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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ARTURO GONZALEZ on behalf of himself, all
others similarly situated, and on behalf of the
general public,

Plaintiffs,

v.

NCI GROUP, INC., dba NCI BUILDING
SYSTEMS; and DOES 1-100,

Defendants.

Case No. 1:18-cv-00948-AWI-SKO

Assigned to the Hon. Anthony W. Ishii

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

Date: February 28, 2022

Time: 1:30 p.m.

Judge: Hon. Anthony W. Ishii

Courtroom: 2

Action Filed: June 6, 2018

Action Removed: July 12, 2018

Trial Date: None Set

1 **TO ALL PARTIES HEREIN AND TO THEIR COUNSEL OF RECORD:**

2 PLEASE TAKE NOTICE that Plaintiff Arturo Gonzalez moves this Court for an order: (1)
3 Provisionally certifying the Class for settlement purposes only; (2) Preliminarily approving the class
4 action settlement embodied in the Stipulation and Settlement of Class Action Claims; (3) Approving the
5 Class Notice and the plan for distribution of the Notice; (4) Appointing the Settlement Administrator;
6 and (5) Scheduling a Final Approval Hearing.

7 This motion is set for determination on February 28, 2022, at 1:30 p.m. in Courtroom 2 before the
8 Honorable Anthony W. Ishii in Robert E. Coyle United States Courthouse located at 2500 Tulare Street,
9 Eight Floor, Fresno, California 93721. This renewed motion is based upon this notice, the accompanying
10 Memorandum of Points & Authorities, the accompanying Declaration of David Mara, the Stipulation
11 Regarding Settlement of Class and Representative Action and all exhibits, the filings on record in this
12 case, and upon such further evidence, both documentary and oral, that may be presented at the hearing on
13 this motion.
14

15 Dated: January 28, 2022

MARA LAW FIRM, PC

16 By: /s/ Jill Vecchi

17 David Mara, Esq.

18 Jill Vecchi, Esq.

19 Attorneys for Plaintiff
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I. INTRODUCTION

Plaintiff Arturo Gonzalez (“Plaintiff”), a former employee of Defendant NCI Group, Inc., dba NCI Building Systems (“Defendant” or “NCI”), alleges that NCI fails to provide legally compliant meal and rest breaks, fails to pay all wages owed, fails to pay all wages at termination, fails to provide compliant pay stubs, and violates California’s Unfair Competition Law.

Plaintiff seeks preliminary approval of the Parties’ Amended Stipulation Regarding Settlement of Class and Representative Action (“Settlement” or “Settlement Agreement”). The proposed Settlement is a non-reversionary \$600,000 Maximum Settlement Amount (“MSA”) on behalf of approximately 274 Class Members. The proposed Class is defined as “all non-exempt current and former employees who worked for Defendant NCI Group, Inc. as hourly warehouse workers, industrial workers, shipping checkers, distribution employees, shipping clerks, packers, stackers, loaders, packaging clerks, machine operators, receiving clerks, production workers, and all other similarly situated employees in California at any time during the Class Period.” The Class Period extends from June 6, 2014 through February 24, 2020. Settlement Class Members¹ will automatically receive their share of the Settlement without needing to submit a claim.

The Settlement is projected to pay each Class Member an average of \$1,350, less employee taxes.² Employer-side payroll taxes will be paid separate and apart from the MSA. The Settlement was reached after considerable investigation, which included the analysis of hundreds of pages of documents, including but not limited to handbooks, manuals, policies, logs, paystubs, and the interpretation of tens of thousands of lines of data code (*e.g.*, time clock data). The Settlement reflects the strengths and vulnerabilities of Plaintiff’s case and the risks of class certification, as well as the risks of proceeding on the merits of the claims. When taking these risks into account, the proposed Settlement is in the best interests of the Class. Plaintiff respectfully requests that the Court grant preliminary approval of the Settlement, approve the Class Notice, appoint Rust Consulting, Inc. as the Settlement Administrator, appoint Mr. Gonzalez as the

¹ Class Members who do not request exclusion from the Settlement are “Settlement Class Members.”

² \$370,000 Net Settlement Amount divided by 274 Class Members equals \$1,350.36 per Class Member on average. As will be shown below, the Settlement Payments factor in each Class Member’s unique situation, such as rate of pay, number of shifts worked, whether they worked within the last year of the Class Period, and whether they are former employees, therefore making it impossible to provide a truly accurate average payment at this time. At final approval, Plaintiff will provide the Court with an accurate average payment.

1 class representative, appoint Plaintiff's counsel as Class Counsel, and schedule a final approval hearing.

2 **II. FACTUAL AND PROCEDURAL BACKGROUND**

3 NCI manufactures and markets metal building systems and components for the nonresidential
4 construction industry. To carry out its business, NCI employs warehouse workers. This lawsuit alleges
5 that NCI violated various California wage and hour laws applicable to NCI's warehouse workers. Mara
6 Decl. ¶ 22. Plaintiff filed this matter in Merced County Superior Court on June 6, 2018. NCI filed an
7 Answer on July 12, 2018 and removed this matter on July 12, 2018. Mara Decl. ¶ 23.

8 **a. Investigation**

9 Plaintiff propounded special interrogatories and demands for production of documents to which
10 NCI responded. NCI produced hundreds of documents including employee handbooks and policy
11 manuals, earning statements, personnel files, break logs, job descriptions and work tasks. NCI also
12 produced tens of thousands of lines of time records—the majority of which were produced in a raw
13 electronic format which had to be analyzed and interpreted. NCI also propounded written discovery to
14 which Plaintiff responded. Mara Decl. ¶ 24.

15 **b. Settlement Negotiations**

16 The Parties attended a mediation on November 19, 2019 and engaged in extensive arm's-length
17 negotiations mediated by retired Superior Court Judge and well-respected mediator, Honorable Joan A.
18 Lewis (Ret). As a result of meditation, the Parties signed a Term Sheet Settlement Agreement and
19 negotiated and finalized a Stipulation Regarding Settlement of Class and Representative Action. On
20 February 3, 2020, Plaintiff filed a motion for preliminary approval. (ECF Dkt. No. 18). The Court issued
21 an Order on Plaintiff's Motion for Preliminary Approval of Class Action Settlement (ECF Dkt. No. 21)
22 on August 6, 2020. Thereafter, the Parties revised the terms of the settlement and entered into an Amended
23 Stipulation Regarding Settlement of Class and Representative Action, which is now before the Court for
24 preliminary approval.³ Mara Decl. ¶ 25.

25 **III. SUMMARY OF SETTLEMENT**

26 **a. The Proposed Class and Subclasses**

27 The Class is comprised of: All non-exempt current and former employees who worked for

28 ³ The terms of the Settlement are set forth in **Exhibit A** to the Declaration of David Mara, Esq., in Support
of Plaintiff's Motion for Preliminary Approval ("Mara Decl.").

Defendant NCI Group, Inc. as hourly warehouse workers, industrial workers, shipping checkers, distribution employees, shipping clerks, packers, stackers, loaders, packaging clerks, machine operators, receiving clerks, production workers, and all other similarly situated employees in California at any time during the time period of June 6, 2014 through February 24, 2020. There are approximately 274 individuals who fall within this Class definition.

The Class is comprised of three (3) subclasses:

Meal, Rest, and Unpaid Wages Subclass: This subclass includes all Class Members.

Waiting Time Penalties Subclass: This subclass includes all Class Members who worked for Defendant at any time from June 6, 2015 through February 24, 2020, and who are no longer employed by Defendant.

Wage Statement and PAGA Subclass: This subclass includes all Class Members who worked for Defendant during the period of time from June 6, 2017 through February 24, 2020.

See Mara Decl., **Ex. A** at Section VI, ¶¶ 1.4.

These three subclasses are adequately tailored to the claims asserted and the alleged violations that occurred. All Class Members are appropriately included in Plaintiff's Meal, Rest, and Unpaid Wages Subclass. Class Members worked over five hours in approximately 97.8% of shifts. Declaration of Jim Adams ("Adams Decl.") ¶ 4. As shifts of over five hours qualify for both a meal and rest period, all Class Members would be entitled to at least one meal period and one rest period in the vast majority of shifts and are appropriately included in this subclass. In addition, Plaintiff's unpaid wages claim is based upon the time employees spend donning and doffing protective gear during meal periods. Therefore, this claim would affect shifts which qualified for a meal period. Because all Class Members almost always worked shifts that qualified for a meal period, *i.e.*, a shift of five hours or more, they are appropriately included in the Meal, Rest, and Unpaid Wages Subclass.

The Waiting Time Penalties Subclass and Wage Statement and PAGA Subclass are also appropriately tailored to the relevant statute of limitations. In addition, the Waiting Time Penalties Subclass only includes Class Members who are no longer employed by Defendants, which is a necessary predicate for receiving waiting time penalties. These qualifications ensure that only Class Members who were subject to these alleged California Labor Code violations are included in these subclasses and receive

1 a settlement payment for these claims.

