realistic range of outcomes of the litigation.” *Munoz v. BCI Coca-Cola Bottling Co.*, (2010), 186
2 Cal. App. 4th 399, 409-10 (citing *Kullar*, 168 Cal. App. 4th at 120 (emphasis added)). Overall,
3 “the most important factor” in determining “whether a settlement is fair and reasonable” is the
4 “strength of the case for Plaintiff on the merits, balanced against the amount offered in the
5 settlement.” *Id.* at 409 n.6 (quoting *Kullar*, 168 Cal. App. 4th at 130). As discussed further
6 below, the recovery of \$2,900,000 for the Class Members is well within the range of reasonable-
7 ness and undeniably fair, adequate, reasonable considering risks and hurdles of litigation.

8 The damage model used in calculating potential liability was largely based on the number
9 of class members (broken down into current and former employees), the number of pay periods,
10 the average rate of pay and a random sample of time records, wage statements and documents
11 produced by Defendant in preparation for mediation. Based on the information provided by
12 Defendant, the estimated number of work weeks is 187,000 during the Class Period and 40,926
13 pay periods during the PAGA Period. The average hourly rate of pay is approximately \$21.73.
14 The estimated ranges for potential violations were calculated as follows: (Hawkins Decl. ¶ 14.)

15 a. Defendant’s Binding Arbitration Policy and Class Waiver

16 As a threshold matter, at least 60% of the putative class (including the Plaintiff in this
17 case) are subject to Defendant’s Arbitration Policy, which went into effect in February 2021.
18 This policy included a class action waiver and delegated the “gateway” question of arbitrability
19 and enforceability of the policy “exclusively to [the] arbitrator.” (Roberts Decl., ¶ 8.) Thus,
20 many, if not most, of the putative class members are required to litigate their claims on an
21 individualized basis through binding arbitration per Defendant’s binding arbitration policy. (*Id.*)
22 This alone poses a substantial risk to the class certification process and the viability of
23 certification. (*O’Connor v. Uber Technologies, Inc.* (9th Cir. 2018) 904 F.3d 1087, 1094–1095
24 [holding that a class cannot be certified where it includes individuals who are required to
25 arbitrate their claims and cannot participate in a class or representative action]; *Vigueras v. Red*
26 *Robin Int. Inc.* (C.D. Cal., July 22, 2020, No. SACV171422JVSDFMX) 2020 WL 13042722, at
27 *8 [noting court decertified the class as to class members who signed arbitration agreements].)
28

1 b. Failure to Pay Lawful Wages- Plaintiff's class claim for failure to pay lawful
2 wages is based on allegations that Plaintiff and putative class members were not paid for the time
3 spent "off the clock" under the direction and control of Defendant prior to the start of their work
4 shifts. For instance, Plaintiff Kabitzke, while clocked out for her meal breaks, had to continue to
5 answer phone calls or remain on the line even while clocked out. Likewise, at the end of the
6 shift, Plaintiff and Class Members were also frequently required to clock out in their respective
7 work areas but continue to perform job duties for approximately fifteen (15) minutes or longer
8 after clocking out, including needing to answer calls, assist patients, and remain on the line or
9 on-call while clocked out. Plaintiff alleges that she and Class Members were not compensated
10 for this time and therefore not paid all lawful wages earned during the liability period. Thus,
11 Plaintiff and class members who were required to work more than eight (8) hours in a day or
12 more than forty (40) hours in a workweek without proper overtime compensation. Plaintiff
13 contends that Defendant also failed to pay minimum wages for work performed "off the clock."

