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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

CHERYL MILLER, as an individual, and on
behalf of all others similarly situated,

Plaintiff,

vs.

MOUNTAIN HIGH REUNITED, LLC, a
California Limited Liability Company; and DOES
1 through 100,

Defendants.

Case No. CIVDS 2010045

*[Assigned for all purposes to Hon. David S.
Cohn; Dept. S-26]*

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

Date: October 25, 2022
Time: 10:00 a.m.
Dept.: S-26

Complaint Filed: March 17, 2020
Trial Date: None Set

PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court, on October 25, 2022, at 10:00 a.m. in Department S-26 of the above-entitled Court, located at the San Bernardino Justice Center, 247 West Third Street, San Bernardino, California 92415, Plaintiffs Cheryl Miller and Sherry Bamburg (“Plaintiffs”) individually and on behalf of a class of similarly situated individuals, will and hereby do move this Court for:

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

All current and former non-exempt employees who worked for Defendant Mountain High Reunited, LLC in California at any time from March 17, 2016 through November 2, 2021 (the “Class Period”).

3. Preliminary appointment of Plaintiffs Cheryl Miller and Sherry Bamburg as Class Representatives;
4. Preliminary appointment of Haines Law Group, APC and Stonebrook Law as Class counsel;
5. The scheduling of a hearing to consider whether the Settlement should be finally approved and to permit service awards to Plaintiffs, civil penalties payable to the LWDA, Settlement Administrator costs, and attorneys’ fees and costs to Class counsel;
6. Appointment of Phoenix Settlement Administrators as the third-party Settlement Administrator for mailing notices; and
7. Approval of the proposed Class Notice and an order that it be disseminated to the proposed Settlement Class as provided in the Settlement Agreement.

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1 This Motion is based on this Notice of Motion, the attached Memorandum of Points and
2 Authorities, the declaration of Paul K. Haines and exhibits attached thereto, the declaration of
3 Josef Tojarieh, the declaration of Jodey Lawrence of Phoenix Settlement Administrators and
4 exhibits attached thereto, the declarations of Plaintiffs Cheryl Miller and Sherry Bamburg; the
5 Settlement Agreement, and on any further oral or documentary evidence or argument presented
6 at the time of hearing.

7
8 Respectfully submitted,

9 Dated: September 14, 2022

HAINES LAW GROUP, APC

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11 By:



12 Paul K. Haines
13 Attorneys for Plaintiffs
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Cheryl Miller and Sherry Bamburg (“Plaintiffs”) seek preliminary approval of
4 a class action settlement (“Settlement”) with Defendant Mountain High Reunited, LLC
5 (“Mountain High”). The Settlement resolves a class and representative action pending before this
6 Court, in which Plaintiffs allege that Mountain High: (1) failed to pay all minimum and overtime
7 wages; (2) failed to provide all legally-compliant meal periods; (3) failed to authorize and permit
8 all legally-compliant rest periods; (4) failed to reimburse necessary business expenses; (5) failed
9 to furnish accurate itemized wage statements; and (6) failed to timely pay final wages. Based on
10 these alleged Labor Code violations, Plaintiffs additionally seek civil penalties under the Private
11 Attorneys’ General Act of 2004 (“PAGA”).

12 Plaintiffs now respectfully request that this Court preliminarily approve this non-
13 reversionary, common-fund class action settlement,¹ in which Mountain High has agreed to pay
14 Seven Hundred Thirty Thousand Dollars and Zero Cents (\$730,000.00) to the following
15 Settlement Class, which is estimated to consist of 3,062 individuals:

16 All current and former non-exempt employees who worked for
17 Defendant Mountain High Reunited, LLC in California any time
18 from March 17, 2016 through November 2, 2021 (the “Class
Period”).

19 The Settlement was only reached after extensive formal and informal discovery, and after
20 the Parties participated in mediation with the Hon. Steven R. Denton (Ret.), a well-respected wage
21 and hour class action mediator. In connection with mediation, Mountain High formally produced
22 a sampling of timekeeping and payroll records for putative class members, and other information
23 and documents regarding Mountain High’s wage and hour policies. After extensive research and
24 analysis, including a detailed analysis of Mountain High’s potential exposure, the Parties were
25

26
27 ¹ The Stipulation of Settlement (“Settlement”) is attached as Exhibit 1 to the Declaration of Paul
28 K. Haines (“Haines Decl.”) filed concurrently with this Motion. The proposed Class Notice and
Notice of Estimated Settlement Award are attached as Exhibits A and B, respectively, to the
Settlement Agreement.

1 able to reach a settlement at the mediation.

2 The \$730,000.00 Gross Settlement Amount (“GSA”) will be deposited with the
3 Settlement Administrator in two (2) installments, with the first installment of \$365,000.00 having
4 already been deposited with the Settlement Administrator on June 13, 2022, and the second
5 installment of \$365,000.00 due on June 1, 2023. *See* Settlement, § 3(A). Settlement Class
6 members’ individual payments (“Settlement Awards”) will be mailed approximately twenty-one
7 (21) days after Mountain High deposits the entirety of the GSA with the Settlement
8 Administrator.² *See* Settlement, § 4(C). Funds from checks not cashed within 180 days will be
9 sent to proposed *cy pres* recipient, Legal Aid Society of San Bernardino. *Id.*, § 4(E).

10 Significantly, Settlement Class members do not need to file a claim to reap the financial
11 benefits of the Settlement, as all Settlement Class members will automatically receive a payment
12 unless they affirmatively opt-out. This is a favorable result for Settlement Class members, who
13 will be agreeing to a release of only those claims that were asserted in this litigation.

14 The proposed Settlement is within the range of possible approval in light of the significant
15 legal and factual obstacles that Plaintiffs faced, the risks and costs of further litigation, and the
16 tangible monetary benefits to be received by Plaintiffs and the Settlement Class. For the reasons
17 discussed herein, Plaintiffs respectfully request that this Court grant preliminary approval of the
18 Settlement.

