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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
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Date: March 16, 2020

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

TO ALL PARTIES HEREIN AND TO THEIR COUNSEL OF RECORD:

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

This motion is set for determination on March 16, 2020, at 1:30 p.m. in Courtroom 2 before the Honorable Anthony W. Ishii in Robert E. Coyle United States Courthouse located at 2500 Tulare Street, Eight Floor, Fresno, California 93721. This motion is based upon this notice, the accompanying Memorandum of Points & Authorities, the accompanying Declaration of David Mara, the Stipulation Regarding Settlement of Class and Representative Action and all exhibits, the filings on record in this case, and upon such further evidence, both documentary and oral, that may be presented at the hearing on this motion.

Dated: February 3, 2020

MARA LAW FIRM, PC

By: /s/ Jamie Serb

David Mara, Esq.

Jamie Serb, Esq.

Nikki Trenner, Esq.

Attorneys for Plaintiff

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I. INTRODUCTION

Named 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 now seeks preliminary approval of the Parties’ Stipulation Regarding Settlement of Class and Representative Action (“Settlement”). 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.

Assuming each class member participates in the Settlement, the Settlement is projected to pay each class member an average of \$1,350.36, less employee taxes. 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 class representative, appoint Plaintiff’s counsel as Class Counsel, and schedule a final approval hearing.

II. FACTUAL AND PROCEDURAL BACKGROUND

NCI manufactures and markets metal building systems and components for the nonresidential construction industry. To carry out its business, NCI employs warehouse workers. This lawsuit alleges

¹ Class Members who have not requested exclusion from the Settlement are “Settlement Class Members.”

that NCI violated various California wage and hour laws applicable to NCI's warehouse workers. Mara Decl. ¶ 24. Plaintiff filed this matter in Merced County Superior Court on June 6, 2018. NCI filed an Answer on July 12, 2018 and removed this matter on July 12, 2018. Mara Decl. ¶ 25.

a. Investigation

Plaintiff propounded special interrogatories and demands for production of documents to which NCI responded. NCI produced hundreds of documents including employee handbooks and policy manuals, earning statements, personnel files, break logs, job descriptions and work tasks. NCI also produced tens of thousands of lines of time records—the majority of which were produced in a raw electronic format which had to be analyzed and interpreted. NCI also propounded written discovery to which Plaintiff responded. Mara Decl. ¶ 26.

b. Settlement Negotiations

The Parties attended a mediation on November 19, 2019 and engaged in extensive arm's-length negotiations mediated by retired Superior Court judge and well-respected mediator, Honorable Joan A. Lewis (ret). As a result of meditation, the Parties signed a Term Sheet Settlement Agreement and continued to negotiate over the terms of the Stipulation Regarding Settlement of Class and Representative Action, which is now before the Court for preliminary and final approval². Mara Decl. ¶ 27.

III. SUMMARY OF SETTLEMENT

a. The Proposed Class

The Class is comprised of: 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 (June 6, 2014 through February 24, 2020). There are approximately 274 individuals who fall within this Class definition.

b. Settlement Terms

NCI shall pay an MSA of \$600,000 to fully and finally settle this matter. This is the total amount NCI can be required to pay under this Settlement, with the exception of Employer payroll taxes, which

² 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.").

will remain NCI's exclusive responsibility and will be paid by NCI separate and apart from the MSA. **No portion of the MSA will revert to NCI for any reason.** Deductions from the MSA will be made subject to the Court's approval, as follows:

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

Subject to Court approval, Mr. Gonzalez shall receive a payment not to exceed \$5,000. The payment shall be made from the MSA. As representative for the absent class members, Mr. Gonzalez risked a potential judgment taken against him for attorneys' fees and costs if this matter had not been successfully concluded. *See Early v. Superior Court*, 79 Cal.App.4th 1420, 1433 (2000) (a losing party is liable for the prevailing party's costs). In some wage and hour actions, such as this case, pursuant to *Cal. Lab. Code* § 218.5, the prevailing party can also recover attorneys' fees. Though the fee agreement provides that Class Counsel would pay such costs in the event his case was not won, Mr. Gonzalez could nevertheless have had a cost bill entered against him if he were unsuccessful, leaving him liable for potentially hundreds of thousands of dollars in the unexpected possibility that Class Counsel did not meet their obligation to cover those costs. Mara Decl. ¶ 28. Unfortunately, there have been judgments like this entered against class representatives.³ The risk of payment of NCI's costs, alone, is a sufficient basis for an award of the requested service award. Few individuals are willing to take this risk, and Mr. Gonzalez championed a cause on behalf of others with potentially huge monetary risks.

