

Larry W. Lee (State Bar No. 228175)
lwlee@diversitylaw.com
Kristen M. Agnew (State Bar No. 247656)
kagnew@diversitylaw.com
Nicholas Rosenthal (State Bar No. 268297)
nrosenthal@diversitylaw.com
DIVERSITY LAW GROUP, P.C.
515 S. Figueroa Street, Suite 1250
Los Angeles, CA 90071
Telephone: (213) 488-6555
Facsimile: (213) 488-6554

Attorneys for Plaintiff and the Class

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

ERNESTO DELGADO,

Plaintiffs,

vs.

KLOECKNER METALS
CORPORATION, et al.

Defendants.

Case No. 2:20-cv-07405-GW-SK

Assigned to Hon. Judge George H. Wu

**PLAINTIFF'S NOTICE OF
MOTION AND MOTION FOR
PRELIMINARY APPROVAL OF
CLASS AND REPRESENTATIVE
ACTION SETTLEMENT;
MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT**

Date: January 3, 2022

Time: 8:30 a.m.

Courtroom: 9D, 9th Floor

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on January 3, 2022, at 8:30 a.m., or as soon
3 thereafter as counsel may be heard, before the Honorable George H. Wu, in
4 Courtroom 9D of the United States District Court for the Central District of
5 California, located at 350 West 1st Street, Los Angeles, CA 90012, Plaintiff
6 Ernesto Delgado (“Plaintiff”) will and hereby does move the Court for preliminary
7 approval of the proposed class and representative action settlement. Specifically,
8 Plaintiff respectfully requests that the Court: (1) grant preliminary approval for the
9 proposed class and representative action settlement; (2) grant conditional
10 certification of the proposed settlement class; (3) authorize the mailing of the
11 proposed notice to the class of the settlement; and (4) schedule a “fairness
12 hearing,” i.e., a hearing on the final approval of the settlement.

13 Plaintiff makes this motion on the grounds that the proposed settlement is
14 within the range of possible final approval, and notice should, therefore, be
15 provided to the class. This Motion is based upon this Notice of Motion and Motion
16 for Preliminary Approval of Class and Representative Action Settlement, the
17 attached Memorandum of Points and Authorities in Support, the Declarations of
18 Larry W. Lee, Kristen M. Agnew, Nicholas Rosenthal, and Ernesto Delgado filed
19 herewith, the Stipulated Settlement Agreement and Release of Claims filed
20 herewith, any oral argument of counsel, the complete files and records in the
21 above-captioned matter, and such additional matters as the Court may consider.

22
23 Dated: December 20, 2021

DIVERSITY LAW GROUP, P.C.

24
25 By: 

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

Attorneys for Plaintiff and the Class

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION AND SUMMARY OF AGREEMENT	7
A. Factual Allegations and Procedural Background.....	7
B. Summary of the Current Settlement.....	9
II. LEGAL ANALYSIS	11
A. The Class at Issue and the Settlement Fund.....	11
B. Two-Step Approval Process	11
C. The Settlement Meets The Requirements of FRCP 23(e)(2).....	12
1. The Amended FRCP 23(e)(2) Establishes Factors That Must Be Met for Any Settlement to be Found to Be “Fair, Reasonable, and Adequate”	13
a. Class Counsel Has Adequately Represented the Class.....	13
b. Plaintiff Has Adequately Represented the Class.....	14
c. The Instant Settlement Is the Product of An Arm’s Length Negotiation	14
d. The Relief Provided To The Class Is Adequate	14
i. Value of the Claims.....	14
ii. Risk of Continued Litigation	15
iii. Distribution of Settlement Awards.....	19
iv. Terms of Attorney’s Fees	20
v. All Class Members Are Treated Equitably	20
D. The Settlement Satisfies the Heightened Scrutiny Given To Pre-Certification Settlements.....	20
E. The Proposed Settlement Class Satisfies the Elements for Certification.....	22
1. Numerosity.....	22
2. Ascertainability	22
3. Typicality	23
4. Commonality	23
5. Adequacy	24
6. Common Questions of Law and Fact Predominate	25
7. Superiority of Class Action	25
F. Attorneys’ Fees, Costs, and Class Representative Service Award	25
G. Settlement Administrator.....	26

H. Class Definition	26
I. Class Action Fairness Act (“CAFA”).....	26
III. CONCLUSION	26

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Augustus v. ABM Services, Inc.</i> , 2 Cal. 5th 257, 260 (2016)	17
<i>Boyd v. Bank of Am. Corp.</i> , 2014 U.S. Dist. LEXIS 162880 at *22-*23 (C.D. Cal. Nov. 18, 2014)	21
<i>Boyd v. Bechtel Corp.</i> , 485 F. Supp. 610, 616-17 (N.D. Cal. 1979).....	15
<i>Carrington v. Starbucks Corp.</i> , 30 Cal. App. 5th 504 (2018)	15
<i>Chavez v. Converse, Inc.</i> , N.D. Cal. Case No. 15-3746 NC, Dkt. No. 89 (N.D. Cal. Sept. 22, 2016)	23
<i>Coleman v. Jenny Craig, Inc.</i> , 649 Fed. Appx. 387, 388-389 (9th Cir. April 20, 2016)	16
<i>Cook v. Niedert</i> , 142 F.3d 1004, 1015 (7th Cir. 1998)	25
<i>Cordy v. USS-Posco Indus.</i> , 2014 WL 212587, at *3 (N.D. Cal. Jan. 17, 2014)	22
<i>Fernandez v. Victoria Secret Stores, LLC</i> , 2008 WL 8150856 (C.D. Cal. July 21, 2008).....	21
<i>Garcia v. Gordon Trucking, Inc.</i> , 2012 WL 5364575 (E.D. Cal. Oct. 31, 2012).....	21
<i>Girsh v. Jepson</i> , 521 F.2d 153, 157 (3d Cir. 1975).....	15
<i>Greer v. Dick's Sporting Goods, Inc.</i> , 2017 WL 1354568, at *6 (E.D. Cal. Apr. 13, 2017).....	23
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011, 1019 (9th Cir. 1998)	23, 25
<i>Harris v. Palm Springs Alpine Estates, Inc.</i> , 329 F.2d 909, 913-14 (9th Cir. 1964).....	22
<i>In re Bluetooth Headset Products Liability Litigation</i> , 654 F.3d 935, 947 (9th Cir. 2011)	21
<i>In re General Motors Corp.</i> , 55 F.3d 768, 806 (3d Cir. 1995).....	15
<i>In re Pacific Enterprises Sec. Litig.</i> , 47 F.3d 373, 379 (9th Cir. 1995).....	22
<i>In re United Energy Corp. Solar Power Modules Tax Shelter Invs. Sec. Litig.</i> , 122 F.R.D. 251, 256 (C.D. Cal. 1988).....	23
<i>Jordan v. L.A. County</i> , 669 F.2d 1311, 1320 (9th Cir.)	22
<i>Lerwill v. Inflight Motion Pictures, Inc.</i> , 582 F.2d 507, 512 9th Cir. 1978).....	24
<i>Magadia v. Wal-Mart Assocs., Inc.</i> , 324 F.R.D. 213, 225 (N.D. Cal. 2018).....	24
<i>McKinney-Drobnis v. Oreshack</i> , 16 F. 4th 594, 607 (9th Cir. 2021)	13

