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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF CONTRA COSTA**

CHEYENNE ROBLES, as an individual
and on behalf of all others similarly situated,
Plaintiff,

vs.

WESTERN STONE & METAL CORP., a
Colorado corporation; and DOES 1 through
100,
Defendants.

Case No.: MSC20-00392

*[Case assigned for all purposes to the Hon.
Edward G. Weil, Dept. 39]*

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

Date: TBD
Time:
Dept.: 39

Action Filed: February 26, 2020
Trial Date: None Set

1 PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court,
2 on a date and time to be determined by the Court, in Department 39 of the above-entitled Court,
3 located at 725 Court Street, Martinez, California, 94553, Plaintiff Cheyenne Robles (“Plaintiff”),
4 individually and on behalf of a class of similarly situated individuals, will and hereby does move
5 this Court for:

- 6 1. Preliminary approval of the proposed Settlement of this lawsuit;
- 7 2. Pursuant to Section 382 of the California Code of Civil Procedure, provisional
8 certification of the following Settlement Class defined as follows:

9 **Settlement Class** – all current and former non-exempt employees who
10 worked for Defendant Western Stone & Metal Corp. d.b.a. Shane Co.
11 in California from February 26, 2016 until the date of preliminary
12 approval.

- 13 3. Preliminary appointment of Plaintiff Cheyenne Robles as Class Representative;
- 14 4. Preliminary appointment of Fletcher W. Schmidt, Paul K. Haines, and Alexandra R.
15 McIntosh of Haines Law Group, APC as Class Counsel;
- 16 5. The scheduling of a hearing to consider whether the Settlement should be finally
17 approved and to award amounts for the Class Representative enhancement payment,
18 Settlement Administrator costs, the PAGA payment to the Labor and Workforce
19 Development Agency, as well as attorneys’ fees and costs to Class Counsel;
- 20 6. Appointment of Phoenix Settlement Administrators as the third-party Settlement
21 Administrator for mailing notices; and
- 22 7. Approval of the proposed Class Notice and entry of the proposed Order instructing the
23 Class Notice to be disseminated to the proposed Settlement Class as provided in the
24 Settlement.

25 ///

26 ///

27 ///

1 This Motion is based on this Notice of Motion, the attached Memorandum of Points and
2 Authorities, the declarations of Fletcher W. Schmidt, Paul K. Haines, Alexandra R. McIntosh,
3 Cheyenne Robles, Jodey Lawrence of Phoenix Settlement Administrators, and the exhibits
4 attached thereto, the pleadings and other papers filed in this action, and on any further oral or
5 documentary evidence or argument presented at the time of hearing.

6
7 Dated: January 5, 2021

Respectfully Submitted,
HAINES LAW GROUP, APC

8
9 By:



Fletcher W. Schmidt
Attorneys for Plaintiff

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Cheyenne Robles (“Plaintiff”) filed this putative class action (the “Lawsuit”) on
4 behalf of all current and former non-exempt employees who worked for Western Stone & Metal
5 Corp. d.b.a. Shane Co. (“Shane Co.”) in California from February 26, 2016 until the date of
6 preliminary approval (the “Class Period”) (hereinafter Plaintiff and Shane Co. will be referred to
7 collectively as the “Parties”). Plaintiff alleges that Shane Co.: (1) failed to provide all legally-
8 compliant meal periods; (2) failed to authorize and permit all legally-required rest periods; (3)
9 failed to issue accurate and itemized wage statements; (4) failed to pay all final wages to
10 employees upon separation of employment; (5) engaged in unfair, unlawful business practices;
11 and (6) is liable for civil penalties under the Private Attorneys General Act (Labor Code § 2698
12 *et seq.*) (“PAGA”).

13 Through this Motion, Plaintiff respectfully requests that this Court preliminarily approve
14 this non-reversionary class action settlement (“Settlement”),¹ on behalf of the following
15 Settlement Class:

16 **Settlement Class** – all current and former non-exempt employees who worked
17 for Shane Co. in California from February 26, 2016 until the date of
18 preliminary approval.

19 Based upon the data received from Shane Co., there are approximately 261 potential
20 Settlement Class members who worked approximately 20,833 combined workweeks during the
21 Class Period. The Settlement calls for Shane Co. to pay a Gross Settlement Payment (“GSP”) of
22 \$630,000.00. This represents a significant result for Settlement Class members who will be
23 agreeing to a release of only those claims that were actually asserted, or which could have been
24 asserted based on the same set of operative facts alleged in the Lawsuit. After deductions for
25 Plaintiff’s enhancement payment, settlement administrator costs, the PAGA payment to the Labor
26

27 ¹ The Settlement Agreement (“Settlement Agreement”) and the proposed Notice of Proposed Class Action
28 Settlement (“Class Notice”) are attached as Exhibits 1 and 2, respectively, to the Declaration of Fletcher
W. Schmidt filed concurrently herewith.

1 & Workforce Development Agency (“LWDA”), and attorneys’ fees and costs to Class Counsel,
2 the remaining amount (the “Net Settlement Amount”) of approximately \$345,000.00 will be
3 distributed to the Settlement Class. Significantly, Settlement Class members do not need to file a
4 claim form in order to receive a Settlement Award, and all Settlement Class members who do not
5 opt-out will automatically receive average payments of approximately \$1,321.84.

6 Prior to reaching this proposed Settlement, Shane Co. provided Plaintiff with timekeeping
7 and payroll data for a sample of the putative class, which Plaintiff’s counsel and a retained expert
8 used to construct a comprehensive damages model. Shane Co. also produced relevant policies in
9 effect during the Class Period. After extensive legal research and analysis along with a
10 comprehensive review of the data performed by Plaintiff and her expert, the Parties participated
11 in a mediation session with Steven G. Mehta, Esq., a respected wage and hour class action
12 mediator, which resulted in a settlement. The long-form Settlement Agreement was drafted and
13 executed over the following months and is now submitted to this Court for approval.

