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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF RIVERSIDE

RABIH MUSTAPHA, as an individual and on
behalf of all other aggrieved employees,

Plaintiff,

vs.

PALM SPRINGS MOTORS, INC., a California
Corporation; and DOES 1 through 100,

Defendants.

Case No. RIC2003035

*[Case assigned for all purposes to the
Hon. Sunshine S. Sykes; Dept. 6]*

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

Date: January 31, 2022

Time: 8:30 a.m.

Dept: 6

Reservation ID: 031052319514

Complaint Filed: August 4, 2020

Trial Date: None set.

1 PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court,
2 on January 31, 2022, at 8:30 a.m. in Department 6 of the above-entitled Court, located at 4050
3 Main Street, Riverside, California 92501, Plaintiff Rabih Mustapha (“Plaintiff”), individually and
4 on behalf of a class of similarly situated individuals, will and hereby does move this Court for:

- 5 1. Preliminary approval of the proposed class settlement of this lawsuit;
- 6 2. Pursuant to section 382 of the California Code of Civil Procedure, provisional
7 certification of the following Settlement Class defined as follows:
8 All individuals employed by Defendant Palm Springs Motors, Inc. as
9 commission paid employees in California who worked at any time from
10 May 27, 2019 through the date of the Court Order granting preliminary
11 approval of the Settlement (the “Class Period”).
- 12 3. Preliminary appointment of Plaintiff Rabih Mustapha as Class Representative;
- 13 4. Preliminary appointment of Paul K. Haines, Sean M. Blakely, and Neil M. Larsen of
14 Haines Law Group, APC as Class Counsel;
- 15 5. The scheduling of a hearing to consider whether the Settlement should be finally
16 approved and to permit an enhancement payment to Plaintiff, Settlement
17 Administrator costs, civil penalties payable to the Labor & Workforce Development
18 Agency (“LWDA”), and attorneys’ fees and costs to Class Counsel;
- 19 6. Appointment of Phoenix Settlement Administrators as the third-party Settlement
20 Administrator for mailing notices; and
- 21 7. Approval of the proposed Class Notice and an order that it be disseminated to the
22 proposed Settlement Class as provided in the Settlement Agreement.

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1 This Motion is based on this notice of motion, the attached memorandum of points and
2 authorities, the declarations of Paul K. Haines, Sean M. Blakely, and Neil M. Larsen, Plaintiff
3 Rabih Mustapha, and 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 6, 2022

Respectfully submitted,
HAINES LAW GROUP, APC

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9 By: 
10 Paul K. Haines
11 Sean M. Blakely
12 Attorneys for Plaintiff
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Rabih Mustapha (“Plaintiff”) seeks preliminary approval of a class action
4 settlement with Defendant Palm Springs Motors, Inc. (hereinafter “Defendant”). On August 6,
5 2021, Plaintiff filed the operative First Amended Class and Representative Action Complaint
6 (“FAC”) which alleges class-wide claims for: (1) failure to pay all minimum wages; (2) failure to
7 pay all overtime wages; (3) failure to provide all meal periods; (4) failure to authorize and permit
8 all rest periods; (5) failure to furnish accurate, itemized wage statements; (6) failure to reimburse
9 necessary business expenses; (7) failure to pay timely pay all wages owed upon separation of
10 employment; (8) violations of the Business & Professions code; and (9) civil penalties under the
11 PAGA.

12 Plaintiff now respectfully requests that this Court preliminarily approve this non-
13 reversionary, common-fund class action settlement¹, in which Defendant has agreed to pay a
14 Gross Settlement Amount (“GSA”) of Two Hundred Twenty-Five Thousand Dollars and Zero
15 Cents (\$225,000.00) on behalf of the following Settlement Class:

16 All individuals employed by Defendant Palm Springs Motors, Inc. as
17 commission paid employees in California who worked at any time from
18 May 27, 2019 through the date of the Court Order granting preliminary
19 approval of the Settlement (the “Class Period”).

20 The \$225,000 GSA represents a substantial benefit to Class Members who will be
21 agreeing to a release of only those claims that were asserted in this litigation. After deductions for
22 Plaintiff’s requested enhancement payment, settlement administrator costs, the amount set aside
23 as PAGA civil penalties, and requested attorneys’ fees and costs to Class Counsel, the remaining
24 amount (the “Net Settlement Amount”) will be distributed to all Class Members who do not opt-
25 out of the Settlement based on the proportionate number of pay periods worked by each Class

26 ¹ The Stipulation of Settlement (“Settlement”) is attached to the Declaration of Sean M. Blakely
27 as Exhibit A. The proposed Class Notice, Request for Exclusion Form, and Objection Form are
28 attached to the Settlement as Exhibits 1, 2, and 3, respectively, and are also attached to the
[Proposed] Order Granting Preliminary Approval of Class Action Settlement submitted with this
motion. All defined terms in this motion have the same definition as that in the Settlement.

1 Member during the Class Period. Former employees with standing for waiting time penalties will
2 also receive additional consideration for their release of waiting time penalty claims.
3 Significantly, Class Members do not need to file a claim form in order to receive a Settlement
4 Award, as all Class Members will automatically receive a Settlement Award unless they
5 affirmatively opt-out. There are approximately 48 Class Members, and the average Settlement
6 Award is projected to be approximately **\$2,171.88**. This is an excellent result for Class Members,
7 especially given that Defendant has represented that virtually all of the Class Members signed
8 enforceable arbitration agreements, which significantly reduced the value of their claims given
9 that it is highly unlikely that they would be able to pursue their claims outside of individual
10 arbitrations.

11 The proposed Settlement is well within the range of possible approval in light of the
12 significant legal and factual obstacles that Plaintiff faced, the risks and costs of further litigation,
13 and the significant monetary benefits to be received by Plaintiff and the Settlement Class. For the
14 reasons discussed herein, Plaintiff respectfully requests that the Court grant preliminary approval
15 of the Settlement.

