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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF TEHAMA

NATALI ASCENCIO, an individual, on
behalf of herself and others similarly situated,

PLAINTIFF,

v.

KUMAR HOTELS, INC.; and DOES 1 thru
50, inclusive,

DEFENDANTS.

CASE NO. 23CI-000020

[Case Assigned for All Purposes to Dept. 5]

**NOTICE OF MOTION AND MOTION FOR
FINAL APPROVAL OF CLASS ACTION
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

*[Filed concurrently with Motion for Approval
of Attorneys' Fees and Costs; Declarations of
Liane Katzenstein Ly, Natali Ascencio and
Jonathan Paul of Xpand Legal Consulting,
Proposed Order and Judgment]*

Date: December 10, 2024

Time: 8:30 AM

Dept.: 5

Complaint Filed: January 24, 2023

FAC Filed: April 3, 2023

Trial Date: None Set

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 10, 2024 at 8:30 AM in Department 5 of the above-entitled court, Plaintiff Natali Ascencio (“Plaintiff”) will, and hereby does, move the Court for an Order of Final Approval of the Class Settlement in this case. Plaintiff moves the Court for an order:

1. Granting final approval of the settlement in the case pursuant to the Class Action and PAGA Settlement Agreement (“Agreement”), a copy of which is attached to the concurrently-filed Declaration of Liane Katzenstein Ly as Exhibit “1”;

2. Affirming Kingsley Szamet & Ly as Class Counsel;

3. Affirming Natali Ascencio as Class Representative and awarding an enhancement award of \$10,000.00;

4. Awarding Xpand Legal Consulting claims administration fees of \$10,000.00 for its services as Administrator; and,

5. Entering judgment.

This Motion will be made pursuant to Code of Civil Procedure section 382 and California Rule of Court, rule 3.769 on the grounds that the proposed Agreement is fair, adequate, reasonable, and in the best interest of the Settlement Class Members and the parties.

The Motion will be based on this Notice of Motion, the attached Memorandum of Points and Authorities, the Declarations of Liane Katzenstein Ly, Natali Ascencio, Jonathan Paul, all other papers and records on file in this action, and on such oral and documentary evidence as may be presented at the hearing on this Motion.

DATED: November 13, 2024

KINGSLEY SZAMET & LY

By: 

Liane Katzenstein Ly
Attorneys for Plaintiff NATALI ASCENCIO and the
Proposed Class

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Natali Ascencio (“Plaintiff”) submits this Motion for Final Approval of Class
4 Settlement and requests that the Court:

5 1. Grant final approval of the settlement in this case pursuant to the Class Action and
6 PAGA Settlement Agreement (“Agreement”), a copy of which is attached to the concurrently-filed
7 Declaration of Liane Katzenstein Ly as Exhibit “1”;

8 2. Award attorneys’ fees and costs as detailed in the concurrently-filed Motion for
9 Attorneys’ Fees and Costs;

10 3. Award Xpand Legal Consulting claims administration fees of \$10,000.00 for its
11 services as Administrator;

12 4. Affirm named Plaintiff Natali Ascencio as Class Representative and award a
13 cumulative Class Representative payment of \$10,000.00; and

14 5. Enter judgment.

15 **II. FACTUAL BACKGROUND**

16 **A. Litigation Overview and Procedural History**

17 On January 24, 2023, Plaintiff NATALI ASCENCIO filed a Class Action Complaint
18 seeking recovery for (1) failure to pay wages and/or overtime under Labor Code sections 510,
19 1194, and 1199; (2) failure to provide meal breaks pursuant to Labor Code sections 226.7 and 512;
20 (3) failure to provide rest breaks pursuant to Labor Code section 226.7; (4) failure to issue accurate
21 itemized wage statements pursuant to Labor Code section 226(a); (5) penalties under Labor Code
22 section 203; and (6) violation of Business & Professions Code section 17200. (Declaration of Liane
23 Katzenstein Ly (Ly Decl.) ¶5.) Also on January 24, 2023, Plaintiff sent a notice letter, pursuant
24 to Labor Code section 2699 (“PAGA”), to the Labor Workforce Development Agency (“LWDA”)
25 regarding her intent to seek civil penalties for the same Labor Code violations above, under Labor
26 Code section 2699, et seq. (Ly Decl. ¶6.)

27 On April 3, 2023, Plaintiff filed a First Amended Class and Representative Action
28 Complaint adding an additional cause of action for penalties pursuant to Labor Code § 2699, et

seq., the Private Attorneys General Act (“PAGA”) based on the underlying Labor Code violations already pled. (Hereafter, the “Action”.) (Ly Decl. ¶7.)

Plaintiff brings the Class Action on behalf of a Proposed Class defined as:

“All non-exempt employees who are employed or have been employed by Kumar Hotels, Inc., in the State of California who worked one or more pay periods since four (4) years prior to the filing of this action to the present plus any additional time during which the statutes of limitation for the causes of action herein were tolled pursuant to Emergency Rule 9 of the California Rules of Court, the ‘Emergency Rules Related to COVID-19’. (“Proposed Class”) Plaintiff brings the representative action on behalf of herself and a group of aggrieved employees defined as: “All non-exempt employees who are employed or have been employed by Kumar Hotels, Inc., in the State of California who worked one or may pay periods since one (1) year prior to the date of this letter and continuing to the present.” (“aggrieved employees”)

B. The Discovery Process

The Parties have started to engage in formal discovery but have focused their efforts on resolving this case through early mediation. Plaintiff served her first set of Special Interrogatories and Requests for Production of Documents on July 12, 2023, and Defendant responded to this discovery on September 7, 2023. Defendant produced time and pay data as well as employee files in responding to discovery. (Ly Decl. ¶8.)

