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8 As an individual and on behalf of all others similarly situated

9
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF EL DORADO**

12 CHARMAINE TATE, as an individual and
on behalf of all others similarly situated,

13
14 Plaintiff,

15 v.

16 PRO ENERGY SERVICES GROUP, LLC,
a Delaware Limited Liability Company;
17 and DOES 1-100, inclusive,

18
19 Defendants.
20

Case No.: 23CV0586

Assigned for All Purposes to:
Hon. Gary S. Stossberg
Dept. 9

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

Date: TBD
Time: 8:30 a.m.
Dept. 9

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1 **I. INTRODUCTION**

2 Plaintiffs Charmain Tate and Dave Crockett hereby move the Court for an order granting
3 preliminary approval to a proposed non-reversionary class action settlement to resolve wage and
4 hour claims on behalf of about 1,474 individuals employed by Defendant Pro Energy Services
5 Group, LLC (“Pro Energy” or “Defendant”) in California at any time during the Class Period of
6 April 20, 2019 to June 5, 2024. The proposed \$900,000 settlement will provide about \$487,500 in
7 cash payments to the class, with an average award currently estimated at about \$330, plus
8 additional amounts under PAGA. The balance of approximately \$412,500 will cover reasonable
9 attorney’s fees and actual litigation costs, settlement administration costs, modest enhancement
10 awards to Plaintiffs, and civil penalties to the State. The settlement is the product of Plaintiffs’
11 pre-filing investigation, formal discovery and a pre-mediation exchange of information, and arms-
12 length negotiations overseen by experienced mediator Luis Marlin, Esq.

13 The proposed settlement is within the “range of reasonableness” for approval and
14 Plaintiffs’ counsel submit the settlement is a fair result given the substantial risks inherent in this
15 matter. Accordingly, Plaintiffs request the Court enter an order: (1) granting preliminary approval
16 to the proposed class action settlement; (2) conditionally certifying the settlement class as defined
17 below; (3) appointing Zachary M. Crosner, Jamie K. Serb and Brandon Brouillette, and Crosner
18 Legal, P.C., and Larry Lee and Simon Yang, and Diversity Law Group, as Class Counsel; (4)
19 appointing Plaintiffs Charmaine Tate and Dave Crockett as the Class Representatives; (5)
20 appointing Phoenix Settlement Administrators as the Settlement Administrator; (6) approving the
21 form of notice to the class and the notice procedure; and (7) scheduling a final fairness hearing.

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

23 Defendant Pro Energy provides a wide range of construction support services for the utility
24 industry, and partners with companies engaged in the construction, maintenance, repair, planning,
25 design, testing, and inspection of electrical infrastructure and facilities. Plaintiff Tate worked for
26 the Defendant for approximately one month until she resigned in September of 2022. Her title
27 was 'Flagger' or traffic helper' and she was on the flag team that assisted with road closures and
28 traffic management. She was a member of the Local IBW union. She would work anywhere from

1 6-12 hours per day, 5 days a week. Plaintiff Crockett worked for the Defendant for approximately
2 four years as a Senior Program Manager. He oversaw construction managers, inspectors, and
3 traffic control workers. In addition to hourly pay, a significant portion of his weekly income was
4 paid as "Per Diems." Unlike Plaintiff Tate, he was not a union employee. [Declaration of Brandon
5 Brouillette ("Brouillette Decl."), ¶ 4.]

6 Plaintiffs alleges several wage and hour violations by Defendant. First, they allege
7 Defendant failed to pay employees for all hours worked, and that supervisors were tasked with
8 logging hours at each job site resulting in accurate timekeeping. Plaintiff Tate also alleges she
9 sometimes was required to ride in a company van while picking up various employees from
10 different jobs sites after her shift had ended, which time she claims was not recorded or paid for.
11 Plaintiff Crockett further alleges that Pro Energy failed to include per diem payments in the
12 calculation of the "regular rate" used to determine overtime wages and, as a result, that they and
13 class members were underpaid for their overtime hours. [Brouillette Decl., ¶ 5.]

14 Plaintiffs also claim meal and rest break violations and allege Defendant did not provide
15 1st or 2nd meal periods to Plaintiff and other flaggers who were required to eat while working and
16 30 minutes "auto deducted" from their time. Plaintiffs similarly claim Defendant did not provide
17 Plaintiff and other flaggers with any rest periods. Lastly, Plaintiffs argued they had to use their
18 personal cell phones for work purposes such as communicating with supervisors during a shift,
19 and that they received no reimbursement [Brouillette Decl., ¶ 6.]

