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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF ALAMEDA**
10

11
12 ARTHUR QUESADA, as an individual and
on behalf of all others similarly situated,

13
14 Plaintiff,

15 v.

16 XPDEL, INC., a California Corporation
17 and DOES 1-100, inclusive, ADVATIX,
18 INC., a Delaware Corporation, and DOES
1-100, inclusive,

19 Defendants.
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Case No.: 23CV031688

Assigned for All Purposes to:
Hon. Michael Markman
Dept. 23

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

[Filed concurrently with Notice of Motion and
Motion; Declarations of Brandon K. Brouillette,
Arthur Quesada, and Jodey Lawrence; [Proposed]
Order

Date: January 14, 2025
Time: 10:00 a.m.
Dept. 23

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1 **I. INTRODUCTION**

2 Plaintiff Arthur Quesada hereby moves the Court for an order granting preliminary approval to a
3 proposed non-reversionary class action settlement to resolve wage and hour claims on behalf of
4 approximately 432 individuals employed by defendant XPDEL, Inc. (“XPDEL” or Defendant”) in
5 California and classified as non-exempt and who worked for Defendant during the Class Period of April
6 21, 2019 to the date of preliminary approval. The proposed \$175,000 settlement will provide about
7 \$67,167 in cash payments to the class, with an average award currently estimated at about \$155. The
8 balance of approximately \$107,833 will cover reasonable attorney’s fees and actual litigation costs,
9 settlement administration costs, a modest enhancement award to plaintiff, and civil penalties to the State.
10 The settlement is the product of Plaintiff’s pre-filing investigation, discovery and a pre-mediation
11 exchange of information, and arms-length negotiations overseen by mediator Daniel Turner, Esq.

12 The proposed settlement is within the “range of reasonableness” for approval and Plaintiff’s
13 counsel submit the settlement is a fair result given the substantial risks inherent in this matter.
14 Accordingly, Plaintiff requests the Court enter an order: (1) granting preliminary approval to the
15 proposed class action settlement; (2) conditionally certifying the settlement class as defined below; (3)
16 appointing Zachary M. Crosner and Brandon Brouillette, and Crosner Legal, P.C. as Class Counsel; (4)
17 appointing Plaintiff Arthur Quesada as the Class Representative; (5) appointing Phoenix Settlement
18 Administrators as the Settlement Administrator; (6) approving the form of notice to the class and the
19 notice procedure; and (7) scheduling a final fairness hearing.

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

21 Defendant XPDEL is a third-party fulfillment and logistics company specializing in providing
22 supply chain solutions for both business to business and direct to consumer companies. Plaintiff worked
23 for Defendant as an hourly paid, non-exempt delivery associate from about May to November 2021.
24 [Declaration of Brandon K. Brouillette (“Brouillette Decl.”), ¶ 4.]

25 Plaintiff alleges a number of wage and hour violations by Defendant. First, he alleges a
26 failure to pay for all hours worked as he and other class members had to continue working after
27 clocking out for their meal breaks, which time was neither recorded nor paid for. For the same
28 reason, he alleges XPDEL failed to provide all required meal and rest breaks, and that

1 Defendant had a practice of “auto-deducting” 30 minute meal periods even though employees
2 continued working while purportedly on a lunch break. Plaintiff also alleges XPDEL failed to provide
3 second meal periods on shifts of 10+ hours, and further failed to provide fully compliant meal periods
4 before the end of the fifth hour of work and pay meal period premiums when required. He further alleges
5 rest break violations based on a non-compliant written policy and failure to provide all required rest
6 breaks. Lastly, he alleges Defendant failed to reimburse employees for use of their personal cellular
7 devices for company business. [Brouillette Decl., ¶ 5.]

8 Based on these allegations, on April 21, 2023, Plaintiff filed his class action complaint alleging
9 (1) failure to pay minimum wage for all hours worked (Labor Code §§ 1194, and 1194.1); (2) failure to
10 pay overtime wages (Labor Code § 510); (3) failure to provide meal periods (Labor Code §§ 512 and
11 226.7); (4) failure to authorize or permit rest periods (Labor Code § 226.7); (5) failure to provide
12 complete and accurate wage statements (Labor Code § 226); (6) failure to timely pay all wages due
13 (Labor Code §§ 201-204); and (7) failure to reimburse business expenses (Labor Code § 2802); and (8)
14 Unfair Business Practices (Bus. & Prof. Code § 17200, *et seq.*). After notice to the LWDA and
15 exhausting administrative remedies, Plaintiff filed an amended complaint on August 5, 2024 adding
16 PAGA claims based on the same alleged Labor Code violations. The First Amended Complaint is the
17 operative pleading for purposes of settlement. [Brouillette Decl., ¶ 6; Exh. 2.]

