

BRIAN A. SHORT, ESQ. SBN 236140
brian@shortlegal.com
DOROTA A. JAMES, ESQ. SBN 309933
dorota@shortlegal.com
SHORTLEGAL, APC
350 10th Ave., Suite 1000
Telephone: (619) 272-0720
Facsimile: (619) 839-3129

Attorneys for Plaintiff Hector Martin
and Proposed Class Counsel

Zach Crosner, ESQ. SBN (SBN 272295)
Zach@crosnerlegal.com
JAMIE SERB, ESQ. (SBN 289601)
jamie@crosnerlegal.com
Crosner Legal, P.C.
9440 Santa Monica Blvd., Suite 301
Beverly Hills, CA 90210
Telephone: 1-866-276-7637
Facsimile: 310-510-6429

Attorneys for Plaintiff Erik Rudolph
and Proposed Class Counsel

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

HECTOR MARTIN, Individually and
on behalf of all similarly-situated
employees of Defendants in the State of
California,

Plaintiffs,

v.

HERC RENTALS, INC and DOES 1
through 50, inclusive,

Defendants.

Case No.: 37-2020-00016112-CU-OE-CTL

Unlimited Civil - Amount Demanded
Exceeds \$25,000.00

IMAGED FILE

**NOTICE OF UNOPPOSED MOTION AND
UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT AND SEEKING
LEAVE TO FILE SECOND AMENDED
COMPLAINT**

Date: May 12, 2023
Time: 8:30 a.m.
Judge: Hon. Ronald F. Frazier
Department: C-65

Date Complaint Filed: March 16, 2020

1 **PLEASE TAKE NOTICE THAT** on May 12, 2023 at 8:30 a.m., or as soon thereafter as
2 the matter may be heard, in Department 65 of the above-entitled Court, located at 330 West
3 Broadway, San Diego, California 92101, Plaintiffs Hector Martin and Erik Rudolph (“Plaintiffs”)
4 will and hereby do move unopposed for an Order (1) preliminarily finding that the settlement falls
5 within the range of reasonableness and approving the proposed class action settlement in the above-
6 captioned case, (2) conditionally certifying, for settlement purposes only, a settlement class, (3)
7 approving the appointment of Plaintiffs as Class Representatives, (4) approving the appointment of
8 Brian R. Short of ShortLegal, APC as Class Counsel and Zach Crosner and Jamie Serb of
9 Crosner Legal P.C. as Class Counsel, (5) approving the appointment of Phoenix Class Action
10 Administration Solutions (“Phoenix”) as settlement administrator, (6) preliminarily approving the
11 allocation of \$20,000 from the Gross Settlement Amount to settle Plaintiffs’ representative claims
12 under the Private Attorney General Act (Lab. Code §§ 2698 et seq.), of which seventy-five percent
13 (75%) will be paid to the Labor and Workforce Development Agency and twenty-five percent
14 (25%) will be paid on a pro rata basis to the Class Members, (7) approving as to content and form
15 the notice to the settlement class, and directing it be disseminated by the settlement administrator,
16 (8) permitting Plaintiffs to file a Second Amended Complaint, and (9) setting a final fairness and
17 approval hearing.

18 This unopposed Motion is made pursuant to Rule 3.769 of the California Rules of Court,
19 which provides for court approval of the settlement of a purported class action and allows the Court
20 to preliminarily certify a class for settlement purposes only.

21 The basis for this unopposed Motion is that the proposed settlement is fair, adequate, and
22 reasonable and in the best interests of the settlement class as a whole, and that the procedures
23 proposed by the Parties are adequate to ensure the opportunity of class members to participate in,
24 opt out of, or object to the settlement.

1
2 This Motion will be based on the Memorandum of Points and Authorities set forth herein,
3 the Settlement Agreement and Release of Claims, the Declarations of Brian R. Short and Zach
4 Crosner, such evidence or oral argument as may be presented at the hearing, and on the complete
5 record and file herein.

6
7 Dated: April 20, 2023

SHORTLEGAL, APC

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10 By: _____
11 Brian R. Short, Esq.
12 Attorneys for Plaintiff
13 Hector Martin
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Parties have reached a resolution of this class action and hereby submit their Settlement
4 Agreement and Release of Claims (“Settlement”, “Stipulation” or “Stip.”) for the Court’s approval.
5 The Settlement is made and entered into by and between Plaintiffs Hector Martin (“Martin”) and
6 Erik Rudolph (“Rudolph”) (herein collectively, “Plaintiffs”), on behalf of themselves and on behalf
7 of all others similarly situated, and Defendant Herc Rentals, Inc. (“Defendant”).

