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

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
**IN AND FOR THE COUNTY OF SAN BERNARDINO**

ERIK MARTINEZ on behalf of himself, all  
others similarly situated, and on behalf of the  
general public,

Plaintiffs,

v.

PATRICK INDUSTRIES, INC.; and DOES  
1-100,

Defendants

Case No. CIVDS2009663

*[Assigned for All Purposes to the  
Hon. David Cohn; Dept. S26]*

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFF ERIK MARTINEZ'S  
MOTION FOR PRELIMINARY  
APPROVAL OF CLASS ACTION  
SETTLEMENT, CONDITIONAL  
CERTIFICATION, APPROVAL OF  
CLASS NOTICE, SETTING OF FINAL  
APPROVAL HEARING DATE**

Date: July 5, 2022

Time: 10:00 a.m.

Complaint Filed: June 1, 2020

Trial Date: None Set

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1       **I. INTRODUCTION**

2           Plaintiff Erik Martinez, on behalf of himself and the approximately 358-member putative  
3 class, respectfully requests that this Court preliminarily approve the Settlement Agreement  
4 (hereinafter “Agreement”<sup>1</sup>) entered into between Plaintiff and Defendant Patrick Industries, Inc.  
5 (hereinafter “Defendant” or “Patrick”) (hereinafter Plaintiff and Defendant are collectively  
6 referred to as the “Parties”). The Parties’ Agreement seeks to resolve claims raised against  
7 Defendant in this matter in exchange for a non-reversionary \$1,800,000 Gross Settlement Amount.  
8 The proposed Class is comprised of all non-exempt employees of Defendant who worked in  
9 California from June 1, 2016 through June 10, 2022.<sup>2</sup> The Class Period is June 1, 2016 through  
10 June 10, 2022.<sup>3</sup> It is requested that the Court grant preliminary approval, as, when analyzing the  
11 strengths and vulnerabilities of the claims and Defendant’s potential liability exposure, this  
12 proposed settlement of \$1,800,000 is within the range of reasonableness. This settlement is  
13 estimated to pay Class Members an average payment of approximately \$2,995.98,<sup>4</sup> and a high  
14 estimated payment of \$18,769.40.<sup>5</sup> In addition, this settlement is estimated to pay the  
15 approximately 202 PAGA Aggrieved Employees<sup>6</sup> an average payment of \$92.82,<sup>7</sup> and a high  
16 payment of \$406.55.<sup>8</sup> Moreover, the proposed Agreement satisfies all of the criteria for

17 \_\_\_\_\_  
18 <sup>1</sup> The Parties’ Joint Stipulation and Settlement Agreement (“Agreement”) is attached to the  
19 Declaration of David Mara, Esq. (“Mara Dec.”) as Exhibit 1. “Exhibit 1” herein refers to the  
20 Parties’ Agreement.

21 <sup>2</sup> Exhibit 1 at Section I, Paragraph 5, Page 1.

22 <sup>3</sup> Exhibit 1 at Section I, Paragraph 10, Page 2.

23 <sup>4</sup> The Net Settlement Amount is approximately \$1,072,560. \$1,072,560 divided by approximately  
24 358 Class Members = \$2,995.98.

25 <sup>5</sup> The workweek value under the settlement is approximately \$59.72. There are approximately  
26 314.29 workweeks between June 1, 2016 and June 10, 2022. \$59.72 multiplied by 314.29  
27 workweeks is \$18,769.40.

28 <sup>6</sup> PAGA Aggrieved Employees are Class Members who worked during the PAGA Period. (Exhibit  
1 at Section I, Paragraph 28, Page 4).

<sup>7</sup> The portion of the PAGA Payment available for distribution to PAGA Aggrieved Employees is  
approximately \$18,750. \$18,750 divided by approximately 202 PAGA Aggrieved Employees =  
\$92.82.

<sup>8</sup> The pay period value under the settlement is approximately \$2.35. There are approximately 173  
pay periods between February 19, 2019 through June 10, 2022. \$2.35 multiplied by 173 pay  
periods = \$406.55.

preliminary approval under Rule 3.769 of the California Rules of Court.

As the following sections show, Class Counsel are convinced that the proposed settlement is in the best interests of the Class based on the negotiations and a detailed knowledge of the issues presented in this action. The length and risks of trial and perils of litigation that affect the value of the claims were all carefully weighed. In addition, the defenses asserted by Defendant, the uncertainty of class certification, the difficulties of complex litigation, the lengthy process of establishing specific damages and various possible delays and appeals were also carefully considered by Class Counsel in arriving at the proposed settlement. The Agreement was the product of an all-day mediation with wage and hour mediator Michael Dickstein and was the product of non-collusive, arm's-length negotiations by informed counsel and parties. The settlement is fair, reasonable, and adequate. Accordingly, Plaintiff seeks: (1) preliminary approval of the terms contained in the Agreement; (2) provisional certification of the Class; (3) appointment of Plaintiff as Class Representative; (4) appointment of Mara Law Firm, PC, as Class Counsel; (5) approval of the Parties' proposed notice of class action settlement<sup>9</sup> (referred to herein as the "Class Notice" or "Notice") and method of notifying the Class about the settlement; and (6) a hearing date for final approval on October 17, 2022 or later.

## **II. BACKGROUND**

Patrick is a major manufacturer and distributor of component and building projects for the recreational vehicle, manufactured housing, and marine industries. Patrick also supplies many of its products to certain industrial markets that include customers in the residential housing, high-rise, hospitality, kitchen cabinet, office and household furniture, fixtures and commercial furnishings, and other industrial markets.

On February 19, 2020, Plaintiff uploaded a notice to the Labor and Workforce Development Agency in accordance with the PAGA. Plaintiff's notice alleges that Defendant failed to pay all straight time and overtime wages, failed to provide lawful meal and rest periods, failed to provide accurate itemized wage statements, and failed to pay all wages due at the

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<sup>9</sup> The Class Notice is attached to the Agreement as Exhibit A.

1 termination of employment. (Mara Dec. ¶ 9).

2 Plaintiff filed the Complaint against Defendant San Bernardino County Superior Court on  
3 June 1, 2020 (Case No. CIV2009663). The complaint alleged the following causes of action  
4 against Defendant: (1) failure to pay all straight time and/or minimum wages; (2) failure to pay  
5 all overtime wages; (3) failure to provide meal periods; (4) failure to authorize and permit rest  
6 periods; (5) knowing and intentional failure to comply with itemized employee wage statement  
7 provisions; (6) violation of the Labor Code Private Attorneys General Act of 2004; and (8)  
8 violation of Unfair Competition Law. (Mara Dec. ¶ 10).

### 9 **III. INVESTIGATION**

#### 10 **a. Discovery**

11 Since the filing of the Action and through execution of this Settlement Agreement, Plaintiff  
12 has conducted a thorough investigation into the facts underlying the claims asserted in the  
13 Complaint. Plaintiff has also engaged in extensive informal and formal discovery, including, the  
14 production of an extensive data sampling of time clock punches and wage statements and all  
15 applicable policies. In total, Defendant produced over 5,500 documents. (Mara Dec. ¶ 11).

16 Prior to mediation, Defendant provided Plaintiff with detailed information regarding the  
17 size of the Class, the applicable hiring and termination dates for Class Members, and the pay rates  
18 of Class Members, in addition to other relevant information. (Mara Dec. ¶ 12).

#### 19 **b. The Parties Agreed to Attend Mediation**

20 On March 28, 2022, the Parties participated in a full-day mediation with respected wage  
21 and hour mediator, Michael Dickstein. This mediation was successful. The Parties then met and  
22 conferred over all the terms of the settlement and finalized their agreement in the Parties'  
23 Agreement. The Parties seek preliminary approval of the Agreement in the instant motion. (Mara  
24 Dec. ¶ 13; *see also* Exhibit 1 attached thereto).

#### 25 **c. The Parties' Staunchly Conflicting Positions**

##### 26 **i. Meal Period Claim**

27 Plaintiff contends that Defendant does not provide employees with meal periods that conform  
28

1 with California law. Employers have an obligation under California law to provide employees with  
2 thirty (30) minute meal periods. Under California Labor Code § 512(a), “[a]n employer may not  
3 employ an employee for a work period of more than five hours per day without providing the  
4 employee with a meal period of not less than 30 minutes . . . .” Cal. Lab. Code § 512(a). An employer  
5 “satisfies this obligation [to provide meal periods] if it relieves its employees of all duty, relinquishes  
6 control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-  
7 minute break, and does not impede or discourage them from doing so.” *Brinker Restaurant Corp. v.*  
8 *Superior Court* (2012) 53 Cal.4th 1004, 1040.

