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14 and all others similarly situated and Aggrieved Employees

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF KERN

SERINA MAIRE BLACKMON, KAYLA
MARIE HEITZENRODER, AND
MALLORIE CHRISTINE MATTESON,
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

M & S SECURITY SERVICES
INCORPORATED; and DOES 1 through 100,

Defendants

Case No. BCV-23-103332

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR PRELIMINARY
APPROVAL OF SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES; DECLARATION OF
THEODORE TANG; PROPOSED ORDER**

Date: August 27, 2024

Time: 8:30 a.m.

Dept: T2

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 27, 2024 at 8:30 a.m. or as soon thereafter as
the matter may be heard in Department T2 of the Kern County Superior Court located at 3131
Arrow Street, Bakersfield, CA 93308, Plaintiff Kayla Marie Heitzenroder will and hereby does
move the court pursuant to Rule of Court 3.769(c) and seek an order for the following:

(1) preliminarily approving the Class Action and PAGA Settlement;

1 (2) provisionally certifying the following class for settlement purposes only: all persons
2 who were employed by Defendant in California as hourly-paid or non-exempt employees during
3 the Class Period [June 16, 2022 to the date of preliminary approval];

4 (3) appointing Kayla Marie Heitzenroder as the Class Representative and Frontier Law
5 Center as Class Counsel;

6 (4) finding on a preliminary basis that the settlement appears to be within the range of
7 reasonableness;

8 (5) approving the Notice of Proposed Class Action Settlement (“Notice Packet”) for the
9 Class Members and its concomitant distribution;

10 (6) appointing ILYM Group as the Administrator; and

11 (7) setting the matter for a Final Approval hearing.

12 The Motion will be based on this notice, the Memorandum of Points and Authorities, the
13 declaration of Theodore Tang which contains the Settlement Agreement and the proposed Notice
14 Packet, the declaration of Kayla Heitzenroder, pleadings on file, and arguments at the hearing.

15
16 Date: July 24, 2024

FRONTIER LAW CENTER

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19 Theodore Tang
20 Attorney for Plaintiff
21 Kayla Marie Heitzenroder
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This is a wage and hour class and PAGA action. Plaintiff Kayla Marie Heitzenroder
4 (“Plaintiff”) alleges that he worked as a non-exempt employee for Defendant M&S Security
5 (“Defendants”) as a security officer. Plaintiff alleges that Defendants violated the Labor Code by
6 the following: 1) failing to provide compliant off-duty meal and rest breaks; 2) failing to pay
7 overtime; 3) failing to pay minimum wages for all hours worked; 4) failing to provide accurate and
8 complete wage statements; 5) failing to pay all wages due timely at termination; and 6) failing to
9 reimburse for all work expenses. Plaintiff brought claims under the Unfair Competition Law and
10 Private Attorney General Act for the above violations.

11 Prior to the mediation, the Parties engaged in the exchange of informal data and a study of
12 the legal principles applicable to the claims asserted. Defendant produced Plaintiffs’ punch
13 records, wage statements, and personnel files, as well as data around the total number of class
14 members and pay periods involved.

15 The case was mediated with experienced mediator, the Honorable David Lampe (Ret.).
16 With the mediator’s help the parties were able to reach a settlement in the case. Plaintiffs Serina
17 Blackmon and Mallorie Matteson accepted individual settlements for their individual claims.
18 Plaintiff Heitzenroder remained as a class representative, and settled the class and PAGA case for
19 a gross amount of \$220,000.

20 This is a non-reversionary settlement, and class members do not need to submit claims to
21 receive payment.

22 **II. BACKGROUND OF THE SETTLEMENT.**

23 **A. Procedural History and Summary of the Allegations**

24 On June 20, 2023, Plaintiff uploaded a PAGA letter to the LWDA website and sent the
25 letter by certified mail to Defendant, alleging that Defendant violated the Labor Code with regard
26 to minimum wages, overtime pay, meal breaks, rest breaks, failure to reimburse work expenses,
27 suitable seating violations, wage statement violations, and waiting time penalties. On July 17,
28 2023 Plaintiff uploaded a supplemental PAGA letter to the LWDA website and sent the letter by

1 certified mail to Defendant, adding an additional legal theory of liability with regard to meal
2 periods due to rounding of meal period times. On October 4, 2023, Plaintiff filed this complaint
3 against Defendant, alleging failure to provide compliant meal periods, failure to provide complaint
4 rest periods, wage statement penalties, waiting time penalties, and UCL and PAGA causes of
5 action based on those violations. On March 12, 2024, Plaintiff uploaded a 2nd supplemental PAGA
6 letter to the LWDA website and sent the letter by certified mail to Defendant, adding allegations
7 that Defendant was a temporary services employer within the meaning of Labor Code section
8 201.3, yet failed to pay its temporary services employees weekly. On May 9, 2024, Plaintiff filed
9 an amended complaint adding these allegations, and adding class claims for these violations.

