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all others similarly situated, and on behalf of the general public

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF KERN

MARK FRANKLIN on behalf of
himself, all others similarly situated, and
on behalf of the general public,

Plaintiffs,

v.

DESERT HAVEN ENTERPRISES; and
DOES 1-100,

Defendants.

Case No. BCV-23-101153
(Consolidated with Case No. BCV-23-101829)

*[Assigned for All Purposes to the
Honorable Gregory A. Pulskamp; Div. J]*

**PLAINTIFF MARK FRANKLIN'S
MOTION FOR PRELIMINARY
APPROVAL OF CLASS AND PAGA
ACTION SETTLEMENT, APPROVAL OF
CLASS NOTICE, SETTING OF FINAL
APPROVAL HEARING DATE**

Date: June 26, 2024
Time: 8:30 a.m.
Division: J
Location: 1215 Truxton Avenue
Bakersfield, California 93301

Complaint Filed: April 13, 2023
Trial Date: None Set

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1 **I. INTRODUCTION**

2 Plaintiff Mark Franklin (hereinafter “Plaintiff” or “Mr. Franklin”), on behalf of himself
3 and the approximately 625-member putative class, respectfully requests that this Court
4 preliminarily approve the Joint Stipulation and Settlement Agreement (hereinafter “Agreement”¹)
5 entered into between Plaintiff and Defendant Desert Haven Enterprises (hereinafter “Defendant”
6 or “Desert Haven”) (hereinafter Plaintiff and Defendant are collectively referred to as the
7 “Parties”). The Parties’ Agreement seeks to resolve claims raised against Defendant in this matter
8 in exchange for a non-reversionary \$1,750,000 Gross Settlement Amount. The proposed Class is
9 comprised of all non-exempt, hourly employees of Defendant in the State of California from April
10 13, 2019 through June 1, 2024, and includes, but is not limited to, job positions Defendant refers
11 to as Trainers and Consumers.² It is requested that the Court grant preliminary approval, as, when
12 analyzing the strengths and vulnerabilities of the claims and Defendant’s potential liability
13 exposure, this proposed settlement of \$1,750,000 is well within the range of reasonableness. This
14 settlement is estimated to pay Class Members an average payment of approximately \$1,580.³
15 Moreover, the proposed Agreement satisfies all of the criteria for preliminary approval under Rule
16 3.769 of the California Rules of Court.

17 In addition to funding the Gross Settlement Amount, as part of the settlement, Defendant
18 has agreed to make policy changes. Defendant has agreed to implement, beginning June 1, 2024,
19 the following policies and practices: Updated policies and procedures, including but not limited to
20 compliant meal and rest period policies for on-site service employees, time and attendance tracking
21 policies for all employees and consumers, updated sick leave policies and procedures. (Exhibit 1
22 at Section II, Paragraph 54, Page 8).

23 As the following sections show, Class Counsel are convinced that the proposed settlement
24 is in the best interests of the Class based on the negotiations and a detailed knowledge of the issues

25 _____
26 ¹ The Parties’ Joint Stipulation and Class Action Settlement Agreement (“Agreement”) is attached
27 to the Declaration of David Mara, Esq. as Exhibit 1. “Exhibit 1” herein refers to the Parties’
28 Agreement.

² Exhibit 1 at Section I, Paragraph 5, Page 1.

³ The Net Settlement Amount is approximately \$987,500. \$987,500 divided by approximately 625
Class Members = \$1,580.

presented in this action. The length and risks of trial and perils of litigation that affect the value of the claims were all carefully weighed. In addition, the defenses asserted by Defendant, the uncertainty of class certification, the difficulties of complex litigation, the lengthy process of establishing specific damages and various possible delays and appeals, were also carefully considered by Class Counsel in arriving at the proposed settlement. The Agreement was the product of an all-day mediation with respected wage and hour mediator Mark Rudy as well as follow up mediation conversations with Mr. Rudy and was the product of non-collusive, arm's-length negotiations by informed counsel and parties. The settlement is fair, reasonable, and adequate. Accordingly, Plaintiff seeks: (1) preliminary approval of the terms contained in the Agreement; (2) provisional certification of the Class; (3) appointment of Plaintiff as Class Representative; (4) appointment of Mara Law Firm, PC, and Lawyers for Employee and Consumer Rights as Class Counsel; (5) approval of the Parties' proposed notice of class action settlement⁴ (referred to herein as the "Class Notice" or "Notice") and method of notifying the Class about the settlement; and (6) a hearing date for final approval on October 23, 2024, or later.

II. BACKGROUND

Defendant provides training to and staffs individuals with developmental disabilities with employers throughout the Antelope Valley of California. Defendant employs "trainers" and "consumers." Consumers is the term Desert Haven uses to refer to individuals with developmental disabilities that Desert Haven trains and staffs. Trainers are employees that Desert Haven employs to train and work alongside the consumers.

On April 13, 2024, Plaintiff filed a class action complaint against Defendant (the "Class Action"). The complaint alleges the following causes of action against Defendant: (1) Failure to Pay All Straight Time Wages; (2) Failure to Pay Overtime; (3) Failure to Provide Meal Periods; (4) Failure to Authorize and Permit Rest Periods; (5) Failure to Adopt a Compliant Sick Pay/Paid Time Off Policy; (6) Knowing and Intentional Failure to Comply with Itemized Employee Wage Statement Provisions; (7) Failure to Pay all Wages Due at the Time of Termination; and (8)

⁴ The Class Notice is attached to the Agreement as Exhibit A.

1 Violation of Unfair Competition Law. (Declaration of David Mara, Esq. in Support of Plaintiff's
2 Motion for Preliminary Approval ("Mara Dec.") ¶ 10).