9       Recently, the California Supreme Court issued a decision, wherein it ruled that time records  
10 showing late, short, or missed meal periods raises a rebuttable presumption that the meal periods were  
11 not provided: “If time records show missed, short, or delayed meal periods with no indication of  
12 proper compensation, then a rebuttable presumption arises” that the meal periods were not provided  
13 in accordance with California law. *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, 74.

14       Plaintiff contends that Defendant’s records show meal period violations. Plaintiff asserts that  
15 this occurs because employees are not provided with full thirty-minute meal periods because they are  
16 told that they have to be back at their workstation within thirty minutes of leaving for a meal period.  
17 As Defendant’s facility is expansive, Plaintiff contends that employees must clock in early from meal  
18 periods to ensure they are back at their workstation before thirty minutes expires. Further, Plaintiff  
19 asserts that Defendant’s records show meal periods taken after the fifth hour of work. In addition,  
20 Plaintiff alleges that meal periods are entirely not provided in some shifts.

21       Defendant asserts that its meal period policy is lawful and that it provides employees with  
22 meal periods in compliance with California law. Defendant alleges that if litigation continues it  
23 would be able to show that it advised employees of the right to take a meal period through its  
24 employee handbook and that employees either took a lawful meal period or knowingly and  
25 voluntarily decided to skip the meal period or take a late or short meal period. Defendant contends  
26 that this evidence would rebut the presumption under *Donohue v. AMN Services, LLC*. As such, a  
27 legal dispute exists as to whether Defendant can rebut the presumption that arises when employees’

1 time records show late, short, and missed meal periods.

2 **ii. Unpaid Wages Claim**

3 Plaintiff alleges that Defendant does not pay for all hours worked. Employees must be  
4 paid for all “hours worked,” as that phrase is defined in the Wage Order and interpreted by  
5 California courts. Hours worked is defined in the Wage Order as “the time during which an  
6 employee is subject to the control of an employer, and includes all the time the employee is  
7 suffered or permitted to work, whether or not required to do so.” Wage Order 1-2001, Subd. 2(G);  
8 *see also Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833. In California, rounding  
9 policies are permissible if the rounding policy is “fair and neutral on its face and ‘it is used in  
10 such a manner that it will not result, over a period of time, in failure to compensate the employees  
11 properly for all the time they have actually worked.’” *See’s Candy, Inc. v. Superior Court* (2012)  
12 210 Cal. App. 4th. 889, 907.

13 Plaintiff alleges that Defendant has an unlawful rounding practice that is not fair and  
14 neutral in practice. Plaintiff asserts that Defendant’s rounding policy results in employees  
15 systematically being undercompensated. Defendant counters that its rounding policy is fair and  
16 neutral on its face and in practice and that its rounding policy does not systematically result in  
17 employees being undercompensated.

18 **iii. Rest Period Claim**

19 Plaintiff alleges that employees are not provided with lawful rest periods because Plaintiff  
20 contends employees are not free to leave the premises during rest periods. Employers have an  
21 obligation to provide employees with ten (10) minute rest periods. An employer’s obligation to  
22 provide its employees with rest periods arises under the Industrial Welfare Commission Wage  
23 Orders. Wage Order 1-2001, Section 12(A) states, “[e]very employer shall authorize and permit  
24 all employees to take rest periods, which insofar as practicable shall be in the middle of each work  
25 period. The authorized rest period time shall be based on the total hours worked daily at the rate  
26 of ten (10) minutes net rest time per four (4) hours or major fraction thereof.”

27 Plaintiff contends that Defendant does not have a written rest period policy. Plaintiff also

1 contends that in Defendant's Employee Guide, Defendant states, "If you leave the building for any  
2 reason other than Company business assigned to you by your supervisor, and regardless of the  
3 length of time away from work, you must clock out." Under this policy, Plaintiff asserts that  
4 employees are unable to leave Defendant's warehouse during rest periods, unless they clock out.  
5 Plaintiff asserts that this requirement is unlawful under California law.

6 Defendant argues that employees are verbally informed about Defendant's rest period  
7 policies. In addition, Defendant contends that employees are trained on when to take rest periods.  
8 Defendant contends that it does not require employees to remain on the premises during rest periods.  
9 Defendant argues that in order to resolve this claim, you would have to ask whether employees knew  
10 of Defendant's rest period policy and whether employees knew they could leave the premises during  
11 rest breaks. In addition, Defendant contends that employees did, in fact, leave the premises during  
12 rest periods. Defendant asserts that should litigation continue, it would present declarations from  
13 employees stating that they were free to leave the premises, and did leave the premises, during rest  
14 periods.

15 Defendant further asserts that regardless of whether or not it tells employees they are to remain  
16 on the premises, a point that Defendant does not concede, the practical limitations the ten (10) minutes  
17 allotted for rest periods imposes on an employee's movement are what prevent employees from  
18 leaving the premises. In other words, the time limitation of only having ten (10) minutes for rest  
19 periods prevents off-premises movement during rest periods, not telling employees that rest periods  
20 are to be taken on the premises. Based on the fact that the practical limitations associated with ten  
21 (10) minute rest periods restrict off-premises movement, and not Defendant's policies, Defendant  
22 contends its policies are aligned with, and not antagonistic to *Augustus*. Defendant finds support for  
23 this in the following language from *Augustus*:

24 Because rest periods are 10-minutes in length (Wage Order 4, subd. 12(A)), they  
25 impose practical limitations on an employee's movement. That is, during a rest  
26 period an employee generally can travel at most five minutes from a particular work  
27 post before returning to make it back on time. Thus, one would expect that  
28 employees will ordinarily have to remain on site or nearby. *Augustus, supra*, 2  
Cal.5th at 270.

1 Defendant contends employees are not confined to a work station, break area, or even the  
2 confines of the facility, which would place an impediment on employee movement during ten (10)  
3 minute breaks that is not inherent in the time allotted for breaks. In other words, Defendant asserts  
4 that employees are relieved of all work and employer control during rest periods. And, to the extent  
5 there is any limitation placed on rest periods, it is something that arises simply out of the fact that  
6 ten (10) minutes is a short amount of time. Therefore, the limitations placed on employees are  
7 merely inherent to rest periods and not an exertion of employer control. There is, therefore, a  
8 dispute between the Parties regarding whether there is a limitation placed on any employee by  
9 Defendant with respect to rest breaks that is not inherent in the fact that rest periods are only ten  
10 (10) minutes in length. Stated differently, the dispute centers on whether Defendant placed  
11 unlawful restrictions on putative class members that extend beyond the practical limitations of rest  
12 periods.

#### 13 **iv. Wage Statement Claim**

14 Plaintiff alleges that employees are not provided with lawful wage statements. Section 226(a)  
15 provides that employers must furnish an accurate itemized statement in writing showing: (1) gross  
16 wages earned; (2) total hours worked by the employee; (3) the number of piece rate units earned and  
17 applicable piece rate if the employee is paid on a piece rate basis; (4) all deductions; (5) net wages  
18 earned; (6) the inclusive dates of the period for which the employee is paid; (7) the name of the  
19 employee and only the last four digits of his or her social security number or employee identification  
20 number other than a social security number; (8) the name and address of the legal entity that is the  
21 employer; and (9) all applicable hourly rates in effect during the pay period and corresponding number  
22 of hours worked at each hourly rate by the employee.

23 Plaintiff alleges that Defendant failed to provide employees with accurate itemized wage  
24 statements because Defendant's wage statements do not for the relevant portion of the time period,  
25 on the check itself, Defendant only lists a P.O. Box. Plaintiff contends that this is not the address  
26 of the legal entity that is the employer. Defendant asserts that a P.O. Box is sufficient. As such,  
27 the Parties have a legal dispute as to whether a P.O. Box is sufficient to meet the requirements of

California Labor Code § 226(a). Defendant further argues that Plaintiff cannot show that any potential failure to comply with California Labor Code § 226 was “knowing and intentional.” *See Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1195.

#### **v. Waiting Time Penalties**

Plaintiff also pursued waiting time penalties. This claim is derivative of Plaintiff’s unpaid wages claim. Should Plaintiff’s unpaid wages claim fail, this claim would also fail. In addition, Defendant contends that even if Plaintiff were successful in his unpaid wage claim, he would have to prove Defendant “willfully” failed to pay employees the appropriate wages due upon separation of employment. “A willful failure to pay wages within the meaning of Labor Code Section 203 occurs when an employer intentionally fails to pay wages to an employee when those wages are due. However, a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203.” Cal. Code Regs. Tit. 8 § 13520. “A ‘good faith dispute’ that any wages are due occurs when an employer presents a defense, based in law or fact, which would preclude any recovery on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist.” *Id.* Defendant contends that any failure to pay wages due at the separation of employment was not willful. Defendant argues that it would not be liable for waiting time penalties because a “good faith dispute” exists over the payment of those wages. *See* Cal. Code Regs. Tit. 8 § 13520; *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1201.