14 This proposed Settlement is well within the range of possible approval in light of the
15 significant legal and factual obstacles that Plaintiff faced, the risks and costs of further litigation,
16 and the substantial monetary benefits to the Settlement Class. For the reasons discussed herein,
17 Plaintiff respectfully requests that the Court grant preliminary approval of the Settlement.

18 **II. SUMMARY OF THE LITIGATION**

19 Shane Co. is one of the largest privately owned jewelers in the United States with 20 retail
20 stores across the Country, including four stores within California. Declaration of Fletcher W.
21 Schmidt (“Schmidt Decl.”), ¶ 8. Plaintiff, like all other members of the Settlement Class, worked
22 for Shane Co. as a non-exempt employee during the Class Period. *Id.* Plaintiff’s theories of
23 liability, and Shane Co.’s defenses to each are discussed below.

24 **A. PLAINTIFF’S CLAIMS AND SHANE CO.’S DEFENSES**

25 Plaintiff alleges that Shane Co. failed to provide employees with full, uninterrupted 30-
26 minute meal periods before the end of the fifth hour of work and failed to provide second meal
27 periods when employees worked in excess of 10.0 hours. *See Brinker Restaurant Corp. v.*
28 *Superior Court* (2012) 53 Cal.4th 1004, 1049 (holding that the applicable wage orders and the

1 California Labor Code require employers to provide a first meal period before the end of the fifth
2 hour of work and a second meal period “after no more than 10 hours of work”); Schmidt Decl., ¶
3 9. Plaintiff further alleges that Shane Co. maintained an unlawful policy of only paying employees
4 a meal period premium when the employee’s meal period commenced after the end of the *sixth*
5 hour of work, rather than in all instances in which the employee’s meal period commenced after
6 the end of the *fifth* hour of work in violation of California law. *See Brinker*, 53 Cal.4th at 1049;
7 Schmidt Decl., ¶ 9. Additionally, in those instances where Shane Co. did actually pay its
8 employees a meal period premium, Plaintiff alleges that Shane Co. incorrectly paid the meal
9 period premium at the employees’ base hourly rate of pay rather than the employees’ “regular
10 rates of compensation”, which were higher due to their receipt of non-discretionary bonuses
11 (hereinafter “incentive pay”). *See Labor Code Section 226.7(c)* (“if an employer fails to provide
12 an employee a meal or rest or recovery period in accordance with a state law..., the employer shall
13 pay the employee one additional hour of pay at the employee's *regular rate of compensation* for
14 each workday that the meal or rest or recovery period is not provided.”) (Italics added.)

15 In response, Shane Co. contends that it has always provided employees with legally-
16 compliant first and second meal periods and that any meal periods that did not meet that standard
17 were solely the result of employee choice (not Shane Co.’s policy/practice). Schmidt Decl., ¶ 10.
18 Specifically, Shane Co. argues that employees, despite being relieved for their meal periods, often
19 requested to take their meal periods at a later time to complete sales. *Id.* Shane Co. argues that
20 under *Brinker* it is only required to “provide” the opportunity to take meal periods, not “ensure”
21 meal periods are taken, which Shane Co. contends it has always done. *Brinker, supra*, 53 Cal.4th
22 at 1038 (rejecting “ensure” standard); *Id.* Shane Co. maintains that employees voluntarily waived
23 their second meal period when they worked shifts in excess of 10.0 hours (but less than 12.0
24 hours). *Id.* Shane Co. further contends that it pays meal period premium wages to employees who
25 are not provided full, uninterrupted meal periods, per Labor Code section 226.7 and that it is not
26 required to include incentive pay in its calculation of the “regular rate of compensation” for the
27 purposes of meal and rest period premiums. *Id.* Shane Co. argues that although this is an open
28 issue that is currently being reviewed by the California Supreme Court in *Ferra v. Loews*

1 *Hollywood Hotels*, the prevailing Court of Appeals’ decision found that employers are not
2 required to include non-discretionary bonuses in its calculation of the “regular rate of
3 compensation” for the purposes of meal and rest period premiums. *Ferra*, (2019) 40 Cal.App.5th
4 1239, 1243; Schmidt Decl., ¶ 10. Finally, Shane Co. contends that Plaintiff’s meal period claim
5 is not suited for class certification as individual inquiries would be required to assess which
6 employees received non-compliant meal periods or missed second meal periods, how many meal
7 periods were non-compliant or missed, and the reasons why a particular individual recorded a
8 non-compliant meal period or missed a meal period on a particular shift. Schmidt Decl., ¶ 10.

9 Plaintiff alleges that Shane Co. maintained an unlawful written rest period policy which
10 allows managers and supervisors to require employees to remain on premises during rest periods
11 in violation of California law. *See Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257,
12 260 (“During required rest periods, employers must relieve their employees of all duties and
13 relinquish any control over how employees spend their break time.”); Schmidt Decl., ¶ 11.
14 Plaintiff further alleges that, in practice, Shane Co. enforced this policy by requiring employees
15 to remain on-premises throughout the entirety of their shift when the stores would conduct
16 inventory. *Id.* Additionally, even on days when employees were able to leave the premises,
17 Plaintiff alleges that Shane Co. failed to authorize and permit Plaintiff and other non-exempt
18 employees to take all duty-free 10-minute rest periods for every four hours worked, including
19 third rest-periods on shifts in excess of 10.0 hours, and failed to pay employees rest period
20 premiums at the employees applicable “regular rate of compensation,” as discussed above. *Id.*

21 Shane Co. contends that it authorized and permitted all legally required rest periods to
22 employees, and in practice, employees may leave the premises during rest periods. Schmidt Decl.,
23 ¶ 13. Shane Co. also maintains that its written rest period policy specifically authorizes third rest
24 periods on shifts in excess of 10.0 hours. *Id.* Additionally, Shane Co.’s written rest period policy
25 merely indicated that managers and supervisors “*may*” ask that employees remain on premises
26 during rest periods, but that it did not do so across the board as a matter of policy, meaning that
27 individualized inquiries would be required to determine whether an employee was in fact asked
28 to remain on the premises, thus undermining class certification. *Id.* Shane Co. also contends that

