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Attorneys for Plaintiff

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE**

MANUEL CHAVEZ, as an individual and on
behalf of all others similarly situated,

Plaintiff,

vs.

TROPICAL PLAZA NURSERY, INC., a
California Corporation; and DOES 1 through
100,

Defendants.

Case No. 30-2020-01122820-CU-OE-CXC

*[Assigned for all purposes to Hon. Peter
Wilson; Dept. CX-102]*

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Date: April 1, 2021

Time: 2:00 p.m.

Dept: CX-102

Complaint filed: January 9, 2020

Trial Date: None Set

1 PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court,
2 on April 1, 2021 at 2:00 p.m. in Department CX-102 of the above-entitled Court, located at 751
3 West Santa Ana Blvd., Santa Ana, California 92701, Plaintiff Manuel Chavez ("Plaintiff")
4 individually and on behalf of a class of similarly situated individuals, will and hereby does move
5 this Court for:

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

9 All current and former non-exempt employees who are or were
10 employed by Tropical Plaza Nursery, Inc. in the position of field
11 worker in the State of California during the time period of January
12 9, 2016 through the date of preliminary approval of the settlement
13 ("Class Period").

- 13 3. Preliminary appointment of Plaintiff Manuel Chavez as Class Representative;
- 14 4. Preliminary appointment of Paul K. Haines and Sean M. Blakely of Haines Law
15 Group, APC as Class Counsel;
- 16 5. The scheduling of a hearing to consider whether the Settlement should be finally
17 approved and to permit an enhancement payment to Plaintiff, civil penalties payable
18 to the Labor & Workforce Development Agency, Settlement Administrator costs, and
19 attorneys' fees and costs to Class Counsel;
- 20 6. Appointment of Phoenix Settlement Administrators as the third-party Settlement
21 Administrator for mailing notices; and
- 22 7. Approval of the proposed Class Notice and an order that it be disseminated to the
23 proposed Settlement Class as provided in the Settlement Agreement.

24 This Motion is based on this Notice of Motion, the attached Memorandum of Points and
25 Authorities, the declarations of Paul K. Haines, Sean M. Blakely, Plaintiff Manuel Chavez, and
26 Jodey Lawrence of Phoenix Settlement Administrators, and the exhibits attached thereto, the
27 Settlement Agreement, the pleadings and other papers filed in this action, and on any further oral
28 or documentary evidence or argument presented at the time of hearing.

1 Given the multiplicity of issues addressed herein, Plaintiff's memorandum of points and
2 authorities necessitates exceeding the 20-page limit set forth in the California Rules of Court
3 3.764(c)(2). As this Motion is unopposed, Plaintiff respectfully requests that the Court consider
4 the entire Motion, which is 24 pages in length.

5
6
7 Dated: March 4, 2021

Respectfully submitted,
HAINES LAW GROUP, APC

8
9 By: 
10 Paul K. Haines
11 Sean M. Blakely
12 Attorneys for Plaintiff
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Manual Chavez (“Plaintiff”) is pursuing this putative class and representative
4 action on behalf of current and former non-exempt employees of Defendant Tropical Plaza
5 Nursery, Inc. (“Tropical Plaza”) in the position of field worker in California during the time
6 period of January 9, 2016 through the date of preliminary approval of the settlement (“Class
7 Period”). Plaintiff’s primary allegations are that: (1) Tropical Plaza failed to pay all wages as a
8 result of its unlawful timekeeping policies/practices; (2) Tropical Plaza failed to pay all overtime
9 wages to its non-exempt employees as a result of its policy/practice of only paying overtime
10 wages for work performed in excess of forty (40) hours in a workweek, and not paying daily
11 overtime wages for work performed in excess of eight (8) hours per workday; (3) Tropical Plaza
12 failed to provide legally-compliant meal periods as a result of its unlawful meal period
13 policies/practices; and (4) Tropical Plaza failed to authorize and permit all legally-compliant rest
14 periods. Based on these alleged violations, Plaintiff also alleges that Tropical Plaza failed to pay
15 all wages due upon separation of employment, failed to issue accurate and complete itemized
16 wage statements, and is liable for civil penalties under the Private Attorneys General Act of 2004
17 (“PAGA”).¹

18 Plaintiff now respectfully requests that this Court preliminarily approve this non-
19 reversionary, common-fund class action settlement,² in which Tropical Plaza has agreed to pay
20 Four Hundred Thousand Dollars and Zero Cents (\$400,000.00) to the following Settlement Class:
21
22

23 ¹ Plaintiff’s operative First Amended Class and Representative Action Complaint alleges the
24 following causes of action: (1) Failure to Pay All Overtime Wages; (2) Minimum Wage
25 Violations; (3) Rest Period Violations; (4) Meal Period Violations; (5) Wage Statement
26 Violations; (6) Waiting Time Penalties; (7) Unfair Competition; and (8) Civil Penalties Under the
PAGA.

27 ² The Stipulation of Settlement (“Settlement”) is attached to the Declaration of Sean M. Blakely
28 as Exhibit A. The proposed Class Notice, Notice of Estimated Settlement Award, and Request
for Exclusion Form are attached to the Settlement as Exhibits 1, 2, and 3, respectively. All defined
terms in this motion have the same definition as that in the Settlement.

1 All current and former non-exempt employees who are or were
2 employed by Tropical Plaza Nursery, Inc. in the position of field
3 worker in the State of California during the time period of January
4 9, 2016 through the date of preliminary approval of the settlement
5 (“Class Period”).

6 The Settlement was only reached after the parties mediated this action with the Hon. Peter
7 D. Lichtman (Ret.), a preeminent wage and hour class action mediator. In connection with
8 mediation, Tropical Plaza produced a 20% random sampling of timekeeping and corresponding
9 payroll records for Settlement Class members, as well as applicable documents regarding Tropical
10 Plaza’s wage and hour policies, and other information. After extensive research and analysis,
11 including a detailed analysis of Tropical Plaza’s potential exposure for each of Plaintiff’s claims,
12 a full-day mediation was held on October 21, 2020, where the parties reached a class-wide
13 resolution of all claims alleged in Plaintiff’s First Amended Class and Representative Action
14 Complaint.

15 If the Settlement is approved, Tropical Plaza will pay a non-reversionary Gross Settlement
16 Amount (“GSA”) of \$400,000.00. After deducting settlement administration costs, Plaintiff’s
17 requested enhancement payment, payment of PAGA penalties to the Labor & Workforce
18 Development Agency (“LWDA”), and requested attorneys’ fees and costs, the remaining “Net
19 Settlement Amount” (“NSA”) will be distributed to all Settlement Class members who do not opt
20 out of the Settlement based on the proportionate number of workweeks worked during the Class
21 Period. Former employees with standing for waiting time penalties, and employees with standing
22 for wage statement and PAGA penalties (subject to a one-year statute of limitations) will also
23 receive additional consideration for their release of these penalty claims.

