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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA**

CINTHIA MENDOZA and DELISHIA
HYDE, as individuals and on behalf of all
others similarly situated,

Plaintiffs,

vs.

PRIME NOW LLC, a Delaware limited
liability company; and DOES 1 through 50,
inclusive,

Defendants.

Case No.: RG20068286

(Assigned to the Hon. Evelio Grillo, Dept. 21)

**PLAINTIFFS’ NOTICE OF MOTION AND
MOTION FOR PRELIMINARY APPROVAL
OF CLASS AND REPRESENTATIVE
ACTION SETTLEMENT; MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT**

Date: December 20, 2022
Time: 10:00 A.M.
Dept.: 21

Reservation No.: 429567802028

Complaint Filed: July 21, 2020
FAC Filed: April 5, 2022
SAC Filed: November 4, 2022
Trial Date: None Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 20, 2022, at 10:00 a.m., or as soon thereafter as the matter may be heard, before the Honorable Evelio Grillo, judge presiding, in Department 21 of the above referenced Court located at 1221 Oak Street, Oakland, California 94612, Plaintiffs Delishia Hyde, Clara Trotter, Eugenia Dubose, and Araya Turner (collectively, “Plaintiffs”) will and hereby do move this Court for the following relief with respect to the Class Action Settlement and Release (“Agreement” or “Settlement Agreement”) entered into by Plaintiffs and Defendant Prime Now LLC (“Defendant”) (together with Plaintiffs, the “Parties”):

1. That the Court approve the Settlement Agreement referenced above;

2. That the Court conditionally certify the following Class (“Settlement Class”) for settlement purposes only:

a. all current and former non-exempt employees of Prime Now in the State of California who were paid additional remuneration (beyond wages) which were treated as non-discretionary and includable in the regular rate of pay and meal period premium pay during the same workweek at any time during April 6, 2016 through and including August 15, 2022, and/or

b. all current and former non-exempt employees of Prime Now in the State of California who were paid additional remuneration (beyond wages) which were treated as non-discretionary and includable in the regular rate of pay and sick pay wages or paid time off during the same workweek and whose employment ended at any time during April 6, 2017, through and including August 15, 2022.

3. That Plaintiffs Delishia Hyde, Clara Trotter, Eugenia Dubose, and Araya Turner be appointed as Class Representatives and Larry W. Lee, Nicholas Rosenthal, Max W. Gavron, Kwanporn “Mai” Tuylathan, and Shalom “Christine” Choo of Diversity Law Group, P.C. be appointed as Class Counsel;

4. That the Court preliminarily approve the Settlement Agreement and the Gross Settlement Fund of Five Million One Hundred Fifty Thousand Dollars (\$5,150,000.00);

5. That the Court finds on a preliminary basis that the Settlement Agreement appears to be within the range of reasonableness of a settlement, including the amount allocated to PAGA

1 penalties, the Class Representative Enhancement Payments to Plaintiffs, Class Counsel Award,
2 Settlement Administration Costs, and the allocation of payments to Class Members, that could
3 ultimately be given final approval by this Court;

4 6. That the Court approve the mailing of the proposed “Notice Packet” to be sent to
5 Settlement Class Members;

6 7. That the Court appoint Phoenix Class Action Administration Solutions as the
7 Settlement Administrator; and

8 8. That the Court schedule the matter for a Final Fairness and Final Approval
9 hearing.

10 This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which
11 provides for court approval of the settlement of a purported class action and allows the Court to
12 preliminarily certify a class for settlement purposes.

13 The basis for this Motion, filed without any opposition from Defendant, is that the
14 proposed settlement is fair, adequate, and reasonable, and the procedures proposed by the Parties
15 are adequate to ensure the opportunity of Settlement Class Members to participate in, opt-out of,
16 or object to the settlement.

17 This Motion will be based on the attached Memorandum of Points and Authorities, the
18 Settlement Agreement and the proposed Notice, and the supporting Declarations of Larry W. Lee,
19 Nicholas Rosenthal, Max W. Gavron, Kwanporn “Mai” Tulyathan, Shalom “Christine” Choo,
20 Plaintiff Delishia Hyde, Plaintiff Eugenia Dubose, Plaintiff Clara Trotter, and Plaintiff Araya
21 Turner, upon the oral arguments of counsel (should there be any), and on the complete records
22 and file herein.

23
24 DATED: November 28, 2022

DIVERSITY LAW GROUP, P.C.

25
26 By: 

Larry W. Lee

Max W. Gavron

Attorneys for Plaintiffs and the Class

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. FACTUAL AND PROCEDURAL BACKGROUND.....	1
A. The Original Complaint	1
B. The First Amended Complaint.....	2
C. Summary of Investigation and Discovery.....	2
D. The Parties Participate in Mediation	3
E. The Operative Second Amended Complaint.....	4
III. SUMMARY OF THE CURRENT SETTLEMENT.....	4
A. The Class Definitions	4
B. The Gross Settlement Fund.....	4
C. The Calculation of the Individual Settlement Payment	5
D. Individual PAGA Payments to Allegedly Aggrieved Employees	6
E. The Settlement is Non-Reversionary.....	6
F. Attorneys' Fees and Reimbursement of Litigation Costs	7
G. Enhancement Payments to Plaintiffs	7
H. Settlement Administration Costs.....	7
I. Scope of the Settlement Class Members' and Aggrieved Employees' Release	7
J. Notice to Settlement Class Members.....	8
IV. TWO-STEP APPROVAL PROCESS.....	8
V. THE COURT SHOULD GRANT PRELIMINARY APPROVAL OF THE SETTLEMENT.....	9

1	A. The Settlement Was Reached Through Arm’s Length Negotiations Between	
2	Experienced Wage and Hour Attorneys	10
3	B. The Parties Engaged in Significant Investigation and Discovery.....	10
4	C. The Strengths and Weaknesses of the Class and Representative PAGA Claims	10
5	1. The Strengths and Weaknesses of the Meal Period Premium Claim.....	11
6	2. The Strengths and Weaknesses of the Sick Pay Claim.....	13
7	3. The Strengths and Weaknesses of the Wage Statement Claim.....	14
8	4. The Strengths and Weaknesses of the PAGA Claims.....	15
9	D. The Settlement is Reasonable as Compared to the Potential Estimated Value of the	
10	Class and Representative PAGA Claims	15
11	E. The Court Should Preliminary Approve the Award of Litigation Costs and Fees.....	18
12	F. The Court Should Preliminary Approve the Award of Settlement Administration	
13	Costs	20
14	G. The Court Should Preliminarily Approve the Proposed Payment to the Class	
15	Representatives	21
16		
17	VI. THE PROPOSED SETTLEMENT CLASS MEETS ALL CERTIFICATION	
18	REQUIREMENTS.....	22
19	A. The Settlement Class is Ascertainable and Sufficiently Numerous	23
20	B. There are Common Questions of Law and Plaintiffs’ Claims are Typical of the	
21	Settlement Class	23
22	C. Plaintiffs and Class Counsel Have Adequately Represented the Settlement Class.....	24
23		
24	VII. CONCLUSION	25
25		
26		
27		
28		

TABLE OF AUTHORITIES

Page(s)

State Cases

<i>Accord Dunk v. Ford Motor Co.</i> , 48 Cal. App. 4th 1794, 1803 (1996).....	9, 22
<i>Amaral v. Cintas Corp. No. 2</i> , 163 Cal.App.4th 1157, 1209 (2008)	16
<i>Brinker Rest. Corp. v. Superior Ct.</i> , 53 Cal. 4th 1004, 1040, 273 P.3d 513, 537 (2012)	12
<i>Carrington v. Starbucks Corp.</i> , 30 Cal. App. 5th 504 (2018)	17
<i>Chavez v. Netflix, Inc.</i> , 162 Cal. App. 4th 43, 66 n.11 (2008)	19
<i>City of San Jose v. Superior Court</i> , 12 Cal. 3d 447, 460 (1974)	24
<i>Donohue v. AMN Services, LLC</i> , 11 Cal.5th 58, 77 (2021).....	12
<i>Faulkinbury v. Boyd & Assocs., Inc.</i> , 216 Cal. App. 4th 220, 240 (2013)	23
<i>Ferra v. Loews Hollywood Hotel, LLC</i> , 40 Cal. App. 5th 1239, 1246, (2019)	11, 12
<i>Kullar v. Foot Locker Retail, Inc.</i> , 168 Cal.App.4th 116, 128 (2008).....	9, 10
<i>Laffitte v. Robert Half Int’l</i> , 1 Cal. 5th 480, 503 (Aug. 11, 2016)	19, 20
<i>Laffitte v. Robert Half Int’l</i> , 231 Cal. App. 4th 860, 871 (2014)	20
<i>Lee v. Dynamex, Inc.</i> , 166 Cal. App. 4th 1325, 1334 (2008).....	23
<i>McGhee v. Bank of Am.</i> , 60 Cal. App. 3d 442, 450 (1976)	24
<i>McPherson v. EF Intercultural Found., Inc.</i> , 47 Cal. App. 5th 243, 263, 260 Cal. Rptr. 3d 640, 654 (2020).....	13
<i>Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles</i> , 186 Cal.App.4th 399, 408-9 (2010)	10
<i>Naranjo v. Spectrum Sec. Servs., Inc.</i> , 13 Cal. 5th 93, 121 (2022).....	3
<i>Parr v Golden State Overnight Delivery Service, Inc.</i> , 2014 WL 11199453 (Alameda Sup. Ct. July 10, 2014).....	17
<i>Serrano v. Priest</i> , 20 Cal. 3d 25, 34 (1977)	19
<i>Stephens v. Montgomery Ward & Co.</i> , 193 Cal. App. 3d 411, 421 (1987)	24
<i>Vasquez v. Superior Court</i> , 4 Cal. 3d 800, 812-13 (1971).....	24
<i>Wershba v. Apple Computer, Inc.</i> , 91 Cal. App. 4th 224, 240 (2001).....	22