14 Defendant adamantly disputes Plaintiff's allegations that employees were required to
15 perform any work "off the clock" during their work shift. Defendant contends that Plaintiff
16 lacked evidence of any "off the clock" work by herself and Class Members and provided nearly
17 100 employee declarations refuting this claim. Defendant also had a binding arbitration policy
18 that applies to all employment disputes, including the wage and hour claims pled by Plaintiff
19 and which applied to most of the putative class members, and which included class waivers and
20 required each individual employee's claims be submitted to binding arbitration. Defendant also
21 asserts that its policies not only prohibit employees from working "off the clock but also require
22 employees to accurately record their time and report inaccuracies Further, Defendant contends
23 that this claim would be difficult to certify given the predominance of the individualized inquiry
24 as to whether, and to what extent, each Class Member performed work "off the clock." Based
25 on the documents and information produced by Defendant in preparation for mediation and
26 during settlement negotiations, Plaintiff's counsel estimated a maximum potential liability of
27 \$4,063,510.00 based on an estimated one (1) hour per work week at the average hourly rate of
28 \$21.73 for 187,000 workweeks. However, taking into account the nature of the claim and

1 defenses thereto including the inability to establish the violation with respect to the majority of
2 the Class Members, this claim was valued between \$406,351 (10%) and \$203,176 (5%).

3 c. Meal Period Claim - The meal break violation claim is based primarily on
4 Defendant's alleged failure to provide Plaintiff and class members with complete duty-free meal
5 periods in violation of California Labor Code §§ 226.7 and 512 and IWC Wage Order 5-2001.
6 If an employer fails to provide an employee required meal periods in accordance with the
7 applicable provisions of the Wage Order, it must pay the employee one additional hour of pay at
8 the employee's regular rate of compensation for each workday that the meal period is not
9 provided. (IWC Wage Order 5-2001(11)(D); Cal. Lab. Code § 226.7.) Specifically, Plaintiff
10 alleges that, in the class period, due to policies and practices, Plaintiff and class members' meal
11 breaks were late or cut short due to mandatory meetings.

12 Defendant also denies Plaintiff's meal break allegations in their entirety and maintains
13 that she and class members were provided with the opportunity to take full, timely and
14 uninterrupted meal periods of 30 to 60 minutes, as per its policies and the law. In addition, all
15 putative class members were required to verify every pay period that they had taken all of their
16 breaks in that pay period or had advised their supervisor of any missed breaks. Defendant
17 disputes the propriety of certification on this claim as well, under the holding in *Brinker* and
18 other state and federal decisions, Defendant fulfilled their legal obligations to non-exempt
19 employees by providing them with timely and proper meal periods. Defendant also produced
20 policies and nearly 100 current and former employee declarations that refute this claim and
21 pointed to its binding arbitration policy that applies to all employment disputes and the claims of
22 most of the putative class members, and which included class waivers and required each
23 individual employee's claims be submitted to binding arbitration.

24 Based upon Plaintiff's review of the documents and information provided in anticipation
25 of mediation, including the random sample of time records, the estimated maximum potential of
26 the meal break claim was \$607,940. This was determined by taking the estimated unique number
27 of meal break violations, 27,977, and multiplying by the average hourly rate of \$21.73 (27,977 x
28 \$21.73 = \$607,940). Taking into consideration the nature of the claim, Defendant's defenses and

1 issues faced due to *Brinker* for purposes of settlement, the meal break claim was valued between
2 an estimated maximum of \$60,794 (10%) and \$30,397 (5%). (*Id.*)

3 d. Rest Break Claim - The rest break claim is premised on allegations that Plaintiff
4 and putative class members were not provided compliant rest breaks during their work shifts as a
5 result of Defendant's practice and policies. Plaintiff alleges that when she and Class Members
6 worked at least six hours, or in excess of ten hours, Defendant did not provide a second or third
7 minimum ten-minute rest break at all times. Specifically, Plaintiff's and class member's rest
8 break were frequently skipped or interrupted due to patient demands and other job duties, which
9 Plaintiff and class members were required to attend to immediately. Plaintiff and Class Members
10 allege not being compensated one (1) hour of pay at regular rate of compensation for each work-
11 day that a rest period was not provided, in violation of laws, regulations, and IWC Wage Orders.

