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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

JOHNATHAN SATELE, an individual, on
behalf of himself and others similarly
situated,

PLAINTIFF,

v.

KSARIA SERVICE CORPORATION; and
DOES 1 thru 50, inclusive,

DEFENDANTS.

CASE NO. 37-2023-00002198-CU-OE-CTL

[Case Assigned for All Purposes to Hon.
Gregory W. Pollack in Dept. C-71]

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

*[Filed concurrently with Declaration of Liane
Katzenstein Ly and Proposed Order]*

Date: August 16, 2024

Time: 9:30 A.M.

Dept.: C-71

Reservation ID: 3093915

Complaint Filed: January 17, 2023

FAC Filed: March 24, 2023

Trial Date: None Set

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 16, 2024 at 9:30 A.M. in Department C-71 of the above-entitled court, Plaintiff JOHNATHAN SATELE will move the Court for an Order of Preliminary Approval of the Class Action and PAGA Settlement Agreement (“Agreement”), a copy of which is filed concurrently herewith.

The Motion will be made on the grounds that the proposed Agreement is fair, adequate, reasonable, and in the best interest of the Class and the Parties.

The Motion will be based on this Notice of Motion, the attached Memorandum of Points and Authorities, the Declaration of Liane Katzenstein Ly, the Agreement and Release, 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: February 26, 2024

KINGSLEY & KINGSLEY, APC

By: 

Liane Katzenstein Ly
Attorneys for Plaintiff JOHNATHAN SATELE and
the proposed class

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff JOHNATHAN SATELE (“Plaintiff”) submits this Memorandum of Points and
4 Authorities in support of Plaintiff’s Motion for Preliminary Approval of the Class Action and PAGA
5 Settlement Agreement reached between Plaintiff and Defendant KSARIA Service Corporation
6 (“Defendant”) (Plaintiff and Defendant together, the “Parties”).

7 By this Motion, Plaintiff requests that the Court:

8 (1) Grant preliminary approval of the fully-executed Class Action and PAGA Settlement
9 Agreement (“Settlement” or “Agreement”). A true and correct copy of the Agreement is attached
10 hereto as Exhibit “1”;

11 (2) Approve the proposed Notice to Class Members, a copy of which is attached to the
12 Agreement as Exhibit “A,” and direct that the Notice be sent to Class Members in the manner set forth
13 in the Agreement;

14 (3) Schedule a hearing on final approval of the proposed Settlement and Plaintiff’s
15 counsel’s application for attorney’s fees and litigation costs (“Final Approval Hearing”).

16 **II. FACTUAL BACKGROUND**

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

18 On January 17, 2023, Plaintiff filed a Class Action Complaint seeking recovery for: (1) failure
19 to reimburse expenses pursuant to Labor Code §2802 and (2) violation of Business & Professions
20 Code §17200. (Declaration of Liane Katzenstein Ly (“Ly Decl.”) ¶4.) Also on January 17, 2023,
21 Plaintiff sent a notice letter, pursuant to Labor Code §2699, et seq. (“PAGA”), to the Labor Workforce
22 Development Agency (“LWDA”) regarding his intent to seek civil penalties for the violations above,
23 under PAGA. (Ly Decl. ¶5.) Plaintiff also included a claim for a violation of Labor Code §432.5,
24 arguing that the non-solicitation agreement signed by the aggrieved employees was illegal. (*Id.*)

25 On March 24, 2023, Plaintiff filed an amended Complaint adding an additional cause of action
26 for penalties pursuant to PAGA. (Hereafter, the “Action”.) (Ly Decl. ¶6.)

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1 B. The Discovery Process

2 The Parties have yet to engage in formal discovery, instead focusing their efforts on resolving
3 this case through early mediation. Defendant informally produced the necessary discovery for
4 mediation. (Ly Decl. ¶7.)

5 Defendant denies any liability or wrongdoing of any kind associated with the claims alleged,
6 disputes the damages and penalties claimed by Plaintiff, and further contends that, for any purpose
7 other than settlement, Plaintiff's claims are not appropriate for class or representative action treatment.
8 (Ly Decl. ¶8.) Defendant contends, among other things, that, at all times, it has complied with the
9 California Labor Code, and the Industrial Wage Commission Orders. (*Id.*)

10 Based on their own independent investigation and evaluation, Class Counsel is of the opinion
11 that the Agreement with Defendant is fair, reasonable and adequate, and in the best interest of the
12 settlement classes in light of all known facts and circumstances, including the risk of significant delay,
13 defenses asserted by Defendant, uncertainties regarding a class and representative action trial on the
14 merits, and numerous potential appellate issues. (Ly Decl. ¶9.) Although Defendant denies any
15 liability, Defendant is agreeing to this Agreement solely to avoid the cost of litigation. (*Id.*)
16 Accordingly, the Parties and their counsel desire to fully, finally, and forever settle, compromise and
17 discharge all disputes and claims arising from or relating to the Action on the terms set forth here. (*Id.*)

