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individually and on behalf of others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO

SEBASTIAN NICOLAS, individually and on
behalf of others similarly situated,

Plaintiffs,

vs.

MASTERCRAFT PAINTING, INC. and
DOES 1 through 50,

Defendants.

CASE NO.: 23CV001218

CLASS ACTION

Assigned For All Purposes To:
Judge: Hon. Jill Talley
Dept.: 23

**NOTICE OF MOTION AND PLAINTIFF'S
MOTION FOR FINAL APPROVAL OF
CLASS ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Final Approval Hearing:
Date: July 12, 2024
Time: 9:00 a.m.
Dept.: 23

Complaint Filed: May 8, 2023

1 TO EACH PARTY AND EACH ATTORNEY OF RECORD:

2 PLEASE TAKE NOTICE THAT on July 12, 2024 at 9:00 a.m. or as soon as the matter can
3 be heard in Department 23 of this Court, located at 720 Ninth Street, Sacramento, CA 95814,
4 Plaintiff Sebastian Nicolas ("Plaintiff") will, and hereby does, move the Court for an order
5 granting final approval of a class action settlement between Plaintiff and Defendant Mastercraft
6 Painting, Inc. ("Defendant") (collectively the "Parties") upon the terms and conditions set forth in
7 the Settlement Agreement ("Agreement"), a copy of which was submitted on December 20, 2023
8 as Exhibit 1 to the Declaration of Justian Jusuf in Support of Plaintiff's motion for preliminary
9 approval of the Settlement.

10 Plaintiff will, and hereby does, further move the Court for an order:

- 11 1. Granting final approval of the Settlement;
- 12 2. Certifying a Class for settlement purposes;
- 13 3. Appointing Plaintiff Sebastian Nicolas as Class Representative for settlement
14 purposes;
- 15 4. Appointing Plaintiff's Counsel, Justian Jusuf of Law Office of Justian Jusuf APC
16 and Sahag Majarian II of Majarian Law Group, as Class Counsel for settlement
17 purposes;
- 18 5. Approving settlement of claims for civil penalties under the Labor Code Private
19 Attorneys General Act ("PAGA") in the sum of \$7,000.00 (Seven Thousand
20 Dollars and Zero Cents), to be paid out of the Settlement Fund. Out of this amount,
21 75% (\$5,250.00) will be paid to the Labor and Workforce Development Agency
22 ("LWDA"), and the remaining 25% (\$1,750.00) will be paid to the Aggrieved
23 Employees, proportionally based on the number of Pay Periods they worked during
24 the PAGA Period (from May 8, 2022 to March 31, 2023).
- 25 6. Approving payment to the Settlement Administrator, Phoenix Settlement
26 Administrators, in the sum of \$6,500.00 (Six Thousand Five Hundred Dollars and
27 Zero Cents), to be paid out of the Settlement Fund, for administering this class
28 action and PAGA settlement.

7. Approving an Enhancement Award in the amount of \$5,000.00 (Five Thousand Dollars and Zero Cents) to Plaintiff/Class Representative Sebastian Nicolas, to be paid out of the Settlement Fund, for his services to the Class and taking the risks of bringing the Action as a class action, which has resulted in substantial benefits to the Class Members;
8. Approving reasonable attorneys' fees to Class Counsel in the amount of \$28,333.33 (Twenty-Eight Thousand Three Hundred Thirty-Three Dollars and Thirty-Three Cents), which is one-third (33.33%) of the Settlement Fund, and reimbursement of costs in the amount of \$4,187.35 (Four Thousand One Hundred Eighty-Seven Dollars and Thirty-Five Cents), to be paid out of the Settlement Fund.
9. Directing the Parties to implement the terms of the Settlement; and
10. Entering a Judgment approving the Settlement.

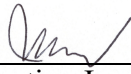
The motion will be based upon this notice, the attached memorandum of points and authorities, Declaration of Justian Jusuf, Declaration of Taylor Mitzner with respect to Notice and Settlement Administration, all filed concurrently herewith, the records and files in this action, and any other further evidence or argument that the Court may properly receive at or before the hearing.

Plaintiff does not anticipate any opposition to this motion.

Respectfully submitted,

Dated: June 12, 2024

LAW OFFICE OF JUSTIAN JUSUF, APC
MAJARIAN LAW GROUP

By: 
Justian Jusuf

Attorneys for Plaintiff Sebastian Nicolas,
individually and on behalf of others similarly
situated

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1 **I. INTRODUCTION**

2 Plaintiff Sebastian Nicolas (“Plaintiff”) and Defendant Mastercraft Painting, Inc.
3 (“Defendant”) (collectively the “Parties”) have reached a class action settlement, which includes a
4 settlement of alleged claims for civil penalties under the Labor Code Private Attorneys General
5 Act (“PAGA”), upon the terms and conditions set forth in the Settlement Agreement
6 (“Agreement”), a copy of which was submitted on December 20, 2023 as Exhibit 1 to the
7 Declaration of Justian Jusuf in Support of Plaintiff’s motion for preliminary approval of the
8 Settlement.