1 it pays rest period premium wages to employees who are not permitted to take all rest periods,
2 pursuant to the applicable wage order.² *Id.* Shane Co. further argues that Plaintiff’s rest period
3 claim would not be amenable to class treatment, since individual inquiries would be required to
4 determine which employees failed to take rest periods, how many of these rest periods each
5 individual failed to take, and the reasons why each individual did not take a rest period on a
6 particular shift. *Id.* Lastly, Shane Co. contends that it properly paid rest period premiums at the
7 employees’ base rate of compensation and is not required to include non-discretionary bonuses
8 in its calculation of the regular rate of compensation for the purposes of rest period premiums as
9 stated previously. *Id.*

10 As a result of these alleged substantive violations, Plaintiff contends that Shane Co. is
11 liable for derivate wage statement violations, waiting time penalties for its failure to pay
12 employees all final wages upon their separation of employment, and civil penalties under PAGA,
13 Labor Code section 2698 *et seq.* Schmidt Decl., ¶ 14. Additionally, Plaintiff alleges that Shane
14 Co. issued facially deficient wage statements as a result of its failure to accurately list the hourly
15 rate and corresponding number of hours worked for payments denoted as “Bonus OT”. *See* Labor
16 Code § 226(a) (“An employer...shall furnish to his or her employee...an accurate itemized
17 statement in writing showing... all applicable hourly rates in effect during the pay period and the
18 corresponding number of hours worked at each hourly rate by the employee.”)

19 Shane Co. argues that the alleged wage statement violations were not “knowing and
20 intentional,” and that Plaintiff could not show she “suffer[ed] injury,” as required by Labor Code
21 section 226(e) for imposition of penalties. *See Amaral v. Cintas Corp.* (2008) 163 Cal. App. 4th
22 1157, 1201; Schmidt Decl., ¶ 18. Shane Co. further contends that it possesses strong, good faith
23 defense to Plaintiff’s underlying claims, thus precluding recovery of waiting time penalties
24 (which are only available for the “willful” failure to pay wages). *See* 8 Cal. Code Regs. § 13520
25 (“[A] good faith dispute that any wages are due will preclude imposition of waiting time penalties
26 under Section 203...A good-faith dispute that any wages are due occurs when an employer
27

28 ² Beginning in 2018, Shane Co. began paying its employees rest period premiums at their base rate of
pay when employees reported that they were not provided with a rest period. *Id.*

1 presents a defense, based in law or fact which, if successful, would preclude any recovery on the
2 part of the employee.”); Schmidt Decl., ¶ 18. Shane Co. also contends that Plaintiff’s meal and
3 rest period claims cannot support a claim for waiting time penalties. *See Ling v. P.F. Chang’s*
4 *China Bistro, Inc.* (2016) 245 Cal.App.4th 1242, 1261 (meal and rest period premium pay
5 compensates for the non-provision of meal and rest periods, not for the ‘nonpayment of wages’
6 as required by Labor Code § 203); Schmidt Decl., ¶ 18. Shane Co. also maintains that, given its
7 good-faith defenses, this Court would exercise its discretion to substantially reduce any PAGA
8 penalties if it were to find Shane Co. liable for any of Plaintiff’s underlying claims. Schmidt Decl.,
9 ¶ 18.

10 **B. DISCOVERY AND MEDIATION**

11 In connection with mediation, Shane Co. provided Plaintiff with timekeeping and payroll
12 data for 20% of the putative class. Schmidt Decl., ¶ 20. Shane Co. also provided relevant policies
13 and procedures in effect during the Class Period along with other relevant data necessary to
14 perform a class-wide exposure analysis. *Id.* Plaintiff, with the help of her expert, conducted an
15 analysis of this data and created a comprehensive damages model to calculate the likely exposure
16 that Shane Co. faced on each claim. *Id.*

17 On October 8, 2020, the Parties participated in a mediation with Steven G. Mehta, Esq., a
18 highly respected wage and hour class action mediator. Schmidt Decl., ¶ 21. During mediation, the
19 Parties exchanged divergent views on Shane Co.’s liability and exposure valuations, their legal
20 positions, and the likelihood of certification of Plaintiff’s claims. *Id.* With the help of Mr. Mehta,
21 the Parties reached a class-wide resolution at the conclusion of the mediation. *Id.*

22 **III. THE PROPOSED SETTLEMENT**

23 **A. ESSENTIAL TERMS OF THE SETTLEMENT**

24 If the Court preliminarily approves this settlement, Shane Co. will pay a GSP of
25 \$630,000.00. Settlement § 5. This Settlement is non-reversionary and Settlement Class members
26 will automatically receive their Individual Settlement Payment unless they affirmatively opt-out
27 of the Settlement. *Id.*, § 6.B.

28 Shane Co. will fund the GSP within 30 days of after Final Approval – which is defined as

the later of: (1) the date on which any appeal might be filed or (2) successful resolution of any appeal(s), including expiration of any time to seek reconsideration or further review. Settlement § 5.A.

The monetary terms of the Settlement are as follows:

Gross Settlement Payment:	\$630,000.00
Minus Court-approved attorneys' fees (1/3):	\$210,000.00
Minus Court-approved attorneys' costs (up to):	\$27,500.00
Minus Court-approved enhancement payment (up to):	\$7,500.00
Minus Settlement Administrator costs (up to):	\$10,000.00
Minus PAGA payment to the LWDA:	\$30,000.00
Net Settlement Amount:	\$345,000.00

1. The Settlement Provides for Reasonable Monetary Payments

After deducting amounts for court-approved attorneys' fees and costs, enhancement payment, costs of settlement administration, and the PAGA payment to the LWDA, the Settlement requires Shane Co. to pay a Net Settlement Amount of approximately \$345,000.00 to the Settlement Class. *See* Settlement § 6.A.

