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

ERNESTO DELGADO,

Plaintiffs,

vs.

KLOECKNER METALS CORPORATION,
et al.

Defendants.

Case No.: 20STCV22503

[Assigned to the Honorable Yvette M.
Palazuelos, Department 9]

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

Date: August 23, 2022

Time: 10:30 a.m.

Dept.: 9

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

2 **PLEASE TAKE NOTICE** that on August 23, 2022, at 10:30 a.m., or as soon thereafter
3 as counsel may be heard, before the Honorable Yvette M. Palazuelos, in Courtroom 9 of the
4 Superior Court of California, County of Los Angeles, located at 312 North Spring Street, Los
5 Angeles, CA 90012, Plaintiff Ernesto Delgado (“Plaintiff”) will and hereby does move the Court
6 for preliminary approval of the proposed class and representative action settlement. Specifically,
7 Plaintiff respectfully requests that the Court: (1) grant preliminary approval for the proposed
8 class and representative action settlement; (2) grant conditional certification of the proposed
9 settlement class; (3) authorize the mailing of the proposed notice to the class of the settlement;
10 and (4) schedule a “fairness hearing,” i.e., a hearing on the final approval of the settlement.

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

19
20 Dated: May 24, 2022

DIVERSITY LAW GROUP, P.C.

21
22 By: 
23 Larry W. Lee
24 Kristen M. Agnew
25 Nicholas Rosenthal
26 Attorneys for Plaintiff and the Class
27
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

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

3 Plaintiff Ernesto Delgado (“Plaintiff”) respectfully requests that the Court grant
4 preliminary approval of the Stipulated Settlement Agreement and Release of Claims (hereinafter
5 referred to as “Settlement Agreement” or “Stipulation”) that he has reached in the above-
6 captioned matter with Defendant Kloeckner Metals Corporation (“Defendant”) (Plaintiff and
7 Defendant collectively referred to as the “Parties”).

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

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

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

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

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

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

27 Defendant denies Plaintiff’s allegations and contends that it has complied with its
28 obligations under the law.

1 On June 10, 2020, Plaintiff commenced this action in Superior Court for the State of
2 California, County of Los Angeles, alleging claims for violation of California Labor Code §§
3 201-203, 212-213, 226, 226.7, 512, and 2698, *et seq.*, the Private Attorneys General Act
4 (“PAGA”), and California Business and Professions Code § 17200 *et seq.* (“Complaint”).

5 On August 17, 2020, Defendant filed a Notice of Removal of Action to the United States
6 District Court for the Central District of California. This matter was remanded to this Court on
7 January 28, 2022.

8 The Parties thoroughly investigated the facts relating to the claims alleged in the
9 Complaint. Plaintiff conducted formal written discovery, including propounding interrogatories
10 and requests for production. Plaintiff also obtained and reviewed Defendant’s discovery
11 responses and document production and took the deposition of Defendant’s FRCP 30(b)(6)
12 witnesses regarding its meal and rest break and payroll policies and procedures. Defendant also
13 took the deposition of Plaintiff. (Declaration of Nicholas Rosenthal (“Rosenthal Decl.”) ¶ 2.)

14 The Parties then agreed to conduct a private mediation with wage and hour class action
15 mediator Steven J. Serratore, Esq. on March 22, 2021. (Rosenthal Decl. ¶ 4.) In connection with
16 the mediation, Defendant provided Plaintiff with data for the entire class, which permitted
17 Plaintiff’s counsel to conduct a damage analysis. (*Id.*)

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

19 Again, on March 22, 2021, the Parties attended an all-day mediation before Steven J.
20 Serratore. Despite a full day of negotiations, the Parties were unable to reach an agreement. The
21 Parties continued negotiations over the course of several months, and with the assistance of Mr.
22 Serratore, ultimately reached an agreement to resolve the case on a class-wide basis. (Rosenthal
23 Decl. ¶ 6.) The Parties memorialized their agreement in the concurrently filed Settlement
24 Agreement, which is attached as **Exhibit A to the Declaration of Nicholas Rosenthal**. The
25 Class definition is as follows: “All persons employed by Defendant in California as an hourly
26 non-exempt employee during the Class Period [April 6, 2016 through October 4, 2021].”