8 The settlement is a result of extensive arm’s-length negotiations by experienced counsel
9 with the assistance of a respected mediator with experience in the area of employment class actions.
10 Most importantly, the settlement will result in significant financial benefit to the participating
11 claimants on terms that are by any measure fair, reasonable and adequate. *See Dunk v. Ford Motor*
12 *Co.* (1996) 48 Cal. App. 4th 1794, 1801-02. The proposed settlement provides for a non-
13 revisionary class settlement in the gross amount of \$600,000 and the proposed settlement class
14 contains approximately 1,102 members who worked approximately 115,893 work weeks during
15 the Class Period (See Settlement Agreement at Section H(17) attached as **Exhibit A** to the
16 Declaration of Brian R. Short “Short Decl.”). As detailed below, the settlement is in the best
17 interests of the class in light of all of the facts and circumstances and the risks and delays of further
18 litigation.

19 **II. BACKGROUND AND PROCEDURAL HISTORY**

20 On March 4, 2020, Plaintiff Martin exhausted the pre-filing requirements of the Labor Code
21 Private Attorneys General Act of 2004 (“PAGA”). (Short Decl. at ¶ 10). Thereafter, on March 16,
22 2020, Plaintiff Rudolph initiated this Action by filing a Class Action Complaint on behalf of himself
23 and all other aggrieved employees which was subsequently amended as the First Amended
24 Complaint on July 9, 2020 to include representative PAGA claims after expiration of the
25 administrative exhaustion period. As part of the settlement approval process, Plaintiff Martin seeks
26 to file a Second Amended Complaint, in the form attached to the concurrently-filed Brian R. Short
27 Declaration as **Exhibit B**, which effectively adds Plaintiff Rudolph as a plaintiff to this action and
28 consolidates his separately-asserted claims which are currently pending in his action. Short Decl.

1 at ¶ 10.

2 On November 21, 2019, Plaintiff Rudolph exhausted the pre-filing requirements of the
3 PAGA. Declaration of Zach Crosner (“Crosner Decl.”) at ¶2. On or about April 15, 2020, Plaintiff
4 Rudolph initiated the Rudolph Action, Los Angeles Superior Court case no. 20STCV14715, by
5 filing a Complaint on behalf of himself and all similarly-situated employees of Defendant in the
6 State of California which was subsequently removed to United States District Court for the Central
7 District of California. Crosner Decl. at ¶ 3.

8 **III. INVESTIGATION AND SETTLEMENT DISCUSSIONS**

9 Class Counsel represent that they have conducted a thorough investigation into the facts
10 and law during the prosecution of this class action case, including the exchange of extensive
11 informal discovery and the review and verification of statistical data and other facts and information
12 provided by Defendant. Counsel for the Parties also represent that they have investigated the
13 applicable law as applied to the facts discovered regarding the alleged claims of Plaintiffs and
14 potential defenses thereto, and the damages claimed by Plaintiffs. Short Decl. at ¶ 11-17.

15 On July 23, 2021, following their exchange of information regarding the Class and PAGA
16 group and the claims and defenses asserted by the Parties, counsel for the Parties engaged in a
17 global mediation with Louis Marlin. Although the mediation was unsuccessful, the parties were
18 able to make significant progress on the merits and procedural claims and defenses and continued
19 negotiations over the next few months and were able to reach the material terms of the Settlement.
20 Short Decl. at ¶18.

21 Based on their own independent investigation and evaluation, Class Counsel are of the
22 opinion (and will so represent to the Court) that settlement for the consideration and on the terms
23 set forth in this Settlement Agreement is fair, reasonable, and adequate and is in the best interest of
24 the Settlement Class in light of all known facts and circumstances, including the risk of significant
25 delay, the risk the Settlement Class will not be certified by the Court, and the defenses asserted by
26 Defendant. Defendant and its counsel also agree (and will so represent to the Court) that this
27 settlement is fair and in the best interest of the Settlement Class. Short Decl. at ¶19; Crosner Decl.
28 ¶16.

1 **IV. LEGAL ANALYSIS**

2 **A. The Proposed Settlement Terms**

3 **1. The Settlement Class**

4 The Parties have agreed to a settlement class (hereinafter the “Class”) defined as of “all
5 current and former hourly paid or non-exempt employees who have worked for Defendant in
6 California from March 19, 2018 through February 24, 2022” (the “Class Period”). Additionally,
7 the Parties have agreed to a Subclass defined as “all current and former hourly paid or non-exempt
8 employees who worked for Defendant as sales and/or operations coordinators or jobs with similar
9 titles at any time since March 19, 2018.” (the “Sales Subclass” or “Subclass”) The Sales Subclass
10 has certain unique claims, such as the claim that Defendant failed to properly calculate the regular
11 rate of pay for purposes of paying overtime, that are not applicable to any individual not in sales or
12 operation positions.