20 Based on these allegations, Plaintiff Tate filed a class action complaint in April 2023
21 alleging causes of action against Defendant for unpaid minimum wages, unpaid overtime wages,
22 failure to provide meal periods, failure to provide rest periods, violations of Labor Code Section
23 226, failure to timely pay all wages due upon separation of employment, failure to reimburse for
24 business expenses, unfair competition. On July 27, 2023, after notice to the LWDA and
25 exhausting administrative remedies, Plaintiff Tate filed an amended complaint adding a claim for
26 violations under PAGA based on the various alleged Labor Code violations identified in her
27 PAGA notice letter. On July 21, 2023, Plaintiff Crockett filed a separate class action complaint
28 against Defendant in the Placer County Superior Court, alleging causes of action against

1 Defendant for unpaid overtime wages, violations of Labor Code Section 226, and unfair
2 competition. [Brouillette Decl., ¶ 7; Exh. 2.]

3 Pro Energy has at all times denied Plaintiffs' collective allegations and maintained its
4 payroll and timekeeping policies and procedures comply with California law, that it paid the class
5 members for all wages due and provided all required meal and rest breaks on a fully-compliant
6 basis. Defendant also contends there would be no need for any class member to use their own
7 phone on company business and therefore no reimbursement is owed. Additionally, Pro Energy
8 strongly contends the case cannot be maintained as a class action, arguing for example that to the
9 extent class members worked off the clock, or missed any breaks, it was intermittent and
10 infrequent and evidence of such off the clock work would be anecdotal, and therefore
11 individualized issues would predominate. Lastly, Pro Energy emphasized that, like Plaintiff Tate,
12 a significant portion of the putative class were union employees and the terms of their employment
13 controlled by the terms of the relevant Collective Bargaining Agreements. Thus, per Defendant,
14 the claims of many class members were subject to federal preemption under the Labor
15 Management Relations Act and further subject to the grievance and arbitrations procedures of the
16 CBAs. [Brouillette Decl., ¶ 8.]

17 After Plaintiffs filed their respective complaints, the Parties engaged in initial written
18 discovery and, after meeting and conferring regarding discovery, law and motion, and other case
19 management issues, agreed to attempt a global mediation. The Parties also agreed on a protocol
20 for an exchange of substantial documents and information before the mediation to facilitate the
21 settlement discussions. Consequently, Plaintiffs' counsel reviewed payroll records, compensation
22 plans, personnel policies/handbooks, personnel files, relevant CBAs, meal and rest break policies,
23 and a random of sampling of Class Member paystubs and time records. Plaintiffs then had those
24 records analyzed by Berger Consulting Group to look for, inter alia, violation rates for potential
25 damages from off the clock work, violation rates for meal violations, etc. Defendant also provided
26 data regarding the total number of putative class members, the estimated total amount of
27
28

1 workweeks and pay periods they worked, average pay rates, and information regarding other non-
2 hourly compensation, among other relevant data. [Brouillette Decl., ¶ 9.]

3 The Parties then engaged Lou Marlin, Esq., a respected professional neutral with
4 substantial wage and hour and class action experience and, in April 2024, the Parties participated
5 in a full day mediation with Mr. Marlin. Throughout the day, the arms-length negotiations were
6 hard-fought and adversarial as the Parties exchanged extensive information on their legal and
7 factual positions, and made numerous offers and counter-offers. With the mediator's assistance,
8 the Parties finally reached agreement on all major issues. The Parties then collaboratively drafted
9 the Class Action and PAGA Settlement Agreement ("Settlement Agreement") setting forth the
10 settlement terms now before the Court for approval. A true and correct copy of the Settlement
11 Agreement is attached to the Brouillette Declaration as Exhibit 1. [Brouillette Decl., ¶ 10.]

12 **III. THE PROPOSED SETTLEMENT TERMS**

13 Under the settlement, Pro Energy will pay \$900,000.00 into a common fund, the Gross
14 Settlement Amount ("GSA"). Reasonable attorney's fees of up to one-third of the GSA, or
15 \$300,000.00, actual litigation costs of up to \$15,000, modest enhancement awards of up to
16 \$10,000 for each plaintiff, settlement administration costs of no more than \$17,500, and \$60,000
17 for alleged civil penalties under PAGA,¹ all will be paid from the GSA. The remainder of
18 approximately \$487,500 will be allocated among the Participating Class Members based on their
19 total weeks worked during the Class Period. No portion of the GSA will revert to Pro Energy.
20 [Brouillette Decl., ¶ 11.]