18 XPDEL has at all times denied Plaintiff’s allegations and maintained its meal and rest
19 break and payroll policies and procedures comply with California law, that it paid employees for
20 all hours worked, and that provided employees with required meal and rest breaks on a fully
21 compliant basis. XPDEL also argued there would be no need for employees to use their personal
22 phones for any work-related purposes. Additionally, XPDEL strongly contends the case cannot
23 be maintained as a class action, arguing for example that to the extent class members missed meal
24 and/or rest breaks, that such breaks were non-compliant, or that class members had to use their
25 own phones for work it was intermittent and infrequent and evidence of such missed breaks or
26 phone use would be anecdotal, and therefore individualized issues would predominate.
27 [Brouillette Decl., ¶ 7.]
28

1 Once the matter was at issue, the Parties initiated discovery and began meeting and
2 conferring regarding discovery, law and motion, and other case management issues, and
3 ultimately agreed to attempt early mediation. The Parties also agreed on a protocol for an
4 exchange of additional documents and information before the mediation to facilitate the
5 settlement discussions. Consequently, Plaintiff's counsel reviewed payroll records, compensation
6 plans, personnel policies/handbooks, meal and rest break policies, personnel files, and a random
7 of sampling of Class Member paystubs and time records. Defendant also provided data regarding
8 the total number of putative class members, the estimated total amount of workweeks and pay
9 periods they worked, average pay rates, and information regarding other non-hourly
10 compensation, among other relevant data. Plaintiff had this data analyzed by consulting experts
11 at Berger Consulting Group to assist with evaluating potential violation rates and formulating a
12 damages model. [Brouillette Decl., ¶ 8.]

13 The Parties then engaged Daniel Turner, Esq., a respected professional neutral with
14 substantial wage and hour and class action experience. In December 2023, the Parties participated
15 in a full day mediation with Mr. Turner. Throughout the day, the arms-length negotiations were
16 hard-fought and adversarial as the Parties exchanged extensive information on their legal and
17 factual positions, and made numerous offers and counter-offers. While the matter did not settle
18 that day, the Parties continued negotiating with Mr. Turner's assistance, and ultimately both sides
19 accepted a mediator's proposal and reached agreement on all major issues. The Parties then
20 collaboratively drafted the Class Action and PAGA Settlement and Class Notice ("Settlement
21 Agreement") setting forth the settlement terms now before the Court for approval. [Brouillette
22 Decl., ¶ 9.] A fully-executed, true and correct copy of the Settlement Agreement is attached to
23 the Brouillette Declaration as Exhibit 1.

24 **III. THE PROPOSED SETTLEMENT TERMS**

25 Under the settlement, XPDEL will pay \$175,000 into a common fund, the Gross
26 Settlement Amount ("GSA"), in two equal payments approximately six months apart. Attorney's
27 fees of up to \$58,333.33 (1/3 of the GSA), litigation costs of up to \$15,000, settlement
28 administration costs of no more than \$8,500, a service award to Plaintiff of no more than \$10,000,

1 and PAGA civil penalties of \$16,000, all will be paid from the GSA. The balance of around
2 \$67,167 will be allocated pro rata to the Class Members based on their weeks worked during the
3 Class Period. No portion of the GSA will revert to XPDEL. [Brouillette Decl., ¶ 10.]

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

5 The settlement provides for conditional certification of a settlement class including all
6 individuals employed by XPDEL in California and classified as non-exempt and who worked for
7 Defendant during the Class Period of April 21, 2019 to the date the Court grants preliminary
8 approval. The Settlement Class consists of about 432 individuals. [Brouillette Decl., ¶ 11.]

