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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

FRANCISCO CALDERON, as an individual
and on behalf of all others similarly situated,

Plaintiff,

vs.

SMILEDIRECTCLUB, LLC, a Tennessee
limited liability company; JEFFREY
SULITZER, D.M.D., PROFESSIONAL
CORPORATION, a California corporation; and
DOES 1 through 100, inclusive,

Defendants.

Case No. 20STCV03799

*[Assigned for all purposes to Hon. Yvette M.
Palazuelos, Dept. SSC-9]*

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR PRELIMINARY APPROVAL
OF CLASS ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Date: May 17, 2021
Time: 10:00 a.m.
Dept.: SSC-9

Complaint Filed: January 30, 2020
Trial Date: None Set

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court, on May 17, 2021 in Department SSC-9 of the above-entitled Court, located at 312 N. Spring Street, Los Angeles, California 90012, Plaintiff Francisco Calderon ("Plaintiff"), individually and on behalf of a class of similarly situated individuals, will and hereby does move this Court for:

1. Preliminary approval of the proposed class settlement of this lawsuit;
2. Pursuant to section 382 of the California Code of Civil Procedure, provisional certification of the following Settlement Class defined as follows:

All current and former non-exempt, hourly, employees of Defendants SmileDirectClub, LLC, and Jeffrey Sulitzer, D.M.D., Professional Corporation who worked in California at any time from November 8, 2017 through the date of preliminary approval.

3. Preliminary appointment of Plaintiff Francisco Calderon as Class Representative;
4. Preliminary appointment of Scott M. Lidman, Elizabeth Nguyen, Milan Moore, and Romina Tamiry of Lidman Law, APC and Paul K. Haines of Haines Law Group, APC as Class Counsel;
5. The scheduling of a hearing to consider whether the Settlement should be finally approved and to permit a service award to Plaintiff, Settlement Administration costs, civil penalties payable to the California Labor Workforce Development Agency, and attorneys' fees and costs to Class Counsel;
6. Appointment of Phoenix Settlement Administrators ("Phoenix") as the third-party Settlement Administrator for mailing notices; and
7. Approval of the proposed Notice Packet (which is comprised of the Notice of Pendency of Class Action and Proposed Settlement and Notice of Individual Settlement Award) and an order that it be disseminated to the proposed Settlement Class Members as provided in the Settlement Agreement.
8. Leave to file the Second Amended Complaint Class and Representative Action Complaint, which is attached as Exhibit A to the Settlement.

This Motion is based on this notice of motion, the memorandum of points and authorities, the declarations of Scott M. Lidman, Elizabeth Nguyen, Milan Moore, Paul K. Haines, Plaintiff Francisco Calderon, and Jodey Lawrence of Phoenix Settlement Administrators, and the exhibits attached thereto, the pleadings and other papers filed in this action, and on any further oral or documentary evidence or argument presented at the time of hearing.

Dated: March 2, 2021

Respectfully submitted,
LIDMAN LAW, APC

By: 
Elizabeth Nguyen
Scott M. Lidman
Attorneys for Plaintiff
FRANCISCO CALDERON

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**¹

2 **I. INTRODUCTION**

3 Plaintiff Francisco Calderon (“Plaintiff”) brought this class and representative action against
4 Defendants SmileDirectClub, LLC, and Jeffrey Sulitzer, D.M.D., Professional Corporation (hereinafter
5 collectively referred to as “SmileDirect” or “Defendants”) alleging various wage and hour violations.
6 Plaintiff’s primary allegations are that Defendants: (1) failed to pay all overtime wages owed; (2) failed
7 to pay all minimum wages owed; (3) failed to provide all legally required meal periods; (4) failed to
8 authorize and permit all legally required rest periods; (5) failed to provide accurate, itemized wage
9 statements; (6) failed to timely pay all wages upon separation of employment; (7) engaged in unlawful
10 business practices; and (8) is liable for civil penalties under the Labor Code Private Attorneys General
11 Act of 2004 (“PAGA”).

12 Plaintiff now respectfully requests that this Court preliminarily approve this non-reversionary,
13 class action settlement,² in which Defendants have agreed to pay Six Hundred Fifty Thousand Dollars
14 and Zero Cents (\$650,000.00) to the following Settlement Class:

15 All current and former non-exempt, hourly, employees of Defendants
16 SmileDirectClub, LLC, and Jeffrey Sulitzer, D.M.D., Professional Corporation
17 who worked in California at any time from November 8, 2017 through the date
of preliminary approval.

18 Significantly, Settlement Class Members do not need to file a claim to benefit from the
19 Settlement because all Settlement Class Members will automatically receive a payment unless they
20 affirmatively opt-out. There are approximately 277 Settlement Class Members, rendering the average
21 payment to participating Settlement Class Members to be approximately **\$1,321.58**.³

22 The Settlement was reached only after the parties mediated the action with Jeffrey Krivis, Esq.,
23

24 ¹ Given the multiplicity of issues addressed in this Motion, Plaintiff respectfully requests that the Court allow
25 Plaintiff to exceed the 20-page limit set forth in California Rule of Court 3.764(c)(2), and that the Court consider
the attached memorandum of points and authorities which is 22 pages in length.

26 ² The Stipulation of Settlement (“Settlement”) is attached to the Declaration of Elizabeth Nguyen as Exhibit 1.
27 The proposed Second Amended Class and Representative Action Complaint (“SAC”) is attached to the
Settlement as Exhibit A. The proposed Notice Packet (which consists of the Notice of Pendency of Class Action
and Proposed Settlement and Notice of Individual Settlement Award) is attached to the Settlement as Exhibit B.
28 All defined terms in this motion have the same definitions as used in the Settlement.

³ This amount includes the PAGA Allocation for each Settlement Class member.

1 a well-respected wage and hour class action mediator. In connection with mediation, Defendants
2 produced timekeeping and payroll records for the putative class, as well as applicable documents
3 regarding its wage and hour policies, and other information. After extensive research and analysis,
4 including a detailed analysis of Defendants’ potential exposure by Plaintiff’s retained expert who holds
5 a Ph.D. in economics, a full-day mediation was held on November 10, 2020. The Parties agreed on a
6 class-wide resolution, subject to approval by this Court, and memorialized the agreement in a
7 Memorandum of Understanding at the mediation. Since mediation, the Parties finalized the terms of
8 settlement and executed the Settlement that is now submitted for this Court’s preliminary approval.

9 If the Settlement is approved, Defendants will pay a non-reversionary Gross Settlement Amount
10 (“GSA”) of \$650,000.00. After deducting administration costs, Plaintiff’s service award, attorneys’
11 fees and costs, and payment of PAGA penalties to the LWDA, the remaining Net Settlement Amount
12 (“NSA”) of approximately \$363,583.34 will be distributed to all Settlement Class Members who do not
13 opt-out of the Settlement. This amount includes the \$7,500 (or 25% of the \$30,000.00 PAGA Amount)
14 that will be distributed to certain Settlement Class Members.