9 On March 8, 2024, the Court granted Plaintiff’s motion for preliminary approval of the
10 class action and PAGA settlement, and scheduled a final approval hearing for July 12, 2024.

11 The Settlement Administrator has completed a comprehensive notification process,
12 including individualized mailing of the Notice of Class and PAGA Settlement (in English and
13 Spanish) to the 87 Class Members on April 5, 2024. (Declaration Of Taylor Mitzner With Respect
14 To Notice And Settlement Administration (“Mitzner Decl.”), ¶ 6.) The Administrator conducted
15 reasonable search for new addresses for returned mails, and promptly re-mailed those notices. (*Id.*
16 ¶ 7) Ultimately, after reasonable efforts to locate new or better addresses for re-mailing, a total of 3
17 (three) Notices (3.4% of the 87 Class Members) remain undeliverable. (*Id.* ¶ 8)

18 None of the Class Members opted out of the Settlement, and none of them objected to the
19 Settlement. (Mitzner Decl. ¶¶ 9, 10) The lack of opt-outs and objections indicate that the
20 settlement has been well-received by the Class Members.

21 Upon the Court granting final approval of the Settlement, these Class Members will receive
22 a total of approximately \$31,582.29. (Mitzner Decl. ¶ 13) The highest individual class settlement
23 payment is approximately \$1,045.74, the lowest amount is approximately \$10.25, and the average
24 amount is approximately \$363.01. (*Id.* ¶ 14) In addition, those Class Members who were
25 employed during the PAGA Period will receive a total of \$1,750.00 as Aggrieved Employees for
26 the PAGA settlement. (*Id.* ¶ 15) The highest individual payment to an Aggrieved Employee is
27 approximately \$80.32, the lowest amount is approximately \$10.25, and the average amount is
28 approximately \$60.34. (*Id.*)

1 Defendant has fully funded the \$85,000.00 Settlement Fund amount. (Mitzner Decl. ¶ 3)
2 A summary of the estimated amounts to be paid out of the Settlement Fund amount is as follows:

3	Payments to Class Members	\$31,582.29
4	Employer's Side of Payroll Taxes	\$1,584.38
	LWDA	\$5,250.00
5	Payments to Aggrieved Employees	\$1,750.00
6	Enhancement Award for Plaintiff	\$5,000.00
7	Settlement Administration Fees/Costs	\$6,500.00
8	Attorney Fee Award to Class Counsel	\$28,333.33
9	Costs Reimbursement to Class Counsel	\$5,000.00
	Total Settlement Fund	<u>\$85,000.00</u>

10 The actual total payments to Class Members will be slightly more than the amount stated
11 above because the actual requested costs reimbursement to Class Counsel is slightly lower than the
12 originally estimated \$5,000.00.

13 Any settlement checks that are not cashed after 180 (one hundred eighty) calendar days of
14 issuance will be cancelled, and the money will be transmitted to the California State Controller's
15 Office, to be placed in its Unclaimed Property funds.

16 In Class Counsel's opinion, this is an excellent result for the Class Members, in light of the
17 sharply disputed factual and legal issues, and the potentially costly and lengthy litigation without
18 any assurance of a better outcome for the Class, particularly in light of the fact that Defendant is no
19 longer in business.

20 The terms of the proposed class settlement are fair and reasonable, and were achieved after
21 Plaintiffs and Class Counsel conducted sufficient investigation and discovery. The Settlement
22 resolves the case favorably for the Class, and it provides substantial benefits to the Class Members
23 and the State.

24 On December 20, 2023, a copy of the Settlement and the moving papers for preliminary
25 approval of the Settlement were submitted to the LWDA, concurrently with the filing of the
26 motion for preliminary approval of the Settlement. (Please see Proof of Service, filed on
27 December 20, 2023) The LWDA has expressed no objection to the settlement of the claims for
28 civil penalties under PAGA. (Jusuf Decl. ¶ 3)

1 The settlement eliminates costly and lengthy litigation without any assurance of a better
2 outcome for the Class. It promotes judicial efficiency, and it eliminates the inherent litigation risks
3 that the Class Members may get nothing. The Court has granted preliminary approval of the
4 Settlement. As noted above, none of the Class Members objected to the Settlement, and none of
5 them has opted out of the Settlement. Final approval is appropriate.

6 **II. SUMMARY OF FACTS AND PROCEDURAL INFORMATION**

7 Defendant was in the business of providing property painting services in Northern
8 California. Plaintiff was employed by Defendant as a non-exempt employee.