19 **II. SUMMARY OF THE LITIGATION**

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

21 Mountain High is a winter resort located in San Bernardino County, California. *See*
22 Declaration of Paul K. Haines (“Haines Decl.”), ¶ 11. Plaintiff Miller worked for Mountain High
23 as a non-exempt employee from approximately November 16, 2019 to approximately December
24 2019. *See* Declaration of Cheryl Miller (“Miller Decl.”), ¶ 2. Plaintiff Bamburg worked for
25 Mountain High as a non-exempt employee from approximately November 4, 2019 to
26 approximately January 5, 2020. *See* Declaration of Sherry Bamburg (“Bamburg Decl.”), ¶ 2.

27
28 ² As noted below and in the Haines Declaration, this payment plan was warranted based on
Mountain High’s financial condition. *See* Haines Decl., ¶¶ 13, 30.

1 On March 17, 2020, Plaintiff Miller filed a Class Action Complaint in San Bernardino
2 County Superior Court alleging causes of actions for: (1) failure to pay all overtime wages; (2)
3 minimum wage violations; (3) rest period violations; (4) wage statement violations; (5) waiting
4 time penalties; (6) failure to indemnify all necessary business expenditures; and (7) unfair
5 competition in violation of California Business & Professions Code § 17200, *et seq.* Haines Decl.,
6 ¶ 12.

7 On August 18, 2020, Plaintiffs filed the operative First Amended Class and Representative
8 Action Complaint to add Plaintiff Bamburg as a named plaintiff and also to add causes of action
9 for meal period violations and civil penalties under the Private Attorneys' General Act of 2004
10 ("PAGA"), Labor Code Section 2698, *et seq.* Haines Decl., ¶ 12.

11 **B. PLAINTIFFS' CLAIMS AND MOUNTAIN HIGH'S DEFENSES**

12 **1. Meal Period Claims**

13 Plaintiffs allege that Mountain High failed to provide legally-compliant meal periods.
14 Haines Decl., ¶ 17. Specifically, throughout the Class Period, Plaintiffs allege that first meal
15 periods were at times not provided until after the completion of five hours of work due to work
16 demands. *Id.* Plaintiffs further contend that meal periods were at times short (i.e., less than 30
17 minutes). *Id.* Plaintiffs also allege that Mountain High failed to provide legally-compliant second
18 meal periods during shifts in excess of 10.0 hours. *Id.*, at ¶ 18.

19 However, Mountain High contends that it maintained compliant written meal period
20 policies throughout the Class Period, and provided legally-compliant meal periods in line with
21 those policies. Haines Decl., ¶ 17. Mountain High also argues that under *Brinker*, it was only
22 required to "provide" the opportunity to take meal periods, not "ensure" meal periods are taken.
23 *Id.*; *see Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004, 1038 (2012) (rejecting
24 "ensure" standard and holding employers only have to "provide" employees the opportunity to
25 take meal periods). Mountain High also argues that any short, missed, or late first meal periods
26 were the result of lawful employee waiver or choice, thereby precluding liability. Haines Decl., ¶
27 17. With respect to second meal periods, Mountain High argues that second meal periods may
28 lawfully be waived on shifts of more than 10.0 hours but less than 12.0 hours per Labor Code §

512, and that employees did so. Haines Decl., ¶ 18. Lastly, Mountain High argues individualized inquiries would be needed to determine why each meal period was taken late or short or missed by each employee, and whether there was a valid waiver, making certification of the meal period claim unlikely. *Id.*, at ¶¶ 17-18.

2. Rest Period Claims

Plaintiffs allege that Mountain High failed to authorize and permit third rest periods on shifts in excess of 10.0 hours throughout the Class Period. Haines Decl., ¶ 19. However, Mountain High argues that it always maintained and enforced lawful rest period policies and practices during the Class Period. *Id.* Mountain High also maintains that any failure to take rest periods was the result of employee choice, and that it is not required to police rest periods. *Id.* Finally, Mountain High contends that Plaintiffs' rest period claim is not amenable to class treatment as individualized inquiries would be required to determine which employees failed to take rest periods, and the reasons why each employee failed to take a rest period on a particular shift. *Id.* These considerations are particularly present with respect to rest periods, Mountain High argues, as rest periods are not – and need not be – recorded. *Id.*

3. Failure to Reimburse For All Necessary Business Expenses

Plaintiffs allege that they and other Settlement Class members employed as indoor based employees were required to purchase Mountain High branded jackets. Haines Decl., ¶ 20. Plaintiffs also allege that they and all other Settlement Class members were required to use their personal cell phones and personal computers for a variety of work activities, including checking their daily work schedules for updates outside of work hours on an application called “When to Work.” *Id.* Despite being required to purchase Mountain High branded jackets and being required to use their personal cell phones and computers for these work activities, Plaintiffs allege that Mountain High failed to reimburse Plaintiffs and other non-exempt employees for these necessary business expenses, in violation of Labor Code §§ 2802 and 2804. *Id.*

Mountain High maintains that Settlement Class members were not required to purchase Mountain High branded jackets and also were not required to use their personal cellular phones and computers for work purposes, as there were computers on site to view employees' schedules.

1 Haines Decl., ¶ 20. Mountain High further argues that any expenses incurred by Settlement Class
2 members for cell phone expenses were minimal, given the wide availability of low-cost cellular
3 phone plans and internet data plans. *Id.* Lastly, Mountain High argues this claim is not suitable
4 for class treatment, as it would require individualized determinations as to whether each
5 Settlement Class member purchased a Mountain High branded jacket and/or used a personal
6 cellular phone or computer for work-related purposes, and how much of Settlement Class
7 members’ cellular phone and personal computer use was a reasonable percentage of their
8 individual monthly phone/internet bill. *Id.*

9 **4. Unpaid Wages Due to Rounding**

10 Plaintiffs argue that Mountain High maintained an unlawful policy/practice of rounding
11 timekeeping entries to the nearest quarter of an hour up until December 2020. Haines Decl., ¶ 21.
12 Based on Plaintiffs’ review of employee timekeeping records, Plaintiffs argue that Mountain
13 High’s rounding practice resulted in approximately 2,878 net hours of unpaid wages. *Id.*

14 Mountain High argues that its rounding practices was lawful, since it was both neutral on
15 its face and resulted, over time, in employees being paid for all hours worked. *Id.*; *see also See’s*
16 *Candy Shops, Inc. v. Superior Court*, 210 Cal.App.4th 889, 901 (2012) (rounding policy lawful
17 if employer “applies a consistent rounding policy that, on average, favors neither overpayment
18 nor underpayment.”).