16 **II. SUMMARY OF THE LITIGATION**

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

18 Defendant owns and operates automotive retailers in California, including Palm Springs
19 Ford, Palm Springs Lincoln, and Palm Springs Mazda. *See* Declaration of Sean M. Blakely
20 (“Blakely Decl.”), ¶ 7. Plaintiff and Class members worked for Defendant in California as
21 commission-paid employees during the Class Period. *Id.*

22 On August 4, 2020, Plaintiff filed a Representative Action Complaint against Defendant
23 for civil penalties under the Private Attorneys’ General Act, California Labor Code § 2698 *et seq.*
24 (“PAGA”), premised on Defendant’s alleged Labor Code violations. Blakely Decl., ¶ 8. As part
25 of the Settlement, the Parties agreed for Plaintiff to file a First Amended Class and Representative
26 Action Complaint (“FAC”) to add class-wide claims for: (i) minimum wage violations; (ii) failure
27 to pay all overtime wages; (iii) meal period violations; (iv) rest period violations; (v) wage
28 statement violations; (vi) failure to reimburse necessary business expenses; (vii) waiting time

penalties; and (viii) unfair competition. *Id.* Plaintiff filed the FAC on August 6, 2021. *Id.*

B. PLAINTIFF’S CLAIMS AND DEFENDANT’S DEFENSES

1. Arbitration Agreements

As a preliminary matter, Defendant asserts that nearly all Class Members signed valid and enforceable arbitration agreements with class action waivers. Blakely Decl., ¶ 12. Setting aside any arguments as to the merits of Plaintiff’s claims, Defendant contends that absent settlement, a class-wide recovery was not possible and that only PAGA civil penalties could potentially be recovered on behalf of the Settlement Class. *Id.* Accordingly, Defendant maintains that absent its agreement to not raise the arbitration agreements as a defense, any recovery to the Class Members would be significantly smaller per Class Member.

2. Commission Claims

Plaintiff asserts that Defendant failed to separately compensate Class Members for all required rest periods when they were compensated on a commission-only basis. Blakely Decl., ¶ 13; *see Vaquero v. Stoneledge Furniture LLC*, 9 Cal.App.5th 98, 114 (2017) (holding that a commission pay plan was unlawful because it did not separately compensate for rest periods, stating “[w]e agree with *Bluford* that Wage Order 7 requires employers to separately compensate employees for rest periods if an employer’s compensation plan does not already include minimum hourly wage for such time”). While Plaintiff acknowledges that Defendant separately compensated its commissioned-based employees for *some* rest periods during the Class Period, Plaintiff alleges that Defendant did not correctly calculate rest period pay owed in *all* pay periods during the Class Period. Blakely Decl., ¶ 13. Plaintiff further maintains that Defendant failed to separately compensate Class Members who were paid on a commission-only basis for “non-productive” time, such as time spent attending meetings, and waiting for customers. Blakely Decl., ¶ 14; *see Gonzalez v. Downtown LA Motors, LP*, 215 Cal.App.4th 36, 40-41 (2013) (“DTLA”) (“...we conclude that class members [paid on a piece-rate basis] were entitled to separate hourly compensation for time spent waiting for repair work or performing other non-repair tasks directed by the employer...”); *see also Vaquero v. Ashley Furniture Industries, Inc.*, 824 F.3d 1150 (9th Cir. 2016) (affirming certification of a class of commission-only “sales

associates” based on the failure to compensate for “non-sales” time).

Defendant argues that its Commission Pay Plans comply with California law and that it has always compensated its commissioned-based employees for all required rest periods. Blakely Decl., ¶ 13. Defendant argues that at all times throughout the Class Period it has calculated separate rest period compensation for its commissioned based employees in accordance with Labor Code § 226.2. *Id.* Defendant also contends that employees experienced minimal (if any) uncompensated “non-productive” time. *Id.*, at ¶ 14. Additionally, Defendant maintains that any questions of non-productive time would be highly individualized, as employees worked in a variety of locations, and there are no records or other common evidence of time spent on potentially non-productive tasks necessary to establish class-wide liability, thereby precluding certification. *Id.*

3. Direct Wage Statement Claims

Plaintiff alleges that Defendant failed to list all hourly rates of pay and corresponding hours worked for rest and recovery periods on the wage statements issued to Plaintiff and other non-exempt employees, in violation of Labor Code § 226(a)(9). Blakely Decl., ¶ 15. Specifically, Plaintiff alleges that Defendant only lists the total amount of rest period pay earned (denoted as “Rest/Recovery” on wage statements) and does not list the rate of pay or the corresponding number of hours worked associated with rest period pay. *Id.* Because rest period compensation constitutes hours worked, Plaintiff argues Labor Code § 226(a)(9) requires that the wage statements list both the rate of pay and the number of rest period hours worked during the pay period. *Id.*

Defendant maintains that any alleged wage statement violations were not “knowing and intentional,” and Plaintiff cannot show he or other employees “suffer[ed] injury” due to the alleged wage statement violations, as required by Labor Code Section 226(e) for the imposition of penalties. Blakely Decl., ¶ 15.

4. Meal Period Claims

Plaintiff alleges that as a matter of policy and/or practice, Defendant failed to provide Plaintiff and other non-exempt employees with an opportunity to take timely, uninterrupted, and

1 duty-free thirty-minute meal periods before the end of the fifth hour of work and/or a second meal
2 period before the tenth hour of work. Blakely Decl., ¶ 16.

3 Defendant counters that it has maintained compliant written meal period policies
4 throughout the Class Period and has always provided employees the *opportunity* to take legally
5 compliant meal periods, and that they are not required to “ensure” meal periods are taken. Blakely
6 Decl., ¶ 16; *see Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004, 1038 (2012)
7 (rejecting “ensure” standard and holding employers only have to “provide” employees the
8 opportunity to take meal periods). Additionally, Defendant maintains that employees voluntarily
9 waived their second meal period when they worked shifts in excess of 10.0 hours (but less than
10 12.0 hours), as they are required to do under Labor Code § 512. Blakely Decl., ¶ 16. Finally,
11 Defendant argues that these claims are not suited for class treatment, as individual inquiries would
12 be needed to assess which employees took non-compliant meal periods or missed meal periods,
13 how many meal periods were non-compliant or missed, and the reasons why a particular employee
14 did not take a compliant meal period on a particular shift. *Id.*

15 **5. Failure To Reimburse For All Necessary Business Expenses**

16 Plaintiff further contends that he and other non-exempt employees were required to use
17 their personal cell phones for a variety of work activities, including communicating with
18 customers. Blakely Decl., ¶ 17. Despite being required to use their personal cell phones for these
19 work activities, Plaintiff alleges that Defendant failed to reimburse Plaintiff and other non-exempt
20 employees for this necessary business expense, in violation of Labor Code §§ 2802 and 2804. *Id.*;
21 Labor Code § 2802(a); *see also Cochran v. Schwan’s Home Service, Inc.*, 228 Cal.App.4th 1137
22 (2014).