### **IV. TERMS OF THE PROPOSED SETTLEMENT**

#### **a. Deductions from the Settlement**

The Parties have agreed (subject to and contingent upon the Court’s approval) that this action be settled and compromised for the non-reversionary total sum of \$1,800,000 (“Gross Settlement Amount” or “GSA”), which includes, subject to Court approval: (a) attorneys’ fees of up to \$599,940 (33.33% of the GSA) to compensate Class Counsel for work already performed and all work remaining to be performed in documenting the settlement, administrating the settlement, and securing Court approval; (b) litigation costs estimated at approximately, and not to exceed,

\$30,000;<sup>10</sup> (c) a Class Representative Enhancement Payment to the named class representative, Aaron Romero, in a sum not to exceed \$10,000 in consideration for prosecuting this class action, serving as Class Representative, work performed, and risks undertaken for the payment of attorneys' fees and costs in the event he had been unsuccessful in the matter; (d) claims administration fees and expenses to Phoenix Class Action Administration Solutions (hereinafter "Phoenix"), estimated not to exceed approximately \$15,000;<sup>11</sup> and (e) PAGA payment of \$75,000.

**b. Calculation of the Settlement Payments to Participating Class Members and PAGA Aggrieved Employees**

After all Court-approved deductions from the GSA, it is estimated that \$1,072,560 ("Net Settlement Amount" or "NSA"), less employee taxes on the "wage portion" of the settlement payment, will be distributed to Participating Class Members.<sup>12</sup> Subject to the terms and conditions of the settlement, each Participating Class Member will receive a proportionate share of the Net Settlement Amount that is equal to (i) the number of Qualifying Workweeks he or she worked for Defendant in California as a Class Member based on the Class Data provided by Defendant, divided by (ii) the total number of Qualifying Workweeks worked by all Participating Class Members based on the same Class Data, (iii) which is then multiplied by the Net Settlement Amount. Therefore, the value of each Class Member's Individual Settlement Share ties directly to the amount of weeks that he or she worked. (Exhibit 1 at Section III, Paragraph 58(A)(i), Page 10). Under no circumstances will any portion of the \$1,800,000 settlement revert to Defendant and 100% of the NSA will be paid out to Participating Class Members. In addition, the employer's share of taxes will be paid in addition to and outside of the GSA. (Exhibit 1 at Section I, Paragraph 20, Page 3).

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<sup>10</sup> These will be tabulated and presented to the Court at final approval. Plaintiff will only seek the amount of actual costs incurred during the litigation of this case. Should the actual costs exceed \$30,000, Plaintiff will only seek reimbursement of costs up to \$30,000. Should the actual costs be lower than \$30,000, the difference will be added to the Net Settlement Amount for disbursement to Participating Class Members.

<sup>11</sup> Phoenix will present to the Court a declaration in conjunction with the final approval motion outlining the costs of the settlement administration process. If the settlement administration costs are lower than the amount allocated in the Agreement, the difference will be added to the Net Settlement Amount for distribution to Participating Class Members.

<sup>12</sup> Participating Class Members are Class Members who do not submit a valid and timely request to exclude themselves from this Settlement. (Exhibit 1 at Section I, Paragraph 33, Page 5).

1 In addition, each PAGA Aggrieved Employee will receive a proportionate share of the PAGA  
2 Fund that is allocated for distribution to PAGA Aggrieved Employees (i.e., 25% of the PAGA  
3 Payment), equal to (i) the number of Qualifying Workweeks he or she worked for Defendant in  
4 California during the PAGA Period based on the Class data provided by Defendant, divided by (ii)  
5 the total number of Qualifying Workweeks worked by all PAGA Aggrieved Employees during the  
6 PAGA Period based on the same Class data, (iii) which is then multiplied by the PAGA Payment  
7 allocated for distribution to PAGA Aggrieved Employees. (Exhibit 1 at Section III, Paragraph  
8 58(A)(ii), Page 10).

9 Each Class Member's Individual Settlement Share will be apportioned as follows: 25%  
10 wages, 37.5% interest, and 37.5% penalties. Each PAGA Aggrieved Employee's PAGA  
11 Settlement Share will be apportioned as 100% penalties. (Exhibit 1 at Section III, Paragraph 58(B),  
12 Pages 10-11).

13 **c. Notice to the Class**

14 Within fifteen (15) business days after entry of the Preliminary Approval Order, Defendant  
15 shall deliver to the Settlement Administrator an electronic database, which will list the following  
16 information for each Class Member: (1) first and last name; (2) last known mailing address; (3) last  
17 known telephone number; (4) Social Security number; (5) hire and termination dates; (6) the total  
18 number of weeks during which the Class Member performed actual work during the Class Period;  
19 and (7) the total number of pay periods during which the PAGA Aggrieved Employees worked during  
20 the PAGA Period. (Exhibit 1 at Section I, Paragraph 7, Page 2; Section III, Paragraph 61(B)(i), Page  
21 14).

22 The Settlement Administrator will conduct a skip trace for the address of all former employee  
23 Class Members. The Settlement Administrator will mail the Class Notices by first class U.S. mail to  
24 all Class Members at the address Defendant has on file for those Class Members to all former  
25 employee Class Members at the address resulting from the skip trace within fourteen (14) calendar  
26 days after receipt of the Class Data. (Exhibit 1 at Section I, Paragraph 39, Page 6 and Section III,  
27 Paragraph 61(B)(iii), Page 15).

1 After notices are mailed, Class Members will have thirty (30) days to respond to the  
2 settlement. If the 30-day deadline falls on a Sunday or federal holiday, the Response Deadline will be  
3 extended to the next day on which the U.S. Postal Service is open. (Exhibit 1 at (Section I, Paragraph  
4 38, Page 6). This deadline is referred to as the “Response Deadline.” Class Members may respond to  
5 the settlement by requesting to be excluded from it or objecting to it. Class Members can request to  
6 be excluded from the settlement by mailing a written request for exclusion to the Settlement  
7 Administrator. The written request for exclusion must: (a) state the Class Member’s name, address,  
8 telephone number, and the last four digits of the Class Member’s social security number or employee  
9 identification number; (b) state the Class Member’s intention to exclude themselves from or opt-out  
10 of the Settlement; (c) be addressed to the Settlement Administrator; (d) be signed by the Class  
11 Member or his or her lawful representative; and (e) be postmarked no later than the Response  
12 Deadline. (Exhibit 1 at Section III, Paragraph 61(D), Pages 17-18).

13 Class Members who wish to object to the settlement may appear at the final approval hearing,  
14 either in person or through an attorney at the Class Member’s own expense, provided the Class  
15 Member notified the Court of his or her intention to do so. Class Members can object to the settlement  
16 by mailing a written objection to the Settlement Administrator. Any Objections shall state: (a) the  
17 objecting person’s full name, address, and telephone number; (b) the words “Notice of Objection” or  
18 “Formal Objection;” (c) describe, in clear and concise terms, the legal and factual arguments  
19 supporting the objection; (d) list identifying witness(es) the objector may call to testify at the Final  
20 Approval hearing; and (e) provide true and correct copies of any exhibit(s) the objector intends to  
21 offer at the Final Approval hearing. (Exhibit 1 at Section III, Paragraph 61(C), Pages 16-17).

22 If a Class Notice is returned because of an incorrect address, within five (5) business days  
23 from receipt of the returned notice, the Settlement Administrator will conduct a search for a more  
24 current address for the Class Member and re-mail the Class Notice to the Class Member. The  
25 Settlement Administrator will use the National Change of Address Database and skip traces to attempt  
26 to find the current address. The Settlement Administrator will be responsible for taking reasonable  
27 steps to trace the mailing address of any Class Member for whom a Class Notice is returned by U.S.

Postal Service as undeliverable. These reasonable steps shall include, at a minimum, the tracking of all undelivered mail, performing address searches for all mail returned without a forwarding address, and promptly re-mailing to Class Members for whom new addresses are found. (Exhibit 1 at Section III, Paragraph 61(B)(iv), Page 15).

