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

FRANCISCO AGAPITO and AMBROCIO
LEZAMA, on behalf of themselves and all
other similarly situated,

Plaintiffs,

v.

LA VERNE NURSERY, INC., a California
Corporation, and DOES 1 through 100,

Defendants.

Case No. 56-2019-00527470-CU-OE-VTA

*[Assigned for all purposes to the
Hon. Henry J. Walsh, Dept. 42]*

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

Date: January 24, 2022
Time: 9:30 a.m.
Dept.: 42

Complaint Filed: April 18, 2019
Trial Date: None Set

PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court, on January 24, 2022 at 9:30 a.m., or as soon thereafter as the matter may be heard in Department 42 of the above-entitled Court, located at 800 South Victoria Avenue, Ventura, CA 93009, Plaintiffs Francisco Agapito and Ambrocio Lezama ("Plaintiffs") will, and hereby do, move this Court for:

1. Preliminary approval of the proposed Settlement Agreement;
2. Pursuant to Section 382 of the California Code of Civil Procedure, provisional certification, for settlement purposes only, of the following Settlement Class:

All current and former non-exempt employees of La Verne Nursery, Inc. ("LVN") who worked for LVN in California at any time from April 18, 2015 to the date of preliminary approval of the Settlement ("Class Period").
3. Preliminary appointment of Plaintiffs as Class Representatives;
4. Preliminary appointment of Paul K. Haines, Tuvia Korobkin, Neil M. Larsen, and Bianca V. Perez of Haines Law Group, APC as Class Counsel;
5. Appointment of Phoenix Settlement Administrators as the Settlement Administrator;
6. Approval of the proposed Class Notice and Notice of Estimated Settlement Award (together, the "Notice Packet"), and an order that the Notice Packet be disseminated to the Settlement Class as provided in the Settlement Agreement; and
7. The scheduling of a hearing to consider whether the Settlement Agreement should be finally approved and to award an amount for a Class Representative Service Awards to Plaintiffs, and attorneys' fees and costs to Class Counsel.

This motion is based on this notice of motion; the attached memorandum of points and authorities; the declarations of Paul K. Haines, Tuvia Korobkin, Neil M. Larsen, and Bianca V. Perez, and exhibits attached thereto; the declaration of Jodey Lawrence and exhibits attached thereto; the declarations of Plaintiffs; the pleadings and other papers filed in this action; and on any further oral or documentary evidence or argument presented at the time of hearing.

Dated: December 27, 2021

Respectfully Submitted,
HAINES LAW GROUP, APC



Paul K. Haines
Attorneys for Plaintiffs

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Francisco Agapito and Ambrocio Lezama (“Plaintiffs”) seek preliminary approval of a class action settlement agreement (“Settlement”) with Defendant La Verne Nursery, Inc. (“LVN” or “Defendant”). The Settlement resolves a class and representative action pending before this Court (the “Action”), in which Plaintiffs allege that LVN (i) failed to pay all earned wages due to its allegedly unlawful time-rounding practice, (ii) failed to provide legally-compliant meal periods, and (iii) caused unlawful deductions to be taken from employee wages by treating reimbursements as wages. Plaintiffs further allege that as a result of these violations, LVN failed to issue accurate itemized wage statements, failed to timely pay all final wages, and is liable for civil penalties under the Labor Code Private Attorneys General act (“PAGA”).

Plaintiffs now respectfully request that this Court preliminarily approve this non-reversionary, common-fund class action Settlement,¹ in which LVN has agreed to pay \$400,000.00 to the following Settlement Class, which is estimated to consist of 422 individuals:

All current and former non-exempt employees of LVN who worked for LVN in California at any time from April 18, 2015 through the date of preliminary approval of the Settlement (“Class Period”).