Defendant denies any liability or wrongdoing of any kind associated with the claims alleged in the Action, disputes the damages and penalties claimed by Plaintiff, and further contends that, for any purpose other than settlement, Plaintiff’s claims are not appropriate for class or representative action treatment. (Ly Decl. ¶9.)

Based on their own independent investigation and evaluation, Class Counsel is of the opinion that the Agreement with Defendant is fair, reasonable and adequate, and in the best interest of the settlement classes in light of all known facts and circumstances, including the risk of significant delay, defenses asserted by Defendant, uncertainties regarding a class and representative action trial on the merits, and numerous potential appellate issues. (Ly Decl. ¶10.) Accordingly, the Parties desire to fully, finally, and forever settle, compromise and discharge all

disputes and claims arising from or relating to the Action on the terms set forth here. (*Id.*)

C. Preliminary Approval

On June 4, 2024, the Court issued an Order preliminarily approving the settlement in this case, approving the proposed Class Notice, ordering that the Administrator send notice to the Class, and setting a date for the Final Approval and Fairness Hearing. (Ly Decl. ¶11.)

III. THE PRELIMINARILY APPROVED SETTLEMENT

A. The Settlement Class

For purposes of Agreement, the settlement class is defined as: “all non-exempt employees who are employed or have been employed by Kumar Hotels, Inc., in the State of California from January 24, 2019 to March 7, 2024.” (“Settlement Class Members” or “Class”.) (Ly Decl. ¶12; Agreement, Ex. 1 at §1, ¶1.5.)

The Class Period is January 24, 2019 to March 7, 2024. (Ly Decl. ¶13; Ex. 1 at § 1, ¶1.24.) As of March 7, 2024 (the date of mediation), and based on documents and other information produced by Defendant, there are approximately 70 Settlement Class Members. (Ly Decl. ¶14; Ex. 1 at § 4, ¶4.1.)

The final Class contained 67 individuals. (Paul Decl. ¶12.)

B. Aggrieved Employees

For purposes of Agreement, the Aggrieved Employees are defined as: “All non-exempt employees who are employed or have been employed by Kumar Hotels, Inc., in the State of California who worked one or more pay periods since January 24, 2022 and March 7, 2024.” (“Aggrieved Employees”.) (Ly Decl. ¶15; Agreement, Ex. 1 at §1, ¶1.4.)

The PAGA Period is January 24, 2023 to March 7, 2024. (Ly Decl. ¶16; Ex. 1 at § 1, ¶1.31.) As of March 7, 2024 and based on documents and other information produced by Defendant, there are approximately 34 Aggrieved Employees. (Ly Decl. ¶17; Ex. 1 at § 4, ¶4.1.)

C. Gross Settlement Amount

As detailed fully in the Agreement, the Settlement provides for Defendant to pay a Gross Settlement Amount of \$125,000.00, which includes the sum of the Individual Class Payments,

the Class Representative service award, the Class Counsel Award, PAGA Payment, and the Settlement Administration Costs. (Ly Decl. ¶18; Ex. 1 at § 3, ¶3.1.)

Plaintiff now requests final approval of the allocation of the Gross Settlement Amount to determine the Net Settlement Amount for distribution to the Class as follows:

Gross Settlement Amount:	\$	125,000.00
Less Class Representative Enhancement:	\$	10,000.00
Less Class Counsel's Fees (1/3):	\$	41,666.67
Less Class Counsel's Costs:	\$	13,076.75 ¹
Less Administrator Costs:	\$	10,000.00
Less PAGA Payment:	\$	5,000.00
		<i>(\$3,750.00 to the LWDA; \$1,250.00 to remain in the Net Settlement Amount)</i>
Less Administrator Costs:	\$	<u>10,000.00</u>
Net Settlement Amount:	\$	41,506.58

D. Individual Settlement Payments

The Individual Class Payment amount of each Participating Class Member is an individualized amount that is based on the Participating Class Member's pro rata share of the Net Settlement Amount calculated according to the number of Workweeks worked during the Class Period. (Ex. 1 at § 1, ¶1.23; see also Ex. A to the Agreement [Class Notice].) Specifically, Individual Class Payments will be paid from the Net Settlement Amount and shall be paid pursuant to the settlement formula as follows: (a) dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating Class Members during the Class Period and (b) multiplying the result by each Participating Class Member's Workweeks. (Ex. 1 at § 3, ¶3.2.4.)