3 On April 7, 2023, Plaintiff provided notice to the Labor and Workforce Development
4 Agency ("LWDA") in accordance with the PAGA. Thereafter, on June 12, 2023, Plaintiff filed an
5 action against Defendant that alleges causes of action under the Private Attorneys General Act of
6 2004 (the "PAGA Action"). This case was designated with Case Number BCV-23-101829. The
7 complaint sought civil penalties under the PAGA in relation to the following alleged violations
8 suffered by allegedly similar aggrieved employees: (1) Failure to Pay All Straight Time Wages;
9 (2) Failure to Pay Overtime; (3) Failure to Provide Meal Periods; (4) Failure to Authorize and
10 Permit Rest Periods; (5) Failure to Pay all Wages Due at the Time of Termination; (6) Knowing
11 and Intentional Failure to Comply with Itemized Employee Wage Statement Provisions; and (7)
12 Failure to Adopt a Compliant Sick Pay Policy. (Mara Dec. ¶ 11).

13 On June 2, 2023, Defendant filed a notice of removal of the Class Action to the U.S. District
14 Court for the Central District of California. Thereafter, Plaintiff filed a motion to remand the matter
15 back to state court, which led to Defendant agreeing to stipulation to remand the matter back to
16 state court and the matter returned to the Superior Court of California, for the County of Kern.
17 (Mara Dec. ¶ 12).

18 On September 28, 2023, the Parties filed a stipulation to consolidate the Class Action and
19 the PAGA Action. The Court granted this stipulation on October 3, 2023. (Mara Dec. ¶ 13).

20 **III. INVESTIGATION AND LITIGATION HISTORY**

21 **a. Discovery and Investigation**

22 After filing, the Parties engaged in extensive informal discovery and Plaintiff conducted
23 investigation into the claims. As part of this discovery, Defendant produced hundreds of
24 documents and policies including, but not limited to, wage and hour policies – including meal and
25 rest period policies – that covered putative class members, Plaintiff's time and pay records, and a
26 sampling of time and pay records for Class Members. (Mara Dec. ¶ 14).

27 ///

28 ///

1 **b. The Parties Agreed to Attend Mediation**

2 The Parties attended an all-day mediation with respected wage and hour mediator Mark
3 Rudy on January 16, 2024. This mediation was unsuccessful. Thereafter, the Parties continued to
4 engage in negotiations at arms-length, with Defendant producing additional documents and data.
5 The Parties engage in additional mediation conversations with Mr. Rudy. As a result of these
6 continued settlement discussions, all of which were facilitated through the mediator, the Parties
7 were able to reach a settlement, which was reduced to a MOU that was executed on April 18, 2024.
8 The Parties then met and conferred over all the terms of the settlement and finalized their
9 agreement in the Parties' Agreement. The Parties seek preliminary approval of the Agreement in
10 the instant motion. (Mara Dec. ¶ 15; *see also* Exhibit 1 attached thereto).

11 **c. The Parties' Staunchly Conflicting Positions**

12 **i. Meal Period Claim**

13 Plaintiff contends that Defendant does not provide employees with meal periods that
14 conform with California law. Employers have an obligation under California law to provide
15 employees with thirty (30) minute meal periods. Under California Labor Code § 512(a), "[a]n
16 employer may not employ an employee for a work period of more than five hours per day without
17 providing the employee with a meal period of not less than 30 minutes" Cal. Lab. Code §
18 512(a). An employer "satisfies this obligation [to provide meal periods] if it relieves its employees
19 of all duty, relinquishes control over their activities and permits them a reasonable opportunity to
20 take an uninterrupted 30-minute break, and does not impede or discourage them from doing so."
21 *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1040. Here, Plaintiff contends
22 that employees' meal periods are not duty-free. (Mara Dec. ¶ 16).

23 Defendant asserts that its meal period practice is lawful and that it provides employees with
24 meal periods in compliance with California law. Further, Defendant alleges that if litigation
25 continues it would be able to show that it advised employees of the right to take a meal period in
26 compliance with California law. Defendant contends that employees either took a lawful meal
27 period or knowingly and voluntarily decided to skip the meal period or take a late or short meal
28 period. Defendant also asserts that the evidence in this case shows that it paid meal period

1 premiums in shifts in which employees were not provided with compliant meal periods. Thus,
2 Defendant contends that to the extent an employee was not provided the opportunity to take a
3 legally compliant meal period, they were provided a meal premium. (Mara Dec. ¶ 17).

4 **ii. Rest Period Claim**

5 Plaintiff alleges that employees are not provided with lawful rest periods. Employers have
6 an obligation to provide employees with ten (10) minute rest periods. An employer's obligation
7 to provide its employees with rest periods arises under the Industrial Welfare Commission Wage
8 Orders. Wage Order 4-2001, Section 12(A) states, "[e]very employer shall authorize and permit
9 all employees to take rest periods, which insofar as practicable shall be in the middle of each work
10 period. The authorized rest period time shall be based on the total hours worked daily at the rate
11 of ten (10) minutes net rest time per four (4) hours or major fraction thereof." Here, Plaintiff
12 alleges that Defendant does not provide duty-free rest periods to employees. (Mara Dec. ¶ 19).

13 Defendant asserts that its rest period practice is lawful and that it provides employees with
14 rest periods in compliance with California law. Further, Defendant alleges that if litigation
15 continues it would be able to show that it advised employees of the right to take a rest period in
16 compliance with California law and provided lawful rest periods to employees. (Mara Dec. ¶ 20).

17 **iii. Unpaid Wages Claim**

18 Plaintiff alleges that Defendant does not pay all wages owed to employees because it
19 rounds employees' time punches. Employees must be paid for all "hours worked," as that phrase
20 is defined in the Wage Order and interpreted by California courts. Hours worked is defined in the
21 Wage Order as "the time during which an employee is subject to the control of an employer, and
22 includes all the time the employee is suffered or permitted to work, whether or not required to do
23 so." Wage Order 4-2001, Section 2(K); *see also Mendiola v. CPS Security Solutions, Inc.* (2015)
24 60 Cal.4th 833. In California, rounding policies are permissible if the rounding policy is "fair and
25 neutral on its face and 'it is used in such a manner that it will not result, over a period of time, in
26 failure to compensate the employees properly for all the time they have actually worked.'" *See's*
27 *Candy, Inc. v. Superior Court* (2012) 210 Cal. App. 4th. 889, 907. (Mara Dec. ¶ 22).

