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9
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF SAN DIEGO**

12 ELISEO DE LA TORRE, JOSE NORIEGA,
13 NICASIO ANDRADE, and MARIO CASTRO,
individually and on behalf of all similarly
situated employees,

14 Plaintiffs,
15 v.

16 UNIQUE BUILDING GROUP, INC., a
California Corporation; and DOES 1-100,
17 inclusive,

18 Defendants.
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Case No.: 37-2023- 00011128-CU-OT-CTL

Assigned for All Purposes to:
Hon. Matthew C. Braner
Dept. C-60

**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 Brandon
Brouillette, Eliseo De La Torre, Jose Noriega,
Nicasio Andrade, Mario Castro, and Michael
Moore; [Proposed] Order]

Date: May 24, 2024
Time: 9:00 a.m.
Department: C-60

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	FACTUAL BACKGROUND AND PROCEDURAL POSTURE	1
III.	THE PROPOSED SETTLEMENT TERMS.....	3
	A. Certification of the Settlement Class	3
	B. The Benefit Conferred on the Settlement Class.....	4
	C. Settlement Administration	5
	D. The Class Notice	5
	E. Right to Correct Information, Opt Out, or Object.....	5
	F. Release of Claims.....	6
	G. Attorney’s Fees and Costs, and Plaintiff’s Enhancement Award	6
	H. PAGA Claims and Notice to the LWDA	6
IV.	ARGUMENT	6
	A. Standard of Review for a Class Action Settlement.....	6
	B. The Proposed Settlement Class Should Be Conditionally Certified.....	8
	C. The Proposed Settlement Meets the Dunk and Kullar Factors and is within the Range of Reasonableness.....	9
V.	CONCLUSION	15

TABLE OF AUTHORITIES

Page(s)

Cases

<u>7-Eleven Owners for Fair Franchising v. Southland Corp.</u> (2000) 85 Cal.App.4th 1135	14
<u>Amaral v. Cintas Corp. No. 2</u> (2008) 163 Cal.App.4th 1157	12
<u>Carrington v. Starbucks Corp.</u> (2018) 30 Cal.App.5th 504	12
<u>Class Plaintiffs v. City of Seattle</u> (9th Cir. 1992) 955 F.2d 1268, <u>cert. denied</u> , 506 U.S. 953	7
<u>Dunk v. Ford Motor Co.</u> (1996) 48 Cal.App.4th 1794	7, 8
<u>Global Minerals & Metals Corp. v. Superior Court</u> (2003) 113 Cal.App.4th 836	8
<u>Jennings v. Open Door Mktg. Inc.</u> (N.D. Cal. Oct. 3, 2018) 2018 U.S. Dist. LEXIS 171356.....	13
<u>Jones v. Farmers Ins. Exch.</u> (2013) 221 Cal.App.4th 986	9
<u>Kullar v. Foot Locker Retail, Inc.</u> (2008) 168 Cal.App.4th 116	9, 10
<u>Lane v. Facebook, Inc.</u> (9th Cir. 2012) 696 F.3d 811.....	14
<u>North County Contractors Ass’n, Inc. v. Touchstone Ins. Servs.</u> (1994) 27 Cal.App.4th 1085	7
<u>Potter v. Pacific Coast Lumber Co.</u> (1951) 37 Cal.2d 592	7
<u>See’s Candy Shops, Inc. v. Super. Ct.</u> (2012) 210 Cal. App. 4th 889	11
<u>Slavkov v. First Water Heater Partners I</u> (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS 116303	13
<u>In re Taco Bell Wage and Hour Actions</u> (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. LEXIS 48557.....	13

<u>Van Kempen v. Matheson Tri-Gas, Inc.</u>	
(N.D. Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182.....	13
<u>Wershba v. Apple Computer</u>	
(2001) 91 Cal.App.4th 224	7, 8, 14
<u>White v. Experian Information Solutions, Inc.</u>	
(C.D. Cal. 2011) 803 F.Supp.2d 1086	14
<u>Williams v. Superior Court</u>	
(2013) 221 Cal.App.4th 1353	9

Statutes

Cal. Rule of Court. 3.769	7
Cal. Rule of Court 3.769(c).....	7
California Rules of Court 3.766(d)	5
California Rules of Court 3.769(f)	5
Code of Civil Procedure section 382	8
Labor Code § 203	12
Labor Code section 226	12
Labor Code § 2699(e)(2).....	12
Labor Code section 2699(l)(2)	6
Labor Code § 2802	12