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

22 The settlement provides for conditional certification of a settlement class including all
23 persons employed by Pro Energy in California and classified as a non-exempt hourly employee
24 who worked for Pro Energy during the Class Period of April 20, 2019 to June 5, 2024. The
25 Settlement Class consisted of approximately 1,474 individuals. [Brouillette Decl., ¶ 12.]

26 *////*

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

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

2 As noted, the settlement obligates Pro Energy to pay \$900,000 to resolve the Settlement
3 Class's claims, inclusive of attorney's fees and costs. At least \$487,500 from the GSA will be
4 distributed to the Participating Class Members. This is a cash settlement that does not require
5 Participating Class Members to submit a claim form to receive their settlement share. Participating
6 Class Members will receive their settlement checks automatically via First Class U.S. Mail.
7 Twenty percent of each settlement share will be allocated to wages and the remaining eighty
8 percent will be allocated to expenses, penalties and interest. Pro Energy will pay any and all
9 applicable employer-side payroll taxes separately and in addition to the GSA. Subject to the
10 Court's approval, any amounts not claimed (because a class member does not cash his or her
11 settlement check) will be forwarded to the California State Controller's Unclaimed Property Fund.
12 [Brouillette Decl., ¶ 13.]

13 Each Participating Class Member will receive a share of the Net Settlement Amount based
14 on his or her position held and total weeks worked for Pro Energy during the Class Period while
15 employed as a non-exempt employee. Thus, each Class Member's Individual Settlement Payment
16 will be calculated using criteria typically used in determining appropriate amounts of alleged
17 unpaid wages, unpaid premium wages for missed meal breaks, unreimbursed expenses, and
18 potential statutory penalties under applicable law. These methods are intended to ensure each
19 Class Member receives a portion of the available settlement funds corresponding to the relative
20 value of his or her potential claims. The proposed allocation provides a reasonable way to
21 compensate Class Members based on the amount of time they worked for Pro Energy, and the
22 number of instances they missed a break, were not provided compensation in lieu of such missed
23 breaks, or lost wages due to underpaid overtime. The average award across the board will be
24 approximately \$330. There are approximately 869 Aggrieved Employees also eligible to receive a
25 share of the PAGA civil penalties, and their average PAGA award will be about \$17.28.
26 [Brouillette Decl., ¶ 14.]

27 As discussed below, the overall settlement amount is reasonable in light of the
28 considerable risks associated with Plaintiffs' claims as well as the delay and risk posed by

1 continuing to litigate such disputed allegations. In Plaintiffs' counsels' judgment, the total value
2 recovered for the class is substantial and in the range of reasonableness.

3 **C. Settlement Administration**

4 Subject to the Court's approval, the Parties have agreed on Phoenix Settlement
5 Administrators as the Settlement Administrator. Phoenix is qualified and has significant
6 experience administering class action settlements, including numerous wage and hour matters.
7 Phoenix's fees will not exceed \$17,500.00. If the Court approves less than the above amount, the
8 difference will remain in the Net Settlement Amount for distribution to the Participating Class
9 Members. [Brouillette Decl., ¶ 15; Declaration of Jodey Lawrence, ¶¶ 2-16, Exh. A-B.]

10 **D. The Class Notice**

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

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

22 Class Members will have forty-five days to dispute the information in their Notice used to
23 calculate their settlement award, and also have forty-five days to submit any objections to the
24 settlement or to request exclusion. In the event a Class Member disputes their individual
25 information, the Settlement Administrator will review the Class Member's records as well as any
26 additional information submitted, and make a final determination. [Brouillette Decl., ¶ 17.]

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1 **F. Release of Claims**

2 All Participating Class Members will be deemed to release Pro Energy from all claims
3 alleged in the operative complaint, or that could have been brought based on the allegations in the
4 operative complaint, including PAGA claims, from March 21, 2018 to April 13, 2024. The release
5 is limited to the claims that were actually pleaded or could have been pleaded based on the alleged
6 facts in the operative complaint. [Brouillette Decl., ¶ 18.]