If the Settlement Administrator is unable to locate a better address through a database search or skip trace, the Settlement Administrator shall call the last known phone number provided by Defendant to attempt to obtain an accurate address. If an address is obtained, the Settlement Administrator shall promptly re-mail the Class Notice to the updated address. If the Class Notice is re-mailed, the Settlement Administrator will note for its own records the date and address of each remailing. If the Settlement Administrator is unable to locate an accurate address for the Class Member by telephone, the Settlement Administrator will promptly provide the contact information of the Class Member with the undeliverable Notice to Class Counsel. Class Counsel will provide this contact information to a third-party investigator to perform a TLOxp search using the available contact information. The TLOxp search performs a “deep skiptrace” of the Class Member and will have a greater chance of locating a better address to provide the Class Member with Notice. The costs for the TLOxp searches will be considered part of the Settlement Administration costs. (Exhibit 1 at Section III, Paragraph 61(B)(v), Page 15-16).

#### **d. Distribution of Funds**

Defendant shall wire to the Settlement Administrator the Gross Settlement Amount no later than twenty (20) calendar days of the Effective Final Settlement Date. (Exhibit 1 at Section I, Paragraph 22, Page 3). Within fifteen (15) calendar days after Defendant wires the GSA to the Settlement Administrator, the Settlement Administrator shall disburse: (1) the Net Settlement Amount to be paid to Participating Class Members; (2) the Attorney Fee Award and Cost Award to Class Counsel for attorneys’ fees and costs, as approved by the Court; (3) the Class Representative Enhancement Payment paid to the Class Representative, as approved by the Court; (4) the Administration Costs, as approved by the Court; (5) the PAGA Payment; and (6) Defendant’s portion of payroll taxes as the Class Members’ current or former employer. (Exhibit

1 at Section III, Paragraph 61(K)(i), Pages 21-22).

Participating Class Members and PAGA Aggrieved Employees must cash or deposit their Individual Settlement Share checks within one hundred and eighty (180) calendar days after the checks are mailed to them. If any checks are not redeemed or deposited within ninety (90) calendar days after mailing, the Settlement Administrator will send a reminder postcard indicating that unless the check is redeemed or deposited in the next ninety (90) days, it will expire and become non-negotiable, and offer to replace the check if it was lost or misplaced. If any checks remain uncashed or not deposited by the expiration of the 90-day period after mailing the reminder notice, the Settlement Administrator will, within two hundred (200) calendar days after the checks are mailed, cancel the checks. All funds associated with the Individual Settlement Share checks returned as undeliverable and funds associated with those checks remaining un-cashed, shall escheat to the State of California Controller's Office under the Unclaimed Property Statutes in the name of the Class Member. (Exhibit 1 at Section III, Paragraph 61(M), Pages 22-23).

**e. Release of Claims**

The claims that Plaintiff and other Participating Class Members are releasing in exchange for an Individual Settlement Share payment are based on the facts and claims asserted in the case. In exchange for an Individual Settlement Share, Plaintiff and Participating Class Members will release and discharge the Released Parties<sup>13</sup> from any and all claims, debts, liabilities, demands, obligations, penalties, guarantees, costs, expenses, attorney's fees, damages, action or causes of action of whatever kind or nature, whether known or unknown, contingent or accrued, that are alleged, or that reasonably could have arisen out of the same facts alleged in the Complaint, against the Released Parties and any and all Doe defendants. The Released Claims include, but are not

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<sup>13</sup> The Released Parties are Defendant and its successors and predecessors in interest, subsidiaries, affiliates, trusts, brother-sister or otherwise related companies, and parents, as well as all of their past, present and/or future, direct and/or indirect, officers, managing members, directors, owners, members, employees, principals, heirs, representatives, accountants, auditors, partners, trustees, insurers, reinsurers, administrators, attorneys, agents, parent companies, subsidiaries and affiliated corporations and entities, consultants, shareholders, joint ventures, predecessors, successors, and/or assigns; and any attorney or law firm representing Defendant and/or the other aforementioned Released Parties with regard to Plaintiff's asserted claims against Defendant. (Exhibit 1 at Section I, Paragraph 36, Page 6).

1 limited to, 1) Failure to Pay All Straight Time Wages; 2) Failure to Pay All Overtime Wages; (3)  
2 Failure to Provide Meal Periods (Lab. Code §§ 226.7, 512, IWC Wage Order No. 5- 2001(11);  
3 Cal. Code Regs., tit. 8 § 11050); 4) Failure to Authorize and Permit Rest Periods (Lab. Code §  
4 226.7; IWC Wage Order No. 5- 2001(12); Cal. Code Regs. tit. 8 § 11050); 5) Knowing and  
5 Intentional Failure to Comply with Itemized Employee Wage Statement Provisions (Lab. Code §§  
6 226, 1174, 1175); 6) Failure to Pay All Wages Due at the Time of Termination of Employment  
7 (Lab. Code §§ 201-203); and 7) Violation of Unfair Competition Law (Bus. & Prof. Code § 17200,  
8 et seq.). This release will be for the Class Period. (Exhibit 1 at Section I, Paragraph 36, Pages 5-  
9 6).

10 In addition, the claims that Plaintiff and other PAGA Aggrieved Employees are releasing  
11 in exchange for a portion of the PAGA Payment are based on the facts and claims asserted in the  
12 case and PAGA notice. In exchange for an Individual Settlement Share, Plaintiff and PAGA  
13 Aggrieved Employees will release any and all claims, debts, liabilities, demands, obligations,  
14 penalties, guarantees, costs, expenses, attorney's fees, damages, action or causes of action of  
15 whatever kind or nature, whether known or unknown, contingent or accrued, that are alleged or  
16 could have been alleged based upon a reasonable interpretation of the facts alleged in the PAGA  
17 Action, against Defendant (including any and all unnamed Does). The Released PAGA Claims  
18 include, but are not limited to, violations of the Private Attorneys General Act, Labor Code §2699,  
19 et seq. This release will be for the PAGA Period. (Exhibit 1 at Section I, Paragraph 31, Page 5).

20 In addition, Plaintiff agrees to a general release of his claims against Defendant. (Exhibit  
21 1 at Section III, Paragraph 63, Pages 23-24).

## 22 **V. ARGUMENT**

### 23 **a. Class Action Settlements Are Subject to Court Review and Approval Under 24 the California Rules of Court**

25 Rule 3.769 requires court approval for class action settlements.<sup>14</sup> “Before final approval, the

26 <sup>14</sup> The California Supreme Court also has authorized California's trial courts to use Federal Rule  
27 23 and cases applying it for guidance in considering class issues. *See Vasquez v. Superior Court*  
(1971) 4 Cal.3d 800, 821; *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146. Where appropriate,  
28 therefore, the Parties cite Federal Rule 23 and federal case law in addition to California law.

1 court must conduct an inquiry into the fairness of the proposed settlement.” (California Rules of Court,  
2 Rule 3.769(g)). Rule 3.769 further requires a noticed motion for preliminary approval of class  
3 settlements:

4 (a) A settlement or compromise of an entire class action, or a cause of action in a  
class action, or as to a party, requires the approval of the court after hearing.

5 . . .  
6 (c) Any party to a settlement agreement may serve and file a written notice of  
motion for preliminary approval of the settlement. The settlement agreement  
7 and proposed notice to class members must be filed with the motion, and the  
proposed order must be lodged with the motion.

8 Courts act within their discretion in approving settlements that are fair, not collusive, and take  
9 into account “all the normal perils of litigation as well as the additional uncertainties inherent in  
10 complex class actions.” *In re Beef Industry Antitrust Litigation* (5th Cir. 1979) 607 F. 2d 167, 179,  
11 cert. den. sub nom. *Iowa Beef Processors, Inc. v. Meat Price Investigators Ass’n* (1981) 452 U.S. 905.

#### 12 **b. The Settlement Is Fair, Reasonable, and Adequate**

13 In deciding whether to approve a proposed class action settlement under Code of Civil  
14 Procedure § 382, the Court must find that a proposed settlement is “fair, adequate and reasonable.”  
15 *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. A proposed class action settlement is  
16 **presumed** fair under the following circumstances: (1) the parties reached settlement after arms-length  
17 negotiations; (2) investigation and discovery were sufficient to allow counsel and the court to act  
18 intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is  
19 small. *Dunk v. Ford Motor Co.*, *supra*, at 1802. As the following shows, all of these elements – with  
20 the exception of the percentage of objectors, which cannot be anticipated at this stage of the litigation  
21 – bearing on the fairness of the proposed settlement are present here and the Court’s grant of  
22 preliminary approval is therefore requested.