15 This proposed Settlement is well-within the range of possible approval in light of the significant
16 legal and factual obstacles that Plaintiff faced, the risks and costs of further litigation, and the tangible
17 monetary benefits to be received by the Settlement Class. For the reasons discussed herein, Plaintiff
18 respectfully requests that the Court grant preliminary approval of the Settlement.

19 **II. SUMMARY OF THE LITIGATION**

20 **A. THE PARTIES, PROCEDURAL HISTORY, DISCOVERY, AND ARMS-** 21 **LENGTH NEGOTIATIONS**

22 **1. The Parties**

23 According to their website, Defendants are the first digital brand for straightening teeth and
24 operate various locations known as SmileShops throughout California and also represent 95% of the
25 doctor-directed at-home clear aligner industry. *See* Declaration of Elizabeth Nguyen (“Nguyen Decl.”),
26 ¶ 10. Plaintiff was employed by Defendants as a non-exempt employee from approximately March
27 2019 through approximately January 2, 2020. *See* Declaration of Francisco Calderon (“Calderon
28 Decl.”), ¶ 2. During his employment, Plaintiff worked inside the CVS Pharmacy in Woodland Hills,

1 California as a Smile Guide and performed various duties including without limitation, explaining the
2 products and guiding customers through timelines and payment plans. *Id.*

3 **2. Procedural History**

4 On January 30, 2020, Plaintiff filed a putative class action complaint against Defendants in Los
5 Angeles County Superior Court. Nguyen Decl., ¶ 10. On April 6, 2020, Plaintiff filed a First Amended
6 Class and Representative Action Complaint adding a cause of action for civil penalties under the Labor
7 Code Private Attorneys General Act (“PAGA”). *Id.*

8 Pursuant to the terms of the Settlement, subject to Court approval, the Parties stipulated to allow
9 Plaintiff to file a Second Amended Complaint Class and Representative Action Complaint adding a
10 cause of action for Defendants’ failure to timely pay all wages upon separation of employment. Nguyen
11 Decl., ¶ 10, Exhibit 1 (Settlement, Exh. A). Therefore, in order to effectuate the terms of the Settlement,
12 Plaintiff also seeks leave from the Court to file the Second Amended Complaint Class and
13 Representative Action Complaint, which is attached as Exhibit A to the Settlement.⁴

14 **3. Discovery**

15 After agreeing to participate in early mediation, Defendants informally produced time records
16 and payroll data for the putative class, as well as its wage and hour policies and other relevant documents
17 and information relevant to the claims alleged in advance of mediation. Nguyen Decl., ¶ 11. Plaintiff
18 retained an expert to conduct an analysis of the payroll data and time records produced by Defendants.
19 After the detailed review of the payroll and time records and other documents and policies produced by
20 Defendants, Class Counsel drew on their extensive experience in similar cases to assess the strengths
21 and weaknesses of Plaintiff’s case. *Id.* This discovery also allowed the Parties to discuss the strengths
22 and weaknesses of Plaintiff’s contemplated waiting time penalty claim and Plaintiff’s various theories
23 of liability on his claim. This discovery allowed the parties to assess the merits and value of Plaintiff’s
24 claims and Defendants’ defenses thereto, if a settlement could not be reached. *Id.*

25 **4. Arms-Length Negotiations**

26 On November 10, 2020 after extensive research and analysis, including a detailed analysis of

27 ⁴ Plaintiff submitted a supplemental letter to the Labor and Workforce Development Agency with respect to the
28 cause of action for Defendants’ failure to timely pay all wages upon separation of employment on December 9,
2020. The sixty-five day exhaustion period expired on February 12, 2021. *See* Nguyen Decl., ¶ 10.

1 Defendants' potential exposure by Plaintiff's retained expert who holds a Ph.D. in economics, a full-
2 day mediation was held with Jeffrey Krivis, Esq., a well-respected wage and hour class action mediator,
3 at First Mediation. Nguyen Decl., ¶ 12. During mediation, the parties vigorously debated their opposing
4 legal positions, the likelihood of certification of Plaintiff's claims, and the legal basis for the claims and
5 defenses. *Id.* As part of the negotiations and settlement discussions, the Parties agreed that Plaintiff
6 would file a Second Amended Complaint which adds a claim for failure to timely pay all final wages
7 upon termination. *Id.* After a full day mediation, the Parties reached agreement and executed a
8 Memorandum of Understanding ("MOU"). Thereafter, the Parties signed the Stipulation of Settlement
9 ("Settlement"). *Id.*

10 **III. ARGUMENT**

11 **A. CLASS CERTIFICATION FOR SETTLEMENT PURPOSES**

12 California Rule of Court 3.769 conditions settlement of a class action on court approval, which
13 is generally evaluated under the federal standards applicable under Rule 23 of the Federal Rules of
14 Civil Procedure. *See Reed v. United Teachers Los Angeles* (2012) 208 Cal.App.4th 322 requires trial
15 court to determine "that the settlement is fair, reasonable and adequate to all concerned"); *Hanlon v.*
16 *Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026 requires the trial court to determine "whether a
17 proposed settlement is fundamentally fair, adequate, and reasonable").

18 As further explained below, the Settlement Class satisfies the criteria for certification of a
19 settlement class under California law because: (1) the Settlement Class is so numerous that joinder
20 would be impractical; (2) common questions of law and fact predominate over individual questions
21 such that class certification is the most efficient and desirable way to maintain this litigation; (3)
22 Plaintiff's claims are typical of the claims of absent Settlement Class Members; and (4) Plaintiff and
23 his counsel will fairly and adequately represent Settlement Class Members' interest. *See* Cal. Civ. Proc.
24 § 382.

25 **1. Numerosity is Satisfied.**

26 Here, the proposed Settlement Class consists of approximately 277 members, and is therefore
27 sufficiently numerous as to make joinder impracticable. *See* Nguyen Decl., ¶ 14; *See, e.g., Bowles v.*
28

1 *Sup. Ct.* (1955) 44 Cal.2d 574 (holding a class representing 10 beneficiaries of a trust sufficiently
2 numerous). Thus, numerosity is satisfied.

3 Further, a class is “ascertainable” where the members “may be readily identified without
4 unreasonable expense or time by reference to official [or business] records.” *See Sevidal v. Target*
5 *Corp.* (2010) 189 Cal.App.4th 905, 916 (alterations in original). Here, the proposed Settlement Class
6 is defined as “All current and former non-exempt, hourly, employees of Defendants SmileDirectClub,
7 LLC, and Jeffrey Sulitzer, D.M.D., Professional Corporation who worked in California at any time
8 from November 8, 2017 through the date of preliminary approval.” Nguyen Decl., ¶ 14.