Other Authorities

Federal Judicial Center, <u>Managing Class Action Litigation: A Pocket Guide for Judges</u> (3d ed. 2010), available at http://www.fjc.gov/sites/default/files/2012/	14
<u>Newberg on Class Actions</u> (4th ed. 2002) § 11.41	6

1 **I. INTRODUCTION**

2 Plaintiffs Eliseo De La Torre, Jose Noriega, Nicasio Andrade, and Mario Castro hereby
3 move the Court for an order granting preliminary approval to a proposed non-reversionary
4 class action settlement to resolve wage and hour claims on behalf of approximately 769
5 individuals employed by Defendant Unique Building Group, Inc. (“UBG” or “Defendant”) as
6 non-exempt employees during the period of March 16, 2019 through March 15, 2024. The
7 proposed \$700,000 settlement will provide at least \$336,667 in cash payments to the
8 settlement class, with an average award of about \$438. The balance of approximately
9 \$363,333 will cover modest enhancement awards to Plaintiffs, reasonable attorney’s fees and
10 actual litigation costs, settlement administration costs, and payment of civil penalties to the
11 state. The settlement is the product of Plaintiffs’ pre- and post-filing investigation, a pre-
12 mediation exchange of information, and arms-length and adversarial negotiations overseen by
13 experienced and well-regarded mediator Louis Marlin, Esq.

14 As demonstrated below, the settlement is within the “range of reasonableness” for
15 preliminary approval. Plaintiffs’ counsel believes the settlement is a significant result for the
16 class given the substantial risks inherent in this matter. Accordingly, Plaintiffs request the
17 Court enter an order: (1) granting preliminary approval to the proposed class action
18 settlement; (2) conditionally certifying the settlement class as defined below; (3) appointing
19 as Brandon Brouillete, Zachary M. Crosner and Jamie Serb, and Crosner Legal, PC as Class
20 Counsel; (4) appointing plaintiffs Eliseo De La Torre, Jose Noriega, Nicasio Andrade, and Mario
21 Castro as the Class Representatives; (5) appointing Phoenix Settlement Administrators as the
22 Settlement Administrator; (6) approving the form of notice to the class and the procedure for
23 providing such notice; and (7) scheduling a final fairness hearing.

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

25 Defendant Unique Building Group, Inc. is a subcontractor that specializes in large-scale
26 framing and building envelope solutions. This means they work with general contractors to install
27 framing and drywall, cladding solutions and panel systems, and rainscreen system on larger
28 commercial developments. Defendant is a non-signatory to the carpenters' union, meaning they hire

1 non-union workers for general labor duties, including the four named Plaintiffs. During the
2 proposed class period, the named Plaintiffs covers the time period from January 2020 through June
3 2022. The Plaintiffs worked throughout California in various job positions, including taper, hanger,
4 framer, and drywaller. [Brouillette Decl., ¶ 4.]

5 On March 16, 2023, Plaintiffs filed their class action complaint in San Diego Superior
6 Court. On March 20, 2023, Plaintiff De La Torre submitted his PAGA notice to the LWDA and
7 Defendant. Thereafter, Plaintiffs filed an amended adding a PAGA claim. Shortly after Plaintiffs
8 filed the action the Parties agreed to participate in early mediation. Plaintiffs' First Amended
9 Complaint include claims for unpaid minimum wages, unpaid overtime wages, failure to provide
10 meal breaks, failure to provide rest breaks, failure to furnish accurate wage statements, failure to
11 timely pay all wages due upon separation of employment, failure to reimburse business expenses,
12 unfair competition, and a PAGA claim. [Brouillette Decl., ¶ 5.]

13 UBG has at all times denied Plaintiffs' allegations and maintained its meal break and
14 payroll policies and procedures comply with California law, that it provided its employees
15 with required meal and rest breaks, that it properly tracked employee time and paid Plaintiffs
16 and all other employees all wages due at the correct hourly and overtime rates. Additionally,
17 UBG strongly contends the case cannot be maintained as any kind of class or representative
18 action, arguing that to the extent class members missed meal breaks, that such breaks were
19 non-compliant, or that any unpaid "off the clock" work occurred, it was intermittent and
20 infrequent, that evidence of such violations would be purely anecdotal, and therefore
21 individualized issues predominate and trial would be unmanageable. [Brouillette Decl., ¶ 6.]

