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SIMILARLY SITUATED

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
UNLIMITED JURISDICTION

JOSHUA SWEET, INDIVIDUALLY AND ON)
BEHALF OF THOSE SIMILARLY SITUATED,)

PLAINTIFFS,

v.

SF TIRE & SERVICE CENTRAL INC., A)
CALIFORNIA CORPORATION, AND DOES 1)
THROUGH 10, INCLUSIVE,)

DEFENDANTS.

CASE No. CGC-20-584213

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

Date: December 2, 2021

Time: 9:30 a.m.

Dept: 302

Judge: Hon. Ethan P. Schulman

ACTION FILED APRIL 22, 2020

NO TRIAL DATE SET

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I. INTRODUCTION

After thorough discovery, extensive analysis and a lengthy mediation session with Jeffrey Ross, Plaintiff Joshua Sweet (“Sweet”) and Defendant SF Tire and Service Central, Inc. (“SF Tire”) reached a settlement on behalf of non-exempt California employees of SF Tire. The \$1,475,000 settlement resolves all wage and hour claims brought in this case, including class action and Private Attorneys General Act (“PAGA”) claims alleging failure to pay overtime wages and premium pay for missed/noncompliant meal and rest periods, failure to timely pay final wages, failure to provide compliant and accurate wage statements, and unfair competition regarding some of the aforementioned wage and hour claims. In addition, Sweet brought an additional PAGA claim alleging SF Tire failed to provide suitable seating. As set forth below, the Class should be conditionally certified for purposes of settlement because the requirements of California Code of Civil Procedure § 382 and California Rules of Court are met. Further, the settlement is fair, adequate and reasonable, and the notice plan comports with due process.

Accordingly, Sweet respectfully requests that the Court (1) grant preliminary approval of the class action settlement, (2) conditionally certify the Class, (3) approve the form and method of Class Notice, (4) approve Kevin Woodall of Woodall Law Offices as Class Counsel, (5) approve Sweet as Class Representative, (6) appoint Phoenix Settlement Administrators as the settlement administrator, and (7) approve the proposed mechanism for objections and elections to opt-out of the settlement.

II. STATEMENT OF FACTS

A. Background and Claims Asserted By Plaintiff

On April 22, 2020, Sweet filed his initial complaint alleging the following class action claims: (1) unpaid overtime wages under Labor Code §§ 510 and 1194; (2) missed meal and rest periods under Labor Code §§ 226.7 and 512; (3) failure to timely pay final wages under Labor Code §§ 201-203; (4) failure to provide accurate itemized wage statements under Labor Code § 226; and (5) unfair competition. (Woodall Declaration in Support of Mtn. for Preliminary Approval (“Woodall Decl.”), ¶ 2.) At or about the same time, Sweet provided notice under the PAGA that SF Tire not only committed the foregoing wage and hour violations, but failed to

1 provide suitable seating to employees. (*Id.*, Exh. 3.)

2 One June 3, 2020, Sweet filed a First Amended Complaint, in which he asserted PAGA
3 claims relating to all of the foregoing class action claims, along with a PAGA claim for failure to
4 provide suitable seating. (Woodall Decl., ¶ 3.)

5 In July, 2021, the parties participated in a full-day mediation session with Jeffrey Ross,
6 an experienced and well-respected wage and hour mediator who has resolved numerous class
7 action and PAGA disputes. (Woodall Decl., ¶ 4.) The mediation was successful and the parties
8 agreed to settle this matter for \$1,475,000. (*Id.*)

9 **B. Thorough Discovery Conducted**

10 The parties engaged in thorough discovery prior to settling this matter. (Woodall Decl,
11 ¶ 5.) Sweet propounded and received responses to informal discovery requests for documents
12 and information. SF Tire produced a 10 percent random sample wage statements and time entry
13 records, along with employment policies and information relating to the 547 Class Members
14 including, but not limited to, their dates of employment, positions held, rates of pay, workweeks
15 and pay periods, and employment status (i.e., whether they were former or current employees).
16 (*Id.*) After receiving this information and documents, Sweet’s counsel and staff conducted an
17 extensive analysis of the data and records. (*Id.*) Prior to the mediation, SF Tire also produced
18 confidential financial records of the company, which demonstrated the difficulty the company
19 experienced during the pandemic. (*Id.*)

20 **C. Primary Settlement Terms**

21 The parties settled this matter for One Million Four Hundred Seventy-Five Thousand
22 Dollars (\$1,475,000) (hereinafter, “Maximum Settlement Amount”), which is non-reversionary.
23 (Woodall Decl., ¶ 6, Exh. 1 at pp. 3, 7 (Section A, ¶ 16; Section C, ¶ 2).) The Maximum Settlement
24 Amount will be allocated as follows under the agreement: (1) \$30,000 will be paid to the Labor
25 Workforce Development Agency (“LWDA”) and PAGA represented employees (75 percent to the
26 LWDA and 25 percent to PAGA represented employees); (2) class counsel will seek thirty-three
27 percent (33%) of the Maximum Settlement Amount in attorney’s fees, along with the
28 reimbursement of costs advanced—not to exceed \$25,000 in costs; (3) the Settlement