27 The Settlement Agreement provides for a total settlement sum of Four Hundred Sixty-
28 Five Thousand Dollars (\$465,000.00), inclusive of payments to Settlement Class Members, the

1 class representative service award, attorneys' fees and costs, payment to the State of California
2 Labor and Workforce Development Agency (pursuant to PAGA), and settlement administration
3 costs. The Parties agreed to remand this matter after reaching a settlement.

4 Pursuant to the terms of the Settlement Agreement, the Net Settlement Amount ("NSA")
5 (after deduction of attorneys' fees in the amount of up to \$155,000.00, litigation costs up to
6 \$25,000.00, service award in the amount of up to \$10,000.00, PAGA penalties in the amount of
7 \$30,000.00 (or 75% of \$40,000.00) to the Labor and Workforce Development Agency (the
8 "LWDA"), and costs of settlement administration in the amount of approximately \$11,000.00) is
9 approximately \$234,000.00. (Settlement Agreement ¶¶ A.17; C.41(a), (e), (f), (g), (h).) Twenty
10 percent (20%) of the Individual Settlement Amounts distributed to Participating Class Members
11 will be allocated as wages, subject to withholding of all applicable taxes, and 80% will be
12 allocated as interest and penalties. (*Id.* ¶ C.41(d).) Defendant will be responsible for the
13 employer portion of payroll taxes. (*Id.* ¶ C.41(a).)

14 Individual Settlement Payments will be calculated based on the number of weeks a
15 Settlement Class Member worked during the Class Period. (*Id.* ¶ C.41(c).) Specific calculations
16 of Individual Settlement Payments will be made as follows:

- 17 1. The Settlement Administrator will determine the aggregate number of Weeks
18 Worked by Settlement Class Members during the Class Period ("Total Weeks
19 Worked"). The Settlement Administrator will then divide the Net Settlement
20 Amount by the Total Weeks Worked to determine a per workweek value
21 ("Workweek Value"). The Workweek Value will be multiplied by the number of
22 Weeks Worked by each Settlement Class Member during the Class Period to
23 determine the distribution, prior to legal deductions, for each Settlement Class
24 Member. (*Id.* ¶ C.41(c).)
- 25 2. If there are any timely submitted Requests for Exclusion, the Settlement
26 Administrator shall proportionately increase the Individual Settlement Amounts
27 for each Participating Class Member so that the amount actually distributed to
28 Participating Class Members equals 100% of the Net Settlement Amount. (*Id.*)

3. Data from Defendant's payroll records will be presumed to be correct, unless a Settlement Class Member timely demonstrates otherwise to the Settlement Administrator by credible evidence. All workweek disputes will be reviewed by counsel for the Parties, and if they are unable to agree, shall be decided by the Settlement Administrator. (*Id.* ¶ G.57.)

Significantly, this settlement is non-reversionary and claim forms are not required.

In other words, none of the unclaimed settlement funds will revert back to Defendant and a Settlement Class Member need not submit a claim to receive his or her share. (*Id.* ¶ C.42.) Instead, the Settlement Class Member will automatically receive a check in connection with resolution of the class and PAGA claims so long as he or she does not opt-out. (*Id.* ¶ G.59(a).) Any remaining monies from uncashed checks will be distributed to the California State Controller's Office, Unclaimed Property Division, in the name of the Settlement Class Member. (*Id.* ¶ G.64.)

