

**HAINES LAW GROUP, APC**  
Paul K. Haines (SBN 248226)  
phaines@haineslawgroup.com  
Fletcher W. Schmidt (SBN 286462)  
fschmidt@haineslawgroup.com  
Matthew K. Moen (SBN 305956)  
mmoen@haineslawgroup.com  
2155 Campus Drive, Suite 180  
El Segundo, California 90245  
Tel: (424) 292-2350  
Fax: (424) 292-2355

*Attorneys for Plaintiff*

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES**

SANTOS ORELLANA, as an individual and  
on behalf of all others similarly situated,

Plaintiff,

vs.

SMARTE CARTE, INC., a Minnesota  
corporation; and DOES 1 through 100,

Defendants.

Case No. 20STCV08890

*[Assigned for all purposes to the Hon. Yvette  
M. Palazuelos, Dept. SSC-9]*

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

Date: September 14, 2021  
Time: 10:00 a.m.  
Dept.: SSC-9

Action Filed: March 5, 2020  
Trial Date: None Set

1 PLEASE TAKE NOTICE that, pursuant to Rule 3.769 of the California Rules of Court,  
2 on September 14, 2021, at 10:00 a.m., or as soon thereafter as the matter may be heard, in  
3 Department SSC-9 of the Los Angeles County Superior Court, 312 N. Spring Street, Los Angeles,  
4 California 90012, Plaintiff Santos Orellana ("Plaintiff"), individually and on behalf of a class of  
5 similarly situated individuals, will and hereby does move this Court for:

- 6 1. Preliminary approval of the proposed Joint Stipulation of Class Action and PAGA  
7 Settlement and Release ("Settlement Agreement") in this lawsuit;
- 8 2. Pursuant to Section 382 of the California Code of Civil Procedure, provisional  
9 certification of the Settlement Class, defined as follows:  
10 All current and former non-exempt employees who worked for Defendant  
11 Smarte Carte, Inc. in California at any time during the period from March  
12 5, 2016 to the date of the order granting Preliminary Approval of the  
Settlement or July 16, 2021, whichever is first (the "Class Period").
- 13 3. Preliminary appointment of Plaintiff Santos Orellana as the Class Representative;
- 14 4. Preliminary appointment of Paul K. Haines, Fletcher W. Schmidt, and Matthew K.  
15 Moen of Haines Law Group, APC as Class Counsel;
- 16 5. The scheduling of a hearing to consider whether the Settlement Agreement should be  
17 finally approved and to award amounts for the Class Representative Service Award,  
18 settlement administration costs, payment to the Labor and Workforce Development  
19 Agency for its share of civil penalties paid in settlement of Plaintiff's claims under the  
20 Private Attorneys General Act, Labor Code section 2698 *et seq.*, and Class Counsel's  
21 attorneys' fees and costs;
- 22 6. Appointment of Phoenix Settlement Administrators as the third-party settlement  
23 administrator; and
- 24 7. Approval of the proposed Notice of Class Action Settlement ("Settlement Notice"),  
25 and entry of the proposed Order instructing the Settlement Notice to be disseminated  
26 to the proposed Settlement Class in English, Spanish, Mandarin and Vietnamese, as  
27 provided in the Settlement Agreement.

28 ///

1 This motion is based on this notice of motion, the attached memorandum of points and  
2 authorities, the declarations of Paul K. Haines, Fletcher W. Schmidt, Matthew K. Moen, Santos  
3 Orellana, and Jodey Lawrence of Phoenix Settlement Administrators, and the exhibits attached  
4 thereto, the pleadings and other papers filed in this action, and on any further oral or documentary  
5 evidence or argument presented at the time of hearing.

6 Given the multiplicity of issues addressed in this Motion, Plaintiff believes there is good  
7 cause to exceed the 20-page limit set forth in California Rule of Court 3.764(c)(2), and  
8 respectfully requests that the Court consider Plaintiff's Memorandum of Points and Authorities  
9 in its entirety, which is 22 pages in length.

10  
11 Dated: June 22, 2021

Respectfully Submitted,  
HAINES LAW GROUP, APC

12  
13 By:

  
Fletcher W. Schmidt

## **TABLE OF CONTENTS**

|                                                                                           |    |
|-------------------------------------------------------------------------------------------|----|
| I. INTRODUCTION .....                                                                     | 1  |
| II. SUMMARY OF THE LITIGATION .....                                                       | 2  |
| A. Factual And Procedural Background .....                                                | 2  |
| B. Plaintiff's Claims And Defendant's Defenses .....                                      | 3  |
| 1. Overtime and Minimum Wage Violations.....                                              | 3  |
| 2. Meal Period Violations .....                                                           | 4  |
| 3. Rest Period Violations .....                                                           | 5  |
| 4. Wage Statement, Waiting Time, and PAGA Penalties .....                                 | 7  |
| C. Discovery And Mediation .....                                                          | 8  |
| III. THE PROPOSED SETTLEMENT.....                                                         | 8  |
| A. Essential Terms Of The Settlement .....                                                | 8  |
| 1. The Settlement Provides for Reasonable Monetary Payments .....                         | 8  |
| 2. Attorneys' Fees, Costs, and Plaintiff's Service Award.....                             | 9  |
| IV. ARGUMENT.....                                                                         | 11 |
| A. Preliminary Approval Is Warranted .....                                                | 11 |
| 1. Standard for Preliminary Approval.....                                                 | 11 |
| a. The Strength of Plaintiff's Case.....                                                  | 11 |
| b. Risk, Expense, Complexity, and Duration of Further Litigation.....                     | 12 |
| c. Risk of Maintaining Class Action Status .....                                          | 12 |
| d. Amount Offered in Settlement Given Realistic Value of Claims.....                      | 13 |
| e. The Experience and Views of Counsel .....                                              | 17 |
| 2. The Preliminary Approval Standard is Met .....                                         | 18 |
| a. The Settlement is Within the Range of Possible Approval.....                           | 18 |
| b. The Settlement Resulted from Serious, Informed and<br>Non-Collusive Negotiations ..... | 18 |
| c. The Settlement is Devoid of Obvious Deficiencies .....                                 | 19 |
| B. The Court Should Certify The Settlement Class.....                                     | 19 |
| 1. The Proposed Class is Ascertainable and Numerous.....                                  | 19 |

|   |                                                                                |    |
|---|--------------------------------------------------------------------------------|----|
| 1 | 2. Common Issues of Law and Fact Predominate.....                              | 20 |
| 2 | 3. The Claims of the Named Plaintiff are Typical .....                         | 20 |
| 3 | 4. Plaintiff and Class Counsel are Adequate to Represent the Class .....       | 20 |
| 4 | C. The Court Should Order Distribution Of The Proposed Settlement Notice ..... | 21 |
| 5 | D. The Court Should Set A Final Approval Hearing.....                          | 22 |
| 6 | V. CONCLUSION.....                                                             | 22 |

## **TABLE OF AUTHORITIES**

### **Federal Cases**

|                                                                                             |    |
|---------------------------------------------------------------------------------------------|----|
| <i>Dunleavy v. Nadler</i><br>213 F.3d 454 (9th Cir. 2000) .....                             | 17 |
| <i>Eisen v. Carlisle and Jacquelin</i><br>417 U.S. 156 (1974) .....                         | 21 |
| <i>Hanlon v. Chrysler Corp.</i><br>150 F.3d 1011(9th Cir. 1998) .....                       | 11 |
| <i>In re Pacific Enterprises Securities Litigation</i><br>47 F.3d 373 (9th Cir. 1995) ..... | 17 |
| <i>In re Syncor ERISA Litigation</i><br>516 F.3d 1095 (9th Cir. 2008) .....                 | 11 |
| <i>Linney v. Cellular Alaska Partnership</i><br>151 F.3d 1234 (9th Cir. 1998) .....         | 17 |