Courts have regularly and routinely granted approval of settlements containing enhancements, such as the one requested here. *See, e.g., Staton v. Boeing*, 327 F.3d 938, 977 (9th Cir. 2003). The typical enhancement award in wage and hour cases ranges from \$5,000 to \$75,000, although some awards may be higher. Very commonly there is more than one class representative who receive awards in the above range.⁴

Additionally, the modern-day work force is mobile, with employees holding several jobs over the

³ *See, e.g., Koehl v. Verio, Inc.*, 142 Cal.App.4th 1313, 1328 (2006) (a wage and hour class action where 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.).

⁴ *See, e.g., Cook v. Niedert*, 142 F.3d 1004, 1015 (7th Cir. 1998); *Roberts v. Texaco*, 979 F. Supp. 185 (S.D.N.Y. 1997) ("present or past employee whose present position or employment credentials or recommendation may be at risk by reason of having prosecuted the suit, who therefore lends his or her 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.").

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

ii. Attorneys’ Fees and Costs

Subject to Court approval, Plaintiff’s Counsel shall request an award of attorneys’ fees in an amount not to exceed \$150,000 (25% of the MSA). This amount is justified in this case, considering both past work completed by Plaintiff’s counsel and work remaining in documenting the settlement, securing Court approval, ensuring the settlement is fairly administered, and obtaining dismissal of the action. Also, subject to Court approval, Plaintiff’s Counsel shall request a reimbursement from the MSA for actual litigation costs in an amount not to exceed \$30,000. *See* Mara Decl., **Ex. A**, §VI, ¶ 2.10.1. Class Counsel will move the Court for a fee award in conjunction with final approval. Class Counsel intends to request only 25% of the MSA as their fee award, which is in line with the federal benchmark for such awards. Class Counsel will submit a fee motion, supporting their request for 25% of the MSA—which is \$150,000—including a lodestar crosscheck, hours, and hourly rates 7 days before the expiration of the Notice Period.

iii. Payment to the LWDA

Subject to Court approval, the Settlement allots \$60,000 of the MSA to PAGA penalties (“PAGA Payment”). As required by the Labor Code, seventy-five percent (75%) (\$45,000) of the PAGA Payment shall be paid to the LWDA, and twenty-five percent (25%) (\$15,000) of the PAGA Payment will become part of the Net Settlement Amount distributed to Settlement Class Members. Mara Decl., **Ex. A** at § IV, ¶ 1.25.

iv. Settlement Administration Expenses

The Parties have agreed to the appointment of Rust Consulting, Inc. (“Rust”) as the settlement administrator. Rust is an experienced class administration company that has acted as claims administrator

in numerous wage and hour cases. The Settlement allots an amount not to exceed \$15,000 to administer this Settlement, which falls within the range of estimates Class Counsel has received in the past for settlements of similar size and circumstances. The Settlement Administration Costs will be paid out of the MSA. If Rust's actual expenses or the amount awarded is less than the amount allotted in the Settlement, the difference shall become part of the NSA and be available for distribution to Settlement Class Members. Mara Decl. ¶ 29.

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

v. Settlement Payments to Class Members

After all deductions have been made, it is estimated that \$370,000 ("Net Settlement Amount" or "NSA") will be available for disbursement to Settlement Class Members, resulting in an average payment of \$1,350.36⁵ per Class Member. The money available for payout to these individuals comes out of the NSA, which is what remains of the MSA after subtracting all Court approved attorneys' fees and costs, the class representative enhancement, settlement administration costs, and the LWDA's portion of the PAGA Payment.