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

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

II. LEGAL ANALYSIS

A. The Class at Issue and the Settlement Fund

Defendant has agreed to collect information regarding the identity of the members of the Settlement Class. The Parties have further agreed and stipulated that this class be certified on a provisional, non-mandatory basis for the purposes of this settlement only. (*Id.* ¶ K.78.) As set forth in the Settlement, the Parties have agreed that the settlement is non-reversionary and that

claim forms will not be required.

B. Two-Step Approval Process

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

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

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

Thus, the preliminary approval by the trial court is simply a conditional finding that the settlement appears to be within the range of acceptable settlements. As Professor Newberg comments, “[t]he strength of the findings made by a judge at a preliminary hearing or conference concerning a tentative settlement proposal may vary. The court may find that the settlement proposal contains some merit, is within the range of reasonableness required for a settlement offer, or is presumptively valid subject only to any objections that may be raised at a final 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. Conditional Certification of the Class is Appropriate for Settlement Purposes

Pursuant to California Rules of Court, Rule 3.769(d), the Court is permitted at the

1 preliminary approval stage to make an order approving certification of a provisional settlement
2 class. The standard of scrutiny applied by a court to determine the propriety of certifying a
3 settlement class is a lesser standard than that applied to a litigation class since the case
4 management concerns inherent in determining if a litigation class should be certified need not be
5 addressed with respect to a settlement class where trial is not anticipated. *Dunk*, 48 Cal.App.4th
6 at 1807 n. 19; *see also Officers for Justice*, 688 F.2d at 633 (“[C]ertification issues raised by
7 class action litigation that is resolved short of a decision on the merits must be viewed in a
8 different light.”); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1987) (“Confronted
9 with a request for settlement-only class certification, a district court need not inquire whether the
10 case, if tried, would present intractable management problems...for the proposal is that there be
11 no trial.”). Additionally, the court’s fairness review adequately protects the absent class
12 members. For the reasons discussed below, and for settlement purposes only, Plaintiffs request
13 that this Court provisionally certify the Settlement Class pursuant to California Code of Civil
14 Procedure § 382.

15 **a. The Class is Ascertainable and Sufficiently Numerous**

16 The Settlement Class is tailored to ensure the members are readily ascertainable: “All
17 persons employed by Defendant in California as an hourly non-exempt employee during the
18 Class Period [April 6, 2016 through October 4, 2021].” Further, the Settlement Class is
19 identifiable from Defendant’s payroll and personnel records. *Rose v. City of Hayward*,
20 Cal.App.3d 926, 932 (1981) (finding “[c]lass members are ‘ascertainable’ where they may be
21 readily identified without unreasonable expense or time by reference to official records.”).
22 (Rosenthal Decl., ¶ 5.)

23 The Class is comprised of 339 individuals. (Rosenthal Dec., ¶ 12.) Numerosity is met as
24 the individual joinder of all class members would be impracticable. Code Civ. Proc. §382;
25 *Richmond v. Dart Indus., Inc.*, 29 Cal.3d 462, 470 (1981); *Rose*, 126 Cal.App.3d at 934
26 (presumption of impracticable joinder for class of 30 to 40 individuals).

27 **b. Class Counsel Has Adequately Represented the Class**

28 Plaintiff’s counsel conducted an extensive investigation of the factual allegations, formal

1 written and deposition discovery, communicated with putative class members, and obtained
2 payroll data and contact information for the entire class. (Rosenthal Decl. ¶¶ 2, 4.) Counsel also
3 performed extensive damages calculations prior to mediation and went so far as to retain an
4 expert statistician to assist in performing those calculations. (Rosenthal Decl. ¶ 4). This matter
5 settled after Plaintiff's Motion for Class Certification had already been filed, which demonstrates
6 not only the time and effort put into this matter by Class Counsel, but also that provides some
7 indication that Defendant felt pressure to resolve this matter before a ruling was issued on class
8 certification. Plaintiff's counsel have maintained and continue to maintain an adversarial
9 relationship with Defendant throughout the course of this litigation. (Rosenthal Decl. ¶ 9).
10 Further, Plaintiff's Counsel have been approved as class counsel in a large number of other wage
11 and hour class actions. (Rosenthal Decl. ¶ 14; Lee Decl. ¶¶ 5-6; Agnew Decl. ¶¶ 5-6.)