2 **b. Settlement Terms**

3 NCI shall pay an MSA of \$600,000 to fully and finally settle this matter. This is the total amount
4 NCI can be required to pay under this Settlement, with the exception of employer payroll taxes, which
5 will remain NCI's exclusive responsibility and will be paid by NCI separate and apart from the MSA. **No**
6 **portion of the MSA will revert to NCI for any reason.** Deductions from the MSA will be made subject to
7 the Court's approval, as follows:

8 **i. Class Representative's Service Award/General Release Payment**

9 Subject to Court approval, Mr. Gonzalez shall receive a payment not to exceed \$5,000. The
10 payment shall be made from the MSA. As representative for the absent class members, Mr. Gonzalez
11 risked a potential judgment taken against him for attorneys' fees and costs if this matter had not been
12 successfully concluded. *See Early v. Superior Court*, 79 Cal.App.4th 1420, 1433 (2000) (a losing party is
13 liable for the prevailing party's costs). In some wage and hour actions, such as this case, pursuant to
14 California Labor Code § 218.5, the prevailing party can also recover attorneys' fees. Though the fee
15 agreement provides that Class Counsel would pay such costs in the event his case was not won, Mr.
16 Gonzalez could nevertheless have had a cost bill entered against him if he were unsuccessful, leaving him
17 liable for potentially hundreds of thousands of dollars in the unexpected possibility that Class Counsel did
18 not meet their obligation to cover those costs. Mara Decl. ¶ 26. Unfortunately, there have been judgments
19 like this entered against class representatives.⁴ The risk of payment of NCI's costs, alone, is a sufficient
20 basis for an award of the requested service award. Few individuals are willing to take this risk, and Mr.
21 Gonzalez championed a cause on behalf of others with potentially huge monetary risks.

22 Courts have regularly and routinely granted approval of settlements containing enhancements,
23 such as the one requested here. *See, e.g., Staton v. Boeing*, 327 F.3d 938, 977 (9th Cir. 2003). The typical
24 enhancement award in wage and hour cases ranges from \$5,000 to \$75,000, although some awards may
25 be higher. Very commonly there is more than one class representative who receive awards in the above

26
27 ⁴ *See, e.g. Koehl v. Verio, Inc.*, 142 Cal.App.4th 1313, 1328 (2006) (a wage and hour class action where
28 Defendant prevailed at trial, the named Plaintiffs were held liable, jointly and severally for the Defendant's
attorneys' fees); *Whiteway v. Fedex Kinkos Office & Print Services, Inc.*, No. 05-2320, 2007 U.S. Dist.
LEXIS 95398 (N.D. Cal. Dec. 17, 2007) (a wage and hour misclassification case lost on summary
judgment, after the case was certified, the named Plaintiff was assessed costs in the sum of \$56,788.).

1 range.⁵

2 Additionally, the modern-day work force is mobile, with employees holding several jobs over the
3 span of their career. It is also true that prospective employers in this computer, high-tech age do extensive
4 background checks (or merely “google” prospective hires) and have access to court databases to see if
5 applicants have ever filed a lawsuit or have ever been sued. Here, Mr. Gonzalez’s conduct could be used
6 against him by an unscrupulous prospective employer choosing between an applicant who has never sued
7 an employer and one who has done so. The requested award compensates Mr. Gonzalez for opportunities
8 he may lose in the future because of the exercise of a constitutional right to petition the courts for redress
9 of a grievance.

10 **ii. Attorneys’ Fees and Costs**

11 Subject to Court approval, Plaintiff’s Counsel shall request an award of attorneys’ fees in an
12 amount not to exceed \$150,000 (25% of the MSA). This amount is justified in this case, considering both
13 past work completed by Plaintiff’s counsel and work remaining in documenting the settlement, securing
14 Court approval, ensuring the settlement is fairly administered, and obtaining dismissal of the action. Class
15 Counsel intends to request only 25% of the MSA as their fee award, which is in line with the federal
16 benchmark for such awards. Class Counsel will submit a fee motion, supporting their request for 25% of
17 the MSA—which is \$150,000—including a lodestar crosscheck, hours, and hourly rates seven (7) days
18 before the expiration of the Notice Period.

19 Also, subject to Court approval, Plaintiff’s Counsel shall request a reimbursement from the MSA
20 for actual litigation costs in an amount not to exceed \$30,000. These will be tabulated and presented to the
21 Court at final approval. Plaintiff will only seek the amount of actual costs incurred during the litigation of
22 this case. Should the actual costs exceed \$30,000, Plaintiff will only seek reimbursement of costs up to
23 \$30,000. Should the actual costs be lower than \$30,000, the difference will be added to the Net Settlement
24 Amount and be available for distribution to Settlement Class Members. Class Counsel will provide the

25 ⁵ See, e.g., *Cook v. Niedert*, 142 F.3d 1004, 1015 (7th Cir. 1998); *Roberts v. Texaco*, 979 F. Supp. 185
26 (S.D.N.Y. 1997) (“present or past employee whose present position or employment credentials or
27 recommendation may be at risk by reason of having prosecuted the suit, who therefore lends his or her
28 name and efforts to the prosecution of litigation at some personal peril, a substantial enhancement award
is justified”); *Thornton v. East Texas Motor Freight*, 497 F.2d 416, 420 (6th Cir. 1974) (“We also think
there is something to be said for rewarding those drivers who protect and help to bring rights to a group
of employees who have been the victims of discrimination.”).

1 Court with information regarding their actual litigation costs in conjunction with their fee motion.

2 **iii. Payment to the LWDA**

3 Subject to Court approval, the Settlement allots \$60,000 of the MSA to PAGA penalties (“PAGA
4 Payment”). As required by the California Labor Code, 75% (\$45,000) of the PAGA Payment shall be paid
5 to the LWDA, and 25% (\$15,000) of the PAGA Payment will be paid out to Wage Statement and PAGA
6 Subclass Members. Mara Decl., **Ex. A** at § IV, ¶ 1.32.

7 **iv. Settlement Administration Expenses**

8 The Parties have agreed to the appointment of Rust Consulting, Inc. (“Rust”) as the settlement
9 administrator. Rust is an experienced class administration company that has acted as claims administrator
10 in numerous wage and hour cases. The Settlement allots an amount not to exceed \$15,000 to administer
11 this Settlement, which falls within the range of estimates Class Counsel has received in the past for
12 settlements of similar size and circumstances. The Settlement Administration Costs will be paid out of the
13 MSA. If Rust’s actual expenses or the amount awarded is less than the amount allotted in the Settlement,
14 the difference shall become part of the Net Settlement Amount and be available for distribution to
15 Settlement Class Members. Mara Decl. ¶ 27.

16 These costs are reasonable, as Rust will calculate the settlement payments, mail notice packets to
17 the Class, maintain a website which has information about the Settlement and links to the settlement
18 documents, and keep track of requests for exclusion from the Settlement. Should preliminary and final
19 approval be granted by the Court, Rust will facilitate the funding of the MSA, disbursement of the Court
20 approved payments, and disbursement of the NSA to Settlement Class Members.

21 **v. Settlement Payments to Class Members**

22 After all deductions have been made, it is estimated that \$370,000 (“Net Settlement Amount” or
23 “NSA”) will be available for disbursement to Settlement Class Members. The money available for payout
24 to these individuals comes out of the NSA, which is what remains of the MSA after subtracting all Court
25 approved attorneys’ fees and costs, the class representative enhancement, settlement administration costs,
26 and the PAGA Payment.

27 The NSA is comprised of three (3) payout funds:

28 Meal, Rest, and Unpaid Wages Payout Fund: This fund shall comprise eight-three percent
(83%) of the NSA.

1 Waiting Time Penalties Payout Fund: This fund shall comprise seven percent (7%) of the
2 NSA.

3 Wage Statement and PAGA Payout Fund: This fund shall comprise ten percent (10%) of
4 the NSA.

5 See Mara Decl., Ex. A at Section VI, ¶¶ 1.27. Each Settlement Class Member's Settlement Payment will
6 be the product of three (3) calculations. These calculations are tied to the unique circumstances of each
7 Class Member.

8 First, Settlement Class Members will receive a payment as part of the Meal, Rest, and Unpaid
9 Wages Subclass. This payment will be calculated by multiplying the Meal, Rest, and Unpaid Wages Shift
10 Value⁶ by that Settlement Class Member's number of "Meal, Rest, and Unpaid Wages Individual Adjusted
11 Shifts." A Settlement Class Member's number of "Meal, Rest, and Unpaid Wages Individual Adjusted
12 Shifts" is the Subclass Member's number of actual shifts worked for Defendant during the Class Period
13 multiplied by the Subclass Member's Adjusted Shift Multiplier. The "Adjusted Shift Multiplier" accounts
14 for and is tied to the Subclass Member's last known rate of pay. The "Adjusted Shift Multiplier" is the
15 Settlement Class Member's Last Known Pay Rate multiplied by 0.1. For example, if a Settlement Class
16 Member's Last Known Pay Rate is \$17.50, the Adjusted Shift Multiplier would be 1.75. Therefore, a
17 Settlement Class Member who earned \$20.00 per hour will be credited with twice as many shifts – and
18 therefore damages – as a Settlement Class Member who earned \$10.00 per hour.⁷

19 Second, Settlement Class Members may also be entitled to a payment from the Waiting Time
20 Penalties Payout Fund if they are a member of the Waiting Time Penalties Subclass. These payments will
21 be calculated by multiplying the Waiting Time Penalties Shift Value⁸ by that Settlement Class Member's
22 number of Waiting Time Penalties Individual Adjusted Shifts, if any such shifts were worked. Each
23 Settlement Class Member's number of Waiting Time Penalties Individual Adjusted Shifts will be the

24 ⁶ "Meal, Rest, and Unpaid Wages Shift Value" is the number which is the quotient of the Meal, Rest, and
25 Unpaid Wages Payout Fund divided by the Total Adjusted Meal, Rest, and Unpaid Wages Shifts.