9 **2. Commonality is Satisfied.**

10 The focus in a certification dispute is not the merits, but rather on what types of questions,
11 “common or individual,” are likely to arise in the action. *See Sav-On Drug Store, Inc. v. Superior*
12 *Court (Rocher)* (2004) 34 Cal.4th 319, 327.

13 Here, Settlement Class Members’ claims arise from Defendants’ common, uniform policies and
14 practices that applied to Plaintiff and Settlement Class Members during the class period. Nguyen Decl.,
15 ¶ 15. Specifically, Plaintiff alleged that Defendants’ common and uniform policies and practices
16 resulted in the following violations: (1) failure to pay all overtime wages owed; (2) failure to pay all
17 minimum wages owed; (3) failure to provide all legally required meal periods; (4) failure to authorize
18 and permit all legally required rest periods; (5) failure to provide accurate, itemized wage statements;
19 (6) failure to timely pay all wages upon separation; (7) unlawful business practices; and (8) liability for
20 civil penalties under the Labor Code Private Attorneys General Act of 2004 (“PAGA”).

21 As a result of the common and uniform policies and practices that applied to all Settlement
22 Class Members, their claims involve common questions of law and fact, including but not limited to:

- 23 1. Whether Defendants properly paid all overtime wages;
- 24 2. Whether Defendants properly paid all minimum wages;
- 25 3. Whether Defendants provided all legally compliant meal periods;
- 26 4. Whether Defendants authorized and permitted all legally required rest periods;
- 27 5. Whether Defendants failed to furnish accurate, itemized wage statements;
- 28 6. Whether Defendants failed to timely pay all wages owed upon separation; and

1 7. Whether Defendants' conduct constituted unlawful and/or unfair business practices.

2 These alleged practices result in common questions as to the affected Settlement Class
3 Members. *See e.g., Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 726.

4 **3. Typicality is Satisfied.**

5 The typicality requirement is satisfied where class representatives have claims that are typical
6 of those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d
7 1341, 1347 (finding typicality satisfied where named Plaintiff purchased the same goods as the putative
8 class in a consumer class action).

9 Here, Plaintiff's claims are typical of those held by the members of the proposed Settlement
10 Class. First, Plaintiff was employed by Defendants during the Class Period as a non-exempt employee
11 and was subject to Defendants' wage and hour policies at issue in this case. *See Calderon Decl.*, ¶ 2.
12 Second, Plaintiff was injured by the same challenged policies that injured the Settlement Class as a
13 whole. For example, Plaintiff asserts that he, like the members of the Classes, was not provided with
14 all required meal periods, was not provided all legally required minimum wages and overtime wages,
15 was not authorized and permitted to take all required rest periods, did not receive meal and rest period
16 premium wages when he was not provided compliant meal or rest periods, was not provided with
17 accurate, itemized wage statements, and was not paid all of his wages owed upon separation of
18 employment. *Id.* Given that Defendants' policies and practices applied to all non-exempt employees,
19 Settlement Class Members possess a similar interest and have suffered similar alleged injuries as
20 Plaintiff. Accordingly, because Plaintiff's claims and those of the Settlement Class all arise from the
21 same conduct, typicality is satisfied.

22 **4. Adequacy is Satisfied.**

23 The adequacy requirement examines conflicts of interest between named parties and the
24 class(es) they seek to represent. *Capital People First v. State Dept. of Developmental Services* 155
25 (2007) Cal.App.4th 676, 697.

26 Here, there are no apparent conflicts of interest between Plaintiff and the Settlement Class he
27 seeks to represent. *See Calderon Decl.*, ¶ 12. Indeed, Plaintiff's interests are aligned with those of the
28 Settlement Class Members, as they all seek monetary relief under the same facts and legal theories. *Id.*

1 Additionally, Class Counsel does not have any conflict of interest with the Settlement Class. *See*
2 *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450-51 (adequacy satisfied where there was
3 no indication that Class Counsel were not qualified and the named plaintiff had no interests antagonistic
4 to those of the proposed class). Further, Class Counsel also have extensive experience in wage and
5 hour class action litigation and have vigorously litigated this case. *See* Nguyen Decl., ¶¶2-8;
6 Declaration of Scott M. Lidman (“Lidman Decl.”), ¶¶ 2-8; Declaration of Paul K. Haines (“Haines
7 Decl.”), ¶¶ 2-8; Declaration of Milan Moore (“Moore Decl.”), ¶¶ 2-4; Declaration of Romina Tamiry
8 (“Tamiry Decl.”), ¶¶ 2-3.

9 **B. THE COURT SHOULD GRANT PRELIMINARY APPROVAL OF THE**
10 **PROPOSED CLASS ACTION SETTLEMENT BECAUSE IT IS FAIR,**
11 **ADEQUATE, AND REASONABLE**

12 Settlement is the preferred means of dispute resolution, particularly in complex class action
13 litigation. *See In re Syncor ERISA Litig.* (9th Cir. 2008) 516 F.3d 1095, 1101. The Court’s role in
14 evaluating a proposed settlement is limited to ensuring that the agreement taken as a whole is fair. *See*
15 *e.g., Hanlon, supra*, 150 F.3d at 1027. There is an initial presumption of fairness where, as here, the
16 Settlement agreement was negotiated at arm’s-length by class counsel and with the assistance of an
17 experienced wage and hour class action mediator. *See e.g. Kullar v. Foot Locker Retail, Inc.* (2008)
18 168 Cal.App.4th 116, 130.

19 **1. The Preliminary Approval Standard is Met**

20 To make a fairness determination, the Court should consider several factors, including: “the
21 strength of plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation, the
22 risk of maintaining class action status through trial, the amount offered in settlement, the extent of
23 discovery completed and the stage of the proceedings, [and] the experience and views of counsel.”
24 *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. “The list of factors is not exclusive and the
25 court is free to engage in a balancing and weighing of the factors depending on the circumstances of
26 each case.” *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 230, 245. As discussed below,
27 the proposed Settlement is fair, adequate, and reasonable in light of the overall balance of factors in this
28 case.

1 **a. The Strength of Plaintiff’s Case**

2 Although Plaintiff maintains that his claims are meritorious, Plaintiff acknowledges that there
3 were substantial risks and uncertainty in proceeding with litigation. As described below, Defendants
4 presented multiple defenses to Plaintiff’s claims, both on the merits and class certification. Thus, while
5 Plaintiff was prepared to litigate these claims through certification, and ultimately trial, success was far
6 from certain.