22 After Plaintiffs filed their complaint, the Parties engaged in substantial meet and confer
23 discussions regarding discovery, potential law and motion, and other case management issues,
24 and ultimately agreed to attempt early mediation, and further agreed to explore settlement on a
25 class action basis. Thereafter, the Parties engaged in additional informal discovery to
26 facilitate an exchange of information necessary to engage in a meaningful mediation.
27 Consequently, Plaintiffs' counsel reviewed payroll records, personnel policies/handbooks,
28 meal break policies, personnel files, and a random sampling of paystubs and time records

1 produced by UBG. Defendant also provided documents and information reflecting the
2 estimated total amount of workweeks and pay periods they worked, number of class members,
3 and average hourly pay rates, among other relevant data. Plaintiffs had this data reviewed by a
4 consulting expert to assist with determining potential violations rates and formulating a
5 damages model. [Brouillette Decl., ¶ 7.]

6 The Parties then engaged Louis Marlin, Esq., a highly respected mediator with
7 extensive wage and hour class action experience and, on December 15, 2023, participated in a
8 mediation with Mr. Marlin. The arms-length negotiations were hard-fought and adversarial as
9 the Parties exchanged extensive information on their legal and factual positions, and made
10 numerous offers and counter-offers. Ultimately, the Parties reached agreement on all major
11 issues to resolve the matter on both a class and PAGA basis. The Parties thereafter
12 collaboratively drafted the Settlement Agreement setting forth the full and final settlement
13 terms. [Brouillette Decl., ¶ 8.]

14 **III. THE PROPOSED SETTLEMENT TERMS**

15 Under the settlement, UBG will pay \$700,000.00 into a common fund, the Gross
16 Settlement Amount (“GSA”). Reasonable attorney’s fees of up to 33.33% of the GSA, or
17 \$233,333.33, actual litigation costs of up to \$17,500, a modest enhancement award of up to
18 \$10,000 each for plaintiffs, settlement administration costs of no more than \$12,500, and
19 \$60,000 for alleged civil penalties under PAGA,¹ all will be paid from the GSA. The
20 remainder of approximately \$336,667 will be allocated among the Participating Class
21 Members based on their total weeks worked during the Class Period. No portion of the GSA
22 will revert to UBG. [Brouillette Decl., ¶ 9.]

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

24 The settlement provides for conditional certification of a settlement class including all
25 individuals who worked for Defendant as a non-exempt employee in California during the Class
26 _____

27 ¹ Consistent with PAGA, \$45,000 of that amount will go the LWDA for the State’s share of the
28 civil penalties, and the remaining \$15,000 will be distributed pro rata to the Aggrieved
Employees.

Period, which runs from March 16, 2019 through March 15, 2024. For mediation, the Parties estimated the Settlement Class at approximately 769 individuals. [Brouillette Decl., ¶ 10.]

B. The Benefit Conferred on the Settlement Class

As noted, the settlement obligates UBG to pay \$700,000 to resolve the Settlement Class's claims, inclusive of attorney's fees and costs. At least \$336,667 from the GSA will be distributed to the Participating Class Members. This is a cash settlement that does not require Participating Class Members to submit a claim form to receive their settlement share. Participating Class Members will receive their settlement checks automatically via First Class U.S. Mail. Twenty percent of each settlement share will be allocated to wages and the remaining eighty percent will be allocated to expenses, penalties and interest. UBG will pay any and all applicable employer-side payroll taxes separately and in addition to the GSA. Subject to the Court's approval, any amounts not claimed (because a class member does not cash his or her settlement check) will be forwarded to the California State Controller's Unclaimed Property Fund. [Brouillette Decl., ¶ 11.]

Each Participating Class Member will receive a share of the Net Settlement Amount based on the total weeks worked for UBG during the Class Period while employed as a non-exempt employee. Thus, each Class Member's Individual Settlement Payment will be calculated using criteria typically used in determining appropriate amounts of alleged unpaid wages, unpaid premium wages for missed meal breaks, unreimbursed expenses, and potential statutory penalties under applicable law. These methods are intended to ensure each Class Member receives a portion of the available settlement funds corresponding to the relative value of his or her potential claims. The proposed allocation provides a reasonable way to compensate Class Members based on the amount of time they worked for UBG, and the number of instances they missed a break, were not provided compensation in lieu of such missed breaks, or lost wages due to underpaid overtime. The average award will be approximately \$438. There are approximately 143 Aggrieved Employees also eligible to receive a share of the PAGA civil penalties, and their average PAGA award will be about \$105. [Brouillette Decl., ¶ 12.]