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

10 As noted, the settlement obligates XPDEL to pay \$175,000 to resolve the Settlement
11 Class's claims, inclusive of attorney's fees and costs. At least \$67,167 from the GSA will be
12 distributed to the Participating Class Members. This is a cash settlement that does not require
13 Participating Class Members to submit a claim form to receive their settlement share.
14 Participating Class Members will receive their settlement checks automatically via First Class
15 U.S. Mail. Twenty-five percent of each settlement share will be allocated to wages and the
16 remaining seventy-five percent will be allocated to penalties and interest, which allocation is
17 consistent with XPDEL's potential liability. XPDEL will pay any and all applicable employer-
18 side payroll taxes separately and in addition to the GSA. Subject to the Court's approval, any
19 amounts not claimed (because a class member does not cash their settlement check) will be
20 forwarded to the East Bay Community Law Center as the proposed *cy pres* beneficiary.
21 [Brouillette Decl., ¶ 12.]

22 Each Participating Class Member will receive a share of the Net Settlement Amount based
23 on his or her total weeks worked in California as a non-exempt employee during the Class Period.
24 Thus, each Class Member's Individual Settlement Payment will be calculated using criteria
25 typically used in determining appropriate amounts of unpaid wages, unpaid premium wages for
26 missed meal and rest breaks, and potential statutory penalties under applicable law. These
27 methods are intended to ensure each Class Member receives a settlement award corresponding to
28 the relative value of their potential claims. The proposed allocation provides a reasonable way to

1 compensate Class Members based on the amount of time they worked for XPDEL and the amount
2 unpaid wages, the number of missed meal breaks and/or rest breaks, etc. The average award is
3 estimated to be around \$155. [Brouillette Decl., ¶ 13.]

4 **C. Settlement Administration**

5 Subject to the Court's approval, the Parties have agreed on Phoenix Settlement
6 Administrators as the Settlement Administrator. Phoenix is qualified and has significant
7 experience administering class action settlements, including numerous wage and hour matters.
8 Phoenix's fees and costs will not exceed \$8,500.00. If the Court approves less than the above
9 amount, the difference will remain in the Net Settlement Amount for distribution to the
10 Participating Class Members. [Brouillette Decl., ¶ 14; Declaration of Jodey Lawrence, ¶¶ 2-16;
11 Exhs. A-B.]

12 **D. The Class Notice**

13 The proposed Notice of Class Action Settlement (Exhibit A to the Settlement
14 Agreement) sets out information about this case and explains the basic settlement terms in plain
15 language. The Notice also sets forth the individualized information used to calculate Class
16 Members' Individual Settlement Payments and each Class Member's estimated settlement
17 award. The Notice likewise details the procedures for Class Members to dispute their individual
18 information, the procedure for submitting an objection to the Settlement, the procedure to
19 request exclusion, and the fact that any final judgment will bind all class members who do not
20 opt out. Cal. Rules of Court 3.769(f) and 3.766(d). In sum, the Notice provides the Class
21 Members with the information necessary to evaluate the Settlement and decide to participate in,
22 opt out of, or object to the proposed Settlement, and meets all requirements imposed by the
23 California Rules of Court. Coupled with the notice procedure, the Notice provides the best
24 notice practicable. [Brouillette Decl., ¶ 15.]

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

26 Class Members will have sixty (60) days to dispute the information in their Notice used
27 to calculate their settlement award, and also have 60 days to submit any objections to the
28 settlement or to request exclusion. If a Class Member disputes their individual information, the

1 Settlement Administrator will review the Class Member's records and any other information
2 submitted, and make a final determination. [Brouillette Decl., ¶ 16.]

3 **F. Release of Claims**

4 All Participating Class Members will release XPDEL and the Released Parties from all
5 claims alleged in the operative complaint, or that could have been brought based on the factual
6 allegations in the complaint during the Class Period, including claims under PAGA. The release
7 is limited to the claims that were actually pleaded or could have been pleaded based on the
8 alleged facts in the operative complaint. [Brouillette Decl., ¶ 17.]