23 Defendant maintains that Class Members were not required to use their personal cellular
24 phones as part of their job. Blakely Decl., ¶ 17. Defendant further argues that any expenses
25 incurred by Class Members were minimal, given the wide availability of low-cost cellular phone
26 plans. *Id.* Lastly, Defendant argues this claim is not suitable for class treatment, as it would require
27 individualized determinations as to whether each Class Member used a personal cellular phone
28 for work-related purposes, and if so, how much of that use was a reasonable percentage of their

1 individual monthly phone bill. *Id.*

2 **6. Overtime Claims**

3 Plaintiff asserts that despite Class Members occasionally working overtime hours,
4 Defendant failed to compensate Class Members for any overtime hours worked. Blakely Decl., ¶
5 18. Defendant argues that Class Members were exempt from the Wage Order’s overtime
6 requirements pursuant to the “inside sales exemption.” *Id.*; see Wage Order 4 § 3(D) (overtime
7 requirements do not “apply to any employee whose earnings exceed one and one-half (1 ½) times
8 the minimum wage if more than half of that employee’s compensation represents commissions”).
9 Defendant further argues that this claim is not suitable for class treatment as an individualized
10 inquiry would be required to determine whether the inside sales exemption was met for each Class
11 Member during each pay period in the Class Period, resulting in an unmanageable series of mini-
12 trials. Blakely Decl., ¶ 18.

13 **7. Derivative Claims Under Labor Code § 203 and the PAGA**

14 As a result of the unpaid wages and meal and rest period violations described above,
15 Plaintiff alleges that Defendant failed to comply with its final pay obligations set forth in Labor
16 Code §§ 201-203 and is liable for civil penalties under the PAGA. Blakely Decl., ¶¶ 19-20. As to
17 waiting time penalties, Defendant maintains that it possesses strong, good faith defenses to
18 Plaintiff’s underlying claims, thus precluding recovery of waiting time penalties, which are only
19 available for the “willful” failure to pay wages. *Id.*, at ¶ 19; see also 8 Cal. Code Regs. § 13520
20 (“[A] good faith dispute that any wages are due will preclude imposition of waiting time penalties
21 under Section 203 . . . A ‘good faith’ dispute that any wages are due occurs when an employer
22 presents a defense, based in law or fact which, if successful, would preclude any recovery on the
23 part of the employee.”). Defendant further argues that waiting time penalties are not recoverable
24 at all for alleged meal and rest period violations. Blakely Decl., ¶ 19; see *Naranjo v. Spectrum*
25 *Security Servs., Inc.*, 40 Cal.App.5th 444, 473-75 (2019) (review granted Jan. 2, 2020).

26 Additionally, since Plaintiff’s PAGA claim is derivative of his underlying claims,
27 Defendant asserts the PAGA claim would fail with those claims. Blakely Decl., ¶ 20; see *Price v.*
28 *Starbucks Corp.*, 192 Cal.App.4th 1136, 1147 (2011) (“Because the underlying causes of action

1 fail, the derivative UCL and PAGA claims also fail.”). Defendant also maintains that given their
2 good faith defenses, this Court would exercise its discretion to substantially reduce any PAGA
3 penalties if it were to find Defendant liable for any of Plaintiff’s claims. Blakely Decl., ¶ 20; *see*
4 Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Mgmt., Inc.* 203 Cal.App.4th 1112, 1135
5 (affirming reduction of PAGA penalties) (2012); *Fleming v. Covidien Inc.*, Case No. ED CV10-
6 01487 RGK (OPx), 2011 WL 7563047, at *4 (C.D. Cal. 2011) (reducing PAGA penalties from
7 \$2.8 million to \$500,000); *Aguirre v. Genesis Logistics*, Case No. SACV 12-00687 JVS (ANx),
8 2013 WL 10936035, at * 2-3 (C.D. Cal. 2013) (reducing PAGA penalties from \$1.8 million to
9 \$500,000).

10 **C. DISCOVERY AND MEDIATION**

11 In connection with mediation, the parties engaged in significant informal discovery,
12 including Defendant’s production of an approximate 11.6% random sampling of timekeeping and
13 payroll data for the putative class, Defendant’s relevant wage and hour policies and “Commission
14 Pay Plans,” and other relevant data and information. Blakely Decl., ¶ 22. Defendant also produced
15 a “class list” with Class Members’ hire and termination dates (if applicable). *Id.* Plaintiff
16 conducted a comprehensive analysis and extrapolation of the timekeeping and payroll data to
17 calculate Defendant’s potential exposure for each of Plaintiff’s claims. *Id.* This discovery allowed
18 the Parties to assess the merits and value of Plaintiff’s claims, the chances of certification of
19 Plaintiff’s claims, and Defendant’s potential defenses. *Id.*

20 On April 1, 2021, the Parties attended a full-day mediation with Eve Wagner, Esq., a well-
21 respected wage and hour class action mediator. Blakely Decl., ¶ 23. During mediation, the Parties
22 vigorously debated their opposing legal positions, the likelihood of certification of Plaintiff’s
23 claims, and the legal bases for Plaintiff’s claims and Defendant’s defenses. *Id.* At the conclusion
24 of mediation, Ms. Wagner issued a mediator’s proposal for a class-wide settlement, which was
25 ultimately accepted by all Parties and documented in a Memorandum of Understanding (“MOU”).
26 *Id.* During the months that followed, the Parties negotiated and finalized the long-form Settlement
27 Agreement now before this Court. *Id.*

28 ///

1 **III. THE PROPOSED SETTLEMENT**

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

3 If the Court preliminarily approves this Settlement, Defendant will pay a Gross Settlement
4 Amount (“GSA”) of \$225,000.00. *See* Settlement, § 3. Significantly, this Settlement is non-
5 reversionary, and no Class Member will have to submit a claim form to receive a Settlement
6 Award. *Id.*, at §§ 3(C), 4. Each Class Member will automatically receive a Settlement Award
7 unless they affirmatively opt out of the Settlement. *See Id.*, at § 4.

8 The monetary terms of the Settlement are summarized below:

- 9
- | | |
|---|---------------------|
| • Gross Settlement Amount (“GSA”): | \$225,000.00 |
| • Minus Court-approved attorneys’ fees (up to 1/3): | \$75,000.00 |
| • Minus Court-approved verified costs (up to): | \$15,000.00 |
| • Minus Court-approved Enhancement Payment: | \$5,000.00 |
| • Minus Amount Set Aside as PAGA penalties: | \$25,000.00 |
| • <u>Minus estimated settlement administration costs:</u> | <u>\$7,000.00</u> |
| Net Settlement Amount (“NSA”): | \$98,000.00 |
| • PLUS 25% “PAGA Amount” to Settlement Class: | \$6,250.00 |
| • Total Amount Paid to Class Members: | \$104,250.00 |
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15 **1. The Settlement Provides For Reasonable Monetary Payments**

16 After deducting amounts for the Court-approved attorneys’ fees and verified costs,
17 Plaintiff’s Class Representative Enhancement Payment, Settlement Administrator costs, and the
18 amount set aside as PAGA penalties, the Settlement requires Defendant to pay a Net Settlement
19 Amount (“NSA”) of approximately \$98,000.00 to all Class Members who do not timely opt out.
20 *See* Settlement, § 4(A). Ninety percent (90%) of the Net Settlement Amount shall be distributed
21 to all participating Class Members based on the participating Class Member’s proportionate
22 number of pay periods worked during the Class Period. *See* Settlement, § 4(B)(i). Ten percent
23 (10%) of the Net Settlement Amount shall be designated as the “Waiting Time Amount” and will
24 be distributed in equal, pro-rata shares to each participating Class Member who separated their
25 employment with Defendant at any time during the Class Period. Settlement, § 4(B)(ii). Lastly,
26 in addition to the NSA, Six Thousand Two Hundred and Fifty Dollars and Zero Cents (\$6,250.00)
27 has been designated the “PAGA Amount,” and shall be distributed to Class Members
28

proportionally based on the number of pay periods worked during the Class Period. Settlement, § 4(B)(iii).