1 Administrator will receive approximately \$7,000; (4) Sweet will seek an incentive payment of
2 \$7,500 relating to his efforts in advancing the interests of class members; and (5) the Settlement
3 Class Members will receive the remainder of the Maximum Settlement Amount (“Net Settlement
4 Amount”). (*Id.*, Exh. 1 at pp. 7-9 (Section C, ¶¶ 1-7).)¹ The Maximum Settlement Amount will
5 be fully paid, pursuant to an installment plan, by March 1, 2023. (*Id.*)

6 The Net Settlement Amount will be distributed to putative class members who do not opt-
7 out of the settlement as follows: the Settlement Administrator will divide the Net Settlement
8 Amount by the total number of workweeks in the Class Period (April 22, 2016 to January 1, 2020)
9 for all Settlement Class Members to arrive at an amount per workweek. That amount will then be
10 multiplied by the number of workweeks of each Settlement Class Member to arrive at the
11 Individual Settlement Payments. (Woodall Decl., ¶ 7, Exh. 1 at p. 9 (Section C, ¶ 7).)

12 Assuming each of the projected 547 Class Members does not opt-out, the average
13 compensation attributed to each Settlement Class Member before subtraction of the fees, costs and
14 payments above will be approximately \$2,696. (Woodall Decl., ¶ 8.) The amount attributed to
15 Settlement Class Members who worked the entire Class Period, before subtraction of fees, costs
16 and payments above, will be in excess of \$14,780 (\$1,475,000/ 18,761² workweeks in Class Period
17 = \$78 per workweek x 188 workweeks in the Class Period). It is also noteworthy that if not all
18

19 ¹ In or about 2020, Sweet filed an administrative charge with the Department of Fair
20 Employment and Housing (“DFEH”) (Case No. 202004-09845607), in which he alleged SF Tire
21 engaged in disability discrimination and retaliation. Sweet not only alleged he suffered
22 discrimination and retaliation during his employment, but his employment was terminated due to
23 discrimination and retaliation. Sweet contends that his damages resulting from the discrimination
24 and retaliation were in the six figures, including lost income, emotional distress, attorney’s fees
25 and costs. Without admission of liability by SF Tire, the parties entered into a separate agreement
26 to resolve the allegations in the DFEH action, including a Civil Code § 1542 waiver that does not
27 release the class action claims in this case, in exchange for \$25,000 payable to Sweet. This
28 payment will not be made from the Gross Settlement Fund. (Woodall Decl., ¶ 34; Sweet
Declaration in Supp. of Mtn. for Preliminary Approval (“Sweet Decl.”), ¶ 6.) Separate agreements
to address non-class claims of class representatives have been deemed acceptable by courts. *Amey*
v. Cinemark Inc., 2018 WL 3956326, *5 (N.D. Cal. Aug. 17, 2018); *Narouz v. Charter Commc’ns*,
591 F.3d 1261, 1265 (9th Cir. 2010).

² See Woodall Decl., Exh. 1 at p. 9 (Section C, ¶ 8.)

1 Class Members participate in the settlement, the settlement amount for each Settlement Class
2 Member would be higher. (*Id.*)

3 Payroll withholdings will be made on the one-third (1/3) portion deemed unpaid wages,
4 while there will be no taxes withheld regarding the two-thirds (2/3) portion deemed penalties,
5 interest and other non-wage damages. (Woodall Decl, ¶ 9, Exh. 1 at p. 15 (Section C, ¶ 25).) In
6 exchange for their participation, the Settlement Class Members will provide a *limited* release that
7 covers the claims asserted in this action for the Class Period (April 22, 2016 through January 1,
8 2020), including those claims that were brought or could have been brought and that arose from
9 or relate to the facts alleged in the First Amended Complaint. (*Id.*, Exh. 1 at pp. 2, 4-5 (Section A,
10 ¶¶ 7, 24).)³

11 III. DISCUSSION

12 A. Preliminary Approval of Class Action Settlement Standard

13 Pursuant to California Rules of Court, Rule 3.769 (“Rule 3.769”), a class action settlement
14 requires court approval. Likewise, under PAGA, the “superior court shall review and approve any
15 penalties sought as part of a proposed settlement agreement.” Cal. Labor Code § 2699(l).⁴ Wage-
16 and-hour cases such as this action “routinely proceed as class actions.” *Prince v. CLS Transp.,*
17 *Inc.*, 118 Cal. App. 4th 1320, 1328 (2004). When they settle before the court has certified a class
18 action, “[a] trial court unquestionably ha[s] the authority to conditionally certify a class for

