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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

DELAINE PHILLIPS, individually, and on
behalf of other members of the general public
similarly situated;

Plaintiff,

v.

PENUMBRA, INC., a Delaware corporation;
and DOES 1 through 100, inclusive;

Defendants.

Case No.: 23CV030740

Assigned for All Purposes to:
Honorable Brad Seligman
Department 22

CLASS ACTION

**NOTICE OF MOTION AND MOTION
FOR PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT,
CONDITIONAL CERTIFICATION,
APPROVAL OF CLASS NOTICE,
SETTING OF FINAL APPROVAL
HEARING DATE; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

[Reservation ID: 289477146995]

[Declaration of Proposed Class Counsel
(Douglas Han); Declaration of Proposed
Administrator (Lisa Mullins); Declaration of
Joan Graff; Declaration of Steven A Groode;
and [Proposed] Order filed concurrently
herewith]

Hearing Date: August 20, 2024
Hearing Time: 3:00 p.m.
Hearing Place: Department 22

Complaint Filed: April 7, 2023
FAC Filed: November 6, 2023
SAC Filed: May 7, 2024
Trial Date: None Set

1 **PLEASE TAKE NOTICE** that on August 20, 2024 at 3:00 p.m., or as soon as the matter
2 may be heard, before the Honorable Brad Seligman in Department 22 of the Alameda County
3 Superior Court located at 1225 Fallon Street, Oakland, California, 94612, Plaintiff Delaine
4 Phillips (“Plaintiff”) will and hereby does move for an order:

- 5 • Granting Preliminary Approval of the proposed class action settlement described
6 herein and as set forth in the Parties’ Class Action and PAGA Settlement
7 Agreement (“Settlement Agreement,” “Settlement,” or “Agreement”), attached
8 as **Exhibit 2** to the Declaration of Douglas Han, including, and not limited to, the
9 means of allocation and distribution of funds;
- 10 • Conditionally certifying the Class for settlement purposes only;
- 11 • Appointing Plaintiff as the class representative;
- 12 • Appointing Justice Law Corporation as Class Counsel;
- 13 • Approving the Court Approved Notice of Class Action and PAGA Settlement and
14 Hearing Date for Final Court Approval (“Class Notice”) attached as **Exhibit A** to
15 the [Proposed] Order Preliminarily Approving Class Action Settlement and
16 Setting Hearing for Final Approval of Settlement and Settlement Agreement;
- 17 • Directing the mailing of the Class Notice with a postage-paid return envelope to
18 the Class;
- 19 • Approving the deadlines for the notice and settlement administration process;
- 20 • Approving ILYM Group, Inc. as the Administrator; and
- 21 • Scheduling a hearing to consider whether to grant Final Approval of the
22 Settlement Agreement, at which time the Court will also consider whether to
23 grant Final Approval of the requests for the Class Counsel Fees Payment, Class
24 Counsel Litigation Expenses Payment, Class Representative Service Payment,
25 Administration Expenses Payment, and Private Attorneys General Act of 2004
26 (“PAGA”) Penalties.

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1 This motion is based upon the following memorandum of points and authorities;
2 Declaration of Proposed Class Counsel (Douglas Han); Declaration of the Proposed
3 Administrator (Lisa Mullins); Declaration of Joan Graff; Declaration of Steven A. Groode;
4 [Proposed] Order filed concurrently with this motion; pleadings and other records on file with
5 the Court in this matter; and such documentary evidence and oral argument as may be presented
6 at the hearing on this motion.

7
8 Dated: June 18, 2024

JUSTICE LAW CORPORATION

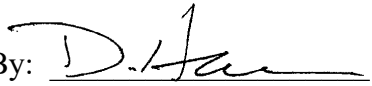
9 By: 
10 Douglas Han
11 *Attorneys for Plaintiff*
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TABLE OF CONTENTS

I.	INTRODUCTION	10
II.	BACKGROUND	10
III.	INVESTIGATION/ LITIGATION HISTORY	11
a.	Discovery, Investigation, and the Parties' Staunchly Conflicting Positions	11
b.	The Parties Were Able to Reach an Agreement on Settlement of the Action	12
i.	The Parties Attended Mediation Which Led to the Settlement	12
ii.	The Settlement Was Reached as a Result of Arm's-length Negotiations	12
iii.	The Settlement Is the Result of Thorough Investigation and Discovery	12
c.	Terms of the Settlement	13
i.	Deductions from the Settlement	13
ii.	Calculation of Settlement Payments	13
iii.	The Allocation of 20% to Wages and 80% to Interest and Penalties Is Justified Under the Claims of this Action	13
iv.	Notice to the Class	14
v.	Distribution of Funds	14
vi.	Release of Claims	15
d.	Counsel for Both Parties Are Experienced in Similar Litigation	16
IV.	ARGUMENT	16
a.	Class Action Settlements Are Subject to Court Review	16
b.	The Settlement Is a Reasonable Compromise of Claims	17
i.	The Gross Settlement Amount of \$4,595,000 Is Fair and Reasonable	17
ii.	The PAGA Penalties of \$400,000 Is Reasonable	18
c.	Discount Analysis Justifies the Settlement	19
d.	Conditional Certification of the Class Is Appropriate	20

1	i.	The Proposed Class Is Ascertainable and Sufficiently Numerous.....	21
2	ii.	The Class Members Share a Well-defined Community of Interest	21
3	1.	Common Issues Predominate.....	21
4	2.	Plaintiff’s Claims Are Typical of the Class Claims.....	22
5	3.	Plaintiff Is Adequate to Represent the Class.....	22
6	4.	Class Action Is Superior for the Fair and Efficient Adjudication of	
7		this Controversy	23
8	e.	The Settlement Is Fair, Reasonable, and Adequate	23
9	f.	Notice to Class Members Complies with California Rules of Court,	
10		Rule 3.769(f).....	23
11	V.	CONCLUSION.....	24