12 Defendant again disputes Plaintiff's allegations regarding rest break violations and
13 contends it provided timely, uninterrupted rest breaks of at least 10-minutes. Defendant also
14 produced policies and nearly 100 current and former employee declarations that refute this claim
15 and pointed to its binding arbitration policy that applies to all employment disputes and the
16 claims of most of the putative class members, and which included class waivers and required
17 each individual employee's claims be submitted to binding arbitration. Based on documents
18 provided by Defendant, Plaintiff estimated the maximum potential liability at \$17,946,568. The
19 maximum estimated liability for this claim was based on a 100% violation rate. The maximum
20 potential liability was determined by taking all shifts over 3.5 hours, 825,889, and multiplying by
21 the average hourly rate of \$21.73, is approximately \$17,946,568 (825,889 shifts x \$21.73 =
22 \$17,946,568). However, given Defendants' defenses to class certification including a facially
23 valid policy and certification issues faced due to the *Brinker* decision, the rest break claim was
24 valued between and estimated \$1,794,657 and \$0 (*Id.*).

25 e. Failure to Provide Accurate Itemized Wage Statements - Under Lab. Code
26 §226(e), an employee suffering "injury as a result of a knowing and intentional failure by an
27 employer" to provide accurate wage statements is entitled to \$50 for the initial violation and
28

1 \$100 for each subsequent violation up to \$4,000. The estimated maximum potential liability for
2 this claim was calculated at \$12,520,000 based on an estimated 3,130 employees x \$4,000.

3 Defendant contends that the wage statements issued to the employees fully complied with
4 Labor Code section 226. Defendant states that because they believe no wages are unpaid, there
5 can be no derivative penalties. Further, Defendant argues that, if any wage statements were in
6 fact inaccurate, they did not “knowingly and intentionally” fail to provide accurate statements
7 and that Plaintiff and the class did not suffer any “injury” from such inaccurate wage statements.
8 For purposes of settlement negotiations, said claim was valued between \$1,878,000 (15%) and
9 \$626,000 (5%). (*Id.*) Defendant also produced nearly 100 current/former employee affidavits
10 refute this claim and pointed to its binding arbitration policy that applies to all employment
11 disputes and the claims of most of the putative class members, and which included class waivers
12 and required each individual employee’s claims be submitted to binding arbitration.

13 f. Failure to Timely Pay Wages - This claim is derivative of the other claims
14 asserted. Pursuant to Labor Code sections 201, 202 and 203, each employee in the relevant
15 statutory period (i.e., three years before the filing of the initial Complaint) is entitled to 30 days’
16 worth of wages as a waiting time penalty for not being paid all wages upon the separation of
17 employment. Plaintiff alleges that penalties are owed under Labor Code section 203 due to, at a
18 minimum, Defendant’s failure to pay wages for all hours worked and failure to pay premium
19 wages. With respect to Lab. Code § 203 claim, there were an estimated 2,150 Class Members to
20 whom this claim applied. The estimated maximum potential liability was determined to be
21 \$10,932,363 using the formula ((# of terminated/former employees) x (30 x average hourly rate x
22 average number of hours worked per day)). (2,150 x (30 x \$21.73 x 7.8).

23 Defendant once again defends that no unpaid wages are owed as Defendant did not fail to
24 pay the correct overtime wages nor did they fail to pay accrued vacation pay. Defendant further
25 contends that their actions were not willful as required for penalties to issue and that, thus,
26 waiting time penalties cannot be awarded. Defendant also produced about 100 current/former
27 employee declarations that refute this claim and pointed to its binding arbitration policy that
28

1 applies to all employment disputes and to most of putative class members, included class waivers
2 and required each individual employee's claims be submitted to binding arbitration.

3 For purposes of settlement negotiations, said claim was valued between \$1,093,236
4 (10%) and \$546,618 (5%). (*Id.*)

5 g. Bus. & Prof. Code § 17200 et seq. ("UCL") Claim - The only remedies available
6 under the unfair competition law ("UCL") Business and Professions Code Section 17200 et seq.
7 are restitution and injunction, as opposed to damages *Clark v. Superior Court*, (2010) 50 Cal.
8 4th605, 610. The UCL provides that "[t]he court may make such orders or judgments ... as may
9 be necessary to restore to any person in interest any money or property, real or personal, which
10 may have been acquired by means of such unfair competition." (Bus. & Prof. Code, § 17203.)
11 Restitution under the UCL includes "earned wages." *Cortez v. Purolator Air Filtration Prods.*
12 *Co.*, (2000) 23 Cal. 4th 163, 177-78.