26 ⁷ Because the number of shifts allocated to each Class Member will be increased based upon their last
27 known pay rate, the exact shift value is unknown at this time. Prior to the shift counts being adjusted, there
28 are approximately 170,321 shifts worked by Class Members. This equates to a shift value of \$2.17. This
would equate to a workweek value of approximately \$10.85 if an employee worked five shifts per
workweek.

⁸ "Waiting Time Penalties Shift Value" is the number which is the quotient of the Waiting Time Penalties
Payout Fund divided by the Total Adjusted Waiting Time Penalties Shifts.

product of (1) the number of actual shifts worked for Defendant by the Waiting Time Penalties Subclass Member during the period of time from June 6, 2015 through February 24, 2020 up to a maximum of 30 shifts,⁹ and (2) the Waiting Time Penalties Subclass Member's Adjusted Shift Multiplier. As noted above, the "Adjusted Shift Multiplier" accounts for and is tied to the Subclass Member's last known rate of pay. The "Adjusted Shift Multiplier" is the Settlement Class Member's Last Known Pay Rate multiplied by 0.1.

Last, Settlement Class Members may also be entitled to a payment from the Wage Statement Payout Fund and the PAGA Payout Fund if they are a member of the Wage Statement and PAGA Subclass. These payments will be calculated by multiplying the Pay Period Value¹⁰ by that Settlement Class Member's number of Qualifying Pay Periods, if any such pay periods were worked. Qualifying Pay Periods are any pay period in which a Wage Statement and PAGA Subclass Member worked for Defendant from June 6, 2017 through February 24, 2020. Both Plaintiff's wage statement claims and PAGA claims have a one-year statute of limitations and incur penalties based upon pay periods worked. In addition, because penalties under Plaintiff's wage statement claims and PAGA claims are statutorily prescribed and do not take into account an employee's hourly rate, each employee who worked a Qualifying Pay Period would be entitled to the same damages regardless of what they earned per hour. Stated differently, Plaintiff's wage statement claims and PAGA claims do not differentiate damages owed based upon the hourly rate an employee earned.

Each Settlement Class Member's portion of the Meal, Rest, and Unpaid Wages Payout Fund will be apportioned as 90% wages and 10% interest. Each Settlement Class Member's portion of the Waiting Time Penalties Payout Fund and Wage Statement and PAGA Payout Fund will be apportioned as 100% penalties and interest. The amounts paid as wages shall be subject to all tax withholdings customarily made from an employee's wages and all other authorized and required withholdings customarily made from an employee's wages and shall be reported on IRS Form W-2. The amounts paid as penalties and

⁹ Under California Labor Code Section 203, "If an employer willfully fails to pay . . . any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; **but the wages shall not continue for more than 30 days.**" (Emphasis added). Therefore, an employee cannot receive waiting time penalties in excess of 30 days.

¹⁰ "Pay Period Value" is the number which is the quotient of the Wage Statement Payout Fund and PAGA Payout Fund divided by the Total Pay Periods.

1 interest shall be reported on IRS Form 1099. *See* Mara Decl., **Ex. A** at Section VI, ¶¶ 2.1.1.

2 **vi. Funding and Distribution of Settlement Funds**

3 Upon final approval, and provided that there are no objections or appeals to the Court's Final
4 Approval Order and Judgment, NCI will fund the MSA within five (5) business days after the Effective
5 Date.¹¹ Within fifteen (15) business days after the Effective Date, the Administrator will disburse all
6 payments required under the Settlement. *See* Mara Decl., **Ex. A** at Section VI, ¶¶ 2.8.1, 2.8.2.

7 **vii. Uncashed Checks and Cy Pres Payment**

8 Any checks issued to Settlement Class Members shall remain valid and negotiable for 180 days
9 from the date of mailing. If any checks are not redeemed or deposited within ninety (90) calendar days
10 after mailing, the Settlement Administrator will send a reminder postcard indicating that unless the check
11 is redeemed or deposited before the expiration date, it will expire and become non-negotiable, and offer
12 to replace the check if it was lost or misplaced. The Parties agreed that a *cy pres* beneficiary will receive
13 the funds that were allocated to Settlement Class Members who did not cash or deposit their checks. *See*
14 Mara Decl., **Ex. A** at Section VI, ¶¶ 2.8.4-2.8.5.

15 **viii. Cy Pres Beneficiary**

16 The Parties chose Legal Aid At Work ("Legal Aid") as the *cy pres* beneficiary because it offers
17 legal services and various trainings to employees on their rights. For instance, Legal Aid offers a Workers'
18 Rights Clinic to low-income and unemployed people to provide information about legal rights related the
19 workplace. LEGAL AID AT WORK, <https://legalaidatwork.org/> (last visited January 22, 2019). Other Legal
20 Aid clinics help workers file claims for unpaid wages. *Id.* For example, the Wage Claim Clinic empowers
21 workers by offering free advice and assistance in filing wage claims with the California Labor
22 Commissioner. *Id.* Legal Aid maintains free do-it-yourself guides, toolkits, and letters for handling
23 communications with employers as well as a variety of free trainings for employees to learn about their
24 workplace rights. *Id.* Legal Aid even brings class actions and individual actions on behalf of workers. *Id.*

25
26 ¹¹ The Effective Date means the date on which the Judgment becomes final and can no longer be appealed
27 or otherwise disturbed because one of the following has occurred: (i) the final affirmance on appeal of the
28 Judgment; (ii) the final dismissal with prejudice of any appeal from the Judgment; or (iii) if there are no
objectors and no plaintiffs in intervention at the time the court grants final approval of the settlement and
enters the Judgment, the date the Court grants final approval and enters Judgment.. *See* Mara Decl., **Ex.**
A, at Section VI, ¶ 1.13.

1 **ix. Released Claims**

2 In exchange for NCI's promise to make the payments provided for in the Settlement, as of the
3 Effective Date, Settlement Class Members will release the following Released Claims – all of which are
4 limited to the allegations arising from the facts alleged in the operative complaint:

5 “Released Claims” all claims, including without limitations “Unknown Claims” as defined
6 in Paragraph 1.48 hereof, demands, rights, liabilities and causes of action of every nature
7 and description whatsoever including without limitation statutory, constitutional,
8 contractual or common law claims, whether known or unknown, against the Defendant
9 Releasees, or any of them, for any type of relief arising out of any Settlement Class
10 Member's employment with Defendant, based on the facts alleged in the Complaint, that
11 accrued during the Class Period for alleged or actual (i) failure to compensate for all hours
12 worked; (ii) failure to pay regular and/or premium wages at the proper hourly rates for all
13 hours worked; (iii) failure to comply with payroll or wage record-keeping documentation
14 or wage statement itemization requirements; (iv) failure to provide sufficient meal and/or
15 rest periods or pay additional sums of money in lieu thereof; (v) failure to timely pay wages
16 due at termination or otherwise; (vi) failure to furnish accurate wage statements; (vii)
17 failure to pay minimum wages; (viii) unfair business practices relating to or arising out of
18 the previous claims; and (ix) to the extent not covered above, any claims pled in or
19 reasonably arising out of the facts alleged in the operative complaint in the Litigation.
20 Released Claims include (1) claims for penalties or any other remedies under any statute
21 or regulation or other provision of law, based on the facts alleged in the Complaint,
22 including without limitation claims under California Labor Code sections 201-204, 216,
23 225.5, 226, 226.3, 226.7, 500, 510, 512, 558, 1174, 1174.5, 1197, 1198, California Labor
24 Code section 1194, *et seq.*, California Labor Code section 2698 *et seq.*, California Business
25 and Professions Code section 17200 *et seq.*, any applicable California Industrial Welfare
26 Commission Wage Order; (2) claims, based on the facts alleged in the Complaint, for
27 injunctive relief, restitution, disgorgement, accounting, declaratory relief or other equitable
28 relief; (3) any and all claims, based on the facts alleged in the Complaint, for interest, costs,
or attorney fees, including without limitation claims under California Labor Code sections
218.5, 1194 & 2698 *et seq.* and California Code of Civil Procedure section 1021.5; (4) and,
to the extent not covered above, any and all claims arising from the facts alleged in the
Complaint in the Litigation.

23 “Unknown Claims” means any Released Claims which the Class Representative or any
24 Settlement Class Member does not know or suspect to exist in his or her favor at the time
25 of the entry of the Judgment, and which, if known by him or her might have affected his
26 or her settlement with and release of the Defendant Releasees or might have affected his
27 or her decision not to object to this settlement. With respect to any and all Released Claims,
28 the Settling Parties stipulate and agree that, upon the Effective Date, the Class
Representative shall expressly and each of the Settlement Class Members shall be deemed
to have, and by operation of the Judgment shall have, waived the provisions, rights and
benefits of California Civil Code section 1542, which provides:

1 A general release does not extend to claims that the creditor or releasing
2 party does not know or suspect to exist in his or her favor at the time of
3 executing the release and that, if known by him or her, would have
4 materially affected his or her settlement with the debtor or released party.