Shane Co.'s records indicate that there are approximately 261 potential Settlement Class members who worked a combined 20,833 workweeks during the Class Period. Schmidt Decl., ¶ 22; Settlement § 11.A.i. Based on the allocations of the Net Settlement Amount, participating employees will receive, on average, a payment of approximately \$1,321.84. Schmidt Decl., ¶ 22. Settlement Class members will have 60 calendar days from the mailing of the Class Notice to opt-out or object to the Settlement, thereby providing ample time to review the Class Notice without unduly delaying the Settlement. *See* Settlement § 11.D. Those Settlement Class members who do not opt-out of the Settlement will be bound by its terms and will release all claims against Shane Co. that were asserted or could have been asserted based on the operative facts alleged in the Lawsuit during the Class Period. *Id.*, § 3. The release will run from February 26, 2016 through the date of preliminary approval. *Id.*, § 2.

2. Attorneys' Fees, Costs, and Representative Enhancement Payment

As part of the Settlement, Plaintiff will apply for an enhancement payment at the time of seeking final approval of the Settlement in the total amount of \$7,500.00 for her service to the

1 Settlement Class and her general release of all claims (known or unknown) against Shane Co. *See*
2 Settlement §§ 4, 8; Schmidt Decl., ¶ 23. “[I]ncentive awards are fairly typical in class action cases
3 . . . and are intended to compensate class representatives for work done on behalf of the class
4 [and] to make up for financial or reputational risk undertaken in bringing the action.” *In re*
5 *Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th 1380, 1393-94. Plaintiff’s requested
6 enhancement payment is intended to recognize the significant benefits conferred upon the
7 Settlement Class due to the time and effort that Plaintiff expended on behalf of the Settlement
8 Class, including providing factual information and documents to her attorneys, responding to
9 Shane Co.’s informal discovery requests, which requested Plaintiff’s phone records and other
10 private information from her social media accounts, identifying potential witnesses, and
11 participating in in-person and telephonic meetings with her attorneys to discuss the claims and
12 theories at issue in the litigation, as well as the significant risks Plaintiff undertook by agreeing
13 to serve as the named plaintiff in this case, as well as the fact that Plaintiff agreed to a general
14 release of all claims subject to a waiver of California Civil Code section 1542. Settlement § 4;
15 Schmidt Decl., ¶ 23; Declaration of Cheyenne Robles (“Robles Decl.”), ¶ 3.

16 Class Counsel will also apply for an attorneys’ fee award of \$210,000.00 (one-third of the
17 GSP), and up to \$27,500.00 in verified costs. *See* Settlement, § 7; Schmidt Decl., ¶ 24. Plaintiff
18 submits that the requested fee is fair compensation for undertaking complex, risky, expensive,
19 and time-consuming litigation on a purely contingent fee basis. Class Counsel incurred substantial
20 attorneys’ fees conducting pre-filing investigation, analyzing Plaintiff’s claims, conducting legal
21 research and analysis, reviewing documents and data produced by Shane Co., responding to Shane
22 Co.’s informal discovery requests, building a comprehensive damages model, preparing for and
23 attending mediation, negotiating and preparing the long-form Settlement Agreement, preparing
24 this motion for preliminary approval, and otherwise litigating the case. Schmidt Decl., ¶ 24. Class
25 Counsel will also expend future attorney time in attending the hearing on this Motion, overseeing
26 the Notice process, drafting the Final Approval Motion and supporting documents, and attending
27 the Final Approval hearing, among other tasks. *Id.*

28 Both California and federal courts have recognized that an appropriate method for

1 awarding attorneys' fees in class actions is to award a percentage of the "common fund" created
2 as a result of the settlement. *See Laffitte v. Robert Half Int'l Inc.* (2016) 1 Cal.5th 480, 506 ("the
3 percentage of fund method survives in California class action cases..."); *Wershba v. Apple*
4 *Computer, Inc.* (2001) 91 Cal.App.4th 224, 254 (recognizing both the "percentage of recovery"
5 and "lodestar/multiplier" methods). Historically, courts have awarded percentage fees in the range
6 of 20% to 50%, depending on the circumstances of the case. *See 4 Newberg on Class Actions* §
7 14.6 (4th Ed. 2013) ("No general rule can be articulated on what is a reasonable percentage of a
8 common fund. Usually 50% of the fund is the upper limit on a reasonable fee award from a
9 common fund in order to assure that the fees do not consume a disproportionate part of the
10 recovery obtained for the class, although somewhat larger percentages are not unprecedented.").

11 Class Counsel submits that the request for attorneys' fees is reasonable when viewed as
12 an overall percentage of the settlement (one-third) in light of the substantial risks, including the
13 possibility that the Lawsuit could not move forward as a class action, as well as the significant
14 work undertaken, the extremely positive results obtained for the class, and the efficiency with
15 which the Parties conducted the litigation. Should the Court grant preliminary approval, Class
16 Counsel will seek an award of attorneys' fees and verified litigation costs at the time of seeking
17 final approval of the Settlement.