13 h. Lab. Code § 2699 (PAGA Claim) - Plaintiff's claims under PAGA are predicated
14 on or derivative of the claims discussed above. The estimated maximum PAGA penalty was
15 calculated as \$4,092,600. This figure attributes a \$100 penalty to each of the estimated 40,926
16 pay periods in scope during the PAGA Period. This figure is based on an assumption that there
17 is a 100% violation rate during the PAGA Period, such that every single pay period in question
18 involved at least one Labor Code violation, despite disputes regarding Defendant's liability.
19 However, PAGA claims under the facts and circumstances of this case may result in no award or
20 at best a very minimal award by the trial court. See specifically §2699(e)(2) which states in its
21 pertinent part: "... a court may award a lesser amount than the maximum civil penalty amount
22 specified by this part if, based on the facts and circumstances of the particular case, to do
23 otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory."

24 For instance, in *Fleming v. Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011), a
25 federal court reduced PAGA penalties from \$2,800,000 to \$500,000, a reduction of 82.2%,
26 because the court found maximum penalties "unjust" because the employees had suffered no
27 injuries. Some trial courts have actually awarded no civil penalties, even when Labor Code
28 violations are established. See *Makabi v. Gedalia*, 2016 Cal. App. Unpub. 1489, *5-7 (2nd Dist.

1 Ct. of App. Mar. 6, 2016) (no PAGA penalties were awarded by the Los Angeles County
2 Superior Court) (unpublished decision); *In re Taco Bell Wage & Hour Actions*, 2016 U.S. Dist.
3 LEXIS 48557, *40-43 (E.D. Cal. Apr. 6, 2016) (PAGA penalties denied after trial).

4 In order to recover any PAGA penalties, Plaintiff would be required at trial to prove each
5 of the underlying Labor Code violations. See *Cardenas v. McLane Foodservice, Inc.*, 2011 U.S.
6 Dist. LEXIS 13126, *10 (C.D. Cal. 2011) ("Given the statutory language [of PAGA], a plaintiff
7 cannot recover on behalf of individuals whom the plaintiff has not proven suffered a violation of
8 the Labor Code by the defendant."). Here, Plaintiff would need to prove that each PAGA
9 Aggrieved Employee suffered all violations for each pay period the employee worked. As
10 discussed herein, the nature of the PAGA based claims (i.e. rest break, meal period, wage
11 statements, failure to pay all wages owed and to timely pay wages) and Defendant's asserted
12 defenses thereto present a strong risk that the PAGA penalties sought may not be awarded.

13 Defendant denies that a violation for each pay period can be established. Defendant states
14 that because the PAGA Action heavily relies on the same allegations made in the Class Action,
15 they are subject to the same defenses, and, thus, for the same reason Defendant believes there
16 will be no damages collectible in the class action, no PAGA penalties would be awarded, either.
17 Defendant also points out that there is no conduct shown by Plaintiff that would demonstrate any
18 Labor Code violations by Defendant are knowing and intentional such that PAGA penalties
19 would be justified. Defendant contends that an award of PAGA penalties in addition to class
20 action damages is discretionary, and thus insist a Court is unlikely to exercise its discretion to
21 award any PAGA penalties in this Action where class action damages are available to Class
22 Members and any award of PAGA penalties in addition to class action damages would constitute
23 an unjust, arbitrary, oppressive, or confiscatory double recovery. Thus, Class Counsel believes it
24 to be likely that if there were any award it would be a minimal amount. Therefore, the amount of
25 \$100,000 (which has been reserved for the PAGA claim) is both fair and reasonable.