1 As discussed below, the overall settlement amount is reasonable in light of the
2 considerable risks associated with Plaintiffs' claims as well as the delay and risk posed by
3 continuing to litigate such disputed allegations. In Plaintiffs' counsel's judgment, the total
4 value recovered for the class is substantial and within the range of reasonableness.

5 **C. Settlement Administration**

6 Subject to the Court's approval, the Parties have agreed on Phoenix Settlement
7 Administrators ("Phoenix") as the Settlement Administrator. Phoenix is qualified and has
8 significant experience administering class action settlements, including numerous wage and
9 hour matters. Phoenix's fees will not exceed \$12,500.00. If the Court approves less than the
10 above amount, the difference will remain in the Net Settlement Amount for distribution to the
11 Participating Class Members. [Brouillette Decl., ¶ 13; Declaration of Michael Moore, ¶¶ 2-16;
12 Exhs. A-B.]

13 **D. The Class Notice**

14 The proposed Notice (Exhibit A to the Settlement Agreement) sets out information
15 about this case and explains the basic settlement terms in plain language. The Notice also sets
16 forth the individualized information used to calculate Class Members' Individual Settlement
17 Payments and each Class Member's estimated settlement award. The Notice likewise details
18 the procedures for Class Members to dispute their individual information, the procedure for
19 submitting an objection to the Settlement, and the procedure to request exclusion. In sum, the
20 Notice provides the Class Members with the information necessary to evaluate the Settlement,
21 provides fair opportunity to participate in, opt out of, or object to the proposed Settlement, and
22 otherwise complies with California Rules of Court 3.769(f) and 3.766(d). Coupled with the
23 notice procedure, the proposed Notice provides the Class with the best notice practicable.
24 [Brouillette Decl., ¶ 14.]

25 **E. Right to Correct Information, Opt-Out, or Object**

26 Class Members will have forty-five (45) days to dispute the information in their Notice
27 used to calculate their settlement award, and also have 45 days to submit any objections to the
28 settlement or to request exclusion. In the event a Class Member disputes their individual

1 information, the Settlement Administrator will review the Class Member's records as well as
2 any information submitted, and then make a final determination. [Brouillette Decl., ¶ 15.]

3 **F. Release of Claims**

4 All Participating Class Members will be deemed to release UBG from all claims
5 alleged in the operative complaint, or that could have been brought based on the allegations in
6 the operative complaint, including PAGA claims, from March 16, 2019 through March 15,
7 2024. The release is limited to the claims that were actually pleaded or reasonably could have
8 been pleaded based on the alleged facts in the operative complaint. [Brouillette Decl., ¶ 16.]

9 **G. Attorney's Fees and Costs, and Plaintiffs' Enhancement Awards**

10 The settlement provides Defendant will not oppose a request for reasonable attorney's
11 fees not to exceed 33.33% of the Gross Settlement Amount, or \$233,333.33, nor will it oppose
12 a request for reimbursement of actual litigation costs and expenses of up to \$17,500.00.
13 Defendant also will not oppose a request for an enhancement award to Plaintiffs of not more
14 than \$10,000.00 each in recognition of their time spent on this matter, the risks they undertook
15 on behalf of the class, and the benefit conferred to the class. Plaintiffs' counsel will provide
16 the Court with appropriate summaries and evidence of its efforts and time records in
17 anticipation of the Final Approval Hearing, and Plaintiffs have submitted their declarations
18 herewith. If the Court approves less than the above amounts, the difference will remain in the
19 Net Settlement Amount for distribution to the Class. [Brouillette Decl., ¶ 17.]

20 **H. PAGA Claims and Notice to the LWDA**

21 The Parties allocated \$60,000 to payment of civil penalties under PAGA for such
22 claims against UBG, as addressed in more detail below. As required by Labor Code section
23 2699(1)(2), Plaintiffs gave notice of the settlement and preliminary approval hearing to the
24 LWDA via its online portal. [Brouillette Decl., ¶ 18; Exh. 3.)

25 **IV. ARGUMENT**

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

27 The law favors settlement, particularly in class actions where substantial resources can
28 be conserved by avoiding the time, costs and rigors of formal litigation. H. Newberg & A.