19 ³ As set forth more fully below, within five (5) business days of a preliminary
20 approval order by the Court, SF Tire shall provide the Settlement Administrator with the names
21 and contact information of Class Members, along with the information necessary to make the
22 payments described above. (Woodall Decl., ¶ 10, Exh. 1 at pp. 11-13 (Section C, ¶¶ 11-18), Exh.
23 2.) Within five (5) business days of receiving the class list and data from SF Tire, the Settlement
24 Administrator will update the addresses using a national address search service and send to the
25 Class Members via first class mail a Notice Packet. (*Id.*) The Class Notice includes detailed
26 information regarding the claims asserted, the settlement and amounts to be paid under the
27 settlement (above), the number of workweeks worked by the employee during the Class Period,
28 the impact on the rights of Class Members if they choose to opt-out of the settlement or do nothing,
and how to submit an opt-out request and object to the settlement, along with the final approval
hearing date. (*Id.*) If any Notices are returned, the Settlement Administrator will update the
address using a national address search service and resend the Notice Packet. (*Id.*) Class Members
will have forty-five (45) days from the mailing of the Class Notice to opt-out or object to the
settlement. (*Id.*, Exh. 1 at p. 5 (Section A, ¶ 27).)

⁴ Under the PAGA, the parties must provide notice of the proposed settlement to the Labor
Workforce Development Agency, which has already been provided. (Woodall Decl, ¶ 35, Exh.
4.)

1 settlement purposes.” *Hernandez v. Vitamin Shoppe Indus. Inc.*, 174 Cal. App. 4th 1441, 1457
2 (2009). Here, the parties negotiated a settlement prior to the filing of a class certification motion.

3 In determining whether to approve a class action settlement, courts must determine whether
4 the proposed settlement is fair under the circumstances of the case. *Mallick v. Superior Court*, 89
5 Cal. App. 3d 434, 438 (1979); *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 234-235
6 (2001). Specifically, California Code of Civil Procedure section 382 requires that the Court find
7 the proposed settlement is “fair, adequate and reasonable.” *Dunk v. Ford Motor Co.*, 48 Cal. App.
8 4th 1794, 1801 (1996) (quoting *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th
9 Cir. 1982)). A class action settlement is presumed fair under the following circumstances: (1) the
10 parties reached settlement after arms-length negotiations; (2) investigation and discovery were
11 sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar
12 litigation; and (4) the percentage of objectors is small. *Dunk*, 48 Cal. App. 4th at 1802. In addition
13 to showing a class action settlement is fair, adequate and reasonable, the settlement class must
14 satisfy the normal prerequisites for a class action. *Amchem Products, Inc. v. Windsor*, 521 U.S.
15 591, 625-627 (1997).⁵ Under Rule 3.769(b) and (c), the Court should review and approve the

16 ⁵ California courts have routinely followed Rule 23 of the Federal Rules of Civil Procedure
17 and federal cases regarding class action procedures, especially where gaps exist in the California
18 Rules of Court. *City of San Jose v. Superior Court*, 12 Cal. 3d 447, 453 (1974). Under Code of
19 Civil Procedure § 382, “when the question is one of a common or general interest, of many persons,
20 or when the parties are numerous, and it is impracticable to bring them all before the court, one or
21 more may sue or defend for the benefit of all.” Thus, in order to certify a class, one must
22 demonstrate: (1) the existence of an ascertainable and sufficiently numerous class, (2) a well-
23 defined community of interest, and (3) substantial benefits from certification that render
24 proceeding as a class superior to the alternatives. *Brinker Restaurant Corp. v. Superior Court*, 53
25 Cal. 4th 1004, 1021 (2012); *Villacres v. ABM Indus. Inc.*, 189 Cal. App. 4th 562, 573 (2010).
26 Ascertainability and numerosity are determined by examining the class definition, the size of the
27 class and the means available to identify class members, such that notice can be given to putative
28 class members who will be bound by the judgment. *Sotelo v. MediaNews Group, Inc.*, 207 Cal.
App. 4th 639, 647-648 (2012); *Reyes v. Board of Supervisors*, 196 Cal. App. 3d 1263, 1271 (1987).
The community of interest requirement is comprised of three separate factors: (1) predominant
common questions of law or fact; (2) class representatives whose claims or defenses are typical of
the class; and (3) class representatives who can adequately represent the class. *Brinker*, 53 Cal.
4th at 1021, *Richmond v. Dart Indus., Inc.*, 29 Cal. 3d 462, 470 (1981); *Fireside Bank v. Superior
Court*, 40 Cal. 4th 1069, 1089 (2007). The substantial benefits requirement is satisfied where “on
balance, a class action is superior to other methods available for adjudicating the controversy.”
Bradley v. Networkers Int’l, LLC, 211 Cal. App. 4th 1129, 1148-1156 (2012). Courts have held
that “wage and hour disputes (and others in the same general class) routinely proceed as class
actions.” *Hill v. Bauer*, 242 F.R.D. 556, 562 (CD Cal. 2007) (quoting *Prince v. CLS
Transportation, Inc.*, 118 Cal. App. 4th 1320, 1328 (2004)); see also *Leyva v. Medline Indus.*, 716
F.3d 510 (9th Cir. 2013) (class certification proper with unpaid wage, waiting time penalties and

proposed notice to settlement class members and the settlement agreement. Rule 3.769(e) further provides that upon preliminary approval of class action settlement, the Court’s “order must include the time, date, and place of the final approval hearing; the notice to be given to the class; and any other matters deemed necessary for the proper conduct of a settlement hearing.”