28 Plaintiff alleges that Defendant has an unlawful rounding practice that is not fair and

1 neutral in practice. Plaintiff asserts that Defendant's rounding policy results in employees
2 systematically being undercompensated. Defendant counters that its rounding policy is fair and
3 neutral on its face and in practice and that its rounding policy does not systematically result in
4 employees being undercompensated. (Mara Dec. ¶ 23).

5 **iv. Wage Statements and Waiting Time Penalties**

6 Plaintiff also pursued claims for failure to provide accurate itemized wage statements and
7 waiting time penalty claims. These claims are derivative of Plaintiff's unpaid wages, meal period,
8 and rest period claims. Should Plaintiff's unpaid wages, meal period, and rest period claims fail,
9 these claims would also fail. (Mara Dec. ¶ 25).

10 In addition, Defendant contends that even if Plaintiff were successful in his claims, he
11 would have to prove Defendant "willfully" failed to pay employees the appropriate overtime wages
12 and meal and rest period premiums due upon separation of employment. "A willful failure to pay
13 wages within the meaning of Labor Code Section 203 occurs when an employer intentionally fails
14 to pay wages to an employee when those wages are due. However, a good faith dispute that any
15 wages are due will preclude imposition of waiting time penalties under Section 203." Cal. Code
16 Regs. Tit. 8 § 13520. "A 'good faith dispute' that any wages are due occurs when an employer
17 presents a defense, based in law or fact, which would preclude any recovery on the part of the
18 employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good
19 faith dispute did exist." *Id.* Defendant contends that any failure to pay wages due at the separate
20 of employment was not willful. Defendant argues that it would not be liable for waiting time
21 penalties because a "good faith dispute" exists over the payment of those wages. *See* Cal. Code
22 Regs. Tit. 8 § 13520; *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1201. Defendant
23 also argues that Plaintiff's unpaid wages, meal period, and rest period claims cannot form the basis
24 of his wage statement claim. Defendant relies on the case *Maldonado v. Epsilon Plastics, Inc.*
25 (2018) 22 Cal.App.5th 1308, for the position that employees do not suffer injury under California
26 Labor Code § 226(a) so long as the wage statements correctly reflected the hours worked and the
27 pay received even if the pay is later determined to be inaccurate. (Mara Dec. ¶ 26).

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1 **IV. TERMS OF THE PROPOSED SETTLEMENT**

2 Under the terms of the settlement, Defendant will create a settlement fund of \$1,750,000.

3 **a. Deductions From the Settlement**

4 The Parties have agreed (subject to and contingent upon the Court's approval) that this
5 action be settled and compromised for the non-reversionary total sum of \$1,750,000 ("Gross
6 Settlement Amount" or "GSA"), which includes, subject to Court approval: (a) attorneys' fees of
7 up to \$612,500 (35% of the GSA) to compensate Class Counsel for work already performed and
8 all work remaining to be performed in documenting the settlement, administering the settlement,
9 and securing Court approval; (b) litigation costs estimated at approximately, and not to exceed,
10 \$50,000;⁵ (c) a Class Representative Enhancement Payment to the named class representative,
11 Aaron Romero, in a sum not to exceed \$10,000 in consideration for prosecuting this class action,
12 serving as Class Representative, work performed, and risks undertaken for the payment of
13 attorneys' fees and costs in the event he had been unsuccessful in the matter; (d) claims
14 administration fees and expenses to APEX Class Action Administration (hereinafter "APEX"),
15 estimated not to exceed approximately \$10,000;⁶ and (e) LWDA payment of \$56,250 (which is
16 75% of \$75,000 allocated to Plaintiff's claims under the PAGA).

17 **b. Calculation of the Settlement Payments to Class Members and PAGA Group Members**

18 After all Court-approved deductions from the GSA, it is estimated that \$987,500 ("Net
19 Settlement Amount" or "NSA"), less employee taxes on the "wage portion" of the settlement
20 payment, will be distributed to Participating Class Members.⁷ Subject to the terms and conditions
21 of the settlement, Participating Class Members will receive a pro-rated share of the Net Settlement
22

23 ⁵ These will be tabulated and presented to the Court at final approval. Plaintiff will only seek the
24 amount of actual costs incurred during the litigation of this case. Should the actual costs exceed
25 \$50,000, Plaintiff will only seek reimbursement of costs up to \$50,000. Should the actual costs be
26 lower than \$50,000, the difference will be added to the Net Settlement Amount for disbursement
27 to Participating Class Members.

26 ⁶ APEX will present to the Court a declaration in conjunction with the final approval motion
27 outlining the costs of the settlement administration process. If the settlement administration costs
28 are lower than the amount allocated in the Agreement, the difference will be added to the Net
Settlement Amount for distribution to Participating Class Members.

⁷ Participating Class Members are Class Members who do not submit a valid and timely request
to exclude themselves from this Settlement. (Exhibit 1 at Section I, Paragraph 35, Page 5).

1 Amount, less applicable withholdings, based on the number of workweeks they worked in
2 California while employed by Defendant during the Class Period. The maximum amount that each
3 Settlement Class Member is entitled to receive is determined by multiplying Net Settlement
4 Amount by a ratio that is determined by dividing a Participating Class Member's total workweeks
5 worked during the Class Period in California by the total number of workweeks worked during the
6 Class Period by all Settlement Class Members employed by Defendant as expressed in the
7 following formula: Net Settlement Amount multiplied by Participating Class Member workweeks
8 divided by all workweeks worked by all Participating Class Members. (Exhibit 1 at Section III,
9 Paragraph 63(A)(i), Page 10).

10 The individual settlement payments will be divided into a "wage portion" to compensate
11 Participating Class Members for alleged unpaid wages and a "non-wage portion" to compensate
12 Participating Class Members for alleged interest and penalties. The wage portion will make up
13 10% of each Participating Class Members' Individual Settlement Share, and the non-wage portion
14 will make up 90% of each Participating Class Members' Individual Settlement Share. (See Exhibit
15 1 at Section III, Paragraph 63(B), Page 10).

