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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

JEFFREY REYES, as an individual on behalf of himself and on behalf of all others similarly situated, Plaintiff, vs. THE YERBA MATE CO., LLC, a Delaware Limited Liability Company; GUAYAKI SUSTAINABLE RAINFOREST PRODUCTS, INC., a California Corporation; and DOES 1-100, inclusive, Defendants	Case No.: 34-2022-00331592 Assigned for All Purposes to: Hon. Jill Talley Dept. 27 **MEMORANDUM 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 Brandon K. Brouillette, Jeffrey Reyes, and Jodey Lawrence; [Proposed] Order] Date: November 17, 2023 Time; 9:00 a.m. Dept. 27 Reservation ID# A-331592

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I. INTRODUCTION

Plaintiff Jeffrey Reyes hereby moves the Court for an order granting preliminary approval to a proposed non-reversionary class action settlement to resolve wage and hour claims on behalf of approximately 243 individuals employed by Defendants The Yerba Mate Co., LLC and Guayaki Sustainable Rainforest Products, Inc. (together "Yerba Mate" or "Defendants") as non-exempt employees in California at any time within the Class Period of December 18, 2018 to October 14, 2023, excluding certain individuals covered by a prior class action settlement. The proposed $275,000 settlement will provide about $149,393 in cash payments to the class, with an average net award currently estimated at about $616. The balance of approximately $125,157 will cover reasonable attorney's fees and actual litigation costs, settlement administration costs, the State of California's share of allocated PAGA penalties, and an enhancement award to plaintiff. The settlement is the product of Plaintiff's pre-filing investigation, formal discovery and a pre-mediation exchange of information, and arms-length negotiations overseen by experienced mediator the Hon. Carl J. West (Ret.).

Plaintiff and Defendants (collectively the "Parties") have reached a full and final settlement of the above-captioned action, which is embodied in the Joint Stipulation of Class Action Settlement and Release ("Agreement") filed concurrently with the Court. A copy of the fully executed Agreement is attached as Exhibit A to the Declaration of Brandon K. Brouillette ("Brouillette Decl."), served and filed herewith.

Preliminary approval of this Settlement is warranted for multiple reasons. First, a presumption of fairness exists, as the Settlement was reached through extensive, mediated arm's length negotiations, sufficient investigation allowed Plaintiff's counsel to act intelligently, and Plaintiff's counsel is experienced in similar wage-and-hour class litigation. Indeed, the settlement is fair, reasonable, and adequate; it includes a substantial monetary payment and resolves the matter in light of substantial litigation and class-certification risks. Second, the proposed Class Notice complies with California Rules of Court, Rules 3.766 and 3.769, and mailing the Class Notice to the class members' last known addresses is an appropriate form of giving notice. Third, provisional certification of the class is appropriate because the proposed class is ascertainable, common questions of law and fact predominate over any individualized questions, Plaintiff's claims are typical of those of the class members, Plaintiff and his counsel have adequately represented, and will continue to adequately represent, the class, and proceeding as a class action is a superior means of resolving this dispute. Defendants agree to provisional certification of the class for settlement purposes only.

Therefore, Plaintiff respectfully requests that this Court grant preliminary approval of the Agreement and enter the proposed order submitted herewith: (1) granting preliminary approval to the proposed class action settlement; (2) conditionally certifying the settlement class as defined below; (3) appointing Zachary M. Crosner, Jamie K. Serb and Brandon Brouillette, and Crosner Legal, P.C. as Class Counsel; (4) appointing Plaintiff Jeffrey Reyes as the Class Representative; (5) appointing Phoenix Settlement Administrators as the Settlement Administrator; (6) approving the form of notice to the class and the notice procedure; and (7) scheduling a final fairness hearing.

II. FACTUAL BACKGROUND AND PROCEDURAL POSTURE

Defendants manufacture and distribute yerba mate drinks and related products. Plaintiff worked for Defendants as delivery route driver for which he reported to Defendants' locations in San Francisco and Sebastopol, California and completed delivery routes to vendors across Northern California including to Sacramento, San Francisco, and San Jose, California. Plaintiff was hired on or around November 14, 2018. [Brouillette Decl., ¶ 4.]

