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6
7 **SUPERIOR COURT OF CALIFORNIA**
8 **IN AND FOR THE COUNTY OF SAN FRANCISCO**

9
10 GERARDO GUTIERREZ, individually, and
on behalf of all others similarly situated,

11 Plaintiff,

12 vs. FRAICHE CATERING, INC., a
13 California corporation, and DOES 1 through
50, inclusive,

14 Defendants.

CASE NO. CGC-23-605255

MEMORANDUM OF POINTS &
AUTHORITIES IN SUPPORT OF MOTION
FOR PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT

[Filed concurrently with Notice of Motion and
Motion; Declarations of J. Kirk Donnelly,
Gerardo Gutierrez, and Lisa Mullins; [Proposed]
Order

Date: March 1, 2024

Time: 9:30 a.m.

Dept.: 302

1 **I. INTRODUCTION**

2 Plaintiff Gerardo Gutierrez hereby moves the Court for an order granting preliminary
3 approval to a proposed non-reversionary class action settlement to resolve wage and hour claims
4 on behalf of approximately 189 individuals employed by Defendant Fraiche Catering, Inc.
5 (“Fraiche” or “Defendant”) in certain defined job positions during the period of March 20, 2019
6 to January 13, 2024. The proposed \$175,000 settlement will provide about \$94,667 in cash
7 payments to the settlement class, with an average award of about \$500. The balance of
8 approximately \$80,333 will cover a modest enhancement award to Plaintiff, reasonable attorney’s
9 fees and actual litigation costs, settlement administration costs, and payment of civil penalties to
10 the state. The settlement is the product of Plaintiff’s pre- and post-filing investigation and
11 discovery, an informal pre-mediation exchange of information, and arms-length and adversarial
12 negotiations overseen by experienced and well-regarded mediator Mark LeHocky, Esq.

13 As demonstrated below, the settlement is within the “range of reasonableness” for
14 preliminary approval. Plaintiff’s counsel believes the settlement is a significant result for the
15 class given the substantial risks inherent in this matter. Accordingly, Plaintiff requests the Court
16 enter an order: (1) granting preliminary approval to the proposed class action settlement; (2)
17 conditionally certifying the settlement class as defined below; (3) appointing J. Kirk Donnelly
18 and the Law Offices of J. Kirk Donnelly, APC as Class Counsel; (4) appointing plaintiff Gerardo
19 Gutierrez as the Class Representative; (5) appointing ILYM Group, Inc. as the Settlement
20 Administrator; (6) approving the form of notice to the class and the procedure for providing such
21 notice; and (7) scheduling a final fairness hearing.

22 **II. FACTUAL BACKGROUND AND PROCEDURAL POSTURE**

23 On March 20, 2023, Plaintiff, on behalf of himself and all others similarly situated, filed a
24 class action complaint against Defendant for several alleged violations of the Labor Code and
25 IWC Wage Orders. Plaintiff filed his claims on behalf of a putative class of individuals who
26 worked for Fraiche in several job categories, including dishwasher, cook, lead cook, event
27 coordinator/specialist/producer, financial controller, marketing manager, bartender, server and/or
28

1 delivery. Defendant Fraiche provides high-end event catering services throughout the Bay Area,
2 and caters corporate events, weddings, anniversaries, private parties, etc., and also provides “do it
3 yourself” catering where Fraiche delivers the food but does not provide staff for the event. While
4 many of Fraiche’s employees work full-time, many others such as the servers, bartenders and
5 drivers, are part-time, and work intermittently depending on the availability of work, how much
6 they wanted to work, etc. Their pay records suggest they worked as little as 4-5 hours in a pay
7 period up to 40-50 hours or more in a pay period. [Declaration of J. Kirk Donnelly (“Donnelly
8 Decl.”), ¶ 4.]

9 Plaintiff Gerardo Gutierrez worked for Fraiche as a full-time cook and lead cook from
10 about 2015 to May 2020, when he moved out of state. He then returned to work for Fraiche in
11 February 2022 until September 2022, when he was seriously injured in a car accident and went
12 out on disability. He claims he was terminated in and around December 2022 when Fraiche
13 allegedly did not allow him to return to work after he recovered from his injuries. [Donnelly
14 Decl., ¶ 5.]