7 **b. Risk, Expenses, Complexity, and Duration of Further Litigation**

8 Although the parties engaged in significant informal discovery throughout this action, the parties
9 still had significant discovery to complete in formal litigation had the matter not settled. Nguyen Decl.,
10 ¶ 32. Moreover, Plaintiff still had to file for class certification, and faced the prospect of appeals in the
11 wake of a disputed class certification ruling for Plaintiff and/or an adverse summary judgment ruling.
12 *Id.* Even if the classes sought to be certified by Plaintiff were in fact certified, the parties would incur
13 considerably more attorneys’ fees and costs through a possible decertification motion, trial, and possible
14 appeal. *Id.* This Settlement avoids those risks and the accompanying expense. Thus, this factor
15 supports preliminary approval.

16 **c. Risk of Maintaining Class Action Status**

17 Plaintiff had not yet filed his motion for class certification and as such, the extent to which
18 Plaintiff’s proposed classes were certifiable is somewhat speculative. Absent settlement, there was a
19 risk that there would not be a certified class at the time of trial.

20 **d. Overview of the Settlement Agreement**

21 If the Court approves this Settlement, Defendants will pay a Gross Settlement Amount (“GSA”)
22 of \$650,000.00.⁵ Nguyen Decl., ¶ 13, Exh. 1 (Settlement, ¶ 6). Significantly, this Settlement is **non-**
23 **reversionary**, and no Settlement Class member will have to submit a claim form to receive a Settlement
24 Award. *Id.* (Settlement, ¶ 6.D). Each Settlement Class member will automatically receive a Settlement

25 _____
26 ⁵ Defendants represents that there are an estimated 11,463 workweeks during the Class Period. If the number of
27 workweeks during the Class Period is more than 10% greater than this figure (i.e., if there are 12,609 or more
28 workweeks worked by the Settlement Class members), Defendants agree to increase the GSA on a proportional
basis (i.e., if there was 10% increase in the number workweeks during the Class Period, Defendants would agree
to increase the GSA by 10%). However, instead of increasing the GSA if this escalator clause is triggered,
Defendants retain the option to end the Class Period and release period as of the date that the increase in
workweeks reaches 12,609 without any increase in the GSA. *See* Settlement ¶ 13.

Award unless he or she affirmatively opts out of the Settlement.⁶ *Id.* The monetary terms of the Settlement are summarized below:

Gross Settlement Amount (“GSA”):	\$650,000.00
Minus Court-approved attorneys’ fees (1/3 of GSA):	\$216,666.66
Minus Court-approved, verified costs (up to):	\$35,000.00
Minus Court-approved Class Representative Service Award (up to):	\$5,000.00
Minus Settlement Administration Costs:	\$7,250.00
Minus PAGA payment to LWDA:	\$22,500.00
Net Settlement Amount (“NSA”):	\$363,583.34

Defendants shall pay the Gross Settlement Amount within thirty (30) days of the Effective Date.⁷

After deducting amounts for the Court-approved attorneys’ fees and verified costs, Service Award to Plaintiff, Settlement Administrator costs, and the PAGA payment to the LWDA, the Settlement requires Defendants to pay a Net Settlement Amount (“NSA”) of at least **\$363,583.34** to all Settlement Class Members who do not timely opt out. This amount includes the \$7,500.00 PAGA Amount to be paid to the Settlement Class Members. Nguyen Decl., ¶ 13, Exh. 1.

According to Defendants, there are approximately 277 total Settlement Class Members. Nguyen Decl., ¶ 14. Thus, the average Individual Settlement Awards (assuming all Settlement Class Members worked the same length of time and there are no opt-outs) is projected to be approximately **\$1,321.58**.

Id. The Individual Settlement Awards shall be determined as follows:

- i. Ninety-Five Percent (95%) of the Net Settlement Amount, not including the PAGA Amount payable to Settlement Class Members, shall be allocated to Settlement Class Members who worked during the Class Period, as follows: each participating Settlement

⁶ Pursuant to the terms of the Settlement, Defendants will have the option of rescinding the Settlement if more than 10% of the Settlement Class opts out of the Settlement and all actions taken in furtherance of it will thereby be null and void. *See* Settlement ¶ 15.

⁷ The Settlement Agreement shall become effective on the latter of: (a) the expiration of any appeal period following the Court’s final approval of the Settlement (at or following the Final Approval Hearing) and entry of a Final Judgment and Order Approving Settlement in the same or substantially the same form as Exhibit C (“Judgment”); or (b) the final resolution of any appeal that has been filed, with the California Court of Appeal or the California Supreme Court rendering a final judgment affirming the Court’s final approval of the Settlement without material modification (“Effective Date”). *See* Settlement ¶ 6.B.

Class member shall receive a proportionate settlement share based upon the number of workweeks worked during the Class Period, the numerator of which is the Settlement Class member's total workweeks worked during the Class Period, and the denominator of which is the total workweeks worked by all Settlement Class Members who worked during the Class Period. *See* Settlement, ¶ 7.B.i.

iii. Waiting Time Penalty Amount: Five Percent (5%) of the Net Settlement Amount, not including the PAGA Amount payable to Settlement Class Members, shall be designated as the "Waiting Time Penalty Amount." Each participating Settlement Class member who was separated from employment with Defendants at any time during the Class Period shall receive a portion of the Waiting Time Penalty Amount. The Waiting Time Penalty amount shall be divided equally between all Settlement Class Members who were separated from their employment during the Class Period. *See* Settlement, ¶ 7.B.ii.

iv. PAGA Amount: In addition, Seven Thousand Five Hundred Dollars and Zero Cents (\$7,500.00) of the Gross Settlement Amount has been designated as the "PAGA Amount". Each PAGA Employee shall receive a portion of the PAGA Amount proportionate to the number of workweeks that he or she worked during the PAGA Period, which will be calculated by multiplying the PAGA Amount by a fraction, the numerator of which is the PAGA Employee's number of workweeks worked during this time period, and the denominator of which is the total number of workweeks worked by all PAGA Employees. *See* Settlement, ¶ 7.B.iii. PAGA Employees is defined in the Settlement as "All current and former non-exempt, hourly, employees of Defendants SmileDirectClub, LLC, and Jeffrey Sulitzer, D.M.D., Professional Corporation who worked in California at any time from January 30, 2019 through the date of preliminary approval." *See* Settlement, ¶ 2. The time period of January 30, 2019 through the date of preliminary approval is defined in the Settlement as the "PAGA Period." *Id.*

Settlement Class Members will have sixty (60) calendar days from the mailing of the Class Notice to opt-out or object to the Settlement, thereby providing ample time to review the Class Notice without unduly delaying the Settlement. *See* Settlement, ¶ 12.D. Those Settlement Class Members who

do not opt-out of the Settlement will be bound by its terms and will release all claims against Defendants included within the Settlement, for the period of November 8, 2017 through the date of preliminary approval. *See* Settlement, ¶ 4. Settlement Class Members who opt-out of Settlement will still receive a portion of the PAGA Amount if they are a PAGA Employee during the PAGA Period.