10 **B. The Parties Agree to Private Mediate**

11 After the initial pleadings were filed, the Parties began a dialogue about settlement and
12 agreed to go to mediation. The Parties selected mediator David Lampe. In advance of the March
13 21, 2024, mediation, Defendant produced Plaintiffs' punch records, wage statements, and
14 personnel files, as well as data around the total number of class members and pay periods
15 involved. With the help of the mediator, the Parties were able to reach the current settlement.

16 **C. The Terms of the Settlement.**

17 **1. Settlement and Allocation of the Claims**

18 The Class consists of the following: "all persons who were employed by Defendant in
19 California as hourly-paid or non-exempt employees during the Class Period [June 16, 2022 to the
20 date of preliminary approval]." Based upon Defendants' records, the number of Class Members is
21 approximately 284.

22 The Gross Settlement amount is \$220,000. The payments to each Class Member will
23 depend on the number of workweeks worked by each Class Member during the Class Period.
24 Additionally, \$20,000 is allocated to settle PAGA claims. In addition, \$77,000 (35% of the gross
25 settlement) is attributed to attorney fees, \$7,000 is attributed to costs, \$9,000 for settlement
26 administration, and \$7,500 is the requested class representative enhancement.

27 This means that of the \$220,000 gross settlement, after the deductions above, the net
28 settlement amount is \$114,500.

1 **2. Amended Complaint**

2 Per the terms of the settlement, the Parties have stipulated that, for purposes of the
3 settlement only, Plaintiff may file an amended complaint that includes all the allegations in the
4 amended PAGA letters and covers all claims to be released by the Settlement.
5

6 **III. OVERVIEW OF THE APPROVAL PROCESS**

7 **A. Two-Step Approval Process**

8 A settlement of a class action lawsuit must be reviewed and approved by the Court. This is
9 done in two steps: (1) an early (preliminary) review by the trial court, and (2) a final review after
10 notice has been distributed to the class members for their comment or objections. The Manual for
11 Complex Litigation (Third) § 30.41 states:

12
13 If the preliminary evaluation of the proposed settlement does not disclose grounds
14 to doubt its fairness or other obvious deficiencies, such as unduly preferential
15 treatment of class representatives or of segments of the class, or excessive
16 compensation for attorneys, and appears to fall within the range of possible
17 approval, the court should direct that notice ... be given to the class members of a
18 formal fairness hearing, at which arguments and evidence may be presented in
19 support of and in opposition to the settlement.

20 Thus, the preliminary approval by the trial court is simply a conditional finding that the
21 settlement appears to be within the range of acceptable settlements. As Professor Newberg
22 commented, “The strength of the findings made by a judge at a preliminary hearing or conference
23 concerning a tentative settlement proposal may vary. The court may find that the settlement
24 proposal contains some merit, is within the range of reasonableness required for a settlement offer,
25 or is presumptively valid subject only to any objections that may be raised at a final hearing.” 4
26 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 11.26 (4th ed. 2002).

27 **B. Conditional Certification is Appropriate**

28 The parties also may, at the preliminary approval stage, request that the court provisionally
certify class—conditional upon final approval of the settlement. “Pre-certification settlements are
routinely approved if found to be fair and reasonable.” (*Wershba v. Apple Computer, Inc.* (2001))

1 91 Cal. App. 4th 224, 240; accord *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1803
2 (although the settlement was reached before any adversary certification, the court was satisfied
3 that it was fair, adequate and reasonable).

4 5 **IV. THE COURT SHOULD GRANT PRELIMINARY APPROVAL**

6 **A. The Settlement is Fair, Reasonable, and Adequate, and Not the Result of** 7 **Fraud or Collusion**

8 Courts presume the absence of fraud or collusion in the negotiation of settlement unless
9 evidence to the contrary is offered. (*Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447; *Mars*
10 *Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.* (7th Cir. 1987) 834 F.2d 677, 682.

11 Courts do not substitute their judgment for that of the proponents, particularly where a settlement
12 was reached with the participation of experienced counsel familiar with the litigation. (*Nat'l Rural*
13 *Telecomms. Coop. v. DIRECTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 528).

14 While the recommendations of counsel proposing the settlement are not conclusive, the
15 Court can take them into account, particularly where they were involved in discovery and
16 negotiations for some period of time, appear to be competent, have experience with this type of
17 litigation, and have exchanged evidence from the opposing party. *See Newberg on Class Actions*,
18 *supra*, at § 11.47; *Nat'l Rural Telecomms. Coop.*, *supra*, 221 F.R.D. at p. 528 (quoting *In re Paine*
19 *Webber Ltd. P'ships Litig.* (S.D.N.Y. 1997) 171 F.R.D. 104, 125 ("So long as the integrity of the
20 arm's length negotiation process is preserved [] a strong initial presumption of fairness attaches to
21 the proposed settlement...[citations] and great weight is accorded to the recommendations of
22 counsel, who are most closely acquainted with the facts of the underlying litigation"))).

23 Here, both Plaintiffs' counsel and Defendants' counsel have a great deal of experience in
24 wage and hour class action litigation, as demonstrated in the attached declaration.