B. Conditional Certification of The Settlement Class is Appropriate

Based upon the standard above, the Class should be conditionally certified for settlement purposes because (1) the Class is ascertainable and sufficiently numerous, (2) there is a well-defined community of interest, and (3) substantial benefits from certification will render the Class superior to the alternatives.

1. Ascertainability and Numerosity

Conditional class certification for settlement purposes is proper because the Class is sufficiently numerous and ascertainable. “[A] class definition is sufficient if the description of the class is ‘definite enough so that it is administratively feasible for the court to ascertain whether an individual is a member.’” *Vietnam Veterans of Am. v. CIA*, 288 F.R.D. 192, 211 (N.D. Cal. 2012) (quoting *O’Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998)); see also *Dyer v. Wells Fargo Bank, N.A.*, 2014 U.S. Dist. LEXIS 65199 at *6-7 (N.D. Cal. May 12, 2014); *Global Minerals & Metals Corp. v. Superior Court*, 113 Cal. App. 4th 836, 858 (2003). There is no minimum number of plaintiffs required as a matter of law for maintenance of a class action in California. *Rose v. City of Hayward*, 126 Cal. App. 3d 926, 934 (1981); *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2nd Cir. 1995) (numerosity is presumed at 40 or more).

Here, there are approximately 547 Class Members, including 467 former employees, which easily satisfies the numerosity standard. (Woodall Decl., ¶ 28, Exh 1 at p. 2 (Section A, ¶ 2.) Class Members can be easily identified as well, as the Class is defined as “all current and former and

inaccurate wage statement allegations); *Kamar v. Radio Shack Corp.*, 254 F.R.D. 387, 402 (C.D. Cal. 2008) (class certified where employees were allegedly denied wages); *Boyd v. Bank of Am. Corp.*, 300 F.R.D. 431 (C.D. Cal. 2014) (Rule 23(a) and (b)(3) met where putative class was denied overtime wages, meal and rest periods, accurate wage statements and all wages due at termination); *Lopez v. Bank of Am., N.A.*, 2014 U.S. Dist. LEXIS 132149, *10 (N.D. Cal. Sept. 19, 2014) (preliminary certification of wage statement settlement class granted); *Willner v. Manpower Inc.*, 2015 U.S. Dist. LEXIS 65 (N.D. Cal. Jan. 2, 2015) (preliminary certification granted where there were claims relating to improper wage statements).

hourly-paid or non-exempt employees who worked for Defendant within the State of California at any time during the Class Period.” (Woodall Decl., Exh. 1 at p. 2 (Section A, ¶ 3.) Class Members can be ascertained from SF Tire’s records, as it maintains records regarding current and former California employees during this period of time, along with wage statement and time entry records of California employees and the resignation and termination dates of California employees. (*Id.*)

2. Well-Defined Community of Interest

There is a well-defined community of interest for purposes of settlement because there are (1) predominant common questions of law or fact; (2) the class representatives’ claims are typical of the Settlement Class; and (3) the class representative and his counsel can adequately represent the class.

a. Predominant Common Questions of Law And Fact

Numerous courts have determined that common issues predominate and the case is manageable where the claims involve inaccurate or noncompliant wage statements, unpaid wages, missed meal and rest periods, and failure to timely pay final wages. *Boyd*, 2014 U.S. Dist. LEXIS 90670 at *22-29.⁶ In this case, common issues of fact and law predominate.

Here, Sweet contends that SF Tire had defective, uniform policies relating to overtime pay and meal and rest periods that affected all Class Members. (Woodall Decl., ¶¶ 29-31.) Sweet also contends that upon extensive examination of wage statements and time entry records, SF Tire utilized unlawful, company-wide practices with respect to overtime pay, meal and rest periods,