Each Settlement Class Member's Settlement Payment will be calculated by determining the Work Week Value⁶ – i.e., the monetary value attributed to each work week under the Settlement – which is then multiplied by the Settlement Class Member's number of Qualifying Work Weeks.⁷ See Mara Decl., **Ex. A**, Section VI, ¶ 1.27. 25% of each Settlement Payment is intended to settle claims for unpaid wages and will be reported on an IRS Form W2s, subject to all tax withholdings customarily withheld from an employee's wages. The remaining 75% is intended to settle the non-wage claims for interest and penalties and will be reported on IRS Form 1099s. See Mara Decl., **Ex. A** at Section VI, ¶ 2.1.1.

⁵\$370,000 / 274 = \$1,350.36.

⁶ Under the Settlement, "Work Week Value" is the number which is the quotient of the NSA divided by the total number of Qualifying Work Weeks for all Class Members. Mara Decl., **Ex. A**, Section VI, ¶ 1.33.

⁷ Under the Settlement, a "Qualifying Work Week" is any calendar week, i.e., seven consecutive days from Monday to Sunday during the Class Period in which a Class Member worked for Defendant at least one day in the calendar week. Mara Decl., **Ex. A**, Section VI, ¶ 1.38.

vi. Funding and Distribution of Settlement Funds

Upon final approval, and provided that there are no objections or appeals to the Court's Final Approval Order and Judgment, NCI will fund the MSA within 5 business days after the Effective Date.⁸ Within 10 business days after the Effective Date, the Administrator will disburse all payments required under the Settlement. See Mara Decl., **Ex. A** at Section VI, ¶¶ 2.4.1, 2.4.2.

vii. Uncashed Checks and Cy Pres Payment

Any checks issued to Settlement Class Members shall remain valid and negotiable for 180 days from the date of mailing. The Parties agreed that a *cy pres* beneficiary will receive the funds that were allocated to Settlement Class Members who did not cash their checks. See Mara Decl., **Ex. A** at Section VI, ¶¶ 2.8.4-2.8.5.

viii. Cy Pres Beneficiary

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

ix. Released Claims

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

"Released Claims" all claims, including without limitations "Unknown Claims" as defined in Paragraph 1.36 hereof, demands, rights, liabilities and causes of action of every nature and description whatsoever including without limitation statutory, constitutional, contractual or common law claims, whether known or unknown, against the Defendant

⁸ The Effective Date means the date on which the Judgment becomes final and can no longer be appealed or otherwise disturbed because one of the following has occurred: (i) the final affirmance on appeal of the 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, ¶ 1.9.

1 Releasees, or any of them, for any type of relief arising out of any Settlement Class
 2 Member's employment with Defendant, based on the facts alleged in the Complaint, that
 3 accrued during the Class Period for alleged or actual (i) failure to compensate for all hours
 4 worked; (ii) failure to pay regular and/or premium wages at the proper hourly rates for all
 5 hours worked; (iii) failure to comply with payroll or wage record-keeping documentation
 6 or wage statement itemization requirements; (iv) failure to provide sufficient meal and/or
 7 rest periods or pay additional sums of money in lieu thereof; (v) failure to timely pay wages
 8 due at termination or otherwise; (vi) failure to furnish accurate wage statements; (vii)
 9 failure to pay minimum wages; (viii) unfair business practices relating to or arising out of
 10 the previous claims; and (ix) to the extent not covered above, any claims pled in or
 11 reasonably arising out of the facts alleged in the operative complaint in the Litigation.
 12 Released Claims include (1) claims for penalties or any other remedies under any statute
 13 or regulation or other provision of law, based on the facts alleged in the Complaint,
 14 including without limitation claims under California Labor Code sections 201-204, 216,
 225.5, 226, 226.3, 226.7, 500, 510, 512, 558, 1174, 1174.5, 1197, 1198, California Labor
 Code section 1194, *et seq.*, California Labor Code section 2698 *et seq.*, California Business
 and Professions Code section 17200 *et seq.*, any applicable California Industrial Welfare
 Commission Wage Order; (2) claims, based on the facts alleged in the Complaint, for
 injunctive relief, restitution, disgorgement, accounting, declaratory relief or other equitable
 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.