### **State Cases**

|                                                                                                        |       |
|--------------------------------------------------------------------------------------------------------|-------|
| <i>AHMC Healthcare, Inc. v. Sup. Ct.</i><br>(2018) 24 Cal.App.5th 1014 .....                           | 4     |
| <i>Amaral v. Cintas Corp. No. 2</i><br>(2008) 163 Cal.App.4th 1157 .....                               | 7, 16 |
| <i>B.W.I. Custom Kitchen v. Owens-Illinois, Inc.</i><br>(1987) 191 Cal.App.3d 1341 .....               | 20    |
| <i>Bradley v. Networkers Int'l, LLC</i><br>(2012) 211 Cal.App.4th 1129 .....                           | 20    |
| <i>Capitol People First v. Department of Developmental Services</i><br>(2007)155 Cal.App.4th 676 ..... | 20    |
| <i>Carrington v. Starbucks Corporation</i><br>(2018) 30 Cal.App.5th 504 .....                          | 7     |
| <i>Chindarah v. Pick Up Stix, Inc.</i><br>(2009) 171 Cal. App. 4th 796 .....                           | 12    |
| <i>Collins v. Rocha</i><br>(1972) 7 Cal.3d 232 .....                                                   | 19    |
| <i>Dunk v. Ford Motor Co.</i><br>(1996) 48 Cal.App.4th 1794 .....                                      | 11    |

|    |                                                   |        |
|----|---------------------------------------------------|--------|
| 1  | <i>Faulkinbury v. Boyd &amp; Assoc., Inc.</i>     |        |
| 2  | (2013) 216 Cal.App.4th 220 .....                  | 20     |
| 3  | <i>Kullar v. Foot Locker Retail, Inc.</i>         |        |
| 4  | (2008) 168 Cal.App.4th 116 .....                  | 11, 19 |
| 5  | <i>Laffitte v. Robert Half Int'l, Inc.,</i>       |        |
| 6  | 1 Cal.5th 480 (2016) .....                        | 10     |
| 7  | <i>McGhee v. Bank of America</i>                  |        |
| 8  | (1976) 60 Cal.App.3d 442 .....                    | 21     |
| 9  | <i>Price v. Starbucks Corp.</i>                   |        |
| 10 | (2011) 192 Cal.App.4th 1136 .....                 | 7      |
| 11 | <i>Reed v. United Teachers Los Angeles</i>        |        |
| 12 | (2012) 208 Cal.App.4th 322 .....                  | 11     |
| 13 | <i>Sav-On Drug Stores, Inc. v. Superior Court</i> |        |
| 14 | (2004) 34 Cal.4th 319 .....                       | 20     |
| 15 | <i>Sevidal v. Target Corp.</i>                    |        |
| 16 | (2010) 189 Cal.App.4th 905 .....                  | 19     |
| 17 | <i>Thurman v. Bayshore Transit Mgmt., Inc.</i>    |        |
| 18 | (2012) 203 Cal.App.4th 1112 .....                 | 7, 16  |
| 19 | <i>Wershba v. Apple Computer, Inc.</i>            |        |
| 20 | (2001) 91 Cal.App.4th 224 .....                   | 10, 11 |
| 21 |                                                   |        |
| 22 |                                                   |        |
| 23 | <b><u>State Statues and Rules</u></b>             |        |
| 24 | 8 Cal. Code Regs. § 13520.....                    | 7      |
| 25 | Cal. Code Civ. Proc. § 382 .....                  | 19     |
| 26 | Cal. Rule of Court 3.769 .....                    | 22     |
| 27 | Labor Code § 203(a) .....                         | 7      |
| 28 | Labor Code § 226.....                             | 7      |
|    | Labor Code § 226(e)(1) .....                      | 7, 15  |
|    | Labor Code § 226.7.....                           | 6      |
|    | Labor Code § 2699(e)(2) .....                     | 7, 16  |

**Unpublished Cases**

*Altamirano v. Shaw Industries, Inc*

Case No. 13-cv-00939-HSG

2015 WL 4512372 (N.D. Cal. July 24, 2015)..... 17

*Bercea v. AE Retail West*

Case No. 34-2012-00123947 (Sacramento County Super. Ct. May 9, 2012) ..... 18

*Green v. Lawrence Service Co.*

(C.D. Cal. 2013) 2013 WL 3907506..... 16

*Ressler v. Federated Department Stores, Inc.*

Case No. BC335018 (L.A. County Super. Ct. Jan. 2, 2009) ..... 18

*Schiller v. David's Bridal, Inc.*

Case No. 1:10-cv-00616-AWI-SKO

2012 WL 2117001 (E.D. Cal. June 11, 2012) ..... 18

**Other Sources**

4 Newberg on Class Actions § 11:24-25 (4th Ed. 2013) ..... 18

4 Newberg on Class Actions § 14.6 (4th Ed. 2013)..... 10

Manual for Complex Litigation § 30.41 (3rd Ed. 1995)..... 18

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Santos Orellana (“Plaintiff”), individually and on behalf of the proposed  
4 Settlement Class, respectfully requests that this Court preliminarily approve the proposed Joint  
5 Stipulation of Class Action and PAGA Settlement and Release (“Settlement Agreement” or  
6 “Settlement”),<sup>1</sup> entered into by Plaintiff and defendant Smarte Carte, Inc. (“Defendant”)  
7 (collectively, the “Parties”). The operative Second Amended Complaint alleges that Defendant:  
8 (i) failed to pay all overtime wages owed; (ii) failed to pay all minimum wages owed; (iii) failed  
9 to provide all lawful meal periods; (iv) failed to authorize and permit all lawful rest periods; (v)  
10 failed to issue accurate and itemized wage statements; (vi) failed to timely pay all final wages  
11 upon separation; (vii) failed to comply with California’s Unfair Competition laws; and (viii) is  
12 liable for civil penalties under the Private Attorneys General Act, Labor Code § 2698 *et seq.*  
13 (“PAGA”), premised on the underlying Labor Code violations.

14 Plaintiff respectfully requests that this Court preliminarily approve this non-reversionary,  
15 \$1,375,000.00 common-fund class action settlement on behalf of the following Settlement Class:

16 All current and former non-exempt employees who worked for Defendant in  
17 California at any time during the period from March 5, 2016 to the date of the  
18 order granting Preliminary Approval of the Settlement or July 16, 2021, whichever  
is first (the “Class Period”).

19 Based upon the data received from Defendant, there are approximately 490 potential  
20 Settlement Class members. After Court-approved deductions for Plaintiff’s service award,  
21 settlement administrator costs, the PAGA payment to the PAGA Employees<sup>2</sup> and Labor &  
22 Workforce Development Agency (“LWDA”), and attorneys’ fees and costs to Class Counsel, the  
23 remaining Net Settlement Amount (“NSA”) is estimated to be no less than \$818,341.67. This  
24

25 <sup>1</sup> The Settlement Agreement is attached as Exhibit 1 to the Declaration of Fletcher W. Schmidt (“Schmidt  
26 Decl.”), filed concurrently herewith, and the Notice of Class Action Settlement (“Settlement Notice”)  
27 is attached as Exhibit A to the Settlement Agreement. *See* Schmidt Decl., ¶ 18.

28 <sup>2</sup> Defined as all Class Members who worked as non-exempt employees for Defendant in California  
between March 5, 2019 and the date of Preliminary Approval of the Settlement or July 16, 2021, whichever  
is first (the “PAGA Period”). *See* Settlement, ¶ 22.

1 results in average Individual Settlement Awards of approximately \$1,670.08. Further, an  
2 additional \$50,000.00 from the Maximum Settlement Amount (“MSA”) will be set aside as the  
3 PAGA Payment, 25% of which will be proportionately distributed to the PAGA Employees as  
4 additional compensation for satisfaction of the alleged claims under PAGA. Significantly,  
5 Settlement Class members do not need to file a claim form in order to receive an Individual  
6 Settlement Award, and all Settlement Class members who do not opt-out will automatically  
7 receive their share of the Settlement. This represents a significant result for Settlement Class  
8 members, who will be agreeing to a release of only those claims that were actually asserted, or  
9 which could have been asserted based on the facts alleged in the lawsuit.