1	<i>McKinney-Drobnis v. Oreshack</i> , 16 F. 4th 594, 607-608 (9th Cir. 2021).....	21
2	<i>Moore v. Ulta Salon, Cosmetics & Fragrance, Inc.</i> , 311 F.R.D. 590, 596 (C.D. Cal. 2015).....	23
3	<i>National Rural Telecommunications Cooperative v. DIRECTV, Inc.</i> , 221 F.R.D. 523, 526-27	
4	(C.D. Cal. 2004).....	18
5	<i>Otsuka v. Polo Ralph Lauren Corp.</i> , 2010 WL 366653, at *5 (N.D. Cal. Jan. 25, 2010)	23
6	<i>Patrick v. Marshall</i> , 460 F. Supp. 23, 26 (N.D. Cal. 1978).....	22
7	<i>Rodriguez v. Nike Retail Services, Inc.</i> , 2016 WL 8729923, at *6 (N.D. Cal. Aug. 19, 2016)	23
8	<i>Singer v. Beckton Dickinson and Co.</i> , 2010 WL 2196104, at *8 (S.D. Cal. June 1, 2010).....	21
9	<i>Van Bronkhorst v. Safeco Corp.</i> , 529 F.2d 943, 950 (9th Cir. 1976)	18
10	<i>Van Vranken v. Atlantic Richfield Co.</i> , 901 F. Supp. 294, 299-300 (N.D. Cal. 1995)	25
11	<i>Vandervort v. Balboa Capital Corp.</i> , 8 F. Supp. 3d 1200, 1209-10 (C.D. Cal. 2014)	21

STATUTES

13	28 U.S.C. § 1715	26
14	28 U.S.C. § 1715(b)	26
15	California Civil Code § 1542	25
16	Labor Code § 226(e)	18

RULES

18	Fed. R. Civ. P. 23(a)(1).....	22
19	Fed. R. Civ. P. 23(a)(2).....	23
20	Rule 23(a)(3)	23
21	Rule 23(a)(4)	24
22	Rule 23(b)(3).....	25

OTHER AUTHORITIES

25	4 Conte & Newberg, <i>Newberg on Class Actions</i> , § 11.26 (4th ed. 2010)	12, 19
26	Manual for Complex Litigation (“MCL”) (4th ed. 2004), § 21.632.....	12, 15

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND SUMMARY OF AGREEMENT**

3 Plaintiff Ernesto Delgado (“Plaintiff”) respectfully requests that the Court
4 grant preliminary approval of the Stipulated Settlement Agreement and Release of
5 Claims (hereinafter referred to as “Settlement Agreement” or “Stipulation”) that he
6 has reached in the above-captioned matter with Defendant Kloeckner Metals
7 Corporation (“Defendant”) (Plaintiff and Defendant collectively referred to as the
8 “Parties”). In response to the Court’s ruling on Plaintiff’s prior Motion for
9 Preliminary Approval, the Parties have executed an amended settlement that the
10 Parties believe resolves the issues identified by the Court.

11 **A. Factual Allegations and Procedural Background**

12 Plaintiff was hired by Defendant as a non-exempt employee in Los Angeles
13 County, California. Plaintiff worked as a crane operator from January 2014 until
14 December 2019.

15 First, Plaintiff alleges that he and other non-exempt employees in the State
16 of California were denied proper off-duty meal breaks during their employment.
17 Specifically, Plaintiff alleges that due to Defendant’s timekeeping system that
18 rounded meal period punch in and out times, he and his fellow non-exempt
19 workers did not receive meal period premium pay for late or short meal periods
20 because Defendant’s timekeeping system recorded them as legally compliant meal
21 periods. Employees were also not provided a second meal break for shifts of
22 twelve hours or longer.

23 Second, Plaintiff alleges that Defendant required employees to remain on
24 work premises during rest breaks, which amounted to impermissible “on-duty” rest
25 periods.

26 Third, Plaintiff alleges that when he and other non-exempt employees were
27 paid overtime and/or shift differential wages, the corresponding wage statements
28 failed to identify the applicable rates of pay and number of hours worked for such

1 wages.

2 Finally, Plaintiff alleges that Defendant issued final wages in the form of a
3 pay card to Plaintiff and other employees upon separation of employment. As the
4 pay card was not fully cashable, usable at all financial institutions, and
5 accompanied by various fees with use, Plaintiff and other employees did not
6 receive all wages owed upon separation of employment.

7 Defendant denies Plaintiff's allegations and contends that it has complied
8 with its obligations under the law.

9 On June 10, 2020, Plaintiff commenced this action in Superior Court for the
10 State of California, County of Los Angeles, alleging claims for violation of
11 California Labor Code §§ 201-203, 212-213, 226, 226.7, 512, and 2698, *et seq.*,
12 the Private Attorneys General Act ("PAGA"), and California Business and
13 Professions Code § 17200 *et seq.* ("Complaint").