15 "Unknown Claims" means any Released Claims which the Class Representative or
 16 any Settlement Class Member does not know or suspect to exist in his or her favor at the
 17 time of the entry of the Judgment, and which, if known by him or her might have affected
 18 his or her settlement with and release of the Defendant Releasees or might have affected
 19 his or her decision not to object to this settlement. With respect to any and all Released
 Claims, 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:

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

23 The Class Representative and each Settlement Class Member may hereafter
 24 discover facts in addition to or different from those which he or she now knows or believes
 25 to be true with respect to the subject matter of the Released Claims, but the Class
 26 Representative and each Settlement Class Member, upon the Effective Date, shall be
 27 deemed to have, and by operation of the Judgment shall have, fully, finally, and forever
 28 settled and released any and all Released Claims, known or unknown, suspected or
 unsuspected, contingent or non-contingent, whether or not concealed or hidden, which then
 exist, or heretofore have existed upon any theory of law or equity now existing or coming
 into existence in the future, including, but not limited to, conduct which is negligent,
 intentional, with or without malice, or a breach of any duty, law or rule, without regard to
 the subsequent discovery or existence of such different or additional facts. The Class

Representative acknowledges, and the Settlement Class Members shall be deemed by operation of the Judgment to have acknowledged, that the foregoing waiver was separately bargained for and a key element of the settlement of which this release is a part.

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

The release covers claims that were alleged or could have been alleged in Plaintiff's complaint and the release is tied to the facts and allegations contained therein. See Mara Decl., **Ex. A**, at Section IV, ¶¶ 1.28, 1.36.

IV. CONDITIONAL CERTIFICATION SHOULD BE GRANTED

A class action may be certified if all four prerequisites under Rule 23(a) are satisfied and at least one subsection under Rule 23(b) is met. *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304 (9th Cir. 1977). The requirements of Rule 23(a) are referred to as: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy. *United Steel, Paper & Forestry, Rubber, Mfg. Energy v. Conoco Phillips Co.*, 593 F.3d 802, 806 (9th Cir. 2010). As will be discussed below, these requirements are met here. In addition, the Parties agreed to certification of the Class under Rule 23(b)(3) which has the added requirement of "predominance." *Id.* NCI does not oppose certification for the purpose of settlement only. As such, the Parties seek provisional certification of the Class. Should the Settlement not be approved or not become final for any reason, the Parties agree no class will be certified.

a. Rule 23(a) Class Requirements are Met

i. Numerosity

Impracticability of joinder is the hallmark of the numerosity analysis. The numerosity requirement is met when the class is "so numerous that joinder of all members is impracticable[.]" Fed. R. Civ. P. 23(a)(1). Joinder is usually impracticable when a class is "large in numbers" although this is not the only factor in determining impracticability. See *Jordan v. Cnty. of Los Angeles*, 669 F.2d 1311, 1319 (9th Cir.), vacated on other grounds, 459 U.S. 810 (1982) (class sizes of 39, 64, and 71 are sufficient to satisfy the numerosity requirement). NCI employed approximately 274 warehouse workers⁹ in California during the class period making joinder of all parties impracticable. As such, the putative class is sufficiently

⁹ Mara Decl. **Ex. A**, at Section VI, ¶ 1.1.

1 numerous.

2 **ii. Commonality**

3 Commonality is satisfied if “there are questions of law or fact common to the class.” Fed. R. Civ.
 4 P. 23(a)(2). “All questions of law and fact need not be common to satisfy the rule. The existence of shared
 5 legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled
 6 with disparate legal remedies within the class.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir.
 7 1998). The Ninth Circuit has held that commonality exists “where the lawsuit challenges a system-wide
 8 practice or policy that affects all of the putative class members.” *Armstrong v. Davis*, 275 F.3d 849, 868
 9 (9th Cir. 2001). Here, common questions exist, such as whether NCI’s standard policies, applicable to all
 10 putative class members, deprived the Class of wages and legally compliant meal and rest periods. Put
 11 differently, there are questions of law and fact common to the Class with respect to the wage-and-hour
 12 claims: namely, (a) whether NCI failed to provide the Class with compliant meal breaks and rest breaks;
 13 (b) whether NCI paid the Class for all time worked; (c) whether NCI failed to issue compliant itemized
 14 wage statements to the Class; (d) whether NCI willfully failed to pay all wages due up termination; (e)
 15 whether NCI required the Class to work off-the-clock; and, (f) whether NCI failed to pay overtime wages
 16 to the Class.