Defendant's share of employer-side payroll taxes will be paid by Defendant separate, and in addition to, the GSA. *See* Settlement, § 3(D). The Parties propose that any uncashed checks shall be redistributed to those Class Members who have cashed their settlement checks. Settlement, § 4(E).

According to Defendant's records, there are approximately 48 total Class Members. Blakely Decl., ¶ 11. Therefore, the average Settlement Award is projected to be approximately \$2,171.88. *Id.* The lowest potential Settlement Award is estimated to be approximately \$122.22. *Id.* The highest potential Settlement Award is estimated to be approximately \$4,419.37. *Id.*

Class Members will have sixty (60) days to opt-out or object to the Settlement, thereby providing ample time to review the Class Notice without unduly delaying the Settlement. *See* Settlement, §§ 9(C)-(D). Those Class Members who do not opt-out of the Settlement will be bound by its terms and will release all claims against Defendant included within the Settlement, for the extent of the Class Period. *See* Settlement, § 2(A).

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

Plaintiff will separately apply for an enhancement payment at the time of seeking final approval of the proposed Settlement in the amount of \$5,000, for his services to the Settlement Class. *See* Settlement, § 6. "[I]ncentive awards are fairly typical in class action cases . . . and are intended to compensate class representatives for work done on behalf of the class [and] to make up for financial or reputational risk undertaken in bringing the action." *In re Cellphone Fee Termination Cases*, 186 Cal.App.4th 1380, 1393-94 (2010). As will be fully briefed at the time of final approval, Plaintiff's requested enhancement payment is intended to recognize the time and effort Plaintiff expended on behalf of the Settlement Class, including providing substantial factual information and documents to Class Counsel, attending multiple meetings with Class Counsel to discuss the claims and theories at issue in the litigation, actively participating in the prosecution of his claims, as well as the significant risks Plaintiff undertook by agreeing to serve

as the named Plaintiff in this case and the fact that Plaintiff agreed to a general release of all claims subject to a waiver of California Civil Code section 1542. Blakely Decl., ¶ 53.

Class Counsel will also apply for an attorneys' fees award of one-third of the GSA, which is currently estimated to be \$75,000, and up to \$15,000 in verified costs reimbursement. *See* Settlement, § 5; *see also* Blakely Decl., ¶ 52. Plaintiff submits the requested fee is fair compensation for undertaking complex, risky, expensive, and time-consuming litigation on a purely contingent fee basis. Class Counsel has incurred substantial attorneys' fees conducting pre-filing investigation, analyzing Plaintiff's claims, conducting legal research, engaging in informal discovery, reviewing Defendant's documents and policies, analyzing Class Members' relevant records, preparing for and attending mediation, negotiating and preparing the long-form Settlement Agreement, preparing this Motion, and otherwise litigating the case. *Id.* Class Counsel expect to expend additional attorney time in attending the hearing on this Motion, overseeing the Notice process and fielding questions from Class Members, preparing the final approval papers, and attending the Final Approval hearing. *Id.*

California courts recognize an appropriate method for awarding attorneys' fees in class actions is to award a percentage of the "common fund" created as a result of a settlement. *See e.g., Laffitte v. Robert Half Int'l, Inc.*, 1 Cal.5th 480, 506 (2016) (holding "the percentage of fund method survives in California class action cases"). Class Counsel's request for fees of one-third of the GSA is well within the range of reasonableness, and indeed is considered the typical rate for common fund settlements. Historically, courts have awarded percentage fees in the range of 20% to 50%, depending on the circumstances of the case. *See* 4 Newberg on Class Actions § 14.6 (4th Ed. 2013).

Class Counsel submit their request for attorneys' fees is reasonable when viewed as an overall percentage of the Settlement and in light of the substantial risks and significant work undertaken, the excellent results obtained, and the efficiency with which the litigation has been conducted. Should the Court grant preliminary approval, Class Counsel will seek an award of attorneys' fees and verified litigation costs when seeking final approval.

Additionally, the parties have agreed to designate \$25,000.00 of the GSA as PAGA civil

penalties, of which \$18,750.00 (75%) will be paid to the LWDA, with the remaining \$6,250.00 (25%) for distribution to the Settlement Class, as the PAGA requires such penalties to be allocated per Labor Code § 2699(i). *See* Settlement, ¶ 3(C)(5). Plaintiff submits this allocation to the LWDA for PAGA civil penalties is appropriate. *See, e.g., Chu v. Wells Fargo Investments, LLC*, Case No. C 05-4526 MHP, 2011 WL 672645 at *1 (N.D. Cal. 2011) (approving PAGA payment of \$7,500 to LWDA out of \$6.9 million common-fund settlement); *Lazarin v. Pro Unlimited, Inc.*, Case No. C11-03609 HRL, 2013 WL 3541217 (N.D. Cal. 2013) (approving PAGA payment of \$7,500 to LWDA out of \$1.25 million common-fund settlement).

IV. ARGUMENT

A. PRELIMINARY APPROVAL IS WARRANTED

California Rule of Court 3.769 conditions settlement of a class action on court approval, which is generally evaluated under the federal standards applicable under Rule 23 of the Federal Rules of Civil Procedure. *See Reed v. United Teachers Los Angeles*, 208 Cal.App.4th 322, 337 (2012) (Rule 3.769 requires the trial court to determine “that the settlement is fair, reasonable and adequate to all concerned”); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (Rule 23(e) requires the trial court to determine “whether a proposed settlement is fundamentally fair, adequate, and reasonable”). Settlement is the preferred means of dispute resolution, particularly in complex class action litigation. *See In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008). The Court’s role in evaluating a proposed settlement is limited to ensuring that the agreement taken as a whole is fair. *See e.g., Hanlon, supra*, 150 F.3d at 1027. There is an initial presumption of fairness where, as here, the Settlement was negotiated at arm’s-length by Class Counsel and with the assistance of an experienced wage and hour class action mediator. *See e.g., Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 130 (2008).