10 Prior to reaching this proposed Settlement, Defendant provided Plaintiff with timekeeping  
11 and payroll data for an approximately 15% sampling of the putative class members spanning the  
12 entire putative class period, as well as key data points and all relevant written policy documents  
13 in effect during the Class Period. Plaintiff then retained an expert with a Ph.D. in economics to  
14 conduct a comprehensive, class-wide analysis of the data to estimate Defendant’s maximum  
15 potential exposure on all claims at issue. On March 18, 2021, after extensive legal research and  
16 analysis, along with Plaintiff’s and his expert’s comprehensive review of the data, the Parties  
17 participated in a mediation session with Jeffrey Krivis, Esq., an experienced and well-respected  
18 wage and hour class action mediator. At the conclusion of mediation, Mr. Krivis made a  
19 mediator’s proposal for a class-wide settlement of all claims at issue, which the Parties ultimately  
20 accepted. Over the following months, the Parties negotiated and executed the long-form  
21 Settlement Agreement that is now before this Court for preliminary approval.

22 This proposed Settlement is well within the range of possible approval in light of the  
23 significant legal and factual obstacles that Plaintiff faced, the risks and costs of further litigation,  
24 and the monetary benefit to the Settlement Class Members. For the reasons discussed herein,  
25 Plaintiff respectfully requests that the Court grant preliminary approval of the Settlement.

## 26 **II. SUMMARY OF THE LITIGATION**

### 27 **A. Factual And Procedural Background**

28 Defendant provides travel-related rentals, such as luggage carts and electronic lockers,  
and related guest services within various travel hubs and retail locations throughout California,

1 including at LAX and SFO airports. Schmidt Decl., ¶ 8. Plaintiff was hired by Defendant as a  
2 non-exempt employee in approximately November 2004, where he worked until taking a  
3 temporary leave of absence due to a workplace injury from approximately March 6, 2019 until  
4 approximately February 17, 2020. *Id.*; Declaration of Santos Orellana (“Orellana Decl.”), ¶ 2.  
5 Plaintiff was subsequently furloughed during and as a result of the COVID-19 pandemic. *Id.* Like  
6 all Settlement Class Members, Plaintiff was subject to Defendant’s wage and hour policies and  
7 practices. Schmidt Decl., ¶ 8; Orellana Decl., ¶¶ 2-3.

8 On March 5, 2020, Plaintiff filed the initial Complaint in this action, alleging Defendant  
9 failed to: (i) pay all overtime wages owed; (ii) pay all minimum wages owed; (iii) provide all  
10 lawful meal periods; (iv) authorize and permit all lawful rest periods; (v) issue accurate and  
11 itemized wage statements; and (vi) comply with California’s Unfair Competition laws. Schmidt  
12 Decl., ¶ 9. On May 11, 2020, Plaintiff filed his First Amended Complaint, adding a cause of action  
13 for civil penalties under PAGA, premised on the underlying Labor Code violations. *Id.* On  
14 December 8, 2020, Plaintiff received a notice of termination stating that he was being terminated  
15 effective December 31, 2020. Orellana Decl., ¶ 2. On June 9, 2021, Plaintiff filed the operative  
16 Second Amended Complaint, adding a cause of action for waiting time penalties under Labor  
17 Code sections 201-203. Schmidt Decl., ¶ 9.

18 **B. Plaintiff’s Claims And Defendant’s Defenses**

19 **1. Overtime and Minimum Wage Violations**

20 Plaintiff asserts that, throughout the putative class period, Defendant maintained an  
21 unlawful rounding practice that was not even handed over time and resulted in Defendant  
22 systematically underpaying Plaintiff and other similarly situated employees all earned wages.  
23 Schmidt Decl., ¶ 10; *see also See’s Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th  
24 889, 901 (holding that a time-rounding policy is only legal if “*it is used in such a manner that it*  
25 *will not result, over a period of time, in failure to compensate the employees properly for all the*  
26 *time they have actually worked.*”) (italics in original), citing 29 C.F.R. § 785.48(b). Specifically,  
27 Plaintiff claims Defendant records Plaintiff’s and other similarly situated employees’ clock in and  
28 clock out timeclock punches to the minute. Schmidt Decl., ¶ 10. However, Defendant only paid  
Plaintiff and other similarly situated employees in 15-minute increments. *Id.* Plaintiff asserts that

1 this rounding practice was not even-handed over time, resulting in unpaid minimum and overtime  
2 wages. *Id.*; see Wage Order 9, § 4; Labor Code §§ 510(a), 1197, and 1182.12.

3 In response, Defendant contends that its timekeeping practices are lawful and its rounding  
4 practice is neutral and operates in an even-handed way, which Defendant asserts is lawful under  
5 the court’s ruling in *See’s Candy Shops, Inc.* Schmidt Decl., ¶ 11; see also *AHMC Healthcare,*  
6 *Inc. v. Sup. Ct.* (2018) 24 Cal.App.5th 1014, 1027-29 (finding employer’s time-rounding policy  
7 lawful where it was neutral “on its face” and “in practice”). Moreover, Defendant contends that  
8 Plaintiff could not certify this claim, as it would require individualized inquiries into each  
9 employee on a pay period by pay period basis as to whether the employee was overpaid or  
10 underpaid based on Defendant’s rounding practice, resulting in an unmanageable series of mini-  
11 trials. Schmidt Decl., ¶ 11. Defendant further contends that Plaintiff would fail at certifying his  
12 rounding-practice class because of the individualized issues present between each of Defendant’s  
13 airport and retail locations, including the presence of different unions (or no unions), employees  
14 required to work at multiple site locations in a single day, and employees paid fixed amounts per  
15 job, all of which would have required individual inquiries into the application and “in-practice”  
16 neutrality of Defendant’s rounding practice. *Id.*

## 17 **2. Meal Period Violations**

18 Plaintiff further asserts that Defendant failed to provide Plaintiff and the Class Members  
19 with all lawful meal periods to which they were entitled, and failed to adopt a facially-lawful  
20 written meal period policy during the Class Period. Schmidt Decl., ¶ 12. Specifically, Plaintiff  
21 asserts that Defendant failed to provide Plaintiff and the putative class members with all duty-  
22 free, uninterrupted 30-minute meal periods commencing before the end of the fifth hour of work,  
23 and never provided a second, duty-free, uninterrupted 30-minute meal period commencing before  
24 the end of the tenth hour of work on days in which the employee worked more than 10.0 hours.  
25 *Id.* see also Labor Code § 512(a); see also *Brinker v. Superior Court* (2012) 53 Cal.4th 1004,  
26 1041 (“We conclude that, absent waiver, section 512 requires a first meal period no later than the  
27 end of an employee’s fifth hour of work...”); *Benton v. Telecom Network Specialists, Inc.* (2013)  
28 220 Cal.App.4th 701, 728-29 (“[The wage order] imposes an affirmative obligation on every

1 employer to authorize and provide legally required meal and rest breaks; if it fails to do so, it has  
2 violated the law and is liable.”). Further, Plaintiff’s data analysis revealed that Defendant did not  
3 pay a single meal period premium during the Class Period, an issue which itself is certifiable.  
4 Schmidt Decl., ¶ 12; *see also, e.g., Safeway, Inc. v. Superior Court* (2015) 238 Cal.App.4th 1138.