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

20 As a result of these alleged wage and hour violations, Plaintiffs assert that Mountain High
21 failed to comply with its final wage payment and wage statement obligations, in violation of
22 Labor Code §§ 203 and 226, respectively. Haines Decl., ¶¶ 22-23. Finally, Plaintiffs seek civil
23 penalties under the PAGA, based on the aforementioned claims. *Id.*, ¶ 24.

24 Mountain High asserts it has strong, good-faith defenses to Plaintiffs’ underlying claims,
25 precluding imposition of waiting time penalties. *Id.*, ¶ 21; *see* 8 Cal. Code Regs. § 13520 (a “good
26 faith dispute that any wages are due will preclude imposition of waiting time penalties”); *Kao v.*
27 *Joy Holiday*, 12 Cal.App.5th 947, 963 (2017) (holding “good faith dispute” precluded imposition
28 of waiting time penalties).

Mountain High further contends that any alleged wage statement violations could not be shown to be “knowing and intentional,” particularly given its good-faith defenses; that Plaintiffs cannot show they or other employees “suffer[ed] injury” due to alleged wage statement violations, as required by Lab. Code § 226(e); and that wage statements always accurately reflected amounts paid to employees. Haines Decl., ¶ 22; *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal.App.5th 1308, 1337 (2018) (“The purpose of section 226 is to ‘document the paid wages to ensure the employee is fully informed regarding the calculation of those wages’”).

Finally, Mountain High contends the PAGA claim fails because the underlying claims fail. Haines Decl., ¶ 24; see *Price v. Starbucks Corp.*, 192 Cal.App.4th 1136, 1147 (2011) (“Because the underlying causes of action fail, the derivative UCL and PAGA claims also fail.”). Mountain High further maintains that given its good-faith defenses, the Court would substantially reduce any PAGA penalties awarded. Haines Decl., ¶ 24; Lab. Code § 2699(e)(2) (authorizing reduction in PAGA penalties in court’s discretion); *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties); *Fleming v. Covidien, Inc.*, No. ED-CV-10-1487-RGK (OPx), 2011 WL 7563047 at *4 (C.D. Cal. 2011) (reducing PAGA penalties by over 82%); *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018) (affirming PAGA penalty of just \$5 per pay period where employer made “good faith attempts” to comply with the law).

C. DISCOVERY AND MEDIATION

Prior to mediation, the Parties engaged in extensive formal and informal discovery. In response to Plaintiffs’ formal discovery requests, Mountain High provided Plaintiffs with approximately 25% sampling of timekeeping and payroll records for Settlement Class members, all relevant wage and hour policies, and other relevant data and information. Haines Decl., ¶ 13. This information allowed the Parties to assess the merits and value of Plaintiffs’ claims, the chances for class certification, and Mountain High’s potential defenses. *Id.* Plaintiffs conducted a comprehensive analysis and extrapolation of the timekeeping and payroll data to calculate Mountain High’s potential exposure for each of Plaintiffs’ claims. *Id.*

///

On November 2, 2021, the Parties participated in a full-day mediation with Hon. Steven R. Denton (Ret.), a well-respected wage and hour class action mediator. Haines Decl., ¶ 14. At the mediation, the Parties vigorously debated their legal positions, the likelihood of certification of Plaintiffs’ claims, the legal bases for the claims and defenses, as well as Mountain High’s financial condition. *Id.* At the mediation, the Parties agreed to a class-wide settlement, subject to Plaintiffs’ review of Mountain High’s financial records, which was documented in a Memorandum of Understanding (“MOU”). *Id.* During the months that followed, Plaintiffs engaged a forensic accountant to analyze certain financial documents produced by Mountain High, who determined that Mountain High could not reasonably afford to pay more than the settlement achieved at mediation, and the Parties negotiated and finalized the Settlement Agreement now before this Court. *Id.*

III. THE PROPOSED SETTLEMENT

A. ESSENTIAL TERMS OF THE SETTLEMENT

If the Court preliminarily approves the Settlement, Mountain High will pay a Gross Settlement Amount of \$730,000.00. *See* Settlement, § 3. Significantly, this Settlement is non-reversionary, and no Settlement Class member will have to submit a claim form to receive an Individual Settlement Award. *Id.*, at §§ 3-4. Each Settlement Class member will automatically receive an Individual Settlement Award unless he or she affirmatively opts out of the Settlement.

Id. The monetary terms of the Settlement are summarized below:

• Gross Settlement Amount (“GSA”):	\$730,000.00
• Minus Court-approved attorneys’ fees (one-third):	\$243,333.33
• Minus Court-approved, verified costs (up to):	\$20,000.00
• Minus Court-approved Service Awards (up to):	\$10,000.00
• Minus Amount designated as PAGA penalties:	\$40,000.00
• <u>Minus estimated settlement administration costs:</u>	<u>\$26,000.00</u>
Net Settlement Amount (“NSA”):	\$390,666.67
<u>PLUS 25% of PAGA penalties (“PAGA Amount”)</u>	<u>\$10,000.00</u>
TOTAL Amount Paid to Settlement Class:	\$400,666.67

1. The Settlement Provides for Reasonable Monetary Payments

After deducting amounts for the Court-approved attorneys’ fees and costs, Class Representative Service Awards to Plaintiffs, the amount set aside as civil penalties under the PAGA, and Settlement Administrator costs, the Settlement requires Mountain High to pay a Net

1 Settlement Amount (“NSA”) of at least \$390,666.67 to all Settlement Class members who do not
2 timely opt out. *See* Settlement, §§ 3-4. According to Mountain High there are approximately 3,062
3 Settlement Class members. Haines Decl., ¶ 16. Thus, the average Settlement Award is estimated
4 to be \$130.85. *Id.*

5 The NSA will be distributed proportionally among participating Settlement Class
6 members based on the number of workweeks worked by each Settlement Class member during
7 the Class Period. *See* Settlement, § 4(A)(i). Additionally, payments from the PAGA Amount will
8 be based on the proportionate number of pay periods (if any) worked during the PAGA Period.
9 *Id.*, § 4(A)(ii). Mountain High will pay employer-side payroll taxes on the wage portion of each
10 payment in addition to the GSA. *Id.*, § 3(E).