1. Standard For Preliminary Approval

To make a fairness determination, the Court should consider several factors, including: “the strength of plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, [and] the

experience and views of counsel.” *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996). “The list of factors is not exclusive and the court is free to engage in a balancing and weighing of the factors depending on the circumstances of each case.” *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 245 (2001). As discussed below, the proposed Settlement is fair, adequate, and reasonable in light of the overall balance of factors in this case.

a. The Strength of Plaintiff’s Case

Class Counsel carefully vetted the claims at issue, reviewed timekeeping and payroll data and conducted a detailed analysis of the data to create a comprehensive damages model for Defendant’s potential class-wide liability. *See* Blakely Decl., ¶¶ 13-20, 22. Although Plaintiff steadfastly maintains that his claims are meritorious, Plaintiff acknowledges that there were substantial risks and uncertainty in proceeding with litigation. As described in section II.B., *supra*, Defendant presented multiple defenses to Plaintiff’s claims, both on the merits and with respect to class certification. Thus, while Plaintiff was prepared to litigate these claims through class certification, and ultimately trial, success was far from certain.

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

Although the parties engaged in significant discovery in advance of mediation, the Parties still had significant discovery to complete in formal litigation had the matter not settled. Blakely Decl., ¶ 54. This would have required expenditure of substantial time and resources by both Parties that would have very likely spanned several years. *Id.* Even if Plaintiff was to certify the classes, the parties would incur considerably more attorney fees and costs through a possible decertification motion, trial, and possible appeal. *Id.* This Settlement avoids those risks and the accompanying expense. *Id.*

c. Risk of Maintaining Class Action Status

Due to the fact that the overwhelming majority, if not all, of the Class Members signed enforceable arbitration agreements with class action waivers, it is likely that absent settlement, there would not be a certified class at the time of trial. Thus, this factor too, supports preliminary approval of the Settlement.

d. Amount Offered in Settlement Given Realistic Value of Claims

The Settlement provides a fair and reasonable monetary recovery for Class Members for hotly disputed claims. After analyzing the data provided by Defendant prior to mediation, Plaintiff prepared a class-wide exposure model and forecasted the expected recovery for each claim as follows:

Rest Period Violations: \$6,709

Plaintiff argues that Defendant's commission-only pay plans do not separately compensate employees for *all* required rest periods. Blakely Decl., ¶ 13. While Plaintiff acknowledges that Defendant separately compensated its commissioned-based employees for some rest periods during the Class Period, Plaintiff alleges that Defendant did not correctly calculate rest period pay owed in *all* pay periods during the Class Period. *Id.* Based on Plaintiff's review of Defendant's timekeeping and payroll records, Plaintiffs calculated Defendant's maximum exposure for unpaid rest period wages if this claim were entirely successful at trial at approximately \$27,953. *Id.*

Defendant argues that its Commission Pay Plans comply with California law and that it has always compensated its commissioned-based employees for all required rest periods. Blakely Decl., ¶ 13. Defendant argues that at all times throughout the Class Period it has calculated separate rest period compensation for its commissioned based employees in accordance with Labor Code § 226.2. *Id.* Therefore, in light of these arguments, as well as the risk that Plaintiff's class claims could be precluded by the arbitration agreements, Plaintiffs discounted the maximum recovery on this claim by 70% to account for the risk of non-certification and potential inability to proceed on a classwide basis due to the arbitration agreements, and an additional 20% to account for the risk that Defendant could prevail on the merits in establishing a lower damages calculation, to arrive at a reasonably expected total of approximately \$6,709. *Id.*

Unpaid Non-Productive Time: \$32,970

Plaintiff argues that if employees are spending time waiting for potential customers to come into the dealership, working on non-sales related issues, and attending meetings, then they

are not able to work on commissioned activities, making this time “non-productive.” Blakely Decl., ¶ 14. Plaintiff estimates that Defendant is liable for approximately 15 minutes of unpaid non-productive time per employee per workday. *Id.* Therefore, Plaintiff estimates that Defendant’s maximum exposure for unpaid wages if this claim were entirely successful at trial is \$202,886 (17,060 shifts with uncompensated hours worked * 15 minutes of non-productive time * \$47.57 average hourly rate). *Id.*

However, as with all of Plaintiffs’ claims, the vast majority of this potential exposure was subject to arbitration agreements that could preclude any class-wide recovery. Blakely Decl., ¶ 12. Defendant further argues that almost all work performed by commissioned employees was “directly related” to the activities that were being compensated via commissions, and therefore did not need to be separately compensated. *Id.*, at ¶ 14; *see also* Labor Code § 226.2 (stating that compensable non-productive time is “time under the employer's control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis”); *Vaquero, supra*, 9 Cal.App.5th at 111 (“nothing about commission compensation plans justifies treating commissioned employees differently from other employees”). Defendant also argues that Plaintiff’s claims for uncompensated non-productive would be highly individualized, as employees worked in a variety of locations, and there are no records or other common evidence of time spent on potentially non-productive tasks necessary to establish class-wide liability, precluding certification. Blakely Decl., ¶ 14. In light of these arguments, Plaintiff discounted Defendant’s maximum exposure on this claim by 75% to account for a risk of non-certification and potential inability to proceed on a classwide basis due to the arbitration agreements, and by an additional 35% for risk of being unsuccessful on the merits or having the amount of unpaid wages reduced, for a reasonably expected total of approximately \$32,970. *Id.*

Wage Statement Claims: \$22,383

Plaintiff’s data analysis reflected that there were approximately 853 total wage statements issued during the one-year liability period and approximately 48 unique employees during the applicable time period. Blakely Decl., ¶ 15. Plaintiff calculated Defendant’s maximum exposure for wage statement violations if this claim were entirely successful at trial at \$82,900 (48 initial

violations * \$50 for initial penalty = \$2,400) + (805 subsequent violations * \$100 subsequent violation penalty = \$80,500). *Id.*; *see also* Labor Code § 226(e) (providing for \$50 penalty for “initial” violations). *Id.*

Based on Defendant’s arguments that: (i) no violations occurred, (ii) any alleged violations were not “knowing and intentional” as required by Labor Code § 226(e), and (iii) no injury was suffered, Plaintiff discounted the calculated maximum exposure by 70% to account for the risk of non-certification and potential inability to proceed on a classwide basis due to the arbitration agreements, and an additional 10% for a risk of being unsuccessful on the merits, to arrive at a reasonably expected total of approximately \$22,383. Blakely Decl., ¶ 15.