15 Plaintiff alleged that Fraiche failed to pay the class all wages due by (a) paying certain
16 individuals by “salary,” i.e. paying them a set amount per week regardless of hours worked,
17 thereby failing to pay for overtime hours worked, and (b) failing to include all forms of
18 compensation received in the employees’ “regular rate of pay” used for calculating the correct
19 overtime rate, which resulted in underpayment of overtime wages. Plaintiff also alleged Fraiche
20 failed to provide all required meal and rest breaks on a fully compliant basis. Based on
21 information obtained from Plaintiff and review of payroll and time records and other information
22 received from Fraiche, Plaintiff alleges numerous de facto violations where the class members’
23 meal breaks were late or lasted less than 30 minutes, and second meal periods were not provided
24 on shifts lasting longer than 10 hours. Further, class members never received an extra hour of
25 premium pay in lieu of a missed meal or rest break. Plaintiff next contends he and the class
26 members had to use their own personal phones for work purposes, such as receiving texts and
27 phone calls from supervisors, taking pictures of their work, navigating to catering jobs, etc., all
28 without any reimbursement from Fraiche. [Donnelly Decl., ¶ 6.]

1 Based on these allegations, Plaintiff's class action complaint asserted claims for damages
2 for: (1) failure to pay all wages due, (2) failure to provide all required meal and rest breaks or
3 compensation in lieu thereof; (3) failure to reimburse business expenses; (4) failure to provide
4 accurate, itemized wage statements; (4) failure to pay all wages due upon termination of
5 employment; and (5) unfair competition. Plaintiff filed a First Amended Complaint on April 11,
6 2023 that added a claim for civil penalties under PAGA based on the same alleged violations.
7 The FAC is the operative complaint for purposes of settlement. [Donnelly Decl., ¶ 7.]

8 Fraiche has at all times denied Plaintiff's allegations and maintained its meal and rest
9 break and payroll policies and procedures comply with California law, and that it provided the
10 class members with required meal and rest breaks. Fraiche also argued it accurately tracked and
11 paid for all hours worked by its employees, including overtime hours. Additionally, Fraiche
12 strongly contends the case cannot be maintained as any kind of class or representative action,
13 arguing that to the extent class members missed meal and/or rest breaks, that such breaks were
14 non-compliant, it would have been intermittent and infrequent and evidence of such missed
15 breaks or off the clock work would be purely anecdotal, and therefore individualized issues would
16 predominate and trial would be unmanageable. [Donnelly Decl., ¶ 8.]

17 After Plaintiff filed his complaint, the Parties met and conferred on discovery, potential
18 law and motion, and other case management issues, and ultimately agreed to attempt early
19 mediation. The Parties then engaged in extensive informal discovery to facilitate an exchange of
20 information necessary to engage in a meaningful mediation. Consequently, Plaintiff's counsel
21 reviewed payroll records, personnel policies/handbooks, meal and rest break policies, personnel
22 files, and a random sampling paystubs and time records produced by Fraiche for about 25% of the
23 putative class. Defendant also provided documents reflecting its wage and hour policies and
24 practices during the class period, and data regarding the total number of current and former
25 employees, the estimated total amount of workweeks and pay periods they worked, and average
26 hourly pay rates, among other relevant data. [Donnelly Decl., ¶ 9.]

27 The Parties then engaged Mark LeHocky, Esq., a highly respected mediator with
28 extensive wage and hour class action experience and, on November 13, 2023, participated in a

1 full day mediation with Mr. LeHocky. Throughout the day, the arms-length negotiations were
2 hard-fought and adversarial as the Parties exchanged extensive information on their legal and
3 factual positions, and made numerous offers and counter-offers. By the end of the day, after a
4 mediator's proposal, the Parties were able to reach agreement on all major issues. Thereafter, the
5 Parties reduced their tentative agreement to the Settlement Agreement now before the Court for
6 approval. [Donnelly Decl., ¶ 10.]

7 **III. THE PROPOSED SETTLEMENT TERMS**

8 Under the settlement, Fraiche will pay \$175,000.00 into a common fund, the Gross
9 Settlement Amount. Reasonable attorney's fees of up to 1/3 of the GSA, or \$58,333.33, litigation
10 costs of up to \$8,000, an enhancement award of up to \$2,500 to Plaintiff,¹ settlement
11 administration costs of no more than \$6,500, and \$5,000 for PAGA civil penalties,² all will be
12 paid from the Gross Settlement Amount. The remainder of approximately \$94,667 will be
13 allocated pro rata among the Participating Class Members based on their total compensation
14 earned during the Class Period. No portion of the Class Settlement Amount will revert to
15 Fraiche. [Donnelly Decl., ¶ 11.]