The Settlement was reached after the parties engaged in mediation with Jeffrey Krivis, Esq., an experienced wage and hour class action mediator. Prior to mediation, the parties engaged in significant formal discovery, including LVN’s production of relevant wage and hour policies; timekeeping and payroll records for a sampling of putative class members; and a class list with each employee’s hire date, termination date, and contact information (for those employees who did not object to their contact information being disclosed); LVN took the depositions of both Plaintiffs, and Plaintiffs deposed LVN’s Persons Most Knowledgeable. After extensive research and investigation, including interviews of putative class members and analyses of LVN’s potential exposure, the parties attended a full-day mediation with Mr. Krivis on August 13, 2021, where the parties reached a settlement.

¹ The Settlement is attached as Exhibit 1 to the Haines Declaration. The Class Notice and Notice of Estimated Settlement Award are attached as Exhibits A and B, respectively, to the Settlement.

Notably, Settlement Class members are not required to submit a claim to receive a payment (“Settlement Award”) from the Settlement. After deductions for proposed settlement administration costs, attorneys’ fees and costs, Plaintiffs’ service awards, and the LWDA’s share of PAGA civil penalties, the average Settlement Award is estimated to be at least \$434.04, a favorable result. For the reasons discussed herein, Plaintiffs respectfully requests that the Court grant preliminary approval of the Settlement.

II. SUMMARY OF THE LITIGATION

A. FACTUAL AND PROCEDURAL BACKGROUND

Based in Piru, California, LVN is a wholesale supplier of fruit trees to retail nurseries, commercial licensed landscape contractors, home improvement centers, and certain grocery chains throughout California. *See* Declaration of Paul K. Haines (“Haines Decl.”), ¶ 10. Plaintiffs and Settlement Class members are non-exempt employees who worked for LVN in California during the Class Period. *Id.*

On April 18, 2019, Plaintiff Agapito filed the instant class action lawsuit against LVN in this Court. Haines Decl., ¶ 11. On July 5, 2019, Plaintiff Agapito filed a First Amended Class and Representative Action Complaint alleging causes of action for failure to pay all overtime wages; minimum wage violations; meal period violations; wage statement violations; failure to reimburse necessary business expenditures; unfair competition; and civil penalties pursuant to the Private Attorneys General Act of 2004 (“PAGA”), California Labor Code § 2698 *et seq.* *Id.* On August 19, 2020, Plaintiffs filed the operative Second Amended Complaint, which added Plaintiff Lezama as a Class Representative and added claims for unlawful wage deductions and for waiting time penalties, as well as additional factual allegations. *Id.*

B. PLAINTIFFS’ CLAIMS AND LVN’S DEFENSES

1. Claim for Unpaid Wages Due to Time-Rounding

Plaintiffs allege that LVN requires employees to clock in and out for all shifts and records their time worked to the minute, but that it has rounded employees’ time entries to employees’ detriment, resulting in unpaid wages. Haines Decl., ¶ 16.

///

1 LVN contends it utilizes an even-handed timekeeping system that, on balance, results in
2 employees being paid for all hours worked. Haines Decl., ¶ 16; *See’s Candy Shops, Inc. v. Sup.*
3 *Ct.*, 210 Cal.App.4th 889, 901 (2012) (holding rounding policy lawful if consistently applied and,
4 on average, favor neither overpayment nor underpayment of wages). LVN further argues that just
5 because an employee is clocked in does not mean they are *working*. For example, much of the
6 alleged unpaid time was pre-shift (i.e., employees clocked in before the scheduled shift start time),
7 and LVN argues employees work as a group and that they do not (and cannot) begin performing
8 work before the start of their shift, and instead engage in personal activities like talking with co-
9 workers before their shift. Haines Decl., ¶ 16. Moreover, LVN asserts the amount of unpaid time
10 per shift is *de minimis* and thus non-compensable. *Id.* LVN also argued this claim would not be
11 certifiable, since its rounding policy is facially neutral and some employees were overpaid due to
12 rounding, and individualized inquiries would be necessary as to whether employees were in fact
13 underpaid or overpaid for each workday in question (including whether they were actually
14 working when they were clocked in), resulting in an unmanageable series of mini-trials. *Id.*