17 **iii. Typicality**

18 Typicality screens out class representatives with factual circumstances markedly different than
 19 other class members thereby ensuring adequate representation which is centrally focused on common
 20 issues. Rule 23(a) requires that “the claims or defense of the representative parties are typical of the claims
 21 or defenses of the class.” This requirement is “permissive” and requires only that the representative’s
 22 claims are reasonably related to those of the absent class members. *Rodriguez v. Hayes*, 591 F.3d 1105,
 23 1124 (9th Cir. 2010).

24 Plaintiff’s claims and those of the putative class members are based on the same alleged course of
 25 conduct, *i.e.*, the claim that NCI does not pay all wages owed or provide compliant meal and rest periods.
 26 Plaintiff claims he and other employees experienced NCI’s alleged Labor Code violations, as Plaintiff
 27 argues NCI’s policies required all employees to don/doff protective gear as well as include walking time
 28 as part of their meal and rest breaks. Plaintiff and the Class are also alleged to have suffered similar injury.

1 i.e., the non-payment of premiums for allegedly unprovided or non-duty-free meal and rest periods, and
 2 the non-payment of wages for off-the-clock time spent donning/doffing protective gear and walking time.

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

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

9 Both requirements are met. There is no evidence of any conflict or antagonism between the class
 10 representative, his counsel, or the class. Plaintiff has demonstrated that he is willing and able to vigorously
 11 prosecute this litigation. The proposed class representative has a thorough understanding of this lawsuit,
 12 interests in line with those of the class, and no conflicts with other class members. Further, counsel for
 13 Plaintiff have significant experience in the prosecution of wage and hour class actions and in employment
 14 litigation. Mara Decl. ¶¶ 1-22. Plaintiff’s counsel has vigorously prosecuted this matter and will continue
 15 to do so. Thus, Plaintiff and his counsel are adequate representatives and David Mara, Jamie Serb, and
 16 Nikki Trenner from Mara Law Firm, PCs should be appointed class counsel pursuant to Fed. R. Civ. P.
 17 Rule 23(g).

18 **b. Rule 23(b) Standards are Satisfied**

19 **i. Common Issues Predominate**

20 In addition to the Rule 23(a) requirements, a court must find that common issues of law or fact
 21 “predominate over any questions affecting only individual members.” Fed. R. Civ. P. 23(b)(3). With
 22 regard to the requirements of subsection (b), Rule 23(b)(3) allows class certification where common
 23 questions of law and fact predominate over individual questions and class treatment is superior to
 24 individual litigation. The predominance inquiry “tests whether proposed classes are sufficiently cohesive
 25 to warrant adjudication by representation.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). To
 26 determine whether common questions predominate, a court is to consider “the relationship between the
 27 common and individual issues.” The proposed Class in this case is sufficiently cohesive to warrant
 28 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, 514 (9th Cir. 2013).

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

ii. The Class Action Device is Superior

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

Nothing in the record indicates that any class member has a particular individual interest in controlling the prosecution or defense of separate actions. All class members' harm arises out of the same unlawful policies challenged in this lawsuit. There are also no other known actions pending raising the same issues against NCI. Mara Decl. ¶¶ 30. "Finally, as is often the case with wage and hour class actions, the individual damages of each employee are too small to make litigation cost effective." *Wright v. Renzenberger, Inc.*, No. CV136642FMOAGR, 2017 WL 9831398, at *12 (C.D. Cal. Sept. 30, 2017). Therefore, the class action device is a superior means to litigate this matter.

iii. No Manageability Issues Preclude Certification

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

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

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

V. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED

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

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

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

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

the strength of plaintiffs’ case; the risk, expense, complexity and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered 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. *Officers for Justice, supra*, 688 F.2d 615, 625.