14 On August 17, 2020, Defendant filed a Notice of Removal of Action to the
15 United States District Court for the Central District of California.

16 The Parties thoroughly investigated the facts relating to the claims alleged in
17 the Complaint. Plaintiff conducted formal written discovery, including
18 propounding interrogatories and requests for production. Plaintiff also obtained
19 and reviewed Defendant's discovery responses and document production and took
20 the deposition of Defendant's FRCP 30(b)(6) witnesses regarding its meal and rest
21 break and payroll policies and procedures. Defendant also took the deposition of
22 Plaintiff. (Declaration of Nicholas Rosenthal ("Rosenthal Decl.") ¶ 2.)

23 The Parties then agreed to conduct a private mediation with wage and hour
24 class action mediator Steven J. Serratore, Esq. on March 22, 2021. (Rosenthal
25 Decl. ¶ 3.) In connection with the mediation, Defendant provided Plaintiff with
26 data for the entire class, which permitted Plaintiff's counsel to conduct a damage
27 analysis. (*Id.*)

28 ///

1 **B. Summary of the Current Settlement**

2 Again, on March 22, 2021, the Parties attended an all-day mediation before
3 Steven J. Serratore. Despite a full day of negotiations, the Parties were unable to
4 reach an agreement. The Parties continued negotiations over the course of several
5 months, and with the assistance of Mr. Serratore, ultimately reached an agreement
6 to resolve the case on a class-wide basis. (Rosenthal Decl. ¶ 6.) The Parties
7 memorialized their agreement in the concurrently filed Settlement Agreement,
8 which is attached as **Exhibit A to the Declaration of Nicholas Rosenthal**.

9 The Settlement Agreement provides for a total settlement sum of Four
10 Hundred Sixty-Five Thousand Dollars (\$465,000.00), inclusive of payments to
11 Settlement Class Members, the class representative service award, attorneys' fees
12 and costs, payment to the State of California Labor and Workforce Development
13 Agency (pursuant to PAGA), and settlement administration costs.

14 Pursuant to the terms of the Settlement Agreement, the Net Settlement
15 Amount ("NSA") (after deduction of attorneys' fees in the amount of up to
16 \$155,000.00, litigation costs up to \$25,000.00, service award in the amount of up
17 to \$10,000.00, PAGA penalties in the amount of \$30,000.00 (or 75% of
18 \$40,000.00) to the Labor and Workforce Development Agency (the "LWDA"),
19 and costs of settlement administration in the amount of approximately \$11,000.00)
20 is approximately \$234,000.00. (Settlement Agreement ¶¶ A.17; C.41(a), (e), (f),
21 (g), (h).) Twenty percent (20%) of the Individual Settlement Amounts distributed
22 to Participating Class Members will be allocated as wages, subject to withholding
23 of all applicable taxes, and 80% will be allocated as interest and penalties. (*Id.* ¶
24 C.41(d).) Defendant will be responsible for the employer portion of payroll taxes.
25 (*Id.* ¶ C.41(a).)

26 Individual Settlement Payments will be calculated based on the number of
27 weeks a Settlement Class Member worked during the Class Period. (*Id.* ¶
28

1 C.41(c).) Specific calculations of Individual Settlement Payments will be made as
2 follows:

- 3 1. The Settlement Administrator will determine the aggregate number of
4 Weeks Worked by Settlement Class Members during the Class Period
5 (“Total Weeks Worked”). The Settlement Administrator will then
6 divide the Net Settlement Amount by the Total Weeks Worked to
7 determine a per workweek value (“Workweek Value”). The
8 Workweek Value will be multiplied by the number of Weeks Worked
9 by each Settlement Class Member during the Class Period to
10 determine the distribution, prior to legal deductions, for each
11 Settlement Class Member. (*Id.* ¶ C.41(c).)
- 12 2. If there are any timely submitted Requests for Exclusion, the
13 Settlement Administrator shall proportionately increase the Individual
14 Settlement Amounts for each Participating Class Member so that the
15 amount actually distributed to Participating Class Members equals
16 100% of the Net Settlement Amount. (*Id.*)
- 17 3. Data from Defendant’s payroll records will be presumed to be
18 correct, unless a Settlement Class Member timely demonstrates
19 otherwise to the Settlement Administrator by credible evidence. All
20 workweek disputes will be reviewed by counsel for the Parties, and
21 if they are unable to agree, shall be decided by the Settlement
22 Administrator. (*Id.* ¶ G.57.)

23 **Significantly, this settlement is non-reversionary and claim forms are**
24 **not required.** In other words, none of the unclaimed settlement funds will revert
25 back to Defendant and a Settlement Class Member need not submit a claim to
26 receive his or her share. (*Id.* ¶ C.42.) Instead, the Settlement Class Member will
27 automatically receive a check in connection with resolution of the class and PAGA
28 claims so long as he or she does not opt-out. (*Id.* ¶ G.59(a).) Any remaining monies

1 from uncashed checks will be distributed to the California State Controller's
2 Office, Unclaimed Property Division, in the name of the Settlement Class Member.
3 (*Id.* ¶ G.64.)

4 The class members can be ascertained from Defendant's payroll records.
5 Based upon Defendants' records, the number of unique class members is
6 approximately 339. (*Id.* ¶ G.61.) Further, as discussed above, class members have
7 the right to opt-out of the settlement of the class claims.

8 Based on 339 class members, each Participating Class Member will receive
9 a raw average of approximately \$690.27 after deduction for attorneys' fees, service
10 award to Plaintiff, payment to the LWDA, settlement administration costs, and
11 litigation costs. Each individual class member's settlement amount may be more or
12 less than this raw average, depending on the number of weeks the class member
13 worked during the Class Period.