25 The settlement for each Class Member is fair, reasonable, and adequate, given the inherent
26 risks of litigation, including the substantial risks relative to class certification, and the costs of
27 pursuing such litigation, discussed further below. Of course, class members may still opt out of the
28 settlement, and the class members will be apprised of their right to attend the fairness hearing and

1 submit objections to the proposed settlement.

2 **B. The Proposed Settlement Meets the *Kullar* Factors.**

3 As explained in *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 130, 133,
4 a class action settlement should be approved when the plaintiff has conducted discovery and the
5 settlement is reasonable in light of the strengths and weaknesses of the claims.

6 **1. Strengths and Weaknesses of the Claims.**

7 Although Plaintiff's counsel believes the claims are meritorious, they are experienced and
8 realistic, and understand the possibility of non-certification on one or more of the theories alleged.
9 Plaintiffs' counsel further recognizes that the outcome of a trial, any appeal that could follow, are
10 inherently uncertain. These risks are compounded by the Supreme Court's holding in *Duran v.*
11 *U.S. Bank Nat'l Ass'n* (2014) 59 Cal.4th 1 (use of statistical evidence regarding certification).

12 **a. Meal and Rest Break Claims**

13 Employers must allow their employees to take 30-minute meal periods after every five
14 hours of work. (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1037-1038.
15 Such meal periods must be unfettered — *i.e.*, when taking such meal periods, the employee must
16 be relieved of all duty during the entire 30-minute meal period. IWC Wage Order No. 4 § 11(A)
17 (emphasis added). Indeed, this has been well settled since being affirmed by the California
18 Supreme Court in *Brinker*, supra, 53 Cal. 4th at 1040-41 n. 19 (“The employer that refuses to
19 relinquish control over employees during an owed meal period violates the duty to provide the
20 meal period and owes compensation”). Similarly, employees' rest break must be taken off-duty
21 and unfettered by the employer; Labor Code section 226.7 provides for an additional hour of pay
22 at the regular rate for each meal period missed and/or day in which a rest break was denied.

23 Plaintiff alleges that the Class Members were required to remain on premises, on call, and
24 on duty during meal and rest breaks. Further, Plaintiff alleges that Defendant rounded off Class
25 Members' meal periods to 30 minutes, even when less than 30 minutes were taken on (allegedly
26 non-compliant) meal breaks (*See Donohue v. AMN Servs., LLC*, (2021) 11 Cal. 5th 58 . Because
27 Plaintiff alleges that Breaks were required to be taken on site, Plaintiff assumes a maximum
28 theoretical violation rate of 100%. Informal discovery revealed that, as of mediation, there were

1 284 Class Members who worked a collective 11,186 bi-weekly pay periods. Based on these
2 figures, Plaintiff estimates the maximum theoretical liability to be \$1,845,690 each for or Meal
3 Break Claims and for Rest Break Claims.¹

4 Defendants deny any liability or wrongdoing of any kind. First, Defendant's business is a
5 security service and its employees (i.e. the class members) are security guards that are, for the
6 most part, stationed at remote locations. Defendant contends it is therefore not feasible to relieve
7 the class members for a full 30 minutes. Based on this rationale, Defendants obtained On Duty
8 Meal Period Agreements ("ODMPAs") from the Class Members and paid them for the time spent
9 on breaks. Thus, the finder of fact could agree that the nature of the work made off duty meal
10 periods infeasible, and that the on-duty meal periods were valid.

11 In addition, Defendant contends that there was no rounding of meal breaks. While
12 employers must provide 30-minute meal periods, they are *not* required to police their employees to
13 ensure that the entire 30-minutes are actually taken. *Brinker, supra*, (2012) 53 Cal.4th at 1040.
14 Thus, the recorded 30 minutes are accurate, because the class members were provided with that
15 time whether they chose to take it or not. Coupled with the fact that the Class Members were paid
16 during their meal periods, there is also no issue of under-recording time worked, as the time in
17 question would have been paid time whether the class member was enjoying their meal or not.

18 As to rest breaks, Defendant contends that it does not have a written policy prohibiting
19 class members from leaving the site during 10-minute rest breaks, although practical
20 considerations such as the location of the post may make doing so impossible. In fact, Defendant's
21 only written policy on the matter is that employees *must* take their legally assigned breaks and that
22 they are to be assigned any duties while on breaks.

23 Finally, Defendant staffs class members at a variety of different locations, on a variety of
24 different shifts, all of which vary on staffing levels. These facts comprise risks for certification,
25 since there could be a possibility that only individual questions would predominate, and no
26 method of proof would show a uniform lack of breaks at all locations. Given all the risks
27

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¹ Based on an hourly rate of pay of \$16.50 and 10 shifts per pay period.

1 discussed, Plaintiff believes the Risk-Adjusted Value (RAV) to be 10%, or \$184,690 for Meal
2 Periods and 30% for Rest Breaks, or \$554,070.²

3 **b. Off-the-Clock Work**

4 Plaintiff alleges that Defendant rounded meal periods to 30-minute increments whether
5 they were provided 30 minutes or not. Thus, employees were frequently shorted time that was
6 worked, but treated as break time by Defendants.