26 i. Failure to Reimburse Employee Expenses – The business expense reimbursement
27 claim is based on allegations that Plaintiff and class members were required to provide their own
28 tools for the performance of their job duties such as using their personal vehicles for business

1 purposes and were not reimbursed by Defendant. Defendant also failed to reimburse Plaintiff and
2 Class Members for using their personal mobile phones which was required in performance of
3 their job duties (i.e. communicating with other workers and with managers for scheduling and
4 job duties, etc.) Defendant alleges that it was Defendant's practice and policy to provide Plaintiff
5 and Class Members with all required equipment, materials, and tools to perform their duties. If
6 any personal equipment was used, those expenses were reimbursed pursuant to Defendant's
7 policies and practices. Again, Defendant also produced nearly 100 current and former employee
8 declarations that refute the PAGA claim.

9 Plaintiff calculated a maximum potential liability at \$2,949,925 assuming \$50 monthly
10 reimbursement for phone use and estimated average monthly equipment and mileage (5 miles
11 per week) cost. However, this claim would be difficult to certify given the predominance of the
12 individualized inquiry as to whether and to what extent each class member used their personal
13 tools and phones in the performance of their job duties as well as the defenses raised. As such,
14 for purposes of settlement, this claim was valued at \$0 (*Id.*).

15 Through her counsel, Plaintiff took into consideration the significant risks that class
16 certification could be denied on the central claim, that the claims would be referred to individual
17 binding arbitration for the majority of the putative class members and/or that a merits decision on
18 the central claim would not favor the Class. Plaintiff has considered the expense and length of
19 continued proceedings necessary to continue the Action against Defendant through trial and any
20 possible appeals. Plaintiff is also aware of the burdens of proof necessary to establish liability for
21 the claims asserted in the Action, Defendant's defenses thereto, and the difficulties in
22 establishing Plaintiff's damages. (Hawkins Decl. ¶ 15.)

23 The proposed Settlement requires Defendant to pay each Class Member who does not opt
24 out a portion of the Net Settlement Amount as specifically set forth in the Settlement Agreement.
25 (Hawkins Decl. ¶ 16.) The amount to be paid to the Class is undoubtedly fair, adequate and
26 reasonable especially in light of the significant risk to Plaintiff and Class Members in continuing
27 with the litigation and not prevailing on class certification or at trial, and thus leaving employees
28 with no recovery. (*Id.*)

1 For all the foregoing reasons, the proposed Settlement Agreement is fair, adequate and
2 reasonable, and is in the best interests of the Class Members.

3 C. **The Class Representative Service Payments and Class Counsel Fees Are**
4 **Reasonable and Should be Awarded**

5 The Settlement Agreement provides for an award to be paid to the Plaintiff as the Class
6 Representative, the primary purpose of which is to provide Plaintiff an enhancement award,
7 taking into consideration the risks, time, effort and expenses incurred by her in coming forward
8 to provide invaluable information and litigate this matter on behalf of all Class Members and
9 Aggrieved Employees. Plaintiff has actively participated in this case by providing information
10 and documentation and assisting Class Counsel in developing information necessary to litigate
11 and settle this case which has resulted in a favorable settlement for the putative Class Members
12 and Aggrieved Employees. (Hawkins Decl., ¶17.) Thus, the payment of up to \$10,000.00
13 ALEXANDRIA ILENE KABITZKE represents a small portion of the aggregate settlement
14 amount and should be awarded. (*Id.*)

15 Further, as will be discussed in more detail in Plaintiff's motion for final approval of the
16 Settlement, Class Counsel Fees Payment in the amount of \$966,570.00 (33 1/3% of the GSA) is
17 reasonable within California's standard benchmark and well within the range customarily
18 approved by the California courts in comparable class actions.

19 **VI. PRELIMINARY CLASS CERTIFICATION IS APPROPRIATE**

20 In addition to such terms as class definition, settlement amounts and payment procedures,
21 the Settlement Agreement reached between the Parties contains a provision to which the parties
22 stipulate to the Court's provisional certification of the Class but do so for the purposes of this
23 settlement only. Plaintiff now requests this Court to provisionally certify the Class.