16 In addition, each PAGA Group Members will receive a proportionate share of the PAGA
17 Fund that is allocated for distribution to PAGA Aggrieved Employees (i.e., 25% of the PAGA
18 Payment). PAGA Group Members will receive a pro-rated share of the Net PAGA Settlement
19 Amount, less applicable withholdings, based on the number of pay periods they worked in
20 California while employed by Defendant during the PAGA Period. The maximum amount that
21 each PAGA Group Member is entitled to receive is determined by multiplying the Net PAGA
22 Settlement Amount by a ratio that is determined by dividing a PAGA Group Member's total pay
23 periods worked during the PAGA Period in California by the total number of pay periods worked
24 during the PAGA Period by all PAGA Group Members employed by Defendant as expressed in
25 the following formula: Net PAGA Settlement Amount multiplied by PAGA Group Member pay
26 periods divided by all pay periods worked by all PAGA Group Members. (Exhibit 1 at Section III,
27 Section 64(A), Page 11). Each PAGA Group Member's Individual PAGA Settlement Share will
28 be apportioned as 100% penalties. (Exhibit 1 at Section III, Page 64(B), Page 11)

1 **c. Notice to the Class**

2 Within ten (10) business days after entry of the Preliminary Approval Order, Defendant
3 shall deliver to the Settlement Administrator an electronic database, which will list the Class and
4 PAGA Data. (Exhibit 1 at Section III, Paragraph 67(D)(i), Page 15). The Class Data will list the
5 following information for each Class Member: (1) first and last name; (2) last known mailing
6 address; (3) social security number; (4) telephone number; and (5) the total number of weeks
7 during which the Class Member performed work during the Class Period. The Class Data shall be
8 based on Defendant's payroll, personnel, and other business records. (Exhibit 1 at Section I,
9 Paragraph 7, Page 2). The PAGA Data will list the following information for each Aggrieved
10 Employee: (1) first and last name; (2) last known mailing address; (3) social security number; (4)
11 telephone number; and (5) the total number of pay periods during which the Aggrieved Employee
12 performed work during the PAGA Period as an Aggrieved Employee. The PAGA Data shall be
13 based on Defendant's payroll, personnel, and other business records. (Exhibit 1 at Section I,
14 Paragraph 31, Page 5).

15 The Settlement Administrator will use the National Change of Address Database to obtain
16 updated addresses for Class Members. (Exhibit 1 at Section III, Paragraph 67(D)(i), Page 15).
17 Within ten (10) business days after receipt of the Class and PAGA Data, the Settlement
18 Administrator will mail via first-class regular U.S. Mail the Class Notice to all identified Class
19 Members and Aggrieved Employees using the mailing address information provided by Defendant
20 and the results of the search of the National Change of Address Database on all Class Members
21 and Aggrieved Employees. (Exhibit 1 at Section III, Paragraph 67(D)(ii), Page 15).

22 After notices are mailed, Class Members will have forty-five (45) calendar days from the
23 initial mailing of the Class Notices. (Exhibit 1 at Section I, Paragraph 41, Page 6). This deadline
24 is referred to as the "Response Deadline." Class Members may respond to the settlement by
25 requesting to be excluded from it or objecting to it. The Class Notice will provide that Class
26 Members who wish to exclude themselves from the Settlement must mail to the Settlement
27 Administrator a written request for exclusion. The written request for exclusion must: (a) state the
28 Class Member's name, address, telephone number, and the last four digits of the Class Member's

1 social security number or employee identification number; (b) state the Class Member's intention
2 to exclude themselves from or opt-out of the Settlement; (c) be addressed to the Settlement
3 Administrator; (d) be signed by the Class Member or his or her lawful representative; and (e) be
4 postmarked no later than the Response Deadline. (Exhibit 1 at Section III, Paragraph 67(F), Page
5 17).

6 In addition, the Class Notice will provide that Class Members who wish to exclude
7 themselves from the Settlement must mail to the Settlement Administrator a written request for
8 exclusion. The written request for exclusion must: (a) state the Class Member's name, address,
9 telephone number, and the last four digits of the Class Member's social security number or
10 employee identification number; (b) state the Class Member's intention to exclude themselves
11 from or opt-out of the Settlement; (c) be addressed to the Settlement Administrator; (d) be signed
12 by the Class Member or his or her lawful representative; and (e) be postmarked no later than the
13 Response Deadline. (Exhibit 1 at Section III, Paragraph 67(F), Page 17).

14 If a Class Member or Aggrieved Employee who receives a Class Notice wishes to dispute
15 the number of work weeks listed on the Class Notice, the Class Member or Aggrieved Employee
16 may notify the Settlement Administrator by mail or telephone no later than the Response Deadline
17 and should produce any available supporting evidence, such as wage statements, offers of
18 employment, termination letters, and/or other employment records, to the Settlement
19 Administrator. The documentation should provide evidence of the dates the Class Member or
20 Aggrieved Employee contends he or she worked for Defendant during the Class or PAGA Period.
21 The Settlement Administrator shall then provide the documentation provided by the Class Member
22 or Aggrieved Employee to Defendant. Defendant shall review its records, the documentation
23 provided by the Class Member or Aggrieved Employee, and shall provide information to the
24 Settlement Administrator in response to any such disputed claim. Defendant's records shall be
25 presumed to be determinative, but the Settlement Administrator shall evaluate the evidence
26 submitted by the Class Member or Aggrieved Employee and make the decision as to which dates
27 should be applied. The determination by the Settlement Administrator shall be final and binding.
28 (Exhibit 1 at Section III, Paragraph 67(G), Page 18).

1 If a Class Notice is returned because of an incorrect address, within five (5) business days
2 from receipt of the returned notice, the Settlement Administrator will conduct a search for a more
3 current address for the Class Member and re-mail the Class Notice to the Class Member. The
4 Settlement Administrator will use the National Change of Address Database and skip traces to
5 attempt to find the current address. The Settlement Administrator will be responsible for taking
6 reasonable steps to trace the mailing address of any Class Member for whom a Class Notice is
7 returned by U.S. Postal Service as undeliverable. These reasonable steps shall include, at a
8 minimum, the tracking of all undelivered mail, performing address searches for all mail returned
9 without a forwarding address, and promptly re-mailing to Class Members for whom new addresses
10 are found. (Exhibit 1 at Section III, Paragraph 67(D)(iv), Page 16).