14 **II. LEGAL ANALYSIS**

15 **A. The Class at Issue and the Settlement Fund**

16 Defendant has agreed to collect information regarding the identity of the
17 members of the Settlement Class. The Parties have further agreed and stipulated
18 that this class be certified on a provisional, non-mandatory basis for the purposes
19 of this settlement only. (*Id.* ¶ K.78.) As set forth in the Settlement, the Parties have
20 agreed that the settlement is non-reversionary and that claim forms will not be
21 required.

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

23 Any settlement of class litigation must be reviewed and approved by the
24 Court. This is done in two steps: (1) an early (preliminary) review by the court, and
25 (2) a final review and approval by the court after notice has been distributed to the
26 class members for their comment or objections. The *Manual for Complex*
27 *Litigation, Fourth* ("MCL") states:

28 Review of a proposed class action settlement generally

1 involves two hearings. First, counsel submit the proposed
2 terms of settlement and the judge makes a preliminary
3 fairness evaluation. In some cases, this initial evaluation
4 can be made on the basis of information already known,
5 supplemented as necessary by briefs, motions, or
6 informal presentations by parties. If the case is presented
7 for both class certification and settlement approval, the
8 certification hearing and preliminary fairness evaluation
9 can usually be combined. The judge should make a
10 preliminary determination that the proposed class
11 satisfies the criteria set out in Rule 23(a) and at least one
12 of the subsections of Rule 23(b). If there is a need for
13 subclasses, the judge must define them and appoint
14 counsel to represent them. The judge must make a
15 preliminary determination on the fairness,
16 reasonableness, and adequacy of the settlement terms and
17 must direct the preparation of notice of the certification,
18 proposed settlement, and date of the final fairness
19 hearing.

20 MCL § 21.632 (Fed. Jud. Ctr., 4th ed. 2004).

21 Thus, the preliminary approval by the trial court is simply a conditional
22 finding that the settlement appears to be within the range of acceptable settlements.
23 As Professor Newberg comments, “[t]he strength of the findings made by a judge
24 at a preliminary hearing or conference concerning a tentative settlement proposal
25 may vary. The court may find that the settlement proposal contains some merit, is
26 within the range of reasonableness required for a settlement offer, or is
27 presumptively valid subject only to any objections that may be raised at a final
28 hearing.” 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11.26
(4th ed. 2010). Accordingly, a court should grant preliminary approval of a class
action settlement where it is within the “range of reasonableness.” Here, the Parties
have reached such an agreement and have submitted it to the Court in connection
with this filing.

///

///

///

///

C. The Settlement Meets The Requirements of FRCP 23(e)(2)

1 **1. The Amended FRCP 23(e)(2) Establishes Factors That**
2 **Must Be Met for Any Settlement to be Found to Be “Fair,**
3 **Reasonable, and Adequate”**

4 In 2018, FRCP 23(e)(2) was amended such that it now outlines specific
5 factors for a district court to consider when determining whether a settlement is
6 “fair, reasonable, and adequate.” *McKinney-Drobnis v. Oreshack*, 16 F. 4th 594,
7 607 (9th Cir. 2021). Per the amended FRCP 23(e)(2), these factors include
8 whether:

9 a) the class representative and class counsel have adequately represented the
10 class;

11 b) the proposal was negotiated at arm’s length;

12 c) the relief provided for the class is adequate, taking into account:

13 (i) the costs, risks and delay of trial and appeal;

14 (ii) the effectiveness of any proposed method of relief to the class,
15 including the method of processing class member claims;

16 (iii) the terms of any proposed award of attorney’s fees, including
17 timing of payment; and

18 (iv) any agreement required to be identified under Rule 23(e)(3);

19 d) the proposal treats class members equitably relative to each other.

20 **a. Class Counsel Has Adequately Represented the Class**

21 Plaintiff’s counsel conducted an extensive investigation of the factual
22 allegations, formal written and deposition discovery, communicated with putative
23 class members, and obtained payroll data and contact information for the entire
24 class. (Rosenthal Decl. ¶¶ 2, 4.) Counsel also performed extensive damages
25 calculations prior to mediation and went so far as to retain an expert statistician to
26 assist in performing those calculations. (Rosenthal Decl. ¶ 4). As the Court may
27 recall, this matter settled after Plaintiff’s Motion for Class Certification had already
28 been filed, which demonstrates not only the time and effort put into this matter by

1 Class Counsel, but also that provides some indication that Defendant felt pressure
2 to resolve this matter before a ruling was issued on class certification. Plaintiff's
3 counsel have maintained and continue to maintain an adversarial relationship with
4 Defendant throughout the course of this litigation. (Rosenthal Decl. ¶ 9). Further,
5 Plaintiff's Counsel have been approved as class counsel in a large number of other
6 wage and hour class actions. (Rosenthal Decl. ¶ 14; Lee Decl. ¶¶ 5-6; Agnew Decl.
7 ¶¶ 5-6.)

8 **b. Plaintiff Has Adequately Represented the Class**

9 Plaintiff has been actively involved in the instant litigation over the course
10 of the case. Plaintiff's involvement includes meeting with counsel on several
11 occasions, reviewing the Complaint, preparing for deposition, sitting for a full day
12 deposition, reviewing discovery responses, contacting putative class members, and
13 of course participating in the settlement process. Plaintiff has no conflicts with any
14 members of the putative class. (Delgado Decl., ¶ 9).

15 **c. The Instant Settlement Is the Product of An Arm's**
16 **Length Negotiation**

17 This was a contentious litigation with the Parties each being represented by
18 competent counsel. As discussed throughout this brief and in the declarations
19 submitted herewith, the Parties engaged in substantial motion practice and
20 conducted thorough investigations related to the claims and defenses alleged in this
21 case. Further, the proposed settlement was reached after the Parties utilized the
22 assistance of an experienced mediator and after substantial arm's-length
23 negotiations between the Parties.