Federal Cases

<i>Amalgamated Transit Union Local 1309 v. Laidlaw Transit Service, Inc.</i>	2009 WL 2448430, at *9 (S.D. Cal. Aug. 10, 2009)	17
<i>Apodaca v. Costco Wholesale Corp.</i>	, 2014 WL 2533427, at *3 (C.D. Cal. June 5, 2014)	15
<i>Bernstein v. Virgin Am., Inc.</i>	, 3 F.4th 1127, 1144 (9th Cir. 2021).....	17
<i>Boeing Co. v. Van Gemert</i>	, 444 U.S. 472, 478 (1980).....	19
<i>Brotherton v. Cleveland</i>	, 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001)	22
<i>Chavez v. Converse, Inc.</i>	, 2020 WL 1233919, at *1 (N.D. Cal. 2020).....	14
<i>Cook v. Niedert</i>	, 142 F.3d 1004, 1016 (7th Cir. 1998)	22
<i>Dalton v. Lee Publ'ns, Inc.</i>	, 2011 WL 1045107, at *5 (S.D. Cal. Mar. 22, 2011).....	15
<i>Enter. Energy Corp. v. Columbia Gas Transmission Corp.</i>	, 137 F.R.D. 240, 251-52 (S.D. Ohio 1991)	22
<i>Fernandez v. Victoria Secret Stores LLC</i>	, 2008 WL 8150856, *16 n. 59 (C.D. Cal. July 21, 2008)	19
<i>Gaskill v. Gordon</i>	, 160 F.3d 361, 363 (7th Cir. 1998).....	19
<i>Glass v. UBS Fin. Servs.</i>	, No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007)	22
<i>Hanlon v. Chrysler Corp.</i>	, 150 F.3d 1011, 1019 (1998).....	23
<i>Harris v. Vector Mktg. Corp.</i>	, 656 F. Supp. 2d 1128, 1145-46 (N.D. Cal. 2009)	14
<i>In re Baldwin-United Corp.</i>	, 105 F.R.D. 475, 478 (S.D.N.Y. 1984).....	22
<i>In re Dun & Bradstreet Credit Servs. Customer Litig.</i>	, 130 F.R.D. 366, 374 (S.D. Ohio 1990) ...	22
<i>Int'l Bhd. Of Elec. Workers Local 697 Pension Fund v. Int'l Game Tech., Inc.</i>	, 2012 WL 5199742, at *3 (D. Nev. Oct. 19, 2012).....	18
<i>Jordan v. L.A. County</i>	, 669 F.2d 1311, 1320 (9th Cir.)	23
<i>Lesevic v. Spectraforce Techs., Inc.</i>	, 2021 WL 1599310, at *3 (N.D. Cal. Apr. 23, 2021).....	18
<i>Magadia v. Wal-Mart Assocs. et al.</i>	, 2019 U.S. Dist. Lexis 91792	17
<i>Magadia v. Wal-Mart Assocs., Inc.</i>	, 999 F.3d 668, 677 (9th Cir. 2021)	18

1	<i>McPhail v. First Command Fin. Planning, Inc.</i> , 2009 WL 839841, at *5 (S.D. Cal. Mar. 30, 2009)	
2		18
3	<i>Ricaldai v. U.S. Investigations Servs., LLC</i> , 878 F. Supp. 2d 1038, 1047 (N.D. Cal. 2012)	15
4	<i>Richmond v. Dart Industries, Inc.</i> , 29 Cal. 3d 462, 473 (1981).....	24
5	<i>Schroeder v. Envoy Air, Inc.</i> , 2016 WL 11520388, at *11 (C.D. Cal. Sept. 27, 2016)	13
6	<i>Titus v. McLane Foodservices, Inc.</i> , 2016 WL 4797297, at *4 (E.D. Cal. Sept. 14, 2016)	13
7	<i>Van Ba Ma v. Covidien Holding Inc.</i> , U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014) ..	18
8	<i>Van Vranken v. Atlantic Richfield Co.</i> , 901 F. Supp. 294, 299-300 (N.D. Cal. 1995)	22
9	<i>Villalpando v. Excel Direct Inc.</i> , 303 F.R.D. 588, 605-606 (N.D. Cal. 2014).....	23
10	<i>Villegas v. J.P. Morgan Chase & Co.</i> , 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21, 2012).....	18
11	<i>Vincent v. Hughes Air West, Inc.</i> , 557 F. 2d 759, 769 (9th Cir. 1997)	19
12	<i>Wright v. Adventures Rolling Cross Country, Inc.</i> , 2013 WL 1758815, at *9 (N.D. Cal. Apr. 24,	
13	2013)	15
14	Statutes	
15	Business & Professions Code § 17200, <i>et seq.</i>	2, 4
16	Labor Code § 226(l)(1)	13
17	Labor Code § 245, <i>et seq.</i>	13
18	Labor Code § 248.5.....	13
19	Labor Code § 226(a)	14
20	Labor Code § 226.7.....	1, 4, 24
21	Labor Code § 2698, <i>et seq.</i>	2, 4
22	Labor Code § 2699.....	1, 2
23	Labor Code § 2699(e)(2)	17
24	Labor Code § 512.....	1, 4, 24
25	Labor Code §§ 201-203	1, 2, 4, 24
26	Labor Code §§ 226(a)(1)	14
27	Labor Code § 246.....	1, 2, 14, 24

Other Authorities

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3	(Fall 2003) 81 Wash U. L. Q. 653, 659 n. 11).....	19
4	Eisenberg & Miller, <i>Attorney Fees in Class Action Settlements: An Empirical Study: 1993-2008</i> , 7	
5	J. of Empirical Leg. Stud. 248, 262, fn.16 (2010)	20
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I. INTRODUCTION

Plaintiffs Delishia Hyde, Eugenia Dubose, Clara Trotter, and Araya Turner (“Plaintiffs”) seek preliminary approval of a proposed \$5,150,000.00 non-reversionary class action settlement with Defendant Prime Now LLC (“Defendant”). The Gross Settlement Fund is inclusive of settlement payments to Participating Settlement Class Members, all Attorneys’ Fees and Costs, the Class Representative Enhancement Payments to Plaintiffs for their services as class representatives, PAGA Settlement Amount, and Settlement Administration Costs as provided by this Settlement. The settlement will provide substantial monetary payments to approximately 21,345 Settlement Class Members. And, as set forth more fully below, the proposed settlement satisfies all the criteria for settlement approval under California law. The settlement was reached after extensive investigation and litigation, including depositions, mediation, and negotiations.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Original Complaint

On or about June 11, 2020, Cinthia Mendoza (“Mendoza”) filed a notice with the Labor & Workforce Development Agency (“LWDA”), alleging that Defendant violated § 201-203, 226.7, 246, and 512, pursuant to Labor Code § 2699. Declaration of Max W. Gavron (“Gavron Decl.”) ¶ 2. On or about June 16, 2020, Delishia Hyde (“Hyde”) filed a notice with the LWDA alleging that Defendant violated Labor Code §§ 201-203, 226.7, and 512, pursuant to Labor Code § 2699. *Id.* ¶ 3.

Thereafter, on July 21, 2020, Mendoza and Hyde filed a class and representative action complaint in the Alameda County Superior Court on behalf of themselves and all similarly situated employees. *Id.* ¶ 4. As set forth in the initial complaint, Mendoza and Hyde allege that Defendant maintained a policy and practice of (1) failing to correctly calculate the regular rate of pay by not including all non-discretionary remuneration in the regular rate for the purposes of paying meal period premiums, in violation of Labor Code §§ 226.7 and 512; (2) failing to correctly calculate the regular rate of pay by not including all non-discretionary remuneration in the regular rate of pay for the purposes of paying sick pay, in violation of Labor Code §§ 201-203 and 246; (3) failing to provide off-duty rest breaks, in violation of Labor Code § 226.7; (4)

engaging in unfair business practices, in violation of Business & Professions Code § 17200, *et seq.*; and (5) seeking civil penalties for violation of the Private Attorneys General Act, Labor Code § 2698, *et seq.* (the “PAGA”). *Id.* ¶ 4.