12 **c. Plaintiff Has Adequately Represented the Class**

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

18 **d. Plaintiff's Claims Are Typical of The Class**

19 Typicality simply means that the representative(s) claims be similar to those of class
20 members. The interests of the class representatives need not be identical to those of other class
21 members; the class representatives must simply be similarly situated. *B.W.I. Custom Kitchen v.*
22 *Owens- Illinois, Inc.*, 191 Cal.App.3d 1341, 1347 (1987); *Classen v. Weller*, 145 Cal.App.3d 27,
23 46 (1983). Here, Plaintiff submits that his claims are typical of those of other class members
24 because he alleges that he was subjected to the same meal and rest break procedures and received
25 the same wage statements that failed to identify the rates of pay and number of hours worked for
26 overtime and shift differential wages as received by members of the class. Plaintiff also alleges
27 that he received his final wages in the form of a pay card. (Declaration of Ernesto Delgado
28 ("Delgado Decl.") ¶ 6.) Therefore, it is Plaintiff's position that his claims are typical of the class

1 as a whole. (*Id.*)

2 **e. Common Issues of Fact or Law Predominate**

3 Whether a class action is the appropriate mechanism depends largely upon “whether the
4 common questions are sufficiently pervasive to permit adjudication in a class action rather than
5 multiplicity of suits.” *Richmond*, 29 Cal.3d at 477-478. The primary purpose of this inquiry is to
6 ascertain whether the proposed class is sufficiently cohesive to warrant adjudication by
7 representation. *See e.g., Lazar v. Hertz Corp.*, 143 Cal.App.3d 128, 138-139 (1983); *Hogya v.*
8 *Superior Court*, 75 Cal.App.3d 122, 142 (1977).

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

23 **f. The Instant Settlement Is the Product of An Arm’s Length**
24 **Negotiation**

25 This was a contentious litigation with the Parties each being represented by competent
26 counsel. As discussed throughout this brief and in the declarations submitted herewith, the
27 Parties engaged in substantial motion practice and conducted thorough investigations related to
28 the claims and defenses alleged in this case. Further, the proposed settlement was reached after

the Parties utilized the assistance of an experienced mediator and after substantial arm's-length negotiations between the Parties.

g. The Relief Provided To The Class Is Adequate

i. Value of the Claims

Each side has apprised the other of their respective factual contentions, legal theories, and defenses, resulting in extensive arm's-length negotiations taking place among the Parties. Indeed, prior to the mediation, Defendant provided to Plaintiff detailed pay and time data for the entire Class, which included the number of payroll periods at issue. From this data, Plaintiff's counsel was able to calculate the maximum amount of class-wide damages, which is approximately \$5,584,862, which is based on approximately \$1,559,572 owed due to 57,229 noncompliant meal breaks (based on an average hourly rate of pay of \$18.66/hour), approximately \$3,602,033 owed due to 193,035 noncompliant rest breaks (based on an average hourly rate of \$18.66/hour), approximately \$174,567 for potential waiting time penalties for 39 separated employees, and approximately \$248,600 for 2,522 inaccurate wage statements. (Rosenthal Decl. ¶ 12.)

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

ii. Risk of Continued Litigation

To assess the fairness, adequacy, and reasonableness of a class action settlement, the Court must weigh the immediacy and certainty of substantial settlement proceeds against the risks inherent in continued litigation. *In re General Motors Corp.*, 55 F.3d 768, 806 (3d Cir. 1995) ("present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement."); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975); *Boyd v. Bechtel Corp.*, 485 F.