Meal Period Violations: \$108,794

Plaintiff estimates that Class Members worked approximately 14,074 shifts during the Class Period in which a compliant meal period was not provided. Blakely Decl., ¶ 16. Accordingly, Plaintiff calculates Defendant’s maximum exposure for meal period violations if this claim were entirely successful at trial at \$669,500 (14,074 shifts with non-compliant second meal periods * \$47.57 premium). *Id.*

Defendant counters that it has maintained compliant written meal period policies throughout the Class Period and have always provided employees the *opportunity* to take legally compliant meal periods, and that they are not required to “ensure” meal periods are taken. Blakely Decl., ¶ 16. Additionally, Defendant maintains that employees voluntarily waived their second meal period when they worked shifts in excess of 10.0 hours (but less than 12.0 hours), as they are required to do under Labor Code § 512. *Id.* Finally, Defendant argues that these claims are not suited for class treatment, as individual inquiries would be needed to assess which employees took non-compliant meal periods or missed meal periods, how many meal periods were non-compliant or missed, and the reasons why a particular employee did not take a compliant meal period on a particular shift. *Id.* In light of these arguments, Plaintiff discounted Defendant’s maximum exposure on this claim by 75% to account for a risk of non-certification and potential inability to proceed on a classwide basis due to the arbitration agreements, and by an additional 35% for risk of being unsuccessful on the merits, for a reasonably expected total of approximately

1 \$108,794. *Id.*

2 Failure To Reimburse For All Necessary Business Expenses: \$5,119

3 Plaintiff alleges that Defendant failed to reimburse Class Members for a reasonable
4 portion of cellular phone expenses even though Class Members were required to use their personal
5 cellular phones for daily work activities. Blakely Decl., ¶ 17. Based on Defendant's data, Plaintiff
6 estimated that Class Members worked an estimated 853 pay periods during the Class Period. *Id.*
7 Assuming a \$25.00 reimbursement per pay period for cellular phone data for work-related
8 activities, Plaintiff estimated Defendant's maximum exposure at approximately \$21,325 (\$25.00
9 unreimbursed cellular phone data * 853 pay periods). *Id.*

10 Defendant maintains that Class Members were not required to use their personal cellular
11 phones as part of their job. Blakely Decl., ¶ 17. Defendant further argues that any expenses
12 incurred by Class Members were minimal, given the wide availability of low-cost cellular phone
13 plans. *Id.* Lastly, Defendant argues this claim is not suitable for class treatment, as it would require
14 individualized determinations as to whether each Class Member used a personal cellular phone
15 for work-related purposes, and if so, how much of that use was a reasonable percentage of their
16 individual monthly phone bill. *Id.* In light of these arguments, Plaintiff discounted Defendant's
17 maximum exposure on this claim by 70% to account for a risk of non-certification and potential
18 inability to proceed on a classwide basis due to the arbitration agreements, and by an additional
19 20% for risk of being unsuccessful on the merits, for a reasonably expected total of approximately
20 \$5,119. *Id.*

21 Overtime Wages: No Value

22 Plaintiff asserts that despite Class Members occasionally working overtime hours,
23 Defendant failed to compensate Class Members for any overtime hours worked. Blakely Decl., ¶
24 18. However, Defendant argues that Class Members were exempt from the Wage Order's
25 overtime requirements pursuant to the "inside sales exemption." *Id.* Defendant further argues that
26 this claim is not suitable for class treatment as an individualized inquiry would be required to
27 determine whether the inside sales exemption was met for each Class Member during each pay
28 period in the Class Period, resulting in an unmanageable series of mini-trials. *Id.* In light of the

“inside sales exemption,” Plaintiff determined that it would be very difficult to overcome Defendant’s defenses and therefore placed no value on this claim. *Id.*

Waiting Time Penalties: \$60,111

Defendant’s records reflect approximately 27 former Class Members who separated from their employment with Defendant during the Class Period. Blakely Decl., ¶ 19. Based on an hourly rate of \$47.57, Plaintiff estimated the average waiting penalty per former employee to be \$11,417 ($\$47.57 \times 8 \text{ hours} \times 30 \text{ days}$). *Id.* Therefore, Plaintiff estimates Defendant’s maximum exposure for waiting time penalties at approximately \$308,259 (27 waiting time penalty class members * \$11,417 avg. penalty). *Id.*

Defendant maintains that it possesses strong, good faith defenses to Plaintiff’s underlying claims, thus precluding recovery of waiting time penalties, which are only available for the “willful” failure to pay wages. Blakely Decl., ¶ 19. Defendant further argues that waiting time penalties are not recoverable at all for alleged meal and rest period violations. *Id.* Defendant therefore argues that Plaintiff’s damages analysis for waiting time penalties is grossly overstated. *Id.* In light of these defenses, Plaintiff discounted the maximum figure by 70% to account for a risk of non-certification and potential inability to proceed on a classwide basis due to the arbitration agreements, and by an additional 35% for risk of being unsuccessful on the merits or not recovering the full amount of penalties, for a reasonably expected total of \$60,111. *Id.*

PAGA Civil Penalties: \$33,267

The success of Plaintiff’s PAGA claim is wholly dependent upon the success of his underlying claims occurring during the PAGA Period. Assuming that Plaintiff could prove at least one underlying Labor Code violation in each pay period within the PAGA Period, Plaintiff estimates Defendant’s maximum PAGA exposure at \$85,300 (calculated from 853 pay periods at \$100 per violation). Blakely Decl., ¶ 20; *see also Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1207 (2008) (finding “initial” violation rate applies until employer is notified that it is violating a Labor Code provision). However, these penalties derived from the underlying wage and hour violations discussed above, which Defendant vigorously disputes. *See e.g., Green v. Lawrence Service Co.* (C.D. Cal. 2013) 2013 WL 3907506, *5, n.5 (explaining that a PAGA

claim's success was determined by the merits of its underlying claims). Defendant also asserts that the Court would drastically reduce any award of PAGA penalties as "confiscatory." Blakely Decl., ¶ 20; *see also Thurman v. Bayshore Transit Management, Inc.*, 203 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties); *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018) (affirming reduction of PAGA penalties to \$5 per initial violation); *Fleming v. Covidien, Inc.* (C.D. Cal. Aug. 12, 2011) Case No. ED CV 10-01487 RGK (OPx), 2011 WL 7563047 at *4 (reducing PAGA penalties from \$2.8 million to \$500,000). Plaintiff therefore discounted the maximum figure by 40% for the risk of being unable to proceed on a representative basis and risk of losing of the merits, and an additional 35% to account for the possibility of this Court reducing penalties, to arrive at an estimated exposure of approximately \$33,267. Blakely Decl., ¶ 20.