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

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

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

c. The Balancing of Factors

The factors noted above are commonly considered at preliminary approval. The factors here, in their respective levels of applicability, favor approval of the Settlement. Mr. Gonzalez submits—and NCI disputes—that this case was factually and legally strong. This matter was settled after substantial discovery, which included written discovery that resulted in hundreds of pages of documents and thousands of lines of data. Thus, at the point the Settlement was initially agreed to, no one was in a better position than Plaintiff’s counsel to understand the strengths and potential limitations of Mr. Gonzalez’s case and thus evaluate the reasonableness of the amount offered in settlement. Mara Decl. ¶ 31.

Mr. Gonzalez contends that NCI’s failure to provide compliant meal and rest periods and pay all wages owed are the predominant claims in the lawsuit. Mara Decl. ¶ 32.

i. Liability on the Merits and Class Certification

Plaintiff recognizes that none of his class-wide claims would result in a guaranteed win. Plaintiff’s core claims here are for meal and rest break violations and unpaid wages, which faced significant challenges that had to be considered in negotiating class-wide settlement. Mara Decl. ¶ 33.

1. Rest and Meal Break Claims

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

Turning to meal periods, under Labor Code section 226.7(a), “[n]o employer shall require any 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

1 employees of all duty and relinquish control over employee activities. *Brinker*, 53 Cal.4th at 1039-1040.
2 In *Brinker*, the California Supreme Court ruled that the Wage Orders and California Labor Code section
3 512 require employers “to provide a first meal period after no more than five hours of work and a second
4 meal period after no more than 10 hours of work.” *Brinker*, 53 Cal.4th at 1049. Also, during meal periods,
5 “[t]he employer that refuses to relinquish control over employees during an owed meal period violates the
6 duty to provide the meal period and owes compensation and premium pay for hours worked.” *Id.* at FN
7 19.

8 Plaintiff contends NCI requires Class Members to wear protective gear during their shifts. Plaintiff
9 contends NCI requires employees to use part of their break time to don and doff their personal protective
10 gear and to be back at their workstations within the time provided for the break (30 minutes for meal
11 periods, and 15 minutes for rest breaks). Further, each of NCI’s employee handbooks state, “employees
12 are expected to be punctual in starting and ending their breaks and may be disciplined for tardiness in
13 returning to work upon the conclusion of their breaks.” Based on these policies, Plaintiff contends that
14 NCI’s meal and rest period policies are unlawful because they fail to provide employees with a full 30
15 minutes of duty-free time for meal breaks and a full net 10 minutes of rest during a rest period, given that
16 employees must use part of their break time to don and doff protective gear and travel to and from the
17 break area. Mara Decl. ¶ 34.

18 Plaintiff argues that NCI does not tell employees that they are entitled to a net 10 minutes of rest
19 break time in a suitable rest area, regardless of whatever complications may arise in getting to or from the
20 rest area. Rather, Plaintiff asserts NCI simply tells employees that they receive 15 minutes for rest periods
21 and will be disciplined for tardiness. As such, Plaintiff claims that NCI fails to clearly communicate that
22 employees’ 15-minute rest breaks include at least 10 minutes of rest time that begins and ends in the rest
23 area, regardless of how long it takes to get to and from the rest area. Likewise, Plaintiff further claims,
24 because employees must perform duties—*e.g.*, donning/doffing protective gear and walking to/from a
25 break room to their workstations during their allotted break time—their entire meal and rest period time
26 is not theirs to do whatever they would like and is not “duty-free.” Plaintiff maintains that the walk time
27 to/from workstations and the don/doff intrusions results in denial of the Labor Code and Wage Order’s
28 scrupulous protection of employee rights to full 30-minute meal periods and 10-minute rest breaks. *See*,

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

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

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

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

1 instructs employees to stop working to doff any project-specific protective gear before their breaks begin
2 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.*
8 (E.D. Cal. 2017) 2017 WL 6513306 *7 (commonality not met when an inquiry would have to be made as
9 to why each individual did not take their breaks at scheduled times); *Stiller v. Costco Wholesale Corp.*
10 (S.D. Cal. 2014) 298 F.R.D. 611, 626 (certification denied where the policy at issue did not automatically
11 trigger liability); *Cortez v. Best Buy Stores* (C.D. Cal. Jan. 25, 2012) 2012 WL 255345 ("each employee
12 would 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 Labor Code § 226.7 premiums are triggered for each shift in which a meal period or rest break is
16 not provided. Thus, Plaintiff estimates that NCI's **maximum** exposure under Plaintiff's meal and rest
17 break claims would be \$4,513,860¹⁰, representing two violations per shift (one for a meal period violation
18 and one for a rest break violation) per employee. Mara Decl. ¶ 35.