18 **IV. ARGUMENT**

19 **A. PRELIMINARY APPROVAL IS WARRANTED**

20 California Rule of Court 3.769 conditions the settlement of a class action on court
21 approval, which is generally evaluated under the federal standards applicable under Rule 23 of
22 the Federal Rules of Civil Procedure. *See Reed v. United Teachers Los Angeles* (2012) 208
23 Cal.App.4th 322, 337 (stating that Rule 3.769 requires the trial court to determine "that the
24 settlement is fair, reasonable and adequate to all concerned"); *Hanlon v. Chrysler Corp.* (9th Cir.
25 1998) 150 F.3d 1011, 1026 (stating that Rule 23(e) requires the trial court to determine "whether
26 a proposed settlement is fundamentally fair, adequate, and reasonable"). Settlement is the
27 preferred means of dispute resolution, particularly in complex class action litigation. *See In re*
28 *Syncor ERISA Litigation* (9th Cir. 2008) 516 F.3d 1095, 1101. The Court's role in evaluating a

1 proposed settlement is limited to ensuring that the agreement taken as a whole is fair and is not
2 the product of fraud or collusion between the negotiating parties. *See e.g., Hanlon, supra*, 150
3 F.3d at 1027. There is an initial presumption of fairness when the settlement agreement was
4 negotiated at arm's length by class counsel. *See Kullar v. Foot Locker Retail, Inc.* (2008) 168
5 Cal.App.4th 116, 130.

6 **1. Standard for Preliminary Approval**

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

16 **a. The Strength of Plaintiff's Case**

17 Class Counsel carefully vetted the claims at issue, reviewed timekeeping and payroll
18 records as well as relevant policy documents, and conducted a detailed analysis of that data to
19 create a comprehensive damages model for Shane Co.'s liability. *See Schmidt Decl.*, ¶¶ 9-20.
20 Although Plaintiff steadfastly maintains that her claims are meritorious, Plaintiff acknowledges
21 that there were substantial risks and uncertainty in proceeding with class certification and trial.
22 As explained in detail in section II.B., *supra*, Shane Co. presented numerous defenses to
23 Plaintiff's claims, both on the merits and with respect to class certification. Although Plaintiff
24 was prepared to litigate these claims through class certification and, ultimately, through trial,
25 given the amount offered in settlement, Plaintiff predicted that it was unlikely that further
26 litigation would result in a substantially more beneficial result for the Settlement Class. Thus, this
27 factor supports preliminary approval of the Settlement.

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

2 Although the Parties had not yet commenced formal discovery, the Settlement was
3 reached after a significant informal exchange of timekeeping and payroll records and other
4 relevant information for mediation purposes. Schmidt Decl., ¶ 20. Absent settlement, the Parties
5 would need to spend substantial time and resources to complete formal written and deposition
6 discovery and prepare the case for class certification, summary judgment or adjudication, and
7 trial. *Id.* This Settlement avoids the considerable attorneys' fees and costs associated with
8 conducting formal discovery, moving for class certification and summary judgment or
9 adjudication, and ultimately, trial, as well as the risks and the accompanying burden of continued
10 litigation on the Court.

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

12 Prior to reaching the Settlement, Plaintiff had not yet filed her motion for class
13 certification. Considering Shane Co.'s arguments and defenses against certification, there was a
14 legitimate risk that the Court may deny certification of one or more of Plaintiff's claims,
15 preventing the matter from continuing on a classwide basis. Thus, this factor supports preliminary
16 approval of the Settlement.

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

18 This proposed Settlement provides a fair and reasonable monetary recovery for the
19 Settlement Class in the face of disputed claims. After analyzing the data provided by Shane Co.
20 prior to mediation, Plaintiff prepared a class-wide exposure analysis and forecasted the Settlement
21 Class' expected recovery for each claim as follows:

22 Meal Period Violations: \$75,904

23 Plaintiff alleges that despite Shane Co.'s failure to provide full, 30-minute first meal
24 periods commencing before the end of the fifth hour of work as well as second meal periods to
25 employees who worked shifts in excess of 10.0 hours, Shane Co only paid employees a meal
26 period premium when the employee's meal period commenced after the end of the *sixth* hour of
27 work, rather than in all instances in which the employee's meal period commenced after the end
28 of the *fifth* hour of work. *See* Schmidt Decl., ¶ 9. Based on the records provided by Shane Co. and

1 Plaintiff's expert's analysis, Plaintiff estimated Shane Co.'s potential exposure for meal periods
2 at \$233,550 (calculated as follows: (13,214 non-compliant meal periods – 3,693 meal period
3 premiums paid) x \$24.53 average premium). *Id.*

4 Shane Co. maintains that it provided all legally compliant meal periods to employees and
5 that any missed or non-compliant meal periods were the result of employee choice, not Shane
6 Co.'s policy. *See Brinker, supra*, 53 Cal.4th at 1040 (holding that where employees were
7 "provided" the opportunity to take compliant breaks, whether they took a break or not was
8 immaterial); Schmidt Decl., ¶ 10. Shane Co. also contends that putative class members waived
9 their second meal periods on shifts in excess of 10.0 hours (but less than 12.0 hours). Schmidt
10 Decl., ¶ 10. Lastly, Shane Co. maintains Plaintiff's meal period claim is not suited for class
11 certification, since individual inquiries would be required to assess whether meal periods were
12 waived, and the reasons why a particular employee recorded a non-compliant meal period or
13 missed a meal period on a particular shift. *Id.* Given these potential defenses, Plaintiff discounted
14 Shane Co.'s maximum exposure by 50% for the risk of non-certification and 35% for the risk of
15 being unsuccessful on the merits or obtaining reduced damages, to arrive at an estimated exposure
16 of \$75,904. *Id.*, ¶ 9.

17 **Rest Period Violations: \$235,776**

18 Plaintiff alleges that Shane Co. maintained an unlawful on-premises rest period policy and
19 failed to authorize and permit all duty-free 10-minute rest periods for every four hours worked,
20 including third rest-periods on shifts in excess of 10.0 hours. *See* Schmidt Decl., ¶ 11. Based on
21 Plaintiff's testimony that she was not provided with at least one legally compliant rest period at
22 least twice per workweek (or 40% of her shifts), Plaintiff calculated Shane Co.'s potential liability
23 for rest period violations as \$982,402 (calculated as follows: ((101,625 shifts in excess of 3.5+
24 hours x 40% violation rate) – 601 rest period premiums paid) x \$24.53 average premium). *Id.*
25 Shane Co. contends it authorized employees to take all required rest periods and argues that it did
26 not discourage or impede employees from taking rest periods off-premises. *Id.*, ¶ 13. Shane Co.
27 further argues that it paid employees a rest period premium when they were not provided with
28 compliant rest periods as required under the applicable wage order. *Id.* Shane Co. argues that

1 Plaintiff's rest period claim is inherently unsuited for class treatment as it would require
2 individualized inquiries to determine whether a certain rest period was denied on a given shift,
3 and whether a missed rest period was the result of individual employee choice, which would
4 devolve into an unmanageable series of mini-trials. *Id.* Plaintiff discounted Shane Co.'s maximum
5 exposure by 60% for risk of non-certification and 40% for risk of being unsuccessful on the
6 merits, to arrive at an estimated exposure of \$235,776. *Id.*, ¶ 11.