5 The Class Representative and each Settlement Class Member may hereafter discover facts
6 in addition to or different from those which he or she now knows or believes to be true
7 with respect to the subject matter of the Released Claims, but the Class Representative and
8 each Settlement Class Member, upon the Effective Date, shall be deemed to have, and by
9 operation of the Judgment shall have, fully, finally, and forever settled and released any
10 and all Released Claims, known or unknown, suspected or unsuspected, contingent or non-
11 contingent, whether or not concealed or hidden, which then exist, or heretofore have
12 existed upon any theory of law or equity now existing or coming into existence in the
13 future, including, but not limited to, conduct which is negligent, intentional, with or without
14 malice, or a breach of any duty, law or rule, without regard to the subsequent discovery or
15 existence of such different or additional facts. The Class Representative acknowledges,
16 and the Settlement Class Members shall be deemed by operation of the Judgment to have
17 acknowledged, that the foregoing waiver was separately bargained for and a key element
18 of the settlement of which this release is a part.

19 For the sake of clarity, the Settling Parties agree that Unknown Claims include only those
20 claims that meet the definition of Released Claims and do not include claims that do not
21 meet the definition of Released Claims. As such, for example, Unknown Claims do not
22 include claims for any relief for wrongful termination, unlawful harassment, Workers'
23 Compensation, or other claims that do not arise from the facts alleged in the Complaint.

24 The release covers claims that were alleged or could have been alleged in Plaintiff's complaint and the
25 release is tied to the facts and allegations contained therein. *See* Mara Decl., **Ex. A**, at Section IV, ¶¶ 1.36,
26 1.48.

27 Although there are three subclasses, one release is appropriate. This is due to the differing statutes
28 of limitations associated with each of these subclasses. All Class Members are part of the Meal, Rest, and
Unpaid Wages Subclass, which has the longest statute of limitations – four years. The Waiting Time
Penalties Subclass has a three-year statute of limitations and the Wage Statement and PAGA Subclass has
a one-year statute of limitations. While some Class Members will not be a part of the Waiting Time
Penalties Subclass and Wage Statement and PAGA Subclass, they will not be prejudiced by releasing the
Released Claims. This is for two reasons. One, Class Members that ended their employment prior to the
beginning of the relevant time periods for these two subclasses would be barred from bringing these claims
due being outside of the relevant statute of limitations. Therefore, a release of these claims will have no
effect on their ability to pursue these claims in the future because they are already barred from bringing

1 them due to the statute of limitations. Second, Class Members who are not part of the Waiting Time
2 Penalties Subclass because they are currently employed by Defendant will not be prejudiced by releasing
3 these claims because they do not currently possess any waiting time penalties claims as their employment
4 with Defendant has not yet terminated. As such, there is nothing for these Class Members to release. Thus,
5 these Class Members are not giving up any rights and will be able to pursue these claims once they end
6 their employment with Defendant, should they choose to do so. For these reasons, one release is
7 appropriate for all Class Members.

8 **IV. CONDITIONAL CERTIFICATION SHOULD BE GRANTED**

9 A class action may be certified if all four prerequisites under Rule 23(a) are satisfied and at least
10 one subsection under Rule 23(b) is met. *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304 (9th Cir. 1977).
11 The requirements of Rule 23(a) are referred to as: (1) numerosity, (2) commonality, (3) typicality, and (4)
12 adequacy. *United Steel, Paper & Forestry, Rubber, Mfg. Energy v. Conoco Phillips Co.*, 593 F.3d 802,
13 806 (9th Cir. 2010). As will be discussed below, these requirements are met here. In addition, the Parties
14 agreed to certification of the Class under Rule 23(b)(3) which has the added requirement of
15 “predominance.” *Id.* NCI does not oppose certification for the purpose of settlement only. As such, the
16 Parties seek provisional certification of the Class. Should the Settlement not be approved or not become
17 final for any reason, the Parties will revert to their positions prior to entering into the Settlement.

18 **a. Rule 23(a) Class Requirements are Met**

19 **i. Numerosity**

20 Impracticability of joinder is the hallmark of the numerosity analysis. The numerosity requirement
21 is met when the class is “so numerous that joinder of all members is impracticable[.]” Fed. R. Civ. P.
22 23(a)(1). Joinder is usually impracticable when a class is “large in numbers” although this is not the only
23 factor in determining impracticability. *See Jordan v. Cnty. of Los Angeles*, 669 F.2d 1311, 1319 (9th Cir.),
24 vacated on other grounds, 459 U.S. 810 (1982) (class sizes of 39, 64, and 71 are sufficient to satisfy the
25 numerosity requirement). NCI employed approximately 274 warehouse workers¹² in California during the
26 Class Period making joinder of all parties impracticable. In addition, each of the subclasses are numerous.
27 Plaintiff’s Meal, Rest, and Unpaid Wages Subclass includes all Class Members. Therefore, this subclass
28

¹² Mara Decl. **Ex. A**, at Section VI, ¶ 1.4.

1 encompasses approximately 274 individuals. Plaintiff's Waiting Time Penalties Subclass includes all
2 former employees of NCI between June 6, 2015 through February 24, 2020. This subclass encompasses
3 approximately 122 individuals. Plaintiff's Wage Statement and PAGA Subclass includes all employees
4 who worked for NCI between June 6, 2017 through February 24, 2020. This subclass encompasses
5 approximately 152 individuals. As such, the putative class and each subclass are sufficiently numerous.

6 **ii. Commonality**

7 Commonality is satisfied if "there are questions of law or fact common to the class." Fed. R. Civ.
8 P. 23(a)(2). "All questions of law and fact need not be common to satisfy the rule. The existence of shared
9 legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled
10 with disparate legal remedies within the class." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir.
11 1998). The Ninth Circuit has held that commonality exists "where the lawsuit challenges a system-wide
12 practice or policy that affects all of the putative class members." *Armstrong v. Davis*, 275 F.3d 849, 868
13 (9th Cir. 2001). Here, common questions exist, such as whether NCI's standard policies, applicable to all
14 putative class members, deprived the Class of rights afforded to them under California law. Put differently,
15 there are questions of law and fact common to the Class with respect to the wage-and-hour claims. For
16 example, Plaintiff's Meal, Rest, and Unpaid Wages Subclass asks whether NCI's policies, that were
17 applicable to all Class Members deprived the Class of wages and legally compliant meal and rest periods.
18 Plaintiff's Meal, Rest, and Unpaid Wages Subclass asks whether NCI failed to provide the Class with
19 compliant meal breaks and rest breaks, whether NCI paid the Class for all time worked, whether NCI
20 required the Class to work off-the-clock, and whether NCI failed to pay overtime wages to the Class.
21 Plaintiff's Wage Statement and PAGA Subclass asks whether NCI failed to issue compliant itemized wage
22 statements to the Class, and whether NCI violated the PAGA. Plaintiff's Waiting Time Penalties Subclass
23 asks whether NCI willfully failed to pay all wages due at termination. As such, common questions exist
24 as to the putative class and each subclass.

25 **iii. Typicality**

26 Typicality screens out class representatives with factual circumstances markedly different than
27 other class members thereby ensuring adequate representation which is centrally focused on common
28 issues. Rule 23(a) requires that "the claims or defense of the representative parties are typical of the claims

1 or defenses of the class.” This requirement is “permissive” and requires only that the representative’s
2 claims are reasonably related to those of the absent class members. *Rodriguez v. Hayes*, 591 F.3d 1105,
3 1124 (9th Cir. 2010).

4 Plaintiff’s claims and those of the putative class members are based on the same alleged course of
5 conduct, *i.e.*, the claim that NCI does not pay all wages owed or provide compliant meal and rest periods.
6 Plaintiff claims he and other employees experienced NCI’s alleged Labor Code violations, as Plaintiff
7 argues NCI’s policies required all employees to don/doff protective gear as well as include walking time
8 as part of their meal and rest breaks. Plaintiff and the Class are also alleged to have suffered similar injury,
9 *i.e.*, the non-payment of premiums for allegedly unprovided or non-duty-free meal and rest periods, and
10 the non-payment of wages for off-the-clock time spent donning/doffing protective gear and walking time.
11 Plaintiff’s claims also allege that NCI failed to provide Plaintiff and the Wage Statement and PAGA
12 Subclass accurate, itemized wage statements and failed to pay Plaintiff and the Waiting Time Penalties
13 Subclass all wages due at the termination of employment. As all of these claims are based upon the same
14 alleged course of conduct, Plaintiff’s claims are typical of the class and subclasses.

15 **iv. The Class Representative and His Counsel are Adequate**

16 The proposed Class Representative and his counsel have and will continue to “fairly and
17 adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). Adequacy requires the absence of
18 conflicts and assurances of vigorous prosecution. *See Hanlon*, 150 F.3d at 1020 (finding the proposed
19 class representatives must (1) not have conflicts of interest with other class members and (2) be
20 represented by qualified counsel).