B. The First Amended Complaint

On or about February 28, 2022, Clara Trotter (“Trotter”), Eugenia Dubose (“Dubose”), and Araya Turner (“Turner”) filed a notice with the LWDA alleging that Defendant violated Labor Code §§ 201-203 and 246, pursuant to Labor Code § 2699. *Id.* ¶ 5.

During the course of litigation and discovery, Mendoza informed her counsel of record that she no longer wished to pursue her individual claims against Defendant. Gavron Decl. ¶ 6. On March 31, 2022, the Court approved the Parties’ stipulation to file a First Amended Complaint, which dismissed Plaintiff Mendoza’s claims and included the claims of additional plaintiffs Clara Trotter (“Trotter”), Eugenia Dubose (“Dubose”), and Araya Turner (“Turner”).

On April 5, 2022, Plaintiffs filed the first amended complaint. *Id.* ¶ 7.

C. Summary of Investigation and Discovery

Class Counsel investigated the facts surrounding the claims in this action before filing the lawsuit and conducted extensive discovery during the course of litigating and prosecuting this case. Gavron Decl. ¶ 12 On November 18, 2020, Plaintiffs served an initial set of Requests for Production of Documents and Special Interrogatories. *Id.* ¶ 13. Amongst other relevant topics, the discovery called for Defendant to provide verified responses regarding the number of putative class members, the types of non-discretionary remuneration paid to putative class members during the alleged liability period, and the contact information for the entity responsible for processing Defendant’s payroll. *Id.* The discovery also called for Defendant to produce Plaintiffs’ personnel file and wage statements and Defendant’s relevant policies, including meal and rest period policies, meal premium payment and sick pay policies, and policies pertaining to the calculation of the regular rate of pay. *Id.*

On or about March 26, 2021, Defendant served Responses to Request for Production of Documents (Set One) and Responses to Special Interrogatories (Set One). Gavron Decl. ¶ 14. Defendant also produced thousands of responsive documents on a rolling basis. *Id.* ¶ 14. The

1 Parties met and conferred extensively regarding the responses and documents. *Id.* ¶ 14.

2 Ultimately, Plaintiffs obtained the class list from Defendant which permitted them to further their
3 investigation and interview putative class members regarding their experiences working for
4 Defendant during the putative class period. *Id.* ¶ 14.

5 On February 1, 2022, Plaintiffs propounded a second set of Requests for Production on
6 Defendant and the Parties subsequently met and conferred. *Id.* ¶ 15.

7 Defendant also served discovery requests upon Plaintiffs, to which Plaintiffs provided
8 written responses and documents. *Id.* ¶ 16. Finally, the Parties took the depositions of Defendant's
9 Person Most Knowledgeable and Delishia Hyde. *Id.* ¶ 17.

10 **D. The Parties Participate in Mediation**

11 After the depositions addressed above, the Parties agreed to participate in private
12 mediation. Gavron Decl. ¶ 18. In advance of the mediation, Defendant produced extensive payroll
13 data informally, which allowed Plaintiffs to further investigate and evaluate the claims. *Id.* ¶ 18.
14 The data produced by Defendant included: (1) the estimated number of putative class members;
15 (2) the estimated number of putative class members who separated employment during the
16 liability period; (3) the average hourly rate of putative class members during the liability period;
17 (4) the aggregate number of workweeks in which putative class members earned meal period
18 premiums and non-discretionary incentive pay; (5) the aggregate number of workweeks in which
19 putative class members earned non-discretionary incentive pay and sick pay; (6) the aggregate
20 number of meal period premiums paid to putative class members under each respective pay code
21 identified in the payroll data; and (7) information regarding the number of meal period premiums
22 and sick pay wages that was paid to putative class members after Defendant contended it changed
23 its policy to pay employees these wages at the regular rate of pay. *Id.* Based upon this
24 information, counsel for Class Counsel conducted a full damage analysis. *Id.* The Parties also
25 discussed Plaintiff's intention to amend the operative complaint in advance of mediation to
26 include derivative penalties, pursuant to Labor Code § 226 considering the California Supreme
27 Court's ruling in *Naranjo v. Spectrum Sec. Servs., Inc.*, 13 Cal. 5th 93, 121 (2022). *Id.*

28 On June 14, 2022, the Parties participated in private mediation with mediator Michael J.

Loeb, Esq. Gavron Decl. ¶ 19. After a full day of negotiations, the Parties were not able to reach a settlement. *Id.* However, with Mr. Loeb’s assistance, the Parties continued settlement discussions. *Id.* ¶ 19. After the exchange of further information and extended negotiations, the Parties reached an agreement in principle which was memorialized in a Memorandum of Understanding. *Id.*

E. The Operative Second Amended Complaint

On November 4, 2022, Plaintiffs filed the operative Second Amended Complaint (“Complaint”) which alleges causes of action for: (1) violation of Labor Code §§ 226.7 and 512; (2) violation of Labor Code §§ 201-203; (3) violation of Labor Code § 226; (4) violation of Business & Professions Code § 17200, *et seq.*; and (5) violation of Labor Code § 2698, *et seq. Id.* ¶ 8.

III. SUMMARY OF THE CURRENT SETTLEMENT

The material terms of the settlement are described below and set forth in detail in the Class Action Settlement Agreement and Release (“Settlement Agreement” or “SA”). A true and correct copy of the Settlement Agreement is attached to the Declaration of Max W. Gavron as **Exhibit A.**

A. The Class Definitions

The settlement seeks to release the claims of:

all current and former non-exempt employees of Prime Now in the State of California who were paid additional remuneration (beyond wages) which were treated as non-discretionary and includable in the regular rate of pay and meal period premium pay during the same workweek at any time during April 6, 2016 through and including August 15, 2022, and/or

all current and former non-exempt employees of Prime Now in the State of California who were paid additional remuneration (beyond wages) which were treated as non-discretionary and includable in the regular rate of pay and sick pay wages or paid time off during the same workweek and whose employment ended at any time during April 6, 2017, through and including August 15, 2022.

SA ¶ 35. Defendant estimates that there are approximately 21,345 unique individuals comprising the Class. *Id.* ¶ 61.

B. The Gross Settlement Fund

The settlement provides for the gross settlement amount (“Gross Settlement Fund”) of

\$5,150,000.00. SA ¶ 14. The settlement allocates \$200,000.00 of the Gross Settlement Fund for PAGA penalties (the “PAGA Settlement Amount”). *See* SA ¶ 20. Pursuant to the PAGA, seventy-five percent (75%) of the PAGA Settlement Amount, *i.e.*, the sum of \$150,000.00, will be paid to the California Labor and Workforce Development Agency. *Id.* The remaining twenty-five percent (25%) of the PAGA Settlement Amount, *i.e.*, the sum of \$50,000.00, will be distributed to the Allegedly Aggrieved Employees. *Id.*

C. The Calculation of the Individual Settlement Payment

The balance of the Gross Settlement Fund remaining after deduction of the approved Class Representative Enhancement Payments to Plaintiffs, Settlement Administration Costs, PAGA Settlement Amount, Class Counsel Award, and the employer’s share of payroll taxes (which were specifically negotiated to be included in and paid for from the Gross Settlement Amount) (“Net Settlement Amount”), will be available for distribution to Participating Settlement Class Members. SA ¶ 17. The Parties currently estimate that the Net Settlement Amount will be \$3,046,333.33 less the amount required to cover the employer’s share of payroll taxes as specifically negotiated for in the parties’ Agreement. Gavron Decl. ¶ 24.

The Individual Settlement Payments payable to each Settlement Class Member will be based on the total number of weeks in which the employee performed at least one day of work during the applicable time period. SA ¶ 45. The Individual Settlement Payments shall be allocated as follows: 25% to settlement of wage claims and 75% to settlement of claims for interest and penalties. SA ¶ 66.

Based on the approximate number of Settlement Class Members (21,345), each Class Member will be entitled to recover on raw average, up to \$142.72 each.¹ Gavron Decl. ¶ 32. The amount any particular Settlement Class Member will be entitled to recover will be greater or

¹ Settlement Class Members do not need to do anything should they wish to receive their share of the settlement funds. This substantially decreases the amount of burden each Settlement Class Member must bear in order to receive his/her settlement share. If a Settlement Class Member does not wish to take part in this settlement and be bound by the release of the class claims, he/she must submit an exclusion request. Such obligations are thoroughly identified in the Notice Packet. *See* Settlement Agreement, Ex. A.

1 lower than this average depending on the number of weeks he or she worked, with some entitled
2 to receive more, and others less. SA ¶ 45. This is fair, as it strives to allocate greater penalties to
3 individual employees who experienced a higher number of alleged violations. Gavron Decl. ¶ 32.