24 Significantly, Settlement Class members do not need to file a claim to reap the financial
25 benefits of the Settlement, as all Settlement Class members will automatically receive a payment
26 unless they affirmatively opt-out. There are approximately 190 Settlement Class members, and
27 the average payment to participating Settlement Class members is projected to be approximately
28 \$1,140.35. This is a very favorable result for Settlement Class members, who will be agreeing to
a release of only those claims that were asserted in this litigation, especially in light of the

1 significant litigation risks Plaintiff faced.

2 The proposed Settlement is within the range of possible approval in light of the significant
3 legal and factual obstacles that Plaintiff faced, the risks and costs of further litigation, and the
4 tangible monetary benefits to be received by Plaintiff and the Settlement Class. For the reasons
5 discussed herein, Plaintiff respectfully requests that this Court grant preliminary approval of the
6 Settlement.

7 **II. SUMMARY OF THE LITIGATION**

8 **A. THE PARTIES AND BRIEF PROCEDURAL HISTORY**

9 Tropical Plaza provides landscape and hardscape services, irrigation design and
10 implementation, and other outdoor maintenance services to municipalities, residences and
11 commercial buildings. *See* Declaration of Sean M. Blakely (“Blakely Decl.”), ¶ 8. Plaintiff
12 worked as a non-exempt field worker or landscaper from approximately September 2017 through
13 approximately October 2019, and was subject to Tropical Plaza’s wage and hour policies. *See*
14 Declaration of Manuel Chavez (“Chavez Decl.”), ¶ 2.

15 On January 9, 2020, Plaintiff filed a class action complaint against Tropical Plaza in
16 Orange County Superior Court alleging the following causes of action: (1) Failure to Pay All
17 Overtime Wages; (2) Minimum Wage Violations; (3) Rest Period Violations; (4) Meal Period
18 Violations; (5) Wage Statement Violations; (6) Waiting Time Penalties; and (7) Unfair
19 Competition. On May 26, 2020, Plaintiff filed the operative First Amended Class and
20 Representative Action Complaint to add a cause of action for civil penalties under the PAGA.

21 **B. PLAINTIFF’S CLAIMS AND TROPICAL PLAZA’S DEFENSES**

22 **1. Unpaid Wages Due to Tropical Plaza’s Timekeeping Policies/Practices**

23 Plaintiff alleges that Tropical Plaza had a policy/practice of rounding timekeeping entries,
24 however, its timekeeping policy/practice was not neutral or even-handed, resulting in unpaid
25 wages to Settlement Class members. Blakely Decl., ¶ 14. Specifically, Plaintiff alleges that
26 Tropical Plaza had a policy/practice whereby Settlement Class members are allowed to clock in
27 for their shifts before their scheduled start time, however, Tropical Plaza does not compensate for
28 this time and rounds the clock-in time up to the scheduled start time of the work shifts. *Id.*

1 Similarly, Plaintiff alleges that Settlement Class members regularly worked past the scheduled
2 end time of their shifts, however, Tropical Plaza only compensated Settlement Class members
3 based on their scheduled end times, and did not compensate for hours worked after the scheduled
4 end of shift. *Id.* Plaintiff alleges that Tropical Plaza's uneven timekeeping policies/practices
5 resulted in a systematic underpayment of wages to Settlement Class members. *See e.g., See's*
6 *Candy Shops, Inc. v. Superior Court*, 210 Cal.App.4th 889, 901-902 (2012) ("an employer's
7 rounding policy violates the DOL rounding regulation if it 'systematically undercompensate[s]
8 employees,' such as where the defendant's rounding policy 'encompasses only rounding down.'")
9 (citations omitted).

10 Tropical Plaza contends that it utilized an even-handed timekeeping system that, on
11 balance, resulted in employees being paid for all hours actually worked. Blakely Decl., ¶ 14; *see*
12 *See's Candy Shops, supra*, 210 Cal.App.4th at 901 (holding that rounding policies are lawful if
13 they are consistently applied, and on average, favor neither the overpayment or underpayment of
14 wages). Tropical Plaza further argues that it simply allowed Settlement Class members to clock-
15 in prior to their scheduled start of shift, however, it was not possible for Settlement Class members
16 to begin working prior to the scheduled start of shift, and therefore, Settlement Class members
17 could not perform compensable work prior to the start of their scheduled shift. Blakely Decl., ¶
18 14. Tropical Plaza further argues that any unpaid time could have only amounted to a few minutes
19 per day, at most, and was thus *de minimis* and not compensable. *Id.* Finally, Tropical Plaza asserts
20 Plaintiff would be unable to certify this claim given the individualized inquiry as to whether
21 Settlement Class members performed compensable work prior to or after their scheduled shift,
22 creating an unmanageable series of mini-trials which would preclude class certification. *Id.*

23 **2. Unpaid Overtime Wages**

24 Plaintiff alleges that Tropical Plaza failed to pay all overtime wages due to its regular rate
25 miscalculations and its failure to pay daily overtime wages in accordance with California law.
26 Blakely Decl., ¶¶ 15-16; *see* Labor Code § 510(a) and Wage Order 16, § 3(A)(1) (providing for
27 daily overtime). Specifically, Plaintiff alleges that Tropical Plaza only paid overtime wages for
28 work performed in excess of forty (40) hours per workweek and does not pay daily overtime for

1 work performed in excess of eight (8) hours per workday. Blakely Decl., ¶ 15. Additionally,
2 Plaintiff alleges that he and other Settlement Class members worked in excess of eight (8) hours
3 per workday and/or forty (40) hours per workweek, but were not compensated at one and one-
4 half times their regular rate of pay for such hours, as a result of Tropical Plaza’s failure to include
5 non-discretionary bonuses when calculating an employee’s regular rate of pay. Blakely Decl., ¶
6 16. As a result, Plaintiff alleges that he and other Settlement Class members were systematically
7 underpaid for their overtime hours worked, in violation of California law. *Id.*; *see, e.g.,*
8 *Huntington Memorial Hospital v. Superior Court*, 131 Cal.App.4th 893, 902-903 (2005)
9 (discussing regular rate calculation requirements).

10 Tropical Plaza argues that it paid all overtime wages owed to Settlement Class members
11 and has at all times complied with California law regarding overtime compensation. Blakely
12 Decl., ¶¶ 15-16. Tropical Plaza further argues that Settlement Class members rarely worked in
13 excess of eight (8) hours in a workday, and therefore, any alleged unpaid overtime was minimal.
14 *Id.*, at ¶ 15. With respect to Plaintiff’s regular rate claims, Tropical Plaza asserts that it did not
15 use a formula or any set of criteria to determine which employees receive the alleged bonus
16 payment. Blakely Decl., ¶ 16. Tropical Plaza contends that at all relevant times the bonuses it
17 paid to its non-exempt employees were discretionary. *Id.*; *see* DLSE Manual § 49.1.2.4(3)
18 (bonuses are discretionary, and therefore excludable, if “both the fact that payment is to be made
19 and the amount of the payment are determined at the sole discretion of the employer at or near
20 the end of the period and not pursuant to any prior contract, agreement, or promise causing the
21 employee to expect such payments regularly”). Tropical Plaza argues that differences in the
22 frequency, type, and amount of bonuses and various forms of incentive pay received by
23 Settlement Class members would preclude class certification of this claim. Blakely Decl., ¶ 16.