5 In response, Defendant contends that it maintained lawful meal period policies/practices  
6 throughout the Class Period. Schmidt Decl., ¶ 13. Moreover, Defendant argues that it provided  
7 employees with the opportunity to take all legally-compliant meal periods, and that under *Brinker*,  
8 it is only required to “provide” the opportunity to take meal periods, not “ensure” meal periods  
9 are taken, which Defendant contends it has always done. *Id.*; *see Brinker, supra*, 53 Cal.4th at  
10 1038 (rejecting “ensure” standard). Therefore, Defendant asserts that if employees did not take  
11 timely meal periods, this was solely the result of employee choice and not reflective of  
12 Defendant’s policies and practices. Schmidt Decl., ¶ 13. Finally, Defendant contends that  
13 Plaintiff’s meal period claim is not suited for class certification as individual inquiries would be  
14 required to assess the reasons why a particular individual recorded a non-compliant meal period  
15 or missed a meal period on a particular shift, and whether the employees chose to take late meal  
16 periods, resulting in a series of mini-trials. *Id.*

### 17 **3. Rest Period Violations**

18 Plaintiff further alleges that Defendant failed to authorize and permit Plaintiff and the  
19 Class Members to take all lawful rest periods to which they were entitled. Schmidt Decl., ¶ 14.  
20 Specifically, Plaintiff asserts that Defendant maintained facially unlawful rest period policies,  
21 which only authorized and permitted two rest periods for “Employees working an eight-hour  
22 shift,” failing to authorize and permit a single rest period for shifts lasting between 3.5 and 6.0  
23 hours in length, or a third rest period for shifts in excess of 10.0 hours, and failing to incorporate  
24 the “or major fraction thereof” language of the Wage Order. *Id.*; *see also* Labor Code § 516; Wage  
25 Order 9, § 12; *Bufile v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1199 (“The  
26 onus is on the employer to clearly communicate the authorization and permission to its  
27 employees.”). Further, Plaintiff asserts that Defendant maintains a facially unlawful written  
28 policy which prohibits employees from leaving company property during their rest periods, in

1 violation of the California Supreme Court’s holding in *Augustus v. ABM Security Services, Inc.*  
2 (2016) 2 Cal.5th 257, 260, 265 (requiring employers to “relieve their employees of all duties and  
3 relinquish any control over how employees spend their break time.”). Schmidt Decl., ¶ 14.  
4 Plaintiff also asserts that Defendant requires putative class members to carry company-issued  
5 radios/phones/walkie-talkies on their persons at all times and to respond to incoming radio calls,  
6 including during purported rest periods, and has therefore failed to relinquish all control over how  
7 the employees spend their break time. *Id.*; see also *Augustus*, 2 Cal.5th at 260 (requiring  
8 employers to “relieve their employees of all duties” during rest periods.). On occasions when  
9 lawful rest periods were allegedly not authorized and permitted, Defendant failed to pay rest  
10 period premiums as required by Labor Code section 226.7; an issue which itself is certifiable. See  
11 Labor Code § 226.7; *Safeway, supra*, 238 Cal.App.4th at 1159 (certifying UCL claim based on  
12 defendant employer’s failure to pay premium wages under Labor Code § 226.7); Schmidt Decl.,  
13 ¶ 14.

14 Defendant argues that it maintained lawful rest period policies/practices, and asserts that,  
15 in practice, Plaintiff and the Class Members were authorized and permitted to take all lawful rest  
16 periods to which they were entitled. Schmidt Decl., ¶ 15. Therefore, Defendant asserts that if  
17 employees did not take rest periods, this was solely the result of employee choice and not  
18 reflective of Defendant’s policies and practices. *Id.* Defendant also argues that Plaintiff will be  
19 unable to substantiate his rest period claim with any documentary evidence, and asserts that not  
20 all employees were required to carry radios on their persons during work hours or even at all of  
21 Defendant’s airport locations. *Id.* Further, Defendant asserts that this claim is unmanageable, as  
22 it requires individualized inquiries into whether each employee failed to take a lawful rest period  
23 and on which days, which employees, if any, were required to carry radios on their persons, and  
24 on which days, and whether the employees were required to keep their radios on them during rest  
25 periods, and on which days, resulting in an unmanageable series of mini-trials. *Id.* These  
26 manageability concerns are especially present with respect to rest period claims given that rest  
27 periods are not recorded. *Id.*

28 ///

1                   **4. Wage Statement, Waiting Time, and PAGA Penalties**

2                   Additionally, Plaintiff alleges that, as a result of Defendant's failures to pay all overtime  
3 wages, minimum wages, and meal period and rest period premiums, Defendant also failed to issue  
4 accurate and itemized wage statements and timely pay all final wages at the time of separation.  
5 Schmidt Decl., ¶ 16; *see also* Labor Code §§ 203(a) and 226. As a result of these alleged Labor  
6 Code violations, Plaintiff also seeks PAGA civil penalties on behalf of all aggrieved employees.  
7 Schmidt Decl., ¶ 16; *see also Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1213  
8 ("As we have explained, they [civil penalties under PAGA] are mandatory, not discretionary.").

9                   In response, Defendant argues that the wage statements always accurately reflected hours  
10 worked and amounts actually paid to employees, and thus Defendant could not be found liable  
11 for wage statement penalties. Schmidt Decl., ¶ 16; *see, e.g., Maldonado v. Epsilon Plastics, Inc.*  
12 (2018) 22 Cal.App.5th 1308. Defendant further argues that Plaintiff's underlying claims will fail  
13 and, as a result, the derivative wage statement, waiting time, and PAGA claims will also fail.  
14 Schmidt Decl., ¶ 16; *see Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136, 1147 ("Because  
15 the underlying causes of action fail, the derivative UCL and PAGA claims also fail."). Defendant  
16 also maintains that Plaintiff cannot show that the wage statement violations were "knowing and  
17 intentional," or that the putative Class Members "suffer[ed] injury" as a result of the alleged  
18 violations, as required by Labor Code section 226(e) for the imposition of wage statement  
19 penalties. Schmidt Decl., ¶ 16; *see* Labor Code § 226(e)(1). Defendant also maintains that its  
20 good faith defenses to Plaintiff's underlying claims would preclude the recovery of waiting time  
21 penalties, which are only available for the "willful" failure to pay wages, and that this Court would  
22 exercise its discretion to substantially reduce any PAGA penalties awarded. Schmidt Decl., ¶ 16;  
23 *see also* 8 Cal. Code Regs. § 13520 ("[A] good faith dispute that any wages are due will preclude  
24 imposition of waiting time penalties under Section 203."); Labor Code § 2699(e)(2); *Thurman v.*  
25 *Bayshore Transit Mgmt., Inc.* (2012) 203 Cal.App.4th 1112, 1135; *Carrington v. Starbucks*  
26 *Corporation* (2018) 30 Cal.App.5th 504 (affirming reduction of PAGA penalties to 10% of  
27 exposure).

28                   ///

1                   **C. Discovery And Mediation**

2           In connection with mediation, Defendant provided Plaintiff with electronic timekeeping  
3 and payroll records for a sample of approximately 15% of the Class Members spanning the  
4 entirety of the putative class period. Schmidt Decl., ¶ 17. Defendant also produced key data points  
5 and all relevant policies in effect during the Class Period. *Id.* Plaintiff then retained an expert  
6 with a Ph.D. in economics to conduct a comprehensive analysis of the produced data to create a  
7 detailed, class-wide exposure model for the claims at issue. *Id.* On March 18, 2021, the Parties  
8 participated in a mediation session with Jeffrey Krivis, Esq., an experienced and well-respected  
9 wage and hour class action mediator. *Id.* During mediation, the Parties exchanged divergent views  
10 on Defendant's liability and exposure valuations, their legal positions, and the likelihood of  
11 certification of Plaintiff's claims. *Id.* At the conclusion of the mediation, Mr. Krivis made a  
12 mediator's proposal for a settlement of all claims at issue on a class-wide basis, which the Parties  
13 ultimately accepted. *Id.* Over the following weeks, the Parties negotiated and formalized the  
14 remaining terms of the Settlement, and executed the Settlement Agreement now before the Court  
15 for preliminary approval. *Id.*

16           **III. THE PROPOSED SETTLEMENT**

17                   **A. Essential Terms Of The Settlement**

18           If the Court preliminarily approves this settlement, Defendant will pay a MSA of  
19 \$1,375,000. Settlement, ¶ 18. This Settlement is non-reversionary, and Class Members will  
20 automatically receive their Individual Settlement Award unless they affirmatively opt-out. *Id.*, ¶  
21 52(a). The monetary terms of the Settlement are as follows:

|                                                |                       |
|------------------------------------------------|-----------------------|
| <b>Maximum Settlement Amount:</b>              | <b>\$1,375,000.00</b> |
| Minus Court-approved attorneys' fees (1/3):    | \$458,333.33          |
| Minus Court-approved attorneys' costs (up to): | \$30,000.00           |
| Minus Court-approved Service Award:            | \$5,000.00            |
| Minus settlement administrator costs (up to):  | \$13,325.00           |
| Minus PAGA Payment:                            | \$50,000.00           |
| <b>Net Settlement Amount:</b>                  | <b>\$818,341.67</b>   |

25                   **1. The Settlement Provides for Reasonable Monetary Payments**

26           After deducting amounts for Court-approved attorneys' fees and costs, Plaintiff's Service  
27 Award, settlement administration costs, and the PAGA Payment to the LWDA and PAGA  
28 Employees, the Settlement provides for an estimated NSA of no less than \$818,341.67. *See*

Settlement, ¶¶ 19, 52. Individual Settlement Awards will be calculated based on the proportionate number of workweeks worked by each Participating Class Member during the Class Period divided by the total number of workweeks worked by all Participating Class Members, as well as membership in various subclasses. *Id.*, ¶ 52(a)(i). Further, 25% of the PAGA Payment will be paid to all PAGA Employees, regardless of their election to opt-out from participating in the Settlement, based on the proportionate number of workweeks worked by the PAGA Employee during the PAGA Period divided by the total number of workweeks worked by all PAGA Employees during the PAGA Period. *Id.*, ¶ 52(d).