Plaintiff alleges a number of wage and hour violations by Defendants. First, he claims the company pressured employees to complete routes at a breakneck pace in order to minimize labor hours, and any applicable overtime and double time pay. Per Plaintiff, this included pressure to continue driving through meal periods and to clock out but continue working if he was unable to finish his duties in the allotted timeframe. Plaintiff further alleges he and class members regularly missed rest breaks and routinely had meal breaks interrupted. Plaintiff's employment ended on approximately January 5, 2022.[1] [Brouillette Decl."), ¶ 5.]

Based on these allegations, on December 19, 2022, Plaintiff filed a class action complaint in Sacramento Superior Court alleging claims for: (1) failure to pay all wages due, including minimum and overtime wages (2) failure to provide all required meal and rest breaks or

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[1] Plaintiff claims that he is represented by separate counsel relating to potential wrongful termination claims. Defendants contend that any such claims are meritless.

compensation in lieu thereof; (3) failure to provide accurate, itemized wage statements; and (4) failure to pay all wages due upon termination of employment. Plaintiff also alleged claims for unfair competition premised on the same Labor Code violations. Plaintiff subsequently filed a First Amended Complaint adding a PAGA cause of action. [Brouillette Decl., ¶ 6.]

Yerba Mate has at all times denied Plaintiff's allegations and maintained its meal and rest break and payroll policies and procedures comply with California law, that it paid the class member wages due, and provided them with required meal and rest breaks or paid the required compensation for any documented meal/rest violations. Additionally, Yerba Mate strongly contends the case cannot be maintained as a class action, arguing for example that to the extent class members missed meal and/or rest breaks, or that such breaks were non-compliant, it was intermittent and infrequent and evidence of such missed breaks would be anecdotal, and therefore individualized issues would predominate. Defendants further emphasized they reached a class and PAGA settlement in *Troyer v. The Yerba Mate Co., LLC, et al.,* Alameda County Superior Court Case Nos. RG20074741 and RG200683071 (the "*Troyer* Action"), that released many of the wage and hour claims alleged in this matter. [Brouillette Decl., ¶ 7.]

Once the matter was at issue, the Parties began meeting and conferring regarding discovery, law and motion, and other case management issues, and ultimately the Parties agreed to attempt early mediation. The Parties also agreed on a protocol for an exchange of additional documents and information before the mediation to facilitate the settlement discussions. Consequently, Plaintiff's counsel reviewed payroll records, compensation plans, personnel policies/handbooks, meal and rest break policies, personnel files, and a random sampling of Class Member paystubs and time records. Plaintiff then had those records analyzed by consulting experts at Desmond, Marcello & Amster to look for, *inter alia*, violation rates for missed, late and/or short meal breaks, potential damages from unpaid overtime, etc. Defendants also provided data regarding the total number of putative class members, the estimated total amount of workweeks and pay periods they worked, average pay rates, and information regarding other non-hourly compensation, among other relevant data. [Brouillette Decl., ¶ 8.]

The Parties then engaged the Hon. Carl J. West (Ret.), a respected professional neutral with substantial wage and hour and class action experience. In August 2023, the Parties participated in a full day mediation with Judge West. Throughout the day, the arms-length negotiations were hard-fought and adversarial as the Parties exchanged extensive information on their legal and factual positions, and made numerous offers and counter-offers, and ultimately reached agreement on all major issues. The Parties then collaboratively drafted the Joint Stipulation of Class Action Settlement and Release ("Settlement Agreement") setting forth the settlement terms now before the Court for approval. A fully-executed, true and correct copy of the Settlement Agreement is attached to the Brouillette Declaration as Exhibit 1. [Brouillette Decl., ¶ 9.]

III. THE PROPOSED SETTLEMENT TERMS

Under the settlement, Yerba Mate will pay $275,000 into a common fund, the Gross Settlement Amount ("GSA"). Attorney's fees of up to $91,666.67 (1/3 of the GSA), litigation costs of up to $20,000, settlement administration costs of no more than $8,950.00, a service award to Plaintiff of no more than $5,000, and PAGA civil penalties of $20,000, all will be paid from the GSA. The balance of around $149,393 will be allocated pro rata to the Class Members based on their weeks worked during the Class Period. No portion of the GSA will revert to Yerba Mate. [Brouillette Decl., ¶ 10.]