21 Both requirements are met. There is no evidence of any conflict or antagonism between the class
22 representative, his counsel, or the class. Plaintiff has demonstrated that he is willing and able to vigorously
23 prosecute this litigation. The proposed class representative has a thorough understanding of this lawsuit,
24 interests in line with those of the class, and no conflicts with other class members. Moreover, Plaintiff’s
25 work history is in line with that of the Class Members. Plaintiff worked five or more hours in 100% of his
26 shifts and worked overtime in 91% of his shifts. This is in line with the work histories of Class Members.
27 As noted above, Class Members worked over five hours in approximately 97.8% of shifts. Adams Decl.
28

¶ 4. In addition, Class Members almost always worked shifts that included overtime.¹³ Further, Plaintiff is a former employee of NCI and received wage statements. As such, Plaintiff is an adequate representative of the Class and Subclasses.

Further, to the extent that Plaintiff and the Class Members received hourly wages that differed from one another, this will be taken into consideration when determining each Class Members' Settlement Payment. The number of shifts Class Members are credited with will be increased based upon their hourly rates to take into account the fact that some Class Members received higher wages than others. Therefore, even if Plaintiff's hourly rate differed from other Class Members, he is still an adequate representative because each Class Member's Settlement Payment will be tied to their respective hourly rates and higher wage earners will receive a larger portion of the settlement than lower wage earners.

In addition, counsel for Plaintiff have significant experience in the prosecution of wage and hour class actions and in employment litigation. Mara Decl. ¶¶ 1-20. Plaintiff's counsel has vigorously prosecuted this matter and will continue to do so. Thus, Plaintiff and his counsel are adequate representatives and David Mara and Jill Vecchi from Mara Law Firm, PCs should be appointed class counsel pursuant to Fed. R. Civ. P. Rule 23(g).

b. Rule 23(b) Standards are Satisfied

i. Common Issues Predominate

In addition to the Rule 23(a) requirements, a court must find that common issues of law or fact "predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). With regard to the requirements of subsection (b), Rule 23(b)(3) allows class certification where common questions of law and fact predominate over individual questions and class treatment is superior to individual litigation. The predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). To determine whether common questions predominate, a court is to consider "the relationship between the common and individual issues." The proposed Class in this case is sufficiently cohesive to warrant adjudication by representation. Furthermore, because the "predominance" factor concerns liability, any variation in damages is insufficient to defeat class certification. *Leyva v. Medline Indus.*, 716 F.3d 510,

¹³ Based on Plaintiff's analysis of time records produced by NCI it was revealed that overtime was worked in approximately 90% of shifts. Mara Decl. ¶ 28.

1 514 (9th Cir. 2013).

2 Plaintiff contends all claims in this litigation are based on allegedly common, class-wide policies
3 and procedures, and that liability could be determined on a class-wide basis. *Brinker Restaurant Corp. v.*
4 *Superior Court*, 53 Cal.4th 1004, 1033 (2012). The major issues of whether NCI provided duty-free meal
5 and rest periods, and paid all wages owed to Plaintiff and the Class stem from what Plaintiff claims are
6 uniform policies and practices. Each of Plaintiff's causes of action—failure to pay overtime and straight
7 time, failure to provide accurate wage statements, wait time penalties, UCL violations, and PAGA
8 claims—is tied to NCI's meal and rest break policies, which Plaintiff contends all Class Members were
9 required to follow. Although Plaintiff expects that NCI will contend that individualized issues preclude
10 class certification, Plaintiff believes that he can establish classwide liability based solely on NCI's
11 standard, classwide policies. Because the legality of NCI's policies is the primary issue in this litigation,
12 common issues predominate over individualized issues.

13 **ii. The Class Action Device is Superior**

14 “[T]he purpose of the superiority requirement is to assure that the class action is the most efficient
15 and effective means of resolving the controversy.” *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d
16 1168, 1175-76 (9th Cir. 2010) (quotation omitted). The courts must examine: (A) the class members’
17 interests in individually controlling the prosecution or defense of separate actions; (B) the extent and
18 nature of any litigation concerning the controversy already begun by or against class members; (C) the
19 desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D)
20 the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3).

21 Nothing in the record indicates that any class member has a particular individual interest in
22 controlling the prosecution or defense of separate actions. All class members’ harm arises out of the same
23 unlawful policies challenged in this lawsuit. There are also no other known actions pending raising the
24 same issues against NCI. Mara Decl. ¶ 29. “Finally, as is often the case with wage and hour class actions,
25 the individual damages of each employee are too small to make litigation cost effective.” *Wright v.*
26 *Renzenberger, Inc.*, No. CV136642FMOAGRX, 2017 WL 9831398, at *12 (C.D. Cal. Sept. 30, 2017).
27 Therefore, the class action device is a superior means to litigate this matter.

28 / / /

1 **iii. No Manageability Issues Preclude Certification**

2 Finally, no issues of manageability preclude certification. A court faced with a request for a
3 settlement-only class need not inquire whether the case would present intractable problems of trial
4 management, even though other requirements under Rule 23 must still be satisfied. *See, e.g., Lazarin v.*
5 *Pro Unlimited, Inc.*, 2013 WL 3541217, *5 (N.D. Cal. 2013). Nevertheless, as discussed herein, the
6 proposed plan of distribution and settlement process are efficient and manageable.

7 **c. Plaintiff's Counsel Should be Appointed as Class Counsel**

8 Rule 23(g) requires that courts consider the following four factors when appointing settlement
9 class counsel: (1) whether counsel has investigated the class claims; (2) whether counsel is experienced
10 in handling class actions and complex litigation; (3) whether counsel is knowledgeable regarding the
11 applicable law; and (4) whether counsel will commit adequate resources to representing the class. *See*
12 *Grant v. Capital Mgmt. Servs., L.P.*, 2013 WL 6499698, *2-3 (S.D. Cal. 2013). It is clear from the record
13 presented herein that Plaintiff's Counsel should be appointed Class Counsel. Plaintiff's Counsel is highly
14 experienced and knowledgeable regarding complex wage and hour class actions like this one. Mara Decl.
15 ¶¶ 1-20. Indeed, Mr. Mara was class counsel in *Hohnbaum et al. v. Brinker Restaurant Corp et al.*, which
16 is the subject case in the landmark decision of *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th
17 1004 (2012). Mara Decl. ¶ 4. Plaintiff's counsel have prosecuted numerous cases on behalf of employees
18 for California Labor Code violations and thus are experienced and qualified to evaluate the class claims
19 and to evaluate settlement versus trial on a fully informed basis, and to evaluate the viability of the
20 defenses. Mara Decl. ¶¶ 1-20. In sum, Plaintiff's counsel are fully committed to representing the class in
21 this case, have the skill and expertise to do it properly, and will continue to do so whether or not the
22 settlement is approved. Accordingly, appointment of David Mara and Jill Vecchi of Mara Law Firm, PC,
23 as Class Counsel is appropriate.

24 **V. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED**

25 **a. Court Approval Under Rule 23(e) Should Be Granted**

26 Rule 23(e) provides that any compromise of a class action must receive court approval. The court
27 has broad discretion to grant approval and should do so where the proposed settlement is "fair, adequate,
28 reasonable, and not a product of collusion." *Hanlon*, 150 F.3d at 1026. In deciding whether a settlement

1 should be approved, the Ninth Circuit has a “strong judicial policy that favors settlement, particularly
2 where complex class action litigation is concerned.” *In re Heritage Bond Litigation*, 2005 WL 1594403
3 (C.D. Cal. 2005). Court approval involves a two-step process in which a court first determines whether a
4 proposed class action settlement deserves preliminary approval and then, after notice is given to class
5 members, whether final approval is warranted. *Manual of Complex Litigation*, Fourth Ed., § 21,632
6 (2004). At the preliminary approval stage, the Court need only “determine whether the proposed
7 settlement is within the range of possible approval.” *Gatreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir.
8 1982). A class action settlement should be approved if “it is fundamentally fair, adequate and reasonable.”
9 *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992).

10 Although at preliminary approval, the Court need not engage in the rigorous analysis required for
11 final approval (*see Manual for Complex Litigation*, Fourth, § 22.661 at 438 (2004)), the ultimate fairness
12 determination will include balancing several factors, including:

13 the strength of plaintiffs’ case; the risk, expense, complexity and likely duration of further
14 litigation; the risk of maintaining class action status throughout the trial; the amount offered
15 in settlement; the extent of discovery completed, and the stage of the proceedings; the
experience and views of counsel; the presence of a governmental participant; and the
reaction of the Class Members to the proposed settlement.

16 *Officers for Justice, supra*, 688 F.2d 615, 625. Not all of the above factors apply to every class action
17 settlement, and one factor alone may prove determinative in finding sufficient grounds for court approval.
18 *Nat’l Rural Telecommunication Cooperative v. Directv, Inc.*, 221 F.R.D. 523, 525-26 (C.D. Cal. 2004).
19 District courts have wide discretion in assessing the weight and applicability of each factor. *Id.*

20 **b. The Settlement Resulted From Arm’s-Length Negotiations**

21 The Ninth Circuit has shown longstanding support of settlements reached through arms’ length
22 negotiation by capable opponents. In *Rodriguez v. West Publishing Corp.*, 563 F.3d 948 (9th Cir. 2009),
23 the Ninth circuit expressly opined that courts should defer to the “private consensual decision of the
24 [settling] Parties.” *Id.* at 965, citing *Hanlon*, 150 F.3d at 1027. The proposed Settlement is the product of
25 arm’s-length negotiations at a full-day mediation facilitated by professional mediator, Hon. Joan A. Lewis
26 (Ret.).