13 **2. Allocations to be Paid from the Gross Settlement Amount**

14 The Stipulation provides that Defendant shall pay an amount not to exceed \$600,000 to
15 resolve the Action on a class-wide basis (the “Gross Settlement Settlement”). The Gross Settlement
16 Amount includes the attorneys’ fees of Class Counsel, litigation costs and expenses (which
17 includes, without limitation, all such fees and costs incurred to date, as well as such fees and costs
18 to be incurred in documenting the settlement, providing any notices required as part of the
19 settlement, securing Court approval of the settlement, and obtaining judgment in the Actions), the
20 enhancement/general release payments to each Class Representative, as approved by the Court, the
21 payment to the LWDA pursuant to the PAGA claims in the Actions, and all costs of administration,
22 including, without limitation, settlement administration fees and expenses. Defendant shall pay all
23 employer payroll tax obligations due on wage payments made from the Net Settlement Amount in
24 addition to, and separate and apart from, the Gross Settlement Amount. Stip. at ¶ C(1)(a).

25 From the Gross Settlement Amount, Defendant will not oppose Plaintiffs’ counsel’s
26 application to the Court for up to one-third of the Gross Settlement Amount for attorneys’ fees
27 (\$200,000). Stip. at ¶ C(1)(g). From the Gross Settlement Amount, Defendant will not oppose
28 Plaintiffs’ counsel’s application to the Court for up to \$20,000 in reimbursement of litigation costs

1 and expenses. Stip. at ¶ C(1)(h). From the Gross Settlement Amount, Defendant will not oppose
2 Plaintiffs' counsel's application to the Court for service payments to each Class Representative in
3 the gross amount of \$7,500, in consideration for their efforts in instituting and participating in the
4 Action and in exchange for their general release of all claims. Stip. at ¶ C(1)(f). From the Gross
5 Settlement Amount, settlement administration fees paid to Phoenix Settlement Administrators will
6 be no more than \$20,000. Stip. at ¶ C(1)(i). From the Maximum Settlement Amount, the portion
7 to be allocated for settlement of any and all claims for penalties under the PAGA is \$20,000
8 ("PAGA Payment"), 75% of which shall be paid to the LWDA and 25% shall be paid to aggrieved
9 employees who worked during the PAGA Period pro-rata based on their Individual Payment
10 Amount during that period who have not submitted a valid and timely request for exclusion. Stip.
11 at ¶ C(1)(e). The Net Settlement Amount is defined as the Gross Settlement Amount less the
12 amounts approved and awarded by the Court for: attorneys' fees and documented litigation costs
13 and expenses incurred or advanced by Class Counsel, the general release payment to each Class
14 Representative, the payment to the LWDA pursuant to PAGA, and the costs of administering the
15 settlement. Stip. at ¶ C(1)(c).

16 The Individual Payment Amount means the portion of the Net Settlement Amount
17 distributable to each Class Member who participates in the Settlement (i.e., who does not submit a
18 valid request for exclusion form). The Individual Payment Amounts will be calculated by dividing
19 the Net Settlement Amount by the total weeks worked by all participating Class Members for
20 Defendant in California during the Class Period, which will yield the applicable weekly rate
21 ("Workweek Value"). The weekly rate shall be multiplied by the number of weeks each individual
22 participating Class Member and Sales Subclass Member worked for Defendant in California during
23 the Class Period to yield their Individual Payment Amount. The Sales Subclass members will
24 receive a pro rata payment in the ratio of 3:2 compared to the non-Sales Subclass members in light
25 of the subclass's unique claims and the relatively minimal defenses that are particular to those
26 claims asserted on behalf of the Subclass. Each Participating Settlement Class Member who does
27 not opt out will receive an Individual Payment Amount equal to their individual weeks worked for
28 Defendant in California during the Class Period multiplied by the Workweek Value in the ratio

1 applicable to their particular subclass. Stip. at ¶ C(1)(c).

2 **B. Two-Step Approval Process**

3 Any settlement of class litigation must be reviewed and approved by the Court. Cal. R. Ct.
4 3.769; Fed. R. Civ. P. 23(e).¹ This is done in two steps: (1) an early (preliminary) review by the
5 trial court, and (2) a final review after notice has been distributed to the Class Members informing
6 them of the terms of the settlement and allowing them to exclude themselves from, participate in
7 and/or object to the settlement.