#### 23 **i. The Settlement Was Reached as a Result of Arm’s-Length Negotiations**

24 The settlement was reached as a result of arm’s-length negotiations. Though cordial and  
25 professional, the settlement negotiations have been, at all times, adversarial and non-collusive in  
26 nature. Prior to, at, and after the mediation, Counsel for the Parties conducted extensive arm’s length  
27

1 settlement negotiations until the settlement was reached. The terms of the settlement are memorialized  
2 in the Agreement which is attached to the Declaration of David Mara, Esq. as Exhibit 1. While  
3 Plaintiff believes in the merits of his case, he also recognizes the inherent risks of litigation and  
4 understands the benefit of the class receiving significant settlement funds immediately as opposed to  
5 risking continued litigation in achieving class certification, preparing for and conducting a trial, and/or  
6 an appeal that may take several more years to litigate.

7 **ii. The Settlement is the Result of Thorough Investigation and Discovery**

8 The Parties thoroughly investigated and evaluated the factual strengths and weaknesses before  
9 reaching the proposed settlement, and engaged in sufficient investigation, research and discovery to  
10 support the settlement. The settlement was only possible following investigation, discovery, and  
11 evaluation of Defendant's policies and procedures, as well as the data produced for the putative class,  
12 which permitted Class Counsel to engage in a comprehensive analysis of liability and potential  
13 damages. This litigation has reached the stage where "the Parties certainly have a clear view of the  
14 strengths and weaknesses of their cases" sufficient to support the settlement. *Boyd v. Bechtel Corp.*  
15 (N.D. Cal. 1979) 485 F. Supp. 610, 617.

16 **iii. Counsel for Both Parties Are Experienced in Similar Litigation**

17 Both Plaintiff's Counsel and Defendant's Counsel are particularly experienced in wage and  
18 hour employment law and class actions. Plaintiff's Counsel has significant experience in litigating  
19 unpaid wages, unprovided meal and rest periods, and overtime claims. Indeed, Plaintiff's Counsel  
20 was class counsel in *Hohnbaum et al. v. Brinker Restaurant Corp et al.*, which is the subject case in  
21 the landmark decision of *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004. (Mara  
22 Dec. ¶¶ 2-8). Plaintiff's Counsel has prosecuted numerous wage and hour class action cases on behalf  
23 of employees for California Labor Code violations and thus are experienced and qualified to evaluate  
24 the class claims and to evaluate settlement versus trial on a fully informed basis, and to evaluate the  
25 viability of the defenses. (Mara Dec. ¶ 8). This experience instructed Plaintiff's Counsel on the risks  
26 and uncertainties of further litigation and guided their determination to endorse the proposed  
27

1 settlement.<sup>15</sup> Defendant's Counsel practices labor and employment law and have represented  
2 numerous employers in similar types of claims. Accordingly, both Parties' Counsel are experienced  
3 in wage and hour employment law and class actions.

#### 4 **iv. The Proposed Settlement is a Reasonable Compromise of Claims**

5 An understanding of the amount in controversy is an important factor in determining whether  
6 the settlement "of the class members' claims is reasonable in light of the strengths and weaknesses of  
7 the claims and the risks of the particular litigation." *Kullar v. Foot Locker Retail, Inc.* (2008) 168  
8 Cal.App.4th 116, 129; *see also Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186  
9 Cal.App.4th 399, 409. The most important factor in this regard is "the strength of the case for plaintiffs  
10 on the merits, balanced against the amount offered in settlement." *Id.*

11 In weighing the strength of the plaintiff's case, *Kullar* instructs that the court is not to "decide  
12 the merits of the case or to substitute its evaluation of the most appropriate settlement for that of the  
13 attorneys." *Kullar, supra*, 168 Cal.App.4th at 133. *Kullar* does not require an explicit statement of the  
14 maximum amount the plaintiff class could recover if it prevailed on all its claims, provided there is a  
15 record which allows "an understanding of the amount that is in controversy and the realistic range of  
16 outcomes of the litigation." *Munoz*, 186 Cal.App.4th at 409. Put differently, "as the court does when  
17 it approves a settlement as in good faith under Code of Civil Procedure § 877.6, the court must at least  
18 satisfy itself that the class settlement is within the 'ballpark' of reasonableness." *Kullar, supra*, 168  
19 Cal.App.4th at 133, citing *Tech-Bilt v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 499-  
20 500. As the following subsections show, the Parties' investigation and discovery revealed many  
21 reasons to discount claims and agree to this settlement.

#### 22 **1. The Proposed Settlement is a Reasonable Compromise of Claims**

23 The proposed settlement was only possible following significant discovery and an evaluation  
24 of Defendant's relevant policies and procedures, as well as the data that Defendant produced for the  
25 putative class as referenced above. This permitted Class Counsel to engage in a comprehensive

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26 <sup>15</sup> The final factor mentioned in *Dunk* – the number of objectors – is not determinable until the  
27 Class Notice has been provided to the class and they have had an opportunity to respond. This  
28 information will be provided to the Court in conjunction with the final approval motion.

analysis of liability and potential damages. The discovery conducted allowed Plaintiff to evaluate the strengths and weaknesses of his central theories of liability, which are predicated on Plaintiff's claims that Defendant failed to provide compliant meal and rest periods, failed to provide accurate itemized wage statements, and failed to pay all wages owed. As explained herein, Defendant maintains that the discovery produced demonstrates that it would succeed at both in denying class certification and on the merits.

Although, Plaintiff believes this case is suitable for certification on the claimed bases that there are company-wide policies that Plaintiff contends violate California law and uniformly affect the Class Members, Defendant's counter-arguments raise uncertainties with respect to both class certification and success on the merits. As the California Supreme Court ruled in *Sav-On v. Superior Court* (2004) 34 Cal.4th 319, class certification is always a matter of the trial court's sound discretion. Decisions following *Sav-On* have reached different conclusions, with respect to certification of wage and hour claims.<sup>16</sup> While remaining confident in the strengths of his claims, all of these factors led Plaintiff to discount the following maximum potential damage exposure.

## **2. Maximum Potential Exposure as Estimated by Plaintiff**

Based on the data requested of and provided by Defendant, Plaintiff has determined that the approximately 358 Class Members worked approximately 17,959 workweeks, which equates to approximately 89,795 shifts, during the Class Period. In addition, there are approximately 202 PAGA Aggrieved Employees who worked approximately 7,968 pay periods within the PAGA Period. Based upon the data and documents requested of and produced by Defendant, Plaintiff calculated that Class Members were paid an average hourly rate of approximately \$16.36. (Mara Dec. ¶ 14).

Plaintiff alleges that Defendant failed to provide lawful meal periods because Plaintiff

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<sup>16</sup> See, e.g., *Harris v. Superior Court* (2007) 154 Cal. App. 4th 164 (reversing decertification of class claiming misclassification and ordering summary adjudication in favor of employees), *review granted*, 171 P.3d 545 (2007) (not cited as precedent, but rather for illustrative purposes only); *Walsh v. IKON Solutions, Inc.* (2007) 148 Cal. App. 4th 1440 (affirming decertification of class claiming misclassification); *Aguilar v. Cintas Corp. No. 2* (2006) 144 Cal. App. 4th 121 (reversing denial of certification); *Dunbar v. Albertson's Inc.* (2006) 141 Cal. App. 4th 1422 (affirming denial of certification).

1 contends that Defendant's time records show meal period violations. Plaintiff asserts that  
2 Defendant's time records show violations in approximately 95% of shifts. If Plaintiff was to prevail  
3 on this claim for the entire class period, Plaintiff and the Class Members would be entitled to the  
4 following estimated maximum potential damages: \$1,395,593 (89,795 shifts x \$16.36 per hour x  
5 0.95 violation rate = \$1,395,593.89). (Mara Dec. ¶ 15).

6 Plaintiff also alleges that Defendant fails to pay for all hours worked because Plaintiff  
7 contends that Defendant has an unlawful rounding practice. Plaintiff contends that Defendant's  
8 rounding practice results in approximately 0.2 hours of unpaid time per shift on average. If Plaintiff  
9 was to prevail on this claim for the entire class period, Plaintiff and the Class Members would be  
10 entitled to the following estimated maximum potential damages: \$293,809 (89,795 shifts x \$16.36  
11 per hour x 0.2 hours = \$293,809.24). (Mara Dec. ¶ 16).

12 Plaintiff alleges that Defendant fails to provide employees with lawful rest periods.  
13 Plaintiff contends that Defendant does not have a written rest period policy and that employees are  
14 unable to leave Defendant's warehouse during rest periods. If Plaintiff was to prevail on this claim  
15 for the entire class period, Plaintiff and the Class Members would be entitled to the following  
16 estimated maximum potential damages: \$1,469,046 (89,795 shifts x \$16.36 per hour =  
17 \$1,469,046.20). (Mara Dec. ¶ 17).