11 **d. Distribution of Funds**

12 Defendant shall wire or otherwise provide to the Settlement Administrator the Gross
13 Settlement Amount no later fifteen (15) calendar days after the Effective Date.⁸ (Exhibit 1 at
14 Section I, Paragraph 21, Page 3; *see also* Section III, Paragraph 67(M)(i), Page 20). Within ten
15 (10) calendar days after the Settlement Administrator's receipt of the Gross Settlement Amount,
16 the Settlement Administrator shall disburse: (1) the Net Settlement Amount to be paid to
17 Participating Class Members; (2) the Net PAGA Settlement Amount to Aggrieved Employees; (3)
18 the Attorney Fee Award and Cost Award to Class Counsel for attorneys' fees and costs, as
19 approved by the Court; (4) the Class Representative Enhancement Payments paid to the Class
20 Representatives, as approved by the Court; (5) the Administration Costs, as approved by the Court;
21 and (6) the LWDA Payment to the LWDA. (Exhibit 1 at Section I, Paragraph 17, Page 3; *see also*
22 Section III, Paragraph 67(M)(ii), Page 20).

23
24 ⁸ The Effective Date of the settlement is: (i) The date the Court enters Judgment granting final
25 approval of the settlement, if there are no objectors at the time of the final approval hearing; (ii) if
26 there are objectors at the time of the final approval hearing, the date by which an appeal of the
27 judgment must occur, if no notice of appeal is filed; or (iii) if there is a timely notice of appeal
28 filed, the date of final affirmance of the Judgment on an appeal, the expiration of the time for, or
the denial of, a petition to review the Judgment, or if review is granted, the date of final affirmance
of the Judgment following review pursuant to that grant. (Exhibit 1 at Section I, Paragraph 18,
Page 3).

1 Participating Class Members and Aggrieved Employees must cash or deposit their
2 Individual Settlement Share checks within one hundred and eighty (180) calendar days after the
3 checks are mailed to them. If any checks are not redeemed or deposited within ninety (90) calendar
4 days after mailing, the Settlement Administrator will send a reminder postcard indicating that
5 unless the check is redeemed or deposited in the next ninety (90) days, it will expire and become
6 non-negotiable, and offer to replace the check if it was lost or misplaced. If any checks remain
7 uncashed or not deposited by the expiration of the 90-day period after mailing the reminder notice,
8 the Settlement Administrator will, within two hundred (200) calendar days after the checks are
9 mailed, cancel the checks. All funds associated with the Individual Settlement Share checks
10 returned as undeliverable and funds associated with those checks remaining un-cashed shall be
11 tendered to Legal Aid at Work. Legal Aid at Work is a nonprofit legal services organization that
12 has been assisting low-income, working families for more than 100 years. Legal Aid at Work's
13 Wage Protection Program represents low-wage workers who are the victims of wage violations.
14 The wage claims made by Legal Aid at Work's clients are often the same type of claims made in
15 wage-and-hour class actions brought by workers under the federal Fair Labor Standards Act and
16 under California wage-and-hour laws. (Exhibit 1 at Section III, Paragraph 67(O), Page 21).

17 **e. Release of Claims**

18 The Participating Class Members will, upon the Effective Date, release all claims during
19 the Class Period that were pled or could have been pled based on a reasonable interpretation of the
20 facts included in the operative complaint. (Exhibit 1 at Section I, Paragraph 38, Page 5; *see also*
21 Section III, Paragraph 68, Pages 21-22). The PAGA Group Members will, upon the Effective Date,
22 release all claims during the PAGA Period for civil penalties that were pled or could have been
23 pled based on a reasonable interpretation of the facts included in the operative complaint. Further,
24 the State of California will release all claims raised in the PAGA demand letter submitted to the
25 Labor and Workforce Development Agency on or about April 7, 2023. (Exhibit 1 at Section I,
26 Paragraph 39, Pages 5-6; *see also* Section III, Paragraph 69, Page 22). The releases will release
27 Defendant, its subsidiaries, DBA's, and affiliated and/or funding entities, and each of its past or
28 present officers, directors, board members, employees and agents which could be jointly liable

1 with Defendant for the claims alleged. (Exhibit 1 at Section I, Paragraph 40, Page 6).

2 In addition, Plaintiff agrees to a general release of his claims against Defendant. (Exhibit
3 1 at Section III, Paragraph 70, Page 22).

4 **V. ARGUMENT**

5 **a. Class Action Settlements Are Subject to Court Review and Approval Under 6 the California Rules of Court**

7 Rule 3.769 requires court approval for class action settlements.⁹ “Before final approval, the
8 court must conduct an inquiry into the fairness of the proposed settlement.” (California Rules of
9 Court, Rule 3.769(g)). Rule 3.769 further requires a noticed motion for preliminary approval of
10 class settlements:

11 (a) A settlement or compromise of an entire class action, or a cause of action in
12 a class action, or as to a party, requires the approval of the court after
13 hearing.

14 (c) Any party to a settlement agreement may serve and file a written notice of
15 motion for preliminary approval of the settlement. The settlement agreement
16 and proposed notice to class members must be filed with the motion, and
17 the proposed order must be lodged with the motion.

18 Courts act within their discretion in approving settlements that are fair, not collusive, and
19 take into account “all the normal perils of litigation as well as the additional uncertainties inherent
20 in complex class actions.” *In re Beef Industry Antitrust Litigation* (5th Cir. 1979) 607 F. 2d 167,
21 179, cert. den. sub nom. *Iowa Beef Processors, Inc. v. Meat Price Investigators Ass’n* (1981) 452
22 U.S. 905.