8 Thus, the preliminary approval by the trial court is simply a conditional finding that the
9 settlement appears to be within the range of acceptable settlements. *See Wershba v. Apple*
10 *Computer* (2001) 91 Cal.App.4th 224, 234-35. “The strength of the findings made by a judge at a
11 preliminary hearing or conference concerning a tentative settlement proposal may vary. The court
12 may find that the settlement proposal contains some merit, is within the range of reasonableness
13 required for a settlement offer, or is presumptively valid subject only to any objections that may be
14 raised at a final hearing.” 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 11.26
15 (4th ed. 2002).

16 The procedures for the Parties’ submission of a proposed settlement for preliminary
17 approval by the Court also are discussed in 4 *Newberg on Class Actions*:

18 When the parties to an action reach a monetary settlement, they will
19 usually prepare and execute a joint stipulation of settlement, which
20 is submitted to the court for preliminary approval. The stipulation
21 should set forth the essential terms of the agreement, including but
22 not limited to, the amount of settlement, form of payment, manner of
23 determining the effective date of settlement and any recapture clause.

24 *Id.* at § 11.24.

25 Here, the Parties have reached such an agreement and have submitted the Stipulation
26 herewith. *See* Short Decl., **Exhibit A**.

27 ¹ The California Supreme Court has authorized California's trial courts to use Federal Rule 23 and
28 cases applying it for guidance in considering class issues. *See Vasquez v. Superior Court* (1971)
4 Cal.3d 800, 821; *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146. Where appropriate, therefore,
Plaintiffs cite Federal Rule 23 and federal case law in addition to California law.

1 **C. Procedures for Settlement Before Class Certification.**

2 Pursuant to California Rules of Court, Rule 3.769(d), parties also may, at the preliminary
3 approval stage, request that the court provisionally approve certification of the class – conditioned
4 upon final approval of the settlement. “[P]re-certification settlements are routinely approved if
5 found to be fair and reasonable.” *Wershba, supra*, 91 Cal. App. 4th at 240. *Accord Dunk, supra*,
6 48 Cal. App. 4th at 1803 (although the settlement was reached before any “adversary certification,”
7 the court was satisfied that it was “fair, adequate and reasonable.”). *See also In re Baldwin-United*
8 *Corp.* (S.D.N.Y. 1984) 105 F.R.D. 475, 478² (“many courts have employed this practice in the
9 name of judicial efficiency in order to facilitate apparently beneficial settlement proposals.”)

10 The strength of the findings made by a judge at a preliminary hearing
11 or conference concerning a tentative settlement proposal . . . may be
12 set out in conditional orders granting tentative approval to the various
13 items submitted to the court. Three basic rulings are often
conditionally entered at this preliminary hearing. These conditional
rulings may approve a temporary settlement class, the proposed
settlement, and the class counsel’s application for fees and expenses.

14 4 *Newberg on Class Actions*, at § 11.26.

15 1. **The Settlement Class Should Be Certified for Settlement Purposes**

16 It is well established that trial courts should use a lower standard for determining the
17 propriety of certifying a settlement class, as opposed to a litigation class. *Dunk, supra*, 48 Cal.
18 App. 4th at 1807, n. 19. The reason for this is that no trial is anticipated in a settlement class, so
19 the case management issues inherent in determining if the class should be certified need not be
20 confronted. *Amchem Products, Inc. v. Windsor* (1987) 521 U.S. 591, 620. The proposed
21 Settlement Class meets all requirements for certification, as discussed below.

22 a. **The Settlement Class is Ascertainable**

23 The proposed Settlement Class is ascertainable. The class definition, the size of the Class,
24 and the means for identifying the members of the class determine whether the class is ascertainable.
25 *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class and
26 Subclass Members are identifiable from Defendant’s employment and payroll records. Further, the

27 _____
28 ² In determining the fairness and reasonableness of a proposed settlement, California courts may
look to federal cases for guidance. *See Wershba, supra*, 91 Cal. App. 4th at 239-40.

1 Settlement Class is sufficiently numerous to warrant certification. According to Defendant's
2 records, the Class comprises approximately 1,102 employees. (Agreement at Section H(17)).