9 **G. Plaintiff's Enhancement Award**

10 A modest incentive award for Plaintiff is appropriate under applicable law. See Staton v.
11 Boeing (9th Cir. 2003) 327 F.3d 938, 977 (collecting cases awarding class representatives service
12 and incentive payments ranging from \$2,000 to \$25,000). He devoted time and resources to the
13 litigation, provided documents, assisted Class Counsel with investigating the claims asserted and
14 in preparing for mediation. The service payment provided to Plaintiff as the class representatives
15 is typical in class action cases and reasonable. Rodriguez v. W Publ'g Corp. (9th Cir. 2009) 563
16 F.3d 948, 958-59 (incentive awards are "intended to compensate class representatives for work
17 done on behalf of the class, to make up for financial or reputational risk undertaken in bringing
18 the action, and, sometimes, to recognize their willingness to act as a private attorney general.")).
19 Defendant will not oppose a request for an enhancement award to Plaintiff of not more than
20 \$10,000.00 in recognition of his time spent on this matter, the risks he undertook on behalf of the
21 class, and the benefit conferred to the class, as addressed in his declaration filed herewith. If the
22 Court approves less than the above amount, the difference will remain in the Net Settlement
23 Amount for distribution to the Participating Class Members. [Brouillette Decl., ¶ 18; Declaration
24 of Arthur Quesada, ¶¶ 2-9.]

25 **H. Attorney's Fees and Costs**

26 The terms of the Parties' settlement also allow Plaintiff's counsel to apply for an award
27 of attorney's fees of up to one-third of the GSA, or \$58,333.33 and reimbursement of actual
28 costs and expenses of up to \$15,000.00. Plaintiff's counsel will submit a request for attorney's

1 fees and actual litigation costs at final approval per the terms of the Settlement Agreement and
2 applicable law, and will provide the Court with appropriate information and evidence regarding
3 hourly rates, tasks performed, and time expended on the case. If the Court approves less than
4 the above amounts, the difference will remain in the Net Settlement Amount for distribution to
5 the Participating Class Members. [Brouillette Decl., ¶ 19.]

6 **I. PAGA and Notice to the LWDA**

7 As noted, the Parties allocated \$16,000 to resolution of Plaintiff's alleged claims under
8 PAGA. Consistent with PAGA, \$12,000 of that amount will go to the LWDA for the State's
9 share of the civil penalties, while the remaining \$4,000 will be distributed pro rata to eligible
10 Aggrieved Employees. Prior to filing this motion, Plaintiff provided notice of the proposed
11 settlement of the PAGA claims and the approval hearing to the LWDA. [Brouillette Decl., ¶ 20;
12 Exh. 3.]

13 **IV. ARGUMENT**

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

15 The law favors settlement, particularly in class actions where substantial resources can
16 be conserved by avoiding the time, costs and rigors of formal litigation. H. Newberg & A.
17 Conte, 4 Newberg on Class Actions (4th ed. 2002) § 11.41; Class Plaintiffs v. City of Seattle
18 (9th Cir. 1992) 955 F.2d 1268, 1276, cert. denied, 506 U.S. 953; Potter v. Pacific Coast Lumber
19 Co. (1951) 37 Cal.2d 592, 602. Nevertheless, to ensure the rights of absent class members are
20 not unjustly compromised, settlement of a class action requires court approval. Cal. Rule of
21 Court. 3.769; Wershba v. Apple Computer (2001) 91 Cal.App.4th 224, 245; Dunk v. Ford
22 Motor Co. (1996) 48 Cal.App.4th 1794, 1801. This judicial review protects against fraud or
23 collusion, and ensures fairness to the absent class members. Dunk, 48 Cal.App.4th at 1800-01.
24 Judicial review occurs via a two-step process to determine, under all of the circumstances, if the
25 proposed settlement is fair, reasonable and adequate. Id. at 1801; Wershba, 91 Cal.App.4th at
26 245.

27 The first step is a motion for preliminary approval, through which the parties present the
28 court with the proposed settlement and seek a determination that it is sufficiently fair and

1 reasonable to warrant notice to the class and further proceedings as to its fairness and adequacy.
2 Cal. Rule of Court 3.769(c). This preliminary evaluation determines if the proposed settlement
3 is within the “range of reasonableness” and if notice should be provided to the class regarding
4 the settlement’s proposed terms and conditions, and whether a final fairness hearing should be
5 scheduled. Wershba, 91 Cal.App.4th at 234-35; North County Contractors Ass’n, Inc. v.
6 Touchstone Ins. Servs. (1994) 27 Cal.App.4th 1085, 1089-90. Considering the strong judicial
7 policy favoring settlement of class actions, courts generally apply a presumption of fairness to
8 class action settlements when (1) the settlement results from arms-length bargaining, (2)
9 investigation and discovery are sufficient to allow counsel and the court to act intelligently, (3)
10 counsel is experienced in similar litigation, and (4) the percentage of objectors is small. Dunk,
11 48 Cal.App.4th at 1802; Wershba, 91 Cal.App.4th at 245.