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Acosta v. TransUnion, LLC</i>	
(C.D. Cal. 2007) 240 F.R.D. 564.....	20
<i>Aguilar v. Cintas Corp. No. 2</i>	
(2006) 144 Cal.App.4th 121	18
<i>Amaro v. Anaheim Arena Management, LLC</i>	
(2021) 69 Cal.App.5th 521	15
<i>Bartold v. Glendale Federal Bank</i>	
(2000) 81 Cal.App.4th 816	21
<i>In re Beef Industry Antitrust Litigation</i>	
(5th Cir. 1979) 607 F.2d 167	16
<i>Boyd v. Bechtel Corp.</i>	
(N.D. Cal. 1979) 485 F.Supp.610	12
<i>Brinker Restaurant Corp. v. Superior Court</i>	
(2012) 53 Cal.4th 1004	22
<i>Capitol People First v. Department of Developmental Services</i>	
(2007) 155 Cal.App.4th 676	21
<i>Detroit v. Grinnell Corp.</i>	
(2d. Cir. 1974) 495 F.2d 448.....	20
<i>Classen v. Weller</i>	
(1983) 145 Cal.App.3d 27	22
<i>Dunbar v. Albertson's Inc.</i>	
(2006) 141 Cal.App.4th 1422	18
<i>Dunk v. Ford Motor Co.</i>	
(1996) 48 Cal.App.4th 1794	16, 23

<u>Cases</u>	<u>Page(s)</u>
<i>Espinoza v. Galardi South Enters.</i>	
(S.D.Fla. Jan. 11, 2016, No. 14-21244-CIV-GOODMAN) 2016 U.S.Dist.LEXIS.....	22
<i>Ghazaryan v. Diva Limousine, Ltd. (2008)</i>	
169 Cal.App.4th 1524.....	21
<i>Green v. Obledo</i>	
(1981) 29 Cal.3d 126	16
<i>Harris v. Superior Court</i>	
(2007) 154 Cal.App.4th 164	18
<i>Hicks v. Kaufman & Broad Home Corp.</i>	
(2001) 89 Cal.App.4th 908	21
<i>Hopson v. Hanesbrands Inc.</i>	
(N.D.Cal. Apr. 3, 2009, No. CV-08-00844 EDL) 2009 U.S.Dist.LEXIS 33900	19
<i>In re General Motors Corp. Engine Interchange Litigation</i>	
(7th Cir. 1979) 594 F.2d 1106.....	20
<i>Iowa Beef Processors, Inc. v. Meat Price Investigators Ass’n</i>	
(1981) 452 U.S. 905.....	16
<i>Jones v. JGC Dallas LLC</i>	
(N.D.Tex. Nov. 29, 2012, Civil Action No. 3:11-CV-2743-O) 2012 U.S.Dist.LEXIS	
185042.....	22
<i>Kullar v. Foot Locker Retail, Inc.</i>	
(2008) 168 Cal.App.4th 116	17
<i>Linder v. Thrifty Oil Co.</i>	
(2000) 23 Cal.4th 429	21
<i>Linney v. Cellular Alaska Partnership</i>	
(9th Cir. 1998) 151 F.3d 1234	20
///	

<u>Cases</u>	<u>Page(s)</u>
<i>Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles</i>	
(2010) 186 Cal.App.4th 399	17
<i>Nordstrom Com. Cases</i>	
(2010) 186 Cal.App.4th 576	19
<i>Sav-On Drug Stores, Inc. v. Superior Court</i>	
(2004) 34 Cal.4th 319	18, 20, 21
<i>Thurman v. Bayshore Transit Mgmt.</i>	
(2012) 203 Cal.App.4th 1112	18
<i>Vasquez v. Superior Court</i>	
(1971) 4 Cal.3d 800	16
<i>Walsh v. IKON Office Solutions, Inc.</i>	
(2007) 148 Cal.App.4th 1440	18
<u>Rules</u>	
California Rules of Court, Rule 3.769	16
California Rules of Court, Rule 3.769 (f)	23
California Rules of Court, Rule 3.769 (g).....	16
Federal Rule 23	16
<u>Statutes</u>	
Business and Professions Code § 17200.....	17
Code of Civil Procedure § 382.....	20, 23
Code of Civil Procedure § 877.6.....	17
Code of Civil Procedure § 1542.....	15
Labor Code § 201.....	18
Labor Code § 202.....	18
Labor Code § 203.....	18
Labor Code § 204.....	18

Statutes

Page(s)

Labor Code § 210.....	18
Labor Code § 218.5.....	18
Labor Code § 221.....	18
Labor Code § 226.3.....	18
Labor Code § 226.7.....	18
Labor Code § 226(a)	18
Labor Code § 246.....	18
Labor Code § 432.5.....	18
Labor Code § 510.....	18
Labor Code § 512(a)	18
Labor Code § 551.....	18
Labor Code § 552.....	18
Labor Code § 558.....	18
Labor Code § 1174(d)	18
Labor Code § 1194.....	18
Labor Code § 1197.....	18
Labor Code § 1197.1.....	18
Labor Code § 1198.....	18
Labor Code § 2800.....	18
Labor Code § 2802.....	18

1 **I. INTRODUCTION**

2 This motion seeks preliminary approval of a non-reversionary wage-and-hour class action
3 and representative PAGA settlement by Plaintiff on behalf of himself and all current and former
4 hourly-paid or non-exempt employees of Defendant Penumbra, Inc. (“Defendant”), including all
5 direct hires as well as all indirect hires for whom contact information can be obtained from the
6 applicable Third-Party Employers, within the State of California at any time during the period
7 from April 7, 2019, through June 22, 2024 (“Class,” “Class Members,” and “Class Period”). At
8 the time of this filing, the number of Class Members confirmed by Defendant is about 4,963.
9 (Declaration of Douglas Han in Support of Motion For Preliminary Approval of Class Action
10 Settlement (“Han Decl.”), ¶¶ 7, 8.)