4 **D. Individual PAGA Payments to Allegedly Aggrieved Employees**

5 Settlement Class Members who also meet the criteria of Allegedly Aggrieved Employees
6 will receive Individual PAGA Payments as a result of the settlement of Plaintiffs' PAGA claims.
7 Allegedly Aggrieved Employees are defined as:

8 (i) all current and former non-exempt employees of Prime Now in the State of
9 California who were paid additional remuneration (beyond wages) which were
10 treated as non-discretionary and includable in the regular rate of pay and meal
11 period premium pay during the same workweek at any time during June 11, 2019
12 through August 15, 2022 ("Class and PAGA Period End Date"), and/or

13 (ii) all current and former non-exempt employees of Prime Now in the State of
14 California who were paid additional remuneration (beyond wages) which were
15 treated as non-discretionary and includable in the regular rate of pay and sick pay
16 wages or paid time off during the same workweek and whose employment ended
17 at any time during June 11, 2019, through and including August 15, 2022.

18 SA ¶ 2.

19 Twenty-five percent (25%) of the PAGA Settlement Amount, *i.e.*, the sum of \$50,000.00,
20 is allocated for payment to the Allegedly Aggrieved Employees. SA ¶¶ 16, 43. The Individual
21 PAGA Payment payable to each Allegedly Aggrieved Employee will be based on the total
22 number of weeks in which the employee performed at least one day of work for Defendant. SA ¶¶
23 43, 46. The Individual PAGA Payments shall be allocated as follows: 100% to settlement of
24 penalties. SA ¶ 66.

25 **E. The Settlement is Non-Reversionary**

26 This is a non-reversionary settlement. The entirety of the Gross Settlement Fund will be
27 fully paid out. SA ¶ 39. Settlement Class Members will have 180 days from the mailing of the
28 settlement payment to cash the check. *Id.* ¶ 64. After the expiration of 180 days, the funds
represented by uncashed settlement checks will be remitted to the Unclaimed Property Fund
maintained by the State of California Controller's Office in the name of the Settlement Class
Member. *Id.*

1 **F. Attorneys' Fees and Reimbursement of Litigation Costs**

2 As part of the Settlement, Defendant does not object to Class Counsel's request for
3 attorneys' fees up to one-third of the Gross Settlement Fund, *i.e.*, the sum of \$1,716,666.67, plus
4 up to \$30,000.00 for reimbursement of litigation costs, subject to the Court finally approving this
5 Settlement. SA ¶ 40.

6 **G. Enhancement Payments to Plaintiffs**

7 Pursuant to the terms of the Settlement Agreement, and without opposition from
8 Defendant, Plaintiffs are entitled to request a Class Representative Enhancement Payment. SA ¶
9 8. Specifically, Plaintiffs request payment of the following amounts: \$20,000.00 to Delishia
10 Hyde; \$20,000.00 to Eugenia Dubose; \$10,000.00 to Clara Trotter; and \$10,000.00 to Araya
11 Turner. *Id.* Both Plaintiffs and Class Counsel expressly acknowledge that the Court has final
12 discretion in any fee award or Enhancement Payment. *Id.*

13 **H. Settlement Administration Costs**

14 Finally, the Settlement provides for the payment of the fees and expenses reasonably
15 incurred by the Settlement Administrator. SA ¶ 33. The Parties have received a quote from
16 Phoenix Settlement Administrators for a fee of approximately \$97,000.00. *Id.* Any portion of the
17 Settlement Administration Costs not used or approved by the Court shall be added to the Net
18 Settlement Amount. SA ¶ 33.

19 **I. Scope of the Settlement Class Members' and Aggrieved Employees' Release**

20 The scope of the release, as listed below, is identified in the Settlement Agreement at
21 section 27, as well as in the Notice Packet that will be sent to Class Members. Upon the Effective
22 Date, Plaintiffs and all Settlement Class Members will release the following:

23 all claims, actions, demands, causes of action, suits, debts, obligations, demands,
24 rights, liabilities, or legal theories of relief, that are based on the facts and legal
25 theories asserted in the operative complaint in the Action, including without
26 limitation claims for (1) failure to provide meal periods or meal period premiums in
27 violation of Labor Code §§ 226.7 and 512; (2) failure to pay sick time pay or paid
28 time off in violation of Labor Code §§ 201-203 and 246; (3) failure to timely pay all
wages due upon separation of employment in violation of Labor Code § § 201, 202,
and 203; (4) failure to provide accurate wage statements in violation of Labor Code
§ 226; and (5) violations of Business and Professions Code § 17200 et seq. based

solely on the facts alleged in the operative complaint.

SA ¶¶ 27, 58. As shown, the scope of the release is narrow and is limited to the claims asserted in the operative Complaint. Gavron Decl. ¶ 37.

The scope of the release for aggrieved employees is equally limited to the allegations of the operative complaint and LWDA notices. SA ¶ 28, Ex. B; Gavron Decl. ¶ 38.

J. Notice to Settlement Class Members

Should the Court grant the instant motion, Defendant will provide the Settlement Administrator with a list containing each Class Member's full name, most recent mailing address, telephone number, Social Security number, dates of employment, and information sufficient to calculate the number of workweeks that each Settlement Class Member worked during the Class Period and the number of "weeks worked" or "workweeks" that each Allegedly Aggrieved Employee worked during the PAGA Period. SA ¶¶ 6, 50. Within fifteen (15) calendar days of receipt of the Settlement Class Members' contact information from Defendant, the Settlement Administrator will mail the Notice Packet to Settlement Class Members.² *Id.* ¶ 51. Any Notice Packet returned to the Settlement Administrator as non-deliverable on or before the opt-out deadline shall be sent via regular first-class U.S. mail to the forwarding address affixed thereto. *Id.* ¶ 52. If no forwarding address is provided, the Settlement Administrator shall perform a skip trace or other search to locate the most current address and resend the Notice Packet. *Id.*

As set forth in the Notice Packet, Settlement Class Members will be allowed to opt out of or object to the settlement within 45 days of the initial mailing of the Notice Packet. SA ¶¶ 55, 60.

IV. TWO-STEP APPROVAL PROCESS

Any settlement of a class action lawsuit must be reviewed and approved by the Court. This is done in two steps: (1) an early (preliminary) review by the trial court, and (2) a final review after notice has been distributed to the class members for their comment or objections.

Preliminary approval by the trial court is simply a conditional finding that the settlement

² Prior to mailing the Notice to Settlement Group members, the Settlement Administrator shall perform a search based on the National Change of Address Database for information to update and correct for any known or identifiable address changes. SA ¶ 52.

1 appears to be within the range of acceptable settlements. As Professor Newberg comments, “[t]he
2 strength of the findings made by a judge at a preliminary hearing or conference concerning a
3 tentative settlement proposal may vary. The court may find that the settlement proposal contains
4 some merit, is within the range of reasonableness required for a settlement offer, or is
5 presumptively valid subject only to any objections that may be raised at a final hearing.” 4 Alba
6 Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11.26 (4th ed. 2002).

7 The procedures for the parties’ submission of a proposed settlement for preliminary
8 approval by the court also are discussed in 4 *Newberg on Class Actions*:

9 When the parties to an action reach a monetary settlement, they will usually prepare
10 and execute a joint stipulation of settlement, which is submitted to the court for
11 preliminary approval. The Joint Stipulation should set forth the central terms of the
12 agreement, including but not limited to, the amount of settlement, form of payment,
manner of determining the effective date of settlement and any recapture clause.

13 *Id.* § 11.24.

14 Here, the Parties have reached such an agreement and have submitted to this Court in
15 connection with this Motion a copy of the Settlement Agreement fully setting forth the agreement
16 reached among the Parties. *See* Gavron Decl. ¶ 20, Ex. A. The settlement sets forth all terms of
17 the agreement reached by the Parties, which include, among other things, the method for
18 calculating the Settlement Class Members’ Individual Settlement Payments.

19 **V. THE COURT SHOULD GRANT PRELIMINARY APPROVAL OF THE SETTLEMENT**

20 To prevent fraud, collusion, or unfairness to the class, the settlement of a class action
21 requires court approval. *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1800-01 (1996). In
22 considering whether a settlement is reasonable, the trial court should consider relevant factors,
23 which may include the strength of plaintiff’s case, the risk, expense, complexity, and likely
24 duration of further litigation, the risk of maintaining class action status through trial, the amount
25 offered in settlement, the extent of discovery completed and the stage of the proceedings, the
26 experience and views of counsel, the presence of a governmental participant, and the reaction of
27 the class members to the proposed settlement. *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App.
28 4th 116, 128 (2008).

1 In order to approve a class action settlement, the court must satisfy itself that the class
2 settlement is within the “ballpark” of reasonableness. *Kullar*, 168 Cal. App. 4th. at 133. The
3 record need not contain an explicit statement of the maximum theoretical recovery. *Munoz v. BCI*
4 *Coca-Cola Bottling Co. of Los Angeles*, 186 Cal. App. 4th 399, 408-09 (2010).