7 **Unpaid Meal and Rest Period Premiums Based on Regular Rate Miscalculation: \$2,954**

8 Plaintiff alleges that Shane Co. underpaid meal and rest period premiums due to its failure
9 to properly include the value of earned non-discretionary bonus payments in the calculation of
10 the regular rate for meal and rest period premium purposes. Schmidt Decl., ¶¶ 9, 11. Based on the
11 records provided by Shane Co., Plaintiff's expert determined that Shane Co. underpaid employees
12 approximately \$6,563.36 due to its failure to include the value of its non-discretionary bonuses
13 in the regular rate of pay. *Id.*, ¶ 12 However, Shane Co. maintains that the "regular rate of pay"
14 for the purposes of overtime is different than the "regular rate of compensation" for the purposes
15 of meal and rest break premiums, and therefore, Shane Co. is not required to include non-
16 discretionary bonuses in its calculation of the "regular rate of compensation." *Id.*, ¶ 10, 13. Given
17 this defense and that this is an open issue of law at this moment as the California Supreme Court
18 recently granted review of *Ferra* to answer this exact question, Plaintiff discounted the potential
19 liability by 10% for a risk of non-certification and by 50% for the risk of losing on the merits, to
20 arrive at an estimated exposure of \$2,954. *Id.*, ¶ 12.

21 **Waiting Time Penalties: \$78,179**

22 According to the data produced by Shane Co., approximately 166 putative class members
23 separated their employment with Shane Co. during the relevant time period. Schmidt Decl., ¶ 15.
24 Plaintiff therefore calculated Shane Co.'s maximum waiting time penalty exposure at \$977,242
25 (166 former employees x \$24.53 average hourly rate x 8 hours per day x 30 days). *Id.* Shane Co.
26 maintains that waiting time penalties are not appropriate in this matter as meal and rest period
27 claims cannot support such penalties. *See Ling, supra*, 245 Cal.App.4th at 1261 (holding that meal
28 and rest period premium pay compensates for the non-provision of meal and rest periods, not for

the ‘nonpayment of wages’ as required by Labor Code section 203); Schmidt Decl., ¶ 18. Shane Co. also argues it attempted to pay its employees all final wages owed in good faith upon their separation, therefore precluding a finding of wilfulness which is necessary to obtain waiting time penalties under 8 Cal. Code Regs. section 13520. Schmidt Decl., ¶ 18. Plaintiff discounted the value of this claim by 60% for the risk of non-certification of the underlying claims, and 80% for a risk of being unsuccessful on the merits (including a failure to establish wilfulness), for an estimated recovery on this claim of \$78,179. *Id.*, ¶ 15.

Wage Statement Violations: \$209,844

According to Shane Co.’s data, 136 putative class members received 3,954³ wage statements during the 1-year time period associated with wage statement penalties. Schmidt Decl., ¶ 16. Plaintiff calculated Shane Co.’s maximum wage statement exposure at \$388,600 (calculated as follows: ((136 “initial” violations x \$50) + (3,818 “subsequent” violations x \$100)). *Id.* Shane Co. argues that meal and rest period violations (Plaintiff’s primary claims) cannot support derivative wage statement penalties. *Naranjo v. Spectrum Security Services, Inc.*, (2019) 40 Cal.App.5th 444, 474. Shane Co. argues that employees could not show they “suffer[ed] injury” as a result of these violations, as required by Labor Code § 226(e). Schmidt Decl., ¶ 18. In light of all of these arguments, as well as the potential failure to prove that the violations were “knowing and intentional” as required by Labor Code § 226(e), Plaintiff discounted the value of this claim by 10% for the risk of non-certification of the underlying claims and discounted 40% for a risk of being unsuccessful on the merits, for an estimated exposure of \$209,844. *Id.*, ¶ 16.

PAGA Penalties: \$49,425

The success of Plaintiff’s PAGA claim is wholly dependent upon the success of her underlying claims occurring within the one-year statute of limitations applicable to the PAGA. Schmidt Decl., ¶ 17. Assuming that Plaintiff could prove at least one underlying Labor Code violation in each pay period within the PAGA period, Plaintiff estimates Shane Co.’s maximum PAGA exposure at \$395,400 (calculated from 3,954 pay periods at \$100 per violation). *Id.*; see

³ Of those 3,954, only 2,189 wage statements failed to include the applicable hourly rate for “Bonus OT” as well as the corresponding number of “Bonus OT” hours worked in violation Labor Code § 226(a). *Id.*

1 also *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1207 (2008) (finding “initial” violation
2 rate applies until employer is notified that it is violating a Labor Code provision). However, these
3 penalties derived from the underlying wage and hour violations discussed above, which Shane
4 Co. disputes. *See e.g., Green v. Lawrence Service Co.* (C.D. Cal. 2013) 2013 WL 3907506, *5,
5 n.5 (explaining that a PAGA claim’s success was determined by the merits of its underlying
6 claims). Plaintiff also recognizes that the Court has discretion to reduce any award of PAGA
7 penalties where it views them as duplicative. Schmidt Decl., ¶ 17; *see also Carrington v.*
8 *Starbucks Corp.* (2018) 30 Cal.App.5th 504, 529 (affirming reduction of PAGA penalties to \$5
9 per initial violation); *Fleming v. Covidien, Inc.* (C.D. Cal. Aug. 12, 2011) Case No. ED CV 10-
10 01487 RGK (OPx), 2011 WL 7563047 at *4 (reducing PAGA penalties from \$2.8 million to
11 \$500,000). Plaintiff therefore discounted the maximum figure by 50% for the risk of being unable
12 to proceed on a representative basis and an additional 75% to account for the likelihood of this
13 Court reducing penalties, to arrive at an estimated exposure of \$49,425. Schmidt Decl., ¶ 17.