11 **II. BACKGROUND**

12 On January 31, 2023, Plaintiff provided written notice to the California Labor and
13 Workforce Development Agency (“LWDA”) and Defendant of the specific provisions of the
14 Labor Code he contends were violated and the theories supporting his contentions. (Han Decl.,
15 *supra*, at ¶ 9; Exhibit 3.)

16 On April 7, 2023, Plaintiff filed a wage-and- hour class and representative action lawsuit
17 in the Superior Court of California, County of Alameda, alleging nine (9) causes of action. (Han
18 Decl., *supra*, at ¶ 10; Exhibit 4.)

19 On November 6, 2023, Plaintiff filed a First Amended Complaint that updated the “class”
20 definition to remove the “California-based” portion of the definition. (Han Decl., *supra*, at ¶ 11;
21 Exhibit 5.)

22 After engaging in discovery, investigations, and negotiation, the Parties remotely attended
23 mediation with the mediator Brandon McKelvey on April 22, 2024, ultimately resulting in the
24 Parties reaching a tentative settlement via a mediator’s proposal. (Han Decl., *supra*, at ¶ 12.)

25 In line with the Settlement, on May 7, 2024, Plaintiff filed a Second Amended Complaint
26 that adjusted the “class” definition, adjusted the “aggrieved employees” definition, and updated
27 the PAGA cause of action. (Han Decl., *supra*, at ¶ 13; Exhibit 6.)

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On May 21, 2024, Plaintiff provided an amended written notice to the LWDA and Defendant of the specific provisions of the Labor Code he contends were violated and the theories supporting his contentions. (Han Decl., *supra*, at ¶ 14; Exhibit 7.)

III. INVESTIGATION/ LITIGATION HISTORY

a. Discovery, Investigation, and the Parties’ Staunchly Conflicting Positions

After filing this case, Plaintiff propounded form interrogatories, special interrogatories, requests for admission, and requests for production of documents. (Han Decl., *supra*, at ¶ 16.) Defendant responded to the formal discovery requests. (*Ibid.*) Plaintiff also reviewed and opposed Defendant’s Motion to Strike or Dismiss Class Allegations. (*Ibid.*) The Parties then met and conferred, agreed to engage in the informal exchange of information, and agreed to remotely attend mediation. (*Ibid.*)

Defendant produced documents relating to its policies, practices, and procedures. (Han Decl., *supra*, at ¶ 17.) As part of Defendant’s production, Plaintiff also reviewed a sampling of time and pay records and information relating to the size and scope of the Class and Aggrieved Employees. (*Ibid.*) At least a dozen putative class members were also located and interviewed to obtain a better understanding of the alleged day-to-day violations. (*Ibid.*)

Based upon the information provided by Defendant and interviews with putative class members, Plaintiff contends – and Defendant denies – Defendant: (1) failed to provide employees with legally mandated meal and rest breaks and pay applicable premium wages consistently and properly; (2) failed to pay employees for all hours worked; (3) maintained an illegal rounding practice; (4) maintained an invalid alternative workweek schedule (“AWS”); (5) failed to factor non-discretionary bonuses into regular rate of pay; (6) failed to reimburse employees for necessary business expenses; (7) failed to issue compliant wage statements; and (8) failed to timely pay wages. (Han Decl., *supra*, at ¶¶ 19-28.)

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1 **b. The Parties Were Able to Reach an Agreement on Settlement of the Action**

2 **i. The Parties Attended Mediation Which Led to the Settlement**

3 The Parties remotely attended mediation with an experienced wage-and-hour mediator.
4 (Han Decl., *supra*, at ¶ 29.) Under the auspices of the mediator, the Parties reached a tentative
5 settlement via a mediator’s proposal, the terms of which were memorialized in the Settlement
6 Agreement the Parties now seek Preliminary Approval of. (*Id.* at ¶ 29; Exhibits 2, 8.)

7 **ii. The Settlement Was Reached as a Result of Arm’s-length Negotiations**

8 The Settlement was reached because of arm’s-length negotiations. (Han Decl., *supra*, at ¶
9 32.) Though cordial and professional, the settlement negotiations have always been adversarial
10 and non-collusive in nature. (*Ibid.*) At the mediation, the Parties’ counsel conducted extensive
11 arm’s-length settlement negotiations until an agreement was reached. (*Ibid.*)

12 Plaintiff and Class Counsel believe in the merits of the case but recognize the expense and
13 length of additional proceedings necessary to continue the litigation. (Han Decl., *supra*, at ¶ 33.)
14 Plaintiff and Class Counsel also considered the uncertainty and risk of further litigation, potential
15 outcome, and difficulties and delays inherent in such litigation. (*Ibid.*) Plaintiff and Class Counsel
16 believe the settlement set forth in the Agreement is fair, adequate, and reasonable and is in the
17 Class Members’ best interests. (*Ibid.*)

18 **iii. The Settlement Is the Result of Thorough Investigation and Discovery**

19 The Parties investigated and evaluated the factual strengths and weaknesses of the claims
20 and defenses before reaching the Settlement and engaged in sufficient investigation, research, and
21 discovery. (Han Decl., *supra*, at ¶ 34.) The information produced permitted Class Counsel to
22 engage in a comprehensive analysis of liability and potential damages. (*Ibid.*) This case has
23 reached the stage where the Parties understand “the strength of the case; the reasonableness of the
24 settlement in light of the attendant risks of litigation, and in light of the best possible recovery”
25 sufficient to support the Settlement’s reasonableness, adequacy, and fairness. (Han Decl., *supra*,
26 at ¶ 34; *Boyd v. Bechtel Corp.* (N.D.Cal. 1979) 485 F.Supp. 610, 617.)