⁶ See also *Leyva*, 716 F.3d at 513-515 (predominance met because inaccurate wage statement and other wage and hour violations could be established through the employer’s own pay records); *Dyer v. Wells Fargo Bank, N.A.*, 2014 U.S. Dist. LEXIS 65199, *11-12 (N.D. Cal. May 12, 2014); *Brinker*, 53 Cal.4th at 1021; *Bradley v. Superior Court*, 211 Cal.App.4th 1129, 1150 (2012) (noncompliant meal and rest period policies subject to class certification); *Faulkinbury v. Boyd & Assoc., Inc.*, 216 Cal.App.4th 220, 236-237 (2013) (same); *Seckler v. Kindred Healthcare Operating Group, Inc.*, 2013 U.S. Dist. LEXIS 29940, *20 (C.D. Cal. March 5, 2013) (class certified where plaintiffs alleged their regular rates of pay did not include bonus compensation and shift differentials); *Kurihara v. Best Buy Co.*, 2007 U.S. Dist. LEXIS 64224, *27-30 (N.D. Cal. Aug. 30, 2007) (while individualized liability issues existed, predominance standard met where question was whether the company-wide policies or practices resulted in unpaid compensation); *In re Wal-Mart Stores, Inc. Wage & Hour Litig.*, 2008 U.S. Dist. LEXIS 14756 at *46 (N.D. Cal. Feb. 13, 2008) (derivative waiting time penalty claim certified); *McKenzie v. Fed. Express Corp.*, 275 F.R.D. 290, 293, 299-300 (C.D. Cal. 2011) (where company “implemented pay stub system” and “controlled how the wage statements were formatted,” class certification was proper).

1 wage statements and payment of final wages. (*Id.*) Indeed, from the wage statements and time
2 entry records alone, Sweet can demonstrate that Class Members were uniformly affected by the
3 unlawful policies and practices. (*Id.*)

4 **b. Plaintiff's Claims Are Typical**

5 The “test of typicality is whether other members have the same or similar injury, whether
6 the action is based on conduct which is not unique to the named plaintiffs, and whether other class
7 members have been injured by the same course of conduct.” *Martinez v. Joe’s Crab Shack*
8 *Holdings*, 231 Cal. App. 4th 362, 375 (2014); *Classen v. Weller*, 145 Cal. App. 3d 27, 45 (1983).
9 In this case, Sweet’s claims are typical of the Class. Sweet was not paid overtime wages when he
10 worked over 8 hours per day, including at the correct rate of pay, given that his regular rate of pay
11 was not calculated with non-discretionary bonuses and commissions. (Woodall Decl., ¶ 32); Sweet
12 Decl., ¶¶ 1-4.) Further, Sweet was not paid the unpaid overtime wages when his employment
13 ended, which supports a derivative waiting time penalty claim. (*Id.*) In addition, Sweet’s wage
14 statements do not include the correct gross wages earned, the number of hours worked at each rate
15 of pay or the correct total hours worked. (*Id.*) Sweet also regularly missed or was not provided
16 compliant meal and rest periods, yet SF Tire did not provide him with premium pay for said
17 violations. (*Id.*)

18 **c. Plaintiff and His Counsel Will Adequately Represent The Class**

19 The class representative, through qualified counsel, must be capable of “vigorously and
20 tenaciously” protecting the interests of the class members. *Simons v. Horowitz*, 151 Cal. App. 3d
21 834, 846 (1984). Sweet has demonstrated he will vigorously and tenaciously protect the interests
22 of Class Members. Sweet has assisted with the preparation of complaints and informal discovery,
23 the production of detailed information to his counsel and the preparation of his declaration,
24 participated in a lengthy mediation session, and reviewed and changed settlement agreements.
25 (Woodall Decl., ¶ 33; Sweet Decl., ¶ 5.) Finally, Sweet’s counsel is qualified to represent the
26 Class in this litigation, given his extensive class action and employment litigation experience.
27 (Woodall Decl., ¶¶ 24-25.)

3. Superiority

This standard is satisfied where judicial economy is achieved through common adjudication/ settlement of the claims of proposed class members. *Dyer*, 2014 U.S. Dist. LEXIS 65199, *11; *Boring*, 2013 U.S. Dist. LEXIS 165909, *15. Where, as here, the total potential value of each class member's claims is relatively low and the class includes a large number of members, certification of a class achieves judicial economy because a class action is superior to alternative procedures for adjudicating the individual claims. *Id.* In other words, judicial economy will be served by having all Class Members' cases resolved at the same time.

4. Appointment of Class Representative and Class Counsel

Sweet and his counsel should be appointed as class representative and class counsel, respectively, for purposes of settlement. When class requirements are met, plaintiffs should be appointed as class representatives. *Lopez*, 2014 U.S. Dist. LEXIS 132149 at *10-12. When appointing class counsel, the Court must consider: (a) the work counsel has done in identifying or investigating potential claims in the action; (b) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (c) counsel's knowledge of the applicable law; and (d) the resources that counsel will commit to representing the class. *Id.* Here, Sweet's counsel has diligently and vigorously prosecuted this action by: (1) filing and amending complaints; (2) investigating Class Members' potential claims; (3) propounding and receiving discovery; (4) analyzing information and documents that SF Tire provided in discovery; (5) preparing for and participating in a mediation; (6) negotiating the settlement agreement; and (7) briefing the instant motion for preliminary approval. (See Woodall Decl., ¶ 33.) Further, Sweet's counsel has significant experience prosecuting and defending class actions, and handling wage and hour matters. (*Id.* at ¶¶ 24-25.) Thus, Sweet requests that he be appointed class representative and his attorney be appointed class counsel.