15 **2. Meal Period Claim**

16 Plaintiffs allege LVN often provided late meal periods, since LVN would schedule meal
17 periods to begin 5 hours into the shifts but, as mentioned above, employees would often clock in
18 before their scheduled start times, and therefore did not take a meal period until more than 5 hours
19 after they clocked in. Haines Decl., ¶ 17. LVN also frequently did not have employees clock out
20 for lunch but instead auto-deducted meal periods from employee time cards. *Id.* Plaintiffs further
21 allege that LVN failed to provide second meal periods on shifts over 10.0 hours. *Id.*

22 LVN argues it has always maintained legally-compliant meal period policies and
23 communicated those policies to its employees, that under *Brinker* it is only required to “provide”
24 the opportunity to take meal periods, not “ensure” meal periods are taken, and that it has always
25 done so. Haines Decl., ¶ 17; *Brinker Rest. Corp. v. Sup. Ct.*, 53 Cal.4th 1004, 1038 (2012)
26 (rejecting “ensure” standard). LVN also argues that, as noted above, employees do not – and,
27 indeed, cannot – actually perform any work prior to the scheduled beginning of their shift, and
28 therefore meal periods were provided timely at or before the 5-hour mark. Haines Decl., ¶ 17.

1 Because employees are provided timely, 30-minute meal periods, any late or otherwise non-
2 compliant meal periods reflected in time records are the result of employee choice, rather than a
3 company policy or practice. *Id.* LVN also contends that it was extremely rare for employees to
4 work over 10 hours, and when they did, employees routinely waived their second meal period
5 pursuant to Labor Code § 512. *Id.* Lastly, LVN argues this claim would not be suited for class
6 certification because individualized inquiries would be needed to determine whether individual
7 employees did not take a compliant meal period on each individual shift, why they did not take a
8 compliant meal period, and (for second meals) whether they waived the meal period. *Id.*

9 **3. Claim for Unlawful Deductions**

10 Plaintiffs allege that LVN unlawfully deducted wages from employee wages, since it
11 labeled monthly expense reimbursements for certain employees as “wages” on wage statements,
12 which caused those amounts to be taxed. Plaintiffs allege those amounts should not have been
13 taxed since they were reimbursements and not wages, and therefore LVN caused unlawful
14 deductions to be taken from employee wages.² Haines Decl., ¶ 18.

15 LVN argues that it properly classified all employee payments, as the reimbursements paid
16 by LVN were taxable under relevant IRS regulations. Haines Decl., ¶ 18. LVN further argues that
17 the amount of alleged under-payment is so small as to be *de minimis*. *Id.* Finally, LVN argues this
18 claim is not amenable to certification as it would require an employee-by-employee analysis as
19 to whether each employee was under-paid in each pay period. *Id.*

20 **4. Claims Under Lab. Code §§ 203, 226, and the PAGA**

21 As a result of its alleged failure to pay all wages owed, Plaintiffs asserts LVN failed to
22 comply with its final payment and wage statement obligations, in violation of Labor Code §§ 203
23 and 226. Haines Decl., ¶¶ 19-20. Finally, Plaintiffs seek PAGA civil penalties based on the above
24 claims. *Id.*, ¶ 21.

25
26 ² Plaintiffs initially alleged claims for failure to reimburse business expenses and for failure to
27 include “bonuses” in the regular rate. However, as Plaintiffs learned after after discovery
28 and investigation, LVN contends the “bonuses” on wage statements were actually
reimbursements. Thus, Plaintiffs did not anticipate recovery on their reimbursement or
regular rate claims, but pursued an unlawful deduction claim as described herein.