A. Certification of the Settlement Class

The settlement provides for conditional certification of a settlement class including all non-exempt employees, including Plaintiff, who worked for Defendants during the Class Period of December 18, 2018 through October 14, 2023, but excluding those non-exempt employees covered by the settlement in *Casey Troyer v. The Yerba Mate Co., LLC, et al.,* Case No. 3:20-cv-06065-WHA (N.D. Cal.) and as Alameda County Superior Court Case No. RG20068307, whose employment ended prior to April 12, 2021. The Settlement Class consists of about 250 individuals. [Brouillette Decl., ¶ 11.]

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B. The Benefit Conferred on the Settlement Class

As noted, the settlement obligates Yerba Mate to pay $275,000 to resolve the Settlement Class's claims, inclusive of attorney's fees and costs. At least $149,393 from the GSA will be distributed to the Participating Class Members. This is a cash settlement that does not require Participating Class Members to submit a claim form to receive their settlement share. Participating Class Members will receive their settlement checks automatically via First Class U.S. Mail. Twenty-five percent of each settlement share will be allocated to wages and the remaining seventy-five percent will be allocated to penalties and interest, which allocation is consistent with Yerba Mate's potential liability. Yerba Mate will pay any and all applicable employer-side payroll taxes separately and in addition to the GSA. Subject to the Court's approval, any amounts not claimed (because a class member does not cash their settlement check) will be forwarded to the State Controller's Unclaimed Property Fund. [Brouillette Decl., ¶ 12.]

Each Participating Class Member will receive a share of the Net Settlement Amount based on his or her total weeks worked in California as a non-exempt employee during the Class Period. Thus, each Class Member's Individual Settlement Payment will be calculated using criteria typically used in determining appropriate amounts of unpaid wages, unpaid premium wages for missed meal and rest breaks, and potential statutory penalties under applicable law. These methods are intended to ensure each Class Member receives a settlement award corresponding to the relative value of their potential claims. The proposed allocation provides a reasonable way to compensate Class Members based on the amount of time they worked for Yerba Mate in California and the amount unpaid overtime, the number of missed meal breaks and/or rest breaks, etc. The average gross award is estimated to be around $1,100. [Brouillette Decl., ¶ 13.]

C. Settlement Administration

Subject to the Court's approval, the Parties have agreed on Phoenix Settlement Administrators ("Phoenix") as the Settlement Administrator. Phoenix is qualified and has significant experience administering class action settlements, including numerous wage and hour matters. Phoenix's fees and costs will not exceed $8,950. If the Court approves less than the above amount, the difference will remain in the Net Settlement Amount for distribution to the

Participating Class Members. [Brouillette Decl., ¶ 14; Declaration of Jodey Lawrence, ¶¶ 2-6; Exhs. A-C.]

D. The Class Notice

The proposed Notice of Class Action Settlement (Exhibit A to the Settlement Agreement) sets out information about this case and explains the basic settlement terms in plain language. The Notice also sets forth the individualized information used to calculate Class Members' Individual Settlement Payments and each Class Member's estimated settlement award. The Notice likewise details the procedures for Class Members to dispute their individual information, the procedure for submitting an objection to the Settlement, the procedure to request exclusion, and the fact that any final judgment will bind all class members who do not op out. Cal. Rules of Court 3.769(f) and 3.766(d). In sum, the Notice provides the Class Members with the information necessary to evaluate the Settlement and decide to participate in, opt out of, or object to the proposed Settlement, and meets all requirements imposed by the California Rules of Court. Coupled with the notice procedure, the Notice provides the best notice practicable. [Brouillette Decl., ¶ 15.]

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

Class Members will have forty-five (45) days to dispute the information in their Notice used to calculate their settlement award, and also have 45 days to submit any objections to the settlement or to request exclusion. If a Class Member disputes their individual information, the Settlement Administrator will review the Class Member's records and any other information submitted, and make a final determination. [Brouillette Decl., ¶ 16.]

F. Release of Claims

All Participating Class Members will release Yerba Mate from all claims alleged in the operative complaint, or that could have been brought based on the factual allegations in the complaint during the Class Period. The release is limited to the claims that were actually pleaded or could have been pleaded based on the alleged facts in the complaint. [Brouillette Decl., ¶ 17.]