24 **3. Meal Period Claims**

25 Plaintiff alleges that Tropical Plaza failed to provide legally-compliant meal periods, such
26 that first meal periods regularly commenced after the completion of the fifth hour of work due to
27 work demands imposed by Tropical Plaza, and often were not provided at all. Blakely Decl., ¶
28 17. Plaintiff also alleges that Tropical Plaza failed to accurately record the start and end times of

1 each meal period, and instead automatically deducted hours worked from Settlement Class
2 members for a purported meal period. *Id.* Plaintiff alleges this automatic deduction was done
3 regardless of whether an uninterrupted 30-minute meal period was actually provided. *Id.*

4 In response, Tropical Plaza argues that it maintained legally-compliant meal period
5 policies throughout the Class Period, and that under *Brinker* it is only required to “provide” the
6 opportunity to take meal periods, not “ensure” meal periods are taken. Blakely Decl., ¶ 17; *see*
7 *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004, 1038 (2012) (rejecting “ensure”
8 standard and holding employers only have to “provide” employees the opportunity to take meal
9 periods). Tropical Plaza also contends that any short, missed, or late meal periods were the result
10 of lawful employee waiver or choice, thereby precluding liability. Blakely Decl., ¶ 17. Lastly,
11 Tropical Plaza argues that individualized inquiries will be required to determine why each meal
12 period was taken late, short, missed, and whether there was a valid waiver, thereby making
13 certification of this claim unlikely. *Id.*

14 **4. Rest Period Claims**

15 Plaintiff alleges that Tropical Plaza failed to authorize and permit all off-duty rest periods
16 due to work demands imposed by Tropical Plaza. Blakely Decl., ¶ 18. Tropical Plaza contends its
17 written rest period policies are legally compliant, and that it has always authorized and permitted
18 employees at least 10-minute rest periods for each four (4) hours worked, or major fraction
19 thereof. *Id.* Any failure to take rest periods was a result of employee choice, Tropical Plaza
20 argues, rather than any Tropical Plaza policy or practice. *Id.* Tropical Plaza further argues that
21 Plaintiff’s rest period claim is not amenable to class treatment, since individual inquiries would
22 be required to determine which employees failed to take rest periods, how many rest periods they
23 failed to take, and the reasons why each employee failed to take rest period(s) on a particular shift.
24 *Id.* These manageability concerns are especially present with respect to rest periods, Tropical
25 Plaza argues, since rest periods are not recorded. *Id.*

26 **5. Derivative Waiting Time, Wage Statement, and PAGA Penalties**

27 As a result of the unpaid wages and meal and rest period premium wages described above,
28 Plaintiff alleges that Tropical Plaza failed to comply with its final pay obligations set forth in

1 Labor Code §§ 201-203, is liable for wage statement penalties pursuant to Labor Code § 226, and
2 is liable for civil penalties under the PAGA. Blakely Decl., ¶¶ 19-21. Tropical Plaza maintains
3 that it possesses strong, good faith defenses to Plaintiff’s underlying claims, thus precluding
4 recovery of waiting time penalties, which are only available for the “willful” failure to pay wages.
5 Blakely Decl., ¶ 19; *see also* 8 Cal. Code Regs. § 13520 (“[A] good faith dispute that any wages
6 are due will preclude imposition of waiting time penalties under Section 203 . . . A ‘good faith’
7 dispute that any wages are due occurs when an employer presents a defense, based in law or fact
8 which, if successful, would preclude any recovery on the part of the employee.”). Tropical Plaza
9 further argues that waiting time penalties are not recoverable at all for alleged meal and rest period
10 violations. Blakely Decl., ¶ 19.

11 With respect to Plaintiff’s wage statement claims, Tropical Plaza maintains that any
12 alleged wage statement violations were not “knowing and intentional,” and Plaintiff cannot show
13 he or other employees “suffer[ed] injury” due to the alleged wage statement violations, as required
14 by Labor Code Section 226(e) for the imposition of penalties. Blakely Decl., ¶ 20. Tropical Plaza
15 further argues wage statements always accurately reflected hours worked and amounts paid to
16 employees, and thus Tropical Plaza could not be found liable for wage statement penalties per
17 *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal.App.5th 1308, 1336-37 (2018) (agreeing with
18 employer’s “commonsense position that the pay stubs were accurate in that they correctly
19 reflected the hours worked and the pay received...The purpose of section 226 is to
20 *document the paid wages* to ensure the employee is fully informed regarding the calculation of
21 those wages.”) (italics in original; citation omitted). Blakely Decl., ¶ 20. Tropical Plaza further
22 argues that meal and rest period violations cannot serve as a basis for wage statement penalties.
23 *Id.*

24 Since Plaintiff’s PAGA claim is derivative of his underlying wage claims, Tropical Plaza
25 asserts the PAGA claim would fail with those claims. Blakely Decl., ¶ 21; *see Price v. Starbucks*
26 *Corp.* 192 Cal.App.4th 1136, 1147 (2011) (“Because the underlying causes of action fail, the
27 derivative UCL and PAGA claims also fail.”). Additionally, Tropical Plaza contends that, given
28 its good faith defenses, this Court would exercise its discretion to substantially reduce any PAGA

penalties if it were to find Tropical Plaza liable for any of Plaintiff's claims. Blakely Decl., ¶ 21; see Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Mgmt., Inc.* 203 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties); *Fleming v. Covidien Inc.*, Case No. ED CV10-01487 RGK (OPX), 2011 WL 7563047, at *4 (C.D. Cal. 2011) (reducing PAGA penalties from \$2.8 million to \$500,000).

C. DISCOVERY AND MEDIATION

In connection with mediation, Tropical Plaza produced timekeeping and payroll data for a 20% random sampling of Settlement Class members, along with Tropical Plaza's wage and hour policies and other information. Blakely Decl., ¶ 10. Tropical Plaza also produced a class list which included the total number of putative class members and hire and termination dates for all putative class members. *Id.* Plaintiff conducted a comprehensive analysis and extrapolation of the data produced by Tropical Plaza to calculate Tropical Plaza's potential exposure for each of Plaintiff's claims. *Id.* Plaintiff's counsel also interviewed putative class members regarding their work experiences at Tropical Plaza. *Id.* This discovery allowed the parties to assess the merits and value of Plaintiff's claims, the chances for class certification, and Tropical Plaza's potential defenses. *Id.*

On October 21, 2020, the parties participated in a full-day mediation with the Hon. Peter D. Lichtman (Ret.), a preeminent wage and hour class action mediator. Blakely Decl., ¶ 11. During mediation, the parties vigorously debated their opposing legal positions, the likelihood of certification of Plaintiff's claims, and the legal basis for the claims and defenses. *Id.* The parties reached a tentative class-wide settlement at the conclusion of mediation. *Id.* During the months that followed, the parties finalized the terms of the Settlement and executed the long-form Settlement Agreement now before this Court. *Id.*