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1 **c. Terms of the Settlement**

2 **i. Deductions from the Settlement**

3 The Parties agreed (subject to the Court’s approval) this action be settled and
4 compromised for the non-reversionary total sum of \$4,595,000 (“Gross Settlement Amount”)
5 which includes the: (1) Class Counsel Fees Payment of up to \$1,531,666.67 (1/3 of the Gross
6 Settlement Amount); (2) Class Counsel Litigation Expenses Payment of up to \$20,000; (3) Class
7 Representative Service Payment of up to \$10,000; (4) Administration Expenses Payment of up to
8 \$40,000; and (5) PAGA Penalties of up to \$400,000. (Han Decl., *supra*, at ¶ 30.)

9 **ii. Calculation of Settlement Payments**

10 After all Court-approved deductions from the Gross Settlement Amount, it is estimated
11 \$2,593,333.33 (“Net Settlement Amount”) will be distributed to the Participating Class Members,
12 resulting in a gross *average* Individual Class Payment of \$522.53. (Han Decl., *supra*, at ¶ 31.)

13 The Administrator will calculate and disburse the Individual Class Payments using the
14 formula set forth in the Settlement Agreement. (Han Decl., *supra*, at ¶ 29; Exhibit 2, *supra*, at §
15 C(2)(d).) The Administrator will also calculate and disburse Individual PAGA Payments using
16 the formula set forth in the Settlement Agreement. (*Id.* at § C(2)(e).)

17 **iii. The Allocation of 20% to Wages and 80% to Interest and Penalties Is**
18 **Justified Under the Claims of this Action**

19 Individual Class Payments will be allocated as follows: (1) twenty percent (20%) to the
20 settlement of wage claims; and (2) eighty percent (80%) to the settlement of claims for interest
21 and penalties. (Han Decl., *supra*, at ¶ 29; Exhibit 2, *supra*, at § C(2)(d)(i).)

22 The allocation of wages, interest, and penalties indicated above was based on the realistic
23 exposure that Plaintiff could expect to receive for meal and rest break premiums and unpaid and
24 underpaid wages if the case went to trial. (Han Decl., *supra*, at ¶ 55.) Plaintiff added the realistic
25 exposure for rest break premiums and meal break premiums (\$1,346,514.02 + \$181,349.42 =
26 \$1,527,863.44). (*Ibid.*) Plaintiff then added the \$1,527,863.44 to the low-end realistic exposure
27 for unpaid wages due to off-the-clock work and rounding and underpaid overtimes wages, sick
28 leave, and premium wages due to an invalid AWS and regular rates issue (\$1,527,863.44 +

1 \$2,214,922.50 + \$11,052.25 + \$60,316.74 + \$147,184.60 = \$3,961,339.53). (Han Decl., *supra*,
2 at ¶ 55.) The realistic exposure of \$3,961,339.53 that Plaintiff can expect to receive if he were to
3 prevail at trial for meal and rest break premiums, low-end unpaid wages due to off-the-clock work
4 and rounding, and underpaid overtime wages, sick leave, and premium wages due to an invalid
5 AWS and regular rates issue represents about twenty percent (20.63%) of the low-end total
6 realistic exposure and PAGA penalties ($\$3,961,339.53 \div \$19,199,870 = 0.2063 \times 100 = 20.63\%$).
7 (*Ibid.*) Since this represents twenty percent (20%) of wages, allocating twenty percent (20%) for
8 the settlement of wage claims and eighty percent (80%) for the settlement of claims for interest
9 and penalties is appropriate. (*Ibid.*)

10 **iv. Notice to the Class**

11 The Class Data shall be delivered to the Administrator no later than thirty (30) calendar
12 days after the Court grants Preliminary Approval of the Settlement. (Han Decl., *supra*, at ¶ 29;
13 Exhibit 2, *supra*, at § G(4)(a).) No later than fourteen (14) calendar days after receiving the Class
14 Data, the Administrator will send the Class Notice with a translation to all Class Members
15 identified in the Class Data via first-class United States Postal Service mail. (*Id.* at § G(4)(c).)

16 **v. Distribution of Funds**

17 The Gross Settlement Amount and subsequent settlement payments to be made will be
18 funded and disbursed in the manner and time set forth in the Settlement Agreement. (Han Decl.,
19 *supra*, at ¶ 29; Exhibit 2, *supra*, at §§ D(2), D(3).)

20 Participating Class Members and Aggrieved Employees must cash in their settlement
21 checks within one hundred eighty (180) calendar days after the date of their mailing. (Han Decl.,
22 *supra*, at ¶ 29; Exhibit 2, *supra*, at §§ D(3)(a), D(3)(c).) Uncashed settlement checks will be
23 canceled after the void date and transmitted to the *cy pres* recipient Legal Aid At Work. (*Ibid.*)
24 Legal Aid At Work is an appropriate to serve as a *cy pres* recipient (See Declaration of Joan
25 Graff.) The Parties have to connection to or relationship with the *cy pres* recipient Legal Aid At
26 Work that would create the appearance of impropriety. (See declarations filed herewith.)