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G. Plaintiff's Enhancement Award

A modest incentive award for Plaintiff is appropriate under applicable law. See Staton v. Boeing (9th Cir. 2003) 327 F.3d 938, 977 (collecting cases awarding class representatives service and incentive payments ranging from $2,000 to $25,000). He devoted time and resources to the litigation, provided documents, assisted Class Counsel with investigating the claims asserted and in preparing for mediation. The service payment provided to Plaintiff as the class representative is typical in class action cases and reasonable. Rodriguez v. W Publ'g Corp. (9th Cir. 2009) 563 F.3d 948, 958-59 (incentive awards are "intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general."). Defendants will not oppose a request for an enhancement award to Plaintiff of not more than $5,000.00 in recognition of his time spent on this matter, the risks he undertook on behalf of the class, and the benefit conferred to the class, as addressed in his declaration filed herewith. If the Court approves less than the above amount, the difference will remain in the Net Settlement Amount for distribution to the Participating Class Members. Plaintiff limited his request to $5,000.00 since he is not providing any additional or different claims than the class members under the Settlement Agreement in light of his belief that he has additional claims against Defendants. [Brouillette Decl., ¶ 18; Declaration of Jeffrey Reyes, ¶¶ 2-9.]

H. Attorney's Fees and Costs

The terms of the Parties' settlement also allow Plaintiff's counsel to apply for an award of attorney's fees of up to one-third of the GSA, or $91,666.67 and reimbursement of actual costs and expenses of up to $20,000.00. Plaintiff's counsel will submit a request for attorney's fees and actual litigation costs at final approval per the terms of the Settlement Agreement and applicable law, and will provide the Court with appropriate information and evidence regarding hourly rates, tasks performed, and time expended on the case. If the Court approves less than the above amounts, the difference will remain in the Net Settlement Amount for distribution to the Participating Class Members. [Brouillette Decl., ¶ 19.]

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I. PAGA and Notice to the LWDA

As noted, the Parties allocated $20,000 to resolution of Plaintiff's alleged claims under PAGA. Consistent with PAGA, $15,000 of that amount will go to the LWDA for the State's share of the civil penalties, while the remaining $5,000 will be distributed pro rata to eligible PAGA Members. Prior to filing this motion, Plaintiff provided notice of the proposed settlement of the PAGA claims and the approval hearing to the LWDA. [Brouillette Decl., ¶ 20; Exh. 2.]

IV. ARGUMENT

A. Standard of Review for a Class Action Settlement

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

The first step is a motion for preliminary approval, through which the parties present the court with the proposed settlement and seek a determination that it is sufficiently fair and reasonable to warrant notice to the class and further proceedings as to its fairness and adequacy. Cal. Rule of Court 3.769(c). This preliminary evaluation determines if the proposed settlement is within the "range of reasonableness" and if notice should be provided to the class regarding the settlement's proposed terms and conditions, and whether a final fairness hearing should be scheduled. Wershba, 91 Cal.App.4th at 234-35; North County Contractors Ass'n, Inc. v.

Touchstone Ins. Servs. (1994) 27 Cal.App.4th 1085, 1089-90. Considering the strong judicial policy favoring settlement of class actions, courts generally apply a presumption of fairness to class action settlements when (1) the settlement results from arms-length bargaining, (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently, (3) counsel is experienced in similar litigation, and (4) the percentage of objectors is small. Dunk, 48 Cal.App.4th at 1802; Wershba, 91 Cal.App.4th at 245.

If the court grants preliminary approval, it then orders the class be given notice in an appropriate manner, establishes a schedule and procedures for class members to request exclusion or object, and sets the matter for a final fairness hearing. Typically, any motion for attorney's fees and costs is filed subsequent to preliminary approval and heard with the motion for final approval, as part of the second step of the two-step approval process. Dunk, 48 Cal.App.4th at 1800; Wershba, 91 Cal.App.4th at 232. The proposed settlement in this matter warrants preliminary approval under the liberal standard discussed above, as it is fair, reasonable and adequate under all the circumstances, and represents a favorable result for the class.

B. The Proposed Settlement Class Should Be Conditionally Certified

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

In the present matter, conditional certification is proper since this matter satisfies all requirements for class certification under Code of Civil Procedure section 382.