16 **A. Certification of the Settlement Class**

17 The settlement provides for conditional certification of a class including all individuals
18 who worked for Defendant in the job positions of dishwasher, cook, lead cook, event
19 coordinator/specialist/producer, financial controller, marketing manager, bartender, server and/or
20 delivery during the Class Period, which runs from March 20, 2019 to January 13, 2024. The class
21 consists of about 189 individuals. [Donnelly Decl., ¶ 12.]

22 **B. The Benefit Conferred on the Settlement Class**

23 As noted, Plaintiff estimates at least \$94,667 from the Gross Settlement Amount will be
24 distributed to the Participating Class Members. This is a cash settlement that does not require

25 ¹ Plaintiff also entered into an individual settlement agreement regarding his claims for wrongful
26 termination arising out his allegations that Fraiche did not allow him to return to work after he was out on
27 disability leave. [Donnelly Decl., ¶ 11.]

28 ² Per PAGA, the \$3,750 of this amount will go to the Labor & Workforce Development Agency as the
State's share of the civil penalties, and the remaining \$1,250 will be distributed pro rata to the Aggrieved
Employees

1 Participating Class Members to submit a claim form to receive their settlement share.
2 Participating Class Members will receive their settlement checks automatically via First Class
3 U.S. Mail. Twenty percent of each settlement share will be allocated to wages and the remaining
4 eighty percent will be allocated to expenses, penalties and interest, which allocation is consistent
5 with Fraiche's potential liability as discussed below. Fraiche will pay all applicable employer-
6 side payroll taxes separately from the GSA. Subject to the Court's approval, any amounts not
7 claimed (because a class member does not cash his or her settlement check) will be forwarded to
8 the California State Controller's Unclaimed Property Fund. [Donnelly Decl., ¶ 13.]

9 Each Participating Class Member will receive a pro rata share of the Net Settlement
10 Amount based on their total wages paid by Fraiche during the Class Period while working in a
11 covered job position. Thus, each Individual Settlement Payment will be calculated using
12 formulaic criteria equally applied to all Class Members in order to proportionately compensate
13 them for the actual value of their claims relative to fellow class members. Similarly, each Class
14 Member's Individual Settlement Payment will be calculated using criteria that would typically be
15 used in determining appropriate amounts of unpaid wages and damages in wage and hour
16 litigation under applicable law. These methods are intended to ensure each Class Member
17 receives a portion of the available settlement funds corresponding to the relative value of his or
18 her potential claims. The proposed allocation provides the most reasonable way to compensate
19 Class Members based on the amount of time they worked for Fraiche and the number of instances
20 they were not compensated properly or may have been denied required breaks. The pro rata
21 allocation formula, based on earnings for each class member versus earnings of entire class, will
22 account for the fact that certain Class Members, primarily the "full time" employees, worked
23 longer tenures, worked more hours, and/or earned a higher hourly wages, and accordingly have
24 proportionally more damages than those "part-time" employees who may have worked only a few
25 shifts per month. The average award will be approximately \$500. [Donnelly Decl., ¶ 14.]

26 **D. Settlement Administration**

27 Subject to the Court's approval, the Parties have agreed on ILYM Group, Inc. as the
28 Settlement Administrator. ILYM is qualified and has significant experience administering class

1 action settlements, including numerous wage and hour matters, and has agreed to cap its fees and
2 costs at \$6,500. If the Court approves less than the above amount, the difference will remain in
3 the Net Settlement Amount for distribution to the Participating Class Members. [Donnelly Decl.,
4 ¶ 15; Declaration of Lisa Mullins, ¶¶ 2-10; Exhs. A-C.]

5 **E. The Class Notice**

6 The proposed Notice (Exhibit A to the Settlement Agreement) sets out information about
7 this case and explains the basic settlement terms in plain language. It will be disseminated in both
8 English and Spanish. The Notice also sets forth the individualized information used to calculate
9 Class Member Individual Settlement Payments and each Class Member's estimated settlement
10 award. The Notice likewise details the procedures for Class Members to dispute their individual
11 information, the procedure for submitting an objection to the Settlement, and the procedure to
12 request exclusion. In sum, the Notice provides the Class Members with the information
13 necessary to evaluate the Settlement and provides fair opportunity to participate in, opt out of, or
14 object to the proposed Settlement. Coupled with the notice procedure, the proposed Notice
15 provides the Settlement Class with the best notice practicable. [Donnelly Decl., ¶ 16.]