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1 **vi. Release of Claims**

2 Effective on the date when Defendant fully funds the Gross Settlement Amount and all
3 employer’s payroll taxes owed on the Wage Portion of the Individual Class Payments, all
4 Participating Class Members, on behalf of themselves and their former and present
5 representatives, agents, attorneys, heirs, administrators, successors, transferees, and assigns,
6 release the Released Parties from the Released Class Claims. (Han Decl., *supra*, at ¶ 29; Exhibit
7 2, *supra*, at § E(2).)

8 Effective on the date when Defendant fully funds the Gross Settlement Amount and all
9 employer’s payroll taxes owed on the Wage Portion of the Individual Class Payments, Plaintiff,
10 as an agent and proxy of the State of California, and State of California itself (including the
11 LWDA) are deemed to release the Released Parties from the Released PAGA Claims. (Han Decl.,
12 *supra*, at ¶ 29; Exhibit 2, *supra*, at § E(3).)

13 Effective on the date when Defendant fully funds the Gross Settlement Amount and all
14 employer’s payroll taxes owed on the Wage Portion of the Individual Class Payments, Plaintiff
15 and his former and present spouses, representatives, agents, attorneys, heirs, administrators,
16 successors, and assigns generally releases from the Plaintiff’s Release. (Han Decl., *supra*, at ¶ 29;
17 Exhibit 2, *supra*, at § E(1).) Plaintiff also expressly waives and relinquishes the provisions, rights,
18 and benefits, if any, of section 1542 of the Civil Code. (*Id.* at § E(1)(a).)

19 Regarding class action releases, “[A] court may release not only those claims alleged in
20 the complaint and before the court, but also claims which ‘could have been alleged by reason of
21 or in connection with any matter or fact set forth or referred to in’ the complaint.”” (*Amaro v.*
22 *Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 537.) The scope of the releases in
23 this case are acceptable because they are limited to the scope of the allegations in the operative
24 complaints. Moreover, the released claims are ““based on *the identical factual predicate* as that
25 underlying the claims in the settled class action.”” (*Ibid.*) In other words, the released claims do
26 not ““go beyond the scope of the allegations in the operative complaint”” (*Ibid.*)

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1 **d. Counsel for Both Parties Are Experienced in Similar Litigation**

2 The Parties' counsel are experienced in wage-and-hour, employment law and class
3 actions. (Han Decl., *supra*, at ¶¶ 2-6; Exhibit 1.) Class Counsel have prosecuted numerous cases
4 on behalf of employees for Labor Code violations. (*Ibid.*) Thus, Class Counsel's experience
5 guided their determination to endorse the Settlement.¹ (*Ibid.*)

6 **IV. ARGUMENT**

7 **a. Class Action Settlements Are Subject to Court Review**

8 California Rules of Court, rule 3.769 requires court approval for class action settlements.²
9 "Before final approval, the court must conduct an inquiry into the fairness of the proposed
10 settlement." (Cal. Rules of Court, rule 3.769(g).) Rule 3.769 further requires a noticed motion for
11 preliminary approval of class settlements:

- 12 (a) A settlement or compromise of an entire class action, or a cause of action in
13 a class action, or as to a party, requires the approval of the court after
14 hearing.
15 ...
16 (c) Any party to a settlement agreement may serve and file a written notice of motion
 for preliminary approval of the settlement. The settlement agreement and proposed
 notice to class members must be filed with the motion, and the proposed order
 must be lodged with the motion.

17 Courts have discretion to approve settlements that are fair, not collusive, and consider "all
18 the normal perils of litigation as well as the additional uncertainties inherent in complex class
19 actions." (*In re Beef Industry Antitrust Litigation* (5th Cir. 1979) 607 F.2d 167, 179, cert. den. *sub*
20 *nom. Iowa Beef Processors, Inc. v. Meat Price Investigators Ass'n* (1981) 452 U.S. 905.)

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24 ¹ The final factor mentioned in *Dunk* – the number of objectors – is not determinable until
25 the Class Notice has been provided to the Class Members, and they have had an opportunity to
26 respond. This information will be provided to the Court in conjunction with the Motion for Final
27 Approval of Class Action Settlement.

28 ² The California Supreme Court authorized California's trial courts to use Federal Rule 23
and cases applying it for guidance in considering class issues. (See *Vasquez v. Superior Court*
(1971) 4 Cal.3d 800, 821; see *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146.) Where
appropriate, the Parties cite Federal Rule 23 and federal case law in addition to California law.

1 **b. The Settlement Is a Reasonable Compromise of Claims**

2 Understanding the sum in controversy is an important factor in if the settlement “of the
3 class members’ claims is reasonable in light of the strengths and weaknesses of the claims and
4 the risks of the particular litigation.” (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th
5 116, 129; see also *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th
6 399, 409.) The most important factor is “the strength of the case for plaintiffs on the merits,
7 balanced against the amount offered in settlement.” (*Kullar*, at p. 130; see also *Munoz*, at p. 409.)

8 *Kullar* instructs the court is not to “decide the merits of the case or to substitute its
9 evaluation of the most appropriate settlement for that of the attorneys.” (*Kullar v. Foot Locker*
10 *Retail, Inc, supra*, 168 Cal.App.4th at p. 133.) *Kullar* does not require an explicit statement of the
11 maximum amount the class could recover if plaintiff prevailed on all his claims, provided there
12 is a record allowing ““an understanding of the amount that is in controversy and the realistic range
13 of outcomes of the litigation.”” (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles, supra*, 186
14 Cal.App.4th at p. 409.) In other words, “as the court does when it approves a settlement as in
15 good faith under Code of Civil Procedure § 877.6, the court must at least satisfy itself that the
16 class settlement is within the ‘ballpark’ of reasonableness.” (*Kullar*, at p. 133.)