3 b. **Questions of Law or Fact Common to Members of the Settlement**
4 **Class Predominate**

5 The Class Members' and Subclass Members' claims all stem from a common source:
6 members of the Settlement Class allege that Defendant violated the same Labor Code provisions in
7 connection with their employment. All members of the Class and Subclass seek the same relief
8 under the same California laws (related to unpaid wages, unpaid meal and rest period premiums,
9 inaccurate or incomplete wage statements, failure to timely pay wages due upon separation, failure
10 to indemnify employees for expenses and derivative claims). Under these circumstances, the
11 commonality requirement is satisfied for purposes of certifying the Settlement Class.

12 c. **The Proposed Class Representatives' Claims Are Typical of the**
13 **Class Members' Claims**

14 A class representative's claims are typical when they arise from the same event or course
15 of conduct that gives rise to the claims of the class, and are based on the same legal theory.
16 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, named Plaintiffs and proposed
17 Class Representatives are former non-exempt employees who worked for Defendant in the State of
18 California during the Class Period. They contend that Defendant failed to pay all wages, failed to
19 provide meal and rest periods, failed to comply with itemized employee wage statement provisions,
20 failed to reimburse employees for expenses they incurred in carrying out their job duties and failed
21 to timely pay wages at the separation of employment, in violation of Labor Code §§ 201-203,
22 226(a), 226.3, 226.7, 510, 512, 1174, 1194, 2802, 2698, and 2699, among other Labor Code
23 provisions. They have the same claims as those that the members of the Settlement Class would
24 reasonably be expected to bring based on the course of conduct alleged herein.

25 Plaintiffs have also demonstrated that they will aggressively and competently assert the
26 interests of the proposed Settlement Class; they have taken active roles in this litigation and have
27 no apparent conflicts with other class members. (See Short Decl. and Crosner Decl. generally).
28 Furthermore, Plaintiffs have retained competent counsel, experienced in litigating class action

claims in the employment context. *See* Short Decl. ¶¶ 2-8; Crosner Decl. ¶¶10-14

D. The Settlement Is Fair and Reasonable and Not the Result of Fraud or Collusion

Courts presume the absence of fraud or collusion in the negotiation of a settlement unless evidence to the contrary is offered. *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447; *Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.* (7th Cir. 1987) 834 F.2d 677, 682; *In re Chicken Antitrust Litig.* (N.D. Ga. 1980) 560 F. Supp. 957, 962. Courts do not substitute their judgment for that of the proponents, particularly where, as here, settlement has been reached with the participation of experienced counsel familiar with the litigation. *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 528; *Hammon v. Barry* (D.D.C. 1990) 752 F. Supp. 1087, 1093; *Steinberg v. Carey* (S.D.N.Y. 1979) 470 F. Supp. 471, 478; *In re Armored Car Antitrust Litig.* (N.D. Ga. 1979) 472 F. Supp. 1357, 1368; *Sommers v. Abraham Lincoln Federal Sav. & Loan Ass'n* (E.D. Pa. 1978) 79 F.R.D. 571, 580.

While the recommendations of counsel proposing the settlement are not conclusive, the Court can properly take them into account, particularly where, as here, such counsel have been involved in informal discovery and negotiations for some period of time, appear to be competent, have experience with this type of litigation, and have exchanged substantial evidence with the opposing party. *See Newberg on Class Actions, supra*, § 11.47; *In re Paine Webber Ltd. P'ships Litig.* (S.D.N.Y. 1997) 171 F.R.D. 104, 125 (“[s]o long as the integrity of the arm’s-length negotiation process is preserved, however, a strong initial presumption of fairness attaches to the proposed settlement . . . [citations] and ‘great weight’ is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation”). Short Decl. ¶¶ 2-8; Crosner Decl. ¶¶10-14.

Here, the Parties’ counsel have a great deal of experience in class action litigation and specialize in employment wage and hour matters. Moreover, counsel for both Parties conducted an extensive investigation of the factual allegations involved in this case. The Parties have engaged in a broad exchange of documents, data, records and other information. Each side has apprised the other, informally and at a formal mediation, of their respective factual contentions, legal theories

1 and defenses, resulting in extensive arm's-length negotiations taking place among the Parties. *Id.*

2 1. **The Settlement Falls Within The Range of Reasonableness**

3 The Court must make an “independent assessment of the reasonableness of the terms of the
4 settlement” prior to granting preliminary and final approval. *Clark v. American Residential*
5 *Services LLC* (2009) 175 Cal.App.4th 785, 799; *Kullar v. Foot Locker Retail, Inc.* (2008) 168
6 Cal.App.4th 116, 127-28, 130, 133. To do so requires the Parties to submit “basic information
7 about the nature and magnitude of the claims in question and the basis for concluding that the
8 consideration being paid for the release of those claims represents a reasonable compromise.”
9 *Clark, supra*, 175 Cal.App.4th at 800. However, the Court should *not* “attempt to decide the merits
10 of the case or to substitute its evaluation of the most appropriate settlement for that of the attorneys.”
11 *Kullar, supra*, 168 Cal.App.4th at 133. “It is well-settled law that a cash settlement amounting to
12 only a fraction of the potential recovery will not per se render the settlement inadequate or unfair.”
13 *See Officers for Justice v. Civil Serv. Comm’n of City & Cty. of San Francisco*, 688 F.2d 615, 628
14 (9th Cir. 1982).