11 As noted above, the \$730,000.00 GSA will be deposited with the Settlement
12 Administrator in two (2) installments, with the first installment of \$365,000.00 having already
13 been deposited with the Settlement Administrator on June 13, 2022 and the second installment of
14 \$365,000.00 being due on June 1, 2023. *See* Settlement, § 3(A). Settlement Class members’
15 individual payments (“Settlement Awards”) will be mailed approximately twenty-one (21) days
16 after Mountain High deposits the entirety of the GSA with the Settlement Administrator.³ *Id.*, at
17 § 4(C).

18 **2. Attorneys’ Fees and Costs, Service Awards, and LWDA Payment**

19 Plaintiffs will apply for Class Representative Service Awards at the time of seeking final
20 approval of the proposed class action settlement in the amount of \$5,000.00 each to Plaintiff
21 Miller and Plaintiff Bamburg, respectively, for a total of \$10,000.00, for their services to the
22 Settlement Class. *See* Settlement, § 6. “[I]ncentive awards are fairly typical in class action cases
23

24 ³ Following Mountain High’s representation of its financial position, Mountain High turned over
25 its financial records to Plaintiffs. Haines Decl., ¶ 30. Plaintiffs retained a forensic accountant,
26 Keith D. Messerschmidt, who has consulted or provided expert testimony in hundreds of litigation
27 and insurance matters. *Id.* Mr. Messerschmidt opines that Mountain High could not reasonably
28 afford to pay more than the GSA and that the requested payment schedule was necessary for
Mountain High’s ability to fund the Settlement while remaining in business and not dramatically
impacting its operations. *Id.* Should the Court wish to review a declaration from Mr.
Messerschmidt attesting to these facts and Mountain High’s financial condition, this declaration
could either be filed in *camera* or filed under seal, at the Court’s request. *Id.*

1 . . . and are intended to compensate class representatives for work done on behalf of the class
2 [and] to make up for financial or reputational risk undertaken in bringing the action.” *In re*
3 *Cellphone Fee Termination Cases*, 186 Cal.App.4th 1380, 1393-94 (2010). As will be fully
4 briefed at the time of final approval, Plaintiffs’ requested service awards are intended to recognize
5 the time and effort Plaintiffs expended on behalf of the Settlement Class, including providing
6 substantial factual information and documents to Plaintiffs’ counsel, responding to formal
7 discovery, attending multiple meetings with Plaintiffs’ counsel to discuss the claims and theories
8 at issue in the litigation, actively participating in the prosecution of their claims, as well as the
9 significant risks Plaintiffs undertook by agreeing to serve as the named plaintiffs in this case, and
10 the fact that Plaintiffs agreed to a general release of all claims subject to a waiver of Civil Code
11 § 1542. *See* Settlement, §§ 2(B), 6.

12 Plaintiffs’ counsel will also apply for an attorneys’ fees award of one-third of the Gross
13 Settlement Amount, which is currently estimated to be \$243,333.33, and up to \$20,000.00 in
14 verified costs reimbursement. *See* Settlement, §§ 3(B)(4), 5; Haines Decl., ¶ 26. Plaintiffs’
15 counsel submits that the requested fee is fair compensation for undertaking complex, risky,
16 expensive, and time-consuming litigation on a purely contingent fee basis. Haines Decl., ¶ 26.
17 Plaintiffs’ counsel has incurred substantial attorneys’ fees conducting pre-filing investigation,
18 analyzing Plaintiffs’ claims, conducting legal research, propounding, and responding to formal
19 discovery, analyzing Settlement Class members’ timekeeping records, preparing for and
20 attending mediation, negotiating and preparing the long-form Settlement Agreement, preparing
21 this Motion, and otherwise litigating the case. *Id.* Plaintiffs’ counsel will also spend additional
22 attorney time in attending the hearing on this Motion, overseeing the Notice process and fielding
23 questions from Settlement Class members, preparing the Final Approval papers, and attending
24 the Final Approval hearing. *Id.*

25 California courts recognize an appropriate method for awarding attorneys’ fees in class
26 actions is to award a percentage of the “common fund” created as a result of a settlement. *See*
27 *e.g., Laffitte v. Robert Half Int’l, Inc.*, 1 Cal.5th 480, 506 (2016) (holding “the percentage of fund
28 method survives in California class action cases”). Plaintiffs’ counsel’s request for fees of one-

1 third of the Gross Settlement Amount is well within the range of reasonableness, and indeed is
2 considered the typical rate for common fund settlements. Historically, courts have awarded
3 percentage fees in the range of 20% to 50%, depending on the circumstances of the case. *See* 4
4 Newberg on Class Actions § 14.6 (4th Ed. 2013).

5 Plaintiffs’ counsel submit that their request for attorneys’ fees is reasonable when viewed
6 as an overall percentage of the Settlement and in light of the substantial risks and significant work
7 undertaken, the results obtained, and the efficiency with which the litigation has been conducted.
8 Should the Court grant preliminary approval, Plaintiffs’ counsel will seek an award of attorneys’
9 fees and verified costs upon seeking final approval.

10 Additionally, the Parties have agreed to designate \$40,000.00 of the GSA as PAGA civil
11 penalties, of which \$30,000.00 (75%) will be paid to the LWDA, with the remaining \$10,000.00
12 (25%) for distribution to the Settlement Class, as the PAGA requires such penalties to be allocated
13 per Labor Code § 2699(i). *See* Settlement, § 3(B)(5). Plaintiffs submit that this allocation to the
14 LWDA for PAGA civil penalties is appropriate. *See, e.g., Chu v. Wells Fargo Investments, LLC*,
15 Case No. C 05-4526 MHP, 2011 WL 672645 at *1 (N.D. Cal. 2011) (approving PAGA payment
16 of \$7,500 to LWDA out of \$6.9 million common-fund settlement); *Lazarin v. Pro Unlimited, Inc.*,
17 Case No. C11-03609 HRL, 2013 WL 3541217 (N.D. Cal. 2013) (approving PAGA payment of
18 \$7,500 to LWDA out of \$1.25 million common-fund settlement).