9 On May 8, 2023, Plaintiff filed a class action complaint against Defendants, alleging claims
10 for (1) failure to pay minimum wage, (2) failure to provide meal periods, (3) failure to provide rest
11 periods, (4) failure to provide accurate wage statements, (5) failure to reimburse employees for
12 using personal cell phones for work, and (6) violation of Business and Professions Code § 17200.
13 On August 15, 2023, Plaintiff filed the operative First Amended Complaint, adding claims for civil
14 penalties under PAGA.

15 Shortly after the commencement of the Action, counsel for the respective parties engaged
16 in numerous and extensive discussions regarding the factual and legal issues involved in the
17 Action, their respective views on the strengths and weaknesses of the claims and defenses, and,
18 more importantly, *the fact that Defendant is no longer in business as of March 31, 2023*. (Jusuf
19 Decl. ¶ 6) After extensive discussions among counsel for the respective Parties, the Parties
20 eventually reached the terms of a settlement to fully resolve all claims Plaintiff has asserted against
21 the Defendants in this Action. (*Id.*, ¶¶ 6, 7)

22 **III. THE SETTLEMENT SHOULD RECEIVE FINAL APPROVAL**

23 “It is well recognized that settlement agreements are judicially favored as a matter of sound
24 public policy.” *Speed Shore Corp. v. Denda* (9th Cir. 1979) 605 F.2d 469, 473. Approval of a
25 class action settlement involves a two-step process in which the Court first determines whether a
26 proposed class action settlement should receive preliminary approval and then, after notice is given
27 to class members, whether final approval is warranted. California Rule of Court 3.769, *et seq.*
28 The decision to approve or reject a proposed settlement is committed to the sound discretion of the

1 Court. *Munoz v. BCI Coca-Cola Bottling Co. of L.A.* (2010) 186 Cal. App. 4th 399, 407; *Wershba*
2 *v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 234-35.

3 “Although the court gives regard to what is otherwise a private consensual agreement
4 between the parties, the court must also evaluate the proposed settlement agreement with the
5 purpose of protecting the rights of the absent class members who will be bound by the settlement.”
6 *Wershba*, 91 Cal.App.4th at p. 245. “The court must therefore scrutinize the proposed settlement
7 agreement to the extent necessary to ‘reach a reasoned judgment that the agreement is not the
8 product of fraud or overreaching by, or collusion between, the negotiating parties, and that the
9 settlement, taken as a whole, is fair, reasonable and adequate to all concerned.’” (*Id.*)

10 The settlement is entitled to “a presumption of fairness . . . where: (1) the settlement is
11 reached through arm’s-length bargaining; (2) investigation and discovery are sufficient to allow
12 counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4)
13 the percentage of objectors is small.” *Kullar v. Foot Locker Retail* (2008) 168 Cal.App.4th 116,
14 128, quoting *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802.

15 To determine whether a settlement is fair, reasonable and adequate, courts consider several
16 well-recognized factors, including “the strength of plaintiffs’ case, the risk, expense, complexity
17 and likely duration of further litigation, the risk of maintaining class action status through trial, the
18 amount offered in settlement, the extent of discovery completed and the stage of the proceedings,
19 the experience and views of counsel” *Munoz*, 186 Cal. App. 4th at 407.

20 “There is usually an initial presumption of fairness when a proposed class settlement . . .
21 was negotiated at arm’s length by counsel for the class,” but “the court should not give rubber-
22 stamp approval.” *Kullar*, 168 Cal.App.4th at 130. “Rather, to protect the interests of absent class
23 members, the court must independently and objectively analyze the evidence and circumstances
24 before it in order to determine whether the settlement is in the best interests of those whose claims
25 will be extinguished.” *Id.* “To make this determination, the factual record before the . . . court
26 must be sufficiently developed.” *Id.*

27 “The court undoubtedly should give considerable weight to the competency and integrity of
28 counsel and the involvement of a neutral mediator in assuring itself that a settlement agreement

1 represents an arm's length transaction entered without self-dealing or other potential misconduct.”
2 *Kullar*, 168 Cal.App.4th at 129. “The court must stop short of the detailed and thorough
3 investigation that it would undertake if it were actually trying the case....” *Id.* at 130.

4 **IV. THE REQUIREMENTS FOR CLASS ACTION ARE SATISFIED**

5 A proposed class action settlement must meet the requirements of a class action, except the
6 manageability requirement. *Amchem Products, Inc. v. Windsor* (1997) 521 U.S. 591, 620. Courts
7 must pay “undiluted, even heightened, attention” to class certification requirements in a settlement
8 context. *Id.* Importantly, however, in a stipulated class for settlement purposes, the Court need not
9 inquire whether the case, if tried, would present intractable management problem, because the
10 proposed settlement would eliminate any trial. *Id.* at 621.