18 **III. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED FOR**
19 **SETTLEMENT PURPOSES**

20 Originally creatures of equity, class actions have been statutorily embraced by the Legislature
21 whenever “the question [in a case] is one of a common or general interest, of many persons, or when
22 the parties are numerous, and it is impracticable to bring them all before the court” (Code Civ.
23 Proc. § 382; *see, e.g., Fireside Bank v. Sup. Court* (2007) 40 Cal.4th 1069, 1078.) They serve an
24 important function by “establishing a technique whereby the claims of many individuals can be
25 resolved at the same time” thereby “eliminat[ing] the possibility of repetitious litigation and
26 provid[ing] small claimants with a method of obtaining redress.” (*Richmond v. Dart Industries, Inc.*
27 (1981) 29 Cal.3d 462, 469.) Public policy supports the use of class actions to enforce wage and
28 overtime laws for the benefit of workers. (*See Sav-on Drug Stores, Inc. v. Sup. Court* (2004) 34 Cal.4th

319, 340.)

The certification question is “essentially a procedural one that does not ask whether an action is legally or factually meritorious.” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439–440.) A court ruling on a certification motion must determine “whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.” (*Collins v. Rocha* (1972) 7 Cal.3d 232, 238.)

The California Supreme Court has identified three certification requirements: (1) “the existence of an ascertainable and sufficiently numerous class”; (2) “a well-defined community of interest”; and, (3) “substantial benefits from certification that render proceeding as a class superior to the alternatives.” (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021.) The “community of interest” requirement includes three additional requirements: (1) common questions of law or fact predominant over individual questions; (2) the class representatives have claims or defenses typical of the class; and (3) the class representatives can adequately represent the class. (*Ibid*, citing *Fireside Bank*, *supra*, 40 Cal.4th at 1089.)

Class certification for settlement purposes is proper in this case as the proposed Settlement Class satisfies each of the requirements under Code of Civil Procedure § 382. Accordingly, this Court should certify the putative settlement class.

A. The Proposed Classes Are Ascertainable and Sufficiently Numerous

1. Ascertainability

Putative class members are deemed “ascertainable” when they may be “readily identified without unreasonable expense or time by reference to official records.” (*Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932.) In determining whether a class is ascertainable, a court scrutinizes the class definition, the size of the class and the means of identifying class members. (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.)

The proposed Class is ascertainable, because Defendant has agreed to provide a class list to the Administrator containing the Class Member’s information. (Ly Decl. ¶10; Ex. 1 at ¶1.8.)

///

1 2. Numerosity

2 There is no set number that is required as a matter of law to maintain a class action. (*See, e.g.,*
3 *Rose v. City of Hayward, supra*, 126 Cal.App.3d at p. 934.) Here, the proposed Class contains, based
4 upon information and belief, approximately 79 hourly non-exempt employees in the State of
5 California.

6 B. There Is a Well-Defined Community of Interest

7 1. There Are Predominant Questions of Law and Fact

8 In deciding whether questions of common or general interest predominate, a court must
9 determine whether “the issues which may be jointly tried, when compared with those requiring
10 separate adjudication, are so numerous or substantial that the maintenance of a class action would be
11 advantageous to the judicial process and to the litigants.” (*Collins v. Rocha* (1972) 7 Cal.3d 232, 238;
12 *accord, Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) As a general matter,
13 if the defendant’s liability can be determined by facts common to all members of the class, a class will
14 be certified even if the members must individually prove their damages.” (*Hicks v. Kaufman & Broad*
15 *Home Corp.* (2001) 89 Cal.App.4th 908, 916, 107; *accord, Knapp v. AT & T Wireless Services, Inc.*
16 (2011) 195 Cal.App.4th 932, 941.)

17 Here, Plaintiff argues that there are questions of law and fact common to the proposed Class
18 that predominate over any questions affecting only individual Class Members. (Ly Decl. ¶11.) These
19 common questions include:

- 20 1) Whether Defendant failed to reimburse business-related expenses;
21 2) Whether Defendant violated § 2699, et seq. for violations of Labor Code § 432.5 and
22 by engaging in the acts previously alleged.

23 (Ly Decl. ¶12.)

24 Plaintiff’s challenge to Defendant’s uniform policies and practices involves common factual
25 and legal issues that are amenable to class treatment. (Ly Decl. ¶13.) As the California Supreme Court
26 has emphasized, “[c]aims alleging that a uniform policy consistently applied to a group of employees
27 is in violation of the wage and hour laws are of the sort routinely, and properly, found suitable for
28 class treatment.” (*Brinker, supra*, 53 Cal.4th at 1033; *see also Bradley v. Networkers International,*
LLC (2012) 211 Cal.App.4th 1129, 1141-1146.) Moreover, a class of similarly situated employees

1 may be certified based on common questions of fact or law, even if each employee has to establish the
2 amount of damages. (*See Bell v. Farmers Ins. Exch.* (2004) 115 Cal.App.4th 715, 741; *Sav-On Drug*
3 *Stores, Inc. v. Superior Court*, *supra*, 34 Cal.4th at 340.)