7 Defendants contend that, even if this were true, most of the meal periods provided to its
8 employees were on-duty meal periods and treated as *paid time*. Therefore, even if the on-duty
9 requirement was improper, Defendants did not in fact fail to pay for that time. Further, Defendant
10 contends there was no written policy indicating that class members had to perform off-the-clock
11 work, and class members were instructed to take their full 30-minute breaks. To the extent that a
12 manager verbally required a class member to respond to a call or issue while on their meal break,
13 Defendant contends class members were instructed to either restart their break later or else make
14 up the lost time. For class certification, individual issues would be abundant, as to each individual
15 class member's reasons for not taking a full 30-minute break, and the same issues that Plaintiff
16 faces in proving non-complaint meal periods apply equally to claims that those breaks constituted
17 unpaid time. Finally, since the time records appear to all indicated that exactly 30-minute meals
18 were taken on all shifts, it would be difficult or impossible to accurately prove the amount of time
19 actually lost, as Plaintiff would have to depend on independent records (if they exist) or the
20 memories of the individual class members.

21 Assuming an estimate of 2 violations per employee per pay period (or 1 per week on
22 average), for an average of 10 minutes each, and that half of these violations occurred on shifts in
23 which the employee was already working 8 hours (and thus would be paid at overtime rates)
24 Defendant would face a maximum of \$76,903.75 in liability. Given the risks of Defendant being
25 able to prove that most of the posts had on-duty meal periods, and the individual issues that might
26

27
28 ² The rest period percentage is higher than the meal period percentage because there is no such
thing as an "on duty rest period." Even without that defense, the risks of failing to show such a
policy and/or failing class certification as listed above are significant.

1 predominate, Plaintiff estimates the RAV of this claim to be 10%, or \$7,690.38

2 **c. Wage Statement Violations**

3 The wage statement violations are derivative of the unpaid time and meal and rest break
4 violations. Assuming a violation on every single wage statement over the 11,186 pay periods at
5 issue, the maximum theoretical value of this claim is (11,186 x \$50 per initial violation) \$559,300.

6 However, because this claim is purely derivative, defeating liability on the underlying
7 claim also defeats liability on the Wage Statement claim. Even if the underlying claim prevails,
8 Defendants could counter that any alleged omission of information from the wage statements was
9 not knowing and intentional, which could negate wage statement penalties. (*Harris v. Vector*
10 *Mktg. Corp.* (N.D. Cal. 2009) 656 F. Supp. 2d 1128, 1145-46 (summary adjudication warranted on
11 Section 226(e) claim where dispute existed as to whether plaintiff was independent contractor, and
12 record lacked evidence that conduct was knowing or willful). As such, Plaintiff estimates that the
13 RAV on this claim is only 25% of its maximum value, or \$139,825.

14 **d. Waiting Time Penalties**

15 Similarly, the waiting time penalties are derivative from the off the clock and missed break
16 allegations, which are theoretically recoverable consistent with *Naranjo v. Spectrum Sec. Servs.,*
17 *Inc.* (2022) 13 Cal.5th 93. Based on the data regarding the number of Class Members who are no
18 longer employed by Defendant, and the employees' average rates of pay, Plaintiff estimates the
19 maximum liability for the 141 former employees to be \$558,360.

20 On the other hand, Defendants can defeat these claims if they defeat the underlying
21 predicate claims. In addition, much like the wage statement claims, Defendants will likely argue
22 that the failure to pay was not willful, and that it disputes that any wages were due. Given this
23 double risk of losing on liability, Plaintiff evaluates the RAV of this claim to be 25% or \$139,590.

24 **e. PAGA Penalties.**

25 The PAGA claims in this case are based on all of the claims above. The Maximum PAGA
26 Penalties for the other violations are as follows:
27
28

- 1 • **Meal Periods:** 11,186 pay periods x \$50 per pay period (Labor Code section 558)
- 2 = \$559,300
- 3 • **Rest Breaks**11,186 pay periods x \$100 per pay period (Labor Code section 2699)
- 4 = \$1,186,000
- 5 • **Minimum Wage Violations:** 11,186 pay periods x \$100 per pay period (Labor
- 6 Code section 1197.1) = \$1,186,000
- 7 • **Overtime Violations:** 11,186 pay periods x \$50 per pay period (Labor Code
- 8 section 558) = \$559,300
- 9 • **Wage Statement Penalties:** 11,186 pay periods x \$250 per pay period =
- 10 \$2,796,500 (Labor Code section 226.3) (or \$1,118,600 if Labor Code Section 226.3
- 11 is inapplicable).³
- 12 • **Waiting Time:** 141 pay periods x \$100 per pay period (Labor Code section 2699)
- 13 = \$1,410

14 The total maximum theoretical PAGA Penalty amount is therefore \$7,541,910.

15 Of that, by far the single highest dollar value claim comes from the Wage Statement

16 Penalties. Since there is a split of authority over whether the penalties under Labor Code Section

17 226.3 or section 2699(f) would be applicable in this situation though, the court could find that the

18 appropriate penalty is \$50 per violation, rather than \$250. This would reduce the maximum

19 penalty by over \$1 million, from \$7,541,910 to \$6,423,310.