One Third (1/3) of the Gross Settlement Amount to each Participating Class Member shall be deemed payment for settlement of claims for wages and will be subject to appropriate deductions and withholdings calculated and made by the Administrator. (Ex. 1 at § 3, ¶3.2.4.1.) Two Thirds (2/3) of the Gross Settlement Amount to each Participating Class Member shall be

¹ The Agreement provided for counsel to receive cost reimbursement up to \$15,000.00. However, counsel's final costs come to \$13,076.75, which includes the anticipated cost of \$600 for filing the instant motion. (Ly Decl. ¶18, Ex.6). The extra \$1923.25 will remain in the net settlement fund, causing the net distribution to the Class Members to be slightly higher than the \$39,583.33 contemplated in the settlement agreement (*Id.*, Ex. 1 §3, ¶3.2.2)

1 deemed payment for settlement of claims for penalties and interest and other non-wage payments
2 not subject to withholdings. (*Id.*)

3 The Individual PAGA Payment will be an equal payment to all Aggrieved Employees
4 based on the Aggrieved Employee's pro rata share of 25% of the PAGA Penalties calculated
5 according to the number of Workweeks worked during the PAGA Period. (See Ex. 1 at § 1, ¶1.24.)

6 Based on these calculations, the average potential recovery is \$655.42 per Settlement Class
7 Member. (Paul Decl. ¶13.)

8 E. Class Notice

9 The Court approved the proposed Class Notice and directed the mailing of the Notice by
10 first-class mail to Settlement Class Members in accordance with the proposed implementation
11 schedule. (Ly Decl. ¶19) The procedures for giving notice to the Settlement Class Members, as set
12 forth in the Agreement and Plaintiffs' Motion for Preliminary Approval and approved by the Court,
13 have been fully and properly carried out. (Paul Decl. ¶3.)

14 To date, Xpand Legal Consulting received five (5) requests to be excluded ("opt-outs")
15 from the proposed Agreement and zero (0) objections. (Paul Decl. ¶¶5-7.) The five requests for
16 exclusion were submitted by Flormaria German Lopez, Luisa Hernandez Ayala, Patricia Lerma,
17 Abril Ochoa Aceves, and Juana Sanchez. (Paul Decl. ¶5.)

18 F. Check Mailed Settlement – No Reversion

19 The Parties agreed to, and the Court preliminary approved, a checks-mailed settlement
20 without the possibility of reversion of settlement funds to Defendant. Under the Agreement, every
21 Settlement Class Member will receive a settlement check and Settlement Class Members do not
22 need to submit a claim in order to receive a settlement check. Any funds that remain uncashed
23 after the void date shall be turned over by the Administrator, with information for each Settlement
24 Class Member who failed to timely cash his/her settlement check, to the State of California
25 Controller's Office Unclaimed Property Fund. (Ex. 1 at § 4, ¶4.43.)

26 **IV. THE COURT SHOULD ORDER FINAL APPROVAL OF THE SETTLEMENT**

27 Pursuant to California Code of Civil Procedure § 1781(f), "a class action shall not be
28 dismissed or compromised without the approval of the court, and notice of the proposed dismissal

or compromise shall be given to all members of the Class in such manner as the court directs”
In deciding whether to grant final approval to a proposed class action settlement under Code of Civil Procedure § 382, the court’s overriding concern is whether the proposed settlement is “fair, adequate, and reasonable.” (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.)

A. The Settlement is Entitled to a Presumption of Fairness

“A presumption of fairness exists where: (1) the settlement is reached through arm’s 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, supra*, 48 Cal.App.4th at p. 1802.) The proposed Settlement in the present case meets all of the *Dunk* factors and is therefore entitled to a presumption of fairness.

As to the first *Dunk* factor, this settlement is the result of adversarial, non-collusive, and arm’s-length negotiations overseen by an experienced mediator. All settlement discussions were made by experienced and informed counsel, who believe that this settlement represents a favorable resolution for the Settlement Class Members. (Ly Decl. ¶20.) The settlement negotiations have been, at all times, adversarial and non-collusive, with the aid of a mediator, and no self-dealing or other type of misconduct by either side has taken place. (Ly Decl. ¶21.)

Second, the Parties engaged in formal and informal discovery that permitted Class Counsel to fairly evaluate the strength of the case and the risks associated with ongoing litigation. This included time and pay data as well as personnel files of Settlement Class Members. (Ly Decl. ¶22.) Receipt of appropriate discovery allowed Class Counsel to fairly evaluate the exposure and risks associated with each claim alleged in the lawsuit. (Ly Decl. ¶23.)

Third, Class Counsel have significant experience in cases of this type, including several years prosecuting wage, hour, and working condition violations. (Ly Decl. ¶24.) Class Counsel is thus qualified to evaluate the class claims and viability of the defenses. Class Counsel believes that the settlement is fair, reasonable, adequate, and in the best interests of the class and that the average recovery for each Settlement Class Member of \$665.42 is substantial, given the risks inherent in litigation and the defenses asserted. (Ly Decl. ¶25.)

Finally, the fourth *Dunk* factor considers the percentage of objectors. Here, there were five

(5) requests to be excluded and no objectors. (Paul Decl. ¶¶5-7.) As all of the *Dunk* factors are satisfied, this settlement is entitled to a presumption of fairness.

B. The Court Should Approve This Class Action Settlement Because it Satisfies Each of the *Kullar* Factors

The case of *Kullar v. Foot Locker Retail, Inc* (2008) 168 Cal.App.4th 116, 128, set forth several factors that the Court should analyze in determining whether to approve a class action settlement. These factors include: (1) the strength of plaintiff's case; (2) the risk, expense, complexity and likely duration of further litigation; (3) the risk of maintaining class action status through trial; (4) the amount offered in settlement; (5) the extent of discovery completed and stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement.