7 **G. Attorney's Fees and Costs, and Plaintiff's Enhancement Award**

8 The settlement provides Defendant will not oppose a request for reasonable attorney's fees
9 not to exceed one-third of the Gross Settlement Amount, or \$300,000, nor will it oppose a request
10 for reimbursement of actual litigation costs and expenses of up to \$15,000.00. Defendant also
11 will not oppose a request for an enhancement award to Plaintiffs of not more than \$10,000.00 each
12 in recognition of their time spent on this matter, the risks each undertook on behalf of the class,
13 and the benefit conferred to the class. Plaintiffs' counsel will provide the Court with appropriate
14 summaries and evidence of their efforts and time records in anticipation of the Final Approval
15 Hearing, and Plaintiffs have submitted their declarations herewith. If the Court approves less than
16 the above amounts, the difference will remain in the Net Settlement Amount for distribution to the
17 Participating Class Members. [Brouillette Decl., ¶ 19.]

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

19 The Parties allocated \$60,000 to payment of civil penalties under PAGA for such claims
20 against Pro Energy, as addressed in more detail below, and which amount Plaintiffs submit is fair,
21 reasonable and adequate and consistent with PAGA's underlying purposes. As required by Labor
22 Code section 2699(l)(2), Plaintiffs gave notice of the settlement and preliminary approval hearing
23 to the LWDA via its online portal, and further served the LWDA with this motion. [Brouillette
24 Decl., ¶ 20; 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 be
28 conserved by avoiding the time, costs and rigors of formal litigation. H. Newberg & A. Conte, 4

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

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

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

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

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

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

11 In the present matter, conditional certification is proper since this matter satisfies all
12 requirements for class certification under Code of Civil Procedure section 382. First, the class is
13 both sufficiently numerous, consisting of approximately 1,474 individuals, and ascertainable by
14 reference to Defendant's personnel and payroll records. [Brouillette Decl., ¶ 21.] Next, Plaintiffs
15 all are adequate class representatives, as their claims do not conflict with and are not antagonistic
16 to the claims of other class members. Further, their claims are typical given each is a member of
17 the class and their respective claims arise from the same employment practices and course of
18 conduct giving rise to the claims of the other class members. [Brouillette Decl., ¶ 22; Declaration
19 of Charmaine Tate, ¶¶ 2-9; Declaration of Dave Crockett, ¶¶ 2-4.] Lastly, Plaintiffs' counsel are
20 experienced and adequate class counsel. [Brouillette Decl., ¶¶ 37-48; Declaration of Larry Lee
21 ("Lee Decl."), ¶¶ 5-9; Declaration of Simon Yang ("Yang Decl."), ¶¶ 3-7.]

22 Next, common questions of law and fact predominate – particularly for purposes of a
23 settlement class – as the Class Members all were subject to the same meal rest break policies, the
24 same alleged policy that failed to include per diems in calculating the regular rate of pay, etc.
25 Since the focus of the claims against Pro Energy concerns the legality of common policies applied
26 uniformly to the entire class, common issues predominate over individualized inquiries concerning
27 liability. Pro Energy's calculation of the regular rate without accounting for per diems is
28 company-wide policy applied equally and consistently to all class members, and this policy is

1 either compliant with California law or it is not. Regardless of that determination, it will decide
2 liability for all class members one way or another. Similarly, whether Pro Energy’s policy
3 requiring employees to drive in company vehicles after clocking out resulted in unpaid off the
4 clock work is another common question. [Brouillette Decl., ¶ 23]

5 By now it is well-settled that a theory of recovery asserting the existence of a uniform
6 policy violating California law is sufficient to satisfy the requirements for class certification.
7 Brouillette v. Farmers Ins. Exch. (2013) 221 Cal.App.4th 986, 996 (“Claims alleging that a
8 uniform policy consistently applied to a group of employees is in violation of the wage and hour
9 laws are of the sort routinely, and properly, found suitable for class treatment”); Williams v.
10 Superior Court (2013) 221 Cal.App.4th 1353 (“A company-wide practice can sustain a common
11 question of fact or law that supports commonality for class certification”). Lastly, a class action is
12 the superior means for the fair and efficient adjudication of the controversy. [Brouillette Decl.,
13 ¶ 24.]