4 Here, Plaintiff maintains that the proposed Class Members suffered the same injuries, in the
5 same manner: Class Members were not reimbursed for business-related expenses. (Ly Decl. ¶14.)
6 Plaintiff alleges that Class Members worked in the same capacity for the same employer and were
7 subject to the same employment policies and practices, the questions of fact and claims regarding the
8 status of these employees are the same for each member of the Class. Accordingly, for purposes of
9 settlement, the evidence reviewed by Class Counsel demonstrates that common cell phone policies
10 applied to the proposed Class Members and certification for settlement purposes is appropriate. (Ly
11 Decl. ¶15.)

12 2. The Class Representative Has Claims Typical of the Proposed Class

13 A putative class representative's claim must be "typical," but not necessarily identical, to the
14 claims of other class members. The test of typicality "is whether other members have the same or
15 similar injury, whether the action is based on conduct which is not unique to the Class Representatives,
16 and whether other class members have been injured by the same course of conduct." (*Seastrom v.*
17 *Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502.) Thus, it is sufficient that the representative is
18 similarly situated so that he or she will have the motive to litigate on behalf of all class members.
19 (*Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502.) It is not necessary that the class
20 representative have personally incurred all of the damages suffered by each of the other class members.
(*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 238.)

21 Plaintiff worked as an "hourly employee" for Defendant as a technician in the National City,
22 California location, earning \$22 per hour. (Ly Decl. ¶16.) Plaintiff alleges that he worked without
23 being reimbursed for costs associated with personal cell-phone usage. He also alleges that he
24 experienced derivative claims for unfair business competition (B&P Code §17200) and Labor Code
25 §2699, et seq. (Ly Decl. ¶17.) Plaintiff also contends that his claims are typical of those of the Class.
26 (Ly Decl. ¶18.)

27 ///

1 3. Plaintiff Contends That As The Class Representative He Has and Will Fairly
2 Represent the Interests of the Class Members

3 A putative class representative must show that he can adequately represent the class. (*Lockheed*
4 *Martin Corp. v. Superior Court* (2003) 29 Cal.App.4th 1096, 1104.) The representative, through
5 qualified counsel, must be capable of “vigorously and tenaciously” protecting the interests of the class
6 members. (*Simons v. Horowitz* (1984) 151 Cal.App.3d 834, 846.)

7 Plaintiff believes that he is capable of fairly representing and adequately protecting the interests
8 of the proposed Class Members. (Ly Decl. ¶19.) Plaintiff’s interests in this litigation are coextensive
9 with the interests of the proposed Class Members. The members of the proposed Class all worked for
10 Defendant during the relevant time period and incurred the same type of alleged damages with regard
11 to Defendant’s alleged violations of the law. (Ly Decl. ¶20.) Moreover, Plaintiff has agreed to serve
12 as Class Representative and has retained qualified Counsel who is experienced in prosecuting wage
13 and hour class actions. (Ly Decl. ¶21.) This demonstrates he commitment to bringing about the best
14 possible results for the benefit of the proposed Class. (Ly Decl. ¶22.) Plaintiff has provided his
15 Counsel with all necessary and pertinent information. (Ly Decl. ¶23.) He has been a very active
16 participant in the litigation including having frequent contact with Class Members, responding to
17 informal discovery, and working closely with Class Counsel to develop the theories of liability. (Ly
18 Decl. ¶24.) He also attended the full-day mediation in this matter and was informed of and involved
19 in all of the Settlement negotiations. Therefore, Plaintiff believes that he has and will continue to
20 adequately represent the proposed Class Members. (Ly Decl. ¶25.)

21 C. The Class Action Vehicle Is Superior to the Alternatives

22 “The ultimate question in every case of this type is whether . . . the issues which may be jointly
23 tried, when compared with those requiring separate adjudication, are so numerous or substantial that
24 the maintenance of a class action would be advantageous to the judicial process and to the litigants.”
25 (*Lockheed Martin, supra*, 29 Cal.App.4th at 1104–1105.) The California Supreme Court has directed
26 the courts to utilize the class action device to fashion “an effective and inclusive group remedy.”
27 (*Richmond v. Dart Indus., Inc.* (1981) 29 Cal.3d 462, 469.) Normally, in making its class certification
28 decision, the Court must determine that a class action would be superior to alternate means for a fair

1 and efficient adjudication. If the causes of action may be adjudicated in a single proceeding, thereby
2 saving time, reducing waste, and limiting duplication of effort, class certification is superior to
3 individual litigation. (*See, e.g., Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 816.)