As this is a non-reversionary Settlement, 100% of the NSA shall be consumed in that if a Settlement Class Member opts-out of the Settlement, the portion allocated to the individual who opts-out shall be added to the NSA and redistributed and allocated to the Settlement Class Members who did not opt-out. *See* Settlement, ¶ 6.D.

e. The Parties Engaged in Fair and Honest Negotiations.

This Settlement was a result of serious, informed, non-collusive negotiations with the assistance of a mediator. In connection with mediation, Defendants produced timekeeping and payroll data. Plaintiff retained an expert to conduct an analysis of the payroll data and time records produced by Defendants to calculate Defendants' potential exposure for Plaintiff's claims. *Nguyen Decl.*, ¶ 11. After the detailed review of the payroll and time records and other documents and policies produced by Defendants, Class Counsel drew on their extensive experience in similar cases to assess the strengths and weaknesses of Plaintiff's case. *Id.* This discovery allowed the parties to assess the merits and value of Plaintiff's claims and Defendants' defenses thereto, if a settlement could not be reached. *Id.*

On November 10, 2020, the Parties participated in a full-day mediation with Jeffrey Krivis, Esq., a preeminent wage and hour class action mediator. *Nguyen Decl.*, ¶¶ 11-12. During mediation, the parties vigorously debated their opposing legal positions, the likelihood of certification of Plaintiff's claims, as well as the legal basis for the claims and defenses. The Parties agreed on a class-wide resolution and memorialized the agreement in a Memorandum of Understanding at the mediation. Since mediation, the Parties finalized the terms of settlement and executed the Settlement. *Nguyen Decl.*, ¶ 12, Exhibit 1.

Thus, the proposed Settlement is entitled to an initial presumption of fairness as it is the result of: factual investigation and data analysis; the exchange of substantial information and class data, including timekeeping and payroll records; arm's length negotiations by counsel; and mediation before an experienced wage and hour class action mediator. *See Nguyen Decl.*, ¶¶ 11-12; *See Kullar, supra*,

1 168 Cal.App.4th at 130. In addition, the Parties attended a full-day mediation, and worked
2 collaboratively in the following weeks to finalize the Settlement. *Id.* Thus, these factors support
3 preliminary approval.

4 Further, there are no deficiencies in the Settlement. The Settlement does not grant preferential
5 treatment to the class representative or segments of the class (except for appropriate allocations based
6 on the applicable and differing statutes of limitations for the various claims), and is within the range of
7 possible approval, as discussed in detail below. The Settlement will provide monetary relief to
8 Settlement Class Members. The amounts proposed for Class Counsel's attorneys' fees and costs, and
9 service award are all reasonable and appropriate based on the facts of this case. Because the Settlement
10 is devoid of obvious deficiencies, this factor supports preliminary approval.

11 **f. Amount Offered in Settlement Given Realistic Value of Claims**

12 Unlawful Rounding/Off-the-Clock: Plaintiff alleges that Defendants failed to compensate its
13 non-exempt employees for all time worked. Nguyen Decl., ¶ 16. Specifically, Plaintiff alleges that
14 Defendants would keep track of Plaintiff's time worked and would unlawfully round/shave Plaintiff's
15 work time such that Plaintiff would not be fully paid for all time worked. *Id.* This time-shaving and/or
16 rounding practice utilized by Defendants was not even-handed over time and would almost exclusively
17 round and shave in Defendants' favor such that Plaintiff was routinely underpaid for all his time
18 worked. *Id.* Based a review of the time punch data and payroll records, Plaintiff's retained expert, who
19 holds a Ph.D. in economics, calculated Defendants' maximum exposure at approximately \$11,065.00.

20 Defendants contend that they compensated non-exempt employees for all of their time worked
21 and that the time punch data would necessarily include minutes that were not compensable work time
22 because the employee would not start performing any work prior to the start of the shift and/or would
23 not perform any work after the scheduled stop time. Nguyen Decl., ¶ 17. Defendants also contend that
24 they only rounded during a portion of the relevant time period and their rounding practices were lawful,
25 Defendants further contend any unpaid time was *de minimis* and therefore non-compensable. *Id.*
26 Defendants further assert that Plaintiff would be unable to certify a rounding or off-the-clock claim
27 given the individualized inquiries that would be required, given that Defendants rounding mechanism
28 was, according to Defendants, allegedly favored the employees. Based on these risks, Plaintiff

discounted the maximum exposure by 5% for the risk of non-certification, and an additional 5% to account for Defendants' defenses on the merits to arrive at an estimated exposure of \$9,986.16. *Id.*

Meal Period Violations: Plaintiff alleges that he and Settlement Class Members were not provided with all legally-required off-duty meal periods beginning before the end of the fifth hour of work. Nguyen Decl., ¶ 18. Specifically, Plaintiff contends that due to his job duties, he was often prevented from taking meal periods that commenced before the end of the fifth hour of work and/or a meal period altogether. *Id.* Therefore, Plaintiff calculated Defendants' maximum exposure for the alleged meal period violations at approximately \$181,722.50 (38,437 shifts over 6.0 hours x 22% [violation rate] x \$21.49 [average hourly rate]). *Id.*

Defendants counter that they have always provided non-exempt employees with an opportunity to take legally compliant meal periods, and any non-compliant meal periods reflected in employee timekeeping records were solely the result of employee choice, rather than any policy or practice of Defendants. Nguyen Decl., ¶ 19. Furthermore, Defendants counter that the time records reflect compliant meal periods. Defendants point out that under *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, it is only required to "provide" the opportunity to take meal periods, not "ensure" meal periods are taken, and that they have always done so. *Brinker, supra*, 53 Cal.4th at 1038 (rejecting "ensure" standard). Finally, Defendants contend Plaintiff's meal period claim is not suited for class certification, since individual inquiries would be required to assess which employees took non-compliant meal periods, how many meal periods were non-compliant or missed, and the reasons why a particular employee took a non-compliant meal period or missed a meal period during a particular shift. *Id.* Accordingly, Plaintiff discounted the maximum exposure by 10% for the risk of non-certification, and an additional 5% to account for Defendants' defenses on the merits to arrive at an estimated exposure of \$155,372.74. *Id.*

Rest Period Violations: Plaintiff alleges that he and other Settlement Class Members were not authorized and permitted to take all required rest periods due to Defendants' rest period policies/practices which fail to authorize and permit all rest periods for every four hours worked, or *major fraction thereof*. Nguyen Decl., ¶ 20. Specifically, during the shifts when Plaintiff worked alone, Defendants' policy and practice prohibited him from taking any rest periods. Accordingly,

1 Plaintiff calculated Defendants' maximum exposure at \$1,024,235 (47,661 shifts over 3.5 hours x
2 \$21.49 [average hourly rate]). *Id.*