11 Two basic requirements for a class action: “The first is existence of an ascertainable class,
12 and the second is a well-defined community of interest in the question of law and fact involved.”
13 *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 809. Whether a class is “ascertainable” within the
14 meaning of CCP § 382 “is determined by examining (1) the class definition, (2) the size of the
15 class, and (3) the means available for identifying the class members.” *Reyes v. San Diego County*
16 *Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1271. The “community of interest”
17 requirement embodies three factors: (1) predominant questions of law or fact, (2) class
18 representatives whose claims or defenses are typical of the class, and (3) class representatives who
19 can adequately represent the class. *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.

20 **1. Ascertainability.**

21 “Ascertainability is required in order to give notice to putative class members as to whom
22 the judgment in the action will be res judicata.” *Aguilar v. Cintas Corp. No. 2* (2006) 144
23 Cal.App.4th 121, 135. The class members must be “readily identifiable without unreasonable time
24 and expense.” *Hale v. Sharp Healthcare* (2014) 232 Cal.App.4th 50, 59-60. A class may be
25 ascertainable even if the definition includes ultimate facts or conclusions of law. *Hicks v.*
26 *Kaufman & Broad* (2001) 89 Cal.App.4th 908, 918-916. The class definition need not include the
27 claims asserted; the notice to the class is the proper place to explain the relationship between the
28 class and the legal claims being made in the case. *Hicks*, 89 Cal.App.4th at 915.

1 Here, the identities of the Class Members can be ascertained from Defendants' employee
2 records. Indeed, Defendants have ascertained that there are 88 individuals in the proposed Class.
3 Thus, the ascertainability requirement is satisfied.

4 **2. Numerosity.**

5 Class action is appropriate when the parties are so numerous that individual joinder is
6 impracticable. *Bell v. Farmers Insurance Exchange* (2004) 115 Cal.App.4th 715, 739-740. There
7 is no minimum number of putative class members as a matter of law for maintenance of a class
8 action. *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 934. "Generally speaking, courts
9 will find that the 'numerosity' requirement has been satisfied when the class is comprised of 40 or
10 more members, and will find that it has not been satisfied when the class comprises 21 or fewer."
11 *Ansari v. New York Univ.* (S.D. N.Y. 1998) 179 F.R.D. 112, 114.

12 There are 88 individuals in the proposed Class, making joinder impracticable. The
13 numerosity requirement is satisfied.

14 **3. Commonality.**

15 The requirement for common questions of law or fact to predominate in a class action
16 "means each member must not be required to individually litigate numerous and substantial
17 questions to determine his or her right to recover following the class treatment; and the issues
18 which may be jointly tried, when compared with those requiring separate adjudication, must be
19 sufficiently numerous and substantial to make class action advantageous to the judicial process and
20 to the litigants." *Aguilar v. Cintas Corporation No. 2* (2006) 144 Cal.App.4th 121, 132.

21 The claims alleged in this action involve common questions of facts and law. The same
22 policies and procedures being challenged in this action applied to all members of the Class, and the
23 claims covered by the Released Claims involve the same questions of law. Thus, the commonality
24 requirement is satisfied.

25 **4. Typicality.**

26 Typicality means the class representatives' claims are similar to those of class members.
27 Typicality can refer to the nature of the claims of the class representatives as well as to the general
28 facts from which such claims arose. The claims of the class representative need not be identical to

1 those of the class members. *B.W.J. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d
2 1341, 1347. A class representative's claims are "typical" of those of the class members "if they
3 are reasonably co-extensive with those of absent class members; they need not be substantially
4 identical." *Hanlon v. Chrysler Corporation* (1998) 150 F.3d 1011, 1020.

5 Plaintiff's claims are typical of those they seek to represent in this Settlement. Plaintiff is a
6 member of the Class, and he was subjected to the same policies and practices being challenged in
7 this action. The claims they assert and covered by the Released Claims can be asserted by other
8 members of the Class. Thus, the typicality requirement is satisfied.

9 **5. Adequacy of Representation.**

10 The "adequacy of representation" requirement means that (a) the proposed class
11 representative does not have any conflicts of interest with the class members and (b) the class
12 representative is represented by qualified counsel. *Hanlon v. Chrysler Corporation* (1998) 150
13 F.3d 1011, 1020. Here, there is no conflict of interest between Plaintiffs and the members of the
14 Class, and Plaintiff is represented by counsel who are experienced in wage-and-hour class
15 litigations, who have diligently pursued the claims of the Class members. Thus, the adequacy of
16 representation requirement is satisfied.

17 **6. Risk of Class Status.**

18 If the case is not resolved in a settlement, there is always a risk that the case or claim is not
19 certified to proceed as a class, and the risk of decertification after an initial certification. *Weinstat*
20 *v. Dentsply Intern., Inc.* (2010) 180 Cal.App.4th 1213, 1226 ("Our Supreme Court has recognized
21 that trial courts should retain some flexibility in conducting class actions, which means, under
22 suitable circumstances, entertaining successive motions on certification if the court subsequently
23 discovers that the propriety of a class action is not appropriate.")

24 Plaintiff and Class Counsel properly considered those risks, which might result in Class
25 Members receiving nothing.