17 **i. The Gross Settlement Amount of \$4,595,000 Is Fair and Reasonable**

18 The Settlement Agreement was only possible following significant investigation and
19 evaluation of the relevant policies and procedures and the data produced for the putative class,
20 permitting Class Counsel to engage in a comprehensive analysis of liability and potential
21 damages. (Han Decl., *supra*, at ¶ 34.)

22 The claims are predicated on the alleged: (1) failure to pay overtime wages; (2) failure to
23 provide meal and rest breaks and pay applicable premiums properly and consistently; (3) failure
24 to pay minimum wages; (4) failure to timely pay wages; (5) failure to issue compliant wage
25 statements; (6) failure to reimburse business expenses; (7) violation of PAGA; and (8) violation
26 of Business & Professions Code sections 17200. (Han Decl., *supra*, at ¶ 35.) Defendant
27 vehemently denies the theories of liability. (*Id.* at ¶ 36.)

1 While Plaintiff believes the case is suitable for certification even when considering the
2 arbitration agreements, uncertainties with respect to certification are present. (Han Decl., *supra*,
3 at ¶ 37.) As the California Supreme Court ruled in *Sav-On Drug Stores, Inc. v. Superior Court*
4 (2004) 34 Cal.4th 319, class certification is a matter of the trial court's sound discretion. (*Ibid.*)
5 Decisions following *Sav-On Drug Stores, Inc.* have reached different conclusions concerning
6 certification of wage-and-hour claims.³ (*Ibid.*)

7 **ii. The PAGA Penalties of \$400,000 Is Reasonable**

8 The provisions of the Labor Code potentially triggering PAGA penalties include, but are
9 not limited to, Labor Code sections 201, 202, 203, 204, 210, 218.5, 221, 226(a), 226.3, 226.7,
10 246, 432.5, 510, 512(a), 551, 552, 558, 1174(d), 1194, 1197, 1197.1, 1198, 2800, and 2802. (Han
11 Decl., *supra*, at ¶ 48.) Defendant asserted, regardless of the results of the underlying causes of
12 action, PAGA penalties are not mandatory but permissive and discretionary. (*Ibid.*) Defendant
13 maintained it had a strong argument it would be unjust to award maximum PAGA penalties given
14 the law's unsettled state. (Han Decl., *supra*, at ¶ 48; *Thurman v. Bayshore Transit Mgmt.* (2012)
15 203 Cal.App.4th 1112 [reducing penalties by 30% under this authority].) Without stacking and
16 limited to the initial violation, the PAGA penalties would be limited to **\$378,000** (3,780
17 employees x \$100 initial violation) on the low-end and **\$3,024,000** (3,780 employees x \$100
18 initial violation x 8 theories of recovery) on the high-end. (Han Decl., *supra*, at ¶¶ 49-52.)

19 Plaintiff also recognized the risk any PAGA award could be reduced. (Han Decl., *supra*,
20 at ¶ 53.) Many of the causes of action brought were duplicative of the statutory claims. (*Ibid.*)
21 The maximum penalties for each pay period are likely not justified, and it was arguable the Court
22 would award the maximum penalties. (*Ibid.*) Thus, allocating \$400,000 to PAGA civil penalties
23 was reasonable given that Defendant is paying an additional \$4,195,000 in the class settlement.

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

(Han Decl., *supra*, at ¶ 53.) When PAGA penalties are negotiated in good faith and “there is no indication that [the] amount was the result of self-interest at the expense of other Class Members,” such amounts are generally considered reasonable.⁴ (Han Decl., *supra*, at ¶ 53.)

Considering the defenses, supporting evidence, and position the case is not suitable for class treatment, the Settlement is reasonable, adequate, and fair.

c. Discount Analysis Justifies the Settlement

Excluding the civil penalties, which could be completely discretionary, the total estimated potential exposure, assuming certification and prevailing at trial, would be about **\$60,115,842.40** on the low-end and **\$69,156,342.40** on the high-end. (Han Decl., *supra*, at ¶ 54.)

Category	Potential Exposure	Certification Risk	Merits Risk	Realistic Exposure
Rest Break Premiums	\$15,388,731.70	75%	65%	\$1,346,514.02
Meal Break Premiums	\$1,480,403.40	65%	65%	\$181,349.42
Overtime/Minimum Wage: Off-the-Clock Work	\$18,081,000 to \$27,121,500	65%	65%	\$2,214,922.50 to \$3,322,383.75
Rounding	\$40,190	45%	50%	\$11,052.25
Alternative Workweek Schedule	\$219,333.60	45%	50%	\$60,316.74
Regular Rate	\$452,875.70	35%	50%	\$147,184.60
Unreimbursed Business Expenses	\$2,261,540	25%	75%	\$424,038.75
Wage Statement Penalty	\$11,907,000	65%	65%	\$1,458,607.50
Waiting Time Penalty	\$10,284,768	65%	65%	\$1,259,884.08
MAXIMUM TOTAL EXPOSURE	\$60,115,842.40 to \$69,156,342.40⁵			\$7,103,869.86 to \$8,211,331.11⁶

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⁴ (*Hopson v. Hanesbrands Inc.* (N.D.Cal. Apr. 3, 2009, No. CV-08-00844 EDL) 2009 U.S.Dist.LEXIS 33900, at *24; see e.g. *Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 579, “[T]rial court did not abuse its discretion in approving a settlement which does not allocate any damages to the PAGA claims”).)