Defendant represents that there were approximately 490 Settlement Class Members at the time of mediation. Schmidt Decl., ¶ 19; Settlement, ¶ 51(a). Based on the estimated NSA, average Individual Settlement Awards are projected to be approximately \$1,670.08, plus additional sums for those employees who are also PAGA Employees. Schmidt Decl., ¶ 19. Settlement Class Members will have 60 calendar days from the date of the initial mailing of the Settlement Notice to opt-out or object to the Settlement, thereby providing ample time to review the Settlement Notice without unduly delaying the Settlement. *See* Settlement, ¶ 32. Those Settlement Class Members who do not opt-out of the Settlement will be bound by its terms and will release all claims against Defendant as detailed in the Settlement. *Id.*, ¶¶ 25, 45, 49(a). Further, since there is no statutory right for a PAGA Employee to opt-out or otherwise be excluded from the PAGA Payment and associated release of claims and rights under PAGA, all PAGA Employees will be deemed to release their respective PAGA claims against Defendant in connection with the Settlement. *Id.*, ¶ 49(b).

## **2. Attorneys' Fees, Costs, and Plaintiff's Service Award**

At the time of seeking final settlement approval, Plaintiff will apply for a service award in the amount of \$5,000.00 for his service to the Settlement Class and his general release of all claims. Schmidt Decl., ¶ 20. Plaintiff's requested enhancement payment is intended to recognize the significant time and effort that he expended on behalf of the Settlement Class, including gathering relevant documents for use in the lawsuit and providing factual information to his attorneys, holding various phone calls with his attorneys to discuss the claims in the lawsuit and

1 Defendant's practices, assisting his attorneys in preparing for mediation, the significant risks  
2 Plaintiff undertook by serving as the named plaintiff and filing a lawsuit against his current  
3 employer, and the fact that he agreed to a general release of all claims subject to a waiver of Civil  
4 Code section 1542. *Id.*; Orellana Decl., ¶¶ 4-5; Settlement, ¶¶ 7, 49(c).

5 Class Counsel will also apply for an attorneys' fee award of up to one third of the MSA  
6 (currently estimated at \$458,333.33), and up to \$30,000 in reimbursement for actual litigation  
7 costs. *See* Settlement, ¶ 3, 52(c). Plaintiff submits that the requested fee is fair compensation for  
8 undertaking complex, risky, expensive, and time-consuming litigation on a purely contingent fee  
9 basis. Schmidt Decl., ¶ 21. Class Counsel has incurred substantial attorneys' fees conducting pre-  
10 filing investigation, analyzing Plaintiff's claims, conducting legal research and analysis,  
11 reviewing class documents and data produced by Defendant, extensively reviewing and  
12 evaluating the produced timekeeping and payroll records and retaining an expert with a Ph.D. in  
13 economics to build a comprehensive damages model, preparing for and attending mediation,  
14 negotiating and drafting the Memorandum of Understanding, long-form Settlement Agreement,  
15 and Settlement Notice documents, preparing this motion for preliminary approval, and otherwise  
16 litigating the case. *Id.* Class Counsel will also expend future attorney time attending the hearing  
17 on this Motion, overseeing the Notice process, drafting the Final Approval Motion and supporting  
18 documents, attending the Final Approval hearing, and completing other tasks, such as fielding  
19 questions from Settlement Class Members. *Id.*

20 Both California and federal courts have recognized that an appropriate method for  
21 awarding attorneys' fees in class actions is to award a percentage of the "common fund" created  
22 as a result of the settlement. *See Laffitte v. Robert Half Int'l, Inc.* (2016) 1 Cal.5th 480, 506;  
23 *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254. Historically, courts have  
24 awarded percentage fees in the range of 20% to 50%. *See* 4 Newberg on Class Actions § 14.6 (4th  
25 Ed. 2013). Class Counsel submits that the request for attorneys' fees is reasonable when viewed  
26 as an overall percentage of the Settlement in light of the risks and work undertaken, the positive  
27 results obtained for the class, and the efficiency with which the Parties have conducted the  
28 litigation. Class Counsel will seek an award of attorneys' fees when seeking final approval.

1 **IV. ARGUMENT**

2 **A. Preliminary Approval Is Warranted**

3 California Rule of Court 3.769 conditions the settlement of a class action on court  
4 approval, which is generally evaluated under the federal standards applicable under Rule 23 of  
5 the Federal Rules of Civil Procedure. *See Reed v. United Teachers Los Angeles* (2012) 208  
6 Cal.App.4th 322, 337 (stating that Rule 3.769 requires the trial court to determine “that the  
7 settlement is fair, reasonable and adequate to all concerned”); *Hanlon v. Chrysler Corp.* (9th Cir.  
8 1998) 150 F.3d 1011, 1026 (stating that Rule 23(e) requires the trial court to determine “whether  
9 a proposed settlement is fundamentally fair, adequate, and reasonable”). Settlement is the  
10 preferred means of dispute resolution, particularly in complex class action litigation. *In re Syncor*  
11 *ERISA Litigation* (9th Cir. 2008) 516 F.3d 1095, 1101. The Court’s role in evaluating a proposed  
12 settlement is limited to ensuring that the agreement taken as a whole is fair and is not the product  
13 of fraud or collusion between the negotiating parties. *See e.g., Hanlon, supra*, 150 F.3d at 1027.  
14 There is an initial presumption of fairness when the settlement agreement was negotiated at arm’s  
15 length by class counsel. *See Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130.

16 **1. Standard for Preliminary Approval**

17 The Court should consider the following factors when making a fairness determination:  
18 “the strength of plaintiffs’ case, the risk, expense, complexity and likely duration of further  
19 litigation, the risk of maintaining class action status through trial, the amount offered in  
20 settlement, the extent of discovery completed and the stage of the proceedings, [and] the  
21 experience and views of counsel.” *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.  
22 “[T]he court is free to engage in a balancing and weighing of factors depending on the  
23 circumstances of each case.” *Wershba, supra*, 91 Cal.App.4th at 245. As discussed below, the  
24 proposed Settlement is fair, adequate, and reasonable in light of the overall balance of factors.

25 **a. The Strength of Plaintiff’s Case**

26 Class Counsel carefully vetted the claims at issue, reviewed a representative sampling of  
27 Class Member timekeeping and payroll data and all relevant policy documents, and retained an  
28 expert with a Ph.D. in economics to assist in creating a comprehensive damages model for

1 Defendant's liability. Schmidt Decl., ¶ 22. Although Plaintiff steadfastly maintains that his claims  
2 are meritorious, Plaintiff acknowledges that there were substantial risks and uncertainty in  
3 proceeding with class certification and trial. As explained in detail in Section II.B., *supra*,  
4 Defendant presented numerous defenses to Plaintiff's claims, both on the merits and with respect  
5 to class certification and manageability for Plaintiff's PAGA claim. Although he was prepared to  
6 litigate these claims through class certification and ultimately through trial, it was far from certain  
7 that Plaintiff would be able to recover a greater amount should this matter proceed through trial.  
8 Thus, this factor supports preliminary approval.