3 Defendants contend they have always maintained and enforced lawful rest period policies and
4 practices, and that Settlement Class Members were authorized and permitted to take all off-duty rest
5 periods in compliance with California law. Nguyen Decl., ¶ 21. Defendants argue that their policy and
6 practices was to schedule two to three employees to work in any given shift. Therefore, Defendants
7 argue Plaintiff's rest period theory of liability is inherently unsuited for class treatment because it was
8 uncommon for the proposed Settlement Class Members to solely work alone during their shift. In
9 addition, Defendants argue this claim is inherently unsuited for class treatment as it requires an
10 individualized inquiry into whether each Settlement Class member was in fact authorized and permitted
11 to take a compliant rest period, which would devolve into an unmanageable series of mini-trials. *Id.*
12 Accordingly, Plaintiff discounted the maximum exposure by 20% for the risk of non-certification, and
13 an additional 15% to account for Defendants' defenses on the merits to arrive at an estimated exposure
14 of \$696,479.80. *Id.*

15 Wage Statement Violations: Plaintiff further alleges that Defendants issued inaccurate wage
16 statements in violation of Labor Code § 226 as a result of the alleged unpaid wages and meal and rest
17 period premium wages described above. Nguyen Decl., ¶ 22. Specifically, Plaintiff contends that this
18 conduct violated Labor Code § 226(a) because the wage statements issued to Settlement Class Members
19 did not include all hours worked and the rate at which they were being paid. *Id.* In addition, Plaintiff
20 alleges that Defendants' wage statements were also deficient during the pay periods Defendants paid
21 Plaintiff and other Settlement Class Members a non-discretionary bonus based on the employee's sales
22 for the month. Specifically, when Defendants paid Plaintiff wages identified as "CO LOOKBACK"
23 and/or "Smile Shop BON", Defendants failed to list the pay rate and hours on Plaintiff's wage
24 statements. *Id.* Therefore, Plaintiff calculated Defendants' maximum exposure for wage statement
25 violations at approximately \$200,150 ((\$50.00 * 23 current employees) + (\$100.00 x 1,990 subsequent
26 wage statements)). *Id.*

27 Defendants argue that meal and rest period claims cannot support a claim for wage statement
28 penalties after *Naranjo v. Spectrum Security Services, Inc.* (2019) 40 Cal. App. 5th 444 and *Kirby v.*

1 *Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244 (see, e.g., *Jones v. Spherion Staffing*, No. LA-CV-
2 11-06462-JAK(JCx) (C.D. Cal. 2012) 2012 WL 3264081 at **8-9). Nguyen Decl., ¶ 23. Defendants
3 further argue that their alleged wage statement violations could not be shown to be “knowing and
4 intentional,” and that Plaintiff cannot show that he or any other employee “suffer[ed] injury” as a result
5 of the alleged wage statement violations, as required by Lab. Code § 226(e) for imposition of penalties.
6 Nguyen Decl., ¶ 23. As such, Plaintiff discounted the calculated exposure by 10% for a risk of non-
7 certification and an additional 10% for a risk of being unsuccessful on the merits to arrive at an estimated
8 total of \$162,121.50. *Id.*

9 Waiting Time Penalties: Plaintiff alleges that Defendants are also liable for waiting time penalties
10 under Labor Code section 203 as a result of its failure to pay all wages. Nguyen Decl., ¶ 24. Plaintiff
11 alleges that upon his separation of employment, Defendants paid Plaintiff’s wages on an ATM card
12 without his voluntary authorization (which is a form that was not negotiable and payable, on demand,
13 without discount, at an established business in the state of California). Based on the data provided by
14 Defendants, there were approximately 202 Settlement Class Members who have separated their
15 employment with Defendants during the relevant time period who could be entitled to waiting time
16 penalties. *Id.* Therefore, Plaintiff calculated Defendants’ maximum exposure for waiting time penalties
17 at approximately \$1,041,835 (202 former employees x \$21.49 [average regular rate] x 30 days x 8
18 hours/day). *Id.*

19 Defendants assert they have strong defenses to the waiting time claim because there exist good-
20 faith disputes as to Plaintiff’s underlying claims, precluding imposition of penalties. Nguyen Decl., ¶
21 25. See also 8 Cal. Code Regs. § 13520 (a “good faith dispute that any wages are due will preclude
22 imposition of waiting time penalties”); *Kao v. Joy Holiday*, 12 Cal.App.5th 947, 963 (2017) (holding
23 that “good faith dispute” over whether employee was exempt precluded imposition of waiting time
24 penalties over contested wages owed). *Id.* Accordingly, Plaintiff discounted the maximum exposure by
25 20% for the risk of non-certification, and an additional 15% to account for Defendants’ defenses on the
26 merits to arrive at an estimated exposure of approximately \$708,447.80. *Id.*

27 PAGA Civil Penalties: Plaintiff also seeks civil penalties under the PAGA as a result of the
28 foregoing alleged Labor Code violations. Nguyen Decl., ¶ 26. Plaintiff calculated Defendants’ exposure

1 at \$201,300.00 (2,013 pay periods x \$100 initial violation rate). *Id.*; see *Amaral v. Cintas Corp. No. 2*
2 (2008) 163 Cal.App.4th 1157, 1207 (finding “initial” violation rate applies until employer is notified
3 that it is violating a Labor Code provision).

4 Defendants argue that Plaintiff’s PAGA claim will fail for the same reasons that his underlying
5 claims will fail. Nguyen Decl., ¶ 27; see *Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136, 1147
6 (“Because the underlying causes of action fail, the derivative UCL and PAGA claims also fail.”).
7 Defendants also maintain that, given their good faith defenses, this Court would exercise its discretion
8 to substantially reduce any PAGA penalties if it were to find Defendants liable for any of Plaintiff’s
9 claims. Nguyen Decl., ¶ 27; see Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Mgmt., Inc.*
10 (2012) 203 Cal.App.4th 1112, 1135 (affirming reduction of PAGA penalties); *Fleming v. Covidien Inc.*
11 (C.D. Cal. 2011) Case No. ED CV10-01487 RGK (OPx), 2011 WL 7563047, at *4 (reducing PAGA
12 penalties from \$2.8 million to \$500,000). *Id.* Therefore, Plaintiff discounted the maximum exposure
13 figure by 10% for a risk of being unsuccessful on the merits, and an additional 10% to account for the
14 possibility of this Court reducing penalties, to arrive at an estimated exposure of \$163,053.00. *Id.*

15 **g. The Settlement Is Within the Range of Possible Approval**

16 Using these estimated figures for each of the claims described above, Plaintiff predicted the
17 realistic total recovery for the Settlement Class would be approximately \$1,895,461. Nguyen Decl., ¶
18 28. The proposed settlement of \$650,000.00 therefore represents approximately 34% of the reasonably
19 forecasted recovery for the Settlement Class. *Id.* Preliminary approval is appropriate as the settlement
20 will provide tangible monetary relief to Settlement Class Members, and will still provide an average
21 recovery to Settlement Class Members of over \$1,300.