14 Using these estimated figures for each of the claims described above, Plaintiff predicts
15 that a possible recovery for the Settlement Class would be approximately \$652,082. Schmidt
16 Decl., ¶ 19. The proposed recovery to the Settlement Class of \$630,000 represents approximately
17 97% of Plaintiff’s projected potential recovery, while avoiding the further expense and serious
18 risk of proceeding towards class certification and trial. *Id.* Taking into account the risk of non-
19 certification, failure to prevail on the merits, and the Court’s power to reduce the civil penalties,
20 the proposed Settlement falls well within the realm of being fair, reasonable, and adequate. *See*
21 *e.g., Altamirano v. Shaw Industries, Inc.*, (N.D. Cal. 2015) 2015 WL 4512372, at *9 (preliminarily
22 approving wage and hour class action settlement, stating, “[a]lthough 15% represents a modest
23 fraction of the hypothetical maximum recovery estimated by Plaintiff, that figure is sufficient for
24 the Court to grant preliminary approval given the merits of Plaintiff’s claims.”). Preliminary
25 approval is appropriate since the Settlement will provide significant monetary relief to Settlement
26 Class members without the uncertainty, delay, and additional expense of further litigation.

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

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

1 settlement that fairly reflects each party's expected outcome in litigation." *In re Pacific*
2 *Enterprises Securities Litigation* (9th Cir. 1995) 47 F.3d 373, 378. Here, Plaintiff is represented
3 by competent and experienced counsel who possess extensive experience litigating wage and hour
4 class actions from both the plaintiff and defense side and have been appointed as class counsel in
5 numerous cases alleging similar claims. *See* Schmidt Decl., ¶¶ 2-8. Class Counsel, with the help
6 of their expert, conducted an extensive review of Shane Co.'s records produced for mediation as
7 well as relevant policies in effect during the Class Period and drew on their extensive experience
8 in similar cases to assess the strengths and weaknesses of Plaintiff's case. *See* Schmidt Decl., ¶
9 20. The Settlement was also reached with the input and assistance of Steven G. Mehta, Esq., an
10 experienced and highly respected neutral wage and hour class action mediator. *Id.*, ¶ 22. This
11 factor strongly supports preliminary approval of the Settlement. *See Kullar, supra*, 168
12 Cal.App.4th at 130.

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

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

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

20 The proposed Settlement reflects an excellent recovery for the Settlement Class members
21 in light of the significant risks of litigation. The proposed Settlement will provide substantial
22 compensation for contested claims and derivative penalties, and the overall average payment of
23 \$1,321.84 greatly exceeds the average payment achieved in other wage and hour class action
24 settlements.⁴ Thus, Plaintiff submits that the proposed Settlement is within the range of possible
25

26 ⁴ *See e.g., Bercea v. AE Retail West*, Case No. 34-2012-00123947 (Sacramento County Super. Ct. May 9,
27 2012) (average net recovery of approximately \$105); *Ressler v. Federated Department Stores, Inc.*, Case
28 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

1 approval, such that notice should be provided to the Settlement Class members so they can
2 consider the Settlement. The Court will have the opportunity to again assess the reasonableness
3 of the Settlement after the Settlement Class members have had the opportunity to opt-out or
4 object.

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

7 This proposed Settlement is entitled to an initial presumption of fairness (*see Kullar,*
8 *supra*, 168 Cal.App.4th at 130) as it is the result of the exchange of substantial information,
9 including timekeeping and payroll data which was analyzed by Plaintiff's counsel and an expert
10 with a Ph.D. in economics, arm's length negotiations by counsel; mediation before an experienced
11 wage and hour class action mediator; and additional months of finalizing the terms of the long-
12 form Settlement Agreement. *See* Schmidt Decl., ¶¶ 20-21. Thus, the proposed settlement is
13 entitled to an initial presumption of fairness. *See Kullar, supra*, 168 Cal.App.4th at 130.

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

15 The Settlement will provide substantial tangible monetary relief to Settlement Class
16 members. Moreover, the amounts proposed for Plaintiff's enhancement payment, settlement
17 administration costs, attorneys' fees and costs to Class Counsel, and the PAGA payment to the
18 LWDA are all reasonable and appropriate. Because the Settlement is devoid of obvious
19 deficiencies, this final factor supports preliminary approval.

20 **B. THE COURT SHOULD CERTIFY THE PROPOSED SETTLEMENT**
21 **CLASS**

22 The proposed Settlement Class satisfies the criteria for certification of a settlement class
23 under California law because: (1) the individuals in the Settlement Class are so numerous that
24 joinder would be impractical; (2) common questions of law and fact predominate over individual
25 questions such that class certification is the most efficient and desirable way to maintain this
26 litigation; (3) Plaintiff's claims are typical of the claims of the absent Settlement Class members;
27 and (4) Plaintiff and her counsel will fairly and adequately represent the interests of the absent

28 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").

Settlement Class members. *See* Cal. Code Civ. Proc. § 382.

1. The Proposed Class is Ascertainable and Numerous

A class is “ascertainable” where the members “may be readily identified without unreasonable expense or time by reference to official [or business] records.” *See Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 919 (alterations in original). Here, the proposed Settlement Class is defined as all current and former non-exempt employees who worked for Shane Co. in California from February 26, 2016 through the date of preliminary approval. According to Shane Co.’s records, the Settlement Class consists of approximately 261 individuals, rendering it impracticable to gather all the Settlement Class members and bring them before the Court. *See* Schmidt Decl., ¶ 22. Thus, the proposed Settlement Class satisfies the numerosity requirement.