5 **A. The Settlement Was Reached Through Arm’s Length Negotiations Between**
6 **Experienced Wage and Hour Attorneys**

7 As demonstrated in Section II *supra*, the settlement is a result of arm’s length
8 negotiations. The Parties attended a full-day mediation with experienced wage and hour mediator,
9 Michael J. Loeb. During the mediation, the Parties spoke at length about the strengths and
10 weaknesses of each side’s claims and defenses, whether the claims could be certified, and the
11 scope of Defendant’s liability. With the assistance of Mr. Loeb, the Parties reached an agreement
12 for a global resolution of the Action for a non-reversionary fund of \$5,150,000.00.

13 **B. The Parties Engaged in Significant Investigation and Discovery**

14 Plaintiffs engaged in extensive investigation and discovery regarding the merits of the
15 claim and Defendant’s defenses, including propounding Requests for Production of Documents
16 and Special Interrogatories, reviewing Defendant’s compensation policies, taking the deposition
17 of Defendant’s Person Most Knowledgeable, defending Plaintiff Hyde’s deposition, interviewing
18 and communicating with putative class members, and researching Defendant’s defenses. Gavron
19 Decl. ¶ 39. Additionally, in advance of the mediation, Defendant produced extensive payroll data
20 for putative class members regarding the number of meal periods taken during workweeks that
21 included additional remuneration, the number of meal period premiums paid pursuant to various
22 earnings codes identified in payroll records. *Id.* ¶ 39. Using the information garnered through both
23 formal and informal discovery, Class Counsel conducted a full damages and penalty analysis. *Id.*

24 **C. The Strengths and Weaknesses of the Class and Representative PAGA Claims**

25 For the reasons set forth below, the settlement affords fair relief to the Settlement Class,
26 while avoiding significant legal and factual battles, especially at class certification and trial, that
27 otherwise may have prevented the Settlement Class from obtaining any recovery at all. Gavron
28 Decl. ¶¶ 39-57. Thus, although Class Counsel believes the claims are meritorious, they are

1 experienced and realistic, and understand that the outcome of a trial, and the outcome of any
2 appeals that would inevitably follow if the class and/or aggrieved employees prevailed at trial, are
3 inherently uncertain in terms of both outcome and duration. *Id.* ¶ 58; Declaration of Larry W. Lee
4 (“Lee Decl.”) ¶ 4; Declaration of Nicholas Rosenthal (“Rosenthal Decl.”) ¶ 4; Declaration of
5 Kwanporn “Mai” Tulyathan (“Tulyathan Decl.”) ¶ 7.; Declaration of Shalom “Christine” Choo
6 (“Choo Decl.”) ¶ 5.

7 **1. The Strengths and Weaknesses of the Meal Period Premium Claim**

8 As recently explained by the California Supreme Court in *Ferra v. Loews Hollywood*
9 *Hotel, LLC*, employers must pay meal period premiums at the regular rate of pay. 11 Cal. 5th 858
10 (2021). Importantly, at the time Plaintiffs filed their action, the California Supreme Court had yet
11 to decide *Ferra* and thus Defendant vehemently contested Plaintiffs’ interpretation of the law. *See*
12 *Ferra v. Loews Hollywood Hotel, LLC*, 40 Cal. App. 5th 1239, 1246, (2019), *rev’d*, 11 Cal. 5th
13 858, 489 P.3d 1166 (2021) (“We agree with the trial court and with Loews, however, that the
14 statutory terms “regular rate of pay” and “regular rate of compensation” are not synonymous, and
15 the premium for missed meal and rest periods is the employee's base hourly wage.”).

16 The California Supreme Court explained:

17 In sum, we hold that the term “regular rate of compensation” in section 226.7(c)
18 has the same meaning as “regular rate of pay” in section 510(a) and encompasses
19 not only hourly wages but all nondiscretionary payments for work performed by
20 the employee. This interpretation of section 226.7(c) comports with the remedial
purpose of the Labor Code and wage orders and with our general guidance that the
“state's labor laws are to be liberally construed in favor of worker protection.”

21 *Ferra*, 11 Cal. 5th at 878. The court also rejected the defendant’s request that the court’s holding
22 only apply prospectively. *Id.* at 878–880 (“Because our reading of “regular rate of compensation”
23 in section 226.7(c) is “[o]ne very reasonable way to construe” the phrase, Loews “is simply
24 wrong when it argues that ordinary people could not have predicted plaintiff’s interpretation, and
25 that it would violate defendant’s due process rights to adopt that interpretation.”). Thus, Plaintiff
26 argued that because Defendant paid employees non-discretionary incentive wages such as “Surge
27 Premiums” it should have included the value of those payments in the regular rate of
28 compensation when paying meal period premiums. Gavron Decl. ¶ 40.

1 Defendant argued several things in its defense. Most prominently, Defendant argued that
2 *Ferra* did not alleviate Plaintiffs of their burden to prove the underlying meal period violation. In
3 other words, even if Plaintiffs could show that Defendant paid premiums at less than the regular
4 rate of pay, Plaintiffs would still have to demonstrate that Defendant did not meet its obligation
5 under the Labor Code and *Brinker* to provide employees a meal period. *See Brinker Rest. Corp.*
6 *v. Superior Ct.*, 53 Cal. 4th 1004, 1040, 273 P.3d 513, 537 (2012) (“On the other hand, the
7 employer is not obligated to police meal breaks and ensure no work thereafter is performed.”).

8 This, Defendant argued, would result in a claim that could not be certified as a class action
9 for several reasons. First, Defendant contended that it maintained and enforced legally compliant
10 meal period policies. Defendant also argued that even in instances where it paid a meal period
11 premium, it did so without any reference or investigation regarding whether the employee was
12 actually entitled to receive the premium. Defendant contended that because of this policy,
13 Plaintiffs could not use the fact that Defendant paid a premium as a basis to demonstrate liability.
14 Defendant argued that its practice is to automatically pay premiums based upon time records
15 alone, without regard to whether any associate chose to take a short or late meal period or skip it
16 altogether, intentionally erring on the side of overpayment. Defendant claimed this would require
17 Plaintiffs to investigate and ask each putative class member the reason time records may have
18 triggered the automatic payment of a premium.

19 Plaintiffs, on the other hand, argued that they could use the presumption articulated in
20 *Donohue v. AMN Services, LLC*, 11 Cal.5th 58, 77 (2021) to establish the underlying violations.
21 Defendant countered that *Donohue* allows the presumption to be rebutted, which could easily be
22 done in this circumstance where the putative class members ranged in the thousands and
23 Defendant had compliant policies. Accordingly, while Plaintiffs were confident in this claim, the
24 potential for certification was far from certain.

25 Even if Plaintiffs were successful in demonstrating liability and certifying this theory,
26 Defendant argued that it changed its practice on August 1, 2021—only a month after *Ferra*—to
27 include the value of non-discretionary remuneration in meal period premiums. This change in
28 policy, it argued, would significantly limit the liability period and damages and would serve to

1 limit the exposure on Plaintiff's PAGA claims considering the Court's discretion to reduce
2 penalties, further discussed below.

3 2. The Strengths and Weaknesses of the Sick Pay Claim

4 As a separate regular rate violation, Plaintiffs allege that Defendant also underpaid sick
5 pay earnings whenever non-discretionary incentive wages were paid within the same work week.
6 Under the Healthy Workplaces, Healthy Families Act of 2014, Cal. Lab. Code § 245, *et seq.*
7 ("HWHFA"), "[p]aid sick time for nonexempt employees shall be calculated in the **same manner**
8 **as the regular rate of pay** for the workweek in which the employee uses paid sick time, whether
9 or not the employee actually works overtime in that workweek." Cal. Lab. Code § 226(l)(1)
10 (emphasis added). Here, Plaintiffs allege that Defendant consistently paid sick pay at an
11 employee's base hourly rate of pay, even during workweeks when the employee earned non-
12 discretionary incentive wages. Gavron Decl. ¶ 45. Plaintiffs contend that they and other
13 Settlement Class Members are owed waiting time penalties for the allegedly underpaid sick pay
14 wages. *Id.*

15 In response, Defendant argued that Plaintiffs cannot recover derivative waiting time
16 penalties or assert a claim for sick pay wages because there is no private right of action. *See* Cal.
17 Lab. Code § 248.5 (providing only that "the Labor Commissioner or the Attorney General may
18 bring a civil action in a court of competent jurisdiction against the employer or other person
19 violating this article"); *see also, e.g., Titus v. McLane Foodservices, Inc.*, 2016 WL 4797297, at
20 *4 (E.D. Cal. Sept. 14, 2016) (the sick pay "statute provides that only the LWDA may recover
21 civil penalties for a violation"); *Schroeder v. Envoy Air, Inc.*, 2016 WL 11520388, at *11 (C.D.
22 Cal. Sept. 27, 2016) ("because the legislature did not clearly and unambiguously create a private
23 right of action to enforce section 246(h), the Court concludes that there is none available").
24 Gavron Decl. ¶ 46. Regarding Plaintiffs' claim for waiting time penalties, some courts have held
25 that sick pay is not "wages" entitling employees to Section 203 penalties even if underpaid. *See*
26 *McPherson v. EF Intercultural Found., Inc.*, 47 Cal. App. 5th 243, 263, 260 Cal. Rptr. 3d 640,
27 654 (2020), review denied (July 22, 2020) ("because paid sick leave is not considered a form of
28 "wages," employers are not required to pay employees their unused sick leave on termination—

1 accrued or not. (§ 246, subd. (g)(1).).”).