In *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal. App. 4th 399, 409, the court clarified that a *Kullar* showing does not require the parties to submit the outer reaches of maximum possible recovery without taking into account the actual risks of certification, decertification, dispositive motions, and trial, so long as there is a record which allows "an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation." *Munoz*, 186 Cal. App. 4th at 409.

The proposed settlement satisfies each of these factors. (Ly Decl. ¶26.) Class Counsel conducted extensive discovery before entering into meaningful settlement negotiations in this matter. (*Id* at Ly Decl. ¶¶7-9.) This discovery permitted Class Counsel to fairly evaluate the strength of the case and the risks associated with ongoing litigation. (Ly Decl. ¶27.) Class Counsel is experienced in handling wage and hour class actions and, after weighing all of the following factors, supports this Agreement. (Ly Decl. ¶28.)

1. The Strength of Plaintiffs' Case

a) The Risks Associated with the Wage Claims

Plaintiff, proposed class members, and aggrieved employees were forced to work without receiving compensation for all hours worked at proper overtime rates. Labor Code section 510(a) requires "[a]ny work in excess of eight hours in one workday and any work in excess of 40 hours

1 in any one workweek and the first eight hours worked on the seventh day of work in any one
2 workweek shall be compensated at the rate of no less than one and one-half times the regular rate
3 of pay for an employee.” Further, “[a]ny work in excess of 12 hours in one day shall be
4 compensated at the rate of no less than twice the regular rate of pay for an employee” and “any
5 work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate
6 of no less than twice the regular rate of pay of an employee.” (Lab. Code, § 510(a).) “Under state
7 and federal law, overtime compensation is based on an employee’s ‘regular rate’” of pay.
8 (*Huntington Memorial Hosp. v. Superior Court* (2005) 131 Cal.App.4th 893, 902.) In any pay
9 period where a non-exempt employee earns other includable compensation in addition to wages—
10 such as a non-discretionary bonus or a commission based on production or a formula—it must be
11 included into Plaintiff’s regular rate of pay.

12 Plaintiff and other employees often worked two shifts in one day (a double shift), but
13 Defendant did not pay overtime and double time for all hours worked in one day (i.e. those hours
14 in the second shift that were worked in the same day as the first shift). (Ly Decl. ¶29.) This resulted
15 in Plaintiff and employees regularly working in excess of eight hours in one workday and in excess
16 of 40 hours in one workweek and not being compensated at the appropriate overtime or double-
17 time rate for all hours worked. Additionally, Defendant failed to pay Plaintiff and employees for
18 overtime or double time for work on the seventh day. (Ly Decl. ¶30.)

19 Defendant argued that the employees did not work double shifts and the records reflect the
20 accurate hours worked. (Ly Decl. ¶31.)

21 b) The Risks Associated with the Meal Break Claim

22 Under California Labor Code section 512 and IWC Wage Order No. 5, no employer shall
23 employ any person for a work period of more than five hours without providing a meal period of
24 not less than thirty minutes. The first meal period must be permitted to commence no later than
25 after five hours of work, or the start of the sixth hour of work (5.0 hours on the clock). (*Brinker*
26 *Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1049.) The second meal period must be
27 permitted to commence no later than after ten hours of work, or the start of the eleventh hour of
28 work (10.0 hours on the clock). (*Ibid.*) The California Supreme Court succinctly described Section

1 512’s mandate: “Employers must afford employees uninterrupted half-hour periods in which they
2 are relieved of any duty or employer control and are free to come and go as they please.” (*Brinker*
3 *Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1037.)

4 It is well settled that if an employer fails to maintain a uniform policy that authorizes and
5 permits the meal periods or rest breaks called for under the law (as specified in the applicable
6 Wage Order), “it has violated the wage order and is liable.” (*See Brinker*, 53 Cal.4th at p. 1033.)
7 Following *Brinker*, California courts have confirmed that liability for meal and rest period
8 violations arises when an employer adopts a uniform policy that fails to comply with the Labor
9 Code. (*See Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220, 235, [“In
10 *Faulkinbury I*, we concluded that even if [defendant]’s on-duty meal break policy was unlawful,
11 [defendant] would be liable only when it actually failed to provide a required off-duty meal break.
12 *Brinker* leads us now to conclude [defendant] would be liable upon a determination that
13 [defendant]’s uniform on-duty meal break policy was unlawful.” (emphasis added)]; accord
14 *Bradley v. Networkers International LLC* (2012) 211 Cal.App.4th 1129; *Benton v. Telecom*
15 *Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 725–726 [finding that the employer would
16 become liable upon a showing that it failed to maintain a policy authorizing required breaks, which
17 does not require an individual technician to provide he or she actually missed breaks as a result of
18 the employer’s policies. Rather, “the Wage Order . . . imposes an affirmative obligation on every
19 employer to authorize and provide legally-required meal and rest breaks; if it fails to do so, it has
20 violated the law and is liable.”].)