1. The Class Is Ascertainable

To determine whether a class is ascertainable, courts look at (1) the class definition; (2) the size of the class; and (3) the means available for identifying class members. Reyes v. Board of Supervisors (1987) 196 Cal.App.3d 1263, 1271. Here, the class is objectively defined, is sufficiently numerous comprising of approximately 243 class members at the time of mediaiton, and can be identified through Defendants' personnel and payroll records. [Brouillette Decl., ¶ 21.] Thus, the ascertainability requirement is satisfied.

2. The Proposed Class Shares A Well-Defined Community Of Interest.

The community of interest requirement embodies three factors: (1) predominant questions of law and fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1806; Richmond v. Dart Indus. Inc. (1981) 29 Cal.3d 462, 473-475. In this case, all three factors are met.

First,

Next, Plaintiff is an adequate class representative, as his claims do not conflict with and are not antagonistic to the claims of other class members. Further, his claims are typical as he is a member of the class and his claims arise from the same employment practices and course of conduct giving rise to the claims of the other class members. [Id.] Lastly, his counsel is experienced and adequate class counsel. [Brouillette Decl., ¶¶ 36-47.]

i. Common Issues Of Law And Fact Predominate

The commonality criterion requires the existence of common question of law or fact and is generally established with the issues of predominance and typicality. Daar v. Yellow Cab Co. (1967) 67 Cal.2d 695, 713-14. All that is required is a common question of fact or law exists which predominates over issues unique to individual plaintiffs. The existence of individual issues or facts is not a bar to class certification as long as they do not render class litigation unmanageable or predominate over the common issues. See B.W.I. Custom Kitchen v. Owens-Illinois, Inc. (1987) 191 Cal.App.3d 1341, 1354 ("presence of individual damages issues cannot bar certification").

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

Plaintiff's claims present common issues of law and fact that predominate over individual issues and thus warrant class certification. Among other things, Plaintiff alleges that the Class Members all were paid via substantially similar company-wide policies that resulting in off the clock work, underpaid overtime, missed/non-compliant meal and rest breaks, etc. Since the focus of the claims against Yerba Mate concerns the legality of common policies applied uniformly to the entire class, common issues predominate over individualized inquiries concerning liability. For instance, Yerba Mate's compensation plans either properly paid the class members for overtime hours worked or they did not. Regardless of these determinations, it will decide liability for all Class Members one way or another. [Brouillette Decl., ¶ 23.] Plaintiff alleges that these violations were the result of common policies and practices implemented by Defendants that were uniform as to all non-exempt employees. Thus, class treatment is appropriate.

ii. Plaintiff's Claims Are Typical Of The Claims Of The Class Members

To satisfy the typicality requirement, California law does not require that plaintiffs have claims identical to the other class members. Rather, the test of typicality for a class representative is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct. Seastrom v. Neways, Inc. (2007) 149 Cal.App.4th 1496, 1502. The typicality requirement for a class representative refers to the nature of the claim or defense of the representative, and not to the specific facts from which it arose or the relief sought. Id. As Plaintiff's and Settlement Class Members' claims are based on the same legal theories, and arise out of the same unlawful policies and practices, the typicality requirement is satisfied. [Declaration of Jeffrey Reyes, ¶¶ 2-9; Brouillette Decl., ¶ 22.]

iii. Plaintiff and His Counsel Will Fairly and Adequately Represent The Class

The question of adequacy of representation "depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation in the plaintiff's interest or not antagonistic to the interests of the class." McGee v. Bank of America (1976) 60 Cal.App.3d 422, 450. Here, Plaintiff's counsel are well-regarded and accomplished attorneys who are qualified and experienced in wage-and-hour class action litigation. [Brouillette Decl., ¶¶ 36-47.] Furthermore, because Plaintiff's claims are typical of those of other Class Members, and are not based on unique circumstances that might jeopardize the claims of the class, there is no antagonism of interests between Plaintiff and the class. [Declaration of Jeffrey Reyes, ¶¶ 2-9; Brouillette Decl., ¶ 22.] Therefore, the adequacy requirement is satisfied.