19 **IV. ARGUMENT**

20 **A. PRELIMINARY APPROVAL IS WARRANTED**

21 California Rule of Court 3.769 conditions settlement of a class action on court approval,
22 which is generally evaluated under the federal standards applicable under Rule 23 of the Federal
23 Rules of Civil Procedure. *See Reed v. United Teachers Los Angeles*, 208 Cal.App.4th 322, 337
24 (2012) (Rule 3.769 requires trial court to determine “that the settlement is fair, reasonable and
25 adequate to all concerned”); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)
26 (Rule 23(e) requires the trial court to determine “whether a proposed settlement is fundamentally
27 fair, adequate, and reasonable”). Settlement is the preferred means of dispute resolution,
28 particularly in complex class action litigation. *See In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101

(9th Cir. 2008). The Court’s role in evaluating a proposed settlement is limited to ensuring that the agreement taken as a whole is fair. *See e.g., Hanlon, supra*, 150 F.3d at 1027. There is an initial presumption of fairness where, as here, the Settlement was negotiated at arm’s-length by Plaintiffs’ counsel and with the assistance of an experienced wage and hour class action mediator. *See e.g., Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 130 (2008).

1. Standard for Preliminary Approval

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

a. The Strength of Plaintiffs’ Case

Although Plaintiffs steadfastly maintain that their claims are meritorious, Plaintiffs acknowledge that there were substantial risks and uncertainty in proceeding with litigation. As described above in section II.B., *supra*, Mountain High presented multiple defenses to Plaintiffs’ claims, both on the merits and with respect to class certification. Thus, while Plaintiffs were prepared to litigate these claims through class certification, and ultimately trial, success was far from certain.

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

Although the Parties engaged in significant formal and informal discovery in advance of mediation, the Parties still had substantial discovery to complete in formal litigation had the matter not settled. Haines Decl., ¶ 27. This would have required expenditure of substantial time and resources by both Parties that would have very likely spanned several years. *Id.* Even if Plaintiffs were to certify the classes, the Parties would incur considerably more attorneys’ fees

1 and costs through a possible decertification motion, trial, and possible appeal. *Id.* This Settlement
2 avoids those risks and the accompanying expense. *Id.*

3 **c. Risk of Maintaining Class Action Status**

4 Plaintiffs had not yet filed their motion for class certification, and as such, the extent to
5 which Plaintiffs' proposed classes were certifiable is somewhat speculative. Absent settlement,
6 there was a risk that there would not be a certified class at the time of trial, or if there were, it
7 would consist of a significantly smaller group of employees than the proposed Settlement Class
8 (either due to a narrowing of the class definition in a Court order on a contested motion for class
9 certification, or through settlement agreements entered into by Mountain High with individual
10 class members by way of *Pick-Up-Stix* type settlement agreements⁴) and the expected recovery
11 could be significantly reduced, given the settlement amounts that are typically offered through
12 the *Pick-Up-Stix* process. Thus, this factor, too, supports preliminary approval of the Settlement.

13 **d. Amount Offered in Settlement Given Realistic Value of Claims**

14 The Settlement provides fair and reasonable monetary recovery for Settlement Class
15 members concerning heavily disputed claims where the law is in a state of frequent change. Based
16 on a review of the data produced by Mountain High in connection with mediation, Plaintiffs
17 conducted the following exposure analyses:

18 **First Meal Period Violations: \$19,338**

19 Plaintiffs allege that Mountain High failed to provide legally-compliant first meal periods.
20 Haines Decl., ¶ 17. Specifically, throughout the Class Period, Plaintiffs allege that first meal
21 periods were at times not provided until after the completion of five hours of work due to work
22 demands. *Id.* Plaintiffs further contend that meal periods were at times short (i.e., less than 30
23 minutes). *Id.* Based on Plaintiffs' analysis of employee timekeeping records produced by
24

25 ⁴ In *Chindarah v. Pick Up Stix, Inc.*, 171 Cal.App.4th 796 (2009), the Court of Appeal held an
26 employer may enter into pre-certification settlement agreements with individual putative class
27 members in which the putative class members release claims for past unpaid wages and penalties
28 in exchange for consideration. The Court further held that such settlements could preclude those
individual employees from recovery in class action litigation against the employer for the same
wage claims.

Mountain High, there were approximately 11,246 instances of non-compliant first meal periods reflected in the data. *Id.* Plaintiffs’ analysis also revealed that Mountain High paid approximately 4,508 meal period premiums during the Class Period. *Id.* In addition, based on data provided by Mountain High, Settlement Class members’ average hourly rate of pay during the Class Period was approximately \$14.35 per hour. *Id.* Therefore, assuming each late, short, and/or missed meal period reflected in the timekeeping records would result in a violation, Plaintiffs calculated Mountain High’s maximum exposure on this claim at approximately \$96,690 ((11,246 first meal period violations – 4,508 meal period premiums) * \$14.35 average premium). *Id.*

However, Mountain High contends that it maintained compliant written meal period policies throughout the Class Period and provided legally-compliant meal periods in line with those policies. Haines Decl., ¶ 17. Mountain High also argues that under *Brinker*, it was only required to “provide” the opportunity to take meal periods, not “ensure” meal periods are taken. *Id.* Mountain High also argues that any short, missed, or late first meal period was the result of lawful employee waiver or choice, thereby precluding liability. *Id.* Lastly, Mountain High argues individualized inquiries would be needed to determine why each meal period was taken late or short or missed by each employee, and whether there was a valid waiver, making certification of the meal period claim unlikely. *Id.* In light of these defenses and arguments, Plaintiffs discounted Mountain High’s maximum exposure by 50% for the risk of non-certification, and an additional 60% to account for Mountain High’s defenses on the merits, to arrive at an estimated total of approximately \$19,338. *Id.*

Second Meal Period Violations: \$63,575

Plaintiffs also allege that Mountain High failed to provide legally-compliant second meal periods during shifts in excess of 10.0 hours. Haines Decl., ¶ 18. Based on Plaintiffs’ review of employee timekeeping data, approximately 31,645 shifts during the Class Period reflected a potential second meal period violation. *Id.* Thus, Plaintiffs calculated Mountain High’s maximum exposure on this claim at approximately \$454,105 (31,645 second meal period violations * \$14.35 average premium). *Id.*

However, Mountain High argues that it has maintained compliant meal period practices