C. The Class Settlement is Fair, Adequate and Reasonable

The class settlement is fair, adequate and reasonable because the settlement was reached after arms-length negotiations with an experienced mediator, Sweet's counsel engaged in extensive investigation and discovery efforts to allow Sweet and the Court to act intelligently, and

Sweet's counsel is experienced in similar litigation and believes the settlement is a very good result in light of the risks, expense, complexity and duration of continued litigation.⁷ *Mallick*, 89 Cal. App. 3d at 438; *Wershba*, 91 Cal. App. 4th at 234-235; *Dunk*, 48 Cal. App. 4th at 1801-1802.

1. The Settlement Was the Result of Extensive Negotiations Conducted at Arm's Length with the Assistance of an Experienced Mediator

Courts presume the absence of fraud or collusion in the negotiation of settlement unless evidence to the contrary is offered. *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); *Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.*, 834 F.2d 677, 682 (7th Cir. 1987); *In re Chicken Antitrust Litig.*, 560 F. Supp. 957, 962 (N.D. Ga. 1980). Courts do not substitute their judgment for that of the proponents of the settlement, particularly where, as here, settlement has been reached with the participation of experienced counsel familiar with the litigation. *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004); *Hammon v. Barry*, 752 F. Supp. 1087 (D.D.C. 1990); *Steinberg v. Carey*, 470 F. Supp. 471 (S.D.N.Y. 1979).

After extensive discovery, including obtaining information and documents in response to informal discovery requests, the parties participated in a full-day mediation with a well-respected mediator, Jeffrey Ross, prior to reaching the agreement. (Woodall Decl., ¶ 22.) After the arm's length negotiations, the parties came to terms on a fair and reasonable settlement after conducting a close analysis of the evidentiary record, the costs of protracted litigation, and the risks associated with a contested class certification motion and trial on the merits.

2. The Settlement Gives No Class Member Preferential Treatment

The settlement does not grant preferential treatment to segments of the Class, as all Class Members are affected by SF Tire's conduct and they will receive a settlement amount based upon their number of workweeks in the Class Period (i.e., they will receive more compensation the longer they were subjected to SF Tire's alleged unlawful conduct). (Woodall Decl. at ¶ 23, Exh. 1 at p. 9 (Section C, ¶ 7).)

⁷ Sweet also believes the number of objectors will be small and the Class Members will have a positive reaction to the settlement, but that issue will need to be settled after notice is provided to Class Members.

3. Sweet's Counsel is Experienced and Knowledgeable in this Area and Has Concluded the Settlement is a Favorable Result for the Class in Light of the Risks at the Class Certification and Merits Stages of the Action

Sweet's counsel has vast experience and knowledge with respect to wage and hour class actions (Woodall Decl., ¶¶ 24-25) and although he believes Sweet could have ultimately prevailed if this case did not settle, Sweet's counsel realizes his client and the putative class would have to overcome hurdles to demonstrate liability, damages and class action status. (*Id.* at ¶ 26.) Specifically, Sweet contends that SF Tire did not properly pay overtime wages, issued inaccurate wage statements, did not provide compliant meal and rest periods or premium pay for the same, and did not timely pay final wages to putative class members in violation of Labor Code §§ 203, 226, 226.7, 510 and 512. SF Tire denies Sweet's allegations and stood ready and willing to oppose a motion to certify a class action for trial purposes and to litigate the case on the merits. In reaching the settlement, Sweet was mindful of the risk that the Court may not certify a class action for purposes of trial or that SF Tire may prevail on the merits. (*Id.*)

SF Tire was prepared to argue that putative class members are not owed overtime wages because its policy is compliant with Labor Code § 510 and employees did receive overtime pay. (Woodall Decl., 12.) In addition, SF Tire contends that it was not liable for missed or noncompliant meal and rest periods under Labor Code §§ 226.7 and 512, as it maintained policies encouraging employees to take meal and rest periods and paid premium pay. (*Id.*) SF Tire would have argued that if employees chose not to take meal or rest periods, including at the correct time or for the full time permitted, it was not liable. (*Id.*) SF Tire was prepared to argue that Sweet and other employees received their final pay when their employment ended in accordance with Labor Code §§ 201-203. (*Id.*) Finally, SF Tire maintains that the wage statements provided to Sweet and other employees complied with Labor Code § 226. (*Id.*) For purposes of settlement, Sweet weighed these risks against the full value of the class claims.

In addition to its legal arguments, SF Tire provided Sweet's counsel with confidential financial records showing the company suffered financial distress due to the pandemic. (Woodall Decl., ¶ 13; Monteverde Decl. in Supp. of Class Action Settl. ("Monteverde Decl."), ¶¶ 3-13.)