3. Proceeding as a Class Action Is Superior to Individual Actions

Under the circumstances, proceeding as a class action is a superior means of resolving this dispute, as the Settlement Class Members and the Court will derive substantial benefits. Class certification would serve as the only means to deter and redress the alleged Labor Code violations. See Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 434 (relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress the alleged wrongdoing). Furthermore, individual actions arising out of the same operative facts would unduly burden the courts and could produce inconsistent results, which may be avoided by proceeding on a class basis.

For the avoidance of doubt, Defendants agree to provisionally certify the class for settlement purposes only.

Next, common questions of law and fact predominate – particularly for purposes of a settlement class – as the Class Members all were paid via substantially similar company-wide policies that resulting in off the clock work, underpaid overtime, missed/non-compliant meal and rest breaks, etc. Since the focus of the claims against Yerba Mate concerns the legality of common policies applied uniformly to the entire class, common issues predominate over individualized inquiries concerning liability. For instance, Yerba Mate's compensation plans either properly paid the class members for overtime hours worked or they did not. Regardless of these determinations, it will decide liability for all Class Members one way or another. [Brouillette Decl., ¶ 23.]

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

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

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

1. The Settlement is the Product of Serious, Informed and Arm's Length Negotiations by Experienced Counsel.

The proposed settlement resulted from serious, arms-length negotiations facilitated by respected mediator the Hon. Carl J. West (Ret.), who has extensive experience mediating wage and hour class actions. [Brouillette Decl., ¶ 9.] Plaintiff's counsel Brandon Brouillette, Jamie Serb, and Zachary Crosner, and Crosner Legal PC, all have years of litigation experience, including litigating wage and hour class actions. Plaintiff's counsel are well-qualified to evaluate the risks and benefits of pursuing further litigation or settling the matter. [Brouillette Decl., ¶¶ 36-47.]

Prior to mediation, the parties engaged in extensive formal informal discovery to facilitate settlement discussions. As a result, Plaintiff reviewed documents and information regarding Yerba Mate's payroll practices, pay stubs and time records for a sampling of class members, meal and rest break policies, etc., and information from Defendants regarding class size and breakdown of job positions, work weeks, rates of pay, and other information used to formulate a damages model. This extensive information then was analyzed by a consulting expert to look for meal and rest break violation rates, time spent working off the clock, etc., and other issues relevant to liability and damages. Plaintiff's counsel are confident they obtained sufficient information to enable them to understand the law and facts of this case and make an informed decision regarding the proposed settlement and whether it is in the best interests of the class. [Brouillette Decl., ¶¶ 8, 25.]

2. The Settlement Has No "Obvious Deficiencies" and Falls Well Within the Range for Approval.

Next, the proposed settlement falls within the range of reasonableness warranting preliminary approval. The proposed settlement involves a significant sum that, when distributed, will confer direct monetary benefits on the class members. As described above, each class member will be entitled to a monetary payment without having to file a claim and each payment will be relative to the value of his or her potential claims.

Plaintiff's analysis was supported by the pre-mediation production described above, which permitted Plaintiff's counsel to estimate potential damages on various theories of liability. Using that data, Plaintiff ran various calculations and estimated Yerba Mate's likely maximum exposure on the class claims at approximately $1,008,000, including about $95,500 on the off the clock/unpaid wage claims, approximately $72,900 on the meal period claims, about $274,700 on the rest period claims, around $182,350 on the wage statement claims, and $382,600 on the waiting time penalty claims. [Brouillette Decl., ¶¶ 26-27.] Plaintiff and counsel substantially discounted the value of these claims, however, in light of Defendants' multilayered defenses on both class certification and on the merits, and the multiple and considerable risks posed by proceeding with the litigation. Indeed, where both sides face the uncertainty of further litigation, the attendant risks favor settlement. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998). Here, a number of defenses asserted by Defendants present serious threats to the claims of the Plaintiff and the other Class Members.

The unpaid wage claims focus primarily on Yerba Mate's alleged failure to pay Class Members at least minimum wages and/ or overtime wages for all of their hours worked. First, Plaintiff alleged a policy whereby management pressured Plaintiff and other driver employees to complete their routes while off the off the clock, both during meal periods and, at times, after clocking out in order to reduce overtime and double time hours and ensure routes were completed within an allotted timeframe Plaintiff also alleges Defendants failed to incorporate one time flat-sum bonus payments for sales contests into their regular rate of pay calculations when paying overtime as required by Alvarado v. Dart Container Corp. (2018) 4 Cal.5th 542 (2018), although he does acknowledge the damages on this claim are minimal. [Brouillette Decl., ¶ 28.]