1 throughout the Class Period, that under *Brinker* it is only required to “provide” the opportunity to
2 take second meal periods, and that any missed second meal periods were the result of lawful
3 employee waiver or choice. *Id.* Mountain High also contends that Settlement Class members
4 voluntarily waived their second meal periods on shifts in excess of 10.0 hours but less than 12.0
5 hours, as they are entitled to do pursuant to Labor Code § 512. *Id.* Mountain High also contends
6 that class certification would not be proper as individualized inquiries will be required to
7 determine why each second meal period was missed, and whether there was a valid waiver. *Id.* In
8 light of these arguments and defenses, Plaintiffs discounted the maximum amount that the class
9 could potentially recover for second meal periods by 60% for a risk of non-certification, and an
10 additional 65% for a risk of losing on the merits, or having exposure reduced due to Mountain
11 High’s waiver arguments, to arrive at an estimated exposure amount of approximately \$63,575.
12 *Id.*

13 **Rest Period Violations: \$63,396**

14 Plaintiffs allege that Mountain High failed to authorize and permit third rest periods on
15 shifts in excess of 10.0 hours. Haines Decl., ¶ 19. Within these parameters, Plaintiffs’ analysis of
16 Mountain High’s timekeeping data revealed that there were approximately 42,075 shifts in excess
17 of 10.0 hours with potential non-compliant rest periods. *Id.* Therefore, Plaintiffs calculated
18 Mountain High’s maximum exposure on this claim at approximately \$603,776 (42,075 shifts *
19 \$14.35 premium). *Id.*

20 However, Mountain High argues that it has always maintained and enforced lawful rest
21 period policies and practices during the Class Period. Haines Decl., ¶ 19. Mountain High also
22 maintains that any failure to take rest periods was the result of employee choice, and that it is not
23 required to police rest periods. *Id.* Finally, Mountain High contends that Plaintiffs’ rest period
24 claim is not amenable to class treatment as individualized inquiries would be required to
25 determine which employees failed to take rest periods, and the reasons why each employee failed
26 to take a rest period on a particular shift. *Id.* These considerations are particularly present with
27 respect to rest periods, Mountain High argues, as rest periods are not – and need not be – recorded.
28 *Id.* In light of these defenses, Plaintiffs assessed a 65% risk of non-certification, and discounted

1 an additional 70% for risk of being unsuccessful on the merits or failure to recover the full amount
2 sought, to arrive at a projected exposure of approximately \$63,396. *Id.*

3 Failure to Reimburse For All Necessary Business Expenses: \$112,993

4 Plaintiffs allege Mountain High failed to reimburse necessary business expenses, because
5 Plaintiffs and other Settlement Class members employed as indoor employees were required to
6 purchase Mountain High branded jackets, and that all Settlement Class members were required
7 to use their personal cell phones and computers for a variety of work activities, including checking
8 their daily work schedules outside of working hours on an application called “When to Work.”
9 Haines Decl., ¶ 20. Based on Plaintiffs’ analysis of the records produced by Mountain High,
10 Plaintiffs determined that Settlement Class members worked approximately 19,125 months
11 during the Class Period. *Id.* Assuming a \$25.00 reimbursement per month for cellular phone data
12 and personal internet data for work-related activities, Plaintiffs estimated Mountain High’s
13 maximum exposure for its failure to reimburse cell phone and computer expenses at
14 approximately \$478,125 (\$25.00 unreimbursed cellular phone data * 19,125 months). *Id.*
15 Additionally, based upon Plaintiffs’ analysis of the records provided by Mountain High, Plaintiffs
16 determined that Mountain High’s maximum exposure for its failure to reimburse Settlement Class
17 members for the cost of being required to purchase Mountain High branded jackets as \$86,840
18 (2,171 indoor employed Settlement Class members * \$40/jacket). *Id.* In total, Plaintiffs calculated
19 the maximum exposure for this claim at approximately \$564,965. *Id.*
20

21 Mountain High maintains that Settlement Class members were not required to use their
22 personal cellular phones or computers as part of their job, and that computers were available
23 onsite to check employee schedules. Haines Decl., ¶ 20. Mountain High further argues that any
24 expenses incurred by Settlement Class members for cell phone expenses were minimal, given the
25 wide availability of low-cost cellular phone and internet data plans. *Id.* Mountain High also argues
26 that Settlement Class members employed as indoor employees were not required to purchase
27 Mountain High branded jackets. *Id.* Lastly, Mountain High argues this claim is not suitable for
28 class treatment, as it would require individualized determinations as to whether each Settlement

1 Class member employed as an indoor employed purchased a Mountain High branded jacket and
2 whether each Settlement Class member used a personal cellular phone and/or personal computer
3 for work-related purposes, and if so, how much of that use was a reasonable percentage of their
4 individual monthly phone bill. *Id.* In light of these arguments, Plaintiffs discounted Mountain
5 High's maximum exposure on this claim by 50% to account for a risk of non-certification, and
6 by an additional 60% for risk of being unsuccessful on the merits, for a reasonably expected total
7 of approximately \$112,993. *Id.*

8 Unpaid Wages due to Rounding: \$23,477

9 Plaintiffs argue that Mountain High maintained an unlawful policy/practice of rounding
10 timekeeping entries to the nearest quarter of an hour up until December 2020. Haines Decl., ¶ 21.
11 Based on Plaintiffs' review of employee timekeeping records, Plaintiffs contend that Mountain
12 High's rounding practice resulted in approximately 2,878 net hours of unpaid wages. *Id.* Thus
13 and based upon the weighted average minimum wage during the Class Period, Plaintiffs estimate
14 that Mountain High's maximum exposure for this claim is approximately \$65,215 (2,878 hrs. *
15 \$11.33 min. wage * 2 (liquidated damages per Labor Code § 1194.2). *Id.*

16 But as noted above, Mountain High raised several defenses to this claim, including its
17 argument that it utilized an even-handed timekeeping system that, on balance, resulted in
18 employees being paid for all hours actually worked; that some employees were overpaid as a
19 result its rounding practice; that employees did not perform any work before the scheduled start
20 of their shifts; and that Plaintiffs would be unable to certify this claim given the individualized
21 inquiries as to whether employees were in fact underpaid, or overpaid for each workday in
22 question. Haines Decl., ¶ 21. Based on these defenses, Plaintiffs discounted the maximum
23 exposure by 40% to account for the risk of non-certification, and an additional 40% to account
24 for Mountain High's defenses on the merits, to arrive at an estimated exposure of approximately
25 \$23,477. *Id.*

26 Wage Statement Violations: \$105,672

27 Plaintiffs allege that Mountain High is liable for wage statement penalties for its failure
28 to pay all wages owed and failure to pay all meal and rest period premiums. Haines Decl., ¶ 22.