23 **b. The Settlement Is Fair, Reasonable, and Adequate**

24 In deciding whether to approve a proposed class action settlement under Code of Civil
25 Procedure § 382, the Court must find that a proposed settlement is “fair, adequate and reasonable.”
26 *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. A proposed class action settlement is
27 **presumed** fair under the following circumstances: (1) the parties reached settlement after arms-
28 length negotiations; (2) investigation and discovery were sufficient to allow counsel and the court

⁹ The California Supreme Court also has authorized California’s trial courts to use Federal Rule 23 and cases applying it for guidance in considering class issues. *See Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821; *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146. Where appropriate, therefore, the Parties cite Federal Rule 23 and federal case law in addition to California law.

1 to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of
2 objectors is small. *Dunk v. Ford Motor Co.*, *supra*, at 1802. As the following shows, all of these
3 elements – with the exception of the percentage of objectors, which cannot be anticipated at this
4 stage of the litigation – bearing on the fairness of the proposed settlement are present here and the
5 Court’s grant of preliminary approval is therefore requested.

6 **i. The Settlement Was Reached as a Result of Arm’s-Length Negotiations**

7 The settlement was reached as a result of arm’s-length negotiations. Though cordial and
8 professional, the settlement negotiations have been, at all times, adversarial and non-collusive in
9 nature. Prior to, at, and after the mediation, Counsel for the Parties conducted extensive arm’s
10 length settlement negotiations until the settlement was reached. The terms of the settlement are
11 memorialized in the Agreement which is attached to the Declaration of David Mara, Esq. as
12 Exhibit 1. While Plaintiff believes in the merits of his case, he also recognizes the inherent risks
13 of litigation and understands the benefit of the class receiving significant settlement funds
14 immediately as opposed to risking continued litigation in achieving class certification, preparing
15 for and conducting a trial, and/or an appeal that may take several more years to litigate.

16 **ii. The Settlement is the Result of Thorough Investigation and Discovery**

17 The Parties thoroughly investigated and evaluated the factual strengths and weaknesses
18 before reaching the proposed settlement, and engaged in sufficient investigation, research and
19 discovery to support the settlement. The settlement was only possible following investigation,
20 discovery, and evaluation of Defendant’s policies and procedures, as well as the data produced for
21 the putative class, which permitted Class Counsel to engage in a comprehensive analysis of
22 liability and potential damages. This litigation has reached the stage where “the Parties certainly
23 have a clear view of the strengths and weaknesses of their cases” sufficient to support the
24 settlement. *Boyd v. Bechtel Corp.* (N.D. Cal. 1979) 485 F. Supp. 610, 617.

25 **iii. Counsel for Both Parties Are Experienced in Similar Litigation**

26 Both Plaintiff’s Counsel and Defendant’s Counsel are particularly experienced in wage and
27 hour employment law and class actions. Plaintiff’s Counsel has significant experience in litigating
28 unpaid wages, unprovided meal and rest periods, and overtime claims. (See Mara Dec. ¶¶ 2-9;

1 Declaration of Peter Horton, Esq. (“Horton Dec.”) ¶¶ 2-5). Indeed, Plaintiff’s Counsel was class
2 counsel in *Hohnbaum et al. v. Brinker Restaurant Corp et al.*, which is the subject case in the
3 landmark decision of *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004. (Mara
4 Dec. ¶ 4). Plaintiff’s Counsel has prosecuted numerous wage and hour class action cases on behalf
5 of employees for California Labor Code violations and thus are experienced and qualified to
6 evaluate the class claims and to evaluate settlement versus trial on a fully informed basis, and to
7 evaluate the viability of the defenses. This experience instructed Plaintiff’s Counsel on the risks
8 and uncertainties of further litigation and guided their determination to endorse the proposed
9 settlement.¹⁰ Defendant’s Counsel practices labor and employment law and have represented
10 numerous employers in similar types of claims. Accordingly, both Parties’ Counsel are
11 experienced in wage and hour employment law and class actions.

12 **iv. The Proposed Settlement is a Reasonable Compromise of Claims**

13 An understanding of the amount in controversy is an important factor in determining
14 whether the settlement “of the class members’ claims is reasonable in light of the strengths and
15 weaknesses of the claims and the risks of the particular litigation.” *Kullar v. Foot Locker Retail,*
16 *Inc.* (2008) 168 Cal.App.4th 116, 129; *see also Munoz v. BCI Coca-Cola Bottling Co. of Los*
17 *Angeles* (2010) 186 Cal.App.4th 399, 409. The most important factor in this regard is “the strength
18 of the case for plaintiffs on the merits, balanced against the amount offered in settlement.” *Id.*

19 In weighing the strength of the plaintiff’s case, *Kullar* instructs that the court is not to
20 “decide the merits of the case or to substitute its evaluation of the most appropriate settlement for
21 that of the attorneys.” *Kullar, supra*, 168 Cal.App.4th at 133. *Kullar* does not require an explicit
22 statement of the maximum amount the plaintiff class could recover if it prevailed on all its claims,
23 provided there is a record which allows “an understanding of the amount that is in controversy and
24 the realistic range of outcomes of the litigation.” *Munoz*, 186 Cal.App.4th at 409. Put differently,
25 “as the court does when it approves a settlement as in good faith under Code of Civil Procedure §
26

27 ¹⁰ The final factor mentioned in *Dunk* – the number of objectors – is not determinable until the
28 Class Notice has been provided to the class and they have had an opportunity to respond. This
information will be provided to the Court in conjunction with the final approval motion.

877.6, the court must at least satisfy itself that the class settlement is within the ‘ballpark’ of reasonableness.” *Kullar, supra*, 168 Cal.App.4th at 133, citing *Tech-Bilt v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 499-500. As the following subsections show, the Parties’ investigation and discovery revealed many reasons to discount claims and agree to this settlement.