4 Plaintiff maintains that class treatment would be the superior method of managing this case. A
5 class action is superior to individual litigation “when numerous parties suffer injury of insufficient
6 size to warrant individual action and when denial of class relief would result in unjust advantage to
7 the wrongdoer.” (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.) In this regard, the
8 superiority of class treatment is evident here because individual pursuit of class members’ claims may
9 not be economically viable. (Ly Decl. ¶26.) Plaintiff maintains that this economic reality would result
10 in a windfall for Defendant if this case were not certified. (Ly Decl. ¶27.)

11 **IV. THE PROPOSED SETTLEMENT**

12 A. The Settlement Class

13 For purposes of Agreement, the settlement class is defined as: “means all individuals who have
14 worked for Defendant in California as non-exempt employees during the Class Period, excluding those
15 individuals who have entered agreements releasing the claims alleged by Plaintiff.” (“Class”). (Ly
16 Decl. ¶28; Agreement, Ex. 1 at ¶1.5.) The Class Period is from January 17, 2019 through January 6,
17 2024. (Ly Decl. ¶29; Ex. 1 at ¶1.13.) As of September 27, 2023 (the date of mediation), and based on
18 documents and other information produced by Defendant, there are approximately 79 Class Members.
(Ly Decl. ¶30.)

19 B. The Aggrieved Employees

20 For purposes of Agreement, the Allegedly Aggrieved Employees are defined as: all individuals
21 who worked for Defendant in California as non-exempt employees during the PAGA Period.
22 (“Allegedly Aggrieved Employees”). (Ly Decl. ¶31; Agreement, Ex. 1 at ¶1.4.) The PAGA Period is
23 from January 17, 2022 to through January 6, 2024. (Ly Decl. ¶32; Ex. 1 at ¶1.32.) As of September
24 27, 2023 (the date of mediation), and based on documents and other information produced by
25 Defendant, there are approximately 55 aggrieved employees. (Ly Decl. ¶33.)

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C. Gross Settlement Amount

As detailed fully in the Agreement, the Settlement provides for Defendant to pay a Gross Settlement Amount of \$70,000.00, which includes the sum of the Individual Class Payments, the Class Representative service award, the Class Counsel Award (including fees and expenses), PAGA Payment (including Individual PAGA Payments and the LWDA PAGA Payment), and the Settlement Administration Costs. (Ly Decl. ¶34; Ex. 1 at ¶1.23.) The Net Settlement Amount is the Gross Settlement Amount, less Class Counsel Award (including fees and expenses), Class Representative Service Payment, PAGA Payment (including Individual PAGA Payments and the LWDA PAGA Payment), and Settlement Administration Costs. (Ly Decl. ¶35; Ex. 1 at ¶1.29.)

The Parties estimate the amount of the Net Settlement Amount as follows:

Gross Settlement Amount:	\$	70,000.00
Less Class Representative Enhancement:	\$	5,000.00
Less Class Counsel's Fees:	\$	23,333.33
Less Class Counsel's Costs:	\$	10,000.00
Less PAGA Payment:	\$	7,500.00
<i>(\$5,625.00 to the LWDA and \$1,875.00 to Allegedly Aggrieved Employees)</i>		
<u>Less Administrator Costs:</u>	<u>\$</u>	<u>10,000.00</u>
Anticipated Net Settlement Amount	\$	14,166.67

(Ex. 1 at ¶3.)

D. Individual Settlement Payments

The Individual Class Payment amount of each Participating Class Member is an individualized amount that is calculated according to the number of Class Workweeks worked during the Class Period. (Ex. 1 at ¶1.24; *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 Class Workweeks worked by all Participating Class Members during the Class Period and (b) multiplying the result by each Participating Class Member's Class Workweeks. (Ex. 1 at ¶3.2.4)

Each Participating Class Member's Individual Class Payment will be allocated to settlement of claims as ten percent (10%) for interest and ninety percent (90%) for restitution. (Ex. 1 at ¶ 3.2.4.1.) The Individual Class Payments are not subject to wage withholdings. (*Id.*) The Agreement provides for a specific and detailed dispute process regarding Individual Class Payments. (*See* Ex. 1 at ¶7.6.)

1 The Individual PAGA Payment will be an equal payment to all Allegedly Aggrieved
2 Employees calculated as follows: twenty-five percent (25%) of the PAGA Penalties (or \$1,875.00)
3 calculated according to the number of PAGA Pay Periods worked during the PAGA Period. (See Ex.
4 1 at ¶1.25.)

5 E. Process for Administering Settlement after Preliminary Approval

6 The detailed Notice Procedure established by the Agreement will efficiently and accurately
7 ensure that Notice is provided to the Class Members. (Ex. 1 at ¶7.4.) The Parties have agreed to use
8 a reputable third-party claims administrator, ILYM Group, Inc., to administer the Agreement. (Ex. 1
9 at ¶1.2.)