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

10 Although the Parties engaged in substantial informal discovery and information exchange  
11 prior to mediation, the Parties had agreed to refrain from engaging in formal written and  
12 deposition discovery until after exhausting their settlement efforts at mediation. Schmidt Decl., ¶  
13 22. Absent settlement, the Parties will be required to expend substantial time and resources  
14 conducting extensive formal written and deposition discovery. *Id.* Moreover, Plaintiff has not yet  
15 filed for class certification, and thus, absent settlement, the Parties would face the prospect of  
16 appeals in the wake of a disputed class certification ruling and/or an adverse summary judgment  
17 ruling. *Id.* Even if Plaintiff succeeded in certifying one or more classes, the Parties would incur  
18 considerably more attorneys' fees and costs through a possible decertification motion, trial, and  
19 possible appeal. *Id.* This Settlement avoids these considerable costs, risks, and the accompanying  
20 burden of continued litigation on the Court. Thus, this factor supports preliminary approval.

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

22 At the time of the proposed Settlement, Plaintiff had not filed his motion for class  
23 certification. Schmidt Decl., ¶ 23. Had the Court certified any claims, Plaintiff anticipated that  
24 Defendant would seek decertification. *Id.* There was also a risk that Defendant would engage in  
25 a *Pick-up-Stix* campaign to significantly reduce the size of the putative class for a fraction of what  
26 Class Members are receiving through this Settlement. *Id.*; see *Chindarah v. Pick Up Stix, Inc.*  
27 (2009) 171 Cal.App.4th 796. Therefore, absent the Settlement, there was a serious risk that  
28 Plaintiff would be unable to move forward on a class-wide basis, or that a significantly smaller

1 class would exist than that which is currently before this Court for approval. *Id.* Thus, this factor  
2 supports preliminary approval.

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

4 This proposed Settlement provides a fair and reasonable recovery for the Settlement Class  
5 in the face of disputed claims. After analyzing Defendant's produced data, Plaintiff's expert  
6 conducted a class-wide exposure analysis, forecasting the total expected recovery as follows:

7 **Unpaid Wages Due to Unlawful Rounding: \$21,114**

8 Plaintiff's expert's data analysis of Defendant's timekeeping and payroll data revealed  
9 that Defendant's rounding practice resulted in the putative class members losing an aggregate of  
10 5,614 recorded hours of work during the putative class period. Schmidt Decl., ¶ 24. Even after  
11 taking into account an offset for the time rounded in the employees' favor, the putative class  
12 members were still underpaid an average of 4.12 hours *each* as a result of Defendant's rounding  
13 policies/practices. *Id.* Using the weighted average minimum wage of \$11.62 applicable during  
14 the Class Period, Plaintiff calculated that Defendant owed the Class Members approximately  
15 \$46,921 in unpaid wages (2,019 hours x \$11.62 x 2 (liquidated damages)). *Id.* However,  
16 Defendant argues that its rounding practice was neutral, both on its face and in practice, and that  
17 such a policy is lawful under *See's Candy*. *Id.* Plaintiff therefore discounted the maximum  
18 potential exposure by 25% for the risk of non-certification and 40% for the risk of being  
19 unsuccessful on the merits, to arrive at an estimated exposure of \$21,114. *Id.*

20 **Meal Period Violations: \$669,634**

21 Plaintiff's expert's data analysis revealed that approximately 80,527 work shifts over 6.0  
22 hours included an unlawful first meal period, whether missed, short or untimely; and 6,975 shifts  
23 over 10.0 hours included an unlawful second meal period. Schmidt Decl., ¶ 25. Of those second  
24 meal period violations, 5,212 occurred on shifts that had also not been provided with a lawful first  
25 meal period. *Id.* To avoid double counting meal period penalties for two violations that occurred  
26 on the same day, Plaintiff calculated Defendant's liability for second meal periods using only the  
27 1,763 second meal period violations that took place on shifts for which the data reflects a lawful  
28 first meal period was provided. *Id.* Accordingly, Plaintiff calculated Defendant's liability on this

claim at \$1,275,494 (80,527 first meal violations + 1,763 unique second meal violations x \$15.50 avg. premium). *Id.* However, Defendant maintains it has always provided its employees the opportunity to take legally compliant meal periods, and that any missing or late meal periods in the timekeeping records were the result of employee choice, rather than a result of any class-wide policy. *Id.* Given these defenses, Plaintiff discounted the maximum exposure by 25% for the risk of non-certification, and by an additional 30% for risk of losing on the merits, to arrive at an estimated exposure of \$669,634. *Id.*

**Rest Period Violations: \$537,131**

Plaintiff's data analysis revealed that putative Class Members worked approximately 220,023 shifts in excess of 3.5 hours during the relevant time period. Schmidt Decl., ¶ 26. Given Plaintiff's allegation that Defendant maintained unlawful radio and on-premises rest period policies/practices during the Class Period, Plaintiff asserts that each shift in excess of 3.5 hours (i.e. for all shifts for which at least one rest period must be authorized and permitted) constituted a shift in which a rest period violation occurred. *Id.* Plaintiff therefore calculated Defendant's maximum exposure for rest period violations at \$3,410,356 (220,023 shifts in excess of 3.5 hours x \$15.50 average rest premium). *Id.*

Defendant contends it authorized and permitted employees to take all required rest periods, and argues that it did not discourage or impede employees from taking rest periods in practice. Schmidt Decl., ¶ 26. Moreover, Defendant asserts that Plaintiff's damages are severely overstated, since Plaintiff attributed a rest period violation to each rest-period eligible shift during the Class Period, even though not all employees and not all locations were required to carry radios on their persons. *Id.* Defendant further argues that Plaintiff's rest period claim is inherently unsuited for class treatment as it would require individualized inquiries to determine whether a certain rest period was denied on a given shift, whether an employee was required to carry a radio on any given shift, and whether a missed rest period was the result of individual employee choice, which would devolve into an unmanageable series of mini-trials, particularly since rest periods were not recorded and there was no other common evidence of when rest periods were taken. *Id.* Therefore, Plaintiff discounted Defendant's maximum exposure by 65% for risk of non-

1 certification, and by an additional 55% for risk of being unsuccessful on the merits, to arrive at  
2 an estimated exposure of \$537,131. *Id.*

3 **Wage Statement Penalties: \$315,360**

4 According to Plaintiff's expert's data analysis, approximately 16,144 wage statements  
5 were issued to 219 putative Class Members who worked for Defendant during the relevant one-  
6 year statute of limitations period applicable to this claim. Schmidt Decl., ¶ 27. Given that wage  
7 statement penalties are capped at \$4,000 per employee, *see* Labor Code § 226(e)(1), Plaintiff  
8 calculates Defendant's maximum wage statement liability at \$876,000. *Id.* However, Defendant  
9 raises numerous defenses, including that the alleged violations, if any, were not "knowing and  
10 intentional," that Plaintiff could not show that the Class Members "suffer[ed] injury" as a result  
11 of any alleged violations. *Id.*; *see also Maldonado, supra*, 22 Cal.App.5th at 1336-37. Further,  
12 Defendant contends that any derivative wage statement violations are not permissible solely for  
13 Defendant's alleged failure to pay meal and rest period premiums, and therefore Plaintiff's wage  
14 statement valuation is significantly overstated, as wage statement penalties would only be  
15 recoverable for pay periods in which the rounding practice allegedly rounded in the employer's  
16 favor. Schmidt Decl., ¶ 27; *see also Naranjo v. Spectrum Security Services*, Case No. S158966  
17 (certifying for review the following question: "Does a violation of Labor Code section 226.7,  
18 which requires payment of premium wages for meal and rest period violations, give rise to claims  
19 under Labor Code sections 203 and 226...?"). Therefore, Plaintiff discounted the maximum  
20 exposure by 40% for the risk of non-certification of the underlying claims and 40% for a risk of  
21 being unsuccessful on the merits, including failing to prove the violations were "knowing and  
22 intentional," that the Class Members "suffer[ed] injury," or that any derivative wage statement  
23 penalties were recoverable at all in light of the holdings in *Maldonado* and *Naranjo*, for an  
24 estimated recovery on this claim of \$315,360. Schmidt Decl., ¶ 27.