⁵ (Han Decl., *supra*, at ¶¶ 38-47.)

⁶ (*Id.* at ¶¶ 56-54.)

1 Based on this analysis, the realistic recovery for this case is **\$7,103,869.86** on the low-end
2 and **\$8,211,331.11** on the high-end. (Han Decl., *supra*, at ¶ 65.) The Gross Settlement Amount is
3 about six percent (6.64%) of the maximum potential exposure and fifty-six percent (55.96%) of
4 the realistic exposure at trial, which is a reasonable settlement. (*Ibid.*)

5 The only question at preliminary approval is whether the settlement is within the range of
6 possible approval. (*In re General Motors Corp. Engine Interchange Litigation* (7th Cir. 1979)
7 594 F.2d 1106, 1124; *Acosta v. TransUnion, LLC* (C.D. Cal. 2007) 240 F.R.D. 564, 575.) “The
8 fact that a proposed settlement may only amount to a fraction of the potential recovery does not,
9 in and of itself, mean that the proposed settlement is grossly inadequate and should be
10 disapproved.” (*Detroit v. Grinnell Corp.* (2d Cir. 1974) 495 F.2d 448, 455; see also *Linney v.*
11 *Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242, “[I]t is the very uncertainty of
12 outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual
13 settlements. The proposed settlement is not to be judged against a hypothetical or speculative
14 measure of what might have been achieved by the negotiators”). Nevertheless, the Settlement
15 provides significant recovery for the Class Members.

16 **d. Conditional Certification of the Class Is Appropriate**

17 Code of Civil Procedure section 382 “authorizes class actions ‘when the question is one
18 of a common or general interest, of many persons, or when the parties are numerous, and it is
19 impracticable to bring them all before the court.’” (*Sav-On Drug Stores, Inc. v. Superior Court*,
20 *supra*, 34 Cal.4th at p. 326.) The California courts will certify class actions where the plaintiff
21 identifies “both [1] an ascertainable class and [2] a well-defined community of interest among
22 class members.” (*Ibid.*)

23 The Class is ascertainable and numerous as to make it impracticable to join all Class
24 Members, and there are common questions of law and fact amongst the Class. (Han Decl., *supra*,
25 at ¶ 66.) Plaintiff contends, as a former hourly-paid, non-exempt employee of Defendant, his
26 claims are typical of the claims of the Class, and Class Counsel will fairly and adequately protect
27 the interests of the Class. (*Ibid.*) Plaintiff also asserts the prosecution of separate actions by
28 individual Class Members would create the risk of inconsistent or varying adjudications. (Han

Decl., *supra*, at ¶ 66.)

i. The Proposed Class Is Ascertainable and Sufficiently Numerous

“Ascertainability is required in order to give notice to putative class members as to whom the judgment in the action will be res judicata.” (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 914.) “A class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description.” (*Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 828.) The proposed class must also be sufficiently numerous. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.)

This case involves approximately 4,963 Class Members, meaning the Class is sufficiently numerous. (Han Decl., *supra*, at ¶ 67; *Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524, 1531, n.5 [finding a proposed class of “as many as 190 current and former employees” is sufficiently numerous].)

ii. The Class Members Share a Well-defined Community of Interest

The community of interest requirement “embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.” (*Sav-On Drug Stores, Inc. v. Superior Court*, *supra*, 34 Cal.4th at p. 326.) “[T]he community of interest requirement for certification *does not mandate that class members have uniform or identical claims.*” (*Capitol People First v. Department of Developmental Services* (2007) 155 Cal.App.4th 676, 692 (emphasis in original).) Rather, courts focus on the defendant’s internal policies and “pattern and practice . . . in order to assess whether that common behavior toward similarly situated plaintiffs renders class certification appropriate.” (*Ibid.*)

1. Common Issues Predominate

The “common issues” requirement “involves analysis of whether the proponent’s ‘theory of recovery’ is likely to prove compatible with class treatment.” (*Capitol People First v. Department of Developmental Services*, *supra*, 155 Cal.App.4th at p. 690.) Courts determine whether the elements necessary to establish liability are susceptible to common proof, even if the

1 class members must individually prove their damages. (*Brinker Restaurant Corp. v. Superior*
2 *Court* (2012) 53 Cal.4th 1004, 1024). These types of claims are regularly granted class
3 certification when the plaintiff can present evidence of common policies. (See e.g. *Jones v. JGC*
4 *Dallas LLC* (N.D.Tex. Nov. 29, 2012, Civil Action No. 3:11-CV-2743-O) 2012 U.S.Dist.LEXIS
5 185042 [certified collective action involving 190 dancers]; *Espinoza v. Galardi South Enters.*
6 (S.D.Fla. Jan. 11, 2016, No. 14-21244-CIV-GOODMAN) 2016 U.S.Dist.LEXIS 2904 [court
7 certified class of dancers on state law claims].)

8 Plaintiff asserts common issues of fact and law predominate as to each of the claims
9 alleged. (Han Decl., *supra*, at ¶ 68.) Plaintiff contends all persons employed by Defendant as
10 hourly-paid or non-exempt employees in California during the Class Period were subject to the
11 same or similar policies, practices, and procedures described in detail above. (*Ibid.*)

12 **2. Plaintiff's Claims Are Typical of the Class Claims**

13 Typical claims rely on legal theories and facts that are substantially like those of other
14 class members. (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 46.)