22 The proposed settlement reflects approximately 34% of the estimated recovery the Settlement
23 Class could reasonably expect in light of the significant litigation risks, and will provide tangible
24 monetary compensation for hotly disputed claims. Indeed, the percentage of the liability exposure
25 recovered in this case exceeds percentages routinely approved by courts. See, e.g., *Glass v. UBS Finan.*
26 *Servs.* (N.D. Cal. 2007) Case No. C-06-4068 MMC, 2007 WL 221862, *4 (approving settlement
27 representing 25% to 35% of potential damages); *Dunleavy v. Nadler* (9th Cir. 2000) 213 F.3d 454, 459
28 (approving settlement representing about one-sixth of potential recovery); *Nat’l Rural Telecomm.*

1 *Coop. v. DirecTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 527 (“it is well-settled law that a proposed
2 settlement may be acceptable even though it amounts to only a fraction of the potential recovery that
3 might be available to the Settlement Class members at trial”). Thus, Plaintiff submits that the proposed
4 settlement is within the range of possible approval, such that notice should be provided to the
5 Settlement Class so that they can consider the Settlement. The Court will have the opportunity to again
6 assess the reasonableness of the Settlement after the Settlement Class has had the opportunity to opt-
7 out or object.

8 **h. The Experience and Views of Counsel**

9 “Parties represented by competent counsel are better positioned than courts to produce a
10 settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pacific Enterprises*
11 *Securities Litigation* (9th Cir. 1995) 47 F.3d 373, 378. Here, Plaintiff is represented by competent,
12 experienced counsel who possess extensive experience prosecuting and defending wage-and-hour class
13 actions, and who have been appointed as class counsel in numerous cases alleging similar claims. *See*
14 *Lidman Decl.*, ¶¶ 2-8; *Nguyen Decl.*, ¶¶ 2-8; *Haines Decl.*, ¶¶ 2-8. Class Counsel conducted an in-
15 depth review of Defendants’ policies and timekeeping and payroll records, with the assistance of a
16 retained expert with a Ph.D. in economics, and drew on their extensive experience in similar cases to
17 assess the strengths and weaknesses of Plaintiff’s case. *See Nguyen Decl.*, ¶¶ 10-26. The Settlement
18 was also reached with the assistance of an experienced and respected wage and hour class action
19 mediator. *Id.* This factor strongly supports preliminary approval of the Settlement. *See Kullar, supra*,
20 168 Cal.App.4th at 130.

21 **i. Attorneys’ Fees and Costs**

22 California courts recognize an appropriate method for awarding attorneys’ fees in class actions
23 is to award a percentage of the “common fund” created as a result of a settlement. *See e.g., Laffitte v.*
24 *Robert Half Int’l, Inc.* (2016) 1 Cal.5th 480, 506 (holding “the percentage of fund method survives in
25 California class action cases”). Class Counsel’s request for fees of one-third of the GSA is well within
26 the range of reasonableness, and indeed is considered the typical rate for common fund settlements.
27 Historically, courts have awarded percentage fees in the range of 20% to 50%, depending on the
28 circumstances of the case. *See 4 Newberg on Class Actions* § 14.6 (4th Ed. 2013).

1 Here, Class Counsel will also apply for an attorneys' fees award of one-third of the GSA, which
2 is currently estimated to be \$216,666.66, and up to \$35,000.00 in verified costs reimbursement. *See*
3 Settlement, ¶ 8; Nguyen Decl., ¶ 29. Plaintiff submits the requested fee is fair compensation for
4 undertaking complex, risky, expensive, and time-consuming litigation on a purely contingent fee basis.
5 *Id.* Further, Plaintiff has provided written approval of the split of attorneys' fees in this action. Nguyen
6 Decl., ¶ 29. Class Counsel has incurred substantial attorney fees conducting pre-filing investigation,
7 analyzing Plaintiff's claims, conducting legal research, reviewing Defendants' documents and policies,
8 analyzing Settlement Class Members' timekeeping data and payroll records, preparing for and attending
9 mediation, negotiating and revising the long-form Settlement, preparing this Motion, and otherwise
10 litigating the case. *Id.* Class Counsel expect to expend additional attorney time in attending the hearing
11 on this Motion, overseeing the Notice process and fielding questions from Settlement Class Members,
12 preparing the final approval papers and attending the Final Approval hearing. *Id.*

13 Class Counsel submits that the request for attorneys' fees is reasonable when viewed as an
14 overall percentage of the settlement in light of the substantial risks, significant work undertaken, the
15 extremely positive results obtained for the class, and the efficiency with which the Parties conducted
16 the litigation. Should the Court grant preliminary approval, Class Counsel will seek an award of
17 attorneys' fees and verified litigation costs at the time of seeking final approval of the Settlement, which
18 will include a lodestar analysis.

19 **j. Administration Costs**

20 Phoenix Settlement Administrator's fees and expenses are estimated not to exceed \$7,250.00.
21 *See* Declaration of Jodey Lawrence in support of Plaintiff's Motion for Preliminary Approval filed
22 concurrently herewith ("Lawrence Decl."). This request is reasonable in light of the proposed class size
23 of approximately 277 Settlement Class Members and the costs and expenses associated with
24 administering the notices and distributing the awards.

25 **k. Class Representative Service Award**

26 "[I]ncentive awards are fairly typical in class action cases . . . and are intended to compensate
27 class representatives for work done on behalf of the class [and] to make up for financial or reputational
28

1 risk undertaken in bringing the action.” *In re Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th
2 1380, 1393-94.

3 Here, as part of the Settlement, Plaintiff will separately apply for a service award at the time of
4 seeking final approval of the proposed class action settlement in the amount of \$5,000.00 for his
5 services to the Settlement Class. Nguyen Decl., ¶ 31, Exh. 1 (Settlement, ¶ 6); Calderon Decl., ¶¶ 3-
6 13. As will be fully briefed at the time of final approval, Plaintiff’s requested service award is intended
7 to recognize the time and effort Plaintiff expended on behalf of the Settlement Class, including
8 providing substantial factual information and documents to Class Counsel, attending multiple meetings
9 with Class Counsel to discuss the claims and theories at issue in the litigation, as well as the significant
10 risks Plaintiff undertook by agreeing to serve as the named plaintiff in this case, and the fact that
11 Plaintiff has agreed to a general release of all claims subject to a waiver of Civil Code § 1542. *See*
12 Nguyen Decl., ¶ 31; Calderon Decl., ¶¶ 3-11; Settlement ¶ 4.