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

16 The proposed settlement resulted from serious, arms-length negotiations facilitated by
17 respected mediator Lou Marlin, Esq., who has extensive experience mediating wage and hour class
18 actions. [Brouillette Decl., ¶ 10.] Plaintiffs’ counsel Zachary Crosner, Jamie Serb and Brandon
19 Brouillette, and Crosner Legal, PC, and Larry Lee and Simon Yang and Diversity Law Group, all
20 have years of litigation experience, including litigating wage and hour class actions. Plaintiffs’
21 counsel are well-qualified to evaluate the risks and benefits of pursuing further litigation or settling
22 the matter. [Brouillette Decl., ¶¶ 37-48; Lee Decl., ¶¶ 5-9; Yang Decl., ¶¶ 3-7.]

23 California law recognizes several factors bearing on the fairness, adequacy, and
24 reasonableness of a proposed class settlement. Kullar v. Foot Locker Retail, Inc. (2008) 168
25 Cal.App.4th 116, 128. In relevant part, these factors include: 1) the amount offered in settlement 2)
26 the strength of plaintiff’s case; 3) the risk, expense, complexity, and likely duration of further
27 litigation; 4) the risk of maintaining class action status throughout trial; 5) the experience and views
28

1 of counsel; and 6) the reaction of the class members to the proposed settlement. Id. As demonstrated
2 below, the proposed settlement satisfies these requirements.

3 The proposed settlement involves a substantial sum of money that, when distributed,
4 will confer meaningful monetary benefits on the Class members. As described above, each
5 individual award will be based on an allocation consistent with the nature of the claims asserted
6 and will fairly and equitably allocate the available funds in relation to the degree of damage
7 each Class member incurred. While class members who worked for only a short period of time
8 will receive relatively small sums, those with longer tenures and who worked more hours and
9 shifts throughout the class period will receive appropriately larger awards.

10 Prior to settlement, the Parties engaged in formal and informal discovery to facilitate
11 settlement discussions. Thus, Plaintiffs reviewed documents and information regarding Pro
12 Energy's payroll practices, a random sampling of pay stubs and time records from class members,
13 applicable compensation plans, meal and rest break policies, etc., and information from Defendant
14 regarding class size and breakdown, work weeks/pay periods, rates of pay, and other information
15 used to formulate a damages model. Plaintiffs then had that information analyzed by a consulting
16 expert to assist in determining potential violation rates and other data used to formulate a damages
17 model. Plaintiffs' counsel are confident they obtained sufficient information to understand the law
18 and facts of this case and make an informed decision regarding the proposed settlement and whether
19 it is fair and reasonable. [Brouillette Decl., ¶¶ 9, 25.]

20 Using that data, Plaintiff ran various calculations and estimated Defendants' theoretical
21 maximum exposure on the class claims at about \$32.719 million. More specifically, the theoretical
22 maximum includes approximately \$920,300 in unpaid wages due to alleged off the clock work,
23 about \$3,736,800 in underpaid overtime based on the alleged regular rate issue, around \$4,432,800
24 for alleged meal break violations, about \$276,300 for alleged rest break violations, about
25 \$11,294,500 on the expense reimbursement claims, \$694,500 for alleged expense reimbursement,
26 approximately \$3,106,050, on the wage statement claims, and waiting time penalties of about
27 \$8,534,300. [Brouillette Decl., ¶¶ 26-27.] Plaintiffs' counsel substantially discounted the value of
28

1 these claims, however, in light of the multiple and considerable risks posed by proceeding with the
2 litigation, as Pro Energy raised numerous defenses and vigorously defended against these claims.

3 First, Plaintiffs contend they and class members worked “off the clock” when they would
4 travel in company vehicles after clocking out of their shift. In response, Defendants countered that
5 it accurately tracked employee time and paid class members all wages due as required under
6 applicable law. Defendant further argued it had a strict policy against off the clock work and
7 therefore if any such work occurred it was aberrational and against company policy, and done
8 without employer knowledge or consent. White v. Starbucks Corp. (N.D. Cal. 2007) 497 F.Supp.2d
9 1080, 1083 (employer must have actual or constructive knowledge of the off the clock work). For
10 the same reasons, Pro Energy argued it would require individualized inquiries to determine what
11 alleged “off the clock” work occurred and whether such work was potentially compensable, and
12 therefore class certification would not be appropriate on the claim. On the underpaid overtime claim,
13 Plaintiffs allege Pro Energy failed to include certain per diem payments in the calculation of the
14 employee’s “regular rate” of pay then used to determine the correct overtime rate. Alvarado v Dart
15 Container Corp. (2018) 4 Cal.5th 770; Clarke v. AMN Servs. Inc. (9th Cir. 2021) 987 F.3d 848. In
16 response, Defendant argued it accurately accounted for, calculated and paid all overtime hours at
17 the correct rates of pay in accordance with the applicable CBAs and applicable law. [Brouillette
18 Decl., ¶ 28.]