1 LVN argues Plaintiffs’ derivative claims fail for the same reasons as their underlying
2 claims. LVN further asserts it has strong, good-faith defenses to Plaintiffs’ underlying claims,
3 precluding waiting time penalties. *See* Haines Decl., ¶ 20; 8 Cal. Code Regs. § 13520 (a “good
4 faith dispute that any wages are due will preclude imposition of waiting time penalties”); *Kao v.*
5 *Joy Holiday*, 12 Cal.App.5th 947, 963 (2017) (holding “good faith dispute” precluded imposing
6 waiting time penalties). LVN further contends Plaintiffs’ meal period claim cannot support claims
7 for waiting time or wage statement penalties, as multiple courts have held (and which issue is
8 going to be decided by the California Supreme Court in *Naranjo v. Spectrum Security Services*,
9 Case No. S258966 (review granted Jan. 2, 2020)). LVN also argues any alleged wage statement
10 violations could not be shown to be “knowing and intentional,” particularly given its good-faith
11 defenses; that Plaintiffs cannot show they or other employees “suffer[ed] injury” due to alleged
12 violations, as required by Lab. Code § 226(e); and that wage statements always accurately
13 reflected amounts *paid* to employees. Haines Decl., ¶ 19; *Maldonado v. Epsilon Plastics, Inc.*, 22
14 Cal.App.5th 1308, 1336-37 (2018) (“The purpose of section 226 is to *document* the *paid wages* to
15 ensure the employee is fully informed regarding the calculation of those wages.”).

16 Finally, LVN contends the PAGA claim fails because the underlying claims fail. *See, e.g.,*
17 *Price v. Starbucks Corp.*, 192 Cal.App.4th 1136, 1147 (2011) (“Because the underlying causes of
18 action fail, the derivative UCL and PAGA claims also fail.”). LVN further maintains that given
19 its good-faith defenses, the Court would substantially reduce PAGA penalties even if Plaintiffs
20 prevailed on their underlying claims. Haines Decl., ¶ 21; *see also* Lab. Code § 2699(e)(2)
21 (authorizing reduction in PAGA penalties); *Thurman v. Bayshore Transit Mgmt., Inc.*, 203
22 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties because “the evidence
23 showed...defendants took their obligations...seriously and attempted to comply with the law”);
24 *Fleming v. Covidien, Inc.*, No. ED-CV-10-1487-RGK (OPx), 2011 WL 7563047 at *4 (C.D. Cal.
25 2011) (reducing PAGA penalties by over 82% in part because employer “not aware” of
26 violations); *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018) (affirming PAGA
27 civil penalty of just \$5 per pay period where employer made “good faith attempts” to comply with
28 the law).

1 **C. DISCOVERY AND MEDIATION**

2 The parties engaged in significant discovery, with both sides propounding and responding
3 to formal written discovery, meeting and conferring over the other's responses, and both sides
4 providing supplemental discovery responses and documents. Haines Decl., ¶ 12. Defendant also
5 took Plaintiffs' depositions, and Plaintiffs deposed Defendant's Persons Most Knowledgeable
6 (PMKs) on dozens of topics. *Id.* Among other things, LVN produced its relevant wage and hour
7 policies, as well as timekeeping and payroll records for a sample of putative class members, and
8 contact information for putative class members who did not object to their contact information
9 being provided to Plaintiffs' counsel. *Id.* In total, the parties produced over 2,000 pages of
10 documents. *Id.* Plaintiffs' counsel analyzed and extrapolated the data produced by LVN to
11 calculate potential class-wide exposure for Plaintiffs' claims. *Id.* This discovery allowed the
12 parties to assess the merits and value of Plaintiffs' claims and LVN's defenses.

13 The parties attended a full-day mediation on August 13, 2021 with Mr. Krivis. Haines
14 Decl., ¶ 13. The parties vigorously debated their legal positions, the likelihood of certification of
15 Plaintiffs' claims, and the legal bases for the claims and defenses. *Id.* At the conclusion of
16 mediation, Mr. Krivis issued a mediator's proposal that was accepted by the parties. *Id.* Over the
17 following months, the parties negotiated the finer terms of the settlement and finalized the
18 Settlement Agreement now before the Court. *Id.*