24 **d. The Relief Provided To The Class Is Adequate**

25 **i. Value of the Claims**

26 Each side has apprised the other of their respective factual contentions, legal
27 theories, and defenses, resulting in extensive arm's-length negotiations taking
28 place among the Parties. Indeed, prior to the mediation, Defendant provided to

1 Plaintiff detailed pay and time data for the entire Class, which included the number
2 of payroll periods at issue. From this data, Plaintiff's counsel was able to calculate
3 the maximum amount of class-wide damages, which is approximately \$5,584,862,
4 which is based on approximately \$1,559,572 owed due to 57,229 noncompliant
5 meal breaks (based on an average hourly rate of pay of \$18.66/hour),
6 approximately \$3,602,033 owed due to 193,035 noncompliant rest breaks (based
7 on an average hourly rate of \$18.66/hour), approximately \$174,567 for potential
8 waiting time penalties for 39 separated employees, and approximately \$248,600
9 for 2,522 inaccurate wage statements. (Rosenthal Decl. ¶ 12.)

10 With respect to the PAGA penalties, which are discretionary and subject to
11 reduction by this Court, the potential maximum is approximately \$2,364,500. (*Id.*)
12 Indeed, courts have affirmed the reduction of PAGA penalties. For example, in
13 *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), the Court of Appeal
14 affirmed the trial court's reduction of PAGA penalties by 90%. Here, the highest
15 exposure for PAGA penalties is \$2,364,500. If this Court reduced the PAGA
16 penalties by 90%, as the trial court did in *Carrington*, then the total exposure
17 would be only \$236,450. (Rosenthal Decl. ¶ 12.)

18 **ii. Risk of Continued Litigation**

19 To assess the fairness, adequacy, and reasonableness of a class action
20 settlement, the Court must weigh the immediacy and certainty of substantial
21 settlement proceeds against the risks inherent in continued litigation. *In re General*
22 *Motors Corp.*, 55 F.3d 768, 806 (3d Cir. 1995) ("present value of the damages
23 plaintiffs would likely recover if successful, appropriately discounted for the risk
24 of not prevailing, should be compared with the amount of the proposed
25 settlement."); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975); *Boyd v. Bechtel*
26 *Corp.*, 485 F. Supp. 610, 616-17 (N.D. Cal. 1979); MCL § 21.62 at 316.

27 Here, the Settlement affords fair relief to the Class, while avoiding
28 significant legal and factual battles that otherwise may have prevented the Class

1 from obtaining any recovery at all. Although Plaintiff's attorneys believe the
2 Class's claims are meritorious, they are experienced and realistic, and understand
3 that the outcome of a trial, and the outcome of any appeals that would inevitably
4 follow if the Class prevailed at trial, are inherently uncertain in terms of both
5 outcome and duration.

6 Indeed, there is significant doubt regarding whether Plaintiff's claims could
7 achieve class certification and/or make it past a Motion for Summary Judgment.

8 Looking first at Plaintiff's claim for meal period violations, this claim is
9 based on two different theories of liability. First, Defendant's time records
10 demonstrate that for *some* non-exempt employees during *some* of the class period,
11 their time punch entries for the start and end of meal periods were rounded to the
12 nearest quarter hour. These same time punch records show the actual (i.e., the
13 unrounded time stamps) so it is possible to determine which employees took meal
14 periods that were in actuality short or late but were treated as compliant by
15 Defendant. In total, Plaintiff's analysis of the putative class time records
16 determined that there were 57,229 meal periods that were short or late that were
17 rounded into compliance by Defendant. Second, Plaintiff contends that Defendant
18 failed to ensure that employees took second meal periods on occasions when they
19 worked more than 12 hours in a shift.

20 Addressing the first theory, there is significant case law suggesting that
21 failure to pay meal or rest period premiums themselves is not a basis for class
22 certification absent a company policy that in itself prevents employees from taking
23 compliant meal or rest periods. *Coleman v. Jenny Craig, Inc.*, 649 Fed. Appx. 387,
24 388-389 (9th Cir. April 20, 2016). The *Coleman* court held that the meal period
25 penalty is the *remedy* for a noncompliant meal period but that for a class to be
26 certified, Plaintiff needed to show "a common practice of forcing employees to
27 take short or late meal breaks." *Id* at 389. As applied here, even if Plaintiff could
28 prove that rounding resulted in employees not receiving premium pay for

1 noncompliant meal periods, Plaintiff would still need to first show that the
2 company “forced” employees to take the noncompliant meal breaks in the first
3 place. Based on the discovery taken by Plaintiff, there is no evidence that there was
4 any policy that prevented or deterred employees from taking compliant meal
5 periods, which would have made class certification on this claim difficult.

6 On Plaintiff’s claim for failure to provide second meal periods in shifts over
7 12 hours, Plaintiff will again run into the obstacle of the fact that there was no
8 evidence of a policy preventing employees from taking these breaks. The fact that
9 many employees did not take second meal periods is not necessarily conclusive
10 evidence in itself that Defendant was stopping them from doing so.

11 On Plaintiff’s claim for rest periods, Plaintiff alleged that there was a
12 company policy prohibiting employees from leaving the work premises during rest
13 periods, which in turn amounted to employer control of the employee during a
14 break that is supposed to be completely unencumbered per the *Augustus v. ABM*
15 *Services, Inc.* decision. Plaintiff testified at his deposition that he had specifically
16 been told that employees were not permitted to leave the premises for rest breaks.
17 (Deposition of Ernesto Delgado, 91:24-92:13; Exhibit B to the Declaration of
18 Nicholas Rosenthal). Defendant denied that there was any such policy and Plaintiff
19 has not identified a written document that laid out any such policy. Further,
20 *Augustus* centered on use of a walkie-talkie during rest breaks, not on a limitation
21 regarding where an employee could or could not go. *Augustus v. ABM Services,*
22 *Inc.*, 2 Cal. 5th 257, 260 (2016). Thus, this claim could be difficult to certify as
23 well, as it would require collecting information from numerous putative class
24 members, and even then could be subject to individualized issues.

25 Turning to Plaintiff’s claim for a violation of Labor Code Section 203 based
26 on final wages being provided on paycards, this is an untested theory as to when
27 the paycards only charge a fee at certain locations. As revealed in discovery, the
28 paycards issued to separated employees did not require that the employee incur a

1 fee no matter what, but instead fees were only charged at certain ATM locations.
2 While Plaintiff testified that he incurred fees when he attempted to access his final
3 wages, Plaintiff had not yet obtained evidence that other employees had also been
4 subject to these fees and gathering such evidence may not have been possible.