24 It is well established that trial courts should use a lower standard for determining the
25 propriety of certifying a settlement class, as opposed to a litigation class. *Dunk v. Ford Motor*
26 *Co.* (1996) 48 Cal.App.4th at 1794, 1807, fn. 19. Under California law, a class action is proper
27 where the Class is ascertainable and there is a "well defined community of interest in the
28 questions of law and fact affecting the parties to be represented." (Code Civ. Proc., §382; *Dunk*,

1 48 Cal. App. 4th at p. 1806.) State law requirements under California Code of Civil Procedure
2 section 382 for class certification largely mirror Federal Rules of Civil Procedure Rule 23 –
3 namely, numerosity, typicality of the class representative’s claims, adequacy of representation,
4 predominance of common issues and superiority. As discussed below, although Defendant
5 disputes Plaintiff’s ability to certify a litigation class, all of the requirements of certification for
6 settlement purposes are met for the proposed Settlement Class.

7 **A. The Proposed Settlement Class is Ascertainable**

8 Here, the proposed class is ascertainable because all of the Class Members are/were
9 employed directly by Defendant and received their compensation directly from Defendant. The
10 Class Members have been identified through Defendant’s employee and personnel files. *See*
11 *Rose v. City of Hayward* (1981) 126 Cal. App. 3d 926, 932.

12 **B. Numerosity of the Proposed Settlement Class is Satisfied**

13 If the class is sufficiently large that joinder of all members is impractical or that
14 individual joinder is impractical, the numerosity requirement is met *Hebberd v. Colgrove* (1972)
15 28 Cal. App. 3d 1017, 1030. Here, the proposed class consists of 3,700 class members,
16 including current and former employees of Defendant. Therefore, joinder of individual claims
17 would be impractical and the numerosity requirement is met.

18 **C. Common Questions of Law and Fact Apply to the Proposed Settlement Class**

19 Commonality is met if there are common questions of fact and law to the class. *Hanlon*,
20 150 F.3d at p.1019 [“The existence of shared legal issues with divergent legal factual predicates
21 is sufficient, as is a common core of salient facts coupled with disparate legal remedies within
22 the class”].) Here, Plaintiff alleges that the proposed Class Members’ claims all stem from the
23 same alleged conduct. Specifically, Plaintiff alleges that Defendant violated California wage and
24 hour law because they: (1) failed to pay all lawful wages owed including overtime compensation;
25 (2) failed to provide statutorily compliant rest and meal periods and/or to pay one (1) hour of
26 pay at the employees regular rate of compensation for each workday that a compliant meal
27 period and/or rest period was not properly provided; (3) failed to timely pay all wages owed at
28 the termination of the Class Members’ employment; (4) failed to provide accurate itemized wage

1 statements. Plaintiff seeks recovery of alleged premium wages, penalties and interest pursuant to
2 the California Labor Code, the California Industrial Welfare Commission (“IWC”) Wage Orders,
3 Business and Professions Code § 17200 and PAGA. Although Defendant disagrees with
4 Plaintiff’s contentions for purposes of certifying a litigation class, for purposes of a settlement
5 class, these circumstances create questions of law/fact common to all proposed Class Members.

6 **D. The Typicality Requirement is Met as to the Proposed Settlement Class**

7 The typicality requirement is met if the claims of the Plaintiff are typical of those of the
8 class, though “they need not be substantially identical.” *Hanlon*, 150 F.3d at p. 1020. Factual
9 differences may exist between the Class and the Class Representative(s) so long as the claims
10 arise from the same events or course of conduct and are based on the same legal theories. (*Id.*)
11 Here, as set forth in the operative complaint, the claims of the Class Representatives are typical
12 of the other Class Members they represent because they arise from the same factual basis and are
13 based on the same legal theories as those applicable to all Class Members. *Wherner v. Syntex*,
14 (N.D. Cal. 1987) 117 F.R.D. 641, 644. For purposes of a settlement class, typicality is met.

15 **E. The Adequacy Requirement is Met as to the Proposed Settlement Class**

16 If the named representative and her counsel have no interests adverse to the interest of the
17 proposed class members and are committed to vigorously prosecuting the case on behalf of the
18 class, then the adequacy requirement is met. *McGhee v. Bank of America* (1976) 60 Cal. App.3d
19 442, 450. Here, under the proposed Settlement, the Class Representative will receive a fair award
20 for her time and effort assisting counsel with factual issues surrounding the case and risk
21 incurred in bringing this action on behalf of the Class Members. Other than this specific
22 payment, all Class Members who do not opt out of the Settlement will receive a percentage of
23 the NSA based on the number of weeks each Class Member worked during the class period.
24 Therefore, no “settlement allocation” questions are raised. *Hanlon*, 150 F.3d at p.1020.