1 If Sweet were to prevail on liability and class certification, the total amount of unpaid
2 overtime wages during the four-year Class Period (April 22, 2016 to January 1, 2020) would
3 have been approximately \$125,000 (\$99,000 relating to the failure to properly calculate the
4 regular rate of pay and \$26,000 relating to the failure to pay overtime for all hours worked and
5 pay 2 times the regular rate of pay when employees worked in excess of 12 hours per day).
6 (Woodall Decl., ¶ 14.) Sweet's counsel also determined that during the 3-year Class Period
7 (April 22, 2017 to January 1, 2020), Labor Code § 203 penalties relating to the failure to timely
8 pay final wages would have been approximately \$1,112,832 (467 former employees x .60
9 violation rate = 280 affected employees x 8 hours worked per day x 30 days x \$16.56 average
10 hourly rate). (*Id.* at ¶ 15.) In addition, Sweet's counsel determined there were approximately
11 1,354 wage statements during the one-year Class Period (April 22, 2019 to January 1, 2020) that
12 contained incorrect gross wages earned, incorrect hours worked at each rate of pay due or
13 incorrect hours worked due to the violations asserted previously, which resulted in penalties of
14 \$135,420 under Labor Code § 226 (\$100 per pay period x 2,257 pay periods x .60 violation rate).
15 (*Id.* at ¶ 16.) After extensive review of time entry records and wage statements, Sweet's counsel
16 also found that unpaid premium pay for missed and noncompliant meal period claims is
17 \$633,791 (18,761 workweeks x 4 days/week x .51 violation rate x \$16.56 avg. hourly rate). (*Id.*
18 at ¶ 17.) Based upon this information, Sweet's counsel determined the unpaid premium pay for
19 missed and noncompliant rest period claims would be \$633,791 (18,761 workweeks x 4
20 days/week x .51 violation rate x \$16.56 avg. hourly rate). (*Id.* at ¶ 18.)

21 Despite the maximum potential recovery of \$2,640,834 for the class claims, there are
22 risks associated with certifying a class action and establishing liability, including the very same
23 arguments made by SF Tire (above). (Woodall Decl, ¶ 19.) SF Tire also suffered financial
24 distress due to the pandemic, which made it impossible for the company to survive and pay all
25 asserted damages and penalties. (*Id.*; Monteverde Decl., ¶¶ 3-13.) Moreover, where well over
26 half of the potential theoretical recovery consists of penalties, courts have found they may be
27 substantially discounted when evaluating the proposed distribution of a settlement fund.
28

Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 964 (9th Cir. 2009).⁸

Given the risks involved with obtaining and certifying a class action, prevailing on the merits regarding the class claims and actually collecting on a judgment, the realistic potential recovery on the class action claims is a fraction of the maximum theoretical recovery.⁹ Specifically, given the arguments and defenses raised by SF Tire, the realistic potential recovery is approximately 70% of the maximum theoretical recovery or \$1,848,583. (Woodall Decl., ¶ 21.) Thus, this \$1,475,000 settlement represents approximately eighty percent (80%) of the realistic potential recovery and almost fifty-six percent (56%) of the maximum potential recovery. (*Id.*) Courts have found that a settlement is fair when it is a fraction of the potential recovery for class members. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (\$2 million settlement was fair even though potential damages were \$12 million); *Dyer*, 303 F.R.D. at 331 (even though the settlement was a third of the potential recovery, it was fair due to the uncertainties

⁸ In addition to the statutory penalties sought as part of the class action, Sweet seeks civil penalties under PAGA relating to the same alleged violations of Labor Code §§ 201-202, 226, 226.7, 510 and 512. Sweet also seeks civil penalties under PAGA relating to failure to provide suitable seating for employees under Labor Code § 1198. (Woodall Decl., ¶ 20.) Sweet seeks \$100 per pay period for each violation, along with attorney's fees and costs. SF Tire raises the same defenses mentioned above and contends it provided suitable seating for employees. (*Id.*) During the one-year statute of limitations relating to the released PAGA claims (April 22, 2019 to January 1, 2020), Sweet was not able to identify seating violations other than a few instances he experienced, as SF Tire contends chairs were readily available to employees. With respect to violations of Labor Code §§ 201-202, 226, 226.7, 510 and 512, if Sweet were able to demonstrate that SF Tire violated said Labor Code sections during this same period of time, the maximum potential penalties would be \$510,054. (*Id.*) However, all of the risks identified above relating to the underlying alleged Labor Code section violations apply equally to the PAGA claim. In addition, SF Tire would rely on the Court's discretion under PAGA to reduce or eliminate the award of civil penalties under Labor Code § 2699 et seq. SF Tire would have argued the violations were not intentional, but inadvertent. As a result, SF Tire would argue that it would be unjust to award substantial PAGA penalties on top of the statutory penalties and damages available under Labor Code §§ 201-203, 226, 226.7, 510 and 512 for the same underlying statutory violations. Further, if SF Tire were to prevail, the LWDA would obtain 75% of the penalties and aggrieved employees would be entitled to 25% of the penalties. Given the above, it is common for PAGA penalties to be greatly reduced. *Garcia v. Gordon Trucking, Inc.*, 2012 U.S. Dist. LEXIS 160052 at *21-22 (E.D. Cal. Oct. 31, 2012) (approving \$10,000 allocation to PAGA claim in \$3.7 million settlement of wage and hour class action); *Chu v. Wells Fargo Investments*, 2011 U.S. Dist. LEXIS 15821 at *4 (N.D. Cal. Feb. 16, 2011) (approving \$10,000 allocation to PAGA claims in \$6.9 million settlement of wage and hour class action); *Franco v. Ruiz Food Products, Inc.*, 2012 U.S. Dist. LEXIS 169057 at *41 (E.D. Cal. Nov. 27, 2012) (approving \$10,000 allocation to PAGA claim in context of \$2.5 million settlement of claims of 2,055 member class); *Shepard v. Lowe's HIW, Inc.*, 12-CV-03893-JSW (N.D. Cal. 2014).