Therefore, if Plaintiff was entirely successful at trial on all claims described above, Plaintiff estimates the maximum total exposure to be approximately \$1,398,123. Blakely Decl., ¶ 21. However, taking into account Defendant's various defenses, both as to certification and merits issues, difficulties of proof, and other risks described above, Plaintiff predicted that the potential likely recovery for the Settlement Class at trial would be approximately \$269,353. *Id.* The proposed settlement of \$225,000 therefore represents approximately 84% of the reasonably forecasted recovery for the Settlement Class, while avoiding the further expense and serious risk of proceeding towards class certification and trial. *Id.* Taking into account the risk of non-certification, failure to prevail on the merits, and the Court's power to reduce the civil penalties, the proposed Settlement falls well within the realm of being fair, reasonable, and adequate. *See e.g., Altamirano v. Shaw Industries, Inc.* (N.D. Cal. 2015) 2015 WL 4512372, at *9 (preliminarily approving wage and hour class action settlement, stating, "[a]lthough 15% represents a modest fraction of the hypothetical maximum recovery estimated by Plaintiff, that figure is sufficient for the Court to grant preliminary approval given the merits of Plaintiff's claims."). Preliminary approval is appropriate since the Settlement will provide significant monetary relief to Class Members without the uncertainty, delay, and additional expense of further litigation.

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

2 “Parties represented by competent counsel are better positioned than courts to produce a
3 settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pacific*
4 *Enterprises Securities Litigation*, 47 F.3d 373, 378 (9th Cir. 1995). Here, Plaintiff is represented
5 by competent, experienced counsel who possess extensive experience prosecuting and defending
6 wage-and-hour class actions, and who have been appointed as class counsel in numerous cases
7 alleging similar claims. *See* Blakely Decl., ¶¶ 2-6; Declaration of Paul K. Haines (“Haines Decl.”),
8 ¶¶ 2-7; Declaration of Neil M. Larsen (“Larsen Decl.”), ¶¶ 2-4. Class Counsel conducted an in-
9 depth review of Defendant’s relevant policies and timekeeping and payroll records, and drew on
10 their extensive experience in similar cases to assess the strengths and weaknesses of Plaintiff’s
11 case. *See* Blakely Decl., ¶ 22. The Settlement was also reached with the assistance of an
12 experienced wage and hour class action mediator. *Id.*, at ¶ 23. This factor strongly supports
13 preliminary approval of the Settlement. *See Kullar, supra*, 168 Cal.App.4th at 130.

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

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

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

21 The proposed settlement reflects approximately 84% of the estimated recovery the
22 Settlement Class could reasonably expect in light of the significant litigation risks, and will
23 provide tangible, monetary compensation for hotly disputed claims. Indeed, the percentage of the
24 liability exposure recovered in this case exceeds percentages routinely approved by courts. *See,*
25 *e.g., Glass v. UBS Finan. Servs.*, Case No. C-06-4068 MMC, 2007 WL 221862, *4 (N.D. Cal.
26 2007) (approving settlement representing 25% to 35% of potential damages); *Dunleavy v. Nadler*,
27 213 F.3d 454, 459 (9th Cir. 2000) (approving settlement representing about one-sixth of potential
28 recovery); *Nat’l Rural Telecomm. Coop. v. DirecTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004)

1 (“it is well-settled law that a proposed settlement may be acceptable even though it amounts to
2 only a fraction of the potential recovery that might be available to the Class Members at trial”).
3 Further, the average Settlement Award of \$2,171.88 is greater than the average payments
4 achieved in other wage and hour class action settlements.² Thus, Plaintiff submits that the
5 proposed settlement is within the range of possible approval, such that notice should be provided
6 to the Settlement Class so that they can consider the Settlement. The Court will have the
7 opportunity to again assess the reasonableness of the Settlement after the Settlement Class has
8 had the opportunity to opt-out or object.

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

10 The Settlement resulted from an exchange of substantial information, arm’s-length
11 negotiations by counsel, and a full-day mediation before an experienced wage and hour mediator.
12 Thus, the Settlement is entitled to an initial presumption of fairness. *See Kullar, supra*, 168
13 Cal.App.4th at 130. As discussed above, Plaintiff carefully vetted the claims at issue, reviewed
14 extensive payroll and timekeeping data, and conducted a detailed statistical analysis of the data
15 to arrive at the estimated class-wide damages figures. The parties attended a full-day mediation,
16 and worked collaboratively in the following months to finalize the Settlement. Thus, this factor
17

18 ² See e.g., *Bercea v. AE Retail West*, Case No. 34-2012-00123947 (Sacramento County Super. Ct.
19 May 9, 2012) (average net recovery of approximately \$105); *Ressler v. Federated Department*
20 *Stores, Inc.*, Case No. BC335018 (Los Angeles County Super. Ct. Jan. 2, 2009) (average net
21 recovery of approximately \$90); *Palencia v. 99 Cents Only Stores*, Case No. 34-2010-00079619
22 (Sacramento County Super. Ct.) (average net recovery of approximately \$80); *Doty v. Costco*
23 *Wholesale Corp.*, Case No. CV05-3241 FMC-JWJx (C.D. Cal. May 14, 2007) (average recovery
24 of approximately \$65); *Lim v. Victoria’s Secret Stores, Inc.*, Case No. 04CC00213 (Orange
25 County Super. Ct. Jan. 20, 2006) (average net recovery of approximately \$35); *Gomez v. Amadeus*
26 *Salon, Inc.*, Case No. BC392297 (Los Angeles County Super. Ct. July 23, 2010) (average net
27 recovery of approximately \$20); *Sorenson v. PetSmart, Inc.*, Case No. 2:06-CV-02674-JAM-
28 DAD (E.D. Cal. Dec. 17, 2008) (wage and hour class action settlement approved where average
recovery was approximately \$60); *Schiller v. David’s Bridal, Inc.*, Case No. 1:10-cv-00616-AWI-
SKO, 2012 WL 2117001 at *17 (E.D. Cal. June 11, 2012) (“Class Members will receive an
average of approximately \$198.70...[T]his is a substantial recovery where Defendants asserted
compelling defenses to liability; Plaintiff also notes several similar actions where the gross
recoveries per class member were less than \$90...[T]he Court finds that the results achieved are
good”); and *Williams v. Centerplate, Inc.*, Case Nos. 11-CV-2159-H-KSC, 12-CV-0008-H-KSC,
2013 WL 4525428 (S.D. Cal. Aug. 26, 2013) (average recovery of approximately \$108).

1 supports preliminary approval.

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

3 Preliminary approval of the Settlement is also warranted because there are no obvious
4 deficiencies. The Settlement will provide monetary relief to Class Members. The amounts
5 proposed for Class Counsel’s attorneys’ fees and costs, the enhancement payment, and the PAGA
6 allocation are all reasonable and appropriate based on the facts of this case. Because the
7 Settlement is devoid of obvious deficiencies, this factor supports preliminary approval.