21 Moreover, employers have an obligation to both to provide meal breaks and to record
22 having done so. (IWC Wage Order 5-2001(7)(a)(3) [requiring employer to keep time records
23 showing when the employee begins and ends each work period and meal period.].) If the employer
24 fails to properly record a valid meal period, it is presumed that no meal period was provided. (*See*
25 *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, 76 [There is a rebuttable presumption of
26 liability when the records “show noncompliant meal periods.”].)

27 Here, Plaintiff alleges that Defendant failed to maintain a policy informing Plaintiff, the
28 Proposed Class, and aggrieved employees of these rights. Plaintiff and the employees consistently

1 worked shifts over five (5) hours. (Ly Decl. ¶32.) As described above, Plaintiff alleges that
2 Defendant required Plaintiff and employees to stay at their position, offered no coverage to take
3 their breaks, and often interrupted any meal breaks employees were able to take. (Ly Decl. ¶33.)
4 Accordingly, Defendant failed to provide Plaintiff and the employees with proper uninterrupted
5 meal periods of not less than thirty (30) minutes before the fifth hour of work and before the tenth
6 hour of work during the relevant time period all in violation of California labor laws, regulations,
7 and Industrial Welfare Commission Wage Orders. (Ly Decl. ¶34.)

8 Defendant raised a defense that Plaintiff signed an on-duty meal period waiver. Wage
9 Order 5, § (11)(A) states:

10 Unless the employee is relieved of all duty during a 30 minute meal period, the
11 meal period shall be considered an "on duty" meal period and counted as time
12 worked. An "on duty" meal period shall be permitted only when the nature of the
13 work prevents an employee from being relieved of all duty and when by written
14 agreement between the parties an on-the-job paid meal period is agreed to. The
15 written agreement shall state that the employee may, in writing, revoke the
16 agreement at any time.

17 However, this Plaintiff alleges that these waivers are invalid, because they are not signed
18 by the employer, the language does not comply with the Wage Order, the “nature of the work” did
19 not prevent Plaintiff from being relieved of all duty every shift.

17 c) The Risks Associated with the Rest Break Claim

18 Labor Code section 226.7, subdivision (c), requires an employer to pay an additional hour
19 of compensation for each workday the employer fails to provide a rest period according to law.
20 Employees are entitled to a paid ten (10) minute rest break for every four (4) hours worked, or
21 major fraction thereof. (Cal. Code Regs., tit. 8, § 11050, subd. 12(A).)

22 The California Supreme Court has held: “Employees are entitled to 10 minutes’ rest for
23 shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours
24 up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours and so on.” (*Brinker*
25 *Rest. Corp v. Superior Court*, supra, 53 Cal.4th at 1029.) The Court has also clarified what steps
26 an employer must take to make rest breaks available to its employees:

27 An employer is required to authorize and permit the amount of rest break time
28 called for under the wage order for its industry. If it does not—if, for example, it
adopts a uniform policy authorizing and permitting only one rest break for
employees working a seven-hour shift when two are required—it has violated the

1 wage order and is liable. No issue of waiver ever arises for a rest break that was
2 required by law but never authorized; if a break is not authorized, an employee has
3 no opportunity to decline to take it.

4 (*Brinker Rest. Corp. v. Superior Court*, supra, 53 Cal.4th at 1033 (emphasis added).)

5 Moreover, Plaintiff alleges that Defendant’s Meal Time Waiver also improperly waives
6 rest periods. (Ly Decl. ¶35.) A rest break is un-waivable. There is no “on-duty” rest break because
7 unlike on-duty meal breaks “when forced to take on-duty rest periods, “an employee essentially
8 performs ... ‘free’ work, i.e., the employee receives the same amount of compensation for working
9 through the rest periods that the employee would have received had he or she been permitted to
10 take [off-duty] rest periods.” (*Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 266,
11 as modified on denial of reh'g (Mar. 15, 2017); *Murphy v. Kenneth Cole Productions, Inc.* (2007)
12 40 Cal.4th 1094, 1104 [In an eight-hour work day, being denied the two paid rest breaks in a day
13 is “essentially perform[ing] 20 minutes of ‘free’ work.”].) The waiver is invalid and all rest breaks
14 were noncompliant.

15 Defendant alleged that employees took their rest periods. (Ly Decl. ¶36.)

16 d) The Risks Associated with the Failure to Provide Accurate
17 Itemized Wage Statements Claim

18 California Labor Code §226(a) requires that every employer shall, semimonthly or at the
19 time of each payment of wages, furnish each of his or her employees, an accurate itemized
20 statement in writing showing, in relevant part, the total hours worked by the employee and all
21 applicable hourly rates in effect during the pay period and the corresponding number of hours
22 worked at each hourly rate by the employee. (Labor Code § 226(a)(2) and (9).) Such itemized
23 wage statements must list premium pay earned for unlawful breaks. (*See Naranjo v. Spectrum*
24 *Security Services, Inc.* (2022) 13 Cal.5th 93, 121 [holding “that an employer’s obligation under
25 Labor Code section 226 to report wages earned includes an obligation to report premium pay for
26 missed breaks.”].)