15 Settling parties are not, however, required to partake in a hypothetical accounting exercise:
16 **“Kullar does not ... require any such explicit statement of [maximum] value;** it requires a record
17 which allows ‘an understanding of the amount that is in controversy and the realistic range of outcomes of
18 the litigation.’” *Munoz v. BCI Coca-Cola Bottling Co.*, 186 Cal. App. 4th 399, 409-10 (2010) (quoting
19 *Kullar*, 168 Cal. App. 4th at 120 (emphasis added)). Overall, “the most important factor” in determining
20 “whether a settlement is fair and reasonable” is the “strength of the case for plaintiffs on the merits,
21 balanced against the amount offered in the settlement.” *Id.* at 409 n.6 (quoting *Kullar*, 168 Cal. App. 4th at
22 130). As explained in detail below, the Gross Settlement Amount is within the range of reasonableness in
23 light of the nature and magnitude of the claims being settled and the various potential impediments to
24 recovery.

25 Plaintiffs’ counsel created a comprehensive damage analysis using sampling information
26 obtained through informal discovery. This damage analysis reveals that the negotiated settlement
27 falls within a realistic range of recovery on Class Members’ claims. Short Decl. ¶¶11-17.

1 a. **Unpaid Wages Claims**

2 California law defines “hours worked” as “the time during which an employee is subject to the
3 control of an employer, and includes all the time the employee is suffered or permitted to work, whether or
4 not required to do so.” *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 578 (2000). Plaintiffs allege that
5 Defendant required employees to clock out for their thirty-minute meal periods, so that time cards
6 reflected compliant meal breaks while in reality, and in part, due to their excessive workload,
7 understaffing, and supervisors pressuring employees to prioritize work over taking meal breaks,
8 employees were regularly required to work off the clock during their meal breaks. Plaintiffs estimated
9 Defendant’s exposure for these off-the-clock violations as follows: 115,893 work weeks during the Class
10 Period × 10 minutes off-the-clock per shift × \$23.62 average hourly wage = \$456,232.

11 Defendant argued that any time worked off-the-clock would not be reflected in the time records,
12 making it very difficult to accurately determine whether any Class Member worked off-the-clock without
13 engaging in thousands of individualized inquiries that would preclude class certification. *See Brinker*, 53
14 Cal. 4th at 1051-52 (holding that in the absence of a uniform, companywide policy, proof of liability is
15 individual). Due to the difficulties expected in litigating and proving this claim with non-documentary
16 evidence, together with inherent risks of class certification and proof, Plaintiffs were required to discount
17 the value of this claim for purposes of settlement.

18 b. **Meal Period Claim**

19 “An employer may not employ an employee for a work period of more than five hours per day
20 without providing the employee with a meal period of not less than 30 minutes.” Cal. Lab. Code § 512(a) .
21 Additionally, an employee may not work more than 10 hours without being provided a second meal
22 period. *Id.* Where an employee does not receive a timely meal period of at least 30 minutes, the employer
23 is required to pay the employee one additional hour of pay at the employee’s regular rate of compensation.
24 Cal. Lab. Code § 226.7(b).

25 As stated above, Plaintiffs alleged that Defendant required employees to clock out for their thirty-
26 minute meal periods, so that time cards reflected compliant meal breaks while in reality, and in part, due to
27 their excessive workload, understaffing, and negative commentary from supervisors pressuring employees
28 to prioritize work over taking meal breaks, employees were regularly required to work off the clock during

1 their meal breaks. Plaintiffs also alleged that Defendant maintained a facially unlawful meal period policy
2 in that it instructed employees to take initial meal periods after the fifth hour of work (rather than before)
3 and second meal periods after the tenth hour of work (rather than before). =Based on the above policies
4 and practices, Plaintiffs estimated Defendant’s exposure for meal period violations as follows: 115,893
5 work weeks during the Class Period × 20% estimated meal period violation rate × \$23.62 average hourly
6 wage = \$547,478. In its defense, Defendant argued that it has no obligation to “guarantee” or “ensure” that
7 meal periods are taken by all employees at all times. *Brinker*, 53 Cal. 4th at 1040 (employers are “not
8 obligated to police meal breaks and ensure no work thereafter is performed”).