13 **I. PAGA Civil Penalties**

14 The parties have agreed to a PAGA award of \$30,000.00 and in accordance with California
15 Labor Code section 2699(i), the LWDA will receive 75% of the amount attributable to PAGA penalties
16 – or \$22,500.00. Settlement ¶ 6. This \$22,500.00 represents roughly 3.5% of the \$650,000.00 Gross
17 Settlement Amount and is in line with the zero to two percent range for PAGA claims approved by
18 Courts. *See, e.g., In re M.L. Stern Overtime Litig.*, No. CV 07-0118 BTM (JMAx), 2009 WL 995864,
19 at *1 (S.D. Cal. Apr. 13, 2009) (approving PAGA settlement of 2 percent, or
20 \$20,000); *Hopson v. Hanesbrands, Inc.*, No. CV 08-0844 EDL, 2008 WL 3385452, at *1 (S.D. Cal.
21 Apr. 13, 2009) (approving a PAGA settlement of 0.3 percent, or \$1,500); *Nordstrom*
22 *Comm’n Cases*, 186 Cal. App. 4th 576, 589 (2010) (approving settlement of wage and hour class action
23 claims and PAGA claims under which no money was allocated to the PAGA claims).

24 **m. Payroll Taxes**

25 The Settlement provides that the employer’s share of payroll taxes shall be paid separately from,
26 and in addition to, the Gross Settlement Amount. Settlement ¶ 6.E.

27 **n. Uncashed Funds**

28 The Settlement provides that Settlement Class Members with 180 days from the date the

1 Settlement Administrator mails the checks and any funds remaining after 180 days escheat to the
2 California Secretary of State-Unclaimed Property Fund under the unclaimed property laws in the name
3 of the Settlement Class member. Settlement ¶ 7.E. As all settlement funds will be distributed to the
4 Settlement Class Members, there will be no residue and it is unnecessary to designate *cy pres* recipients.

5 **C. SETTLEMENT IS DEVOID OF OBVIOUS DEFICIENCIES**

6 Preliminary approval of the Settlement is also warranted because there are no obvious
7 deficiencies. The Settlement will provide monetary relief to participating Settlement Class Members.
8 The amounts proposed for Class Counsel’s attorneys’ fees and costs, and service award are all
9 reasonable and appropriate based on the facts of this case. Because the Settlement is devoid of obvious
10 deficiencies, this factor supports preliminary approval.

11 **D. THE COURT SHOULD ORDER DISTRIBUTION OF THE PROPOSED**
12 **NOTICE TO SETTLEMENT CLASS MEMBERS**

13 Before the final approval hearing, the Court requires adequate notice of the settlement be given
14 to all class members. This Court should order distribution to the Settlement Class of the proposed
15 Notice Packet (which is comprised of the Notice of Pendency of Class Action and Proposed Settlement
16 and Notice of Individual Settlement Award) by first-class regular U.S. Mail, postage prepaid, using
17 last known mailing address information provided by Defendants. *See* Settlement, ¶ 12, Exh. B. The
18 Notice Packet will be mailed in English only. Defendants employed Plaintiff and the Settlement Class
19 in a retail setting that required the Settlement Class to be able to read and write in English. Specifically,
20 Plaintiff and the Settlement Class were required to perform various job duties in English, including
21 without limitation, explaining the products and guiding customers through timelines and payment
22 plans, counting and recording inventory, and completing paperwork and forms in English related to
23 Defendants’ customers, dental care, orders, payment plans, and/or insurance. As such, the Parties
24 believe that Defendants’ workforce possesses sufficient English language skills and that it is
25 unnecessary to mail the proposed Notice Packets in any other languages.

26 This manner of giving notice is the “best notice practicable” under the circumstances because
27 it provides “individual notice to all members who can be identified through reasonable effort.” *See*
28 *Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156, 173. Here, Plaintiff proposes that the Settlement

1 be administered by Phoenix, an experienced class action settlement administrator. *See generally*
2 Lawrence Decl. and attached exhibits. Class Data will be ascertainable through Defendants' personnel
3 and payroll records, which Defendants will provide to Phoenix within twenty (20) calendar days of
4 preliminary approval of the Settlement. *See* Settlement ¶ 12.A. Within ten (10) business days of receipt
5 of the Settlement Class Members' addresses, Phoenix will run the names of all Settlement Class
6 Members through the United States Postal Service Notice of Change of Address database (which
7 provides updated addresses for any individual who has moved in the previous four years and has
8 notified the U.S. Postal Service of a forwarding address), calculate the estimated Settlement Award for
9 each Settlement Class member, and mail the notices to Settlement Class Members. *See* Settlement ¶
10 12.B. To the extent that any notices are returned, Phoenix will perform a "skip trace" to track any
11 Class Member's current mailing address. *See* Settlement ¶ 12.G.

12 The content of the proposed Notice Packet satisfies California Rule of Court 3.766(d) because
13 it advises Settlement Class Members of the nature of the claims, basic contentions and denials of the
14 parties, and the key terms of the Settlement, the 60-day deadline to opt-out or object to the Settlement
15 and the procedures by which to do so, explains the recovery formula and expected recovery amount
16 for each Settlement Class member, provides them the opportunity to contest their total workweeks
17 included in the notice, and advises them that they will be bound by the terms of the Settlement if they
18 do not opt-out. *See* Nguyen Decl., Exh. 1 (Settlement, Exh. B). The proposed Notice Packet will also
19 notify Settlement Class Members of the final approval hearing date and provides Settlement Class
20 Members the contact information for Class Counsel, and advises Settlement Class Members that they
21 may enter an appearance through counsel if they wish to. Additionally, as stated in the proposed Notice
22 Packet, any changes to the Final Approval hearing date or location will be posted on the Settlement
23 Administrator's website at <http://www.phoenixclassaction.com/class-action-lawsuits/judgments/>. *Id.*
24 Furthermore, the Settlement Administrator will mail the notice of final judgment to the Settlement
25 Class Members. *Id.* This manner of giving notice satisfies California Rule of Court 3.766(e) as the
26 most reliable and cost-effective method of reaching Settlement Class Members.

27 **E. THE COURT SHOULD SET A FINAL APPROVAL HEARING**

28 Finally, this Court should set a hearing for final approval of the Settlement on a date

1 appropriately scheduled to follow the deadline by which Settlement Class Members must file
2 objections to the Settlement or opt-out. *See* California Rule of Court 3.769.

3 **IV. CONCLUSION**

4 For the foregoing reasons, Plaintiff respectfully requests that the Court preliminarily approve
5 the proposed Settlement, provisionally certify the Settlement Class, and enter the Proposed Order
6 Granting Preliminary Approval of Class Action Settlement submitted concurrently herewith.

7
8 Dated: March 2, 2021

Respectfully submitted,
LIDMAN LAW, APC

9
10 By:



Elizabeth Nguyen
Scott M. Lidman
Attorneys for Plaintiff
FRANCISCO CALDERON