1. The Proposed Settlement is a Reasonable Compromise of Claims

The proposed settlement was only possible following significant discovery and an evaluation of Defendant’s relevant policies and procedures, as well as the data that Defendant produced for the putative class as referenced above. This permitted Class Counsel to engage in a comprehensive analysis of liability and potential damages. The discovery conducted allowed Plaintiff to evaluate the strengths and weaknesses of his central theories of liability, which are predicated on Plaintiff’s claims that Defendant failed to provide compliant meal and rest periods, and failed to pay all wages owed. As explained herein, Defendant maintains that the discovery produced demonstrates that it would succeed at both in denying class certification and on the merits.

Although, Plaintiff believes this case is suitable for certification on the claimed bases that there are company-wide policies that Plaintiff contends violate California law and uniformly affect the Class Members, Defendant’s counter-arguments raise uncertainties with respect to both class certification and success on the merits. As the California Supreme Court ruled in *Sav-On v. Superior Court* (2004) 34 Cal.4th 319, class certification is always a matter of the trial court’s sound discretion. Decisions following *Sav-On* have reached different conclusions, with respect to certification of wage and hour claims.¹¹ While remaining confident in the strengths of his claims, all of these factors led Plaintiff to discount the following maximum potential damage exposure.

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¹¹ See, e.g., *Harris v. Superior Court* (2007) 154 Cal. App. 4th 164 (reversing decertification of class claiming misclassification and ordering summary adjudication in favor of employees), *review granted*, 171 P.3d 545 (2007) (not cited as precedent, but rather for illustrative purposes only); *Walsh v. IKON Solutions, Inc.* (2007) 148 Cal. App. 4th 1440 (affirming decertification of class claiming misclassification); *Aguilar v. Cintas Corp. No. 2* (2006) 144 Cal. App. 4th 121 (reversing denial of certification); *Dunbar v. Albertson’s Inc.* (2006) 141 Cal. App. 4th 1422 (affirming denial of certification).

2. Maximum Potential Exposure as Estimated by Plaintiff

The settlement encompasses approximately 82,055 workweeks.¹² This equates to approximately 246,165 shifts.

Plaintiff alleges that Defendant failed to provide employees with meal periods in accordance with California law. If Plaintiff were to prevail on this claim for the entire class period, Plaintiff and the Class Members would be entitled to the following *maximum* potential damages: \$3,692,475 (246,165 shifts x \$15.00 per hour = \$3,692,475). (Mara Dec. ¶ 18).

Further, Plaintiff alleges that Defendant failed to provide employees with rest periods in accordance with California law. If Plaintiff were to prevail on this claim for the entire class period, Plaintiff and the Class Members would be entitled to the following *maximum* potential damages: \$3,692,475 (246,165 shifts x \$15.00 per hour = \$3,692,475). (Mara Dec. ¶ 21).

In addition, Plaintiff alleges that Defendant fails to pay employees all wages owed due to its rounding policy. If Plaintiff were to prevail on this claim for the entire class period, Plaintiff and the Class Members would be entitled to the following *maximum* potential damages: \$923,118 (246,165 shifts x \$15.00 per hour x 0.25 hours = \$923,118.75). (Mara Dec. ¶ 24).

If Plaintiff were to prevail on his unpaid wages, meal period, and/or rest period claims, Plaintiff and the Class Members may be entitled to penalties for accurate itemized wage statements to employees. Under California Labor Code § 226(e)(1), the damages for breach of this section are fifty dollars (\$50) for the initial pay period in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars (\$4,000). If Plaintiff were to prevail on this claim, Plaintiff and the Class Members would be entitled to the following *maximum* damages: \$2,109,100 (580 pay periods x \$50 initial violation = \$29,000 plus 20,801 pay periods x \$100 subsequent violation = \$2,080,100). (Mara Dec. ¶ 27).

In addition, if Plaintiff were to prevail on his unpaid wages, meal period, and/or rest period claims, he and the Class Members may also be entitled to waiting time penalties. Plaintiff

¹² See Exhibit 1 at Section III, Paragraph 58(A), Page 9.

calculates the potential **maximum** exposure under his waiting time penalties cause of action as \$705,600 (196 former employees x 30 days x 8 hours x \$15.00 = \$705,600). (Mara Dec. ¶ 28).

Plaintiff also seeks PAGA penalties. PAGA allows the private enforcement of certain California Labor Code sections relating to wage and hour violations. PAGA Section 2699(f)(2) reads, in part, as follows:

[T]he civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation.

The statute of limitations for PAGA violations go back one year. The potential PAGA penalties for Plaintiff's core claims are: \$1,003,100 (\$100 x 3 PAGA violations (meal periods, rest periods, and unpaid wages) x 21,381 pay periods = \$6,414,300). (Mara Dec. ¶ 29). As Plaintiff's PAGA claims are based on the same alleged unlawful conduct as his class claims, Plaintiff's PAGA claims are subject to the same risks on the merits as Plaintiff's class claims. In addition, the Court may reduce any PAGA penalties awarded under Section 2699, subdivision (e)(2). The likelihood of the Court reducing the PAGA penalties awarded to Plaintiff and the Aggrieved Employees – assuming liability is proven as to each of Plaintiff's claims – is higher in this case where these same individuals may also be receiving money for the same unlawful conduct under the class claims. *See Avila v. Cold Spring Granite Co.* (E.D. Cal. Jan. 12, 2018) Case No. 1:16-cv-001533-AWI-SKO, 2018 U.S. Dist. LEXIS 6142 *17 (“Because the PAGA penalties sought are at least partially duplicative of penalties granted by the underlying Labor Code violations, *see, e.g.,* Cal. Lab. Code §§ 203, 226, 558(a), 1194.2, and because a Court has discretion in whether and in what amount to award PAGA penalties, *see* Cal. Lab. Code § 2699(e)(2), Plaintiffs recognize that the potential PAGA penalties are highly uncertain.”). As such, the Court would likely reduce any PAGA penalty amount awarded to Plaintiff and the Aggrieved Employees.¹³ (Mara Dec. ¶ 30).