12 If the court grants preliminary approval, it then orders the class be given notice in an
13 appropriate manner, establishes a schedule and procedures for class members to request
14 exclusion or object, and sets the matter for a final fairness hearing. Typically, any motion for
15 attorney’s fees and costs is filed subsequent to preliminary approval and heard with the motion
16 for final approval, as part of the second step of the two-step approval process. Dunk, 48
17 Cal.App.4th at 1800; Wershba, 91 Cal.App.4th at 232. The proposed settlement in this matter
18 warrants preliminary approval under the liberal standard discussed above, as it is fair,
19 reasonable and adequate under all the circumstances, and represents a favorable result for the
20 class.

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

22 The purpose of conditional class certification for purposes of settlement is to facilitate
23 provision of notice of the proposed settlement’s terms, and the date and time of the final fairness
24 hearing. In this context, courts apply lesser scrutiny than they would otherwise in the context of
25 certifying a class. Dunk, 48 Cal.App.4th at 1807, n.19; Global Minerals & Metals Corp. v.
26 Superior Court (2003) 113 Cal.App.4th 836, 839 (“[I]t is well established that trial courts should
27 use different standards to determine the propriety of a settlement class.”)
28

1 In the present matter, conditional certification is proper since this matter satisfies all
2 requirements for class certification under Code of Civil Procedure section 382. First, the class
3 is both sufficiently numerous, consisting of approximately 432 individuals, and ascertainable by
4 reference to Defendant's personnel and payroll records. [Brouillette Decl., ¶ 21.] Next, Plaintiff
5 is an adequate class representative, as his claims do not conflict with and are not antagonistic to
6 the claims of other class members. [Quesada Decl., ¶¶ 2-9; Brouillette Decl., ¶ 22.] Further, his
7 claims are typical as he is a member of the class and his claims arise from the same employment
8 practices and course of conduct giving rise to the claims of the other class members. [Id.]
9 Lastly, his counsel is experienced and adequate class counsel. [Brouillette Decl., ¶¶ 36-45.]

10 Next, common questions of law and fact predominate – particularly for purposes of a
11 settlement class – as the Class Members all were paid via substantially similar company-wide
12 policies that allegedly resulted in unpaid wages, missed/non-compliant meal and rest breaks,
13 etc. Since the focus of the claims against XPDEL concerns the legality of common policies
14 applied uniformly to the entire class, common issues predominate over individualized inquiries
15 concerning liability. For instance, XPDEL either had an “auto deduct” policy or did not, which
16 policy either properly recorded meal breaks or it did not. Similarly, whether use of personal
17 phones was “reasonable” or “necessary” to perform the required duties of the job presents yet
18 another common issue. Regardless of these determinations, it will decide liability for all Class
19 Members one way or another. [Brouillette Decl., ¶ 23.]

20 By now it is well-settled a theory of recovery asserting the existence of a uniform policy
21 violating California law is sufficient to satisfy the requirements for class certification. Jones v.
22 Farmers Ins. Exch. (2013) 221 Cal.App.4th 986, 996 (“Claims alleging that a uniform policy
23 consistently applied to a group of employees is in violation of the wage and hour laws are of the
24 sort routinely, and properly, found suitable for class treatment”); Williams v. Superior Court
25 (2013) 221 Cal.App.4th 1353 (“A company-wide practice can sustain a common question fact
26 or law that supports commonality for class certification”). Lastly, a class action is superior to
27 other means for the fair and efficient adjudication of this controversy. [Brouillette Decl., ¶ 24.]
28

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

3 The proposed settlement resulted from serious, arms-length negotiations facilitated by
4 respected mediator Daniel Turner, Esq., who has extensive experience mediating wage and hour
5 class actions. [Brouillette Decl., ¶ 9.] Plaintiff's counsel Brandon Brouillette and Zachary
6 Crosner, and Crosner Legal PC, have years of litigation experience, including litigating wage and
7 hour class actions. Plaintiff's counsel are well-qualified to evaluate the risks and benefits of
8 pursuing further litigation or settling the matter. [Brouillette Decl., ¶¶ 36-45.]