19 Plaintiffs next contend Defendant failed to provide legally compliant meal and rest breaks,
20 and that Defendant essentially had an “auto deduct” policy where 30 minutes of time was
21 deducted from employee hours worked regardless of whether they received a fully-compliant
22 lunch or not. Plaintiffs further argued that lunch breaks frequently were not compliant, and that
23 employees had to work through some or all of their meal breaks, meal breaks started late, and that
24 second meal periods were not always provided on shifts over 10 hours. For similar reasons,
25 Plaintiffs argued they and the class members did not receive required rest breaks either.
26 [Brouillette Decl., ¶ 29.]

27 Defendant deny Plaintiffs’ contentions, claiming it made meal and rest breaks available to
28 Class Members in compliance with California law and the CBAs, and noted it paid thousands in

1 meal period premium payments for documented violations. Pro Energy argued its meal and rest
2 break policies are lawful and that Class Members were frequently reminded they were required to
3 take all meal and rest breaks. Defendants also contend that time records demonstrate that Class
4 Members took duty-free, timely meal and rest breaks. Defendants further contend the meal and rest
5 break policies and practices comported with the flexibility the *Brinker* court held was integral to
6 California’s meal and rest period requirements. Finally, Defendants argued that Plaintiffs’ meal and
7 rest break claims are not susceptible to common proof, as the claims would require individualized
8 inquiries, including whether there was an unlawful companywide policy, whether employees had
9 the opportunity to take meal and rest periods, whether they voluntarily chose to forego their meal
10 and rest periods, and whether Defendants ever prevented them from taking meal and rest periods.
11 Accordingly, Defendant contends these claims are vulnerable to a ruling that class treatment is not
12 appropriate. [Brouillette Decl., ¶ 30.]

13 In the expense reimbursement claim, Plaintiffs claim they and other class members regularly
14 were required to use personal phones while working to, inter alia, communicate with supervisors and
15 each other. Cochran v. Schwan’s Home Service, Inc. (2014) 228 Cal. App. 4th 1137, 1144. In response,
16 Defendant argued it provided employees with access to all electronics needed to perform their job
17 duties and, accordingly, if employees used their personal phones it was purely for their own
18 convenience rather than business necessity and therefore would not be reimbursable. [Brouillette
19 Decl., ¶ 31.]

20 As a result of the above alleged violations, Plaintiffs allege Defendants failed to provide
21 accurate wage statements and failed to timely pay all wages that were due and owing upon
22 separation of employment. In response to these derivative claims, Defendants emphasized that,
23 should the primary claims fail, Plaintiffs’ claim for wage statement violations and waiting time
24 penalties would also fail. Defendants further argued they would not be liable for waiting time
25 penalties because a “good faith dispute” exists over the payment of past wages. Amaral v. Cintas
26 Corp. No. 2 (2008) 163 Cal.App.4th 1157, 1201. Further, Defendants contend Plaintiffs would
27 have to prove Defendants “willfully” failed to pay Class Members appropriate wages due upon
28 separation of employment. [Brouillette Decl., ¶ 32.]

1 Lastly, Pro Energy emphasized that, like Plaintiff Tate, a significant portion of the putative
2 class were union employees and the terms of their employment controlled by the terms of the
3 relevant Collective Bargaining Agreements. Thus, per Defendant, the claims of many class
4 members were subject to federal preemption under the Labor Management Relations Act and
5 further subject to the grievance and arbitrations procedures of the CBAs. [Brouillette Decl., ¶ 33.]