27 / / /

28 / / /

1 **c. The Balancing of Factors**

2 The factors noted above are commonly considered at preliminary approval. The factors here, in
3 their respective levels of applicability, favor approval of the Settlement. Mr. Gonzalez submits—and NCI
4 disputes—that this case was factually and legally strong. This matter was settled after substantial
5 discovery, which included written discovery that resulted in hundreds of pages of documents and
6 thousands of lines of data. Thus, at the point the Settlement was initially agreed to, no one was in a better
7 position than Plaintiff’s Counsel to understand the strengths and potential limitations of Mr. Gonzalez’s
8 case and thus evaluate the reasonableness of the amount offered in settlement. Mara Decl. ¶ 30.

9 Mr. Gonzalez contends that NCI’s failure to provide compliant meal and rest periods and pay all
10 wages owed are the predominant claims in the lawsuit. Mara Decl. ¶ 31.

11 **i. Liability on the Merits and Class Certification**

12 Plaintiff recognizes that none of his class-wide claims would result in a guaranteed win. Plaintiff’s
13 core claims here are for meal and rest break violations and unpaid wages, which faced significant
14 challenges that had to be considered in negotiating a class-wide settlement. Mara Decl. ¶ 32.

15 **1. Rest and Meal Break Claims**

16 With regard to rest periods, under California law, employers must authorize “ten (10) minutes net
17 rest time per four (4) hours or major fraction thereof.” Wage Order 1, Section 12(A). A DLSE letter, which
18 the California Supreme Court cited with approval in *Augustus v. ABM Security Services, Inc.*, stated “there
19 must be a net 10 minutes of rest provided in each ‘work period’ and the rest period must be, as the language
20 implies, duty-free.” 2002 Cal. DLSE LEXIS 30 (Cal. Div. of Labor Standards Enforcement Feb. 22, 2002);
21 see also *Augustus v. ABM Security Services, Inc.*, 2 Cal. 5th 257, 267 (2016). Thus, the DLSE has defined
22 a “net” ten minutes to mean that the rest period begins when the employee reaches an area away from the
23 work area that is appropriate for rest. *Id.* Employers must authorize and permit “a net 10 minutes of rest .
24 . . in each ‘work period’ and the rest period must be, as the language implies, duty-free.” *Augustus*, 2 Cal.
25 5th at 257. “That is, during rest periods employers must relieve employees of all duties and relinquish
26 control over how employees spend their time.” *Id.* at 269.

27 Turning to meal periods, under Labor Code section 226.7(a), “[n]o employer shall require any
28 employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare

Commission.” To satisfy its obligation to provide a meal period, employers must actually relieve employees of all duty and relinquish control over employee activities. *Brinker*, 53 Cal.4th at 1039-1040. In *Brinker*, the California Supreme Court ruled that the Wage Orders and California Labor Code section 512 require employers “to provide a first meal period after no more than five hours of work and a second meal period after no more than 10 hours of work.” *Brinker*, 53 Cal.4th at 1049. Also, during meal periods, “[t]he employer that refuses to relinquish control over employees during an owed meal period violates the duty to provide the meal period and owes compensation and premium pay for hours worked.” *Id.* at FN 19.

Plaintiff contends NCI requires Class Members to wear protective gear during their shifts. Plaintiff contends NCI requires employees to use part of their break time to don and doff their personal protective gear and to be back at their workstations within the time provided for the break (30 minutes for meal periods, and 15 minutes for rest breaks). Further, each of NCI’s employee handbooks state, “employees are expected to be punctual in starting and ending their breaks and may be disciplined for tardiness in returning to work upon the conclusion of their breaks.” Based on these policies, Plaintiff contends that NCI’s meal and rest period policies are unlawful because they fail to provide employees with a full 30 minutes of duty-free time for meal breaks and a full net 10 minutes of rest during a rest period, given that employees must use part of their break time to don and doff protective gear and travel to and from the break area. Mara Decl. ¶ 33.

Plaintiff argues that NCI does not tell employees that they are entitled to a net 10 minutes of rest break time in a suitable rest area, regardless of whatever complications may arise in getting to or from the rest area. Rather, Plaintiff asserts NCI simply tells employees that they receive 15 minutes for rest periods and will be disciplined for tardiness. As such, Plaintiff claims that NCI fails to clearly communicate that employees’ 15-minute rest breaks include at least 10 minutes of rest time that begins and ends in the rest area, regardless of how long it takes to get to and from the rest area. Likewise, Plaintiff further claims, because employees must perform duties—*e.g.*, donning/doffing protective gear and walking to/from a break room to their workstations during their allotted break time—their entire meal and rest period time is not theirs to do whatever they would like and is not “duty-free.” Plaintiff maintains that the walk time to/from workstations and the don/doff intrusions result in denial of the Labor Code and Wage Order’s

1 scrupulous protection of employee rights to full 30-minute meal periods and 10-minute rest breaks. *See,*
2 *e.g., Kaanaana v. Barret Business Services, Inc.*, 29 Cal.App.5th 778, 783 (2018) (“[p]laintiffs are entitled
3 to the statutory remedy under Labor Code section 226.7 – an additional hour of pay at their regular rate”
4 when an employee’s meal period is shortened by 3-5 minutes).

5 Plaintiff recognizes that NCI has colorable defenses to Plaintiff’s meal and rest period claims.
6 NCI is likely to assert that it need not mirror the language in the Wage Order to comply with California’s
7 requirements; rather, NCI will contend that its written meal and rest break policies provided all required
8 breaks, and informed employees when they should take their breaks. *Green v. Lawrence Serv. Co.*, Case
9 No. 12-CV-06155-JAK, 2013 WL 3907506, at *8 (C.D. Cal. July 23, 2013) (“[T]he absence of a formal
10 written policy does not constitute a violation of the meal and rest period laws.”). In fact, California does
11 not even require employers to affirmatively inform employees about their break rights. *Studley v. Alliance*
12 *Healthcare Servs., Inc.*, Case No. 10-CV-00067-CJC, 2012 WL 12286522, at *3 (C.D. Cal. July 26,
13 2012) (“[T]here is no affirmative duty to inform employees of their break rights.”); *Nguyen v. Baxter*
14 *Healthcare Corp.*, Case No.10-CV-01436-CJC, 2011 WL 6018284, at *6 (C.D. Cal. Nov. 28, 2011)
15 (“Ms. Nguyen’s claim that she was not provided with a second meal period is premised on her claim that
16 her supervisor did not inform her that she was entitled to a second thirty-minute break.... But there is no
17 affirmative duty to inform employees of their break rights... Rather, Ms. Nguyen must proffer evidence
18 that she was prohibited or deterred from taking a second meal period.”).

19 Plaintiff recognizes the risk that the Court will agree that NCI’s policies were sufficient to provide
20 necessary meal periods and rest breaks under California law. Under *Brinker*, if an employer provides all
21 necessary meal periods and rest breaks, it need not ensure meal and rest periods are taken. A reasonable
22 factfinder could conclude that NCI’s written policies were sufficient to provide all necessary meal periods
23 and rest breaks.

24 Plaintiff has also learned that NCI intends to argue that there is no common policy or practice of
25 (1) requiring production employees to remain at their work stations until the beginning of a meal break
26 or rest break, (2) to take their breaks in a designated breakroom, and (3) to be back at their work stations
27 by the end of the 30th minute for meal breaks and the end of the 15th minute for rest breaks. Plaintiff is
28 aware that NCI is likely to contend that it forbids employees from performing any off-the-clock work

1 and instructs employees to stop working to doff any project-specific protective gear before their breaks
2 begin and don any project-specific protective gear after they return from a break.

3 Furthermore, Plaintiff recognizes the risk that the putative class may not be certified, if the Court
4 credits NCI's evidence and rejects Plaintiff's evidence. NCI is likely to argue that individualized questions
5 as to the circumstances surrounding each individualized meal period and rest break will predominate over
6 common questions related to NCI's meal and rest break policies. *See In re Taco Bell Wage & Hour Actions*
7 (E.D. Cal. 2016) 2016 U.S. Dist. LEXIS 48577 *20; *Guinn v. Sugar Transport of the Northwest, Inc.* (E.D.
8 Cal. 2017) 2017 WL 6513306 *7 (commonality not met when an inquiry would have to be made as to
9 why each individual did not take their breaks at scheduled times); *Stiller v. Costco Wholesale Corp.* (S.D.
10 Cal. 2014) 298 F.R.D. 611, 626 (certification denied where the policy at issue did not automatically trigger
11 liability); *Cortez v. Best Buy Stores* (C.D. Cal. Jan. 25, 2012) 2012 WL 255345 ("each employee would
12 have to testify as to what she was told...by her specific manager [regarding when to take breaks]";
13 *Lanzarone v. Guardsmark Holdings, Inc.* (C.D. Cal. 2006) 2006 WL 4393465 *7 ("[i]f a claim is based
14 substantially on oral rather than written communications, class action is inappropriate as a matter of law.").