25 Finally, Class Members who wish to exclude themselves from the Settlement may do so.
26 (Settlement Agreement, pp.13-14, ¶ 53(e); Exhibit 1 to the Settlement Agreement.) As a result,
27 there is no conflict of interest between the Plaintiff and the Class Members. Additionally, the
28 Plaintiff and their counsel have prosecuted this action vigorously on behalf of the Class.

1 **F. Common Issues Predominate and a Class-Wide Settlement is Superior to**
2 **Other Available Methods of Resolution**

3 Class certification is authorized where common questions of law and fact predominate
4 over individual questions and where class-wide treatment of a dispute is superior to individual
5 litigation. *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 469. The test is whether the
6 proposed class is sufficiently cohesive to warrant adjudication by representation. *Hanlon*, supra,
7 at p. 1022. Plaintiff contends that the proposed Class in this case is sufficiently cohesive, since
8 all Class Members share a “common nucleus of facts and potential legal remedies.” Specifically,
9 Plaintiff asserts that because all of the Class Members and the Class Representatives seek
10 compensation for alleged premium wages for failure to provide compliant meal and rest breaks,
11 as well as penalties and interest for the allegations described herein; common questions about
12 compensation or lack thereof for worked performed by Class Members predominate over
13 individual questions, and Class Members’ potential legal remedies are identical. Although
14 Defendant disagrees with Plaintiff’s contentions, it has agreed to certification for settlement only.

15 Additionally, particularly in the settlement context, class resolution is superior to other
16 methods for the fair and efficient adjudication of the controversy. *Hanlon*, 150 F. 3d at p. 1023;
17 *Dunk*, supra, 45 Cal. App. 4th at p. 1087. The superiority requirement involves a “comparative
18 evaluation of alternative mechanisms of dispute resolution.” *Hanlon*, supra, at p. 1023. Here,
19 the alternative methods of resolution are a plethora of individual claims from potentially over
20 689 Plaintiffs. The class action device can thus conserve judicial resources by avoiding the
21 waste and delay of repetitive proceedings and prevent inconsistent adjudication of similar issues
22 and claims. *Sav-On Drug Stores, Inc. v Superior Court* (2004) 34 Cal. 4th 319, 340; *Bell v*
23 *Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 741. Thus, classwide settlement is superior.

24 **VII. THE PROPOSED CLASS NOTICE IS APPROPRIATE**

25 The Court Approved Notice of Class Action Settlement (“Class Notice”) is attached as
26 Exhibit 1 to the Settlement Agreement. Should a Class Member wish to exclude himself/herself
27 from the Settlement, he/she can send a request for exclusion to the Settlement Administrator as
28 detailed in the Class Notice. Should a Class Member wish to object to the Settlement, he/she can

1 object as described in the Class Notice. If a Class Member does nothing in response to the Class
2 Notice, the Class Member will be mailed an individual settlement payment.

3 **A. The Proposed Class Notice Satisfies Due Process**

4 California statutory and case law vests the Court with broad authority to fashion an
5 appropriate notice process. (Cal. Rules of Court, Rule 3.760 *et seq.*) A proposed method of
6 notice of a proposed settlement is fair, adequate, and reasonable if it has “a reasonable chance of
7 reaching a substantial percentage of the class members.” *Cartt v. Superior Court* (1975) 50
8 Cal.App.3d 960, 974. The procedure for notice to Class Members described herein entails
9 mailing the Class Notice to all known and reasonably ascertainable Class Members based on
10 Defendant’s payroll records and provides for a reasonable chance of reaching a significant
11 percentage of Class Members (Exh. 1, pp. 11-12 ¶ 53.) Further, such individual notice by first
12 class mail is routinely approved as consistent with due process. (See, e.g., MANUAL FOR
13 COMPLEX LITIGATION (THIRD) (1995) (hereinafter “the MANUAL”) §30.41; Wright &
14 Miller, Fed. Practice & Procedure §1797.6 [“Of course, notice by mail to all of the identified
15 class members . . . will suffice”] (citing cases).) Notice by mail is consistent with certification
16 notices approved by numerous state and federal courts and is the best notice practicable under
17 circumstances of this case. Other potential alternatives, such as publication of notice in a
18 newspaper, or electronic dissemination of notice through email, are unlikely to be as effective as
19 mail notice. Given the geographic range of Class Members, and the lack of email data on Class
20 Members, neither publication nor email notice is feasible or reasonable to satisfy due process.