25 **Waiting Time Penalties: \$193,142**

26 Based on data provided by Defendant, approximately 236 Class Members separated their  
27 employment during the Class Period. Schmidt Decl., ¶ 28. Assuming Plaintiff can prove that each  
28 of these employees was owed wages that were not paid at the time of their separation, Plaintiff

1 calculated a maximum exposure of \$877,920 (average waiting time penalty of \$3,720 (\$15.50  
2 avg. hourly rate x 8 hours x 30 days)). *Id.* Defendant maintains that waiting time penalties are  
3 not appropriate because Plaintiff's claims fail on the merits, and given its good-faith defenses,  
4 Plaintiff cannot show that any failure by Defendant to pay all final wages was willful under 8 Cal.  
5 Code Regs. § 13520. *Id.* Thus, Plaintiff discounted this claim by 45% for the risk of non-  
6 certification and by an additional 60% for risk of being unsuccessful on the merits or failing to  
7 establish willfulness, for an estimated recovery of \$193,142. *Id.*

8 **PAGA Penalties: \$221,980**

9 Plaintiff alleges that PAGA civil penalties would be recoverable for each pay period in  
10 which he could prove an underlying Labor Code violation. Schmidt Decl., ¶ 29. According to  
11 Plaintiff's data analysis, putative class members worked a combined total of 16,144 pay periods  
12 during the PAGA liability period in which an employee worked at least one shift in excess of 3.5  
13 hours, resulting in a rest period violation. *Id.* Plaintiff therefore calculates Defendant's maximum  
14 PAGA exposure at \$1,614,400 (16,144 pay periods x \$100 per violation). *Id.*; *see also Amaral,*  
15 *supra*, 163 Cal.App.4th at 1207 (finding "initial" violation rate applies until employer is notified  
16 that it is violating a Labor Code provision). However, these penalties are mostly derivative of the  
17 underlying violations that Defendant vigorously disputes, both as to certification and the merits.  
18 Schmidt Decl., ¶ 29; *see also Green v. Lawrence Service Co.*, 2013 WL 3907506, \*5, fn. 5 (C.D.  
19 Cal. 2013) (explaining that a PAGA claim's success was determined by the merits of its  
20 underlying claims). Plaintiff also recognizes that the Court has discretion to substantially reduce  
21 any award of PAGA penalties. Schmidt Decl., ¶ 29; *see also* Labor Code § 2699(e)(2); *Thurman,*  
22 *supra*, 203 Cal.App.4th at 1135; *Fleming v. Covidien Inc.*, Case No. ED CV 10-01487 RGK  
23 (OPx), 2011 WL 7563047, \*4 (C.D. Cal. Aug. 12, 2011) (reducing PAGA penalties from \$2.8  
24 million to \$500,000). Therefore, Plaintiff discounted the maximum figure by 45% to account for  
25 the risk that he would not prevail on the underlying claims, and by an additional 75% for the  
26 possibility that this Court would reduce the PAGA penalties, to arrive at an estimated exposure  
27 on this claim of \$221,980. Schmidt Decl., ¶ 29.

28 ///

1 Using these estimated figures, Plaintiff estimated that the potential reasonable recovery  
2 for the Settlement Class would be approximately \$1,958,361. Schmidt Decl., ¶ 30. Thus, the  
3 mediator’s proposal for a \$1,375,000.00 MSA represents approximately 70.21% of Plaintiff’s  
4 reasonably forecasted class-wide recovery, which is well within the range approved by courts as  
5 being fair, reasonable and adequate, while also avoiding further expense and risk of proceeding  
6 towards class certification and trial. *Id.*; see, e.g., *Altamirano v. Shaw Industries, Inc.*, 2015 WL  
7 4512372, \*9 (N.D. Cal. 2015) (“Although 15% represents a modest fraction of the hypothetical  
8 maximum recovery estimated by Plaintiff, that figure is sufficient for the Court to grant  
9 preliminary approval...”); *Dunleavy v. Nadler* (9th Cir. 2000) 213 F.3d 454, 459 (approving  
10 settlement of “roughly one-sixth of the potential recovery”); *Linney v. Cellular Alaska*  
11 *Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242 (“The fact that a proposed settlement may only  
12 amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed  
13 settlement is grossly inadequate and should be disapproved.”) (internal quotations omitted).  
14 Preliminary approval is appropriate since the Settlement will provide tangible monetary relief to  
15 the Class Members without the uncertainty, delay, and additional expense of further litigation.

16 **e. The Experience and Views of Counsel**

17 “Parties represented by competent counsel are better positioned than courts to produce a  
18 settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pacific*  
19 *Enterprises Securities Litigation* (9th Cir. 1995) 47 F.3d 373, 378. Here, Plaintiff is represented  
20 by competent and experienced counsel who possesses extensive experience litigating wage and  
21 hour class actions from both the plaintiff and defense side, and who have been appointed as class  
22 counsel in numerous cases alleging similar claims. See Schmidt Decl., ¶¶ 2-6; Declaration of Paul  
23 K. Haines (“Haines Decl.”), ¶¶ 2-8; and Declaration of Matthew K. Moen (“Moen Decl.”), ¶¶ 2-  
24 7. Class Counsel conducted an extensive review and analysis of Defendant’s produced  
25 timekeeping and payroll records, and drew on their extensive experience in similar cases to assess  
26 the strengths and weaknesses of Plaintiff’s case. See Schmidt Decl., ¶¶ 17, 22-29. It was only  
27 after the completion of this work that the Parties attended mediation and, ultimately accepted the  
28

mediator's proposal for a class-wide settlement of all claims at issue. *Id.* Thus, this factor strongly supports preliminary approval of the Settlement.

## **2. The Preliminary Approval Standard is Met**

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

### **a. The Settlement is Within the Range of Possible Approval**

The proposed Settlement reflects a fair and reasonable recovery for the Class Members in light of the significant risks of litigation. The proposed Settlement will provide compensation for contested claims, while only releasing the claims actually at issue in this litigation. Further, the average payment of \$1,670.08 plus additional sums for the PAGA Employees, greatly exceeds the average payments achieved in other wage and hour class action settlements that have been approved.<sup>3</sup> Thus, the proposed Settlement is within the range of possible approval such that notice should be provided to the Class Members to consider the Settlement. The Court will have the opportunity to again assess the reasonableness of the Settlement after the Class Members have had the opportunity to opt-out or object.

### **b. The Settlement Resulted from Serious, Informed and Non-Collusive Negotiations**

This proposed Settlement is entitled to an initial presumption of fairness as it is the result of the exchange of pertinent information, including all relevant policies, employee timekeeping and payroll records, and key data points which were analyzed by Plaintiff and his retained expert; arm's-length negotiations by counsel; mediation before an experienced and well-respected wage

---

<sup>3</sup> *See e.g., Bercea v. AE Retail West*, Case No. 34-2012-00123947 (Sacramento County Super. Ct. May 9, 2012) (average net recovery of approximately \$105); *Ressler v. Federated Department Stores, Inc.*, Case No. BC335018 (L.A. County Super. Ct. Jan. 2, 2009) (average net recovery of approximately \$90); and *Schiller v. David's Bridal, Inc.*, Case No. 1:10-cv-00616-AWI-SKO, 2012 WL 2117001, at \*17 (E.D. Cal. June 11, 2012) ("Class Members will receive an average of approximately 198.70 . . . [T]his is a substantial recovery where Defendants asserted compelling defenses to liability; Plaintiff also notes several similar actions where the gross recoveries per class member were less than \$90 . . . [T]he Court finds that the results achieved are good").

1 and hour class action mediator; and additional negotiations until the terms of the long-form  
2 Settlement were agreed upon and finalized. Schmidt Decl., ¶ 17; *see also Kullar, supra*, 168  
3 Cal.App.4th at 130. Thus, this factor supports preliminary approval.