18 Further, Plaintiff alleges that Defendant fails to provide accurate, itemized wage statements  
19 because Plaintiff asserts that Defendant lists a P.O. Box which Plaintiff contends does not qualify  
20 as the "address of the legal entity that is the employer." The statute of limitations for Plaintiff's  
21 wage statement claim is one year. Under California Labor Code § 226(e)(1), the damages for  
22 breach of this section are fifty dollars (\$50) for the initial pay period in which a violation occurs  
23 and one hundred dollars (\$100) per employee for each violation in a subsequent pay period, not to  
24 exceed an aggregate penalty of four thousand dollars (\$4,000). If Plaintiff was to prevail on this  
25 claim for the entire class period, Plaintiff and the Class Members would be entitled to the following  
26 estimated maximum potential damages: \$1,304,000 (\$4,000 x 326 employees = \$1,304,000).  
27 (Mara Dec. ¶ 18).

1 If Plaintiff was to prevail on his unpaid wages claim, Plaintiff and the Class Members may  
2 also be entitled to waiting time penalties. Plaintiff calculates the potential maximum exposure  
3 under his waiting time penalties cause of action as \$1,279,564 (290 former employees x 30 days  
4 x 8.99 average shift length x \$16.36 average hourly rate = \$1,279,564.68). As these damages are  
5 derivative of Plaintiffs' unpaid wages claim, if Plaintiffs' unpaid wages claim fails, this claim also  
6 would fail. (Mara Dec. ¶ 19).

7 Plaintiff also seeks PAGA penalties. PAGA allows the private enforcement of certain  
8 California Labor Code sections relating to wage and hour violations. PAGA Section 2699(f)(2) reads,  
9 in part, as follows:

10 [T]he civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay  
11 period for the initial violation and two hundred dollars (\$200) for each aggrieved  
employee per pay period for each subsequent violation.

12 Plaintiffs allege that Defendant has five (5) violations – unlawful rest and meal periods,  
13 failure to pay all wages owed, inaccurate wage statements, and waiting time penalties – of the  
14 California Labor Code sections which give rise to PAGA penalties. The statute of limitations for  
15 PAGA violations go back one year. There are approximately 7,968 pay periods within the PAGA  
16 statute of limitations. Plaintiff calculates Defendant's exposure under PAGA as follows:  
17 \$3,984,000 (\$100 x 5 PAGA violations x 7,968 pay periods = \$3,984,000). (Mara Dec. ¶ 20).

18 Thus, not taking into account any of its defenses or arguments, Plaintiff estimated that if  
19 he were successful in his core claims, Defendant's total exposure would be approximately  
20 \$4,462,448 [\$293,809 (unpaid wages exposure) + \$1,395,593 (meal period exposure) +  
21 \$1,469,046 (rest period exposure) + \$1,304,000 (wage statement exposure) = \$4,462,448]. If  
22 Plaintiff is successful in his unpaid wage claims, he may also be entitled to damages for waiting  
23 time penalties in the amount of \$1,279,564. If all of Plaintiff's claims are successful, he may also  
24 be entitled to PAGA penalties in the maximum amount of \$3,984,000. (Mara Dec. ¶ 21).

### 25 3. Risks to Plaintiff's Claims

#### 26 a. Plaintiff's Meal Period Claim is Subject to Risks at 27 Certification and on the Merits

28 Plaintiff's meal period claim is subject to risks at certification and on the merits. Defendant

1 contends that its written policy provides for meal periods in conformity with California law.  
2 Defendant contends that if litigation continues, at class certification, it will provide declarations from  
3 Class Members that show employees received lawful meal periods which would defeat certification  
4 because individualized issues would then predominate.

5 Plaintiff's meal period claim is also subject to risks on the merits. Plaintiff relies on *Donohue*  
6 *v. AMN Services, Inc.* (2021) 11 Cal.5th 58, 74, to show that Defendant does not provide meal periods  
7 in conformity with California law. Plaintiff asserts that Defendant's time records show that meal  
8 periods were late, short, or missed raising a rebuttable presumption that these meal periods were not  
9 provided in compliance with California law. Defendant contends that it can rebut the presumption that  
10 arises under *Donohue v. AMN Services, Inc.* Defendant asserts that it can show that employees  
11 voluntarily chose to take a short or late meal period or to skip the meal period entirely in these shifts.  
12 There is a risk that Defendant could meet its burden of proof in showing this by providing evidence  
13 that employees were provided with proper meal periods and it was the employee's choice to take a  
14 late or short meal period or forgo taking a meal period altogether.

15 Further, although it firmly believes it can rebut the presumption that arises under *Donohue v.*  
16 *AMN Services, Inc.*, Defendant argues that the violation rate calculated by Plaintiff is higher than the  
17 violation rate that could be proven at trial. Defendant contends that Plaintiff's damage calculations do  
18 not take into account meal period premiums Defendant paid for shifts reflecting late, short, or missed  
19 meal periods. When these premiums are taken into consideration, Defendant asserts that its potential  
20 exposure for Plaintiff's missed meal period claim would be reduced.

21 For all of these reasons, Plaintiff had to discount the potential maximum exposure of this  
22 claim.

23 **b. Plaintiff's Rest Period Claim is Subject to Risks at**  
24 **Certification and on the Merits**

25 Plaintiff's rest period claim is subject to risks at certification and on the merits. As noted  
26 previously, Plaintiff alleges that Defendant does not have a rest period policy. Defendant counters  
27 that it trains and verbally instructs employees on when to take rest periods. Defendant contends

1 that at certification it would provide declarations that show employees knew what Defendant's rest  
2 period policy was and were provided with rest periods in conformity with California law.

3 In addition, Plaintiff alleges that employees are not permitted to leave the premises during  
4 rest periods. Defendant contends that it never required employees to remain on the premises during  
5 rest periods and that employees did, in fact, leave the premises during rest periods. Should  
6 litigation continue, Defendant contends that it will provide declarations which show that  
7 employees were not confined to the premises during rest periods. Defendant asserts that at  
8 certification the Court would have to ask each employee whether or not they remained on the  
9 premises for rest periods and whether they thought Defendant required them to remain on the  
10 premises during rest periods which would defeat certification because individualized issues would  
11 then predominate.

12 This claim is also subject to risks on the merits. Defendant contends that it did not place  
13 any restrictions on rest periods. Moreover, Defendant asserts that any restrictions placed on rest  
14 periods are due only to the inherently short amount of time given to rest periods. Defendant  
15 contends employees are not confined to a work station, break area, or even the confines of the  
16 facility, which would place an impediment on employee movement during ten (10) minute breaks  
17 that is not inherent in the time allotted for breaks. In other words, Defendant asserts that employees  
18 are relieved of all work and employer control during rest periods. And, to the extent there is any  
19 limitation placed on rest periods, it is something that arises simply out of the fact that ten (10)  
20 minutes is a short amount of time. Therefore, should litigation continue, the Parties would file  
21 cross motions for summary judgment on this issue. There is a risk that the Court could agree with  
22 Defendant, which would eliminate all exposure under this claim.

23 For all of these reasons, Plaintiff had to discount the potential maximum exposure of this  
24 claim.

25 **c. Plaintiff's Unpaid Wages Claim was Subject to Risks on**  
26 **the Merits**

27 Plaintiff's rounding claim is subject to risks on the merits. Plaintiff alleges that Defendant  
28

1 has an unlawful rounding policy that is not fair and neutral in practice. Plaintiff asserts that  
2 Defendant's rounding policy results in employees systematically being undercompensated.  
3 Defendant counters that its rounding policy is fair and neutral on its face and in practice and that  
4 its rounding policy does not systematically result in employees being undercompensated. This,  
5 too, is an issue ripe for summary judgment should litigation continue. There is a risk that the Court  
6 could agree with Defendant's arguments, eliminating exposure of this claim. Due to this, Plaintiff  
7 had to reduce the maximum potential exposure of this claim.

8 **d. Plaintiff's Wage Statement Claim is Subject to Risks on**  
9 **the Merits**

10 Plaintiff's wage statement claim is subject to risks on the merits. Plaintiff alleges that  
11 Defendant failed to provide accurate itemized wage statements because Defendant's wage statements  
12 fail to itemize the address of the legal entity that is the employer. Plaintiff contends that the P.O. Box  
13 Defendant lists on its wage statements is not the "address of the legal entity that is the employer."  
14 Defendant argues that the information listed is sufficient and consistent with California law. There is  
15 a risk that the Court could agree with Defendant, which would eliminate all exposure under this claim.  
16 Due to this, Plaintiff had to reduce the maximum potential exposure of this claim.