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

20 As stated above, Plaintiff argues that NCI's policies require Class Members to perform work
21 before the end of their meal periods to don protective gear and to doff protective gear after beginning
22 their meal period. If the factfinder agreed with Plaintiff, Class Members would be entitled to wages for
23 the time spent donning/doffing protective gear while on unpaid meal periods. Plaintiff calculated the
24 unpaid wage exposure at 5 minutes per shift during the Class Period. NCI's **maximum** exposure under
25 Plaintiff's unpaid wages theory of liability would range between \$180,554.40 (calculated as straight time
26 wages)¹¹ and \$270,831.60 (calculated as overtime wages)¹². Mara Decl. ¶ 36.

27 ¹⁰ 173,610 shifts x \$13.00 per hour x 2 violations per shift (one meal and one rest) = \$4,513,860.

28 ¹¹ 173,610 shifts x \$13.00 per hour x 0.08 hours (i.e. 5 minutes) = \$180,554.40.

¹² 173,610 shifts x \$19.50 per hour (overtime rate of \$13 x 1.5) x 0.08 hours (i.e. 5 minutes) = \$270,831.60

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 be whether NCI’s failure to pay all wages was “willful” within the meaning of the statute. If the factfinder agrees with Plaintiff’s theories of liability, Section 203 penalties will be proven in the single-stroke post-certification determination of whether NCI willfully failed to these wages at termination. Plaintiff calculated these penalties as equal to thirty (30) days’ worth of wages for all 122 former employees. Thus, NCI’s **maximum** potential exposure would be \$380,640.¹³ Mara Decl. ¶ 37.

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

4. Wage Statement Claims

¹³ \$13 per hour x 8 hours = \$104.00 x 30 days = \$3,120
122 former employees x \$3,120 (30 days’ worth of wages) = \$380,640. Mara Decl. ¶ 38.

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

Plaintiff’s theory of liability for wage statement violations derives from his unpaid wages claim. In other words, if Plaintiff prevails on his theory of liability for unpaid wages, then Plaintiff contends Class Members are entitled to penalties under Cal. Lab. Code § 226(e) for failure to include gross wages earned, total hours worked by the employee, and net wages earned, pursuant to Cal. Lab. Code § 226(a)(1)-(2) and (5). The statute of limitations for Plaintiff’s inaccurate wage statement cause of action is only one (1) year. As such, Plaintiff calculates NCI’s *maximum* potential exposure under this cause of action as \$608,000.¹⁴ Mara Decl. ¶ 39.

This claim is subject to the same potential defenses NCI is likely to raise in defense of the above substantive claims. Plaintiff considers these defenses in evaluating the overall strength of the wage statement claim. Mara Decl. ¶ 41.

5. PAGA

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

¹⁴ Approximately 152 employees employed within the statute of limitations x \$4,000 (maximum damages per employee under California Labor Code § 226). Mara Decl. ¶ 40.

only be entitled to one penalty for all violations per pay period – assuming Plaintiff prevailed on the merits.

Plaintiff alleges that NCI has five (5) violations—wage statement violations, unlawful rest periods and meal periods, waiting time penalties, and failure to pay unpaid wages—of the Labor Code sections which give rise to PAGA penalties. Based upon the data provided to Plaintiff, Plaintiff estimates NCI employed approximately 152 Class Members who worked within the one-year PAGA statutory period and are thus eligible to receive PAGA penalties. Plaintiff calculates NCI’s maximum exposure under PAGA would be approximately \$790,400¹⁵, assuming that NCI is correct that it would not be possible to stack PAGA penalties in light of the *Amaral* decision. All penalties would be calculated at an initial violation rate (\$100 per workweek), because no court has made a finding of any violation on NCI’s part. *See Amaral*, 163 Cal.App.4th at 1210.