20 The trial court has the discretion to reduce PAGA penalties if, based on the facts and

21 circumstances of the case, to do otherwise would result in an award that is unjust, arbitrary and

22 oppressive, or confiscatory. (Lab. Code, § 2699(e)(2); see also *Delgado v. New Albertson's, Inc.*,

23 2010 WL 11507599 at *7 (C.D. Cal. March 15, 2010) (explaining that court's discretion to reduce

24 penalties under PAGA protects defendants from unconstitutionally excessive penalties).

25

26

27 ³ Currently, there is a split of authority over whether a Plaintiff can recover penalties under Labor

28 code section 226.3 if the wage statements are merely inadequate, as opposed to missing altogether.

Compare Raines v. Coastal Pacific Food Distributors, Inc. (2018) 23 Cal.App.5th 667 with

Gunther v. Alaska Airlines, Inc. (2021) 72 Cal.App.5th 334

1 PAGA penalties could potentially be reduced based on the above. The following are some
2 examples of PAGA awards which were awarded after an actual trial - in the matter of *Magadia v.*
3 *Wal-Mart Assocs.* (N.D. Cal. 2019) 384 F.Supp.3d 1058, while the trial court imposed substantial
4 PAGA penalties, it still represented reductions of 67% and 80% of the potential PAGA penalties.

5 Likewise, in the matter of *Parr v. Golden State Overnight*, Judge Carville of the Alameda
6 Superior Court assessed PAGA penalties upon the defendant of approximately 7% of the total
7 maximum penalties—again, this was only after plaintiff had prevailed at trial. (*Parr v. Golden*
8 *State Overnight Delivery Service, Inc.*, No. RG12-618103, 2014 WL 1199453 (July 10, 2014).)

9 The PAGA claims have been assigned an RAV value based on the same percentage as the
10 claim for the underlying violations:

- 11 • **Meal Break Claims (10%):** \$55,930
- 12 • **Rest Break Claims (30%):** \$355,800
- 13 • **Minimum Wage Claims (10%):** \$118,600
- 14 • **Overtime Wage Claims (10%):** \$55,930
- 15 • **Wage Statement Claims (25%):** \$279,650
- 16 • **Waiting Time Penalty Claims (25%):** \$352.50

17 Thus, the total RAV for all PAGA claims is \$866,262.50

18 **2.Maximum Damages and Penalties at Issue.**

19 Based on the data provided, Plaintiffs' counsel's expert estimated maximum total damages
20 and penalties (including PAGA) to be approximately \$10,582,163.75 based on the number of class
21 members, shifts, and workweeks involved. As stated above however, this theoretical maximum
22 based on the pleadings and the number of class members does not reflect the maximum amount
23 that Plaintiff could reasonably expect to achieve at trial. That number, the RAV, is \$1,025,865.38
24 for the class claims and \$886,262.50 for the PAGA claims, for a total of **\$1,912,127.88** before
25 attorney fees and costs. Thus, the settlement of \$220,000 is about 11.51% of the maximum
26 liability amount Plaintiff could reasonably achieve at trial. This number also does not account for
27 general risks of litigation (such as the time-value of money, degradation of witness memory over
28 time, inability to find witnesses, etc.)

1 Numerous courts have held that gross settlements approximating between only 8 and 25%
2 of the defendant's potential exposure are fair and reasonable. (*See, e.g., In re Mego Fin. Corp.*
3 *Secs. Litig.* (9th Cir. 2000) 213 F.3d 454, 459 holding that class action settlement recovering 16%
4 of potential exposure was fair and reasonable; "It is well-settled law that a cash settlement
5 amounting to only a fraction of the potential recovery does not per se render the settlement
6 inadequate or unfair.)

7 Rather, the fairness and the adequacy of the settlement should be assessed relative to risks
8 of pursuing the litigation to judgment"; *Bellinghausen v. Tractor Supply Co.*, (N.D. Cal. Mar. 20,
9 2015) No. 13-CV-02377-JSC, 2015 WL 1289342, at *6 (holding that class action settlement
10 recovering between 8.5% and 25% of the defendant's potential exposure was fair); *Van Ba Ma v.*
11 *Covidien Holding Inc.*, (C.D. Cal. 2014) U.S. Dist. Ct. Case No. 8:12-cv-02161 (court granted
12 preliminary approval of wage and hour class settlement which obtained 9.1% of projected
13 damages, given the risks of continued litigation.)

14 **C. An Analysis of the Terms of the Settlement**

15 **1. Estimate of Class Members' Recovery**

16 The amount allocated to each Class Member is based on the number of workweeks worked
17 during the Class Period. Based on the Net Settlement Amount of \$114,500 the average payment
18 for the class members is \$403.17, an excellent result.⁴

19 **2. Cy Pres Recipient**

20 Any individual settlement payments that remain uncashed within 180 days of the mailing
21 of settlement payment checks by the settlement administrator will be paid to the *cy pres* recipient
22 Cebtrak Valley pursuant to Code of Civil Procedure section 384.