1 Plaintiffs’ analysis reflected that there were approximately 20,128 unique pay periods worked by
2 Settlement Class members within the one-year liability window under Labor Code § 226. *Id.* In
3 calculating Mountain High’s exposure, Plaintiffs assumed they could recover the “initial” \$50
4 penalty under Section 226(e) for each violation, for a total of \$1,006,400 (20,128 pay periods *
5 \$50) in potential penalties. *Id.*; *see also Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157,
6 1207 (2008) (finding “initial” violation rate applies until employer is notified it violated Labor
7 Code); *Patel v. Nike Retail Svcs., Inc.*, 58 F.Supp.3d 1032, 1042-43 (N.D. Cal. 2014) (citing
8 *Amaral* and applying “initial” \$50 penalty to all pay periods in calculating amount-in-controversy
9 for wage statement claim).

10 However, given Mountain High’s arguments that no violations occurred, that Settlement
11 Class members suffered no “injury,” that any violations were not “knowing and intentional,” as
12 well as risks associated with Plaintiffs’ underlying claims discussed above, Plaintiffs discounted
13 the maximum exposure by 65% for risk of non-certification, and by an additional 70% for risks
14 on the merits, for an estimated realistic exposure of \$105,672. Haines Decl., ¶ 22.

15 Waiting Time Penalties: \$467,761

16 Based on data produced by Mountain High, Plaintiffs’ counsel estimates that there are
17 approximately 2,310 former Settlement Class members who worked for Mountain High since
18 March 17, 2017, and are therefore eligible for waiting time penalties. Haines Decl., ¶ 23. While
19 analyzing this claim, Plaintiffs took into consideration that Mountain High paid 124 former
20 Settlement Class members some waiting time penalties in the amount of \$159,627, for its failure
21 to pay these employees for time spent attending mandatory sexual harassment training in January
22 2020. *Id.* Plaintiffs estimated an average waiting time penalty of \$3,444 (\$14.35/hr * 8 hrs * 30
23 days), and calculated Mountain High’s maximum waiting time penalty exposure as approximately
24 \$7,796,013 ((2,310 separated employees * \$3,444 average waiting time penalty) - \$159,627). *Id.*

25 However, Mountain High asserts it has strong, good-faith defenses to Plaintiffs’
26 underlying claims and thus, even if Plaintiffs were able to recover on their underlying claims,
27 they would not be able to recover waiting time penalties. Haines Decl., ¶ 23. Moreover, Plaintiffs
28 would need to overcome Mountain High’s defenses, both as to class certification and as to the

merits, to their underlying claims. *Id.* Based on these defenses, Plaintiffs discounted Mountain High’s maximum exposure by 70% for risk of non-certification and by an additional 80% for risk of being unsuccessful on the merits or failure to recover the full amount sought, to arrive at an estimated total of \$467,761. *Id.*

PAGA Penalties: \$150,960

Plaintiffs estimated a maximum total PAGA exposure at \$2,012,800 for the relevant time period (20,128 violations * \$100 “initial” penalty). Haines Decl., ¶ 24; *Amaral v. Cintas Corp.* No. 2, 163 Cal.App.4th 1157, 1207 (2008) (finding “initial” violation rate applies until employer is notified that it is violating a Labor Code provision). However, these penalties derive from the underlying wage and hour violations discussed above, which Mountain High vigorously disputes. Haines Decl., ¶ 24; *see e.g., Green v. Lawrence Service Co.* 2013 WL 3907506, *5, n.5 (C.D. Cal. 2013) (explaining that a PAGA claim’s success was determined by the merits of its underlying claims). Mountain High also asserts the Court would drastically reduce any award of PAGA penalties as “confiscatory.” Haines Decl., ¶ 24; *see also Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties); *Fleming v. Covidien Inc.* (C.D. Cal. 2011) Case No. ED CV10-01487 RGK (OPx), 2011 WL 7563047, at *4 (reducing PAGA penalties from \$2.8 million to \$500,000). Therefore, Plaintiffs discounted the maximum figure by 70% for risk of losing on the merits, and an additional 75% to account for the possibility of this Court reducing penalties, to arrive at an estimated exposure of \$150,960. Haines Decl., ¶ 24.

Using these estimated figures for each of the claims described above, Plaintiffs predicted that the potential recovery for the Settlement Class would be approximately \$1,007,172. Haines Decl., ¶ 25. The proposed settlement of \$730,000 therefore represents approximately 72.4% of the reasonably forecasted recovery for the Settlement Class. *Id.* Particularly in light of Mountain High’s financial condition, the Settlement amount is substantial, and preliminary approval is appropriate. *Id.*

e. The Experience and Views of Counsel

“Parties represented by competent counsel are better positioned than courts to produce a

1 settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pac. Enter. Sec.*
2 *Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Plaintiffs are represented by competent counsel with
3 extensive experience litigating wage and hour class actions from both the plaintiff and defense
4 side and have been appointed Plaintiffs’ counsel in numerous cases with similar claims. Haines
5 Decl., ¶¶ 3-8.

6 **2. The Preliminary Approval Standard Is Met**

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

12 **a. The Settlement Is Within the Range of Possible Approval**

13 The proposed settlement reflects approximately 72.4% of the estimated recovery the
14 Settlement Class could reasonably expect in light of the significant litigation risks and Mountain
15 High’s financial condition, and will provide tangible, substantial monetary compensation for
16 hotly disputed claims. Plaintiffs submit that the proposed Settlement is within the range of
17 possible approval, such that notice should be provided to the Settlement Class so that they may
18 consider the Settlement. The Court will have the opportunity to again assess the reasonableness
19 of the Settlement after the Settlement Class has had the opportunity to opt-out or object.