2. Common Issues of Law and Fact Predominate

The focus in a certification dispute is not on the merits of the case, but rather on what types of questions, “common or individual,” are likely to arise in the action. *See Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327. Here, Plaintiff’s claims are predicated on uniform company policies, principally revolving around Shane Co.’s meal and rest period policies and practices. These claims include a failure to provide all meal periods, failure to authorize and permit all rest periods, failure to pay meal and rest period premiums at the applicable regular rate of compensation, and failure to issue accurate itemized wage statements. These types of claims are commonly held to be proper for class certification. *See, e.g., Brinker, supra*, 53 Cal.4th at 1032-34 (“The theory of liability—that Brinker has a uniform policy, and that that policy...allegedly violates the law—is by its nature a common question eminently suited for class treatment.”); *Bradley v. Networkers Int’l, LLC* (2012) 211 Cal.App.4th 1129, 1150 (certifying meal and rest period claims); *Bluford, supra*, 216 Cal.App.4th at 871 (reversing denial for certification of rest period claim).

3. The Claims of the Named Plaintiff Are Typical

The typicality requirement is satisfied where class representatives have claims that are typical of those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1347. Here, Plaintiff’s claims are typical of those held by the members of the

1 proposed Settlement Class. Like other Settlement Class members, Plaintiff was employed by
2 Shane Co. in California during the Class Period. *See* Schmidt Decl., ¶ 8; Robles Decl., ¶ 2.
3 Plaintiff was not provided all meal periods and was not authorized and permitted to take all rest
4 periods. Robles Decl., ¶ 2. Plaintiff was therefore impacted by the same challenged policies that
5 allegedly injured the Settlement Class as a whole and were subject to the same defenses forwarded
6 by Shane Co. as to the Settlement Class and is therefore typical.

7 **4. Plaintiff and Class Counsel Will Fairly and Adequately Represent the**
8 **Class**

9 The adequacy of representation requirement examines conflicts of interest between named
10 parties and the class(es) they seek to represent. *See Capitol People First v. Department of*
11 *Developmental Services* (2007)155 Cal.App.4th 676, 697. Here, Plaintiff and Class Counsel will
12 adequately represent the Settlement Class, as there are no conflicts between Plaintiff and the
13 Settlement Class she seeks to represent, and Plaintiff possesses claims that are in line with those
14 of the Class. *See McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450 (finding adequacy
15 satisfied where there was no indication that the plaintiff's counsel were not qualified and the
16 named plaintiff had no interests antagonistic to those of the proposed class). Class Counsel also
17 has extensive experience in wage and hour class action litigation. *See* Schmidt Decl., ¶¶ 2-8;
18 Haines Decl., ¶¶ 2-8; McIntosh Decl., ¶¶ 2-5.

19 **C. THE COURT SHOULD ORDER DISTRIBUTION OF THE PROPOSED**
20 **CLASS NOTICE**

21 This Court should order distribution of the proposed Class Notice to the Settlement Class
22 by first class mail, postage prepaid, using the last known mailing address information provided
23 by Shane Co. This manner of giving notice is the "best notice practicable" under the circumstances
24 because it provides "individual notice to all members who can be identified through reasonable
25 effort." *See Eisen v. Carlisle and Jacquelin* (1974) 417 U.S. 156, 173. Here, Plaintiff proposes
26 that the settlement be administered by Phoenix Settlement Administrators, an experienced class
27 action settlement administrator. *See* Declaration of Jodey Lawrence and attached exhibits.
28 Settlement Class members' addresses will be ascertainable through Shane Co.'s personnel and
payroll records, which Shane Co. will provide to PSA within seven (7) calendar days after
preliminary approval of the Settlement. *See* Settlement § 11.A. To the extent that any notices are

1 returned, PSA will run those addresses through the National Change of Address database and/or
2 conduct skip traces to obtain current address information. *Id.* § 11.C. The content of the proposed
3 Class Notice satisfies California Rule of Court 3.766(d) because it advises putative Settlement
4 Class members of the nature of the claims, basic contentions and denials of the parties, the key
5 terms of the Settlement, the uniform 60-day deadline to opt-out or object to the Settlement and
6 the procedure by which to do so, explains the recovery formula and expected recovery amount
7 for each Settlement Class Member, and advises them that they will be bound by the terms of the
8 Settlement if they do not opt-out. *See* Schmidt Decl., Ex. 2 (Class Notice). The proposed Class
9 Notice will also notify Settlement Class members of the final approval hearing date and provide
10 the Settlement Class contact information for Class Counsel and advise Settlement Class members
11 that they may enter an appearance through counsel if they wish to. *Id.* This manner of giving
12 notice satisfies California Rule of Court 3.766(e) as the most reliable and cost-effective method
13 of reaching Settlement Class members. Additionally, because the proposed Settlement includes
14 settlement of Plaintiff's representative PAGA claim, notice of the Settlement has been submitted
15 to the LWDA. *See id.*, Ex. 3; Proof of Service.

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

17 Finally, this Court should set a hearing for final approval of the Settlement on a date
18 appropriately scheduled to follow the deadline by which Settlement Class members must file
19 objections to the Settlement or opt-out. *See* California Rule of Court 3.769.

20 **V. CONCLUSION**

21 For the foregoing reasons, Plaintiff respectfully requests that the Court preliminarily
22 approve the proposed Settlement, provisionally certify the Settlement Class, and enter the
23 proposed order submitted concurrently herewith.

24
25 Dated: January 5, 2021

Respectfully submitted,
HAINES LAW GROUP, APC

26
27 By:



28 Fletcher W. Schmidt
Attorneys for Plaintiff