1 Conte, 4 Newberg on Class Actions (4th ed. 2002) § 11.41; Class Plaintiffs v. City of Seattle
2 (9th Cir. 1992) 955 F.2d 1268, 1276, cert. denied, 506 U.S. 953; Potter v. Pacific Coast
3 Lumber Co. (1951) 37 Cal.2d 592, 602. Nevertheless, to ensure the rights of absent class
4 members are not unjustly compromised, settlement of a class action requires court approval.
5 Cal. Rule of Court. 3.769; Wershba v. Apple Computer (2001) 91 Cal.App.4th 224, 245; Dunk
6 v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1801. This judicial review protects against
7 fraud or collusion and ensures fairness to the absent class members. Dunk, 48 Cal.App.4th at
8 1800-01. Judicial review occurs via a two-step process to determine, under all the
9 circumstances, if the proposed settlement is fair, reasonable and adequate. Id. at 1801;
10 Wershba, 91 Cal.App.4th at 245.

11 The first step is a motion for preliminary approval, through which the parties present
12 the court with the proposed settlement and seek a determination if it is sufficiently fair and
13 reasonable to warrant notice to the class and further proceedings as to its fairness and
14 adequacy. Cal. Rule of Court 3.769(c). This preliminary evaluation determines if the
15 proposed settlement is within the “range of reasonableness” and if notice should be provided
16 to the class regarding the settlement’s proposed terms and conditions, and whether a final
17 fairness hearing should be scheduled. Wershba, 91 Cal.App.4th at 234-35; North County
18 Contractors Ass’n, Inc. v. Touchstone Ins. Servs. (1994) 27 Cal.App.4th 1085, 1089-90.
19 Considering the strong judicial policy favoring settlement of class actions, courts generally
20 apply a presumption of fairness to class action settlements when (1) the settlement results
21 from arms-length bargaining, (2) investigation and discovery are sufficient to allow counsel
22 and the court to act intelligently, (3) counsel is experienced in similar litigation, and (4) the
23 percentage of objectors is small. Dunk, 48 Cal.App.4th at 1802; Wershba, 91 Cal.App.4th at
24 245.

25 If the court grants preliminary approval, it then orders the class be given notice in an
26 appropriate manner, establishes a schedule and procedures for class members to request
27 exclusion or object, and sets the matter for a final fairness hearing. Typically, any motion for
28 attorney’s fees and costs, and any enhancement for the class representative(s), is filed

1 subsequent to preliminary approval and heard with the motion for final approval, as part of the
2 second step of the two-step approval process. Dunk, 48 Cal.App.4th at 1800; Wershba, 91
3 Cal.App.4th at 232.

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

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

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

14 In the present matter, conditional certification is proper since this matter satisfies all
15 requirements for class certification under Code of Civil Procedure section 382. First, the class
16 is both sufficiently numerous, consisting of approximately 769 individuals (at the time of
17 settlement), and ascertainable by reference to Defendant's personnel and payroll records.
18 [Brouillette Decl., ¶ 19.] Next, Plaintiffs all are adequate class representatives, as their claims
19 do not conflict with and are not antagonistic to the claims of other class members. Further,
20 each of their claims are typical given each is a member of the class and has claims arising
21 from the same employment practices and course of conduct giving rise to the claims of the
22 other class members. [Brouillette Decl., ¶ 20; Declaration of Eliseo De La Torre, ¶¶ 2-9;
23 Declaration of Jose Noriega, ¶¶ 2-9; Declaration of Nicasio Andrade, ¶¶ 2-9; Declaration of
24 Mario Castro, ¶¶ 2-9.] Lastly, their counsel is experienced and adequate class counsel.
25 [Brouillette Decl., ¶¶ 35-46.]

26 Next, common questions of law and fact predominate – particularly for purposes of a
27 settlement class – as the Class Members all were subject to the same meal rest break policies,
28 the same alleged rounding policy that shorted them on hours worked, etc. Since the focus of

1 the claims against UBG concerns the legality of common policies applied uniformly to the
2 entire class, common issues predominate over individualized inquiries concerning liability.
3 UBG’s alleged rounding policy is a company-wide policy applied equally and consistently to
4 all class members, and this policy is either compliant with California law or it is not.
5 Regardless of that determination, it will decide liability for all class members one way or
6 another. Similarly, whether UBG required employees to use their personal phones for work
7 without proper reimbursement raises another issue common to all class members.
8 [Brouillette Decl., ¶ 21.]