III. THE PROPOSED SETTLEMENT

A. ESSENTIAL TERMS OF THE SETTLEMENT

If the Court preliminarily approves the Settlement, Tropical Plaza will pay a Gross Settlement Amount ("GSA") of \$400,000.00. See Settlement ¶ 3. Significantly, this Settlement is non-reversionary, and no Settlement Class member will have to submit a claim form to receive a

Settlement Award. *Id.*, at ¶¶ 3-4. Specifically, each Settlement Class member will automatically receive a Settlement Award unless he or she affirmatively opts out of the Settlement. *Id.*, at ¶¶ 3-4. The monetary terms of the Settlement are summarized below:

Gross Settlement Amount (“GSA”):	\$400,000.00
Minus Court-approved attorneys’ fees (1/3 of GSA):	\$133,333.33
Minus Court-approved, verified costs (up to):	\$20,000.00
Minus Court-approved Class Representative Enhancement Payment:	\$5,000.00
Minus Settlement Administrator costs:	\$10,000.00
Minus PAGA payment to the LWDA:	\$15,000.00
Net Settlement Amount (“NSA”):	\$216,666.67

1. The Settlement Provides for Reasonable Monetary Payments

After deducting amounts for the Court-approved attorneys’ fees and costs, the Class Representative Enhancement Payment to Plaintiff, LWDA payment, and settlement administration costs, the Settlement requires Tropical Plaza to pay a Net Settlement Amount (“NSA”) of at least \$216,666.67 to all Settlement Class members who do not timely opt out. *See* Settlement, ¶¶ 3-4. The NSA shall be distributed to all participating Settlement Class members as follows: Eighty-five percent (85%) of the NSA will be distributed to participating Settlement Class members based on the proportionate number of Workweeks each participating Settlement Class member worked during the Class Period. *Id.*, at ¶ 4(B)(i). Ten percent (10%) of the NSA shall be designated as the “Waiting Time Amount.” *Id.*, ¶ at 4(B)(ii). The “Waiting Time Amount” will be distributed in equal, pro-rata shares to each participating Settlement Class member who separated their employment with Tropical Plaza at any time between January 9, 2017 through the date of preliminary approval. *Id.* Five percent (5%) of the NSA shall be designated as the “Wage Statement Amount” and will be paid proportionally to each participating Settlement Class member based on the number of Workweeks he or she worked from January 9, 2019 through the date of preliminary approval. *Id.*, at ¶ 4(B)(iii). Finally, Five Thousand Dollars and Zero Cents (\$5,000.00) shall be designated as the “PAGA Amount” with each Settlement Class member who worked for Tropical Plaza at any time from January 9, 2019 through the date of preliminary

1 approval receiving a portion of this amount proportional to the number of Workweeks worked
2 during this period of time. *Id.*, at ¶ 4(B)(iv).

3 According to Tropical Plaza, there are approximately 190 total Settlement Class members.
4 Blakely Decl., ¶ 13. Therefore, the average individual Settlement Award is projected to be
5 approximately \$1,140.35. *Id.* Settlement Class members will have sixty (60) calendar days from
6 the mailing of the Notice Packet to opt-out or object to the Settlement, thereby providing ample
7 time to review the Notice without unduly delaying the Settlement. *See* Settlement, ¶¶ 9(C), (D).
8 Those Settlement Class members who do not opt-out of the Settlement will be bound by its terms
9 and will release all claims against Tropical Plaza included within the Settlement. *See Id.*, at ¶
10 2(A).

11 **2. Attorneys' Fees, Costs, Enhancement Payment, and PAGA Payment**

12 Plaintiff will apply for a Class Representative Enhancement Payment at the time of
13 seeking final approval of the proposed class action settlement in the amount of \$5,000.00 for his
14 services to the Settlement Class. *See* Settlement, ¶ 6. “[I]ncentive awards are fairly typical in class
15 action cases . . . and are intended to compensate class representatives for work done on behalf of
16 the class [and] to make up for financial or reputational risk undertaken in bringing the action.” *In*
17 *re Cellphone Fee Termination Cases*, 186 Cal.App.4th 1380, 1393-94 (2010). As will be fully
18 briefed at the time of final approval, Plaintiff’s requested enhancement payment is intended to
19 recognize the time and effort Plaintiff expended on behalf of the Settlement Class, including
20 providing substantial factual information and documents to Class Counsel, attending multiple
21 meetings with Class Counsel to discuss the claims and theories at issue in the litigation, actively
22 participating in the prosecution of his claims, as well as the significant risks Plaintiff undertook
23 by agreeing to serve as the named plaintiff in this case. *See* Chavez Decl. ¶¶ 3-4.

24 Class Counsel will also apply for an attorneys’ fees award of one-third of the GSA, which
25 is currently estimated to be \$133,333.33, and up to \$20,000.00 in verified costs reimbursement.
26 *See* Settlement, ¶ 5. Plaintiff submits the requested fee is fair compensation for undertaking
27 complex, risky, expensive, and time-consuming litigation on a purely contingent fee basis.
28 Blakely Decl., ¶ 23. Class Counsel has incurred substantial attorneys’ fees conducting pre-filing

1 investigation, analyzing Plaintiff's claims, conducting legal research, engaging in informal
2 discovery, working to develop a comprehensive damages model, preparing for and attending
3 mediation, negotiating and preparing the long-form Settlement, preparing this Motion, and
4 otherwise litigating the case. *Id.* Class Counsel expect to expend additional attorney time in
5 attending the hearing on this Motion, overseeing the Notice process and fielding questions from
6 Settlement Class members, preparing the final approval papers, and attending the Final Approval
7 hearing. *Id.*

8 California courts recognize an appropriate method for awarding attorneys' fees in class
9 actions is to award a percentage of the "common fund" created as a result of a settlement. *See*
10 *e.g., Laffitte v. Robert Half Int'l, Inc.*, 1 Cal.5th 480, 506 (2016) (holding "the percentage of fund
11 method survives in California class action cases"). Class Counsel's request for fees of one-third
12 of the GSA is well within the range of reasonableness, and indeed is considered the typical rate
13 for common fund settlements. Historically, courts have awarded percentage fees in the range of
14 20% to 50%, depending on the circumstances of the case. *See* 4 Newberg on Class Actions § 14.6
15 (4th Ed. 2013).

16 Class Counsel submit their request for attorneys' fees is reasonable when viewed as an
17 overall percentage of the Settlement and in light of the substantial risks and significant work
18 undertaken, the results obtained, and the efficiency with which the litigation has been conducted.
19 Should the Court grant preliminary approval, Class Counsel will seek an award of attorneys' fees
20 and verified litigation costs when seeking final approval.