5 Finally, Plaintiff's claim for inadequate wage statements in violation of
6 Labor Code Section 226(a) was also contested. Defendant asserts that it provided
7 compliant wage statements throughout the entire class period and that Defendant
8 could have prevailed on the "knowing and intentional" and "injury" elements
9 required for penalties to be awarded under Labor Code § 226(e), which would have
10 barred Plaintiff and the class from any recovery.

11 Moreover, even if Plaintiff reached the issue of class certification, the losing
12 party would likely seek an appeal of the certification decision. Following a
13 decision by the trier of fact, the losing party would have the right to appeal. Given
14 the realities of litigation, this process places ultimate relief several years away. The
15 idea of balancing a fair recovery now, with settlement dollars being paid out now,
16 as opposed to a years-long litigation and appeal process regarding various potential
17 issues, is a significant factor to be considered. *National Rural Telecommunications*
18 *Cooperative v. DIRECTV, Inc.*, 221 F.R.D. 523, 526-27 (C.D. Cal. 2004)
19 ("Avoiding such a trial and the subsequent appeals in this complex case strongly
20 militates in favor of settlement rather than further protracted and uncertain
21 litigation.").

22 Further, were the case to be denied class certification, the class members
23 could be left without a remedy as a practical matter and courts across the state
24 would have to address the issues presented here in a piecemeal, costly, and time-
25 consuming manner. The Settlement in this case is therefore consistent with the
26 "overriding public interest in settling and quieting litigation" that is "particularly
27 true in class action suits." *See Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950
28 (9th Cir. 1976); 4 *Newberg on Class Actions* § 11.41.

1 Finally, Defendant denies any liability or wrongdoing of any kind associated
2 with the claims alleged in this lawsuit, and further denies that, for any purpose
3 other than that of settling this lawsuit, this action is appropriate for class treatment.
4 Defendant maintains that it has complied at all times with California wage and
5 hour laws. Because of such denial, if this case is not resolved, it will likely
6 continue to be a long and protracted litigation.

7 **iii. Distribution of Settlement Awards**

8 Under the Settlement, the Settlement Administrator is to mail via first class
9 mail a copy of the Court-approved Notice of Proposed Class Action Settlement and
10 Setting of a Final Approval Hearing (“Notice”) to all Settlement Class Members.
11 The Settlement Administrator will conduct a search based on the National Change
12 of Address Database, or other similar service, to update and correct for any known
13 or identifiable address changes prior to mailing. The Notice provides the
14 Settlement Class with the information needed to make an informed decision. It
15 provides an explanation of the proposed settlement and procedures on how to
16 object, how to opt-out of the settlement, and how to appear at the final approval
17 hearing. The Notice provides a brief explanation of the case, the exclusion and
18 objection procedures/deadline, how to access court records, a toll-free telephone
19 number to obtain more information, the attorneys’ fees to be paid, and the
20 individual member’s number of applicable work weeks. It also states that those
21 who do not opt out of the settlement will be bound by the Settlement related to the
22 release of individual or class claims.

23 Here, the settlement fund is non-reversionary, such that 100% of the Net
24 Settlement Amount will be available for distribution to class members who do not
25 opt-out. Moreover, the settlement does not require claim forms. Rather, class
26 members who do not opt-out will receive a check. Further, the settlement fund will
27 be paid out entirely in cash (as opposed to a voucher, coupon, etc.). In addition, as
28 set forth in the Settlement Agreement, the class release is expressly limited to the

1 class and representative claims asserted in this case, *i.e.*, unpaid premiums and
2 penalties associated with Defendant's policy of providing non-compliant meal and
3 rest breaks, distributing final wages in the form of a pay card, and issuing
4 inaccurate wage statements. The released claims are identical to the causes of
5 action pled or could have been pled based on the facts of the Complaint, including
6 any derivative claims under the FLSA.

7 **iv. Terms of Attorney's Fees**

8 Class Counsel will seek an award of attorney's fees of not more than one-
9 third of the Gross Settlement Amount (or \$155,000.00) and reimbursement of
10 actual costs incurred of up to \$25,000.00. Class Counsel may ultimately make a fee
11 request below one-third depending on the final number of hours expended on this
12 matter. Both the requested service amount and attorneys' fees and costs will be
13 requested simultaneously with Plaintiff's motion seeking final approval of this
14 class action settlement. Plaintiff's counsel of course recognizes that any attorney
15 fee award is at the discretion of the Court.

16 Class Counsel will submit a record of all hours expended on this matter and
17 will perform a lodestar analysis in the Motion for Final Approval. Additionally,
18 Class Counsel will not receive any funds prior to the putative class.

19 **v. All Class Members Are Treated Equitably**

20 Settlement payments to the Class are based solely on the number of weeks
21 worked by each Class Member. In other words, each work week will be assigned a
22 dollar value and that number will be multiplied by the number of weeks during the
23 class period in which the class member worked. Thus, the method by which the
24 settlement is allocated is equitable.

25 ///

26 ///

27 **D. The Settlement Satisfies the Heightened Scrutiny Given To Pre-**
28 **Certification Settlements**

1 Plaintiffs seeking approval of class settlements that were reached pre-
2 certification are subject to “heightened scrutiny.” *In re Bluetooth Headset Products*
3 *Liability Litigation*, 654 F.3d 935, 947 (9th Cir. 2011). Specifically, the factors to
4 be reviewed are: (1) “when counsel receive[s] a disproportionate distribution of the
5 settlement; (2) when the parties negotiate a clear-sailing arrangement, under which
6 the defendant agrees not to challenge a request for an agreed-upon attorney’s fee;
7 and (3) when the agreement contains a kicker or reverter clause that returns
8 unawarded fees to the defendant, rather than the class.” *McKinney-Drobnis v.*
9 *Oreshack*, 16 F. 4th 594, 607-608 (9th Cir. 2021).