9 By now it is well-settled that a theory of recovery asserting the existence of a uniform
10 policy violating California law is sufficient to satisfy the requirements for class certification.
11 Jones v. Farmers Ins. Exch. (2013) 221 Cal.App.4th 986, 996 (“Claims alleging that a uniform
12 policy consistently applied to a group of employees is in violation of the wage and hour laws
13 are of the sort routinely, and properly, found suitable for class treatment”); Williams v.
14 Superior Court (2013) 221 Cal.App.4th 1353 (“A company-wide practice can sustain a
15 common question of fact or law that supports commonality for class certification”). Lastly, a
16 class action is superior to other means for the fair and efficient adjudication of this
17 controversy. [Brouillette Decl., ¶ 22.]

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

20 The proposed settlement resulted from serious, arms-length negotiations facilitated by
21 respected mediator the Louis Marlin, Esq., who has extensive experience mediating wage and
22 hour class actions. [Brouillette Decl., ¶ 8.] Plaintiffs’ counsel Branden Brouillette, Zach
23 Crosner, and Jamie Serb all have years of litigation experience, including litigating wage and
24 hour class actions. Plaintiffs’ counsel is well-qualified to evaluate the risks and benefits of
25 pursuing further litigation or settling the matter. [Brouillette Decl., ¶¶ 35-46.]

26 California law recognizes several factors bearing on the fairness, adequacy, and
27 reasonableness of a proposed class settlement. Kullar v. Foot Locker Retail, Inc. (2008) 168
28 Cal.App.4th 116, 128. In relevant part, these factors include: 1) the amount offered in settlement

1 2) the strength of plaintiff's case; 3) the risk, expense, complexity, and likely duration of further
2 litigation; 4) the risk of maintaining class action status throughout trial; 5) the experience and
3 views of counsel; and 6) the reaction of the class members to the proposed settlement. Id. As
4 demonstrated below, the proposed settlement satisfies these requirements.

5 Prior to mediation, the parties engaged in extensive informal discovery to facilitate
6 settlement discussions. As a result, Plaintiffs reviewed documents and information regarding
7 UBG's payroll practices, pay stubs and time records for a sampling of pay periods, meal and
8 rest break policies, etc., and information from Defendant regarding class size and breakdown of
9 job positions, work weeks, rates of pay, and other information used to formulate a damages
10 model. Plaintiffs' counsel is confident they obtained sufficient information to enable them to
11 understand the law and facts of this case and make an informed decision regarding the proposed
12 settlement and whether it is in the best interests of the class. [Brouillette Decl., ¶¶ 7, 23.]

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

18 Plaintiffs' analysis was supported by the pre-mediation production described above,
19 which permitted Plaintiffs' counsel to estimate potential damages on various theories of
20 liability with the assistance of a consulting expert. Using that data, Plaintiffs ran various
21 calculations and estimated UBG's likely maximum exposure on the class claims at
22 approximately \$10.5 million, including \$412,350 on the unpaid wage claims, \$2,106,750 on
23 the meal break claims, \$4,270,330 on the rest break claims, \$409,600 on the expense
24 reimbursement claim, \$572,000 on the wage statement claims, and \$2747,000 on the waiting
25 time penalty claims. [Brouillette Decl., ¶¶ 24-25.] Plaintiffs and their counsel substantially
26 discounted the value of these claims, however, in light of the multiple and considerable risks
27 posed by proceeding with the litigation.

28 On the unpaid wage claims, Plaintiffs alleged Defendant rounded employee time records

1 throughout the class period to the nearest quarter hour, resulting in an overall loss of hours worked
2 and compensation to the Class Members during many pay periods. Plaintiffs further alleged
3 Defendant routinely kept employees on the job site working late, after they had clocked out, to
4 clean up and put tools away. As a result, Plaintiffs contend UBG did not pay the Class
5 Members for the actual hours worked. [Brouillette Decl., ¶ 26.]

6 In response, Defendant argued its time keeping and rounding policy is entirely neutral
7 in effect and did not deprive class members of compensable hours worked over time and,
8 accordingly, does not violate California law. See's Candy Shops, Inc. v. Super. Ct. (2012) 210
9 Cal. App. 4th 889, 901. Defendant also emphasized that its policies strictly prohibited any off
10 the clock work and, to the extent any such work occurred, it was aberrational, against
11 company policy, and done without the employer's knowledge. Thus, per UBG, the issue is not
12 suited for class certification since any number of individualized inquiries would be required to
13 determine if any such work occurred or if it was compensable. [Brouillette Decl., ¶ 27.]