⁹ As set forth above, the PAGA civil penalties are separate and distinct from the realistic class action damages and statutory penalties.

of continued litigation); *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965-967 (9th Cir. 2009) (counsel is in the best position to determine the value of the case, especially given the challenges of obtaining a favorable verdict). Based upon the risks involved, Sweet's counsel believes the settlement is a very good result for the Class Members. (*Id.*)

D. The Proposed Class Notice Plan Should Be Approved

Class notice must comport with the requirements of due process. “[T]he plaintiff must receive notice plus an opportunity to be heard and participate in litigation, whether in person or through counsel.’ The notice must be ‘the best practicable,’ ‘reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’” *Dyer*, 2014 U.S. Dist. LEXIS 65199 at *19 (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)). “‘The notice should describe the action and the plaintiffs’ rights in it.’” *Id.* “‘The notice must clearly and concisely state in plain, easily understood language: (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 an attorney 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 members’” *Id.* Lastly, “‘an absent plaintiff [must] be provided with an opportunity to remove himself from the class by executing and returning an “opt out” or “request for exclusion” form to the court.’” *Id.*

In this case, the proposed Settlement Administrator is Phoenix Settlement Administrators, a company with substantial experience in this area that submitted a reasonable bid. (Woodall Decl, ¶ 10.) The Settlement Administrator will provide notice via first class mail, calculate the awards of class members, process opt-out requests and objections, mail settlement awards to participating Settlement Class Members, issue tax reporting forms, provide regular updates to counsel for the parties, and any necessary declarations regarding the relevant information. (*Id.*, Exh. 1 at pp. 10-13 (Section C, ¶¶ 10-18).) Prior to issuing notice via first class mail, the administrator will take the Class Members’ last known addresses and update them. (*Id.*) After the Class Notices are sent, Class Members will have 45 calendar days to postmark a Request for Exclusion and make

1 objections. (*Id.*) The Settlement Administrator will perform skip-traces on any returned mail and
2 re-mail class notice to the updated addresses, providing an additional 30 days to Request Exclusion
3 or object to the settlement. (*Id.*) Thus, the proposed Settlement Administrator and Class Notice
4 procedures are appropriate.

5 The Notices to the Class Members are appropriate as well. The Notices clearly and
6 concisely state, in easily understood language: (a) the nature of the action; (b) the definition of the
7 Settlement Class; (c) the class claims, issues or defenses; (d) that Class Members may enter an
8 appearance though an attorney if the member so desires; (e) that the Court will exclude from the
9 Settlement Class any member who requests exclusion; (f) the time and manner for requesting
10 exclusion; and (g) the binding effect of a class judgment on members. (Woodall Decl., Exh. 2.)
11 The Notice also provides the contact information of Class Counsel and the Settlement
12 Administrator. (*Id.*)

13 IV. CONCLUSION

14 For the reasons set forth above, Sweet respectfully requests that the Court grant this
15 unopposed Motion for Preliminary Approval of Class Action Settlement.

16 Dated: November 7, 2021

WOODALL LAW OFFICES

17
18 By: /s/ Kevin F. Woodall
Kevin F. Woodall

19 Attorneys for Plaintiff Joshua Sweet and those
20 similarly situated
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(BY EMAIL and E-SERVICE) I served the foregoing documents by sending them via email to Defendant's counsel listed above. In addition, One Legal electronically served the documents described above on the recipients designated on the Transaction Receipt (Defendant's counsel listed above) located on the One Legal website (www.onelegal.com) pursuant to the Court's Local Rules authorizing electronic service of the documents.

4 Executed this November 8, 2021 at Corte Madera, California.

5 I declare under penalty of perjury under the laws of the State of California and the United States that the above is true and correct.

7 
Kevin F. Woodall