16 **F. Right to Correct Information, Opt Out, or Object**

17 Class Members will have forty-five (45) days to dispute the information in their Notice
18 used to calculate their settlement award, and also have 45 days to submit any objections to the
19 settlement or to request exclusion. In the event a Class Member disputes their individual
20 information, the Settlement Administrator will review the Class Member's records as well as any
21 additional information submitted, and make a final determination. Plaintiff is providing the same
22 release as the Class Members. [Donnelly Decl., ¶ 17.]

23 **G. Release of Claims**

24 All Participating Class Members will be deemed to release defendant Fraiche from all
25 claims alleged in the operative complaint, or that could have been brought based on the facts
26 asserted in the operative complaint, including PAGA claims, from March 20, 2019 to January 13,
27 2024. The release is limited to the claims that were actually pleaded or could have been pleaded
28 based on the alleged facts in the operative complaint. [Donnelly Decl., ¶ 18.]

1 **H. Attorney's Fees and Costs, and Plaintiff's Enhancement Award**

2 The settlement provides Defendant will not oppose a request for attorney's fees of up to
3 1/3 of the GSA, or \$58,333.33, nor will it oppose a request for reimbursement of litigation costs
4 and expenses of up to \$8,000.00. Defendant also will not oppose a request for an enhancement
5 award to Plaintiff of not more than \$2,500.00 in recognition of his time spent on this matter, the
6 risk he undertook on behalf of the class, and the benefit conferred to the class. Plaintiff's counsel
7 will provide the Court with appropriate summaries and evidence of their efforts and time records
8 in anticipation of the Final Approval Hearing, and Plaintiff has submitted his declaration
9 herewith. If the Court approves less than the above amounts, the difference will be distributed to
10 the Participating Class Members. [Donnelly Decl., ¶ 19.]

11 **I. PAGA and Notice to the LWDA**

12 As noted, the Parties allocated \$5,000 to payment of alleged civil penalties under PAGA.
13 As required by Labor Code section 2699(l)(2), Plaintiff gave notice of the settlement and the
14 approval hearing to the LWDA via its online portal. [Donnelly Decl., ¶ 20; Exh. 4.]

15 **IV. ARGUMENT**

16 **A. Standard of Review for a Class Action Settlement**

17 The law favors settlement, particularly in class actions where substantial resources can be
18 conserved by avoiding the time, costs and rigors of formal litigation. H. Newberg & A. Conte, 4
19 Newberg on Class Actions (4th ed. 2002) § 11.41; Class Plaintiffs v. City of Seattle (9th Cir.
20 1992) 955 F.2d 1268, 1276, cert. denied, 506 U.S. 953; Potter v. Pacific Coast Lumber Co.
21 (1951) 37 Cal.2d 592, 602. Nevertheless, to ensure the rights of absent class members are not
22 unjustly compromised, settlement of a class action requires court approval. Cal. Rule of Court.
23 3.769; Wershba v. Apple Computer (2001) 91 Cal.App.4th 224, 245; Dunk v. Ford Motor Co.
24 (1996) 48 Cal.App.4th 1794, 1801. This judicial review protects against fraud or collusion, and
25 ensures fairness to the absent class members. Dunk, 48 Cal.App.4th at 1800-01. Judicial review
26 occurs via a two-step process to determine, under all the circumstances, if the proposed settlement
27 is fair, reasonable and adequate. Id. at 1801; Wershba, 91 Cal.App.4th at 245.

28 The first step is a motion for preliminary approval, through which the parties present the

1 court with the proposed settlement and seek a determination if it is sufficiently fair and reasonable
2 to warrant notice to the class and further proceedings as to its fairness and adequacy. Cal. Rule of
3 Court 3.769(c). This preliminary evaluation determines if the proposed settlement is within the
4 “range of reasonableness” and if notice should be provided to the class regarding the settlement’s
5 proposed terms and conditions, and whether a final fairness hearing should be scheduled.
6 Wershba, 91 Cal.App.4th at 234-35; North County Contractors Ass’n, Inc. v. Touchstone Ins.
7 Servs. (1994) 27 Cal.App.4th 1085, 1089-90. Considering the strong judicial policy favoring
8 settlement of class actions, courts generally apply a presumption of fairness to class action
9 settlements when (1) the settlement results from arms-length bargaining, (2) investigation and
10 discovery are sufficient to allow counsel and the court to act intelligently, (3) counsel is
11 experienced in similar litigation, and (4) the percentage of objectors is small. Dunk, 48
12 Cal.App.4th at 1802; Wershba, 91 Cal.App.4th at 245.