21 Additionally, the parties have agreed to designate \$20,000.00 of the GSA as PAGA civil
22 penalties, of which \$15,000.00 (75%) will be paid to the LWDA, with the remaining \$5,000.00
23 (25%) for distribution to the Settlement Class, as the PAGA requires such penalties to be allocated
24 per Labor Code § 2699(i). *See* Settlement, ¶ 3(D)(5). Plaintiff submits this allocation to the
25 LWDA for PAGA civil penalties is appropriate. *See, e.g., Chu v. Wells Fargo Investments, LLC*,
26 Case No. C 05-4526 MHP, 2011 WL 672645 at *1 (N.D. Cal. 2011) (approving PAGA payment
27 of \$7,500 to LWDA out of \$6.9 million common-fund settlement); *Lazarin v. Pro Unlimited, Inc.*,
28 Case No. C11-03609 HRL, 2013 WL 3541217 (N.D. Cal. 2013) (approving PAGA payment of

1 \$7,500 to LWDA out of \$1.25 million common-fund settlement).

2 **IV. ARGUMENT**

3 **A. PRELIMINARY APPROVAL IS WARRANTED**

4 California Rule of Court 3.769 conditions settlement of a class action on court approval,
5 which is generally evaluated under the federal standards applicable under Rule 23 of the Federal
6 Rules of Civil Procedure. *See Reed v. United Teachers Los Angeles*, 208 Cal.App.4th 322, 337
7 (2012) (Rule 3.769 requires trial court to determine “that the settlement is fair, reasonable and
8 adequate to all concerned”); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (Rule
9 23(e) requires the trial court to determine “whether a proposed settlement is fundamentally fair,
10 adequate, and reasonable”). Settlement is the preferred means of dispute resolution, particularly
11 in complex class action litigation. *See In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir.
12 2008). The Court’s role in evaluating a proposed settlement is limited to ensuring that the
13 agreement taken as a whole is fair. *See e.g., Hanlon*, supra, 150 F.3d at 1027. There is an initial
14 presumption of fairness where, as here, the Settlement was negotiated at arm’s-length by Class
15 Counsel and with the assistance of an experienced wage and hour class action mediator. *See e.g.*
16 *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 130 (2008).

17 **1. Standard for Preliminary Approval**

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

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

28 Although Plaintiff steadfastly maintains that his claims are meritorious, Plaintiff

acknowledges that there were substantial risks and uncertainty in proceeding with litigation. As discussed above in section II.B, *supra*, Tropical Plaza presented multiple defenses to each of Plaintiff's claims, both on the merits and with respect to class certification. Thus, while Plaintiff was prepared to litigate these claims through class certification, and ultimately trial, success was far from certain.

b. Risk, Expense, Complexity, and Duration of Further Litigation

Although the parties engaged in significant informal discovery in advance of mediation, the parties still had significant discovery to complete in formal litigation had the matter not settled. Blakely Decl., ¶ 24. This would have required expenditure of substantial time and resources by both parties that would have very likely spanned several years. *Id.* Plaintiff also still had to file for class certification, and faced the prospect of appeals in the wake of a disputed class certification ruling and/or summary judgment ruling. *Id.* Even if Plaintiff obtained class certification, the parties would incur considerably more attorneys' fees and costs through a possible decertification motion, trial, and possible appeal. *Id.* This Settlement avoids those risks and the accompanying expense. *Id.*

c. Risk of Maintaining Class Action Status

Plaintiff has not yet filed his class certification motion, and as such, the extent to which Plaintiff's proposed classes were certifiable is somewhat speculative. Absent settlement, there was a risk that there would not be a certified class at trial, or if there were, it would consist of a significantly smaller group of employees than the proposed Settlement Class, and the expected recovery would be significantly reduced. Thus, this factor supports preliminary approval.

d. Amount Offered in Settlement Given Realistic Value of Claims

The Settlement provides a positive recovery for the Settlement Class in the face of disputed claims. Plaintiff conducted a detailed analysis of the underpaid wages due to Tropical Plaza's alleged unlawful timekeeping policies/practices, unpaid overtime wages, potential meal and rest period premiums owing, waiting time penalties, wage statement penalties, and PAGA civil penalties. The results of the damages analysis are discussed below:

Unpaid Wages Based on Unlawful Timekeeping Policies/Practices: \$66,453

1 Plaintiff contends that Tropical Plaza utilized an uneven rounding system that only
2 compensated Settlement Class members for their scheduled hours of work, as opposed to their
3 actual hours worked, which resulted in a systematic underpayment of wages to Settlement Class
4 members. Blakely Decl., ¶ 14. Plaintiff's analysis of the timekeeping and payroll data showed
5 that Settlement Class members were underpaid for approximately 10,973 hours in the aggregate
6 over the Class Period. *Id.* Settlement Class members' average hourly rate of pay during the Class
7 Period was approximately \$13.31. *Id.* Therefore, Plaintiff calculates Tropical Plaza's maximum
8 potential exposure for this claim to be \$146,050 (10,973 hours * \$13.31 average hourly rate). *Id.*

9 As noted above, Tropical Plaza maintains that its timekeeping policies are both facially
10 neutral and even-handed in practice, and over time, compensate Settlement Class members for all
11 hours worked. Blakely Decl., ¶ 14. Tropical Plaza contends that while Settlement Class members
12 were able to clock-in before their scheduled start time, this was for the employee's convenience
13 and employees did not perform any work before the scheduled start of their shift. *Id.* Tropical
14 Plaza further argues that Plaintiff could not certify this claim due to the differences in how
15 employees were affected by the policy/practice (i.e., some were overpaid while others were
16 potentially underpaid), and that individualized inquiries would be required to determine whether
17 each employee performed work prior to the scheduled start of shift and after the scheduled end of
18 shift, creating an unmanageable series of mini-trials. *Id.* In light of these defenses, Plaintiff
19 discounted Tropical Plaza's calculated exposure by 30% for risk of non-certification, and an
20 additional 35% for risk of losing on the merits and/or not recovering the full amount of damages
21 sought, to arrive at an estimated exposure of \$66,453. *Id.*

22 **Unpaid Overtime Due to Failure to Pay Daily Overtime: \$51,470**

23 Plaintiff alleges that Tropical Plaza failed to pay daily overtime wages, and instead, only
24 paid overtime wages for work performed in excess of forty (40) hours per workweek. Blakely
25 Decl., ¶ 15. Based on Plaintiff's review of Tropical Plaza's timekeeping and payroll records,
26 Plaintiff estimates Tropical Plaza's maximum exposure for failure to pay daily overtime wages at
27 approximately \$71,237. *Id.*

28 Tropical Plaza argues that it paid all overtime wages owed to Settlement Class members

1 and has at all times complied with California law regarding overtime wages. Blakely Decl., ¶ 15.
2 Tropical Plaza further argues that Settlement Class members rarely worked in excess of eight (8)
3 hours in a workday, and therefore, any alleged unpaid overtime was minimal. *Id.* In light of these
4 defenses, Plaintiff discounted Tropical Plaza's calculated exposure by 15% for risk of non-
5 certification, and an additional 15% for risk of losing on the merits and/or not recovering the full
6 amount of damages sought, to arrive at an estimated exposure of \$51,470. *Id.*