15 Under California Labor Code § 226.7, "[i]f an employer fails to provide an employee with a meal
16 or rest . . . period in accordance with state law, . . . the employer shall pay the employee one additional
17 hour of pay at the employee's regular rate of compensation for each workday that the meal or rest . . .
18 period is not provided." Cal. Lab. Code § 226.7. Therefore, meal and rest period premiums are triggered
19 for each shift in which a meal period or rest break is not provided. However, employees can only receive
20 **one** rest period premium per shift and **one** meal period premium per shift even if multiple rest period or
21 meal period violations occur in the same shift. California Labor Code § 226.7 permits "up to two premium
22 payments per workday." *United Parcel Service Wage and Hour Cases*, 196 Cal. App. 4th 57, 60 (2011).
23 This is regardless of how many missed meal and/or rest periods were incurred each workday. For
24 example, if an employee missed two meal periods and two rest periods, they would only be entitled to
25 two premium payments for these violations – "one for failure to provide meal periods and another for
26 failure to provide rest periods." *Id.*

27 Plaintiff estimates that NCI's **maximum** exposure under Plaintiff's meal and rest break claims
28

would be \$4,513,860¹⁴, representing two violations per shift (one for a meal period violation and one for a rest break violation) per employee.¹⁵ Mara Decl. ¶ 34.

2. Unpaid Wages Resulting From NCI's Control During Meal Periods

As stated above, Plaintiff argues that NCI's policies require Class Members to perform work at the beginning of their meal periods after clocking out to doff protective gear and to don protective gear at the end of their meal period before clocking in. If the factfinder agreed with Plaintiff, Class Members would be entitled to wages for the time spent donning/doffing protective gear while on unpaid meal periods. Plaintiff calculated the unpaid wage exposure at 5 minutes per shift during the Class Period. NCI's *maximum* exposure under Plaintiff's unpaid wages theory of liability would be \$270,831.60 (calculated as overtime wages).¹⁶ As Class Members almost always worked shifts that included overtime, Class Members would be entitled to their overtime rate for these wages. Mara Decl. ¶ 35.

Again, NCI insists that regardless of when or where employees take their breaks, NCI contends it forbids off-the-clock work and instructs employees to don/doff any project-specific protective gear before the break begins and after they have clocked back into work.

3. Waiting Time Claims

An employer is liable for waiting time penalties if the "employer willfully fails to pay... any [owed] wages of an employee who is discharged or quits." Cal. Lab. Code § 203. The term "willful" in § 203 "means that the employer intentionally failed or refused to perform an act which was required to be done." *Ghory v. Al-Lahham*, 209 Cal.App.3d 1487, 1492 (1989).

The wages Plaintiff claims are owed are the same unpaid wages that are the subject of the unpaid straight time and overtime claims. Thus, the only additional issue that would need to be resolved would

¹⁴ 173,610 shifts x \$13.00 per hour x 2 violations per shift (one meal and one rest) = \$4,513,860.

¹⁵ Plaintiff included varying shift lengths in his complaint to ensure that any potential class he may wish to certify in the future was included. For example, if through discovery and investigation it was revealed that Defendant failed to provide third rest periods, only shifts over ten hours would be implicated. If this class was not included in his complaint, he may have been precluded from seeking certification of such a class. Here, the alleged violations occurred in first meal periods and first rest periods, thus, implicating shifts of three and a half- and five-hours or more. Because employees who worked shifts of five or more hours qualified for inclusion in both these classes, and because employees can only receive one meal and one rest period premium per shift, it is irrelevant for settlement purposes whether employees worked shifts of other lengths.

¹⁶ 173,610 shifts x \$19.50 per hour (overtime rate of \$13 x 1.5) x 0.08 hours (*i.e.* 5 minutes) = \$270,831.60

1 be whether NCI's failure to pay all wages was "willful" within the meaning of the statute. If the factfinder
2 agrees with Plaintiff's theories of liability, Section 203 penalties will be proven in the single-stroke post-
3 certification determination of whether NCI willfully failed to these wages at termination. Plaintiff
4 calculated these penalties as equal to thirty (30) days' worth of wages for all 122 former employees. Thus,
5 NCI's *maximum* potential exposure would be \$404,430.¹⁷ Mara Decl. ¶ 36.

6 Plaintiff recognizes the risk that the Court may determine that the mere failure to make payments
7 at termination—the right to which is the subject of a good faith dispute—cannot, as a matter of law,
8 establish a "willful" failure to timely pay all wages. Plaintiff is aware of NCI's argument that it had a good
9 faith basis for believing that it was paying all wages appropriately and that there was a "good faith dispute"
10 that no additional wages were owed at the time of termination. Cal. Lab. Code § 203 ("waiting time"
11 penalties are not owed where there is such a "good faith dispute"); *see also* Cal. Code Regs. tit. 8, § 13520;
12 *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1201-1204 (2008). NCI is expected to present
13 evidence that it forbids off-the-clock work and instructs employees to doff any project-specific protective
14 gear before the break begins and don any project-specific protective gear after they clock back in from the
15 break.

16 4. Wage Statement Claims

17 Cal. Lab. Code § 226(a) provides an employer shall furnish an "an accurate itemized statement in
18 writing showing (1) gross wages earned, (2) total hours worked by the employee,...(5) net wages
19 earned...." An employee is deemed to suffer injury for purposes of § 226(e)(2)(B) if the employer fails to
20 provide accurate and complete information as required and "the employee cannot promptly and easily
21 determine from the wage statement alone" the "amount of gross wages or net wages paid to the employee
22 during the pay period or any of the other information required to be provided on the itemized wage
23 statement." Cal. Lab. Code § 226(e)(2)(B)(i). An employee is further deemed to suffer an injury if the
24 employee is unable to promptly and easily determine from the wage statement alone the deductions the
25 employer made from gross wages. Cal. Lab. Code § 226(e)(2)(B)(ii).

26 Plaintiff's theory of liability for wage statement violations derives from his unpaid wages claim.
27 In other words, if Plaintiff prevails on his theory of liability for unpaid wages, then Plaintiff contends

28 ¹⁷ \$13 per hour x 8.5 hours = \$110.50 x 30 days = \$3,315
122 former employees x \$3,315 (30 days' worth of wages) = \$404,430. Mara Decl. ¶ 37.

1 Class Members are entitled to penalties under Cal. Lab. Code § 226(e) for failure to include gross wages
2 earned, total hours worked by the employee, and net wages earned, pursuant to Cal. Lab. Code § 226(a)(1)-
3 (2) and (5). The statute of limitations for Plaintiff's inaccurate wage statement cause of action is only one
4 (1) year. As such, Plaintiff calculates NCI's *maximum* potential exposure under this cause of action as
5 \$608,000.¹⁸ Mara Decl. ¶ 38.

6 This claim is subject to the same potential defenses NCI is likely to raise in defense of the above
7 substantive claims. Plaintiff considers these defenses in evaluating the overall strength of the wage
8 statement claim. Mara Decl. ¶ 40.

9 5. PAGA

10 PAGA allows the private enforcement of certain Cal. Lab. Code sections relating to wage and hour
11 violations. PAGA Section 2699(f)(2) provides a penalty of \$100 per employee per pay period for an initial
12 violation and \$200 for each subsequent violation. However, California courts have interpreted this
13 language to require notice to the employer that an initial violation occurred before penalties for subsequent
14 violations could be assessed. *See Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1210. NCI
15 argues that Plaintiff would not be able to stack violations for each alleged *Labor Code* violation and would
16 only be entitled to one penalty for all violations per pay period – assuming Plaintiff prevailed on the merits.

17 Plaintiff alleges that NCI has five (5) violations—wage statement violations, unlawful rest periods
18 and meal periods, waiting time penalties, and failure to pay unpaid wages—of the Labor Code sections
19 which give rise to PAGA penalties. Based upon the data provided to Plaintiff, Plaintiff estimates NCI
20 employed approximately 152 Class Members who worked within the one-year PAGA statutory period
21 and are thus eligible to receive PAGA penalties. Plaintiff calculates NCI's exposure under PAGA would
22 be approximately \$790,400¹⁹, assuming that NCI is correct that it would not be possible to stack PAGA
23 penalties in light of the *Amaral* decision. All penalties would be calculated at an initial violation rate (\$100
24 per workweek), because no court has made a finding of any violation on NCI's part. *See Amaral*, 163
25 Cal.App.4th at 1210.

26 ¹⁸ Approximately 152 employees employed within the statute of limitations x \$4,000 (maximum damages
27 per employee under California Labor Code § 226). Mara Decl. ¶ 39.

28 ¹⁹ If NCI prevails on its defense regarding stacking, then penalties would be assessed at 1 violation per
pay period for all warehouse workers (152 x \$100 x 1 violation x 52 pay periods = \$790,400). Mara Decl.
¶ 41.