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

¹⁵ 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. ¶ 42.

¹⁶ *See also Thurman v. Bayshore Transit Mgmt., Inc.* 203 Cal.App.4th 1112, 1135-36 (2012)(affirming 30% reduction under specified PAGA claim where the employer produced evidence that it took its obligations seriously); *Elder v. Schwan Food Co.*, 2011 WL 1797254, at *5-*7 (Cal. Ct. App. May 12, 2011)(reversing trial court decision denying any civil penalties where violations had been proven, remanding for the trial court to exercise discretion to reduce, but not wholly deny, civil penalties); *Li v. A 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).

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

Should the Court agree with any of NCI's defenses, there is a potential that the individual class members would take nothing on their claims, and any associated PAGA penalties would be extinguished, as penalties can only be awarded if the Court agrees with the underlying allegations. Even if NCI's liability is established, the Court is empowered to reduce any PAGA penalties. The likelihood of a penalty reduction is higher in this case than others, as the Court may determine that NCI believed in good faith that it did not intrude into employees' break time. In addition, denial of walking time and time donning and doffing gear may not be considered as egregious as other meal period and rest breaks violations where absolutely zero break time is afforded. Further, if Plaintiff is successful on the merits, PAGA penalties would be duplicative of the recovery from the underlying violations. Therefore, Plaintiff recognizes and reasonably believes the Court could significantly reduce any PAGA penalties if NCI was found liable for the underlying Labor Code violations. Mara Decl. ¶ 43.

d. Value Analysis

In consideration of the best interests of the class, Plaintiff had to discount his exposure analysis in light of the significant defenses NCI is expected to raise if the matter is litigated on the merits. Plaintiff also had to consider the likelihood that the Court may determine that Plaintiff's claims are not suitable for class treatment, which increases the likelihood that putative class members recover nothing on their claims, which may be considered too low in value to pursue individually. For example, the Court could determine that Plaintiff failed to proffer class-wide evidence that rest breaks and meal periods were uniformly denied, given anticipated evidence that some employees took rest breaks and meal periods and that some employees voluntarily declined to take rest breaks and meal periods where employees were allegedly supposed to don and doff. *See, e.g., Rojas-Cifuentes v. ACX Pac. Nw. Inc.*, No. 214CV00697JAMCKD, 2018 WL 2264264, at *5 (E.D. Cal. May 17, 2018) ("Plaintiff's conclusory allegation that rest breaks were not available because of employees using those breaks to don and doff and walk are [...not specific]. It is also unclear how a fact-finder could resolve this allegation without needing to conduct individual inquiries...Finally, Plaintiff does not provide any authority to support a

finding that his donning and doffing rest break allegation is capable of resolution by common proof.”)

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

In performing his exposure analysis, Plaintiff considered the realistic potential of recovering under each of his theories. Based on the above strengths and challenges, Plaintiff and his experienced counsel calculated the potential value of the putative class’s claims, and determined that the gross settlement amount of \$600,000 is a fair and reasonable settlement value. Mara Decl. ¶ 44.

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

VI. NATURE AND METHOD OF NOTICE

a. Data to Administrator and Notice Mailing

The Class Database is due to Rust within 7 business days of the Court granting preliminary approval. *See* Mara Decl., **Ex. A**, § IV, ¶ 2.5.3. Rust will mail notice to class members via first-class regular U.S. Mail (and email if available) within 21 business days after the Court grants preliminary approval. *Id.* at ¶ 2.5.5-2.5.9. Rust will maintain a website that has links to the notice, settlement agreement, motions for approval and for attorneys’ fees, and the Court’s Orders. *Id.* at ¶ 2.5.2. Class Members will have 45 days from the mailing date of the notice packet to opt-out or object to the Settlement.¹⁷

¹⁷*Id.* at ¶ 1.29, 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, 43820707.1 Plaintiff’s Notice of Motion and

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: February 3, 2020

MARA LAW FIRM, PC

/s/ Jamie Serb

Jamie Serb, Esq.

Representing Plaintiff

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).