10 F. Process for Class Members to Respond to Class Notice

11 Class Members will have an opportunity to request exclusion from the Settlement Class (i.e.
12 opt out) and to object to the Settlement at the Final Approval Hearing. (Ex. 1 at ¶7.5.)

13 Class Members who do not opt out of the Settlement Class may object to the Agreement by
14 mailing written objections to the Administrator no later than sixty (60) calendar days after the mailing
15 of the Notice Packet. (Ex. 1 at ¶7.5; 7.7.) Class Member who timely and validly return a Request for
16 Exclusion from the Agreement shall have no right to object and shall be foreclosed from making any
17 objection to the Agreement. (*Ibid.*) The Administrator shall promptly provide any such objections to
18 Class Counsel and Defendant's Counsel, who in turn shall file them with the Court in connection with
19 the final approval motion. (*Ibid.*)

20 Any Class Member wishing to appear at the final approval hearing to object to the Agreement
21 shall expressly indicate this in his or her written objections. (*Ibid.*) The making of an objection to this
22 Agreement does not affect the Class Members' ability to return a valid Claim Form and become a
23 Qualified Claimant if the Agreement is finally approved. (*Ibid.*)

24 G. The Release

25 Plaintiff's release is defined as: "a) all claims that were, or reasonably could have been, alleged
26 based on the facts alleged in the Action and facts alleged in Plaintiff's PAGA Notice; (b) all claims
27 that were, or reasonably could have been, ascertained during the Action, and (c) all claims released
28 pursuant to Paragraphs 5.2 and 5.3 below ("Plaintiff's Release"). Plaintiff's Release does not extend

1 to any claims or actions to enforce this Agreement, or to any claims for vested benefits, unemployment
2 benefits, disability benefits, social security benefits, workers' compensation benefits that arose at any
3 time, or based on occurrences after this Agreement is executed by Plaintiff. Plaintiff acknowledges
4 that Plaintiff may discover facts or law different from, or in addition to, the facts or law that Plaintiff
5 now knows or believes to be true but agrees, nonetheless, that Plaintiff's Release shall be and remain
6 effective in all respects, notwithstanding such different or additional facts or Plaintiff's discovery of
7 them. (Ex. 1 at ¶5.1.)

8 The Release by Participating Class Members is defined as: "All Participating Class Members,
9 on behalf of themselves and their respective former and present representatives, agents, attorneys,
10 heirs, administrators, successors, and assigns, release and discharge Released Parties from all claims,
11 demands, rights, liabilities and causes of action that have been pled in the Complaints in the Action as
12 well as all claims, demands, rights, liabilities and causes of action that could have been alleged based
13 on the facts that have been alleged in the Complaints in the Action, that arose during the Class Period
14 defined above with respect to (a) the alleged failure to reimburse necessary business expenses; the
15 alleged requirement that employees agree to any term or condition known to be prohibited by law; and
16 the alleged entry into a noncompetition agreement that is purportedly void; (b) any right or claim for
17 unfair business practices in violation of California Business and Professions Code section 17200 et
18 seq., based on the alleged failures set forth above; and (c) any violation of the California Labor Code
19 or other state or federal statute, rule or regulation that could have been asserted in this Action based
20 on the facts, claims, causes of action or legal theories described above, including alleged violations of
21 California Labor Code sections 2802 and 432.5 and alleged violations of Business and Professions
22 Code section 16600 et seq., any and all corresponding claims that could have been brought under the
23 Fair Labor Standards Act ("FLSA"), 29 U.S.C. section 201, et seq. based on the facts, claims, causes
24 of action or legal theories described above and in accordance with *Rangel v. PLS Check Cashers of*
25 *Cal., Inc.*, 899 F.3d 1106, 1110–11 (9th Cir. 2018) (holding opt-out release of California state law
26 claims was res judicata against FLSA claims "which were direct federal law counterparts to the state
27 law claims settled"); accord *Richardson v. Wells Fargo Bank, N.A.*, 839 F.3d 442, 451–52 (5th Cir.
28 2016) (plaintiff who became party to the opt-out Rule 23 settlement was bound by all settlement terms,

1 including release of FLSA claims). Per the requirements of FLSA, the release of FLSA claims shall
2 apply only to those Class Members who cash their check under this Settlement. Except as set forth in
3 Paragraph 5.3 of this Agreement, Participating Class Members do not release any other claims,
4 including claims for vested benefits, wrongful termination, violation of the Fair Employment and
5 Housing Act, unemployment insurance, disability, social security, workers' compensation, or claims
6 based on facts occurring outside the Class Period.” (Ex. 1 at ¶5.2.)