13 If the court grants preliminary approval, it then orders the class be given notice in an
14 appropriate manner, establishes a schedule and procedures for class members to request exclusion
15 or object, and sets the matter for a final fairness hearing. Typically, any motion for attorney’s
16 fees and costs, and any enhancement for the class representative(s), is filed subsequent to
17 preliminary approval and heard with the motion for final approval, as part of the second step of
18 the two-step approval process. Dunk, 48 Cal.App.4th at 1800; Wershba, 91 Cal.App.4th at 232.

19 The proposed settlement in this matter warrants preliminary approval under the liberal
20 standard discussed above, as it is fair, reasonable and adequate under all the circumstances, and
21 represents a favorable result for the class.

22 **B. The Proposed Settlement Class Should Be Conditionally Certified**

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

1 In the present matter, conditional certification is proper since this matter satisfies all
2 requirements for class certification under Code of Civil Procedure section 382. First, the class is
3 both sufficiently numerous, consisting of at least 189 individuals, and ascertainable by reference
4 to Fraiche’s personnel and payroll records. [Donnelly Decl., ¶ 21.]

5 Next, Plaintiff is an adequate class representative, as his claims do not conflict with and
6 are not antagonistic to the claims of other class members. In this regard, the settlement of his
7 individual claims is not an obstacle to his ability to serve as class representative for several
8 reasons. First, his independent claim in no way impacted negotiation of the final class settlement
9 which, as noted, was achieved via negotiations facilitated by a professional neutral and which
10 negotiations took into account Plaintiff’s individual claims – in other words, the settlement
11 amount represents a professional neutral’s independent evaluation of the value of the case.
12 Second, Plaintiff is seeking a modest enhancement award in recognition of the fact he is receiving
13 additional monies for his individual non-wage and hour claims, and he is not releasing any of the
14 claims alleged in this matter as part of his individual settlement. Thus, Plaintiff has in no way
15 “sold out” the class members for his own personal benefit but instead has simply received fair
16 value for his separate claims in addition to securing a positive result for the absent class members.
17 For these reasons, Plaintiff contends he is an adequate class representative. [Donnelly Decl., ¶
18 22; Declaration of Gerardo Gutierrez (“Gutierrez Decl.”), ¶¶ 2-9.] Further, his claims are typical
19 given he is a member of the class and his claims arise from the same employment practices and
20 course of conduct giving rise to the claims of the other class members. [Donnelly Decl., ¶ 22;
21 Gutierrez Decl., ¶¶ 2-3.] Lastly, his counsel is experienced and adequate class counsel.
22 [Donnelly Decl., ¶¶ 37-40.]

23 Next, common questions of law and fact predominate – particularly for purposes of a
24 settlement class – as the Class Members all were subject to the same meal and rest break policy,
25 and likewise allegedly were paid by “salary.” Since the focus of the claims against Fraiche
26 concerns the legality of common policies applied uniformly to the entire class, common issues
27 predominate over individualized inquiries concerning liability. For instance, Fraiche’s meal and
28 rest break policy is company-wide policy applied equally and consistently to all class members,

1 and this policy is either compliant with California law or it is not. Regardless of that
2 determination, it will decide liability for the class one way or another. Similarly, whether Fraiche
3 correctly calculated the regular rate of pay and applicable overtime rates presents yet another
4 common question. [Donnelly Decl., ¶ 23.]

5 By now it is well-settled a theory of recovery asserting the existence of a uniform policy
6 violating California law is sufficient to satisfy the requirements for class certification. Jones v.
7 Farmers Ins. Exch. (2013) 221 Cal.App.4th 986, 996 (“Claims alleging that a uniform policy
8 consistently applied to a group of employees is in violation of the wage and hour laws are of the
9 sort routinely, and properly, found suitable for class treatment”); Williams v. Superior Court
10 (2013) 221 Cal.App.4th 1353 (“A company-wide practice can sustain a common question of fact
11 or law that supports commonality for class certification”). Lastly, a class action is superior to
12 other means for the fair and efficient adjudication of this controversy. [Donnelly Decl., ¶ 24.]