9 California law recognizes several factors bearing on the fairness, adequacy, and
10 reasonableness of a proposed class settlement. Kullar v. Foot Locker Retail, Inc. (2008) 168
11 Cal.App.4th 116, 128. In relevant part, these factors include: 1) the amount offered in settlement
12 2) the strength of plaintiff's case; 3) the risk, expense, complexity, and likely duration of further
13 litigation; 4) the risk of maintaining class action status throughout trial; 5) the experience and
14 views of counsel; and 6) the reaction of the class members to the proposed settlement. Id. As
15 demonstrated below, the proposed settlement satisfies these requirements.

16 Prior to mediation, the parties engaged in extensive informal discovery to facilitate
17 settlement discussions. As a result, Plaintiff reviewed documents and information regarding
18 XPDEL's payroll practices, pay stubs and time records for a sampling of class members, meal
19 and rest break policies, etc., and information from Defendant regarding class size and breakdown
20 of job positions, work weeks, rates of pay, and other information used to formulate a damages
21 model. This extensive information then was analyzed by a consulting expert to look for meal and
22 rest break violation rates, time spent working off the clock, etc., and other issues relevant to
23 liability and damages. Plaintiff's counsel are confident they obtained sufficient information to
24 understand the law and facts of this case and make an informed decision regarding the proposed
25 settlement and whether it is in the best interests of the class. [Brouillette Decl., ¶¶ 8, 25.]

26 Next, the proposed settlement falls within the range of reasonableness warranting
27 preliminary approval. The proposed settlement involves a significant sum that, when distributed,
28 will confer direct monetary benefits on the class members. As described above, each class

1 member will be entitled to a monetary payment without having to file a claim and each payment
2 will be relative to the value of his or her potential claims.

3 Plaintiff's analysis was supported by the pre-mediation production described above,
4 which permitted Plaintiff's counsel to estimate potential damages on various theories of
5 liability. Using that data, Plaintiff ran various calculations and estimated XPDEL's likely
6 maximum exposure on the class claims at approximately \$1,915,745, including about \$164,140
7 on the off the clock/unpaid wage claims, approximately \$70,805 on the meal period claims,
8 about \$455,260 on the rest period claims, about \$61,940 on the expense reimbursement claim,
9 around \$102,600 on the wage statement claims, and \$1,061,000 on the waiting time penalty
10 claims. [Brouillette Decl., ¶¶ 26-27.] Plaintiff and counsel substantially discounted the value of
11 these claims, however, in light of Defendant's multi-layered defenses on both class certification
12 and the merits.

13 On the unpaid wage claims, Plaintiff alleged that, due to understaffing and the press of
14 business, he and the class members regularly had to continue working during their meal breaks
15 even though they had clocked out, and that XPDEL simply "auto-deducted" 30 minutes of time
16 for each shift even though employees were working during that time. Accordingly, Plaintiff
17 contends he lost at least 2 hours of pay each week for this "off the clock" work. In response,
18 XPDEL argued its timekeeping and payroll policies were fully compliant and that it accurately
19 tracked and paid for all hours worked. It also emphasized that off the clock was strictly
20 prohibited and accordingly if any employees worked while clocked out it was against company
21 policy and done on a voluntary basis, and without the company's knowledge. White v.
22 Starbucks Corp. (N.D. Cal. 2007) 497 F.Supp.2d 1080, 1083 (employer must have actual or
23 constructive knowledge of the off the clock work). For the same reason, XPDEL contended this
24 issue was not suitable for class certification, as determining the reasons behind any alleged off
25 the clock work would have required extensive individualized inquiries. [Brouillette Decl., ¶ 28.]