23 **3. Scope of the Release**

24 The scope of the release, as listed below, is identified in the Settlement at section 5, as well
25 as in the Notice Packet that will be sent to Class Members and is limited to the claims in the
26

27
28 ⁴ Calculated by dividing the Net Settlement Amount by the number of class members. Actual
average recovery will vary based on each Class Members workweek's worked, as well as the
number of Class Members who opt out.

1 complaint:

2 5.1 Plaintiff's Release. In exchange for a payment of Seven Thousand Five
3 Hundred Dollars (\$7,500), Heitzenroder and her respective former and present
4 spouses, representatives, agents, attorneys, heirs, dependents, administrators,
5 devisees, legatees, executors, trustees, conservators, guardians, personal
6 representatives, successors, and assigns, whether individual, class, representative,
7 legal, equitable, direct or indirect, or any other type of any capacity, shall and does
8 hereby forever generally release, discharge, and agree to hold harmless the
9 Released Parties from any and all charges, complaints, claims, liabilities,
10 obligations, promises, agreements, controversies, damages, causes of action, suit,
11 rights, demands, costs, losses, transactions, occurrences, or debts or expenses
12 (including attorney fees and costs), known or unknown, at law or in equity which
13 she may now have or may become aware of after the signing of this Agreement,
14 including, but not limited to: (a) arising out of or in any way connected with their
15 employment with Defendant, including the Released Claims, (b) all claims that
16 were, or reasonably could have been, alleged, based on the facts contained, in the
17 Operative Complaint; (c) all PAGA claims that were, or reasonably could have
18 been, alleged based on facts contained in the Action, Plaintiffs Serina Maire
19 Blackmon, Kayla Marie Heitzenroder, and Mallorie Christine Matteson's PAGA
20 Notice, or ascertained during the Action and released under **Error! Reference**
21 **source not found.**, below, and (d) any and all transactions, occurrences, or matters
22 between the Parties occurring prior to the date this Agreement is fully executed.
23 Without limiting the generality of the foregoing, this release shall include, but not
24 limited to, any and all claims under: (a) the Americans with Disabilities Act; (b)
25 Title VII of the Civil Rights Act of 1964; (c) the Civil Rights Act of 1991; (d) 42
26 U.S.C. § 1981; (e) the Age Discrimination in Employment Act; (f) the Fair Labor
27 Standards Act; (g) the Equal Pay Act; (h) the Employee Retirement Income
28 Securities Act, as amended; (i) the Consolidated Omnibus Budget Reconciliation
Act; (j) the Rehabilitation Act of 1973; (k) the Family and Medical Leave Act; (l)
the Civil Rights Act of 1966; (m) the California Fair Employment and Housing
Act; (n) the California Constitution; (o) the California Labor Code; (p) the
California Government Code; (q) the California Civil Code; and (r) any and all
other federal, state, and local statutes, ordinances, regulations, rules, and other laws,
and any and all claims based on constitutional, statutory, common law, or
regulatory grounds as well as any other claims based on theories of wrongful or
constructive discharge, breach of contract or implied contract, fraud,
misrepresentation, promissory estoppel, or intentional infliction of emotional
distress, negligent infliction of emotional distress, or damages under any other
federal, state, or local statutes, ordinances, regulations, rules, or laws. This release
is for any and all relief, no matter how denominated, including, but not limited to,
back pay, front pay, vacation pay, bonuses, compensatory damages, tortious
damages, liquidated damages, punitive damages, damages for pain and suffering,
and attorney fees and costs. ("Plaintiff's Release.") Plaintiff's Release does not
extend to any claims or actions to enforce this Agreement, or to any claims for
vested benefits, unemployment benefits, disability benefits, social security benefits,
workers' compensation benefits that arose at any time, or based on occurrences

1 after signing this Agreement. Heitzenroder acknowledges that Heitzenroder may
2 discover facts or law different from, or in addition to, the facts or law that
3 Heitzenroder now knows or believes to be true but agrees, nonetheless, that
4 Plaintiff's Release shall be and remain effective in all respects, notwithstanding
5 such different or additional facts or Heitzenroder's discovery of them..

6 5.1.1 Plaintiff's Heitzenroder Waiver of Rights Under California Civil
7 Code Section 1542. For purposes of Plaintiff's Release, Heitzenroder, being aware
8 of California Civil Code section 1542, as well as any other statutes or common law
9 principles of a similar effect, hereby forever expressly waives and relinquishes the
10 provisions, rights, and benefits, if any, of section 1542 of the California Civil Code,
11 which reads:

12 **"A general release does not extend to claims that the creditor or**
13 **releasing party does not know or suspect to exist in his or her**
14 **favor at the time of executing the release and that, if known by**
15 **him or her, would have materially affected his or her settlement**
16 **with the debtor or released party."**

17 Heitzenroder specifically acknowledges that she is aware of and familiar with the
18 provisions of the above Civil Code section 1542. Heitzenroder may hereafter
19 discover facts in addition to or different from those which she now knows or
20 believes to be true with respect to the subject matter of all the claims referenced
21 herein, but agree that, upon the funding of the entire Gross Settlement Amount and
22 Employer Taxes, Heitzenroder shall and hereby does fully, finally, and forever
23 settle and release any and all claims against the Released Parties, known or
24 unknown, suspected or unsuspected, contingent or non-contingent, that were
25 asserted or could have been asserted upon any theory of law or equity without
26 regard to the subsequent discovery of existence of such different or additional facts,
27 through the date on which this Agreement is fully executed.