21 **B. The Proposed Class Notice Is Accurate and Informative**

22 Not only is the manner of the proposed Class Notice proper, so too is the content of the
23 said notice. The proposed Class Notice provides information on the meaning and the nature of
24 the proposed Settlement, the terms and provisions of the Settlement (and where it may be found),
25 the relief the Settlement will provide the Class Members, the application of Plaintiff’s counsel
26 for reimbursement of costs and attorneys’ fees from the Settlement amount, the date, time and
27 place of the final fairness and approval hearing, and the procedure and deadlines for opting out
28

1 of the Settlement and for submitting objections. Counsel for Plaintiff and Defendant have spent
2 considerable time attempting to draft a Class Notice likely to be understood by Class members.

3 The Class Notice also fulfills the requirement of neutrality in class notices. (2
4 NEWBERG §8.39.) It summarizes the proceedings to date and the terms and conditions of the
5 Settlement in an informative and coherent manner, in compliance with the MANUAL'S
6 statement, "the notice should be accurate, objective, and understandable to class members..."
7 (MANUAL at §30.21.) The Class Notice clearly states the settlement does not constitute an
8 admission of liability by Defendant and recognizes the Court has not ruled on the merits. It also
9 states the final settlement approval decision has yet to be made, and that any final determination
10 of that issue will be made at the final approval hearing. Thus, the Class Notice complies with the
11 standards of fairness, completeness and neutrality required of class notice disseminated under the
12 authority of the Court.

13 Moreover, the class notice comports with CA Rules of Court, Rule 3.766 (d). As per Rule
14 3.766, the contents of the class notice that provides for an opt out procedure for the class
15 members must include the following:

- 16 (1) A brief explanation of the case, including basic contentions/denials of the parties;
- 17 (2) A statement that the Court will exclude members if requested by a specified date;
- 18 (3) A procedure for the member to follow in requesting exclusion from the class;
- 19 (4) A statement the judgment, favorable or not, will bind members who do not opt-out;
- 20 (5) A statement that any member who does not request exclusion may, if the member so
21 desires, enter an appearance through counsel.

22 The Proposed Class Notice contains the information required under Rule 3.766 (d). (See
23 Exhibit 1 attached to Settlement Agreement.)

24 **VIII. CONCLUSION**

25 Based on the foregoing, Plaintiff respectfully requests that the Court enter the Proposed
26 Order Granting Preliminary Approval of the Class and PAGA Settlement submitted concurrently
27 herewith, and thus:

28 ///

- 1 1. Grant preliminary approval of the Settlement Agreement, and certify the
- 2 Settlement Class for the purposes of settlement only;
- 3 2. Confirm Plaintiff Alexandria Ilene Kabitzke as Class Representatives;
- 4 3. Confirm James R. Hawkins, Isandra Fernandez, and Lance Dacre of James
- 5 Hawkins APLC provisionally as Class Counsel;
- 6 4. Approve and appoint ILYM Group, Inc. as Settlement Administrator;
- 7 5. Enter an Order preliminarily approving the proposed Settlement and approving of
- 8 the Class Notice; and
- 9 6. Schedule the Final Fairness Hearing Date on , _____ (to be determined by
- 10 the Court at the hearing for preliminary approval of settlement).

11

12

13 Dated: August 21, 2023

Respectfully submitted,

JAMES HAWKINS, APLC



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