2 Defendant also would have argued that, even if there were a private right of action and any
3 underpayment could be proven (which Defendant disputes), its payments to employees were
4 made pursuant to a good faith belief that it was paying sick pay correctly, and as a result,
5 Plaintiffs cannot establish that Defendant willfully failed to pay the sick pay wages at separation
6 of employment and/or that a good faith dispute exists as to whether the allegedly underpaid sick
7 pay amounts to wages due. *Id.* This is a legal defense that, if successful, could potentially defeat
8 Plaintiffs’ Section 203 claim. *Chavez v. Converse, Inc.*, 2020 WL 1233919, at *1 (N.D. Cal. 2020)
9 (holding that an employer’s failure to pay is not willful where there is uncertainty in the law or a
10 “good faith mistaken belief that wages are not owed”). Gavron Decl. ¶ 47.

11 Defendant argued that as of early 2020, it provides the employees at issue in this action
12 with paid time off (“PTO”). Thus, class certification would be precluded because individual
13 analysis would be required to determine whether an employee took time off using “sick wages,”
14 which must arguably be paid at the regular rate of pay, or “PTO,” which would not need to be
15 paid at the regular rate. Accordingly, this claim also faced hurdles from a liability and
16 certification perspective. Gavron Decl. ¶ 48.

17 **3. The Strengths and Weaknesses of the Wage Statement Claim**

18 Plaintiffs allege a claim under Labor Code § 226(a) predicated on Defendant’s alleged
19 failure to list “all applicable hourly rates in effect during the pay period” and gross and net wages
20 earned on the wage statements issued to Settlement Class Members. Labor Code §§ 226(a)(1),
21 (5), and (9). Plaintiffs allege that as a result of the violations above, the wage statements issued to
22 putative class members did not comply with California law. *Id.* ¶ 49. Accordingly, this claim
23 suffers from the same weaknesses, and benefits from the same strengths, addressed above.

24 Plaintiffs would also face the additional burden of demonstrating that any alleged
25 omission of information from the wage statements was a “knowing and intentional failure” by
26 Defendant to comply with Labor Code § 226(a). *See Harris v. Vector Mktg. Corp.*, 656 F. Supp.
27 2d 1128, 1145-46 (N.D. Cal. 2009) (granting summary judgment in favor of employer and finding
28 its conduct was not “knowing and intentional”); Gavron Decl. ¶ 50. Defendant also would have

argued that penalties under Section 226 are subject to a similar “good faith” defense as articulated above in the context of Plaintiffs’ claims for waiting time penalties. *See, e.g., Apodaca v. Costco Wholesale Corp.*, 2014 WL 2533427, at *3 (C.D. Cal. June 5, 2014) (“Where an employer has a good faith belief that it is not in violation of Section 226, any violation is not knowing and intentional.”); *Wright v. Adventures Rolling Cross Country, Inc.*, 2013 WL 1758815, at *9 (N.D. Cal. Apr. 24, 2013) (same); *Ricaldai v. U.S. Investigations Servs., LLC*, 878 F. Supp. 2d 1038, 1047 (N.D. Cal. 2012) (same); *Dalton v. Lee Publ'ns, Inc.*, 2011 WL 1045107, at *5 (S.D. Cal. Mar. 22, 2011) (same). Considering the strengths and weaknesses of this claim too supports the proposed settlement as fair, adequate, and reasonable. Gavron Decl. ¶ 50.

4. The Strengths and Weaknesses of the PAGA Claims

Plaintiffs also pursue representative PAGA claims. Given that the PAGA claim is derivative in nature, it faced the same obstacles. The PAGA claim also was subject to unique considerations given the Court’s discretion to lower penalties. Gavron Decl. ¶ 51.

D. The Settlement is Reasonable as Compared to the Potential Estimated Value of the Class and Representative PAGA Claims

Plaintiffs premised the settlement with the risks and benefits addressed above in mind. For each claim, Plaintiffs analyzed the potential exposure based on data provided by Defendant in advance of mediation. For Plaintiffs’ meal period claim, the bulk of the exposure related to waiting time penalties because where Defendant paid meal period premiums at the base rate of pay, the difference between the base rate and regular rate of pay often would be a matter of cents. The potential exposure for waiting time penalties on the meal period claim could be as high as approximately \$37.6 million, which Plaintiffs premised on approximately 9,797 former employees who received meal period premiums and non-discretionary wages during the same work week during the class period and who earned an average rate of pay of \$16.00 (9,797 Former Meal + Non-Discretionary x (($\$16.00 \times 8$) x 30 days)).³ This exposure contemplates the

³ This exposure analysis does not take into account that while approximately 9,797 former employees received meal period premiums, nothing demonstrates that all 9,797 of them were required to be paid meal period premiums.

entirety of the class period, which includes almost a full year *after* Defendant changed its practices in August 2021—after this time, Defendants argue that there would have been no additional violations. If accounting for the more limited period, the potential exposure was approximately \$29.7 million in waiting time penalties based on approximately 7,747 former employees (7,747 Former Meal + Non-Discretionary x (($\$16.00 \times 8$) x 30 days).⁴ Gavron Decl. ¶ 52.

The exposure on Plaintiffs' sick pay claim was also largely driven by waiting time penalties for the same reason described above. Plaintiffs estimated the maximum exposure could be as high as \$30.8 million based on 8,144 former employees who earned sick pay and non-discretionary wages during the same workweek (8,144 Former Sick + Non-Discretionary x (($\$15.77 \times 8$) x 30 days). This group of employees, however, necessarily included some overlap with the individuals who addressed above who fell within the meal period class. Further, Plaintiffs recognize that the likelihood that the Court would award successive waiting time penalties for different theories of liability is very low. This calculation also does not take into account Defendant's change in policy, discussed above, that may have significantly limited the period subject to Plaintiffs' theory of liability on the sick pay claim. If accounting for the more limited time period, Plaintiffs calculated approximately \$25.5 million in exposure (6,746 Former Sick + Non-Discretionary x (($\$15.77 \times 8$) x 30 days). Gavron Decl. ¶ 53.

Plaintiffs calculated approximately \$3.6 million in Section 226 penalties, which Plaintiffs premised on approximately 36,668 pay periods during the applicable statute of limitations ($\$100 \times 36,668$ pay periods). Gavron Decl. ¶ 54.

Plaintiffs estimated that Defendant could face civil penalties in the amount of approximately \$3.6 million if Plaintiffs were successful at trial and the Court applied a penalty of \$100 per pay period. *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1209 (2008); *accord Amalgamated Transit Union Local 1309 v. Laidlaw Transit Service, Inc.* 2009 WL 2448430, at *9

⁴ Again, this exposure analysis does not take into account that while approximately 7,747 former employees received meal period premiums, nothing demonstrates that all 7,747 of them were required to be paid meal period premiums.

1 (S.D. Cal. Aug. 10, 2009) (“[u]nder California law, courts have held that employers are not
2 subject to heightened penalties for subsequent violations unless and until a court or commissioner
3 notifies the employer that it is in violation of the Labor Code”); *see also Bernstein v. Virgin Am.,*
4 *Inc.*, 3 F.4th 1127, 1144 (9th Cir. 2021) (holding no subsequent penalty unless prior citation or
5 court ruling). Gavron Decl. ¶ 55.

6 Even assuming Plaintiffs ultimately prevailed on their PAGA claims, the Court still has
7 discretion to reduce any PAGA penalties. Pursuant to Labor Code § 2699(e)(2), the Court can
8 decline to award PAGA penalties where “if, based on the facts and circumstances of the particular
9 case, to do otherwise, would result in an award that is unjust, arbitrary and oppressive, or
10 confiscatory.” Indeed, as shown in the Court of Appeal’s decision in *Carrington v. Starbucks*
11 *Corp.*, while the plaintiff prevailed on his PAGA claim upon trial, the trial court reduced the
12 maximum PAGA penalty amount by 90%, citing the employer’s good faith attempt at complying
13 with the law. 30 Cal. App. 5th 504, 517 (2018). Upon review, the Court of Appeal found such
14 reduction to be proper. *Id.* at 539. Similarly, this Court reduced the maximum PAGA penalty
15 amount by 93% in *Parr v Golden State Overnight Delivery Service, Inc. Parr v Golden State*
16 *Overnight Delivery Service, Inc.*, 2014 WL 11199453 (Alameda Sup. Ct. July 10, 2014). With
17 respect to the Labor Code § 226 claim, this Court noted in assigning a \$15 penalty, “[a]mong the
18 long list of possible Labor Code violations that could support a PAGA action, this is by no means
19 the most serious, and there is no evidence that any employee was paid less than what was due or
20 was otherwise harmed by the form of wage statement used by [defendant].” *Id.* A 90% reduction
21 on the PAGA penalties here would result in potentially available penalties of approximately
22 \$360,000.00. Gavron Decl. ¶ 55.