17 **e. Plaintiff's Waiting Time Claim is Subject to Risks on the**  
18 **Merits**

19 Plaintiff also pursued a claim for waiting time penalty claims. This claim is derivative of  
20 Plaintiff's unpaid wages claim. Should Plaintiff's unpaid wages claim fail or not be certified, this  
21 claim would also fail. As noted above, Plaintiff's unpaid wages claim is subject to risks at certification  
22 and on the merits. This claim is subject to those same risks.

23 Further, this claim is also subject to its own risks on the merits independent of the risks of  
24 Plaintiff's unpaid wages claim. This is because this claim has a "willful" component. "Some statutory  
25 penalties are imposed only if an employers' violation was 'willful' or 'knowing.' . . . [S]ection 203  
26 penalizes an employer that 'willfully' fails to pay wages due under *section 201* or *202*["] *Amaral v.*  
27 *Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1195. Defendant contends that even if Plaintiff  
28 were successful in his unpaid wages claim, he would have to prove Defendant "willfully" failed to

1 pay Class Members appropriate wages due upon separation of employment. “A willful failure to pay  
2 wages within the meaning of Labor Code Section 203 occurs when an employer intentionally fails to  
3 pay wages to an employee when those wages are due.” Cal. Code Regs. Tit. 8 § 13520; *see also*  
4 *Amaral, supra*, 163 Cal.App.4th at 1201 (“The settled meaning of ‘willful,’ as used in *section 203*, is  
5 that an employer has intentionally failed or refused to perform an act which was required to be done.”).  
6 “However, a good faith dispute that any wages are due will preclude imposition of waiting time  
7 penalties under Section 203.” Cal. Code Regs. Tit. 8 § 13520. “A ‘good faith dispute’ that any wages  
8 are due occurs when an employer presents a defense, based in law or fact, which would preclude any  
9 recovery on the part of the employee. The fact that a defense is ultimately unsuccessful will not  
10 preclude a finding that a good faith dispute did exist.” *Id.*

11 Defendant contends that any failure to pay wages due at the separation of employment was  
12 not willful. Defendant argues that it would not be liable for waiting time penalties because a “good  
13 faith dispute” exists over the payment of those wages. *See* Cal. Code Regs. Tit. 8 § 13520; *Amaral,*  
14 *supra*, 163 Cal.App.4th at 1201. As outlined above, Defendant contends that the time employees  
15 spend waiting in line and going through the turn styles is not compensable time.

16 Due to this, Plaintiff had to reduce the maximum potential exposure of this claim.

17 **f. Plaintiff’s PAGA Exposure would Likely be Reduced by**  
18 **the Court**

19 Plaintiff’s PAGA claims are subject to the same risks on the merits as Plaintiff’s non-  
20 PAGA claims. Section 2699, subdivision (e)(2) provides that “[i]n any action by an aggrieved  
21 employee seeking recovery of a civil penalty available under subdivision (a) or (f), a court may  
22 award a lesser amount than the maximum penalty amount specified by this part if, based on the  
23 facts and circumstances of the particular case, to do otherwise would result in an award that is  
24 unjust, arbitrary, oppressive, or confiscatory.” In *Thurman v. Bayshore Transit Management, Inc.*  
25 (“*Thurman*”) (2012) 203 Cal. App. 4th 1112, the court determined that an award of the maximum  
26 penalty allowed may be unjust in circumstances outside of when a defendant cannot afford to pay  
27 the maximum amount. *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal. App. 4th

1 1112, 1135-1136. The *Thurman* court found that penalties may be reduced when a defendant has  
2 taken its obligations to comply with the law seriously. *Id.* Defendant argues that if the case were  
3 to continue in litigation, it would be able to show that it took its obligations to comply with the  
4 law seriously. As such, if Plaintiff were able to prevail on the merits of his PAGA claims, it is  
5 likely that the Court would reduce the maximum penalty allowed.

6 As Plaintiff's PAGA claims are based on the same alleged unlawful conduct as his class  
7 claims, Plaintiff's PAGA claims are subject to the same risks on the merits as Plaintiff's class  
8 claims. Therefore, PAGA penalties can only be awarded if the factfinder agrees with Plaintiff's  
9 meal and rest period, and unpaid wages allegations. The likelihood of the Court reducing the  
10 PAGA penalties awarded to Plaintiff and the aggrieved employees – assuming liability is proven  
11 as to each of Plaintiff's claims – is higher in this case where these same individuals may also be  
12 receiving money for the same unlawful conduct under the class claims. *See Avila v. Cold Spring*  
13 *Granite Co.* (E.D. Cal. Jan. 12, 2018) Case No. 1:16-cv-001533-AWI-SKO, 2018 U.S. Dist.  
14 LEXIS 6142 \*17 (“Because the PAGA penalties sought are at least partially duplicative of  
15 penalties granted by the underlying Labor Code violations, *see, e.g.,* Cal. Lab. Code §§  
16 203, 226, 558(a), 1194.2, and because a Court has discretion in whether and in what amount to  
17 award PAGA penalties, *see* Cal. Lab. Code § 2699(e)(2), Plaintiff recognizes that the potential  
18 PAGA penalties are highly uncertain.”). Plaintiff must take into consideration the risks his  
19 underlying claims faced, as well as the risk that the Court would likely reduce the amount of PAGA  
20 penalties awarded.

#### 21 **4. The Settlement Amount of \$1,800,000 is Reasonable**

22 Based upon the risks just discussed, Plaintiff had to discount his maximum potential  
23 exposure. Plaintiff also had to consider that, should the Court agree with his theories and grant  
24 certification as to each of his claims, he may not be awarded the full exposure at trial. Plaintiff also  
25 had to consider that the Court could agree with Defendant's arguments. If his unpaid wage claims  
26 failed, his claim for waiting time penalties would also fail. If any of Plaintiff's claims failed, his  
27 claims for PAGA penalties would similarly be reduced. All of these factors led Plaintiff to reduce  
28

1 the realistic potential exposure in order to gain a definite monetary recovery for the class.

2 In light of the risks Plaintiff's claims faced, Plaintiff and his Counsel believe that the  
3 settlement amount of \$1,800,000 – **with an average settlement share amount estimated at**  
4 **\$2,995.98** – is a reasonable and fair settlement amount. (Mara Dec. ¶ 22).

5 It should be noted that a settlement is not judged solely against what might have been  
6 recovered, had the plaintiff prevailed at trial, nor does the settlement have to provide 100% of the  
7 damages sought to be fair and reasonable. *Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th  
8 224, 246, 250; *Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1139; “Compromise is  
9 inherent and necessary in the settlement process...even if the relief afforded by the proposed  
10 settlement is substantially narrower than it would be if the suits were to be successfully litigated, this  
11 is no bar to a class settlement because the public interest may indeed be served by a voluntary  
12 settlement in which each side gives ground in the interest of avoiding litigation.” *Wershba, supra*, at  
13 250; *Officers for Justice v. Civil Serv. Comm’n* (9th Cir. 1982) 688 F.2d 615, 628 (“It is well-settled  
14 law that a cash settlement amounting to only a fraction of the potential recovery does not...render the  
15 settlement inadequate or unfair”); *see also In re Omnivision Technologies, Inc.* (N.D. Cal. 2007) 2007  
16 U.S. Dist. LEXIS 95616, \*21 , (noting that certainty of recovery in settlement of 6% of maximum  
17 potential recovery after reduction for attorneys’ fees was higher than median percentage for recoveries  
18 in shareholder class action settlements, averaging 2.2%-3% from 2002 through 2006).

19 **c. Provisional Class Certification Should be Granted**

20 Under California law, a class action is appropriate when the class is ascertainable and there is  
21 “a well defined community of interest in the questions of law and fact involved affecting the parties  
22 to be represented.” Cal. Civ. P. Code § 382. State law requirements under California Code of Civil  
23 Procedure section 382 for class certification follow federal law according to Rule 23 of the Federal  
24 Rule of Civil Procedure: numerosity, typicality of the class representatives’ claims, adequacy of  
25 representation, predominance of common issues, and superiority. Fed. R. Civ. P. 23(a); *see also*  
26 *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1019. It should be noted that while a court  
27 must certify a class for settlement purposes if a class has not already been certified, “it is well  
28

1 established that trial courts should use different standards to determine the propriety of a settlement  
2 class, as opposed to a litigation class certification. Specifically, a lesser standard of scrutiny is used  
3 for settlement cases.” *Glob. Minerals & Metals Corp. v. Superior Court* (2013) 113 Cal.App.4th 836,  
4 859 citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1807, fn. 19.