1 Supp. 610, 616-17 (N.D. Cal. 1979); MCL § 21.62 at 316.

2 Here, the Settlement affords fair relief to the Class, while avoiding significant legal and
3 factual battles that otherwise may have prevented the Class from obtaining any recovery at all.
4 Although Plaintiff's attorneys believe the Class's claims are meritorious, they are experienced
5 and realistic, and understand that the outcome of a trial, and the outcome of any appeals that
6 would inevitably follow if the Class prevailed at trial, are inherently uncertain in terms of both
7 outcome and duration.

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

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

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

1 breaks in the first place. Based on the discovery taken by Plaintiff, there is no evidence that there
2 was any policy that prevented or deterred employees from taking compliant meal periods, which
3 would have made class certification on this claim difficult.

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

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

21 Turning to Plaintiff's claim for a violation of Labor Code Section 203 based on final
22 wages being provided on paycards, this is an untested theory as to when the paycards only
23 charge a fee at certain locations. As revealed in discovery, the paycards issued to separated
24 employees did not require that the employee incur a fee no matter what, but instead fees were
25 only charged at certain ATM locations. While Plaintiff testified that he incurred fees when he
26 attempted to access his final wages, Plaintiff had not yet obtained evidence that other employees
27 had also been subject to these fees and gathering such evidence may not have been possible.

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

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

15 Further, were the case to be denied class certification, the class members could be left
16 without a remedy as a practical matter and courts across the state would have to address the
17 issues presented here in a piecemeal, costly, and time-consuming manner. The Settlement in this
18 case is therefore consistent with the "overriding public interest in settling and quieting litigation"
19 that is "particularly true in class action suits." See *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943,
20 950 (9th Cir. 1976); 4 *Newberg on Class Actions* § 11.41.

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

26 **iii. Distribution of Settlement Awards**

27 Under the Settlement, the Settlement Administrator is to mail via first class mail a copy
28 of the Court-approved Notice of Proposed Class Action Settlement and Setting of a Final

1 Approval Hearing (“Notice”) to all Settlement Class Members. The Settlement Administrator
2 will conduct a search based on the National Change of Address Database, or other similar
3 service, to update and correct for any known or identifiable address changes prior to mailing.
4 The Notice provides the Settlement Class with the information needed to make an informed
5 decision. It provides an explanation of the proposed settlement and procedures on how to object,
6 how to opt-out of the settlement, and how to appear at the final approval hearing. The Notice
7 provides a brief explanation of the case, the exclusion and objection procedures/deadline, how to
8 access court records, a toll-free telephone number to obtain more information, the attorneys’ fees
9 to be paid, and the individual member’s number of applicable work weeks. It also states that
10 those who do not opt out of the settlement will be bound by the Settlement related to the release
11 of individual or class claims.

12 Here, the settlement fund is non-reversionary, such that 100% of the Net Settlement
13 Amount will be available for distribution to class members who do not opt-out. Moreover, the
14 settlement does not require claim forms. Rather, class members who do not opt-out will receive a
15 check. Further, the settlement fund will be paid out entirely in cash (as opposed to a voucher,
16 coupon, etc.). In addition, as set forth in the Settlement Agreement, the class release is expressly
17 limited to the class and representative claims asserted in this case, *i.e.*, unpaid premiums and
18 penalties associated with Defendant’s policy of providing non-compliant meal and rest breaks,
19 distributing final wages in the form of a pay card, and issuing inaccurate wage statements. The
20 released claims are identical to the causes of action pled or could have been pled based on the
21 facts of the Complaint, including any derivative claims under the FLSA.