7 The Release by Allegedly Aggrieved Employees is defined as: All Aggrieved Employees are
8 deemed to release, on behalf of themselves and their respective former and present representatives,
9 agents, attorneys, heirs, administrators, successors, and assigns, the Released Parties from all claims,
10 demands, rights, liabilities and causes of action under PAGA as asserted in the Complaints in the
11 Action and/or the PAGA Notice sent to the LWDA dated January 17, 2023 (case no. LWDA-CM-
12 929827-23) that arose during the PAGA Period premised on the facts, claims, causes of action or legal
13 theories as well as all claims, demands, rights, liabilities and causes of action under PAGA that could
14 have been alleged based on the facts that have been alleged in the Complaints in the Action and the
15 PAGA Notice referenced herein. (Ex. 1 at ¶5.3.)

16 **V. ARGUMENT**

17 **A. Plaintiff Requests Approval of This Class Action Settlement**

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

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

1 understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.”
2 *Munoz, 186 Cal. App. 4th at 409.*

3 The proposed settlement satisfies each of these factors. (Ly Decl. ¶36.) Class Counsel
4 conducted extensive informal discovery before entering into meaningful settlement negotiations in
5 this matter. (*Id* at Ly Decl. ¶¶7-9.) This discovery permitted Class Counsel to fairly evaluate the
6 strength of the case and the risks associated with ongoing litigation. (Ly Decl. ¶37.) Class Counsel is
7 experienced in handling wage and hour class actions and, after weighing all of the following factors,
8 supports this Agreement. (Ly Decl. ¶38.)

9 1. The Strength of Plaintiff’s Case

10 a. Defendant Failed to Reimburse Necessary Business Expenses

11 Labor Code section 2802 provides that an employer must “indemnify his or her employee
12 for all necessary expenditures or losses incurred by the employee in direct consequence of the
13 discharge of his or her duties” (Lab. Code, § 2802, subd. (a).) Plaintiff brings a class claim on
14 behalf of the Proposed Class for Defendant’s failure to reimburse necessary business expenses, as well
15 as a representative action claim on behalf of the State of California under PAGA.

16 Here, Plaintiff alleges that Defendant failed to reimburse Plaintiff and the Proposed Class for
17 the cost of using their personal cell phones that were not provided by Defendant but were necessary
18 for the performance of Plaintiff and the Proposed Class’s job duties. (Ly Decl. ¶39.) Plaintiff contends
19 that Defendant required Plaintiff and all Proposed Class members to use their own cellphones to
20 perform and complete their job duties, including communicating with supervisors and coworkers. (Ly
21 Decl. ¶40.) These cell phones were not provided by Defendant and it is Plaintiff’s position that
22 Defendant failed to reimburse Plaintiff and the Proposed Class for the costs of regular and consistent
23 cellular phone usage despite the fact that these expenditures were necessary for business related
24 purposes. (Ly Decl. ¶41.)

25 b. Defendant Violated Labor Code Section 432.5

26 Labor Code §432.5 provides that no employer shall require any employee to agree, in writing,
27 to any term or condition which is known by the employer to be prohibited by law. PAGA permits
28 Plaintiff and the Aggrieved Employees to collect civil penalties on behalf of the State of California for

1 this violation.

2 Here, Plaintiff alleges that Defendant requires, as a condition of employment, that Plaintiff and
3 other aggrieved employees sign a “Nondisclosure, Inventions and Noncompetition Agreement” which
4 includes an unlawful noncompete provision:

5 Employees agree that when they are employed by the Company and for
6 18 months after their employment terminates for any reason, employees
7 will not, directly or indirectly, solicit or endeavor to entice away from
the Company, or otherwise interfere with the business relationship of
the Company with any person who is, or was within the prior year,
employed by or working for the Company.

(Ly Decl. ¶42.)

8 Provisions of Defendant’s Agreement, as described above, explicitly violate several provisions
9 of California law and public policy. (See Cal. Bus. & Prof. Code, § 16600 [“[E]very contract by which
10 anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that
11 extent void.”]; *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 945 [discussing that
12 noncompete agreements are generally void in California]; *D’sa v. Playhut, Inc.* (2000) 85 Cal.App.4th
13 927, 933 [“...there exists a clear legislative declaration of public policy against covenants not to
14 compete.”].)

15 Plaintiff and the aggrieved employees were required to agree to an unlawful non-compete
16 provision. As such, Defendant has violated Labor Code §432.5 with respect to Plaintiff and all
17 aggrieved employees, and liable for penalties under PAGA.

18 c. Defendant is Liable for Penalties Pursuant to PAGA

19 PAGA’s statutory penalties are available for violations of Labor Code section 2802, as stated
20 in Labor Code §2699.5. Labor Code section 2699(f) provides, in relevant part, “[f]or all provisions of
21 this code except those for which a civil penalty is specifically provided, there is established a civil
22 penalty for a violation of these provisions, as follows: one hundred dollars (\$100) for each aggrieved
23 employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved
24 employee per pay period for each subsequent violation.” In addition, the statute provides that “[a]ny
25 employee who prevails in any action shall be entitled to an award of reasonable attorney’s fees and
26 costs.” (Labor Code § 2699(g)(1).)