7 Unpaid Overtime Due to Regular Rate Miscalculations: \$19,063

8 Plaintiff alleges Tropical Plaza paid non-discretionary incentive pay, including bonuses,
9 but failed to include these bonuses when calculating employees' regular rate of pay for overtime
10 purposes. Blakely Decl., ¶ 16. Plaintiff calculated Tropical Plaza's maximum potential liability
11 to be approximately \$29,784 in unpaid overtime due to the regular rate violations during the Class
12 Period. *Id.*

13 Tropical Plaza asserts that it did not use a formula or any set of criteria to determine which
14 employees received the alleged bonus payment. *Id.* Tropical Plaza contends that at all relevant
15 times the bonuses it paid to its non-exempt employees were discretionary, and therefore, need not
16 be included in the regular rate of pay. *Id.* Moreover, Tropical Plaza argues that differences in the
17 frequency, type, and amount of bonuses and various forms of incentive pay received by
18 Settlement Class members would preclude class certification of this claim. *Id.* In light of these
19 defenses, Plaintiff discounted Tropical Plaza's calculated exposure by 20% for risk of non-
20 certification, and an additional 20% for risk of losing on the merits and/or not recovering the full
21 amount of damages sought, to arrive at an estimated exposure of \$19,063. *Id.*

22 Meal Period Violations: \$61,429

23 Plaintiff's analysis of the timekeeping data showed there were approximately 25,640
24 shifts over 6.0 hours worked in the Class Period. Blakely Decl., ¶ 17. As stated above, Settlement
25 Class members did not clock-out/in for meal periods, rather Tropical Plaza automatically
26 deducted hours from Settlement Class members' daily hours worked for a purported meal period.
27 *Id.* Because there are no meal period punches for shifts over 6.0 hours, based on Plaintiff's
28 investigation, Plaintiff estimated a 50% meal period violation rate for all shifts over 6.0 hours. *Id.*

1 Therefore, Plaintiff estimated Tropical Plaza's maximum exposure for meal period violations at
2 approximately \$170,634 (12,820 non-compliant meal periods * \$13.31 premium). *Id.*

3 As discussed above, Tropical Plaza maintains that it has always provided legally
4 compliant meal periods to Settlement Class members, and has maintained and enforced lawful
5 meal period policies which provide for compliant first meal periods. Blakely Decl., ¶ 17. Tropical
6 Plaza also contends that any short, missed, or late meal periods were the result of lawful employee
7 waiver or choice, thereby precluding liability. *Id.* Tropical Plaza further argues that this claim
8 would not be certified due to the lack of any common evidence tying together the reason that
9 Settlement Class members experienced a meal period violation. *Id.* Tropical Plaza also argues
10 that the presence of these affirmative defenses as to the voluntariness of a particular meal period
11 decision would preclude class certification. *Id.*; *see also, Duran v. U.S. Bank National*
12 *Association*, 59 Cal.4th 1, 25 (2014). Based on these defenses, Plaintiff discounted the maximum
13 exposure by 40% for the risk of non-certification, and an additional 40% to account for Tropical
14 Plaza's defenses on the merits, to arrive at an estimated exposure of \$61,429. Blakely Decl., ¶ 17.

15 Rest Period Violations: \$78,855

16 Plaintiff alleges that Tropical Plaza failed to authorize and permit off-duty rest periods for
17 every four hours of work, or major fraction thereof, as required under California law. Blakely
18 Decl., ¶ 18. Based on Plaintiff's analysis and extrapolation of the timekeeping records, Plaintiff
19 estimated there were approximately 28,725 total shifts over 3.5 hours during the Class Period,
20 that approximately 75% of shifts contained a rest period violation, and thus a potential maximum
21 exposure of \$286,747 on Plaintiff's rest period claim (\$13.31 premium * 28,725 shifts * 75%
22 violation rate). *Id.*

23 However, Tropical Plaza contends it has maintained compliant written rest period policies
24 throughout the Class Period, and that it has always authorized and permitted employees at least
25 10-minute rest periods for each 4 hours worked, or major fraction thereof. Blakely Decl., ¶ 18.
26 Tropical Plaza further argues that Plaintiff's rest period claim is not amenable to class treatment,
27 since individual inquiries would be required to determine which employees failed to take rest
28 periods, how many rest periods they failed to take, and the reasons why each employee failed to

1 take rest period(s) on a particular shift. *Id.* These manageability concerns are especially present
2 regarding rest periods, Tropical Plaza contends, since rest periods are not recorded. *Id.* Plaintiffs
3 therefore discounted this maximum amount by 45% for risk of non-certification and an additional
4 50% for a risk of being unsuccessful on the merits or of failing to recover the full amount sought,
5 to arrive at an estimated realistic exposure of \$78,855. *Id.*

6 Waiting Time Penalties: \$85,017

7 Based on Tropical Plaza's data, there are approximately 91 Settlement Class members
8 who separated their employment with Tropical Plaza within the three-year statute of limitations
9 period applicable to Labor Code § 203. Blakely Decl., ¶ 19. Based on an average hourly rate of
10 \$13.31, Plaintiff estimated the average waiting penalty per former employee to be \$3,194 (\$13.31
11 avg. rate of pay * 8 hours per day * 30 days). *Id.* Therefore, Plaintiff calculated Tropical Plaza's
12 maximum exposure for waiting time penalties at approximately \$290,654 (91 former employees
13 * \$3,194 waiting time penalty). *Id.*

14 Tropical Plaza presented several defenses to this claim, most notably Tropical Plaza's
15 assertion that because it possessed good faith defenses to the underlying claims, any failure to pay
16 wages was not "willful" as a matter of law. Blakely Decl., ¶ 19. Tropical Plaza further contends
17 that no waiting time penalties are recoverable as a matter of law as to Plaintiff's claims predicated
18 on a failure to provide meal and/or rest periods. *Id.* To account for Tropical Plaza's defenses,
19 Plaintiff discounted the maximum exposure by 35% for the risk of non-certification, and an
20 additional 55% for risk of losing on the merits, and/or not receiving the maximum penalties
21 sought, to arrive at an estimated exposure of \$85,017. *Id.*

22 Wage Statement Violations: \$43,063

23 Tropical Plaza's data revealed there were approximately 92 unique employees and
24 approximately 1,371 pay periods during the applicable time period. Blakely Decl., ¶ 20.
25 Therefore, Plaintiff calculated Tropical Plaza's maximum exposure for wage statement violations
26 at \$132,500 (92 initial violations * \$50 for initial penalty = \$4,600) + (1,279 subsequent violations
27 * \$100 subsequent violation penalty = \$127,900). *Id.*; *see also* Labor Code § 226(e) (providing
28 for \$50 penalty for "initial" violations).