22 **iv. All Class Members Are Treated Equitably**

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

27 **D. Attorneys’ Fees, Costs, and Class Representative Service Award**

28 Pursuant to the terms of the Agreement, and without opposition from Defendant, Plaintiff

1 will also be entitled to request a service award of up to a maximum of \$10,000.00, which is to
2 compensate Plaintiff for prosecuting this case, participating in discovery, including testifying at
3 his deposition, making himself available as needed, including for trial, protecting the interests of
4 the class, and executing a general release with a California Civil Code § 1542 waiver. *Cook v.*
5 *Niedert*, 142 F.3d 1004, 1015 (7th Cir. 1998); *Van Vranken v. Atlantic Richfield Co.*, 901 F.
6 Supp. 294, 299-300 (N.D. Cal. 1995). Similarly, Class Counsel will seek an award of attorney's
7 fees of not more than one-third of the Gross Settlement Amount (or \$155,000.00) and
8 reimbursement of actual costs incurred of up to \$25,000.00. Both the requested service amount
9 and attorneys' fees and costs will be requested simultaneously with Plaintiff's motion seeking
10 final approval of this class action settlement.

11 **E. Settlement Administrator**

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

14 Notice by U.S. mail, along with the National Change of Address search, has been
15 approved by numerous courts and, therefore, the Parties agreed to notice by U.S. mail. (*Id.*)
16 Again, the costs for the settlement administration are not to exceed \$11,000.00. The settlement
17 administration costs will be deducted from the Gross Settlement Amount.

18 **III. CONCLUSION**

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

24 Dated: May 24, 2022

DIVERSITY LAW GROUP, P.C.

26 By: _____

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

Attorneys for Plaintiff and the Class

1 **PROOF OF SERVICE**

2 **(Code of Civil Procedure Sections 1013a, 2015.5)**

3
4 STATE OF CALIFORNIA]
5 COUNTY OF LOS ANGELES]ss.
6]

7 I am employed in the County of Los Angeles, State of California. I am over the age of 18
8 and not a party to the within action; my business address is 515 S. Figueroa Street, Suite 1250, Los
9 Angeles, California 90071.

10 On May 24, 2022, I served the following document(s) described as:

- 11 **1. PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY**
APPROVAL OF CLASS AND REPRESENTATIVE ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
- 12 **2. DECLARATION OF NICHOLAS ROSENTHAL IN SUPPORT OF PLAINTIFF'S**
MOTION FOR PRELIMINARY APPROVAL OF CLASS AND REPRESENTATIVE
ACTION SETTLEMENT
- 13 **3. DECLARATION OF LARRY W. LEE IN SUPPORT OF PLAINTIFF'S MOTION**
FOR PRELIMINARY APPROVAL OF CLASS AND REPRESENTATIVE ACTION
SETTLEMENT
- 14 **4. DECLARATION OF KRISTEN M. AGNEW IN SUPPORT OF PLAINTIFF'S**
MOTION FOR PRELIMINARY APPROVAL OF CLASS AND REPRESENTATIVE
ACTION SETTLEMENT
- 15 **5. DECLARATION OF ERNESTO DELGADO IN SUPOPRT OF PLAINTIFF'S**
MOTION FOR PRELIMINARY APPROVAL
- 16 **6. [PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY**
APPROVAL OF CLASS AND REPRESENTATIVE ACTION SETTLEMENT

17 on the interested parties in this action as follows:

18 Daniel B. Chammas
19 dchammas@fordharrison.com
20 Min K. Kim
21 mkim@fordharrison.com
22 Ford & Harrison LLP
23 350 S. Grand Avenue, Suite 2300
24 Los Angeles, California 90071
25 *Attorneys for Defendant Kloeckner Metals Corporation*

1 X BY ELECTRONIC SERVICE: Based on a court order I caused the above-
2 entitled document(s) to be served through the ACE E-Filing System at the website
3 www.efile.acelegal.com, addressed to all parties appearing on the electronic service list for the
4 above-entitled case. The service transmission was reported as complete and a copy of the filing
5 receipt/confirmation will be filed, deposited, or maintained with the original document(s) in this
6 office.

7 I declare under penalty of perjury under the laws of the State of California that the above
8 is true and correct. Executed on May 24, 2022, at Los Angeles, California.

9 
Erika Mejia