27 As a result of the wages and overtime and meal and rest break claims alleged above,
28 Defendant engaged in a practice of failing to provide Plaintiff, proposed class members, and all
aggrieved employees accurate itemized wage statements listing accurate total hours worked, all

1 applicable hourly rates in effect during the pay period and the corresponding number of hours
2 worked at each hourly rate, and premium pay, in violation of Labor Code section 226(a). (Ly Decl.
3 ¶37.) Defendant is liable for fifty dollars for the initial violation and one hundred dollars for each
4 violation in a subsequent pay period per proposed class member, not exceeding an aggregate
5 penalty of four thousand dollars.

6 This is a derivative claim, and as such, if Plaintiff did not succeed on the underlying claims,
7 this claim would fail as well.

8 e) The Risks Associated with the Failure to Provide All Wages at the
9 Time of Termination

10 Under Labor Code section 203, if an employer fails to provide wages at the time of an
11 employee's termination or within seventy-two (72) hours of resignation, then the employee's
12 wages shall continue as a penalty for up to thirty (30) days. (Labor Code § 203.) Section 203
13 reflects a public policy that favors the full and prompt payment of earned wages. (*See, e.g.,*
14 *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7; *Mamika v. Barca* (1998) 68
15 Cal.App.4th 487, 492.)

16 Here, Plaintiff and numerous Proposed Class Members and aggrieved employees are no
17 longer employed by Defendant. (Ly Decl. ¶38.) Plaintiff alleges that Defendant failed to pay all
18 wages owed and due upon their termination and/or resignation. Defendant's actions were willful,
19 as they have intentionally failed or refused to perform an act which was required to be done. (*See*
20 *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1201.; Ly Decl. ¶39.) "The failure to
21 pay is willful if the employer 'knows what [it] is doing [and] intends to do what [it] is doing', and
22 does not also require proof that the employer acted with "a deliberate evil purpose to defraud
23 work[ers] of wages which the employer knows to be due.'" (*Diaz v. Grill Concepts Services, Inc.*
24 (2018) 23 Cal.App.5th 859, 868.) Defendant was fully aware of its payment policies and practices
25 and intended to carry out said policies and practices. Therefore, Defendant is liable for damages.

26 Defendant contests the underlying claims giving rise to these penalties and argued that any
27 alleged violation was not willful. (Ly Decl. ¶40.)

28 f) The Risks Associated with the PAGA Claim

California’s Private Attorneys General Act (“PAGA”), Labor Code § 2698, et seq., permits private litigants to recover civil penalties for violations of the Labor Code. PAGA provides that plaintiffs may recover previously established civil penalties (section 2699(a)) or, if none were established, plaintiffs may recover default penalties provided in section 2699(f) in the amount of \$100 per employee per pay period for the initial violation and \$200 for subsequent violations.

The Parties discounted the PAGA claim for multiple reasons. First, the aggrieved employees’ PAGA claims are derivative of all the foregoing class claims. Second, a court has discretion to award less than the maximum penalty. Labor Code § 2699(e)(2) (“a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory”). *See e.g., Carrington v. Starbucks Corporation* (2018) 30 Cal.App.5th 504, 241 Cal.Rptr.3d 647, 669 (affirming award of 10% of maximum PAGA penalty). Finally, the settlement Class is compensated for these violations in the proposed Agreement, and thus any PAGA recovery for these same violations would be duplicative. As such, the Agreement’s contemplated PAGA payment of \$5,000.00 is appropriate. (Ly Decl. ¶41.) *See Nordstrom Commissions Cases*, 186 Cal.App.4th 576, 589 (2010) (affirming settlement allocating \$0 of \$6.4 million settlement to PAGA penalties).

2. The Risk, Expense, Complexity, and Likely Duration of Further Litigation

There is significant expense associated with class certification. (Ly Decl. ¶42.) If the Court did certify a class, trial of a case involving 70 Class Members would require expensive expert witnesses, the accrual of litigation costs, and a significant time overlay by the parties. (Ly Decl. ¶43.) Moreover, given the complexity of the issues in this case it is likely that any outcome at trial would have resulted in a lengthy and costly appeal. (Ly Decl. ¶44.)

3. The Risk of Maintaining Class Action Status through Trial

This case has not been certified. (Ly Decl. ¶45.) While Plaintiff believes there is strong evidence to support certification of several possible subclasses, certification is always hard fought and subject to judicial discretion. Moreover, in class actions, decertification is always a possibility. (*Id.*) In attempting to certify a class, the parties would need to conduct multiple depositions,

including of the Class Representative and of several person(s) most knowledgeable regarding Defendant's policies. (*Id.*) There is a risk for both sides as to what these depositions will reveal and whether they will support class certification to the extent expected. (*Id.*)

4. The Amount Offered in Settlement

It was very difficult for the Parties to reach this Settlement of \$125,000.00. (Ly Decl. ¶46.) This Settlement is the result of adversarial, non-collusive, and arms-length negotiations. (Ly Decl. ¶47.) The Parties arrived at it after extensive investigation and discovery, careful evaluation of the law, risks, and all information substantiating the amount of penalties reasonably likely to be awarded to the class were the trier of fact to find Defendant liable, and the assistance of an experienced mediator, Russ J. Wunderli. (*Id.*)

a) Plaintiff's Assessment of Defendant's Maximum Exposure

Plaintiff assessed full value of the Minimum Wage/Overtime claim, without any discount, at approximately \$9,000.00. (Ly Decl. ¶48.) This calculation took into account the fact that half time and double time was not paid for shifts where employees worked at two locations. (Ly Decl. ¶49.) Plaintiff used an hourly average rate of \$14.19. (Ly Decl. ¶50.)