1 Based on Tropical Plaza’s arguments that: (i) no violations occurred; (ii) any alleged
2 violations were not “knowing and intentional” as required by Labor Code § 226(e); (iii) no actual
3 injury was suffered; and (iv) meal and rest period violations cannot serve as a basis for wage
4 statement penalties, Plaintiff discounted the calculated maximum exposure by 35% for a risk of
5 non-certification, and an additional 50% for a risk of being unsuccessful on the merits, to arrive
6 at an estimated total of \$43,063. Blakely Decl., ¶ 20.

7 **PAGA Penalties: \$34,275**

8 Plaintiff estimated a maximum total PAGA exposure at \$137,100 for the relevant time
9 period (1,371 pay periods * \$100 initial penalty). Blakely Decl., ¶ 21; *Amaral v. Cintas Corp. No.*
10 *2*, 163 Cal.App.4th 1157, 1207 (2008) (finding “initial” violation rate applies until employer is
11 notified that it is violating a Labor Code provision). However, these penalties derive from the
12 underlying wage and hour violations discussed above, which Tropical Plaza vigorously disputes.
13 Blakely Decl., ¶ 21; *see e.g., Green v. Lawrence Service Co.* 2013 WL 3907506, *5, n.5 (C.D.
14 Cal. 2013) (explaining that a PAGA claim’s success was determined by the merits of its
15 underlying claims). Tropical Plaza also asserts the Court would drastically reduce any award of
16 PAGA penalties as “confiscatory.” Blakely Decl., ¶ 21; *see also Thurman v. Bayshore Transit*
17 *Mgmt., Inc.*, 203 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties);
18 *Fleming v. Covidien Inc.* (C.D. Cal. 2011) Case No. ED CV10-01487 RGK (OPx), 2011 WL
19 7563047, at *4 (reducing PAGA penalties from \$2.8 million to \$500,000). Therefore, Plaintiff
20 discounted the maximum figure by 50% for risk of losing on the merits, and an additional 50%
21 to account for the possibility of this Court reducing penalties, to arrive at an estimated exposure
22 of \$34,275. Blakely Decl., ¶ 21.

23 Using these estimated figures for each of the claims described above, Plaintiff predicted
24 that the potential recovery for the Settlement Class would be approximately \$439,625. Blakely
25 Decl., ¶ 22. The proposed settlement of \$400,000 therefore represents approximately 90.9% of
26 the reasonably forecasted recovery for the Settlement Class. *Id.* Preliminary approval is
27 appropriate since the Settlement will provide significant monetary relief to the Settlement Class,
28 which is consistent with what Plaintiff’s counsel believes could have been recovered had the case

proceeded through trial.

e. The Experience and Views of Counsel

“Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pacific Enterprises Securities Litigation* 47 F.3d 373, 378 (9th Cir. 1995). Here, Plaintiff is represented by competent, experienced counsel who possess extensive experience prosecuting and defending wage-and-hour class and PAGA actions, and who have been appointed as class counsel in numerous cases alleging similar claims. *See* Blakely Decl., ¶¶ 2-6; Declaration of Paul K. Haines (“Haines Decl.”), ¶¶ 2-7. Class Counsel conducted an in-depth review of Tropical Plaza’s policies and timekeeping and payroll records and drew on their extensive experience in similar cases to assess the strengths and weaknesses of Plaintiff’s case. *See* Blakely Decl., ¶ 10. The Settlement was also reached with the assistance of an experienced and well-respected wage and hour class action mediator. *Id.*, at ¶ 11. This factor strongly supports preliminary approval of the Settlement. *See Kullar, supra*, 168 Cal.App.4th at 130.

2. The Preliminary Approval Standard Is Met

At this stage, the Court can grant preliminary approval of the settlement and direct that notice be given if the proposed settlement: (1) falls within the range of possible approval; (2) appears to be the product of serious, informed and non-collusive negotiations; and (3) has no obvious deficiencies. *See* Manual for Complex Litigation § 30.41(3rd Ed. 1995); 4 Newberg on Class Actions § 11:24-25 (4th Ed. 2013).

a. The Settlement Is Within the Range of Possible Approval

The proposed settlement reflects approximately 90.9% of the estimated recovery the Settlement Class could reasonably expect in light of the significant litigation risks, and will provide tangible, substantial monetary compensation for hotly disputed claims. Indeed, the percentage of the liability exposure recovered in this case far exceeds percentages routinely approved by courts. *See, e.g., Glass v. UBS Finan. Servs.*, Case No. C-06-4068 MMC, 2007 WL 221862, *4 (N.D. Cal. 2007) (approving settlement representing 25% to 35% of potential damages); *Dunleavy v. Nadler*, 213 F.3d 454, 459 (9th Cir. 2000) (approving settlement

1 representing about one-sixth of potential recovery); *Nat'l Rural Telecomm. Coop. v. DirecTV,*
2 *Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) (“it is well-settled law that a proposed settlement may
3 be acceptable even though it amounts to only a fraction of the potential recovery that might be
4 available to the Settlement Class members at trial”). Further, the average Settlement Award of
5 approximately \$1,140.35 exceeds average payments achieved in other wage and hour class action
6 settlements. Thus, Plaintiff submits that this proposed Settlement is within the range of possible
7 approval, such that notice should be provided to the Settlement Class so that they can consider
8 the Settlement. The Court will have the opportunity to again assess the reasonableness of the
9 Settlement after the Settlement Class has had the opportunity to opt-out or object.

10 **b. The Settlement Resulted from Serious, Informed Negotiations**

11 The Settlement resulted from an exchange of substantial information, arm’s-length
12 negotiations by counsel, a full-day mediation before an experienced and well-respected wage and
13 hour mediator, and additional months of negotiating the long-form settlement agreement. Thus,
14 the Settlement is entitled to an initial presumption of fairness. *See Kullar, supra*, 168 Cal.App.4th
15 at 130. As discussed above, Plaintiff carefully vetted the claims at issue and reviewed extensive
16 timekeeping records and payroll data and conducted a detailed statistical analysis of the data to
17 arrive at the estimated class-wide damages figures. *See Blakely Decl.*, ¶¶ 14-22. The parties
18 attended a full-day mediation, and worked collaboratively in the following months to finalize the
19 Settlement. *Id.*, at ¶ 11. Thus, this factor supports preliminary approval.

20 **c. The Settlement Is Devoid of Obvious Deficiencies**

21 Preliminary approval of the Settlement is also warranted because there are no obvious
22 deficiencies. The Settlement will provide substantial monetary relief to Settlement Class
23 members. The amounts proposed for Class Counsel’s attorneys’ fees and costs, Plaintiff’s
24 enhancement payment, and the PAGA allocation are all reasonable and appropriate based on the
25 facts of this case. Because the Settlement is devoid of obvious deficiencies, this factor supports
26 preliminary approval.

27 **B. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS**

28 The Settlement Class satisfies the criteria for certification of a settlement class under

California law because: (1) the Settlement Class is so numerous that joinder would be impractical; (2) common questions of law and fact predominate over individual questions such that class certification is the most efficient and desirable way to maintain this litigation; (3) Plaintiff's claims are typical of the claims of absent Settlement Class members; and (4) Plaintiff and his counsel will fairly and adequately represent Settlement Class members' interest. *See* Cal. Civ. Proc. § 382.