14 On the meal and rest break claims, while UBG's written policies generally appeared
15 compliant, Plaintiff's review of the time and payroll records suggested Defendant failed to keep
16 accurate meal period records, as employees would clock in to begin their shift and clock out at the
17 end of their shift, but would not clock in and out for meal breaks. Instead, Plaintiffs allege meal
18 break times were auto-deducted to show meals were taken in a compliant fashion even when they
19 were not. Per Plaintiffs, however, meal breaks were routinely cut short or taken late due to work
20 requirements and mandates to meet progress deadlines on each job site. For the same reasons,
21 Plaintiffs contend they were not provided with the required amount of rest breaks and received at
22 most one rest break per shift. [Brouillette Decl., ¶ 28.]

23 In response, UBG emphasized its written policies are compliant, and that it provided
24 many class members with the opportunity to take all required meal and rest breaks and thus
25 met its obligations under the law. UBG states that the construction sites shut down and all
26 workers were able to take their breaks at the same time. UBG further argued its records
27 accurately reflect that employees took timely and compliant meal breaks. UBG also noted
28 that, in light of its compliant policies, whether a class member missed a meal period, received

1 a late meal period, or missed a rest break would have been aberrational and against company
2 policy. Thus, per Defendant, these issues are not amenable to class or representative treatment
3 since their resolution would require individualized inquiries as to why a break was missed or
4 non-compliant. [Brouillette Decl., ¶ 29.]

5 On the expense reimbursement claim, Plaintiffs claimed that they and the Class
6 Members regularly had to use their personal phones while on the clock and for work purposes
7 to, inter alia, communicate with supervisors, take pictures of their work, and so on. Per
8 Plaintiffs, UBG did not pay any reimbursement for use of personal phones. UBG on the other
9 hand argued that any use of personal mobile devices was unnecessary to perform the job and
10 therefore was purely for personal convenience. If so, then the expense was neither reasonable
11 nor necessary, and therefore no reimbursement was required. Labor Code § 2802. [Brouillette
12 Decl., ¶ 30.]

13 On the claims under Labor Code section 226, for inaccurate wage statements, Plaintiffs
14 alleged derivative wage statement violations based on the alleged underpaid overtime and
15 meal/rest break violations, and further alleged derivative Labor Code 203 violations for
16 failure to timely pay all wages due on separation of employment. Being derivative, these
17 claims accordingly are subject to the same risks and uncertainties applicable to the primary
18 claims, plus additional risks posed by the need to take into account the discretionary nature of
19 such awards and the “good faith” and other defenses available to Defendant. Amaral v. Cintas
20 Corp. No. 2 (2008) 163 Cal.App.4th 1157, 1203-4 (employer did not willfully fail to pay
21 wages under Labor Code § 203 even though class prevailed on underlying claim for failure to
22 pay living wages). Thus, while these claims largely are derivative of the unpaid wage claims,
23 they also are subject to additional defenses. [Brouillette Decl., ¶ 31.]

24 As far as potential PAGA liability, the allegedly aggrieved employees theoretically are
25 entitled to penalties totaling about \$5 million in civil penalties should Plaintiffs prevail on all
26 claims and establish violations of the multiple Labor Code sections at issue for each and every
27 pay period, and secure the maximum allowable penalties. [Brouillette Decl., ¶ 32.] As with the
28 class claims, Plaintiffs discounted the potential PAGA penalties based on UBG’s various