26 On the meal and rest break claims, Plaintiff contends that XPDEL's alleged "auto-
27 deduct" policy obscured the fact that employees worked through meal periods or did not receive
28 fully compliant meal periods. In Donohue v. AMN Servs., LLC (2021) 11 Cal.5th 58, 61, the

1 California Supreme Court recognized “the meal period provisions are designed to prevent even
2 minor infringements on meal period requirements, and rounding is incompatible with that
3 objective.” Thus, per Plaintiff and Donohue, even minor infringements on the meal period
4 requirements resulted in a violation and obligation for XPDEL to pay the required premium pay.
5 Plaintiff’s review of the time and payroll records provided suggested these deficiencies in the
6 policies affected employee breaks. For example, Plaintiff’s expert’s analysis showed at least a
7 17.6% violation rate for meal period violations. Plaintiff also alleged XPDEL failed to provide
8 second lunches on shifts of 10 or more hours. Similarly, Plaintiff alleged XPDEL’s written
9 break policy likewise was non-compliant, failed to properly reflect the time periods for taking
10 breaks, and also resulted in “de facto” violations as well as the absence of third rest breaks on
11 shifts over 10 hours. [Brouillette Decl., ¶ 29.]

12 In response, XPDEL argued its written meal and rest break policies are fully compliant,
13 and that it provided employees with the opportunity to receive all required breaks. Defendant
14 further maintained that, in light of its compliant policies, whether a class member missed a meal
15 period, received a late meal period, or missed a rest break would have been aberrational and
16 against company policy. Thus, per XPDEL, these issues are not amenable to class or
17 representative treatment since their resolution would require individualized inquiries as to why a
18 break was missed or non-compliant. [Brouillette Decl., ¶ 30.]

19 On the expense reimbursement claim, Plaintiff alleges Defendant’s management and
20 supervisors would constantly text Plaintiff and other employees on their cell phones throughout
21 their shifts to communicate with them on work-related issues, and that no reimbursement was
22 paid. Cochran v. Schwan’s Home Service, Inc. (2014) 228 Cal. App. 4th 1137; Stuart v.
23 RadioShack (N.D. Cal. 2009) 641 F.Supp.2d 901, 903-04 (if an employer “knows or has reason
24 to know that the employee has incurred a reimbursable expense . . . it has the duty to exercise
25 due diligence and take any and all reasonable steps to ensure that the employee is paid for the
26 expense.”) On the other hand, XPDEL argued there would be no conceivable need for
27 employees to use their own phones while working or for any work-related purposes, and if they
28

1 did so it was purely for personal convenience rather than business necessity. Thus, per XPDEL,
2 no reimbursement is owed. [Brouillette Decl., ¶ 31.]

3 The claims under Labor Code sections 203 and 226 are derivative of the primary unpaid
4 wage claims, and accordingly are subject to the same risks and uncertainties plus additional
5 risks posed by the need to take into account the discretionary nature of such awards and the
6 “good faith” and other defenses available to Defendant. Amaral v. Cintas Corp. No. 2 (2008)
7 163 Cal.App.4th 1157, 1203-4 (employer did not willfully fail to pay wages under Labor Code
8 § 203 even though class prevailed on underlying claim for failure to pay living wages). Thus,
9 while these claims largely are derivative of the unpaid wage claim, they also are subject to
10 additional defenses. [Brouillette Decl., ¶ 32.]

11 As far as potential PAGA liability, the allegedly aggrieved employees theoretically are
12 entitled to penalties totaling around \$415,000 should Plaintiff prevail on all claims and establish
13 violations of the multiple Labor Code sections as to each and every pay period at issue.
14 [Brouillette Decl., ¶ 33.] As with the class claims, Plaintiff discounted the potential PAGA
15 penalties based on Defendant’s various defenses on the merits and also accounted for the Court’s
16 wide discretion to reduce such penalties, or to decline to award penalties at all. Labor Code §
17 2699(e)(2); Carrington v. Starbucks Corp. (2018) 30 Cal.App.5th 504 (trial court awarded
18 penalties of \$5 per pay period after a bench trial, which decision was upheld on appeal); In re
19 Taco Bell Wage and Hour Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. LEXIS 48557 (PAGA
20 penalties denied after trial).