¹³ For example, in a PAGA trial where liability was found by a jury for improper wage statements, the court reduced the maximum amount of civil penalties – \$5,845,250 – by approximately 94% to \$350,835 under § 2699(e)(2) finding that the employer's violations had not be willful. *Parr v. Golden State Overnight Delivery Serv., Inc.* (Alameda Sup. Ct. July 10, 2014) 2014 Cal. Super. LEXIS 1551; *see also Fleming v. Covidien, Inc.* (C.D. Cal. Aug. 12, 2011) 2011 U.S. Dist. LEXIS 154590 (finding defendant liable for issuing defective wage statements but reducing penalties from \$2.8 million to \$500,000); *In re Taco Bell Wage and Hour Actions* (E.D. Cal. April 8, 2016) 2016

1 Thus, not taking into account any of its defenses or arguments, Plaintiff estimates that if he
2 were successful in his core claims, Defendant's total exposure would be approximately \$8,308,068
3 [\$3,692,475 (rest period exposure) + \$3,692,475 (meal period exposure) + \$923,118 (unpaid wage
4 exposure) = \$8,308,068]. If Plaintiff are successful in his unpaid wage, meal period, and rest period
5 claims, he may also be entitled to damages for wage statements (\$2,109,100) waiting time penalties
6 (\$705,600). If Plaintiff's claims are successful, he may also be entitled to PAGA penalties. (Mara
7 Dec. ¶ 31).

8 **3. The Settlement Amount of \$1,750,000 is Reasonable**

9 In light of the risks Plaintiff's claims faced, Plaintiff and his Counsel believe that the
10 settlement amount of \$1,750,000 – with an average settlement share amount estimated at \$1,580
11 – is a reasonable and fair settlement amount. (Mara Dec. ¶ 32; Horton Dec. ¶ 6).

12 It should be noted that a settlement is not judged solely against what might have been
13 recovered, had the plaintiff prevailed at trial, nor does the settlement have to provide 100% of the
14 damages sought to be fair and reasonable. *Wershba v. Apple Computers, Inc.* (2001) 91
15 Cal.App.4th 224, 246, 250; *Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1139;
16 “Compromise is inherent and necessary in the settlement process...even if the relief afforded by
17 the proposed settlement is substantially narrower than it would be if the suits were to be
18 successfully litigated, this is no bar to a class settlement because the public interest may indeed be
19 served by a voluntary settlement in which each side gives ground in the interest of avoiding
20 litigation.” *Wershba, supra*, at 250; *Officers for Justice v. Civil Serv. Comm'n* (9th Cir. 1982) 688
21 F.2d 615, 628 (“It is well-settled law that a cash settlement amounting to only a fraction of the
22 potential recovery does not...render the settlement inadequate or unfair”); *see also In re*
23 *Omnivision Technologies, Inc.* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 95616, *21, (noting that
24 certainty of recovery in settlement of 6% of maximum potential recovery after reduction for
25 attorneys' fees was higher than median percentage for recoveries in shareholder class action

26 _____
27 U.S. Dist. LEXIS 48555 (awarding no civil penalties pursuant to PAGA notwithstanding a jury
28 verdict in favor of the plaintiff as to liability for underpaid meal premiums for short or missed meal
breaks, because plaintiffs had not proven the precise number of violations with certainty.).

1 settlements, averaging 2.2%-3% from 2002 through 2006).

2 **c. Provisional Certification Should be Granted**

3 Under California law, a class action is appropriate when the class is ascertainable and there
4 is “a well defined community of interest in the questions of law and fact involved affecting the
5 parties to be represented.” Cal. Civ. P. Code § 382. State law requirements under California Code
6 of Civil Procedure section 382 for class certification follow federal law according to Rule 23 of
7 the Federal Rule of Civil Procedure: numerosity, typicality of the class representatives’ claims,
8 adequacy of representation, predominance of common issues, and superiority. Fed. R. Civ. P.
9 23(a); *see also Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1019. It should be noted
10 that while a court must certify a class for settlement purposes if a class has not already been
11 certified, “it is well established that trial courts should use different standards to determine the
12 propriety of a settlement class, as opposed to a litigation class certification. Specifically, a lesser
13 standard of scrutiny is used for settlement cases.” *Glob. Minerals & Metals Corp. v. Superior*
14 *Court* (2013) 113 Cal.App.4th 836, 859 *citing Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th
15 1794, 1807, fn. 19. Plaintiff contends, and Defendant does not dispute for settlement purposes
16 only, each of these elements is present. *See Wershba v. Apple Computer* (2001) 91 Cal. App. 4th
17 224, 237-38.

18 **d. Notice to the Class Complies with California Rule of Court 3.769(f)**

19 California Rule of Court 3.769(f), provides:

20 If the court has certified the action as a class action, notice of the final approval
21 hearing must be given to class members in the manner specified by the court. The
22 notice must contain an explanation of the proposed settlement and procedures for
class members to follow in filing written objections to it and in arranging to appear
at the settlement hearing and state any objections to the proposed settlement.

23 The proposed Class Notice meets all of these requirements. The proposed Class Notice advises the
24 class of their rights to participate in the settlement, how to and when to object to or request
25 exclusion from the settlement, and the date, time, and location of the final approval hearing. The
26 proposed Class Notice is attached as Exhibit A to the Agreement.

27 ///

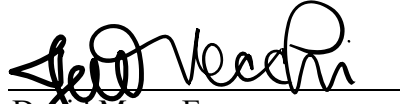
28 ///

1 **VI. CONCLUSION**

2 Plaintiff respectfully submits that the proposed settlement is in the best interests of the
3 Class and Class Members, as it is fair, adequate, and reasonable, and one that should ultimately be
4 granted final approval. Under the applicable class action criteria and guidelines, the proposed
5 settlement should be preliminarily approved by the Court, the class should be conditionally
6 certified for purposes of settlement only, and the Class Notice should be approved. Plaintiff also
7 respectfully requests the Court set a final approval hearing date of October 23, 2024.

8
9 Dated: May 29, 2024

MARA LAW FIRM, PC

10 

11 David Mara, Esq.

12 Jill Vecchi, Esq.

13 Representing Plaintiff MARK FRANKLIN,
14 on behalf of himself, all others similarly situated,
15 and on behalf of the general public.
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