23 In *Magadia v. Wal-Mart Assocs., et al.*, while the trial court imposed substantial PAGA
24 penalties upon the defendant, such amount still represented reductions of 67% and 80% of the
25 potential PAGA penalties at issue. 2019 U.S. Dist. Lexis 91792 at *87-*100 (N.D. Cal. May 31,
26 2019). Moreover, this was only after the plaintiff in *Magadia* had prevailed after trial. Thereafter,
27 the Ninth Circuit reversed the trial court’s ruling eliminating the judgment altogether, which
28 demonstrates the significant risk presented in moving forward with litigation. *Magadia v. Wal-*

1 *Mart Assocs., Inc.*, 999 F.3d 668, 677 (9th Cir. 2021).

2 Based on the information provided by Defendant, Plaintiffs' counsel estimated total
3 damages and penalties to be as high as approximately \$75 million if Plaintiffs were successful in
4 certifying all of their claims and prevailing on the merits, or approximately \$62.4 million if
5 Plaintiffs were only successful on the pre-policy change theories of liability. Gavron Decl. ¶ 56.
6 Plaintiffs' success was far from certain, given the risks addressed above and the possibility of
7 years of appeal and reversal of judgment. Therefore, the proposed settlement of \$5,150,000.00 is
8 fair, adequate and reasonable and well within the range accepted by most courts. *See Lesevic v.*
9 *Spectraforce Techs., Inc.*, 2021 WL 1599310, at *3 (N.D. Cal. Apr. 23, 2021) (noting wage and
10 hour class fund of \$600,000 that compensated for 7% of maximum potential recovery was
11 reasonable); *Van Ba Ma v. Covidien Holding Inc.*, U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D.
12 Cal. 2014) (approving wage and hour class settlement which obtained only 9.1% of projected
13 damages); *Villegas v. J.P. Morgan Chase & Co.*, 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21,
14 2012) (holding that settlement of approximately 15% of the potential recovery was fair and
15 reasonable); *McPhail v. First Command Fin. Planning, Inc.*, 2009 WL 839841, at *5 (S.D. Cal.
16 Mar. 30, 2009) (approving settlement equal to approximately 7% of estimated damages); *Int'l*
17 *Bhd. Of Elec. Workers Local 697 Pension Fund v. Int'l Game Tech., Inc.*, 2012 WL 5199742, at
18 *3 (D. Nev. Oct. 19, 2012) (approving settlement recovering approximately 3.5% of maximum
19 exposure).

20 Although Plaintiffs believe in the merits of the alleged claims and maintains that there is
21 no reason for reducing PAGA penalties, Plaintiffs are aware that Defendant may raise defenses to
22 the statutory violations and further with respect to the reduction of PAGA penalties and that it
23 could be persuasive to the Court. *Id.* ¶ 57. The Gross Settlement Fund was premised with these
24 risks in mind. *Id.* ¶ 57.

25 **E. The Court Should Preliminary Approve the Award of Litigation Costs and Fees**

26 California state and federal courts have recognized that an appropriate method for
27 determining award of attorneys' fees is based on a percentage of the total value of benefits to
28 class members by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254

(2001); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977) (“*Serrano III*”); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1997). The purpose of this equitable doctrine is to avoid unjust enrichment of counsel and to “spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone.” *Vincent*, 557 F.2d at 769.

Under California law, the award of attorneys’ fees in common fund wage and hour class action settlements should start with the percentage method. *See Laffitte v. Robert Half Int’l*, 1 Cal. 5th 480, 503 (Aug. 11, 2016) (“We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created”). Under the percentage of the fund method, the Court’s objective remains to “mimic the market” in fixing a reasonable fee. *See Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998) (J. Posner) (“When a fee is set by a court rather than by contract, the object is to set it at a level that will approximate what the market will set...The judge, in other words, is trying to mimic the market in legal services”).

An award of one-third of the fund in attorneys’ fees mimics the marketplace as it “is supported by the fact that typical contingency fee agreements provide that class counsel will recover 33% if the case is resolved before trial and 40% if the case is tried.” *Fernandez v. Victoria Secret Stores LLC*, 2008 WL 8150856, *16 n. 59 (C.D. Cal. July 21, 2008) (citing Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 Wash U. L. Q. 653, 659 n. 11 (Fall 2003)). Indeed, “empirical studies [that] show that...fee awards in class actions average around one-third of the recovery.” *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66 n. 11 (2008).

The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3 percent of the fund. 1 Cal. 5th at 506. And this was based on a lodestar amount that required a multiplier of 2.13. *Id.* at 487. As the Court held, only when the multiplier is “extraordinarily high or low [should] the trial court [] consider whether the percentage method should be adjusted so as to

bring the imputed multiplier within a justifiable range.” *Id.* at 505.

Moreover, in the *Laffitte* intermediate court decision, the court observed that “33 1/3 percent of the common fund is consistent with, and in the range of, awards in other class action lawsuits.” *Laffitte v. Robert Half Int’l*, 231 Cal. App. 4th 860, 871 (2014). Here, the fee award representing one-third of the fund clearly falls within that range, and is consistent with other comprehensive surveys of class action settlements and fee awards. *See Fitzpatrick, An Empirical Study of Class Action Settlements and Their Fee Award*, 7 J. Empirical Leg. Stud. 811, 833 (2010) (analyzing 444 cases between 2006-2007 and concluding that “[m]ost fee awards were between 25 percent and 35 percent, with almost no awards more than 35 percent”); Eisenberg & Miller, *Attorney Fees in Class Action Settlements: An Empirical Study: 1993-2008*, 7 J. of Empirical Leg. Stud. 248, 262, fn. 16 (2010) (independent studies of class action litigation nationwide conclude that fees representing one-third of the total recovery is consistent with market rates).

The results delivered by Class Counsel also support the requested percentage of the fund. Here, the Parties have agreed to a payment of a maximum of one-third (1/3) of the Gross Settlement Fund, *i.e.*, the sum of the sum of \$1,716,666.67, for payment to Class Counsel as attorneys’ fees. The Parties have agreed to a payment of the foregoing attorney’s fees and, thus, this payment should be presumed to be fair. Further, it is not uncommon for courts to award attorneys’ fees as one-third of the settlement amount in wage and hour class action settlements. At the time of Final Approval, Plaintiffs’ counsel will evidence to show that a payment of one-third of the recovery is justified and fair when cross-checked under the lodestar method.

Further, the Parties have agreed to reimbursement of Class Counsel’s litigation costs. Class Counsel has, at its own risk, expended costs, for example, to file this instant action, effect service of process, obtain deposition transcripts, and pay mediation fees and other litigation related costs. Lee Decl. ¶ 5. Based on the foregoing, the court should preliminarily approve the attorney’s fees and costs being requested by the Parties.

F. The Court Should Preliminary Approve the Award of Settlement Administration Costs

The Parties have agreed to payment of a maximum of \$97,000.00 to the settlement

1 administrator, Phoenix Settlement Administrators, to send notices and to administer this
2 settlement. Phoenix Settlement Administrators is a well-recognized class action settlement
3 administrator. The Parties believe that the administration fee is reasonable and should be
4 approved. Gavron Decl. ¶ 28.

5 **G. The Court Should Preliminarily Approve the Proposed Payment to the Class**
6 **Representatives**

7 Plaintiffs request enhancement payments for their role in acting as class representatives.
8 Specifically, Plaintiffs request an enhancement payment of \$20,000.00 to Delishia Hyde,
9 \$20,000.00 to Eugenia Dubose, \$10,000.00 to Clara Trotter, and \$10,000.00 to Araya Turner.
10 Plaintiffs met with Class Counsel on various occasions to discuss the case, provide documents
11 and information to Class Counsel, and review the Settlement Agreement. *See* Declaration of
12 Delishia Hyde (“Hyde Decl.”) ¶ 7; Declaration of Eugenia Dubose (“Dubose Decl.”) ¶ 7;
13 Declaration of Clara Trotter (“Trotter Decl.”) ¶ 7; and Declaration of Araya Turner (“Turner
14 Decl.”) ¶ 7. Moreover, as part of their duties as class representatives, Plaintiffs provided
15 information, evidence, and documents that resulted in this settlement. In addition to the invaluable
16 services that Plaintiffs provided, they also took significant risks, both professionally and
17 monetarily, in acting as Class Representatives and seeking benefits on behalf of the Settlement
18 Class. Because the claims alleged by the class representatives involved the payment of costs to
19 the prevailing party, Plaintiffs could have possibly faced paying the fees and costs of Defendant,
20 had Plaintiffs not prevailed in this action. Hyde Decl. ¶ 8; Dubose Decl. ¶ 8; Trotter Decl. ¶ 8;
21 Turner Decl. ¶ 8. Plaintiffs also agreed to provide general releases and a waiver of the protections
22 of Civil Code § 1542. Settlement Agreement ¶ 41.