1 Additionally, Section 2699, subdivision (e)(2) provides that in an action where an employee is
2 seeking civil penalties under PAGA, “a court may award a lesser amount than the maximum penalty
3 amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise
4 would result in an award that is unjust, arbitrary, oppressive, or confiscatory.” The likelihood of the Court
5 reducing the PAGA penalties awarded to Plaintiff and the aggrieved employees – assuming liability is
6 proven as to each of Plaintiff’s claims – is higher in this case where these same individuals may also be
7 receiving money for the same unlawful conduct under the class claims. *See Avila v. Cold Spring Granite*
8 *Co.* (E.D. Cal. Jan. 12, 2018) Case No. 1:16-cv-001533-AWI-SKO, 2018 U.S. Dist. LEXIS 6142 *17
9 (“Because the PAGA penalties sought are at least partially duplicative of penalties granted by the
10 underlying Labor Code violations, *see, e.g.,* Cal. Lab. Code §§ 203, 226, 558(a), 1194.2, and because a
11 Court has discretion in whether and in what amount to award PAGA penalties, *see* Cal. Lab. Code §
12 2699(e)(2), Plaintiff recognizes that the potential PAGA penalties are highly uncertain.”).²⁰

13 As Plaintiff’s PAGA claims are based on the same alleged unlawful conduct as his class claims,
14 Plaintiff’s PAGA claims are subject to the same risks on the merits as Plaintiff’s class claims. Therefore,
15 PAGA penalties can only be awarded if the factfinder agrees with Plaintiff’s theories of liability.

16 Should the Court agree with any of NCI’s defenses, there is a potential that the individual class
17 members would take nothing on their claims, and any associated PAGA penalties would be extinguished,
18 as penalties can only be awarded if the Court agrees with the underlying allegations. Even if NCI’s liability
19 is established, the Court is empowered to reduce any PAGA penalties. The likelihood of a penalty
20 reduction is higher in this case than others, as the Court may determine that NCI believed in good faith
21 that it did not intrude into employees’ break time. In addition, denial of walking time and time donning

22
23 ²⁰ *See also Thurman v. Bayshore Transit Mgmt., Inc.* 203 Cal.App.4th 1112, 1135-36 (2012)(affirming
24 30% reduction under specified PAGA claim where the employer produced evidence that it took its
25 obligations seriously); *Elder v. Schwan Food Co.*, 2011 WL 1797254, at *5-*7 (Cal. Ct. App. May 12,
26 2011)(reversing trial court decision denying any civil penalties where violations had been proven,
27 remanding for the trial court to exercise discretion to reduce, but not wholly deny, civil penalties); *Li v. A*
28 *Perfect Day Franchise, Inc.* 2012 WL 2236752, at *17 (N.D. Cal. June 15, 2012)(denying PAGA penalties
for violation of California Labor Code § 226 as redundant with recovery on a class basis pursuant to
California Labor Code § 226, directly); *Fleming v. Covidien Inc.*, 2011 WL 7563047, at *4 (C.D. Cal.
Aug. 12, 2011)(reducing PAGA penalties from \$2.8 million to \$500,000); *Aguirre v. Genesis Logistics*,
2013 WL 10936035 at *2-*3 (C.D. Cal. Dec. 30, 2013)(reducing penalty for past PAGA violations from
\$1.8 million to \$500,000 after rejecting numerous other PAGA claims).

1 and doffing gear may not be considered as egregious as other meal period and rest breaks violations where
2 absolutely zero break time is afforded. Further, if Plaintiff is successful on the merits, PAGA penalties
3 would be duplicative of the recovery from the underlying violations. Therefore, Plaintiff recognizes and
4 reasonably believes the Court could significantly reduce any PAGA penalties if NCI was found liable for
5 the underlying Labor Code violations. Mara Decl. ¶ 42.

6 **d. Value Analysis**

7 Not taking into account any of its defenses or arguments, NCI's total exposure if Plaintiff were
8 successful in his claims, not including PAGA penalties, would be approximately \$5,797,121 [\$4,513,860
9 (meal and rest period exposure) + \$270,831 (unpaid wages exposure) + \$404,430 (waiting time penalty
10 exposure) + \$608,000 (wage statement exposure) = \$5,797,121]. Plaintiff's meal and rest period and
11 unpaid wages exposure represents approximately 82.5% of the total estimated damages. In addition,
12 Plaintiff's waiting time penalty exposure represents approximately 6.9% of the total estimated damages.
13 Further, Plaintiff's wage statement exposure represents approximately 10.4% of the total estimated
14 damages. These proportions directly correlate to the division of the Net Settlement Amount. As provided
15 in the Settlement, 83% of the Net Settlement Amount is allocated to the Meal, Rest, and Unpaid Wages
16 Payout Fund; 7% of the Net Settlement Amount is allocated to the Waiting Time Penalties Payout Fund;
17 and 10% of the Net Settlement Amount is allocated to the Wage Statement Payout Fund.

18 In consideration of the best interests of the class, Plaintiff had to discount his exposure analysis
19 in light of the significant defenses NCI is expected to raise if the matter is litigated on the merits. Plaintiff
20 also had to consider the likelihood that the Court may determine that Plaintiff's claims are not suitable
21 for class treatment, which increases the likelihood that putative class members recover nothing on their
22 claims, which may be considered too low in value to pursue individually. For example, the Court could
23 determine that Plaintiff failed to proffer class-wide evidence that rest breaks and meal periods were
24 uniformly denied, given anticipated evidence that some employees took rest breaks and meal periods and
25 that some employees voluntarily declined to take rest breaks and meal periods where employees were
26 allegedly supposed to don and doff. *See, e.g., Rojas-Cifuentes v. ACX Pac. Nw. Inc.*, No.
27 214CV00697JAMCKD, 2018 WL 2264264, at *5 (E.D. Cal. May 17, 2018) ("Plaintiff's conclusory
28 allegation that rest breaks were not available because of employees using those breaks to don and doff

1 and walk are [...not specific]. It is also unclear how a fact-finder could resolve this allegation without
2 needing to conduct individual inquiries...Finally, Plaintiff does not provide any authority to support a
3 finding that his donning and doffing rest break allegation is capable of resolution by common proof.”)

4 Accordingly, the Court could conclude that Plaintiff’s walking-time and donning/doffing theories
5 cannot be resolved by common proof. Plaintiff and NCI are likely to provide contrary declarations from
6 employees claiming they used (or did not use) their meal periods and rest breaks for walking time and
7 donning/doffing protective gear. *See Rojas-Cifuentes*, 2018 WL 2264264, at *8 (similar evidence that
8 defeated class certification in a donning/doffing and walking time theory case). NCI has presented
9 evidence that it permits employees to stop working and doff any project-specific protective gear before
10 the break begins and permits employees to don any project-specific protective gear after they clock back
11 in from the break. NCI has also presented evidence that it forbids any off-the-clock work.

12 In performing his exposure analysis, Plaintiff considered the realistic potential of recovering under
13 the each of his theories. Based on the above strengths and challenges, Plaintiff and his experienced counsel
14 calculated the potential value of the putative class’s claims, and determined that the gross settlement
15 amount of \$600,000 is a fair and reasonable settlement value. Mara Decl. ¶ 43.

16 Courts in the Ninth Circuit have observed that “a proposed settlement may be acceptable even
17 though it amounts to only a fraction of the potential recovery.” *Telecomm. Corp. v. DirectTV*, 221 F.R.D.
18 523, 527 (C.D. Cal. 2004). The settlement here of \$600,000 is fair, adequate, and reasonable when
19 considering that it provides warehouse workers with a definite recovery and is in proportion to the
20 strengths and challenges associated with all claims.

21 VI. NATURE AND METHOD OF NOTICE

22 a. Data to Administrator and Notice Mailing

23 The Class Database is due to Rust within 7 business days of the Court granting preliminary
24 approval. *See* Mara Decl., Ex. A, § IV, ¶ 2.5.3. Rust will mail notice to class members via first-class
25 regular U.S. Mail (and email if available) within 21 business days after the Court grants preliminary
26 approval. *Id.* at ¶ 2.5.5-2.5.9. Rust will maintain a website that has links to the notice, settlement
27 agreement, motions for approval and for attorneys’ fees, and the Court’s Orders. *Id.* at ¶ 2.5.2. Class
28 Members will have 45 days from the mailing date of the notice packet to opt-out or object to the

Settlement.²¹

b. The Notice Method Meets the Requirements of Rule 23

Rule 23 (c)(2) requires that the notice inform prospective class members of (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through counsel if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on class members under Rule 23 (c)(3) generally requires the same concepts. “Notice is satisfactory if it generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.” Newberg, 2 *Newberg on Class Actions* §8.32 at 8-103. The proposed class notices meet all of these requirements. See Mara Decl., **Ex. 1** (Class Notice) to **Ex. A** (Settlement Agreement). Thus, Plaintiff respectfully requests the Court order the class notices adequately notify the class of the proposed Settlement.

VII. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court grant preliminary approval of the proposed Settlement, conditionally certify the class, enter the proposed Preliminary Approval Order submitted herewith, and schedule a Final Approval Hearing date.

Dated: January 28, 2022

MARA LAW FIRM, PC

By: /s/ Jill Vecchi

David Mara, Esq.

Jill Vecchi, Esq.

Attorneys for Plaintiff

²¹ *Id.* at ¶ 1.37, 2.6. “[A]bsent class members are entitled not to perfect notice, but to the ‘best notice practicable.’” See *Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d 998, 1016–17 (E.D. Cal. 2019) (Ishii, A.); see also *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994) (actual notice not required under Rule 23(b)(3)); *In re: Cathode Ray Tube (Crt) Antitrust Litig.*, 2016 WL 3648478, at *17 (N.D. Cal. July 7, 2016) (overruling objections that class members did not receive notice, where the notice plan was the best practicable).