28 5.2 Release by Participating Class Members:

5.2.1 Upon the funding of the entire Gross Settlement Amount and
Employer Taxes, all Participating Class Members, on behalf of themselves and
their respective former and present representatives, agents, attorneys, heirs,
dependents, administrators, devisees, legatees, executors, trustees, conservators,
guardians, personal representatives, successors, and assigns, whether individual,
class, representative, legal, equitable, direct or indirect, or any other type of any
capacity, shall and do hereby forever release, discharge, and agree to hold harmless
the Released Parties from all claims during the Class Period that were alleged, or
reasonably could have been alleged, based on the facts stated in the Operative
Complaint for the Class Period or ascertained in the course of the Action including
any and all claims for: (1) failure to provide compliant meal periods or pay meal
period premiums in lieu thereof, (2) failure to provide compliant rest periods or pay
rest period premiums in lieu thereof, (3) failure to provide accurate and complete

1 wage statement, (4) failure to pay all wages due in a timely fashion at discharge or
2 resignation, (5) failure to pay at least minimum wage, (6) failure to pay applicable
3 overtime and double time wages, (7) unreimbursed work expenses, (8) failure to
4 provide suitable seating, (9) failure to timely pay wages during employment, and
5 (10) unfair and unlawful business practices arising out of the violations referenced
6 in the Action (“Released Class Claims”). To the extent based on facts alleged on
7 the Operative Complaint or the PAGA Letter, the Released Class Claims
8 encompass, but are not limited to, all claims pursuant to the applicable IWC Wage
9 Order (including Wage Order 4-2001), and Labor Code §§ 201, 201.3, 202, 203,
10 210, 226, 226.3, 226.7, 510, 512, 558, 1197, 1197.1, 1198, and 2802. Except as set
11 forth in Section 5.2 of this Agreement, Participating Class Members do not release
12 any other claims, including claims for vested benefits, wrongful termination,
13 violation of the Fair Employment and Housing Act, unemployment insurance,
14 disability, social security, workers’ compensation, or claims based on facts
15 occurring outside the Class Period.

16
17 5.2.2 Each Participating Class Member will be bound to the release of
18 Released Class Claims as a result of this Class Settlement and to the terms of the
19 final judgment and the satisfaction of such judgment.

20 5.2.3 Participating Class Members will be deemed to have acknowledged
21 and agreed that their claims for wages and/or penalties in the Action are disputed,
22 and that their Individual Class Payments constitute payment of all sums allegedly
23 due to them. Participating Class Members will be deemed to have acknowledged
24 and agreed that California Labor Code Section 206.5 is not applicable to the
25 Individual Class Payment. That section provides in pertinent part as follows:

26
27 **“An employer shall not require the execution of a release of a
28 claim or right on account of wages due, or to become due, or
made as an advance on wages to be earned, unless payment of
those wages has been made.”**

29 5.3 Release by Aggrieved Employees: Upon the funding of the entire Gross
30 Settlement Amount and Employer Taxes, all Aggrieved Employees are deemed to
31 release, on behalf of themselves and their respective former and present
32 representatives, agents, attorneys, heirs, administrators, successors, and assigns, the
33 Released Parties from all claims, rights, demands, liabilities and causes of action
34 for civil penalties under the PAGA, that Aggrieved Employees have had, now have,
35 or may have in the future against Released Parties based on any acts or omissions
36 occurring during the PAGA Period and based on the PAGA Period facts pleaded in
37 the Action or the PAGA Notice, including, but not limited to, any and all claims for
38 PAGA penalties pursuant to Wage Order 4-2001 and Labor Code §§ 200, 201,
39 201.3, 202, 203, 204, 206.5, 210, 221, 223, 224, 225.5, 226, 226.3, 226.7, 510, 512,
40 551, 552, 558, 1174, 1174.5, 1182.12, 1194, 1197, 1197.1, 1198, 1199, 2800, 2802.
41 Any Aggrieved Employees who submit a valid and timely Request for Exclusion
42 are still entitled to their Individual PAGA Payment and have no right or ability to
43 opt out of the portion of this Settlement releasing the Released PAGA Claims.

1
2 **4. Notice to Class Members**

3 Within 15 days of preliminary approval, Defendants will transmit to the Settlement
4 Administrator the following: each Class Members Member's full name; last known mailing
5 address; social security number; the number of Class Workweeks and PAGA Workweeks. (See
6 Settlement, at §§ 1.8, 4.2.)

7 Within 14 days after receiving the Class List and Data, the Settlement Administrator shall
8 mail Notice Packets to all Class Members via regular First-Class U.S. Mail, using the most
9 current, known mailing addresses. (See Settlement, at § 7.4.2.) With respect to any returned
10 envelopes, the Settlement Administrator shall re-mail to the forwarding address affixed thereto. If
11 no forwarding address is provided, the Settlement Administrator shall promptly attempt to
12 determine a correct address by use of skip-tracing, or other search using the name, address and/or
13 social security number of the respective Class Member, and shall then perform a re-mailing, if
14 another mailing address is identified by the Settlement Administrator.