In response, Yerba Mate argued its payroll policies are fully compliant, that it properly tracked and paid for all hours worked at the appropriate hourly wage. Defendants also argued that, if any class members failed to record and report time, it was in violation of company policy and would have occurred on a haphazard and individual basis. Accordingly, Defendants argued the issue would not be certifiable since it would require individualized inquiries whether any compensable "off the clock" work occurred and why it was or was not documented and paid for. White v. Starbucks Corp., 497 F.Supp.2d 1080, 1083 (N.D. Cal. 2007) (employer must have actual or constructive knowledge of the off the clock work for liability to attach). [Brouillette Decl., ¶ 29.]

On the meal and rest break claims, Plaintiff contends Yerba Mate's written policies are not fully compliant, and Plaintiff and other drivers were pressured to complete their routes at a breakneck pace in order to minimize the hours worked, which policies naturally resulted in missed and non-compliant breaks. Plaintiff's review of the time and payroll records provided suggested these deficiencies in the policies affected employee breaks. For example, Plaintiff's analysis showed a 28% violation rate for meal period violations, and further showed Defendants did not start paying the required premium wage for documented violations until after Plaintiff filed his initial complaint. [Brouillette Decl., ¶ 30.]

In response, Yerba Mate argued its written policies are fully compliant, particularly after settling the prior wage and hour class action, and that it provided employees with the opportunity to receive all required breaks. Yerba Mate further maintained that, in light of its compliant policies, whether a class member missed a meal period, received a late meal period, or missed a rest break would have been aberrational and against company policy. Thus, per Yerba Mate, these issues are not amenable to class or representative treatment since their resolution would require individualized inquiries as to why a break was missed or non-compliant. [Brouillette Decl., ¶ 31.]

The claims under Labor Code sections 203 and 226 are derivative of the primary unpaid wage claims, and accordingly are subject to the same risks and uncertainties plus additional risks posed by the need to take into account the discretionary nature of such awards and the "good faith" and other defenses available to Defendant. Amaral v. Cintas Corp. No. 2 (2008) 163 Cal.App.4th 1157, 1203-4 (employer did not willfully fail to pay wages under Labor Code § 203 even though class prevailed on underlying claim for failure to pay living wages). Thus, while these claims largely are derivative of the unpaid wage claim, they also are subject to additional defenses. [Brouillette Decl., ¶ 32.]

Moreover, there was also a significant risk that, if the action was not settled, Plaintiff would be unable to obtain class certification and thereby not recover on behalf of any employees other than himself. Defendants argued that, given the variety of job duties, work schedules, and policies and procedures that apply between the putative class members, the individual experience of each putative class member varied with respect to the claims - potentially giving rise to individualized, fact specific issues and impacting not only damages, but certification as well. Defendants could also contest class certification by arguing injury and good faith were case by case determinations that precluded class certification. Plaintiff is aware of cases where class certification of similar claims was denied. See e.g., Cacho v. Eurostar, Inc., 43 Cal. App. 5th 885, 256 Cal. Rptr. 3d 547 (2019) (denying certification of meal and rest break claims). Defendants also contended that individual differences in work experiences not only impacted damages but would also impact certification. Finally, even if class certification was successful, as demonstrated by the California Supreme Court decision in Duran v. U.S. Bank National Assn., 59 Cal. 4th 1 (2014), there are significant hurdles to overcome for a class wide recovery even where the class has been certified. While other cases have approved class certification in wage and hour claims, class certification in this action would have been hotly disputed and was by no means a foregone conclusion.

As far as potential PAGA liability, the allegedly aggrieved employees theoretically are entitled to penalties totaling around $1.9 million in civil penalties should Plaintiff prevail on all claims and establish violations of the multiple Labor Code sections at issue. [Brouillette Decl., ¶ 33.] As with the class claims, Plaintiff discounted the potential PAGA penalties based on Defendants' various defenses on the merits and also accounted for the Court's wide discretion to reduce such penalties, or to decline to award penalties at all. Labor Code § 2699(e)(2); Carrington v. Starbucks Corp. (2018) 30 Cal.App.5th 504 (trial court awarded penalties of $5 per pay period after a bench trial, which decision was upheld on appeal); In re Taco Bell Wage and Hour Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. LEXIS 48557 (PAGA penalties denied after trial).