The full value of the Meal Period claim, without any discount, was approximately \$148,000.00. (Ly Decl. ¶51.) This amount is based on a meal period penalty for 10,474 shifts over five hours in length, and Plaintiff assumed that all meals taken were on duty meal periods. (Ly Decl. ¶52.) For the reasons above, Plaintiff determined that accepting a discount of the full amount was appropriate. (Ly Decl. ¶53.)

The full value of the Rest Period claim, without any discount, was approximately \$157,000.00. (Ly Decl. ¶54.) This amount is based on a 100% violation rate for rest periods on 11,052 shifts that were over 3.5 hours in length. (Ly Decl. ¶55.) For the reasons above, Plaintiff determined that accepting a discount of the full amount was appropriate. (Ly Decl. ¶56.)

Plaintiff valued the Wage Statement Claim, without discount, at \$55,800.00. (Ly Decl. ¶57.) Plaintiff used \$50.00/\$100.00 for each wage statement issued (pay period) for 575 pay periods with a \$4,000 cap. (Ly Decl. ¶58.) Due to the risk discussed above that 226(a) liability wouldn't attach under *Naranjo* and *Maldonado*, Plaintiff determined that a steep discount of this

claim was fair for settlement purposes. (Ly Decl. ¶59.)

Plaintiff valued the Waiting Time Claim at \$147,774.00, and this number is based on the penalty for all former employees. (Ly Decl. ¶60.) Considering the derivative nature of Labor Code §203 and the dispute over whether class members were owed any wages, Plaintiff determined that accepting a discount on this claim was appropriate. (Ly Decl. ¶61.)

Finally, Plaintiff calculated the value of the PAGA claim at \$111,200.00 for the aggrieved employees (using \$100 per pay period for 573 pay periods). (Ly Decl. ¶62.) The main risk taken into account with PAGA is the discretionary nature of the penalty award. (Ly Decl. ¶63.) A judge can award the statutory maximum of \$100 for the initial violation and \$200 thereafter or – in theory – one cent per wage statement. (Ly Decl. ¶64.) While there is a dearth of available authority, in Plaintiff's view, were she to succeed on any of the underlying Labor Code violations, it is not likely that a Judge would also award a large amount of penalties of top of any damages recovered. (Ly Decl. ¶65.)

Per Plaintiff's assessment, the maximum potential value of all of Plaintiff's and the Settlement Class Members' claims was approximately \$517,00.00 and PAGA penalties of \$111,200.00. (Ly Decl. ¶66.) The value of the underlying claims, without penalties, is \$314,000.00 and that includes a 100% violation rate for meal and rest periods. However, as a result of the forgoing risks on the merits, Class Counsel believes the Gross Settlement Amount of \$125,000.00 is fair and reasonable. (Ly Decl. ¶67.)

5. The Extent of Discovery Completed and Stage of the proceedings

As outlined above, Class Counsel conducted a thorough investigation into the facts of the claims alleged. (Ly Decl. ¶68.) The agreement to settle did not occur until Class Counsel exchanged and possessed sufficient information to make an informed judgement regarding the likelihood of success on the merits and the results that could be obtained through further litigation. (*Id.*)

6. The Experience and Views of Counsel

Kingsley Szamet & Ly is very experienced in prosecuting employment litigation, and the firm has focused its practice since 2000 on wage, hour, and working condition violations. (Ly

Decl. ¶¶69-71.) The firm is well versed in class action litigation and has diligently and aggressively pursued this action. (*Ibid.*) Kingsley Szamet & Ly currently serves as Class Counsel for dozens of pending class action lawsuits in Northern, Central, and Southern California. (*Ibid.*) A list of representative cases that Kingsley Szamet & Ly has handled is included in the accompanying declaration of Liane Katzenstein Ly. (Ly Decl. ¶¶69-70.) After factoring in the risks explained above, Class Counsel believes that the proposed settlement is fair and reasonable. (Ly Decl. ¶71.)

7. The Presence of a Governmental Participant

There is no governmental participant in this action. (Ly Decl. ¶72.)

8. The Proposed Plan of Allocation Is Fair and Reasonable

Plans of allocation are subject to the same standard of review as class action settlements; they must be “fair, adequate and reasonable.” (See, e.g., *Officers for Justice v. Civil Service Comm’n* (9th Cir. 1982) 688 F.2d 615, 624–625, 629–630.) Here, the proposed plan of allocation compensates Settlement Class Members pro rata based on the number of workweeks worked by the Settlement Class Member during the Class Period. The lump sum payment to each member of the Settlement Class not excluding him/ herself will be determined by dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating Class Members, and (b) multiplying the result by the number of Workweeks worked by each individual Participating Class Member. This allocation distributes Settlement funds proportionally to each class member’s damages, and should therefore be approved as fair, adequate, and reasonable. (Ly Decl. ¶73; Ex. 1 at § 4, ¶1.)

9. The Reaction of the Class Members to the Proposed Settlement

To date, there are five (5) requests to be excluded from the proposed Agreement and zero (0) objections. (Paul Decl. ¶¶5-7.) Such indicates that the reaction of Settlement Class Members on the whole is positive and weighs in favor of approval.