9 **c. Rest Period Claim**

10 California Labor Code section 226.7 provides that no employer shall require an employee to work
11 during any rest period mandated by an applicable order of the California IWC. To comply with its
12 obligation to provide rest periods under California Labor Code section 226.7 and the applicable IWC
13 Wage Order, an employer must “relinquish any control over how employees spend their break time, and
14 relieve their employees of all duties — including the obligation that an employee remain on call. A rest
15 period, in short, must be a period of rest.” *Augustus v. ABM Security Services, Inc.*, 2 Cal. 5th 257, 269-
16 270 (2016). Plaintiffs’ rest break claim alleged that employees were not free to choose independently
17 when they would be able take their rest periods. Rather, they were subject to the whims of their direct
18 supervisors and the company’s needs. Due to a lack of adequate staffing, Plaintiffs and Class Members
19 were regularly prevented from taking a timely, 10-minute, uninterrupted, off-duty rest breaks or called-
20 back during their rest breaks. Instead, they were required to continue working to service Defendant’s
21 customers. Based on the above allegations, Plaintiffs estimated Defendant’s exposure for rest period
22 violations as follows: 115,893 work weeks during the Class Period × 20% estimated meal period violation
23 rate × \$23.62 average hourly wage = \$547,478.

24 In its defense, Defendant argued that it maintained a compliant rest period policy that was
25 communicated to employees. It also would have argued that individual issues would have predominated
26 and thus precluded Plaintiffs from certifying a rest break class because there was a high degree of
27 variability among employees’ ability to take rest breaks.
28

1 **d. Wage Statement Claim**

2 Labor Code section 226(a) provides, in pertinent part, that an employer must provide an “accurate
3 itemized” wage statement showing net and gross wages earned. Cal. Lab. Code § 226(a). “[A]n employee
4 has a statutory right to an accurate pay stub.”³ Based on the preceding allegations, Plaintiffs allege that
5 Defendant issued Class Members incorrect itemized wage statements. Penalties for wage statement
6 violations are calculated according to the formula provided by Labor Code section 226(e)(1): An
7 employee suffering injury as a result of a knowing and intentional failure by an employer to comply with
8 subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial
9 pay period in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a
10 subsequent pay period, not to exceed an aggregate penalty of \$4,000.

11 However, Defendant argued that the “subsequent” penalty applies only after a determination that
12 the employer has violated the Labor Code. *See Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157,
13 1209 (2008). Accordingly, Defendant’s liability was calculated as follows: $\approx 75,000$ pay periods during
14 the 1-year statute of limitations period $\times$ \$50 per violation = \$3,750,000.⁴ Although wage statement claims
15 are readily certifiable, they are vulnerable to an unfavorable disposition on summary judgment as
16 defendants commonly argue that, without more, wage statement claims are nothing but technical
17 violations for which Class Members suffer no injury. Moreover, Defendant argued that these rest period
18 claims are notoriously difficult to certify due to individualized issues about when/how a rest break
19 occurred without documentary evidence.

20
21
22 ⁴ Plaintiff also argued that Defendant’s wage statement failed to include available sick pay. Under the California
23 Healthy Workplaces, Healthy Families Act of 2014 (Labor Code §§ 245 et seq.)(“the Act”), employers are required
24 to provide sick leave at the rate of not less than one hour per every 30 hours worked from the commencement of
25 employment). Labor Code section 246(i) states that “[a]n employer shall provide an employee with written notice
26 that sets forth the amount of paid sick leave available, or paid time off leave an employer provides in lieu of sick
27 leave, for use on either the employee’s itemized wage statement described in Section 226 or in a separate writing
28 provided on the designated pay date with the employee’s payment of wages.” Labor Code § 246(i).

However, at mediation, Plaintiff only assigned a nuisance value to this alternative wage statement theory as
presented under Labor Code Section 246 given the weight of authority of recent case law finding that there was no
private right of action to enforce Section 246(i). Indeed, following the Parties’ mediation, the Court in *Rudolph*
granted Defendant’s Motion to Dismiss the sick pay claims, finding that there was no private right of action to
enforce Section 246(i) and that private plaintiffs were barred from obtaining civil penalties recoverable under the
Act. *Rudolph v. Herc Rentals*, No. 2:20-cv-05412-ODW (Ex), 2021 U.S. Dist. LEXIS 244970, at *15 (C.D. Cal.
Aug. 27, 2021).