23 Given that future employers are much less likely to hire individuals who have filed suit
24 against their prior employer, particularly cases of this nature, Plaintiffs assert that they may face
25 prejudice in the future from other potential employers. Plaintiffs took this risk upon themselves
26 and the whole Settlement Class benefited from these risks taken by Plaintiffs. Settlement Class
27 Members did not have to file individual lawsuits and bear the risks of payment of fees and costs if
28 they did not prevail, nor did they have to face the potential for retaliation and not getting future

1 employment had they filed a public lawsuit.

2 Notably, courts have routinely granted approval of representative enhancements for far
3 greater amounts than the amounts sought by Plaintiffs in this case. *See, e.g., Van Vranken v.*
4 *Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award of \$50,000);
5 *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two
6 incentive awards of \$55,000, and three incentive awards of \$35,000); *Brotherton v. Cleveland*,
7 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001) (granting a \$50,000 incentive award); *Enter.*
8 *Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251-52 (S.D. Ohio 1991)
9 (\$50,000 awarded to each class representative); *Glass v. UBS Fin. Servs.*, No. C-06-4068, 2007
10 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007) (awarding \$25,000 incentive award in
11 FLSA overtime wages class action); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)
12 (affirming \$25,000 Incentive award to class representative in ERISA case). Here, Plaintiffs
13 request enhancements of \$10,000.00 and \$20,000.00, which are reasonable and consistent with
14 case law.

15 **VI. THE PROPOSED SETTLEMENT CLASS MEETS ALL CERTIFICATION**
16 **REQUIREMENTS**

17 The parties also may, at the preliminary approval stage, request that the court
18 provisionally approve certification of the class—conditional upon final approval of the settlement.
19 “[P]re-certification settlements are routinely approved if found to be fair and reasonable.”
20 *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 240 (2001); *Accord Dunk v. Ford Motor*
21 *Co.*, 48 Cal. App. 4th 1794, 1803 (1996) (although the settlement was reached before any
22 “adversary certification,” the court was satisfied that it was “fair, adequate and reasonable”); *In re*
23 *Baldwin-United Corp.*, 105 F.R.D. 475, 478 (S.D.N.Y. 1984) (“many courts have employed this
24 practice in the name of judicial efficiency in order to facilitate apparently beneficial settlement
25 proposals”).⁵ As further explained by Professor Newberg:

26 The strength of the findings made by a judge at a preliminary hearing or conference
27 _____

28 ⁵ In determining the fairness and reasonableness of a proposed settlement, California courts may
look to federal cases for guidance. *See Wershba*, 91 Cal. App. 4th at 239-40.

1 concerning a tentative settlement proposal...may be set out in conditional orders
2 granting tentative approval to the various items submitted to the court. Three basic
3 rulings are often conditionally entered at this preliminary hearing. These conditional
4 rulings may approve a temporary Settlement Class Members, the proposed
5 settlement, and the class counsel's application for fees and expenses.

6 4 *Newberg on Class Actions* § 11.26.

7 In addition to such terms as class identification, settlement amount, and payment
8 procedures, the settlement reached among the Parties contains a provision pursuant to which the
9 Parties stipulate to the Court's provisional certification of the Settlement Class, but do so for the
10 purposes of this settlement only. SA ¶ 88.

11 **A. The Settlement Class is Ascertainable and Sufficiently Numerous**

12 The Settlement Class that Plaintiffs seek to conditionally certify is ascertainable. "Class
13 members are 'ascertainable' where they may be readily identified without unreasonable expense
14 or time by reference to official records." *Lee v. Dynamex, Inc.*, 166 Cal. App. 4th 1325, 1334
15 (2008); *see also Faulkinbury v. Boyd & Assocs., Inc.*, 216 Cal. App. 4th 220, 240 (2013) (same).

16 Here, members of the Settlement Class are readily identifiable. Defendant has determined that
17 there are approximately 21,345 individuals that comprise the Settlement Class. SA ¶ 61.

18 Furthermore, the Settlement Class is sufficiently numerous. Courts generally find that numerosity
19 is satisfied if the class includes forty or more members. *See Villalpando v. Excel Direct Inc.*, 303
20 F.R.D. 588, 605-606 (N.D. Cal. 2014); *see also Jordan v. L.A. County*, 669 F.2d 1311, 1320 (9th
21 Cir.) (noting, in dicta, that the court "would be inclined to find the numerosity
22 requirement...satisfied solely on the basis of [39] ascertained class members"), *vacated on other*
23 *grounds*, 459 U.S. 810 (1982).

24 **B. There are Common Questions of Law and Plaintiffs' Claims are Typical of
25 the Settlement Class**

26 The commonality requirement is met when there are questions of law and fact common to
27 the class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (1998) ("The existence of shared
28 legal issues with divergent legal factual predicates is sufficient, as is a common core of salient
facts couple with disparate legal remedies within the class"). Commonality requires only that
some common legal or factual questions exist; the plaintiffs need not show that all issues in the

litigation are identical. *See Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462, 473 (1981) The defendant's conduct is central to the commonality inquiry. *See City of San Jose v. Superior Court*, 12 Cal. 3d 447, 460 (1974); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 812-13 (1971). Where the employer's conduct is uniformly directed at a class of employees, as Plaintiffs contend it is here, the class wide impact of the defendant's policies satisfies the commonality requirement. *See Stephens v. Montgomery Ward & Co.*, 193 Cal. App. 3d 411, 421 (1987).

Plaintiffs allege that Defendant, as a matter of corporate policy and procedure failed to: (1) pay employees meal period premiums at the correct regular rate of pay that included all non-discretionary remuneration, in violation of Labor Code §§ 201-203, 226.7, and 512; (2) pay employees sick pay at the correct regular rate of pay that included all non-discretionary remuneration, in violation of Labor Code §§ 201-203 and 246; and (3) provide accurate itemized wage statements in violation of Labor Code § 226. Gavron Decl. ¶¶ 8-10; Hyde Decl. ¶¶ 3-5; Dubose Decl. ¶¶ 3-5; Trotter Decl. ¶¶ 3-5; Turner Decl. ¶¶ 3-5. Thus, Plaintiffs submit that their claims are typical to those of the Settlement Class.

C. Plaintiffs and Class Counsel Have Adequately Represented the Settlement Class

Plaintiffs contend that the adequacy requirement is also met. "Adequacy of representation depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." *McGhee v. Bank of Am.*, 60 Cal. App. 3d 442, 450 (1976). Here, Plaintiffs do not have any interests adverse to the Settlement Class, nor have any such issues been raised or presented. Hyde Decl. ¶ 6; Dubose Decl. ¶ 6; Trotter Decl. ¶ 6; Turner Decl. ¶ 6. Plaintiffs have taken all necessary steps to represent the interests of the Settlement Class, by providing information and documents. Hyde Decl. ¶ 7; Dubose Decl. ¶ 7; Trotter Decl. ¶ 7; Turner Decl. ¶ 7. For such reasons, Plaintiffs submit that they have adequately represented the Settlement Class Members and will continue to do so.

Further, as detailed in their declarations, Class Counsel are experienced and well-qualified class action litigators who have litigated many wage and hour class actions and have each been certified as class counsel in numerous other class actions, particularly wage and hour class actions. Gavron Decl. ¶¶ 61-67; Lee Decl. ¶¶ 6-8; Rosenthal ¶¶ 2-3; Tulyathan Decl. ¶¶ 2-6;

1 Choo Decl. ¶¶ 2-4. From the inception of the case, Class Counsel have solely represented the
2 interest of the Settlement Class.

3 **VII. CONCLUSION**

4 Here, the proposed settlement is fair, adequate, and reasonable. It will result in both
5 substantial monetary benefits to Settlement Class Members; it is non-collusive; and it was
6 achieved as the result of informed, extensive, and arm's length negotiations conducted by counsel
7 for the respective Parties who are experienced in wage and hour class action litigation. For the
8 foregoing reasons, Plaintiffs respectfully request that the Court grant preliminary approval of the
9 proposed settlement, sign the proposed Order, approve and authorize mailing of the proposed
10 Notice Packet, and set a date for a final approval hearing.

11
12 DATED: November 28, 2022

DIVERSITY LAW GROUP, P.C.

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14 By: 

Larry W. Lee

15 Max W. Gavron

16 Attorneys for Plaintiffs and the Class
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