27 As each penalty corresponds to an independent Labor Code violation, the penalties are

aggregated consistent with PAGA's purpose. (See *Gonzalez v. CoreCivic of Tennessee, LLC* (E.D. Cal., Sept. 13, 2018, No. 116CV01891DADJLT) 2018 WL 4388425, at *8 [PAGA penalties may be "stacked" when multiple violations are at issue, and "there is no obvious reason to use 'unstacked' calculations to estimate the value of the case" when determining whether to approve a PAGA settlement.].) As such, Defendant is liable for penalties for each Labor Code violation per pay period.

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

There is significant expense associated with the class certification process, which the Parties can avoid by entering into the contemplated Agreement now. (Ly Decl. ¶43.) If the Court did eventually certify a reimbursement class, trial of a case involving approximately 79 Class Members would require the retention of expensive expert witnesses, the accrual of extensive litigation costs, and a significant time overlay by the parties. (Ly Decl. ¶44.) Moreover, given the complexity and unsettled nature 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. ¶45.) An appeal would result in further delay for the Class Members who are waiting for a resolution in this matter. (*Id.*)

3. The Risk of Maintaining Class Action Status through Trial

This case has not been certified to be tried as a class action. (Ly Decl. ¶46.) While Plaintiff believes there is strong evidence to support certification, 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 depositions, including of the Class Representative and of several person(s) most knowledgeable regarding Defendant's reimbursement 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 \$70,000.00. (Ly Decl. ¶47.) This Settlement is the result of adversarial, non-collusive, and arms-length negotiations. (Ly Decl. ¶48.) 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, Kevin T. Barnes, Esq. (*Id.*)

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

With regard to the Reimbursement Claim analysis, Plaintiff believed that it was reasonable to value the potential reimbursement at \$15 per month, per employee, for reimbursement of personal cell phone usage. There are approximately 1,647 months in the Class Period. If each Class Member is owed \$15 a month for reimbursement, the full value of this claim is \$24,705.00. (Ly Decl. ¶49.)

There are 55 aggrieved employees and 1,398 pay periods in the PAGA Period. The Labor Code §432.5 claim is assessed as one pay period per aggrieved employee. (Ly Decl. ¶50.) As such, the value of this claim is \$5,500.00 (55 aggrieved employees multiplied by \$100). (*Id.*) The Labor Code §2802 claim is valued at approximately \$32,300.00. (Ly Decl. ¶51.) This is based on 323 months in the PAGA Period (323 multiplied by \$100). As such, with stacking, the full value of the PAGA claim is \$37,800.00. (Ly Decl. ¶52.) The main risk taken into account with PAGA is the discretionary nature of the penalty award. (Ly Decl. ¶53.) 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. ¶54.) While there is a dearth of available authority, in Plaintiff's view, were he 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. ¶55.)

Per Plaintiff's assessment, the maximum potential value of all of Plaintiff's and the Class Members' claims was approximately \$62,505. (Ly Decl. ¶56.) As a result of the forgoing risks on the merits, Class Counsel believes the Gross Settlement Amount of \$70,000.00 is fair and reasonable. (Ly Decl. ¶57.)

5. The Experience and Views of Counsel

Finally, counsel's experience and success in similar class actions also weigh in favor of preliminary approval. *See Wershba, supra*, 91 Cal.App.4th at 245. Kingsley & Kingsley, APC is very experienced in prosecuting complex employment litigation, and the firm has focused its practice since the year 2000 on complex wage, hour, and working condition violations. (Ly Decl. ¶¶58-60.) The firm is well versed in class action litigation and has diligently and aggressively pursued this action. (*Id.*) Kingsley & Kingsley, APC currently serves as Class Counsel for dozens of pending class action

lawsuits in Northern, Central, and Southern California. (*Id.*) A list of representative cases that Kingsley & Kingsley, APC has handled is included in the accompanying declaration of Liane Katzenstein Ly (*Id.*) After factoring in the risks explained above, Class Counsel believes that the proposed settlement is fair and reasonable. (Ly Decl. ¶61.)

6. 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 Class Members pro rata based on the share of the Net Settlement Amount calculated according to the number of Class Workweeks worked during the Class Period. (Ly Decl. ¶62.) The lump sum payment to each member of the Class not excluding himself will be determined by dividing the Net Settlement Amount by the total number of Class Workweeks worked by all Participating Class Members during the Class Period and (b) multiplying the result by each Participating Class Member’s Class Workweeks. This allocation distributes Settlement funds proportionally to each class member’s damages, and should therefore be approved as fair, adequate, and reasonable. (Ex. 1 at ¶3.2.4.)