26 **V. THE SETTLEMENT IS FAIR AND REASONABLE**

27 In reviewing a class action settlement, "[t]he most important factor is the strength of the
28 case for plaintiffs on the merits, balanced against the amount offered in settlement." *Kullar*, 168

1 Cal.App.4th at 130.

2 **A. The Strength Of Plaintiff's Claims and Range of Class Damages**

3 1. Unpaid Wages and Waiting Time Penalty-Wages

4 Plaintiff alleges that Defendant regularly failed to provide a full 30-minute meal period for
5 each workday, but systematically deducted 30 minutes from employees' daily hours worked,
6 resulting in a failure to pay wages for all hours worked. Defendant rigorously disputes these
7 allegations, and maintains that all employees took a 30-minute meal period each workday.

8 Assuming Plaintiff prevails on the merits and on the class certification issues, the total class
9 damages for the unpaid wages claim is approximately \$100,000. (Jusuf Decl. ¶ 11)

10 Plaintiff contends that the failure to pay wages of all hours worked gives rise to liability to
11 pay waiting time penalty-wages under Labor Code § 203. *Maldonado v. Epsilon Plastics* (2018)
12 22 Cal.App.5th 1308, 1324 ("If the wages are not paid in accordance with law, the employee's
13 wages 'shall continue as a penalty' for up to 30 days.") Liability under Labor Code § 203 need
14 "not be based on a deliberate evil purpose to defraud the worker of wages which the employer
15 knows are due." *Armenta v. Osmose* (2005) 135 Cal.App.4th 314, 325. "As used in section 203,
16 'willful' merely means that the employer intentionally failed or refused to perform an *act which*
17 *was required to be done.*" *Id.* (italic in original). However, "a good faith dispute that any wages
18 are due will preclude imposition of waiting time penalties under Section 203." *Aramal v. Cintas*
19 *Corporation No. 2* (2008) 163 Cal.App.4th 1157, 1201.

20 Assuming Plaintiff prevails on the merits and on the class certification issues, the total class
21 damages for waiting time penalty-wages is approximately \$401,000. (Jusuf Decl. ¶ 12)

22 2. Meal Periods and Rest Periods

23 As noted, Plaintiff contends that Defendant regularly failed to provide proper meal periods
24 and rest periods. Plaintiff further contends that Defendant failed to pay premium wages due under
25 Labor Code § 226.7 in lieu thereof. "Under the wage order, as under the statute, an employer's
26 obligation is to provide a first meal period after no more than five hours of work and a second meal
27 period after no more than 10 hours of work." *Brinker v. Sup. Ct.* (2012) 53 Cal.4th 1004, 1049.
28 However, "the employer is not obligated to police meal breaks and ensure no work thereafter is

1 performed.” *Id.* at 1040. As to rest periods, “[e]mployees are entitled to 10 minutes rest for shifts
2 from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10
3 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on.” *Id.* at 1029.
4 However, as noted, Defendant rigorously disputes these allegations, and contends that it provided
5 compliant meal and rest periods, and further contends that all employees took meal and rest
6 periods.

7 Assuming Plaintiff prevails on the merits and on the class issues, the total class damages
8 for the meal periods claim is approximately \$120,000. (Jusuf Decl. ¶ 13) The class damages for
9 the rest periods claim is also approximately \$120,000. (*Id.*)

10 3. Wage Statement Violation

11 Plaintiff alleges that Defendant failed to provide Plaintiff and other employees with
12 accurate wage statements, in violation of Labor Code § 226(a). Plaintiff further alleges that the
13 violation was “knowing and intentional” within the meaning of Labor Code § 226(e), and therefore
14 they are entitled “to recover the greater of all actual damages or fifty dollars (\$50) for the initial
15 pay period in which a violation occurs and one hundred dollars (\$100) per employee for each
16 violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars
17 (\$4,000), and is entitled to an award of costs and reasonable attorney’s fees.”

18 Plaintiff contends that the wage statements were inaccurate because the total hours worked
19 reported on the wage statements were inaccurate (due to the alleged automatic 30-minute time
20 deductions), and the wage statements failed to show premium wages due under Labor Code §
21 226.7. However, this claim is derivative of those claims, and thus its strength rises and falls with
22 the strength of the alleged unpaid wages claim and meal and rest periods claims.

23 Assuming Plaintiff prevails on the merits and on the class issues, the class damages for this
24 claim is approximately \$92,000. (Jusuf Decl. ¶ 14)

25 4. Failure to Reimburse Work Expenses (Personal Cell Phone)

26 Under Labor Code § 2802, “[a]n employer shall indemnify his or her employee for all
27 necessary expenditures or losses incurred by the employee in direct consequence of the discharge
28 of his or her duties, or of his or her obedience to the directions of the employer....” Employers

1 must reimburse employees a percentage of cell phone expenses related to work calls. *Cochran v.*
2 *Schwan's Home Service, Inc.* (2014) 228 Cal.App.4th 1137, 1144 (“to be in compliance with
3 section 2802, the employer must pay some reasonable percentage of the employee’s cell phone
4 bill.”)