13 C. **The Proposed Settlement Meets the Dunk Factors and is within the Range of**
14 **Reasonableness**

15 The proposed settlement resulted from serious, arms-length negotiations facilitated by
16 respected mediator Mark LeHocky, Esq., who has extensive experience both litigating and
17 mediating wage and hour class actions. [Donnelly Decl., ¶ 10.] Plaintiff’s counsel J. Kirk
18 Donnelly has years of experience litigating wage and hour class actions. Plaintiff’s counsel is
19 well-qualified to evaluate the risks and benefits of pursuing further litigation or settling the
20 matter. [Donnelly Decl., ¶¶ 37-40.]

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

28 Prior to mediation, the parties engaged in informal discovery to facilitate settlement

1 discussions. As a result, Plaintiff has reviewed documents and information regarding Fraiche's
2 payroll practices, a sampling of pay stubs and time records, meal and rest break policies,
3 employee handbooks, etc., and information from Defendant regarding class size and breakdown,
4 work weeks, rates of pay, and other information used to formulate a damages model. Plaintiff's
5 counsel is confident they obtained sufficient information to enable them to understand the law
6 and facts of this case and make an informed decision regarding the proposed settlement and
7 whether it is in the best interests of the class. [Donnelly Decl., ¶¶ 9, 25.]

8 Next, the proposed settlement falls within the range of reasonableness warranting
9 preliminary approval. The proposed settlement involves a significant sum that, when distributed,
10 will confer direct monetary benefits on the class members. As described above, each class
11 member will be entitled to a monetary payment without having to file a claim and each payment
12 will be relative to the value of his or her potential claims. Through the information exchanged and
13 analysis undertaken, Plaintiff weighed the risks of continued litigation against the benefits of the
14 proposed settlement and determined settlement to be the most reasonable option.

15 Using that data, Plaintiff ran various calculations under different theories of liability and
16 estimated Fraiche's maximum exposure on the class claims at approximately \$885,000, including
17 about \$182,000 on the unpaid wage/salary claim, \$43,000 on the regular rate/underpaid overtime
18 claim, \$272,000 on the meal and rest break claims, \$15,000 on the expense reimbursement
19 claims, \$139,000 on the wage statement claims, and \$234,000 on the waiting time penalty claims.
20 [Donnelly Decl., ¶¶ 26-27.] Plaintiff substantially discounted the value of these claims,
21 however, in light of the multiple and considerable risks posed by proceeding with the litigation.

22 First, on the unpaid wage claims, Plaintiff alleged Fraiche wrongfully paid both he and
23 other class members with a base salary regardless of the number of hours worked, or essentially
24 treated them as an "exempt" employee. In order to qualify as exempt,³ however, an employee
25 must be primarily engaged in duties that meet the test of the exemption, customarily and regularly
26 exercise discretion and independent judgment in performing his or her duties, and earn a monthly

27 ³ It is unclear if Fraiche relied on either the administrative exemption, Wage Order 5-2001 §1(B)(2), or
28 the executive exemption, Wage Order 5-2001, § 1(B)(1), although Plaintiff contends this is irrelevant and
that neither exemption applies.

1 salary equivalent to no less than two times the state minimum wage. E.g., Wage Order 5-2001, §§
2 1(B)(1)(a), (d), and (f). Here, Plaintiff contends Defendant failed to pay class members on the
3 required salary basis,⁴ that the duties and responsibilities of the class members' job positions did
4 not involve management or administration of the business, and they didn't exercise any
5 discretion/independent judgment such that they met the requirements of any potentially
6 applicable overtime exemption. Accordingly, Plaintiff argues he and other class members were
7 entitled to receive overtime wages in conformance with California law on top of any salary paid
8 for the base 40 hour work week. [Donnelly Decl., ¶ 28.]