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

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

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

16 A class is “ascertainable” where the members “may be readily identified without
17 unreasonable expense or time by reference to official [or business] records.” *See Sevidal v. Target*
18 *Corp.*, 189 Cal.App.4th 905, 916 (2010) (alterations in original). Here, the proposed class is
19 defined as all individuals employed by Defendant as commission paid employees in California
20 who worked at any time from May 27, 2019 through the date of the Court Order granting
21 preliminary approval of the Settlement. Therefore, Class Members can be identified from
22 Defendant’s personnel and employment records. Defense counsel represents that the Settlement
23 Class consists of approximately 48 current and former non-exempt employees. *See* Blakely Decl.,
24 ¶ 11. It would therefore be impracticable to bring all Class Members before the Court, or for each
25 Class Member to bring an individual lawsuit. The proposed Settlement Class therefore satisfies
26 numerosity. *See, e.g., Bowles v. Sup. Ct.*, 44 Cal.2d 574 (1955) (holding a class representing 10
27 beneficiaries of a trust sufficiently numerous).

28 ///

1 **2. Common Issues Of Law And Fact Predominate**

2 The focus in a certification dispute is not the merits, but rather on what types of questions,
3 “common or individual,” are likely to arise in the action. *See Sav-On Drug Store, Inc. v. Superior*
4 *Court (Rocher)*, 34 Cal.4th 319, 327 (2004). Plaintiff’s claims are predicated on, among other
5 issues, Defendant’s alleged unlawful commission compensation plan, Defendant’s meal period
6 policies and practices, and its failure to reimburse for all necessary business expenses. These types
7 of claims are commonly held to be proper for class certification. *See e.g., Cochran v. Schwan’s*
8 *Home Service, Inc.*, 228 Cal.App.4th 1137 (2014) (reversing denial of certification of
9 reimbursement claim); *Benton v. Telecom Network Specialists, Inc.*, 220 Cal.App.4th 701, 726
10 (2013) (certifying meal and rest period claims).

11 **3. The Claims Of The Named Plaintiff Are Typical**

12 The typicality requirement is satisfied where class representatives have claims that are
13 typical of those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191
14 Cal.App.3d 1341, 1347 (1987) (finding typicality satisfied where named plaintiff purchased the
15 same goods as the putative class in a consumer class action). Here, Plaintiff’s claims are typical
16 of those held by the members of the proposed Settlement Class. First, Plaintiff was employed by
17 Defendant during the Class Period as a commission paid employee and was subject to Defendant’s
18 wage and hour policies at issue in this case. *See Declaration of Rabih Mustapha (“Mustapha*
19 *Decl.”)*, ¶ 2. Second, Plaintiff was injured by the same challenged policies that allegedly injured
20 the Settlement Class as a whole. For example, Plaintiff asserts that he was not properly
21 compensated for all rest periods and non-productive time. Plaintiff also contends that Defendant
22 failed to provide him with legally-compliant meal periods, and failed to reimburse him for all
23 necessary business expenses, including the use of his personal cell phone. *Id.*, ¶¶ 2-4. at
24 Additionally, Plaintiff asserts that he did not receive accurate and compliant wage statements. *Id.*,
25 at ¶ 5. Because Plaintiff has suffered the same injuries as the other members of the Settlement
26 Class, the typicality requirement is satisfied.

27 ///

1 **4. Plaintiff And Class Counsel Will Fairly And Adequately Represent**

2 **The Class**

3 The adequacy requirement examines conflicts of interest between named parties and the
4 class(es) they seek to represent. *See Capital People First v. State Dept. of Developmental*
5 *Services*, 155 Cal.App.4th 676, 697 (2007). Plaintiff and his counsel will adequately represent the
6 Settlement Class, as there are no conflicts between Plaintiff and the proposed Settlement Class,
7 and Plaintiff possesses claims that are in line with those of the Settlement Class. *See McGhee v.*
8 *Bank of America*, 60 Cal.App.3d 442, 450-51 (1976) (adequacy satisfied where there was no
9 indication that Class Counsel were not qualified and the named plaintiff had no interests
10 antagonistic to those of the proposed class). Class Counsel also have extensive experience in wage
11 and hour class action litigation. *See Haines Decl.*, ¶¶ 2-7; *Blakely Decl.*, ¶¶ 2-6; *Larsen Decl.*, ¶¶
12 2-4.

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

14 This Court should order distribution to the Settlement Class of the proposed Class Notice
15 by U.S. Mail, postage prepaid, using last known mailing address information provided by
16 Defendants. *See Settlement*, § 9. This manner of giving notice is the “best notice practicable”
17 under the circumstances because it provides “individual notice to all members who can be
18 identified through reasonable effort.” *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173
19 (1974). Here, Plaintiff proposes that the Settlement be administered by Phoenix Settlement
20 Administrators (“PSA”), an experienced class action settlement administrator. *See generally*
21 *Declaration of Jodey Lawrence* (“Lawrence Decl.”) and attached exhibits.³ Class Members’
22 addresses will be ascertainable through Defendant’s personnel and payroll records, which
23 Defendant will provide to PSA within ten (10) business days of preliminary approval of the
24 Settlement. *See Settlement*, § 9(A). Within ten (10) business days of receipt of the Class
25 Members’ addresses, PSA will run the addresses through the National Change of Address
26 (“NCOA”) database (which provides updated addresses for any individual who has moved in the

27 _____
28 ³ PSA’s proposed capped fee to administer this settlement is \$5,000.00. *See Exh. B to Lawrence Decl.*

1 previous four years and has notified the U.S. Postal Service of a forwarding address) and mail the
2 Class Notice to all Class Members. *See* Settlement, § 9(B). To the extent that any notices are
3 returned, PSA will perform a “skip trace” to track any Class Member’s current mailing address.
4 *Id.*, at § 9(F).

5 The content of the proposed Class Notice satisfies California Rule of Court 3.766(d)
6 because it advises Class Members of the nature of the claims, basic contentions and denials of the
7 parties and the key terms of the Settlement, the 60-day deadline to opt-out or object to the
8 Settlement and the procedures by which to do so, explains the recovery formula and expected
9 recovery amount for each Class Member, and advises them that they will be bound by the terms
10 of the Settlement if they do not opt-out. *See* Blakely Decl., Exhs. 1, 2 and 3 to Exh. A. The
11 proposed Class Notice will also notify Class Members of the final approval hearing date, provide
12 the Settlement Class contact information for Class Counsel, and advise Class Members that they
13 may enter an appearance through counsel if they wish to. *Id.* This manner of giving notice satisfies
14 California Rule of Court 3.766(e) as the most reliable and cost-effective method of reaching Class
15 Members.

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 Class Members must file objections to
19 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 Dated: January 6, 2022

Respectfully submitted,
HAINES LAW GROUP, APC

25

26 By: 

27 Paul K. Haines
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