5 Plaintiff alleges that Defendant required employees to use their personal cell phone for
6 work-related class, and failed to reimburse them for personal cell phone expenses. Defendant
7 rigorously disputes these allegations, and maintains that employees had no reason to use their
8 personal cell phones for work-related calls.

9 Assuming Plaintiff prevails on the merits and on class issues, the class damages for the
10 work expense reimbursement claim is approximately \$12,000. (Jusuf Decl. ¶ 15)

11 5. PAGA Claims

12 Settlement of PAGA claims requires court approval. Labor Code § 2699(l)(2) (“The
13 superior court shall review and approve any settlement of any civil action filed pursuant to this
14 part. The proposed settlement shall be submitted to the agency at the same time that it is submitted
15 to the court.”) In compliance with this requirement, a copy of the Agreement has been submitted
16 to the LWDA concurrently with the filing of this motion. (Jusuf Decl. ¶ 3; Proof of Service, filed
17 December 20, 2023)

18 The requirements for a class action do not apply to a representative suit seeking civil
19 penalties under PAGA. *Arias v. Superior Court* (2009) 46 Cal.4th 969. A PAGA action “is
20 fundamentally a law enforcement action designed to protect the public and not to benefit private
21 parties.” *Id.* at 980. As such, employees cannot opt out of a PAGA settlement. *Robinson v.*
22 *Southern Counties Oil Co.* (2020) 53 Cal.App.5th 476, 482. “The statute of limitations for PAGA
23 claims is one year.” *Brown v. Superior Court* (2018) 28 Cal.App.5th 824, 839.

24 Under PAGA, “the civil penalty is one hundred dollars (\$100) for each aggrieved employee
25 per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee
26 per pay period for each subsequent violation.” Labor Code § 2699(f)(2). Any civil penalties
27 recovered shall be paid 75% to the LWDA, and 25% to the aggrieved employees. Labor Code §
28 2699(i). PAGA further provides that “a court may award a lesser amount than the maximum civil

penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Labor Code § 2699(e)(2). The Court of Appeal has held that the rate for the “initial violation” applies to the first and following violations, and the higher penalty rate for “subsequent” violation applies only after the company has been on notice of a prior violation. *Amaral v. Cintas Corporation No. 2* (2008) 163 Cal.App.4th 1157, 1209.

The theoretical total maximum civil penalties under PAGA is approximately \$535,500, calculated as follows:

Unpaid Wages (\$100 x 1,071 total pay periods)	\$107,100
Meal Periods (\$100 x 1,071 total pay periods)	\$107,100
Rest Periods (\$100 x 1,071 total pay periods)	\$107,100
Wage Statements (\$100 x 1,071 total pay periods)	<u>\$107,100</u>
Work Expenses (\$100 x 1,071 total pay periods)	<u>\$107,100</u>
Total	<u><u>\$535,500</u></u>

Under the Settlement Agreement reached by the Parties, a sum of \$7,000 will be paid as civil penalties under PAGA, 75% (\$5,250) of which will be paid to the LWDA and the remaining 25% (\$1,750) will be paid to the Aggrieved Employees, proportionally based on their respective Pay Periods during the PAGA Period. The amounts allocated as PAGA recovery will be mailed to those employees who are Aggrieved Employees, whether or not they otherwise opt out of the Class, consistent with the principles that class requirements (including the opt-out feature) do not apply to PAGA claims.

The Parties arrived at this amount based on the facts and circumstances of this case, in light of disputed factual and legal issues involved in the claims against Defendant, and notably the fact that Defendant is no longer in business. In the context of class settlements, a trial court may approve a class settlement that assigns no payment for civil penalties under PAGA. *Nordstrom Comm. Cases* (2010) 186 Cal.App.4th 576. The proposed settlement of the PAGA claims is fair and reasonable under the circumstances.

6. Limited Release by Class Members

In exchange for the settlement payments, Plaintiff and Class Members who do not opt out

1 of the Settlement will provide a limited release of claims alleged in the complaint, defined as
2 follows:

3 Any and all claims asserted in the Complaint (filed May 8, 2023), as amended in the
4 operative First Amended Complaint (filed August 15, 2023) arising during the Class
5 Period and PAGA Period based on the facts alleged therein, including claims for
6 alleged failure to pay at least the minimum wage for all hours worked, failure to
7 provide meal periods, failure to provide rest periods, failure to provide accurate wage
8 statements, and failure to reimburse work-related expenses, in alleged violations of
9 California Labor Code sections 200, 203, 226, 226.7, 510, 1182.12, 1194, 1197, and
10 2805, and the applicable provisions of Wage Order 16. The Released Claims also
11 include the derivative claims restitution under Business and Professions Code section
12 17200, et seq., and for civil penalties under Labor Code Private Attorneys General
13 Act ("PAGA"), Labor Code section 2698, et seq. arising during the PAGA Period,
14 based on the alleged Labor Code violations.