Accordingly, the Parties allocated $20,000 to PAGA penalties, and Plaintiff submits this amount is reasonable under the circumstances and in line with comparable settlements in other wage and hour class actions in California. *E.g.*, Van Kempen v. Matheson Tri-Gas, Inc. (N.D. Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182 (granting final approval of $5,000 PAGA penalty from $370,000 settlement, or 1.4 percent of total settlement); Slavkov v. First Water Heater Partners I (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS 116303 (finding a $7,500 PAGA payment reasonable when measured against the overall settlement of $345,000 and the possible weaknesses in Plaintiff's case, or 2.2 percent of total settlement). Additionally, the LWDA has been informed of the terms of the PAGA portion of the settlement, and will be able to weigh in as necessary. Jennings v. Open Door Mktg. Inc. (N.D. Cal. Oct. 3, 2018) 2018 U.S.

Dist. LEXIS 171356, at *27 (approving settlement with PAGA penalties of 0.6% where "[p]laintiffs [have] submitted the settlement agreement to the LWDA, and the LWDA has not objected to the settlement.

The settlement obviates the significant risk that this Court may find any kind of class or representative resolution unachievable or deny certification of all or some of Plaintiff's claims. Furthermore, even if Plaintiff obtained certification of all or some of the claims, continued litigation would be lengthy and expensive as the parties pursued merits discovery, a probable motion to decertify, as well as trial and possible appeals, and would further and substantially delay any recovery by the class with no assurance of recovering significantly more than the proposed settlement. While Plaintiff is confident in the merits of these claims, legitimate controversies exist regarding each one of them. Plaintiff also recognizes proving the amount of wages and penalties due each Class Member would be an expensive, time-consuming, and uncertain proposition. [Brouillette Decl., ¶¶ 34-35.]

Plaintiff and counsel discounted the value of the class claims consistent with the risks discussed above, and carefully weighed the likelihood of the class receiving substantially greater benefit if the litigation continued. Plaintiff and counsel concluded – in light of these very real and substantial risks – settlement on the proposed terms and without prolonged and costly litigation was in the best interests of the class, and the overall $275,000 recovery represents a significant percentage of Defendants' potential exposure. Given these risks, a total recovery for the class of $275,000, which will result in average net award of approximately $600 per class member, is a significant result well within the range of reasonableness considering all potential outcomes, and it will provide direct monetary awards to all Class Members without further delay. [Brouillette Decl., ¶ 35.]

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

3. The Proposed Class Notice Is An Appropriate Form Of Giving Notice To The Class And Satisfies Due Process

The Parties' proposed Class Notice is an appropriate form of giving notice and should be approved by the Court. The Settlement Administrator will send the Notice to the Settlement Class Members via United States postal mail. Prior to mailing, the Settlement Administrator will perform a search using the National Change of Address Database to update and correct any known or identifiable address changes. *Id*. Direct mail notice to Class Members' last known addresses is the best possible notice under the circumstances. See Mullane v. Central Hanover Bank & Trust Co. (1950) 339 U.S. 306, 319; Eisen v. Carlisle & Jacquelin (1974) 417 U.S. 156, 173-176.

The Class Notice also comports with the requirements of California Rules of Court, Rules 3.769 and 3.766. Pursuant to Rule 3.769(f), the class notice provides an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and arranging to appear at the hearing and state objections to the proposed settlement. Cal. R. Ct.

3.769(f). In conformance with Rule 3.766, the class notice includes (1) a brief explanation of the case; (2) a procedure for Class Members to follow in requesting exclusion, and a statement that Class members will be excluded from the class if they request by the specified deadline; (3) a statement that the judgment, whether favorable or not, will bind all Class Members who do not request exclusion; (4) a statement that any class member who does not request exclusion may, if the class member so desires, object and enter an appearance through counsel. [Brouillette Decl., Exh. 1-A].

V. CONCLUSION

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

Dated: October 25, 2023

CROSNER LEGAL, P.C.

By: ______________________

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