15 Plaintiff is a former employee of Defendant and alleges he and the Class Members were
16 employed by the same company and injured by Defendant's common policies, practices, and
17 procedures related to the claims described above. (Han Decl., *supra*, at ¶ 69.) Plaintiff seeks relief
18 for these claims and derivative claims on behalf of all Class Members. (*Ibid.*) Thus, the claims
19 arise from the same employment practices and are based on the same legal theories as those
20 applicable to the Class. (*Ibid.*)

21 **3. Plaintiff Is Adequate to Represent the Class**

22 Plaintiff has proven to be an adequate representative. (Han Decl., *supra*, at ¶ 70.) Plaintiff
23 has conducted himself diligently and responsibly in representing the Class, understands his
24 fiduciary obligations, and actively participated in the prosecution of this case. (*Ibid.*) Plaintiff also
25 has no interests averse to the interests of the Class Members. (*Ibid.*)

26 ///

27 ///

28 ///

1 **4. Class Action Is Superior for the Fair and Efficient**
2 **Adjudication of this Controversy**

3 A class action is superior to other available means for the fair and efficient adjudication
4 of this controversy. Plaintiff contends the joinder of all Class Members is impractical and that
5 class treatment will permit many similarly situated persons to prosecute their common claims for
6 settlement purposes simultaneously in a single forum without the duplication of effort and
7 expense. Because some Class Members are current employees, Plaintiff believes the fear of
8 retaliation further supports the superiority of class-wide relief as this fear deters legal redress,
9 which is only further perpetuated by the presence of the arbitration agreements.

10 **e. The Settlement Is Fair, Reasonable, and Adequate**

11 In deciding to approve a proposed class action settlement under Code of Civil Procedure
12 section 382, the Court must find the proposed settlement is “fair, adequate and reasonable.” (*Dunk*
13 *v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.) A proposed class action settlement is
14 presumed fair under the following circumstances: (1) parties reached settlement after arm’s-
15 length negotiations; (2) investigation and discovery were sufficient to allow counsel and the court
16 to act intelligently; (3) counsel is experienced in similar litigation; and (4) percentage of objectors
17 is small. (*Id.* at p. 1802.) These elements are present.

18 **f. Notice to Class Members Complies with California Rules of Court, Rule 3.769(f)**

19 California Rules of Court, rule 3.769(f), provides:

20 If the court has certified the action as a class action, notice of the final approval hearing
21 must be given to class members in the manner specified by the court. The notice must
22 contain an explanation of the proposed settlement and procedures for class members to
23 follow in filing written objections to it and in arranging to appear at the settlement hearing
24 and state any objections to the proposed settlement.

25 The Class Notice meets all these requirements. The Class Notice advises the Class
26 Members of their right to participate in the Settlement; how and when to object to or request
27 exclusion from the Settlement; and the date, time, and location of the Final Approval Hearing.

28 ///

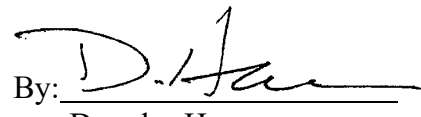
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1 **V. CONCLUSION**

2 Plaintiff submits the Settlement is in the best interests of the Class, as it is fair, adequate,
3 and reasonable. Under the applicable class action criteria and guidelines, the Settlement should
4 be preliminarily approved by the Court, the Class should be conditionally certified for purposes
5 of settlement only, and the Class Notice should be approved.

6
7 Dated: June 18, 2024

JUSTICE LAW CORPORATION

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10 By: 
11 Douglas Han
12 *Attorneys for Plaintiff*
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Make a Reservation

PHILLIPS vs PENUMBRA, INC.

Case Number: 23CV030740 Case Type: Civil Unlimited Category: Other Employment Complaint Case
Date Filed: 2023-04-07 Location: Rene C. Davidson Courthouse - Department 22

Reservation

Case Name: PHILLIPS vs PENUMBRA, INC.	Case Number: 23CV030740
Type: Motion re: (Preliminary Approval of Class Action Settlement)	Status: RESERVED
Filing Party: Delaine Phillips (Plaintiff)	Location: Rene C. Davidson Courthouse - Department 22
Date/Time: 08/20/2024 3:00 PM	Number of Motions: 1
Reservation ID: 289477146995	Confirmation Code: CR-AFBCZBRNZXCYBSEKT

Fees

Description	Fee	Qty	Amount
Motion re: (name extension)	0.00	1	0.00
Court Technology Fee	1.00	1	1.00
TOTAL			\$1.00

Payment

Amount: \$1.00	Type: Visa
Account Number: XXXX4359	Authorization: 07019G
Payment Date: n/a	

[Print Receipt](#)[+ Reserve Another Hearing](#)[View My Reservations](#)

**PROOF OF SERVICE
1013A(3) CCP**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 751 N. Fair Oaks Avenue, Suite 101, Pasadena, CA 91103 and my electronic service address is mluna@justicelawcorp.com

On June 18, 2024, I served the foregoing document described as

NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, CONDITIONAL CERTIFICATION, APPROVAL OF CLASS NOTICE, SETTING OF FINAL APPROVAL HEARING DATE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

for the following case: **Phillips v. Penumbra, Inc.**
LWDA/Court Case No.: **LWDA Case No.: CM-932949-23**
Court Case No.: 23CV030740
Alameda County Superior Court

on interested parties in this action by electronically submitting as follows:

State of California
Labor & Workforce Development Agency
800 Capitol Mall, MIC-55
Sacramento, California 95814

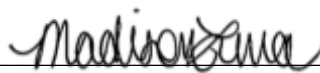
[X] BY ELECTRONIC SUBMISSION

Pursuant to California Senate Bill No. 836, I caused the documents described above to be electronically submitted by and through the procedure stated on the website of the State of California Labor and Workforce Development Agency.

[X] STATE

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 18, 2024, at Pasadena, California.



Madison Luna