6 As far as potential PAGA liability, the theoretical civil penalties likely are around \$15
7 million should Plaintiffs prevail on all claims and establish violations of the multiple Labor Code
8 sections at issue. [Brouillette Decl., ¶ 34.] As with the class claims, Plaintiffs discounted the
9 potential PAGA penalties based on Defendants' various defenses on the merits and also accounted
10 for the Court's wide discretion to reduce such penalties, or to decline to award penalties at all. Labor
11 Code § 2699(e)(2); Carrington v. Starbucks Corp. (2018) 30 Cal.App.5th 504 (trial court awarded
12 penalties of \$5 per pay period after a bench trial, which decision was upheld on appeal); In re Taco
13 Bell Wage and Hour Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. LEXIS 48557 (PAGA
14 penalties denied after trial). Accordingly, the Parties allocated \$60,000 to PAGA penalties.

15 Plaintiffs submit this amount is reasonable under the circumstances and in line with
16 comparable settlements in other wage and hour class actions in California. *E.g.*, Van Kempen v.
17 Matheson Tri-Gas, Inc. (N.D. Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182 (granting final
18 approval of \$5,000 PAGA penalty from \$370,000 settlement, or 1.4 percent of total settlement);
19 Slavkov v. First Water Heater Partners I (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS 116303
20 (finding a \$7,500 PAGA payment reasonable when measured against the overall settlement of
21 \$345,000 and the possible weaknesses in plaintiffs' case, or 2.2 percent of total settlement).
22 Additionally, the LWDA has been informed of the terms of the PAGA portion of the settlement,
23 and will be able to weigh in as necessary. Jennings v. Open Door Mktg. Inc. (N.D. Cal. Oct. 3, 2018)
24 2018 U.S. Dist. LEXIS 171356, at *27 (approving settlement with PAGA penalties of 0.6% where
25 "[p]laintiffs [have] submitted the settlement agreement to the LWDA, and the LWDA has not
26 objected to the settlement.

27 Thus, Plaintiffs and their counsel discounted the value of the class claims consistent with
28 the risks discussed above, and carefully weighed the likelihood of the class receiving substantially

1 greater benefit if the litigation continued. Plaintiffs and counsel concluded – in light of these very
2 real and substantial risks – settlement on the proposed terms and without prolonged and costly
3 litigation was in the best interests of the class. The overall \$900,000 recovery represents a significant
4 percentage of Defendants’ potential exposure. Given Defendants’ multi-layered defenses and all
5 other potential risks of continued litigation, a total recovery for the class of \$900,000, which will
6 result in average award of around \$330 per class member, plus additional sums under PAGA, is a
7 significant result well within the range of reasonableness considering all potential outcomes, and it
8 will provide direct monetary awards to all Class Members without further delay. [Brouillette Decl.,
9 ¶ 35-36; Lee Decl., ¶¶ 2-4.]

10 Importantly, the mere fact that a settlement does not provide the same recovery as might be
11 achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and adequate.
12 Wershba, 91 Cal.App.4th at 246, 250 (“Compromise is inherent and necessary in the settlement
13 process...even if the relief afforded by the proposed settlement is substantially narrower than it
14 would be if the suits were to be successfully litigated, this is no bar to a class settlement because the
15 public interest may indeed be served by a voluntary settlement in which each side gives ground in
16 the interest of avoiding litigation”); 7-Eleven Owners for Fair Franchising v. Southland Corp. (2000)
17 85 Cal.App.4th 1135, 1150 (“The fact that a proposed settlement may amount to only a fraction of
18 the potential recovery does not, in and of itself, mean that the proposed settlement is grossly
19 inadequate and should be disapproved”); White v. Experian Information Solutions, Inc. (C.D. Cal.
20 2011) 803 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable even
21 though it represented 99% discount off the maximum value of the claims); Lane v. Facebook, Inc.
22 (9th Cir. 2012) 696 F.3d 811, 819 (“[T]he question whether a settlement is fundamentally fair . . . is
23 different from the question whether the settlement is perfect in the estimation of the reviewing
24 court”). Importantly as well, the proposed settlement is non-reversionary and will provide immediate
25 benefits to the Class Members without a claims process. White, 803 F.Supp.2d at 1098; c.f., Federal
26 Judicial Center, Managing Class Action Litigation: A Pocket Guide for Judges (3d ed. 2010) at 20,
27 available at [http:// www.fjc.gov/sites/default/files/2012/ClassGd3.pdf](http://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf) (reversionary provisions
28

1 and/or cumbersome claims process may indicate lack of fairness). Plaintiffs and counsel submit the
2 settlement is within the “range of reasonableness,” and is fair and adequate for the Class.

3 **V. CONCLUSION**

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

7
8 Dated: August 23, 2024

CROSNER LEGAL, PC

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