10 First, Plaintiff’s counsel does not receive a “disproportionate” amount of the
11 settlement. Under the settlement, Plaintiff’s counsel will receive no more than one-
12 third of the settlement amount. This figure represents the maximum that Plaintiff’s
13 counsel may ask for under the settlement. The amount requested by Plaintiff’s
14 counsel will depend on the lodestar amount at the time of the filing of the Motion
15 for Final Approval. Moreover, one-third is well within the grounds of normalcy for
16 a class action settlement where the lodestar justifies it. Certainly, the Court has the
17 power to ultimately reduce the requested attorney’s fees, but that does not make a
18 request for one-third “disproportionate.” Indeed, numerous district courts have
19 granted one-third as attorneys’ fees in pre-certification settlements such as this one.
20 *See, e.g., Fernandez v. Victoria Secret Stores, LLC*, 2008 WL 8150856 (C.D. Cal.
21 July 21, 2008) (awarding 34 percent of the common fund in attorneys’ fees in a
22 wage and hour class action settlement; *Garcia v. Gordon Trucking, Inc.*, 2012 WL
23 5364575 (E.D. Cal. Oct. 31, 2012) (approving fees in the amount of 33 percent of
24 the common fund); *Singer v. Beckton Dickinson and Co.*, 2010 WL 2196104, at
25 *8 (S.D. Cal. June 1, 2010) (approving an attorneys’ fee award of 33.33 percent).
26 *Vandervort v. Balboa Capital Corp.*, 8 F. Supp. 3d 1200, 1209-10 (C.D. Cal. 2014)
27 (court awarded 33 1/3%); *Boyd v. Bank of Am. Corp.*, 2014 U.S. Dist. LEXIS
28 162880 at *22-*23 (C.D. Cal. Nov. 18, 2014) (same); *In re Pacific Enterprises*

1 *Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming fee award equal to 33% of
2 fund); *Cordy v. USS-Posco Indus.*, 2014 WL 212587, at *3 (N.D. Cal. Jan. 17,
3 2014) (“a proposed attorney's fee award of not more than 33% appears to be
4 reasonable”). Again, one-third is the maximum Plaintiff’s counsel could request
5 and Plaintiff is not seeking for the court to apprise any fee request at this juncture.

6 Second, the Parties have amended the Joint Stipulation of Settlement to
7 remove the “clear sailing” provision. While Plaintiff’s counsel is limiting itself to a
8 maximum fee request of one-third, Defendant is free to challenge any fee request
9 Plaintiff’s counsel ultimately submits.

10 Third, there is no reversion under the instant settlement. Defendant will not
11 receive any of the settlement funds back.

12 **E. The Proposed Settlement Class Satisfies the Elements for**
13 **Certification**

14 **1. Numerosity**

15 The numerosity requirement is satisfied if the proposed class is “so
16 numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1).
17 Impracticable does not mean impossible, only that it would be difficult or
18 inconvenient to join all members of the class. *Harris v. Palm Springs Alpine*
19 *Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964). Indeed, courts have found
20 numerosity established by class actions consisting of as little as seven putative
21 class members. *Patrick v. Marshall*, 460 F. Supp. 23, 26 (N.D. Cal. 1978); *Jordan*
22 *v. L.A. County*, 669 F.2d 1311, 1320 (9th Cir. 1982) (noting, in dicta, that the court
23 “would be inclined to find the numerosity requirement...satisfied solely on the
24 basis of [39] ascertained class members”), vacated on other grounds, 459 U.S. 810,
25 103 S. Ct. 35, 74 L.Ed.2d 48 (1982). The Class consists of approximately 339 total
26 persons. (Settlement Agreement ¶ G.61.) Accordingly, here, the Settlement Class is
27 numerous and clearly satisfies the numerosity prong.

28 **2. Ascertainability**

1 The Class is ascertainable and has already been identified in Defendant's
2 records. (Rosenthal Decl. ¶ 5.)

3 3. Typicality

4 Typicality under Rule 23(a)(3) is satisfied if the representative plaintiff's
5 claims share a common element with the class: i.e., those claims arise from the
6 same course of conduct that gave rise to the claims of other settlement class
7 members. *In re United Energy Corp. Solar Power Modules Tax Shelter Invs. Sec.*
8 *Litig.*, 122 F.R.D. 251, 256 (C.D. Cal. 1988). Here, Plaintiff submits that his claims
9 are typical of those of other class members because he alleges that he was
10 subjected to the same meal and rest break procedures and received the same wage
11 statements that failed to identify the rates of pay and number of hours worked for
12 overtime and shift differential wages as received by members of the class. Plaintiff
13 also alleges that he received his final wages in the form of a pay card. (Declaration
14 of Ernesto Delgado ("Delgado Decl.") ¶ 6.) Therefore, it is Plaintiff's position that
15 his claims are typical of the class as a whole. (*Id.*)

16 4. Commonality

17 Commonality relates to whether there are "questions of law or fact common
18 to the class." Fed. R. Civ. P. 23(a)(2). Commonality is satisfied if there is one issue
19 common to class members. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th
20 Cir. 1998). Here, Plaintiff contends that his claims for meal and rest period
21 premiums, and penalties for wages owed at separation of employment are suited
22 for class treatment. *Greer v. Dick's Sporting Goods, Inc.*, 2017 WL 1354568, at *6
23 (E.D. Cal. Apr. 13, 2017); *Rodriguez v. Nike Retail Services, Inc.*, 2016 WL
24 8729923, at *6 (N.D. Cal. Aug. 19, 2016); *Chavez v. Converse, Inc.*, N.D. Cal.
25 Case No. 15-3746 NC, Dkt. No. 89 (N.D. Cal. Sept. 22, 2016); *Otsuka v. Polo*
26 *Ralph Lauren Corp.*, 2010 WL 366653, at *5 (N.D. Cal. Jan. 25, 2010) *Moore v.*
27 *Ulta Salon, Cosmetics & Fragrance, Inc.*, 311 F.R.D. 590, 596 (C.D. Cal. 2015).
28 While Plaintiff has identified possible obstacles to class certification, Plaintiff has