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1 However, while Section 203 penalties are relatively straightforward to calculate, the analysis
2 becomes more difficult for settlement purposes as derivative waiting-time penalties are only as strong as
3 the underlying predicate claims, and are subject to good faith defenses. For example, defendants
4 commonly argue that no waiting-time penalties can be awarded unless the failure to pay wages is
5 “willful,” an element that Plaintiffs acknowledge would have been difficult to prove. Taking into account
6 the above defenses, a discount on the maximum value of Class Members’ claims was required (and
7 warranted) to resolve the matter.

8 Plaintiff Rudolph’s employment as a driver presented additional unique defenses.
9 Defendant argued that the overtime, meal, and rest breaks claims of Plaintiff Rudolph and
10 approximately 235 drivers he sought to represent were preempted. Specifically, Defendant argued
11 that Federal and California law exempt employees from overtime pay if the Federal Motor Carrier
12 Safety Act (“MCSA”) regulates their hours of service. 29 U.S.C. § 213 subd. (b)(1); 29 C.F.R. §
13 782.2; 49 U.S.C. 13501 et seq.; IWC Wage Order 9, § 3(L)(1); Cal. Code Regs. tit. 8, § 11090 subd.
14 (3)(L).) Moreover, Defendant argued that Plaintiff Rudolph’s meal and rest break claims are
15 preempted under 49 U.S.C. § 31141 pursuant to the Court’s holding in *Inter. BHD. of Teamsters v.*
16 *Federal Motor Carrier* 986 F. 3d 841 (9th Cir. 2021). Defendant also argued that the employment
17 of a proportion of the class was subject to Collective Bargaining Agreements and based thereon
18 Section 301 of the Labor Management Relations Act preempted certain claims.

19 Finally, Plaintiffs faced the risk that they would not obtain a maximum damage/penalty
20 award on all (or any of) their claims. For example, Plaintiffs seek discretionary penalties pursuant
21 to the PAGA. Even if Plaintiffs did prevail on these claims, it is possible that the Court would not
22 impose all penalties pursuant to its discretionary power to reduce them. Short Decl. ¶25. When
23 the costs and risks of non-certification and loss on the merits are considered, Plaintiffs’ counsel is
24 of the opinion that the settlement reached is clearly a favorable one. Short Decl. ¶38.

25 2. **Despite the Asserted Fairness of the Settlement Terms, Class Members**
26 **May Request Exclusion From, Or Object To, The Settlement**

27 Despite the asserted fairness of the settlement terms, any potential Class Member who
28 objects to the terms of the settlement set forth in the Stipulation of Settlement has the right to submit

1 a request for exclusion (*i.e.*, opt out) from the settlement, pursuant to which the Class Member
2 would be bound only by the PAGA portion of the Settlement but would otherwise retain any claim
3 he or she may have against Defendant. Moreover, Class Members who do not opt out may, upon
4 providing proper notice to the Parties and the Court, attend the final fairness and approval hearing
5 for the purpose of objecting to one or more of the settlement terms set forth in the Stipulation of
6 Settlement.

7 **E. Plaintiffs Should Be Permitted to File Their First Amended Complaint**

8 In connection with this Settlement, Plaintiffs seek to file a Second Amended Complaint,
9 attached to the Declaration of Brian Short as **Exhibit B**, which essentially consolidates the claims
10 in the Plaintiffs' separate actions. To effectuate the class settlement of the Action, Defendant does
11 not oppose the filing of the Second Amended Complaint for settlement purposes only. As part of
12 its order preliminarily approving the settlement, Plaintiffs request that the Court approve their filing
13 of the Second Amended Complaint, and consent that Defendant not be required to file a responsive
14 pleading thereto. Settlement Agreement at Section F(1-2).

15 **V. CONCLUSION**

16 For reasons stated above and pursuant to Cal. Rules of Court, Rule 3.769(d) and
17 (e), Plaintiffs respectfully request that the Court issue an order: (1) granting leave to file a Second
18 Amended Complaint; (2) granting preliminary certification of the settlement class for settlement
19 purposes only; (3) granting preliminary approval for the proposed settlement including
20 appointment of Plaintiff's Counsel as Class Counsel; (4) authorizing the parties to provide the
21 proposed notice to the class; and (5) scheduling a final approval or fairness hearing.
22

23 Dated: April 20, 2023

SHORTLEGAL, APC

24
25 

26 By: _____
27 Brian R. Short, Esq.
28 Attorneys for Plaintiff
Hector Martin