1. The Proposed Class Is Ascertainable and Numerous

A class is "ascertainable" where the members "may be readily identified without unreasonable expense or time by reference to official [or business] records." *See Sevidal v. Target Corp.* 189 Cal.App.4th 905, 916 (2010) (alterations in original). Here, the proposed settlement class is defined as all current and former non-exempt employees who were employed by Tropical Plaza in the position of field worker in California during the Class Period. Therefore, Settlement Class members can be identified from Tropical Plaza's personnel and employment records. Defense counsel represents that the class consists of approximately 190 current and former non-exempt employees. *See* Blakely Decl., ¶ 13. It would therefore be impracticable to bring all Settlement Class members before the Court, or for each Settlement Class member to bring an individual lawsuit. The proposed Settlement Class therefore satisfies numerosity. *See, e.g., Bowles v. Sup. Ct.*, 44 Cal.2d 574 (1955) (holding a class representing 10 beneficiaries of a trust sufficiently numerous).

2. Common Issues of Law and Fact Predominate

The focus in a certification dispute is not the merits, but rather on what types of questions, "common or individual," are likely to arise in the action. *See Sav-On Drug Store, Inc. v. Superior Court (Rocher)* 34 Cal.4th 319, 327 (2004). Plaintiff's claims are predicated on Tropical Plaza's allegedly unlawful timekeeping policies/practices, and allegedly unlawful meal and rest period policies/practices. These types of claims are commonly held to be proper for class certification. *See e.g., Benton v. Telecom Network Specialists, Inc.* 220 Cal.App.4th 701, 726 (2013) (certifying meal and rest period claims).

///

1 **3. The Claims of the Named Plaintiff Are Typical**

2 The typicality requirement is satisfied where class representatives have claims that are
3 typical of those of the rest of the class. *See e.g., B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*
4 191 Cal.App.3d 1341, 1347 (1987). Here, Plaintiff’s claims are typical of those held by the
5 members of the proposed Settlement Class. First, Plaintiff was employed by Tropical Plaza
6 during the Class Period as a non-exempt field worker and was subject to Tropical Plaza’s wage
7 and hour policies at issue in this case. Chavez Decl., ¶ 2. Second, Plaintiff was injured by the
8 same challenged policies that allegedly injured the Settlement Class as a whole. For example,
9 Plaintiff asserts that he was deprived of all minimum and overtime wages due to Tropical Plaza’s
10 timekeeping policies/practices. Plaintiff also contends that Tropical Plaza failed to provide him
11 with legally-compliant meal periods, and failed to authorize and permit all paid rest periods due
12 to work demand imposed by Tropical Plaza. *Id.* Because Plaintiff has suffered the same injuries
13 as the other members of the Settlement Class, the typicality requirement is satisfied.

14 **4. Plaintiff and Class Counsel Will Fairly and Adequately**
15 **Represent the Class**

16 The adequacy requirement examines conflicts of interest between named parties and the
17 class(es) they seek to represent. *See Capital People First v. State Dept. of Developmental Services*
18 155 Cal.App.4th 676, 697 (2007). Plaintiff and his counsel will adequately represent the
19 Settlement Class, as there are no conflicts between Plaintiff and the proposed Settlement Class,
20 and Plaintiff possesses claims that are in line with those of the Settlement Class. *See McGhee v.*
21 *Bank of America* 60 Cal.App.3d 442, 450-51 (1976) (adequacy satisfied where there was no
22 indication that Class Counsel were not qualified and the named plaintiff had no interests
23 antagonistic to those of the proposed class). Class Counsel also have extensive experience in wage
24 and hour class action litigation. *See Blakely Decl.*, ¶¶ 2-6; *Haines Decl.*, ¶¶ 2-7.

25 **C. THE COURT SHOULD ORDER DISTRIBUTION OF THE NOTICE**

26 This Court should order distribution to the Settlement Class of the proposed Class Notice
27 by U.S. Mail, postage prepaid, using last known mailing address information provided by
28 Tropical Plaza. *See Settlement*, ¶ 9. This manner of giving notice is the “best notice practicable”

1 under the circumstances because it provides “individual notice to all members who can be
2 identified through reasonable effort.” *See Eisen v. Carlisle & Jacquelin* 417 U.S. 156, 173 (1974).
3 Here, Plaintiff proposes that the Settlement be administered by Phoenix Settlement
4 Administrators (“Phoenix”), an experienced class action settlement administrator. *See generally*
5 Declaration of Jodey Lawrence (“Lawrence Decl.”) and attached exhibits. Settlement Class
6 members’ addresses will be ascertainable through Tropical Plaza’s records, which Tropical Plaza
7 will provide to Phoenix within ten (10) business days after entry of an order preliminarily
8 approving this Settlement. *See* Settlement, ¶ 9(A). Within ten (10) business days of receipt of the
9 Settlement Class members’ addresses, Phoenix will run the addresses through the National
10 Change of Address (“NCOA”) database (which provides updated addresses for any individual
11 who has moved in the previous four years and has notified the U.S. Postal Service of a forwarding
12 address) and mail the Class Notice to all Settlement Class members. *See* Settlement, ¶ 9(B). To
13 the extent that any notices are returned, Phoenix will perform a “skip trace” to track any
14 Settlement Class member’s current mailing address. *Id.*, at ¶ 9(F).

15 The content of the proposed Class Notice satisfies California Rule of Court 3.766(d)
16 because it advises Settlement Class members of the nature of the claims, basic contentions and
17 denials of the parties and the key terms of the Settlement, the 60-day deadline to opt-out or object
18 to the Settlement and the procedures by which to do so, explains the recovery formula and
19 expected recovery amount for each Settlement Class member, and advises them that they will be
20 bound by the terms of the Settlement if they do not opt-out. *See* Blakely Decl., Exhs. 1, 2, and 3
21 to Exh. A. The proposed Class Notice will also notify Settlement Class members of the final
22 approval hearing date and provides the Settlement Class contact information for Class Counsel,
23 and advises Settlement Class members that they may enter an appearance through counsel if they
24 wish to. *Id.* This manner of giving notice satisfies California Rule of Court 3.766(e) as the most
25 reliable and cost-effective method of reaching Settlement Class members.

26 **D. THE COURT SHOULD SET A FINAL APPROVAL HEARING**

27 Finally, this Court should set a hearing for final approval of the Settlement on a date
28 appropriately scheduled to follow the deadline by which Settlement Class members must file

1 objections to the Settlement or opt-out. *See* California Rule of Court 3.769.

2 **V. CONCLUSION**

3 For the foregoing reasons, Plaintiff respectfully requests that this Court preliminarily
4 approve the proposed Settlement, provisionally certify the Settlement Class, and enter the
5 Proposed Order submitted concurrently herewith.

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7 Dated: March 4, 2021

Respectfully submitted,
HAINES LAW GROUP, APC

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9 By:



10 Paul K. Haines
11 Sean M. Blakely
12 Attorneys for Plaintiff
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