4 **c. The Settlement is Devoid of Obvious Deficiencies**

5 The Settlement will provide tangible monetary relief to the Settlement Class Members.  
6 Moreover, the amounts proposed for Plaintiff’s service award, settlement administration costs,  
7 attorneys’ fees and costs to Class Counsel, and the LWDA’s portion of PAGA civil penalties are  
8 all reasonable and appropriate. Because the Settlement is devoid of obvious deficiencies, this final  
9 factor supports preliminary approval.

10 **B. The Court Should Certify The Settlement Class**

11 The proposed Settlement Class satisfies the criteria for certification of a settlement class  
12 under California law because: (1) the individuals in the Settlement Class are so numerous that  
13 joinder would be impractical; (2) common questions of law and fact predominate over individual  
14 questions such that class certification is the most efficient and desirable way to maintain this  
15 litigation; (3) Plaintiff’s claims are typical of the claims of the absent Settlement Class Members;  
16 and (4) Plaintiff and Plaintiff’s counsel will fairly and adequately represent the interests of the  
17 absent Settlement Class Members. *See* Cal. Code Civ. Proc. § 382.

18 **1. The Proposed Class is Ascertainable and Numerous**

19 A class is “ascertainable” where the members “may be readily identified without  
20 unreasonable expense or time by reference to official [or business] records.” *See Sevidal v. Target*  
21 *Corp.* (2010) 189 Cal.App.4th 905, 919 (alterations in original). Here, the proposed Settlement  
22 Class is defined as all current and former non-exempt employees who worked for Defendant in  
23 California at any time during the Class Period. *See* Settlement, ¶¶ 5-6. Class Members can be  
24 easily identified using Defendant’s employment and payroll records. Schmidt Decl., ¶ 17.  
25 Defendant represents that there were approximately 490 Settlement Class Members at the time of  
26 mediation, rendering it impracticable to bring all Class Members before the Court. *Id.*; *see*  
27 Settlement, ¶ 51(a). Thus, the proposed Settlement Class satisfies numerosity. *See Collins v.*  
28 *Rocha* (1972) 7 Cal.3d 232, 234.

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

2           The focus in a certification dispute is not on the merits of the case, but rather on what  
3 types of questions, “common or individual,” are likely to arise in the action. *See Sav-On Drug*  
4 *Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327. Here, Plaintiff’s claims are predicated  
5 on Defendant’s alleged failures to pay all overtime and minimum wages owed, provide all lawful  
6 meal and rest periods, or pay an additional hour of premium pay in lieu thereof, furnish accurate  
7 and itemized wage statements, and pay all final wages owed upon separation of employment.  
8 These types of claims are commonly held to be proper for class certification. *See, e.g., Brinker,*  
9 *supra*, 53 Cal.4th at 1032-34 (“The theory of liability—that Brinker has a uniform policy, and  
10 that that policy...allegedly violates the law—is by its nature a common question eminently suited  
11 for class treatment.”); *Faulkinbury v. Boyd & Assoc., Inc.* (2013) 216 Cal.App.4th 220, 240  
12 (certifying meal and rest period claims); *Bradley v. Networkers Int’l, LLC* (2012) 211 Cal.App.4th  
13 1129, 1150 (certifying meal and rest period claims); *Bluford, supra*, 216 Cal.App.4th at 871  
14 (reversing denial for certification of rest period claim).

15                                   **3. The Claims of the Named Plaintiff are Typical**

16           The typicality requirement is satisfied where class representatives have claims that are  
17 typical of those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191  
18 Cal.App.3d 1341, 1347. Here, like other Settlement Class Members, Plaintiff was employed by  
19 Defendant as a non-exempt employee in California, and was subject to Defendant’s allegedly  
20 unlawful wage and hour policies/practices during the Class Period. Orellana Decl., ¶¶ 2-4.  
21 Plaintiff was therefore impacted by the same challenged policies that allegedly injured the  
22 Settlement Class as a whole, and was subject to the same defenses forwarded by Defendant as to  
23 the Settlement Class, and is therefore typical.

24                                   **4. Plaintiff and Class Counsel are Adequate to Represent the Class**

25           The adequacy of representation requirement examines conflicts of interest between named  
26 parties and the class(es) they seek to represent. *See Capitol People First v. Department of*  
27 *Developmental Services* (2007) 155 Cal.App.4th 676, 697. Here, Plaintiff and Class Counsel will  
28 adequately represent the Settlement Class as there are no conflicts between the named Plaintiff  
and the Settlement Class he seeks to represent, and Plaintiff possesses claims that are in line with

1 those of the Class Members. *See McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450  
2 (finding adequacy satisfied where there was no indication that the plaintiff's counsel were not  
3 qualified and the named plaintiff had no interests antagonistic to those of the proposed class).  
4 Class Counsel also has extensive experience in wage and hour class action litigation. *See* Schmidt  
5 Decl., ¶¶ 2-6; Haines Decl., ¶¶ 2-8; Moen Decl., ¶ 2-7.

6 **C. The Court Should Order Distribution Of The Proposed Settlement Notice**

7 This Court should order distribution of the proposed Settlement Notice in both English  
8 and Spanish to the Class Members by first class mail, postage prepaid, using the last known  
9 mailing address information provided by Defendant. This manner of giving notice is the “best  
10 notice practicable” under the circumstances because it provides “individual notice to all members  
11 who can be identified through reasonable effort.” *See Eisen v. Carlisle and Jacquelin* (1974) 417  
12 U.S. 156, 173. The Parties propose that the settlement be administered by Phoenix Settlement  
13 Administrators (“Phoenix”), an experienced class action settlement administrator. *See* Declaration  
14 of Jodey Lawrence. Class Members’ addresses will be ascertainable through Defendant’s  
15 personnel records, and Defendant will provide all Class Members’ full names, last known  
16 addresses, social security numbers, dates worked for Defendant as a non-exempt employee in  
17 California during the Class Period, and total workweeks information to Phoenix within twenty-  
18 one (21) calendar days after entry of the Preliminary Approval Order. *See* Settlement, ¶¶ 4, 50(a).  
19 Phoenix will run the Class Members’ addresses through the National Change of Address database  
20 and/or conduct skip traces to obtain current address information. *Id.*, ¶ 50(b).

21 The content of the proposed Settlement Notice satisfies California Rule of Court 3.766(d)  
22 because it advises the Class Members of the nature of the claims, basic contentions and denials  
23 of the Parties, the key terms of the Settlement, the uniform 60-day deadline to opt-out or object  
24 to the Settlement and the procedures by which to do so, explains the recovery formula and  
25 expected recovery amount for each Class Member, and advises them that they will be bound by  
26 the terms of the Settlement if they do not request exclusion. *See* Settlement, Exhibit A. The  
27 proposed Settlement Notice will also notify Class Members of the Final Approval Hearing date,  
28 provide Class Counsel’s contact information, and advise Class Members that they may enter an

1 appearance through counsel if they wish to. *Id.* This manner of giving notice satisfies California  
2 Rule of Court 3.766(e) as the most reliable and cost-effective method of reaching Class Members.

3 **D. The Court Should Set A Final Approval Hearing**

4 Finally, this Court should set a hearing for final approval of the Settlement on a date  
5 appropriately scheduled to follow the deadline by which Settlement Class Members must file  
6 objections to the Settlement or opt-out. *See* California Rule of Court 3.769. Additionally, because  
7 the proposed Settlement includes settlement of Plaintiff's representative PAGA claim, notice of  
8 the Settlement has been submitted to the LWDA. *See* Schmidt Decl., Exhibit 2; Proof of Service.

9 **V. CONCLUSION**

10 For the foregoing reasons, Plaintiff respectfully requests that the Court preliminarily  
11 approve the proposed Settlement, provisionally certify the Settlement Class, and enter the  
12 [Proposed] Order submitted concurrently herewith.

13  
14 Dated: June 22, 2021

Respectfully submitted,  
HAINES LAW GROUP, APC

15  
16 By:

  
Fletcher W. Schmidt  
Attorneys for Plaintiff