9 Plaintiff also alleges Defendant failed to incorporate regular bonus payments made to the
10 Class Members into the regular rate of pay calculations when paying overtime as required by
11 Alvarado v. Dart Container Corp. (2018) 4 Cal.5th 542. In particular, Plaintiff argues amounts
12 Fraiche paid to the class members as "tips" were not true gratuities but rather a share of
13 mandatory charges Fraiche imposed on client bills. Under California law, these "tips" are more
14 properly characterized as a bonus and must be included in the calculation of the regular rate of
15 pay for purposes of determining overtime and double time pay. As explained by the DLSE on its
16 website: "[W]hen an employer distributes all or part of a service charge to its employees, the
17 distribution may be at the discretion of the employer and the service charge, which would be in
18 the nature of a bonus, would be included in the regular rate of pay when calculating overtime
19 payments." Dept. of Indus. Relations, Labor Comm'rs Office, Tips and Gratuities,
20 https://www.dir.ca.gov/dlse/faq_tipsandgratuities.html. Plaintiff contends Fraiche paid overtime
21 at 1.5 times the base hourly rate only, and did not pay any overtime due on the tip/bonus
22 payments. In response, Fraiche denies Plaintiff's contentions, claiming its compensation policies
23 properly paid Plaintiff and the class members for all hours worked, noting there is nothing
24 improper about paying non-exempt employees a "salary" for 40 hours of work per week, and that
25 its records show Plaintiff and the class members rarely worked more than 40 hours per week and
26 that it paid for documented overtime at the correct rates. [Donnelly Decl., ¶ 29.]

27 _____
28 ⁴ For example, in 2022 Plaintiff's "salary" was \$4,333.33/mo. even though a salary of \$5,200/mo. was
required to meet the exemption.

1 Plaintiff also contends Fraiche failed to maintain a fully compliant written meal and rest
2 break policy and, regardless of whether the policies were compliant, that Fraiche failed to provide
3 all required meal and rest periods to Class Members. In support of this argument, Plaintiff
4 contends Defendant's own records show numerous "de facto" violations where meal periods were
5 not recorded, especially with respect to second meal periods, or started after the fifth hour of
6 work and thus were non-compliant. Plaintiff's review of the pay records provided further
7 suggested Fraiche did not pay the required premium pay for these documented violations.
8 [Donnelly Decl., ¶ 30.]

9 Defendant denies Plaintiff's contentions, claiming it made meal and rest breaks available
10 to Class Members in compliance with California law. Defendant contends its meal and rest break
11 policies are lawful and that Class Members were frequently reminded they were required to take
12 all meal and rest breaks. Defendant also contends that time records demonstrate that Class
13 Members took duty-free, timely meal and rest breaks. Finally, Defendant argues that Plaintiff's
14 meal and rest break claims are not susceptible to common proof, as the claims would require
15 individualized inquiry, including whether there was an unlawful companywide policy, whether
16 employees had the opportunity to take meal and rest periods, whether they voluntarily chose to
17 forego their meal and rest periods, and whether Defendant ever prevented them from taking meal
18 and rest periods. Accordingly, Defendant contends these claims are vulnerable to a ruling that
19 class treatment is not appropriate. [Donnelly Decl., ¶ 31.]

20 On the expense reimbursement claim, Plaintiff alleges that throughout his employment, he
21 and the class members were required to use their personal cell phones in order to communicate
22 with supervisors and other employees during work hours, take pictures of their work, and
23 navigate to catering job locations. However, Defendant did not reimburse Plaintiffs and the class
24 members for this expense. Cochran v. Schwan's Home Serv., Inc. (2014) 228 Cal.App.4th 113.
25 On the other hand, Defendant argued there would be no conceivable need for employees to use
26 their phones for work and that any use of employee phones was purely for personal convenience
27 and therefore not reimbursable. [Donnelly Decl., ¶ 32.]

28 Plaintiff also alleged derivatively that, as a result of the above alleged violations,

1 Defendant failed to provide accurate wage statements and failed to timely pay all wages that were
2 due and owing upon separation of employment. Thus, should the primary claims fail, Plaintiff's
3 derivative claims would also fail. Defendant also contends it would not be liable for waiting time
4 penalties because a "good faith dispute" exists over the payment of past wages. Amaral v. Cintas
5 Corp. No. 2 (2008) 163 Cal.App.4th 1157, 1201. Further, Defendant contends Plaintiff would
6 have to prove that Defendant "willfully" failed to pay Class Members appropriate wages due
7 upon separation of employment. Defendant contends that any failure to pay wages upon
8 separation was not willful. [Donnelly Decl., ¶ 33.]