1 also obtained evidence for each of these claims to support the existence of a class
2 subject to a common policy. On the meal period claim, Plaintiff obtained evidence
3 in the form of payroll and time records that there was a policy of rounding time in
4 such a manner that late or short meal breaks were “rounded” in to compliance and
5 no meal period penalties were paid. Defendant testified at deposition that meal
6 period premiums were not paid. On the rest break claim, Plaintiff testified that he
7 was told it was company policy that employees were not to leave the work site
8 during rest breaks. On the pay card claim, Defendant testified that final wages were
9 paid to the putative class on a pay card that charged fees to withdraw money in
10 certain instances. Plaintiff further contends that his wage statement claims are
11 aptly suited for class treatment. *Magadia v. Wal-Mart Assocs., Inc.*, 324 F.R.D.
12 213, 225 (N.D. Cal. 2018) (certified Section 226(a) claims). Defendant testified
13 that all wage statements issued to the putative class were formatted in the same
14 manner. Thus, Plaintiff contends that this class action may be certified for
15 settlement purposes.

16 **5. Adequacy**

17 Adequacy under Rule 23(a)(4) is satisfied if the named plaintiffs have no
18 disabling conflicts of interest with other members of the class and Class Counsel
19 are competent and well qualified to undertake the litigation. *Lerwill v. Inflight*
20 *Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). No conflict exists
21 between Plaintiff and the Class because Plaintiff alleges that he has been damaged
22 by the same alleged conduct as all class members and has the incentive to fairly
23 represent all class members’ claims to achieve the maximum possible recovery.
24 (Delgado Decl. ¶ 9.) Plaintiff has spent considerable efforts in this case, including
25 assisting with investigation, providing documents, and sitting for a deposition. (*Id.*
26 ¶ 7.) Plaintiff remains willing to vigorously prosecute this action to the benefit of
27 the class. (*Id.* ¶ 10.) Moreover, Plaintiff is represented by attorneys who have
28 extensive experience in complex wage and hour litigation as is detailed in each of

1 their declarations supported herewith.

2 **6. Common Questions of Law and Fact Predominate**

3 Here, common questions of law or fact predominate over individual
4 questions pursuant to Rule 23(b)(3). As discussed above, the issues of fact and law
5 raised in this action are common to all members of the classes and predominate in
6 this case.

7 **7. Superiority of Class Action**

8 The requirement that a class action is superior to other methods of
9 adjudication under Rule 23(b)(3) is also met. Courts have recognized that the class
10 action device is superior to other available methods for the fair and efficient
11 adjudication of controversies involving large number of employees in wage and
12 hour disputes. *See, e.g., Hanlon*, 150 F.3d at 1022. Without class-wide relief in this
13 action, the class members would be forced to litigate numerous cases on a
14 piecemeal basis. Here, Plaintiff's lawsuit brings a number of claims under the
15 California Labor Code. For 339 individuals to file their own lawsuits alleging the
16 the same claims presented in the instant class action would be a burden on the
17 court system and would require the 339 individuals to find their own attorneys.

18 **F. Attorneys' Fees, Costs, and Class Representative Service Award**

19 Pursuant to the terms of the Agreement, and without opposition from
20 Defendant, Plaintiff will also be entitled to request a service award of up to a
21 maximum of \$10,000.00, which is to compensate Plaintiff for prosecuting this
22 case, participating in discovery, including testifying at his deposition, making
23 himself available as needed, including for trial, protecting the interests of the class,
24 and executing a general release with a California Civil Code § 1542 waiver. *Cook*
25 *v. Niedert*, 142 F.3d 1004, 1015 (7th Cir. 1998); *Van Vranken v. Atlantic Richfield*
26 *Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995). Similarly, Class Counsel will
27 seek an award of attorney's fees of not more than one-third of the Gross Settlement
28 Amount (or \$155,000.00) and reimbursement of actual costs incurred of up to

1 \$25,000.00. Both the requested service amount and attorneys' fees and costs will
2 be requested simultaneously with Plaintiff's motion seeking final approval of this
3 class action settlement.

4 **G. Settlement Administrator**

5 The Parties have selected Phoenix Settlement Administrators ("Phoenix") as
6 the Settlement Administrator. (Settlement Agreement ¶ A.31.)

7 Notice by U.S. mail, along with the National Change of Address search, has
8 been approved by numerous courts and, therefore, the Parties agreed to notice by
9 U.S. mail. (*Id.*) Again, the costs for the settlement administration are not to exceed
10 \$11,000.00. Plaintiff and his counsel believe that this amount is reasonable in
11 relation to the value of the settlement, as the administration costs account for only
12 2.4% of the Gross Settlement Amount. The settlement administration costs will be
13 deducted from the Gross Settlement Amount.

14 **H. Class Definition**

15 The Court correctly pointed out that there was inconsistency in the class
16 definition. Specifically, the settlement is intended to encompass California
17 employees of Defendant only, but did not articulate that. The Parties have agreed
18 to amend the settlement such that the class definition going forward is: All persons
19 employed by Defendant in California as an hourly non-exempt employee during
20 the Class Period [April 6, 2016 through October 4, 2021].

21 **I. Class Action Fairness Act ("CAFA")**

22 This settlement is subject to the CAFA notice requirements. *See* 28 U.S.C.
23 § 1715. As required by the Agreement, Defendant will provide the required notice
24 to the Attorney General of the United States and all relevant State Attorney
25 Generals within the time period provided by 28 U.S.C. § 1715(b).

27 **III. CONCLUSION**

1 Based on the foregoing, Plaintiff respectfully requests that the Court (1)
2 grant preliminary approval for the proposed class action settlement; (2) authorize
3 the mailing of the proposed notice to the class of the settlement; and (3) schedule a
4 “fairness hearing,” i.e., a hearing on the final approval of the settlement.
5

6 Dated: December 20, 2021

DIVERSITY LAW GROUP, P.C.

7
8 By: 

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

Attorneys for Plaintiff and the Class
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28