21 Accordingly, the Parties allocated \$16,000 to PAGA penalties, and Plaintiff submits this
22 amount is reasonable under the circumstances and in line with comparable settlements in other
23 wage and hour class actions in California. *E.g.*, Van Kempen v. Matheson Tri-Gas, Inc. (N.D.
24 Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182 (granting final approval of \$5,000 PAGA
25 penalty from \$370,000 settlement, or 1.4 percent of total settlement); Slavkov v. First Water
26 Heater Partners I (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS 116303 (finding a \$7,500
27 PAGA payment reasonable when measured against the overall settlement of \$345,000 and the
28 possible weaknesses in Plaintiffs' case, or 2.2 percent of total settlement). Additionally, the

1 LWDA has been informed of the terms of the PAGA portion of the settlement, and will be able
2 to weigh in as necessary. Jennings v. Open Door Mktg. Inc. (N.D. Cal. Oct. 3, 2018) 2018 U.S.
3 Dist. LEXIS 171356, at *27 (approving settlement with PAGA penalties of 0.6% where
4 "[p]laintiffs [have] submitted the settlement agreement to the LWDA, and the LWDA has not
5 objected to the settlement.

6 The settlement obviates the significant risk that this Court may find any kind of class or
7 representative resolution unachievable or deny certification of all or some of Plaintiff's claims.
8 Furthermore, even if Plaintiff obtained certification of all or some of the claims, continued
9 litigation would be lengthy and expensive as the parties pursued merits discovery, a probable
10 motion to decertify, as well as trial and possible appeals, and would further and substantially
11 delay any recovery by the class with no assurance of recovering significantly more than the
12 proposed settlement. While Plaintiff is confident in the merits of these claims, legitimate
13 controversies exist regarding each one of them. Plaintiff also recognizes proving the amount of
14 wages and penalties due each Class Member would be an expensive, time-consuming, and
15 uncertain proposition. [Brouillette Decl., ¶¶ 34-35.]

16 Plaintiff and counsel discounted the value of the class claims consistent with the risks
17 discussed above, and carefully weighed the likelihood of the class receiving substantially
18 greater benefit if the litigation continued. Plaintiff and counsel concluded – in light of these very
19 real and substantial risks – settlement on the proposed terms and without prolonged and costly
20 litigation was in the best interests of the class, and the overall \$175,000 recovery represents a
21 significant percentage of Defendant's potential exposure. Given these risks, a total recovery for
22 the class of \$175,000, which will result in average award of over \$155 per class member, is a
23 significant result well within the range of reasonableness considering all potential outcomes, and
24 it will provide direct monetary awards to all Class Members without further delay. [Brouillette
25 Decl., ¶ 35.]

26 Importantly, the mere fact that a settlement does not provide the same recovery as might
27 be achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and
28 adequate. Wershba, 91 Cal.App.4th at 246, 250 ("Compromise is inherent and necessary in the

1 settlement process...even if the relief afforded by the proposed settlement is substantially
2 narrower than it would be if the suits were to be successfully litigated, this is no bar to a class
3 settlement because the public interest may indeed be served by a voluntary settlement in which
4 each side gives ground in the interest of avoiding litigation”); Lane v. Facebook, Inc. (9th Cir.
5 2012) 696 F.3d 811, 819 (“[T]he question whether a settlement is fundamentally fair . . . is
6 different from the question whether the settlement is perfect in the estimation of the reviewing
7 court”); 7-Eleven Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135,
8 1150 (“The fact that a proposed settlement may amount to only a fraction of the potential
9 recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and
10 should be disapproved”); White v. Experian Information Solutions, Inc. (C.D. Cal. 2011) 803
11 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable even though
12 it represented 99% discount off the maximum value of the claims). Importantly as well, the
13 proposed settlement is non-reversionary and will provide timely benefits to the Class Members
14 without a claims process. White, 803 F.Supp.2d at 1098; c.f., Federal Judicial Center,
15 Managing Class Action Litigation: A Pocket Guide for Judges (3d ed. 2010) at 20, available at
16 [http:// www.fjc.gov/sites/default/files/2012/ClassGd3.pdf](http://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf) (reversionary provisions and/or
17 cumbersome claims process may indicate lack of fairness). Plaintiff and his counsel submit the
18 settlement is within the “range of reasonableness,” and is fair and adequate for the Class.

19 **V. CONCLUSION**

20 For all the foregoing reasons, Plaintiff respectfully requests that the Court grant this
21 motion, conditionally certify the settlement class, grant preliminary approval to the proposed class
22 action settlement, and enter the [Proposed] Order filed herewith.

23
24 Dated: December 19, 2024

CROSNER LEGAL, P.C.

25
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