9 As far as potential PAGA liability, the Aggrieved Employees theoretically are entitled to
10 penalties totaling upwards of \$350,000 should Plaintiff prevail on all claims and establish
11 violations of the multiple Labor Code sections at issue. [Donnelly Decl., ¶ 34.] As with the class
12 claims, Plaintiff discounted the potential PAGA penalties since the Court possesses wide
13 discretion to reduce such penalties, or to decline to award penalties at all. Labor Code §
14 2699(e)(2); Carrington v. Starbucks Corp. (2018) 30 Cal.App.5th 504 (trial court awarded
15 penalties of \$5 per pay period after a bench trial, which decision was upheld on appeal); In re
16 Taco Bell Wage and Hour Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. LEXIS 48557
17 (PAGA penalties denied after trial). Accordingly, the Parties allocated \$5,000 to PAGA penalties,
18 which amount Plaintiff submits is reasonable under the circumstances and in line with
19 comparable settlements in other wage and hour class actions in California. *E.g.*, Van Kempen v.
20 Matheson Tri-Gas, Inc. (N.D. Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182 (granting final
21 approval of \$5,000 PAGA penalty from \$370,000 settlement, or 1.4 percent of total settlement);
22 Slavkov v. First Water Heater Partners I (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS
23 116303 (finding a \$7,500 PAGA payment reasonable when measured against the overall
24 settlement of \$345,000 and the possible weaknesses in Plaintiffs' case, or 2.2 percent of total
25 settlement). Additionally, the LWDA has been informed of the terms of the PAGA portion of the
26 settlement, and will be able to weigh in as necessary. Jennings v. Open Door Mktg. Inc. (N.D.
27 Cal. Oct. 3, 2018) 2018 U.S. Dist. LEXIS 171356, at *27 (approving settlement with PAGA
28 penalties of 0.6% where "[p]laintiffs [have] submitted the settlement agreement to the LWDA,

1 and the LWDA has not objected to the settlement.

2 The settlement obviates the significant risk that this Court may find any kind of class
3 resolution unachievable or might deny certification of all or some of Plaintiff's claims.
4 Furthermore, even if Plaintiffs obtained certification of all or some of the claims, continued
5 litigation would be expensive as the parties pursued merits discovery, a probable motion to
6 decertify, as well as trial and possible appeals, and would substantially delay any recovery by the
7 class with no assurance of recovering significantly more than the proposed settlement. While
8 Plaintiff is confident in the merits of his claims, a legitimate controversy exists as to each cause
9 of action. Plaintiff also recognizes proving the amount of wages and penalties due each Class
10 Member would be an expensive and uncertain proposition. [Donnelly Decl., ¶ 35.]

11 Plaintiff and counsel discounted the value of the class claims consistent with the risks
12 discussed above, and carefully weighed the likelihood of the class receiving substantially greater
13 benefit if the litigation continued. Plaintiff and counsel concluded – in light of these very real and
14 substantial risks – settlement on the proposed terms and without prolonged and costly litigation
15 was in the best interests of the class. The overall \$175,000 recovery represents a significant
16 percentage of Defendant's potential exposure and, given the risks addressed above, a total
17 recovery for the class of \$175,000, which will result in average award of some \$500 per class
18 member, is a significant result well within the range of reasonableness considering all potential
19 outcomes, and it will provide direct monetary awards to all Class Members without further delay.
20 [Donnelly Decl., ¶ 36.]

21 Importantly, the mere fact that a settlement does not provide the same recovery as might
22 be achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and
23 adequate. Wershba, 91 Cal.App.4th at 246, 250 (“Compromise is inherent and necessary in the
24 settlement process...even if the relief afforded by the proposed settlement is substantially
25 narrower than it would be if the suits were to be successfully litigated, this is no bar to a class
26 settlement because the public interest may indeed be served by a voluntary settlement in which
27 each side gives ground in the interest of avoiding litigation”); Lane v. Facebook, Inc., 696 F.3d
28 811, 819 (9th Cir. 2012) (“[T]he question whether a settlement is fundamentally fair . . . is

different from the question whether the settlement is perfect in the estimation of the reviewing court"); 7-Eleven Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135, 1150 ("The fact that a proposed settlement may amount to only a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved"); White v. Experian Information Solutions, Inc. (C.D. Cal. 2011) 803 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable even though it represented 99% discount off the maximum value of the claims). Importantly as well, the proposed settlement is non-reversionary and will provide immediate benefits to the Class Members without a claims process. White, 803 F.Supp.2d at 1098; c.f., Federal Judicial Center, Managing Class Action Litigation: A Pocket Guide for Judges (3d ed. 2010) at 20, available at [http:// www.fjc.gov/sites/default/files/2012/ClassGd3.pdf](http://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf) (reversionary provisions and/or cumbersome claims process may indicate lack of fairness). Plaintiff and his counsel submit the settlement is within the "range of reasonableness," and is fair and adequate for the Class.

IV. CONCLUSION

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

Dated: January 29, 2024

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