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

21 The Settlement resulted from an exchange of substantial information, arm’s-length
22 negotiations by counsel during the mediation, and additional months of negotiating the long-form
23 settlement agreement. Thus, the Settlement is entitled to an initial presumption of fairness. *See*
24 *Kullar, supra*, 168 Cal.App.4th at 130. As discussed above, Plaintiffs carefully vetted the claims
25 at issue, reviewed extensive data, and conducted a detailed analysis of the data to arrive at the
26 estimated class-wide damages figures. *See* Haines Decl., ¶¶ 13, 17-24. Thus, this factor supports
27 preliminary approval.

28 ///

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

2 Preliminary approval of the Settlement is warranted because there are no obvious
3 deficiencies. The Settlement will provide substantial monetary relief to the Settlement Class, and
4 the amounts proposed for attorneys’ fees, costs, settlement administration costs, and service
5 awards are all reasonable and appropriate based on the facts of this case. Thus, this factor supports
6 preliminary approval.

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

8 The Settlement Class satisfies the criteria for certification of a settlement class under
9 California law because: (1) the Settlement Class is so numerous that joinder would be impractical;
10 (2) common questions of law and fact predominate over individual questions such that class
11 certification is the most efficient and desirable way to maintain this litigation; (3) Plaintiffs’
12 claims are typical of the claims of absent Settlement Class members; and (4) Plaintiffs and their
13 counsel will fairly and adequately represent Settlement Class members’ interest. *See* Cal. Civ.
14 Proc. § 382.

15 1. **The Proposed Class Is Ascertainable and Numerous**

16 A class is “ascertainable” where the members “may be readily identified without
17 unreasonable expense or time by reference to official [or business] records.” *See Sevidal v. Target*
18 *Corp.* 189 Cal.App.4th 905, 916 (2010) (alterations in original). Here, the proposed class is
19 defined as all current and former non-exempt employees who worked for Mountain High in
20 California at any time during the Class Period. *See* Settlement, § 1. Therefore, Settlement Class
21 members can be identified from Mountain High’s personnel and employment records. Mountain
22 High represents that the Settlement Class consists of approximately 3,062 current and former non-
23 exempt employees. *Id.* It would therefore be impracticable to bring all Settlement Class members
24 before the Court, or for each Settlement Class member to bring an individual lawsuit. The
25 proposed Settlement Class therefore satisfies numerosity. *See, e.g., Bowles v. Sup. Ct.*, 44 Cal.2d
26 574 (1955) (holding a class representing 10 beneficiaries of a trust sufficiently numerous).

27 2. **Common Issues of Law and Fact Predominate**

28 The focus in a certification dispute is not the merits, but rather on what types of questions,

1 “common or individual,” are likely to arise in the action. *See Sav-On Drug Store, Inc. v. Superior*
2 *Court (Rocher)* 34 Cal.4th 319, 327 (2004). Plaintiffs’ claims are predicated on, among other
3 issues, Mountain High’s meal and rest period policies/practices. These types of claims are
4 commonly held to be proper for class certification. *See e.g., Benton v. Telecom Network*
5 *Specialists, Inc.*, 220 Cal.App.4th 701, 726 (2013) (certifying meal and rest period claims).

6 **3. The Claims of the Named Plaintiffs Are Typical**

7 The typicality requirement is satisfied where class representatives have claims that are
8 typical of those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* 191
9 Cal.App.3d 1341, 1347 (1987) (finding typicality satisfied where named Plaintiff purchased the
10 same goods as the putative class in a consumer class action). Here, Plaintiffs’ claims are typical
11 of those held by the Settlement Class members. Plaintiffs were employed by Mountain High as
12 non-exempt employees during the Class Period, were subject to Mountain High’s wage and hour
13 policies at issue in this case, and were injured by the same challenged policies/practices that
14 allegedly injured the Settlement Class as a whole. Miller Decl., ¶¶ 2-4; Bamburg Decl., ¶¶ 2-4.
15 Thus, typicality is satisfied.

16 **4. Plaintiffs and Class Counsel Will Fairly and Adequately Represent**
17 **the Class**

18 The adequacy requirement examines conflicts of interest between named parties and the
19 class(es) they seek to represent. *Capital People First v. State Dept. of Developmental Svcs.*, 155
20 Cal.App.4th 676, 697 (2007). Plaintiffs and their counsel will adequately represent the Settlement
21 Class, as there are no known conflicts between Plaintiffs and the Settlement Class, and Plaintiffs’
22 counsel have significant relevant experience. Haines Decl., ¶¶ 2-8, 29.

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

24 This Court should order distribution to the Settlement Class of the proposed Class Notice
25 by U.S. Mail, postage prepaid, using last known mailing address information provided by
26 Mountain High. *See Settlement*, § 9. This manner of giving notice is the “best notice practicable”
27 under the circumstances because it provides “individual notice to all members who can be
28 identified through reasonable effort.” *See Eisen v. Carlisle & Jacquelin* 417 U.S. 156, 173 (1974).

1 Here, Plaintiffs propose that the Settlement be administered by Phoenix Settlement
2 Administrators (“Phoenix”), an experienced class action settlement administrator. *See generally*
3 Declaration of Jodey Lawrence (“Lawrence Decl.”) and attached exhibits. Settlement Class
4 members’ addresses will be ascertainable through Mountain High’s records, which Mountain
5 High will provide to Phoenix within ten (10) business days after entry of an order preliminarily
6 approving this Settlement. *See* Settlement, § 9(A). Within ten (10) business days of receipt of the
7 Settlement Class members’ addresses, Phoenix will run the addresses through the National
8 Change of Address (“NCOA”) database (which provides updated addresses for any individual
9 who has moved in the previous four years and has notified the U.S. Postal Service of a forwarding
10 address) and mail the Class Notice to all Settlement Class members. *See* Settlement, § 9(B). To
11 the extent that any notices are returned, Phoenix will perform a “skip trace” to track any
12 Settlement Class member’s current mailing address. *Id.*, at § 9(F).

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

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

25 Finally, this Court should set a hearing for Final Approval of the Settlement on a date
26 appropriately scheduled to follow the deadline by which Settlement Class members must file
27 objections to the Settlement or opt-out. *See* California Rule of Court 3.769.

28 ///

1 **V. CONCLUSION**

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

5
6 Respectfully submitted,

7 Dated: September 14, 2022

HAINES LAW GROUP, APC

8
9 By:



10 Paul K. Haines
11 Attorneys for Plaintiffs
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