V. ENHANCEMENT TO PLAINTIFF

Plaintiff’s Counsel request an enhancement of \$10,000.00 to the Class Representative Natali Ascencio for her work on behalf of the Class. (Ly Decl. ¶111.) “Courts routinely approve incentive awards to compensate named plaintiffs for the services they provide and the risks they

1 incurred during the course of the class action litigation.” *Ingram v. The Coca-Cola Company*, 200
2 F.R.D. 685, 694 (N.D. Ga 2001) (internal quotations and citations omitted); *see also Van Vranken*
3 *v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995). In *Coca-Cola*, the Court
4 approved service awards of \$300,000 to each named plaintiff in recognition of the services they
5 provided to the class by responding to discovery, participating in the mediation process, and taking
6 the risk of stepping forward on behalf of the class. *Coca-Cola*, 200 F.R.D. at 694; *see also, e.g.*
7 *Van Vranken*, 901 F. Supp. at 299 (approving \$50,000 participation award to plaintiffs); *Glass v.*
8 *UBS Financial Services, Inc.*, Case No. C-06-4068 MMC, 2007 WL 227862, at *17 (N.D. Cal.
9 Jan. 26, 2007) (approving \$25,00 enhancement to each named plaintiff).

10 Ms. Ascensio is an adequate class representative because she has diligently, adequately
11 and fairly represented the Class and has not placed her interests above any member of the Class.
12 (*see* Declaration of Natali Ascensio (“Ascensio Decl.”) ¶¶3-11.)

13 Here, Class Counsel requests an enhancement for Ms. Ascensio’s valiant effort and time
14 expended in this matter. The time spent by Natali Ascensio is significant and includes researching
15 and retaining competent counsel; providing information to Class Counsel regarding the nature of
16 the work at Defendant; compiling relevant documents; working closely with Class Counsel to
17 develop the theories of liability and marshal relevant evidence; regularly discussing the status of
18 the case with Class Counsel; discussing the case via telephone with many Settlement Class
19 Members; attending a full-day of mediation; and responding promptly to Class Counsel’s
20 communications regarding settlement. (Ly Decl. ¶112; Ascensio Decl. ¶¶6-9.) As set forth in the
21 Agreement, Plaintiff will also be entering into a general release of liability pursuant to Civil Code
22 Section 1542. (Ly Decl. ¶113; Ex. 1 at § 6, ¶6.1.1.)

23 Class Counsel considers this to be a fair and reasonable enhancement. (Ly Decl. ¶114.)
24 The enhancement takes into consideration the time, effort, and expense incurred by Ms. Ascensio
25 in coming forward to litigate this matter on behalf of all Settlement Class Members. (Ly Decl.
26 ¶115.) Additionally, the Class Representative was at risk for paying for Defendant’s legal fees
27 and costs in the event that Defendant prevailed at trial. (Ly Decl. ¶116.)

28 **VI. SUBMISSION TO THE LABOR AND WORKFORCE DEVELOPMENT AGENCY**

As indicated on the Proof of Service, Plaintiff's Motion for Final Approval of Class Action Settlement ("Motion") will be concurrently uploaded to the Labor and Workforce Development Agency's ("LWDA") website on the date this Motion is filed as required by statute. Proof of submission of Plaintiff's Motion, all related documents, and copy of the email from the LWDA confirming receipt is attached to the Declaration of Liane Katzenstein Ly as Exhibit "6." (Ly Decl. ¶121.)

VII. CONCLUSION

Plaintiff respectfully submits that the proposed Agreement is fair, adequate, reasonable, and in the best interest of the Settlement Class Members. Therefore, Plaintiff respectfully requests that the Court (1) grant Final Approval of the Agreement and all of its terms; (2) award attorneys' fees and costs in the amount detailed in the concurrently filed Motion for Attorneys' Fees and Costs; (3) award Xpand Legal Consulting claims administration fees of \$10,000.00; and (4) award the Class Representative an enhancement of \$10,000.00; and (5) enter judgment.

DATED: November 13, 2024

KINGSLEY SZAMET & LY

By: _____

Liane Katzenstein Ly
Attorneys for Plaintiff NATALI ASCENCIO and the
proposed class

(PROOF OF SERVICE)
[CCP 1013(a)(3)]
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 years and not a party to the within action. My business address is 16133 Ventura Boulevard, Suite 1200, Encino, California 91436.

On November 13, 2024, I served all interested parties in this action the following documents described as: **NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

GRIFFITH & HORN, LLP
David R. Griffith
David@davidgriffithlaw.com
Steven Chamberlin
steven@griffithandhorn.com
15360 Humboldt Road, Suite 3
Chico, CA 95928

[XX] BY ELECTRONIC SERVICE: I caused a true and correct copy thereof to be electronically filed using the Labor and Workforce Development Agency Electronic Filing ("EF") System (<https://dir.tfaforms.net/315>) and service was completed by electronic means by transmittal of the documents referenced herein on the EF System.

[XX] BY ELECTRONIC MAIL TRANSMISSION: I caused the document to be send to the persons at the e-mail address(es) listed on the attached service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. A pdf copy of which was sent via email to the below email address(es).

[XX] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 13, 2024, at Woodland Hills, California.



Michelle Tanzer