15 Class Members will be provided 45 days to opt out, challenge the number of workweeks,
16 or object to the settlement. (See Settlement, at §§7.5.1, 7.6.) This period will be extended by 14
17 days for Class Members whose notice is remailed. Further, Class Members will be notified of the
18 time, date, and place of the final approval hearing and of their right to appear at the fairness
19 hearing.

20 **5. Tax Treatment of Settlement Amounts**

21 The Settlement provides that 10% of each Individual Settlement Payment shall be
22 allocated as payment for alleged unpaid wages, and 90% shall be allocated as alleged penalties
23 and interest. The Settlement Administrator will issue distribute appropriate IRS tax forms.

24 **6. Proposed Payment to Class Representative**

25 Plaintiff requests an individual enhancement payment of \$7,500, which will be discussed
26 in detail in the motion for final approval.

27 **7. Attorneys' Fees and Costs**

28 The attorney fees and costs will be discussed in detail in the motion for final approval.

1 **8. Class Administration Costs**

2 Similarly, reimbursement of the settlement administrator's costs will be discussed in the
3 final approval motion. Currently, the Administration costs are estimated to be \$9,000.

4 **V. THE PROPOSED CLASS MEETS ALL CERTIFICATION REQUIREMENTS**

5 **A. The Class is Ascertainable and Sufficiently Numerous.**

6 The Class that Plaintiff seeks to conditionally certify is ascertainable. "Class members are
7 ascertainable where they may be readily identified without unreasonable expense or time by
8 reference to official records." (*Lee v. Dynamex, Inc.* (2008) 166 Cal. App. 4th 1325, 1334.)
9 Defendants determined that there are 284 class members. (See Settlement, sections 4.1, 8.)

10 Furthermore, the Class is sufficiently numerous. Courts generally find that numerosity is
11 satisfied if the class includes forty or more members. (*See Villalpando v. Excel Direct Inc.* (N.D.
12 Cal. 2014) 303 F.R.D. 588, 605-606.)

13 **B. There Are Common Questions of Law and the Claims Are Typical**

14 The commonality requirement is met when there are questions of law and fact common to
15 the class. (*Hanlon v. Chrysler Corp.* (1998) 150 F.3d 1011, 1019 ("The existence of shared legal
16 issues with divergent legal factual predicates is sufficient, as is a common core of salient facts
17 couple with disparate legal remedies within the class"). Commonality requires only that some
18 common legal or factual questions exist; the plaintiff need not show that all issues in the litigation
19 are identical. (*See Richmond v. Dart Industries, Inc.* (1981) 29 Cal. 3d 462, 473 (1981) Where the
20 employer's conduct is uniformly directed at a class of employees, as it is here, the class-wide
21 impact of the policies satisfies the commonality requirement. (*See Stephens v. Montgomery Ward*
22 *& Co.* (1987) 193 Cal. App. 3d 411, 421.)

23 The claims outlined above were arguably common to all class members, and Plaintiff was
24 subjected to the violations, satisfying the typicality requirement.

25 **C. Plaintiff and Plaintiff's Counsel Adequately Represent the Class**

26 The adequacy requirement is also met. "Adequacy of representation depends on whether
27 the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests
28 are not antagonistic to the interests of the class." (*McGhee v. Bank of Am.* (1976) 60 Cal.App.3d

1 442, 450.) Correspondingly, Plaintiff does not have any interests adverse to the class.

2 As detailed in the attached declaration, Plaintiff's counsel are experienced and well-
3 qualified class action attorneys who have settled a variety wage and hour matters. The work done
4 to prepare for the mediation was fastidious and methodical, which yielded the successful result.

5 **VI. LWDA HAS BEEN PROVIDED WITH NOTICE OF THIS MOTION**

6 The settlement will be uploaded the LWDA website on the same day the motion is filed.

7
8 **VII. CONCLUSION AND ACTION REQUESTED**

9 Plaintiff submits that the proposed settlement is fair, adequate, and reasonable. It will
10 result in both substantial monetary benefits to Class Members and the PAGA portion of the
11 settlement will also benefit the State of California.

12 The settlement was reached after informed, extensive, and arms' length negotiations
13 conducted by counsel for respective parties who are experienced in wage and hour class action
14 litigation, who were able to research the issues and develop a convincing damages model. Out of
15 the gross settlement of \$220,000, after the deductions for attorney fees, costs, settlement
16 administration, the PAGA allocation, and Plaintiff's enhancement payment, a net settlement
17 amount of \$114,500 will be provided for the class members; a definite benefit. Plaintiff
18 respectfully requests the Court to grant the motion for preliminary approval, approve and authorize
19 mailing of the Notice Packet, set a date for the final approval hearing.

20
21
22 Date: July 24, 2024

FRONTIER LAW CENTER

23
24
25 
26 Theodore Tang
27 Attorney for Plaintiff
28 Kayla Marie Heitzenroder