1 defenses on the merits and also accounted for the Court's wide discretion to reduce such
2 penalties, or to decline to award penalties at all. Labor Code § 2699(e)(2); Carrington v.
3 Starbucks Corp. (2018) 30 Cal.App.5th 504 (trial court awarded penalties of \$5 per pay period
4 after a bench trial, which decision was upheld on appeal); In re Taco Bell Wage and Hour
5 Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. LEXIS 48557 (PAGA penalties denied after
6 trial). Accordingly, the Parties allocated \$60,000 to PAGA penalties, and Plaintiffs submit this
7 amount is reasonable under the circumstances and in line with comparable settlements in other
8 wage and hour class actions in California. *E.g.*, Van Kempen v. Matheson Tri-Gas, Inc. (N.D.
9 Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182 (granting final approval of \$5,000 PAGA
10 penalty from \$370,000 settlement, or 1.4 percent of total settlement); Slavkov v. First Water
11 Heater Partners I (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS 116303 (finding a \$7,500
12 PAGA payment reasonable when measured against the overall settlement of \$345,000 and the
13 possible weaknesses in Plaintiffs' case, or 2.2 percent of total settlement). Additionally, the
14 LWDA has been informed of the terms of the PAGA portion of the settlement, and will be able
15 to weigh in as necessary. Jennings v. Open Door Mktg. Inc. (N.D. Cal. Oct. 3, 2018) 2018 U.S.
16 Dist. LEXIS 171356, at *27 (approving settlement with PAGA penalties of 0.6% where
17 "[p]laintiffs [have] submitted the settlement agreement to the LWDA, and the LWDA has not
18 objected to the settlement.

19 The settlement obviates the significant risk that this Court may find any kind of class
20 or representative resolution unachievable or deny certification of all or some of Plaintiffs'
21 claims. Furthermore, even if Plaintiffs obtained certification of all or some of the claims,
22 continued litigation would be lengthy and expensive as the Parties pursued merits discovery, a
23 probable motion to decertify, as well as trial and possible appeals, and would substantially
24 delay any recovery by the class with no assurance of recovering significantly more than the
25 proposed settlement. While Plaintiffs are confident in the merits of these claims, legitimate
26 controversies exist regarding each one of them. Plaintiffs also recognize proving the amount
27 of wages and penalties due each Class Member would be an expensive, time-consuming, and
28 uncertain proposition. [Brouillette Decl., ¶ 33.]

1 Plaintiffs and their counsel discounted the value of the class claims consistent with the
2 risks discussed above, and carefully weighed the likelihood of the class receiving substantially
3 greater benefit if the litigation continued. Plaintiffs and counsel concluded – in light of these
4 very real and substantial risks – settlement on the proposed terms and without prolonged and
5 costly litigation was in the best interests of the class. The overall \$700,000 recovery
6 represents a significant percentage of Defendant’s potential exposure. Given these risks, a
7 total recovery for the class of \$700,000, which will result in average award of about \$438 per
8 class member, is a significant result well within the range of reasonableness considering all
9 potential outcomes, and it will provide direct monetary awards to all Class Members in short
10 order. [Brouillette Decl., ¶ 34.]

11 Importantly, the mere fact that a settlement does not provide the same recovery as
12 might be achieved at trial is not a proper indicator of whether the settlement is fair,
13 reasonable, and adequate. Wershba, 91 Cal.App.4th at 246, 250 (“Compromise is inherent and
14 necessary in the settlement process...even if the relief afforded by the proposed settlement is
15 substantially narrower than it would be if the suits were to be successfully litigated, this is no
16 bar to a class settlement because the public interest may indeed be served by a voluntary
17 settlement in which each side gives ground in the interest of avoiding litigation”); Lane v.
18 Facebook, Inc. (9th Cir. 2012) 696 F.3d 811, 819 (“[T]he question whether a settlement is
19 fundamentally fair . . . is different from the question whether the settlement is perfect in the
20 estimation of the reviewing court”); 7-Eleven Owners for Fair Franchising v. Southland Corp.
21 (2000) 85 Cal.App.4th 1135, 1150 (“The fact that a proposed settlement may amount to only a
22 fraction of the potential recovery does not, in and of itself, mean that the proposed settlement
23 is grossly inadequate and should be disapproved”); White v. Experian Information Solutions,
24 Inc. (C.D. Cal. 2011) 803 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair
25 and reasonable even though it represented 99% discount off the maximum value of the
26 claims). Importantly as well, the proposed settlement is non-reversionary and will provide
27 timely benefits to the Class Members without a claims process. White, 803 F.Supp.2d at
28 1098; c.f., Federal Judicial Center, Managing Class Action Litigation: A Pocket Guide for

1 Judges (3d ed. 2010) at 20, available at [http://www.fjc.gov/sites/default/files/2012/](http://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf)
2 ClassGd3.pdf (reversionary provisions and/or cumbersome claims process may indicate lack
3 of fairness). Plaintiff and his counsel submit the settlement is within the “range of
4 reasonableness,” and is fair and adequate for the Class.

5 **V. CONCLUSION**

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

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10 Date: May 1, 2024

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