15 (Exh. 1: Settlement Agreement, p. 5, ¶ 15; Exh. A to Agreement: Class Notice, p. 4)

16 **B. The Risk, Expense, Complexity And Likely Duration Of Further Litigation**

17 In light of the disputed factual and legal issues, the inherent risks of litigation, both on the
18 merits and at certification, and other factors discussed above, the proposed settlement is in the best
19 interest of the Class, as it eliminates the risk that Class Members will recover nothing. This is
20 particularly true since Defendant is no longer in business since March of 2023.

21 In addition, the proposed settlement also eliminates the need for a lengthy, uncertain, and
22 expensive trial or series of trials and appeals, without assurance of a better outcome for the Class.
23 By eliminating the risk of uncertain outcomes in litigation, the Settlement Agreement also reflects
24 economies of time, effort, and expense by eliminating the need for individual litigation on what
25 are, on average, relatively modest claims. All of these factors weigh heavily in favor of approving
26 the settlement.

27 **C. The Amount Offered In Settlement Is Fair And Reasonable**

28 Under the Settlement, Defendant has agreed to pay, and in fact has deposited the sum of
\$85,000.00 to establish a non-reversionary Settlement Fund, to pay Class Members' claims,
PAGA penalties, an Enhancement Award for Class Representative, the costs of settlement
administration, and reasonable attorney fees and costs reimbursement to Class Counsel.

The \$85,000 Settlement Fund represents approximately 10% of the maximum class
damages of \$845,000 (\$100,000 in unpaid wages, \$401,000 in waiting time penalty-wages,

1 \$120,000 in meal period claim, \$120,000 in rest period claim, \$92,000 in wage statement violation
2 claim, and \$12,000 in work/cell phone expense reimbursement claim). With the maximum PAGA
3 penalties included, the \$85,000 Settlement Fund represents approximately 6% of the theoretical
4 maximum recovery of \$1,380,500 (\$845,000 in maximum class damages + \$535,500 in maximum
5 PAGA civil penalties).

6 This is a good, given the disputed factual and legal issues involved, the inherent litigation
7 risks, both on class certification issues and on the merits, the risks and costs of prolonged further
8 litigation without any assurance of a better result (particularly since Defendant is no longer in
9 business), as discussed above, and in light of the benefit available to the Class Members now
10 under the Settlement.

11 As set forth in the proposed Notice of Class Settlement, each Class member will be given
12 the opportunity to opt out of the Settlement, allowing those who feel they have claims that are
13 greater than the benefits they can receive under this Settlement, to pursue their own claims.

14 The settlement amount is, of course, a compromise figure. It took into account risks related
15 to liability, damages, the availability of class certification, the defenses asserted by Defendants.
16 *Wershba*, 91 Cal. App. 4th at 246, 250 (“Compromise is inherent and necessary in the settlement
17 process...even if the relief afforded by the proposed settlement is substantially narrower than it
18 would be if the suits were to be successfully litigated, this is no bar to a class settlement because
19 the public interest may indeed be served by a voluntary settlement in which each side gives ground
20 in the interest of avoiding litigation”).

21 **VI. DISTRIBUTION OF UNCASHED CHECKS**

22 Any settlement checks that are not cashed after the expiration of the check cashing period
23 will be cancelled, and the money shall be transmitted to the California State Controller’s Office, to
24 be placed in its Unclaimed Property funds.

25 **VII. THE PROPOSED ATTORNEYS’ FEES AND COSTS ARE REASONABLE**

26 The trial court has broad discretion to order an award of attorneys’ fees. *Wershba*, 91 Cal.
27 App. 4th at 234-35. “Courts recognize two methods for calculating attorney fees in civil class
28 actions: the lodestar/multiplier method and the percentage of recovery method.” *Id.* at 254;

1 *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977). Class Counsel intend to seek
2 an award of attorneys' fees based on the "percentage of recovery/common fund" theory. The
3 purpose of the common fund/percentage approach is to "spread litigation costs proportionally
4 among all the beneficiaries so that the active beneficiary does not bear the entire burden alone."
5 *Vincent*, 557 F.2d at 769.

6 The California Supreme Court has re-affirmed the use of the percentage of the common
7 fund approach for determining attorney fee awards. *Laffitte v. Robert Half International, Inc.*
8 (2016) 1 Cal.5th 480, 486 ("We clarify today that when an attorney fee is awarded out of a
9 common fund preserved or recovered by means of litigation, the award is not per se unreasonable
10 merely because it is calculated as a percentage of the common fund.") In *Laffitte*, the trial court
11 approved, over the objection of one class member, an award of attorney fees of \$6,333,333.33,
12 which was one-third (33.33%) of the gross settlement amount of \$19 million. *Id.* at 486.