5 Plaintiff contends, and Defendant does not dispute for settlement purposes only, each of  
6 these elements must be present. *See Wershba v. Apple Computer* (2001) 91 Cal. App. 4th 224,  
7 237-38. Plaintiff seeks approval of the following Class for settlement purposes only: All non-  
8 exempt employees of Defendant who worked in California from June 1, 2016 through June 10,  
9 2022.

10 **i. The Proposed Settlement Class is Ascertainable**

11 Plaintiff contends that the proposed Class is ascertainable because of all of the Class  
12 Members have worked for Defendant as non-exempt employees and have been identified through  
13 Defendant’s own records, such as employee and payroll files. *See Rose v City of Hayward* (1981)  
14 126 Cal.App.3d 926,932 (finding that “Class Members are ‘ascertainable’ where they may be  
15 readily identified without unreasonable expense or time by reference to official records.”); *Sevidal*  
16 *v. Target Corp.* (2010) 189 Cal.App.4th 905, 919 (“[c]lass members are ‘ascertainable’ where they  
17 may be readily identified without unreasonable expense or time by reference to official [or  
18 business] records.”). Thus, the ascertainability requirement is met.

19 **ii. The Proposed Settlement Class is Sufficiently Numerous**

20 The numerosity requirement is met if the class is so large that joinder of all members would  
21 be impracticable. *Gay v. Waiters’ & Dairy Lunchmen’s Union* (N.D. Cal. 1980) 489 F. Supp. 282,  
22 *aff’d* (9th Cir. 1982) 694 F.2d 531. “There is no set number required to maintain a class action, and  
23 the statutory test is whether a class is so numerous that ‘it is impracticable to bring them all before the  
24 court.’” *Henderson v. Ready to Roll Transportation, Inc.* (2014) 228 Cal.App.4th 1213, 1223  
25 (reversing superior court ruling that nine class members was too few); *Bowles v. Superior Court*  
26 (1995) 44 Cal.2d 574 (upholding a class of ten members). “The numerosity requirement is more  
27 readily met when a class contains employees suing their present employer . . . This is because class

1 members may be unwilling to sue their employer individually out of fear of retaliation.” *Romero v.*  
2 *Producers Dairy Foods* (E.D. Cal. 2006) 235 F.R.D. 474, 485. As explained by the California  
3 Supreme Court, “fear of retaliation for individual suits against an employer is a justification for class  
4 certification in the arena of employment litigation, even when it is otherwise questionable that the  
5 numerosity requirements were satisfied . . . It needs no argument to show that fear of economic  
6 retaliation might often operate to induce aggrieved employees quietly to accept substandard  
7 conditions.” *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 460 (citation omitted), overruled on  
8 other grounds in *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348.

9 Here, Defendant’s records show that the proposed Class has approximately 358 members.  
10 Plaintiff contends that joinder of all Class Members is impracticable and, therefore, a class wide  
11 proceeding is preferable. *See Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1030 (noting that  
12 there is no set minimum to meet the numerosity prerequisite, but that a class of as few as 28 is  
13 acceptable.). In fact, a class of ten (10) has been certified as a class action. *Id.*, citing *Bowles v.*  
14 *Superior Court* (1995) 44 Cal.2d 574. Several federal cases on this issue have held that classes of over  
15 forty (40) individuals are numerous enough to meet the numerosity requirement. *See Ikonen v. Hartz*  
16 *Mountain Corp.* (S.D. Cal. 1988) 122 F.R.D. 258, 262. Accordingly, the Class is comprised of  
17 approximately 358 members and is sufficient to satisfy the numerosity requirement.

### 18 **iii. The Commonality Requirement is Met**

19 The commonality requirement is met if there are questions of law and fact common to the  
20 class. *Hanlon, supra*, 150 F.3d at 1019 (“The existence of shared legal issues with divergent factual  
21 predicates is sufficient, as it a common core of salient facts coupled with disparate legal remedies  
22 within the class.”). “Predominance is a comparative concept, and ‘the necessity for class members to  
23 individually establish eligibility and damages does not mean individual fact questions predominate.’”  
24 *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 334. Commonality exists if there  
25 is a predominant common legal question regarding how an employer’s policies impact its employees.  
26 *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal.App.4th 1524, 1536 (2008) (“[T]he common legal  
27 question remains the overall impact of Diva’s policies on its drivers.”). Whether Plaintiff is likely to

1 prevail on his theory of recovery is irrelevant at the certification stage since the question is “essentially  
2 a procedural one that does not ask whether an action is legally or factually meritorious.” *Linder v.*  
3 *Thrifty Oil Co.* (2003) 23 Cal.4th 429, 439-440.

4 Here, Plaintiff contends that the proposed Class Members’ claims all stem from the same  
5 allegedly unlawful policies and practices, which were addressed previously in this motion. Plaintiff  
6 seeks the same legal remedies under state law on behalf of himself and all Class Members. As liability  
7 as to all Class Members is predicated on the same policies and practices, which Plaintiff alleges  
8 violates California law, the commonality requirement has been satisfied.

#### 9 **iv. The Typicality Requirement is Met**

10 The typicality requirement is met if the claims of the named representative are typical of those  
11 of the class, though “they need not be substantially identical.” *Hanlon, supra*, 150 F.3d at 1020;  
12 *Classen v. Weller* (1983) 145 Cal.App.3d 27, 46-47. Plaintiff contends that his claims are typical of  
13 the Class Members’ claims because they arise from the same factual basis and are based on the same  
14 legal theory as those applicable to the Class Members. *See Wehner v. Syntex Corp.* (N.D. Cal. 1987)  
15 117 F.R.D. 641, 644. Each Class Member is challenging the same policies and practices. Plaintiff  
16 alleges that Defendant’s policies applied to all Class Members. Factual differences may exist between  
17 Plaintiff’s and the Class Members so long as the claims arise from the same events or course of  
18 conduct and are based on the same legal theories. *Hanlon, supra*, 150 F. 3d at 1020; *see also Wehner,*  
19 *supra*, 117 F.R.D. at 644; *Newberg on Class Actions*, 4th ed. § 3:15, p.335 [When it is alleged that  
20 the same unlawful conduct was directed at or affected both the named plaintiff and the class sought  
21 to be represented, the typicality requirement is usually met irrespective of varying fact patterns which  
22 underlie individual claims.] As such, the typicality requirement is satisfied.

#### 23 **v. The Adequacy Requirement is Met**

24 The adequacy requirement is met if Plaintiff has no interests adverse to the interests of the  
25 proposed Class Members and is committed to vigorously prosecuting the case on behalf of the  
26 class. *Hanlon, supra*, 150 F.3d at 1020; *McGhee v. Bank of America* (1976) 70 Cal.App.3d 442,  
27 450-51. Plaintiff contends those standards are met here. Plaintiff does not have any conflicts of  
28

1 interest with the Class. He has been and continues to be committed to vigorously prosecuting this  
2 case. If any Class Member wishes to opt-out of the Settlement, he or she may do so. Therefore,  
3 there is no conflict of interest between Plaintiff and the Class Members.

4 **d. Notice to Class Members Complies with California Rule of Court 3.769(f)**

5 California Rule of Court 3.769(f), provides:

6 If the court has certified the action as a class action, notice of the final approval  
7 hearing must be given to class members in the manner specified by the court. The  
8 notice must contain an explanation of the proposed settlement and procedures for  
9 class members to follow in filing written objections to it and in arranging to appear  
10 at the settlement hearing and state any objections to the proposed settlement.

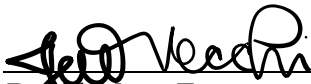
11 The proposed Class Notice meets all of these requirements. The proposed Class Notice advises the  
12 class of their rights to participate in the settlement, how to and when to object to or request  
13 exclusion from the settlement, and the date, time, and location of the final approval hearing. The  
14 proposed Class Notice is attached as Exhibit A to the Agreement.

15 **VI. CONCLUSION**

16 Plaintiff respectfully submits that the proposed settlement is in the best interests of the class  
17 and class members, as it is fair, adequate, and reasonable, and one that should ultimately be granted  
18 final approval. Under the applicable class action criteria and guidelines, the proposed settlement  
19 should be preliminarily approved by the Court, the class should be conditionally certified for  
20 purposes of settlement only, and the Class Notice should be approved. Plaintiff also respectfully  
21 requests the Court set a final approval hearing date of October 17, 2022 or later.

22 Dated: June 10, 2022

23 **MARA LAW FIRM, PC**

24   
25 David Mara, Esq.  
26 Jill Vecchi, Esq.  
27 Representing Plaintiff ERIK MARTINEZ on behalf  
28 of himself, all others similarly situated, and on  
behalf of the general public.