7. The Proposed Notice Fairly Apprises the Class Members of the Terms of the Settlement and of the Class Members’ Rights under the Settlement

Plaintiff requests that the Court approve the proposed plan and form of Class Notice. The standard for determining the adequacy of notice is whether the notice has “a reasonable chance of reaching a substantial percentage of the class members.” (*Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974.) Pursuant to the Agreement, the Notice will be sent to the last known address of all Class Members, or to an updated address if one is located in the National Change of Address Database. (Ex. 1 at ¶7.4.2). If any Notices are returned as undeliverable, the Administrator will undertake another reasonable address verification measure to locate a valid mailing address and will promptly send the Notice to the new address. (*Id.*) As such, the Notice is likely to reach most, if not all, Class Members.

With respect to the contents of the Notice, the “notice given to the class must fairly apprise the class members of the terms of the proposed compromise and of the options open to dissenting class

members.” (*Trotsky v. L.A. Fed. Sav. & Loan Ass’n* (1975) 48 Cal.App.3d 134, 151–52.) The purpose of a class notice is to give class members sufficient information to decide whether they should accept the benefits offered, opt out and pursue their own remedies, or object to the settlement. (*Ibid.*)

Here, the Notice clearly explains the proposed Agreement and the options to opt out of the Settlement or object to it at the Final Approval Hearing. (Ex. 1 at ¶7.5.; 7.7; *see also* Ex. A to the Agreement at pp. 2-3, 5, 8, 9 [Class Notice].) In short, the Court should approve the proposed Class Notice because it describes the proposed settlement with enough specificity to allow Class Members to make an informed choice regarding whether to participate.

VI. THE SERVICE AWARD TO THE NAMED PLAINTIFF

The Class Representative is entitled to an enhancement for his valiant effort and time expended in this matter. (Ly Decl. ¶63.) The time spent by Plaintiff is significant and includes researching and retaining competent counsel; providing information to Class Counsel regarding the nature of the work at Defendant; compiling relevant documents; working closely with Class Counsel to develop the theories of liability and martial relevant evidence; regularly discussing the status of the case with Class Counsel; discussing the case via telephone with many Class Members; providing informal discovery responses; attending a full-day of mediation; and responding promptly to Class Counsel’s communications regarding settlement. (*Id.*) Thus, in addition to the sums paid to Class Members, Plaintiff requests a proposed litigation enhancement in the amount of \$5,000.00, to be paid from the Gross Settlement Amount. (Ex. 1 at ¶3.2.1.) As set forth in the Agreement, Plaintiff will also be entering into a general release of liability pursuant to Civil Code Section 1542. (Ly Decl. ¶65; Ex. 1 at ¶5.1.1.)

Class Counsel considers this to be a fair and reasonable enhancement. (Ly Decl. ¶66.) The enhancement takes into consideration the time, effort, and expense incurred by Plaintiff in coming forward to litigate this matter on behalf of all Class Members. (*Id.*) Plaintiff will provide a detailed declaration with the Final Approval Motion. (*Id.*)

VII. SUBMISSION TO THE LABOR AND WORKFORCE DEVELOPMENT AGENCY

Proof of submission of Plaintiff’s instant Motion, all related documents, and copy of the email from the LWDA confirming receipt is attached to the concurrently-filed Ly Declaration as Exhibit

1 “3.” (Ly Decl. ¶67.)

2 **VIII. CONCLUSION**

3 Plaintiff respectfully submits that the proposed Agreement is fair, adequate, reasonable, and in
4 the best interest of the Class. Therefore, the Parties respectfully request that the Court (1) grant
5 preliminary approval of the Agreement; (2) approve the proposed form of notice, and direct that the
6 Notice be sent to Class Members; and (3) schedule a hearing on final approval of the Agreement and
7 Class Counsel’s application for an award of attorney’s fees and litigation costs.

8
9 DATED: February 26, 2024

KINGSLEY & KINGSLEY, APC

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11 By: 

12 Liane Katzenstein Ly
13 Attorneys for Plaintiff and the proposed class
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(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 February 26, 2024, I served all interested parties in this action the following documents described as **NOTICE OF MOTION AND MOTION FOR PRELIMINARY 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:

EPSTEIN BECKER & GREEN, P.C.

Chelsea Hadaway

Emily T. Patajo

1925 Century Park East, Suite 500

Los Angeles, CA 90067-2506

CHadaway@ebglaw.com

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Attorneys for Defendant

ABRAMSON LABOR GROUP

Willian Zev Abramson

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Attorneys for Plaintiff

[] (BY MAIL) I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage fully prepaid at Encino, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[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 SERVICE) I caused the document to be sent 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 above 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 February 26, 2024, at Woodland Hills, California.


Michelle Tanzer