13 The common fund approach is preferable to the lodestar because: (1) it aligns the interests
14 of class counsel and absent class members; (2) it encourages efficient resolution of the litigation by
15 providing an incentive for early, yet reasonable, settlement; and (3) it reduces the demands on
16 judicial resources. *In re Activision Securities Litigation*, (N.D. Cal 1989) 723 F. Supp. 1373, 1378.

17 Under the Settlement, and subject to the Court's approval, a sum of \$28,333.33, which is
18 one-third (33.33%) of the Settlement Fund, will be paid to Class Counsel (out of the Settlement
19 Fund) in reasonable attorneys' fees for services performed in this action and future services
20 anticipated to be performed in connection with seeking approval and monitoring the
21 implementation of this Settlement. In addition, a sum up to \$5,000.00 will be paid out of the
22 Settlement Fund to Class Counsel for reimbursement of costs and other expenses they incurred in
23 this action relating to claims asserted against these Defendants. The proposed attorneys' fees and
24 cost reimbursement are disclosed to the Class Members in the proposed Class Notice.

25 Plaintiff is seeking \$28,333, which is one-third (33.33%) of the common fund. The request
26 is reasonable in class action settlements. *In re Consumer Privacy Cases* (2009) 175 Cal.App.4th
27 545, 558, fn. 13 ("Empirical studies show that, regardless of whether the percentage method or the
28 lodestar method is used, fee award in class actions average around one-third the recovery.") While

1 the Ninth Circuit “benchmark” is 25% (*Vizcaino v. Microsoft*, 290 F.3d 1043, 1047 (9th Cir.
2 2002)), 33.33% is within the range of reasonable amount, particularly when the settlement fund
3 created is non-reversionary, such as the one achieved by Plaintiff and Class Counsel.

4 The requested fee amount is reasonable in a cross-check to the lodestar approach. Under
5 the lodestar approach, the attorney fee amount is calculated by multiplying the hours spent by a
6 reasonable hourly rate, and then enhance the amount with a multiplier, if appropriate. *Wershba v.*
7 *Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254. “Multiplier can range from 2 to 4 or even
8 higher.” *Id.* at 255.

9 To date Class Counsel have spent a total of no less than 51.8 hours of attorney time
10 reasonably valued at \$33,670 in this litigation. (Jusuf Decl. ¶ 22) The fee amount under the
11 lodestar approach exceeds the requested amount under the Agreement.

12 Class Counsel have borne, and continue to bear, the entire risk and cost of litigation and
13 collection associated with this class action on a pure contingency basis. Based on past experience
14 in wage and hour settlements, Class Counsel is confident that they will be called upon, after Class
15 Notice has been mailed, to expend substantial additional time assisting Class Members with
16 understanding the Settlement terms, preparing and documenting claims, presenting and resolving
17 claim disputes, and other individual Class Member issues.

18 To date, Class Counsel have incurred a total of no less than \$4,187.35 in this action. (Jusuf
19 Decl. ¶ 25; **Exh. 2**: Class Counsel’s costs) These costs were necessary and reasonable to properly
20 prosecute the claims to obtain the result for the Class Members. The requested amount is less than
21 the \$5,000 maximum provided under the Settlement.

22 **VIII. THE ENHANCEMENT AWARD TO NAMED PLAINTIFF IS REASONABLE**

23 Under the Settlement, a sum of \$5,000 shall be paid to Plaintiff, to be paid out of the
24 Settlement Fund, in Enhancement Award for his services to the Class, and taking the risks of
25 bringing this Action as a class action, which has resulted in substantial benefits to the Class.
26 Plaintiff has devoted a great deal of time and work assisting counsel in the case, frequently
27 communicated with counsel and provided important information regarding defendants’
28 employment practices. (Jusuf Decl. ¶ 20)

1 Plaintiff risked intrusive discovery and the personal peril of being perceived as a non-loyal
2 employee -- a perception that could adversely affect her future employment prospects. *See, e.g.,*
3 *Roberts v. Texaco* (S.D.N.Y. 1997) 979 F.Supp. 185, 201 (the assumption of potentially career-
4 damaging risks to vindicate the rights of fellow employees may justify a substantial enhancement).

5 The requested Enhancement Awards are reasonable, in light of the sacrifices Plaintiff has
6 made and the substantial benefit they generated for the Class.

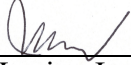
7 **IX. CONCLUSION**

8 For reasons set forth herein, Plaintiff's motion for final approval should be granted.

9 Respectfully submitted,

10 Dated: June 12, 2024

LAW OFFICE OF JUSTIAN JUSUF, APC
MAJARIAN LAW GROUP

11 By: 
12 Justian Jusuf

13 Attorneys for Plaintiff Sebastian Nicolas,
14 individually and on behalf of others similarly
15 situated