19 **III. THE PROPOSED SETTLEMENT**

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

21 Under the Settlement, LVN will pay a non-reversionary Gross Settlement Amount
22 ("GSA") of \$400,000.00, with no claims process required for Settlement Class members to receive
23 payment. The monetary terms of the Settlement are summarized below:

• Gross Settlement Amount ("GSA"):	\$400,000.00
• Minus Court-approved attorneys' fees (one-third):	\$133,333.33
• Minus Court-approved verified costs (up to):	\$25,000.00
• Minus Court-approved Service Awards:	\$10,000.00
• Minus Amount Set Aside as PAGA penalties:	\$50,000.00
• <u>Minus estimated settlement administration costs:</u>	<u>\$11,000.00</u>
Net Settlement Amount ("NSA"):	\$170,666.66
• PLUS 25% "PAGA Amount" to Settlement Class:	\$12,500.00
Total Amount Paid to Settlement Class members:	\$183,166.66

1 **1. The Settlement Provides for Reasonable Monetary Payments**

2 After deducting amounts for court-approved service awards, attorneys' fees and costs,
3 administration costs, and PAGA payment to the LWDA, LVN will pay at least \$183,166.66 to
4 the Settlement Class. *See* Settlement, § 3(D). LVN represents there are approximately 422
5 Settlement Class members. *Id.*, § 3(F). The average Settlement Award is thus estimated to be
6 \$434.04. Haines Decl., ¶ 15. Payments from the NSA will be treated as one-third wages reported
7 on a Form W-2; and as two-thirds penalties and interest, reported on a Form 1099. *See* Settlement,
8 § 4(E). Payments from the PAGA Amount will be treated as 100% penalties. *Id.* LVN will pay
9 its share of payroll taxes on the amount designated as "wages" separate from, and in addition to,
10 the GSA. *Id.*, § 3(E). LVN will deposit the settlement amount in 3 equal installments. *Id.*, § 3(C).

11 Payments will be calculated as follows. First, (i) 70% of the NSA will be distributed to all
12 participating Settlement Class members based on the proportional number of workweeks worked
13 during the Class Period; (ii) 15% of the NSA will be distributed in equal amounts to all
14 participating Settlement Class members whose employment with LVN ended at any time from
15 April 18, 2016 through the end of the Class Period; and (iii) the remaining 15% of the NSA will
16 be distributed to all participating Settlement Class members who were employed by LVN between
17 April 18, 2018 and the end of the Class Period ("Wage Statement Period"), based on their
18 respective number of pay periods worked during that time period. *See* Settlement, § 4(B). Finally,
19 in addition to the NSA, the \$12,500 "PAGA Amount" will be distributed to all Settlement Class
20 members (regardless whether they opt out) who worked for LVN at any time from April 30, 2018
21 through the end of the Class Period ("PAGA Period"), based on the number of pay periods worked
22 for LVN during that time period. *Id.*

23 Settlement Class members will have 60 days from the Notice mailing to object, request to
24 opt-out, or submit disputes, thereby providing ample time to review the Notice without unduly
25 delaying the Settlement. *See* Settlement, § 9(C)-(E). Participating Settlement Class members will
26 be bound by the Settlement, and will release all wage and hour claims pled in the operative
27 Complaint, or that could have been pled based on the facts alleged in the Complaint, during the
28 Class Period ("California Released Claims"). *See* Settlement, § 2(A). In addition, all Settlement

Class members (whether or not they opt out) who worked for LVN during the PAGA Period will release all related PAGA claims against LVN during the PAGA Period (“PAGA Released Claims”). *Id.* Plaintiffs have also agreed to a general release of claims, including a waiver of Cal. Civil Code § 1542. *Id.*, § 2(B).

Settlement Award checks will be valid for 180 days after issuance. *See* Settlement, § 4(F). After 180 days, funds from uncashed checks will be distributed to Western Center on Law & Poverty as a *cy pres* beneficiary. *Id.*

2. Attorneys’ Fees and Costs, Service Awards, and PAGA Payment

At final approval, Plaintiffs will apply for Class Representative Service Awards in the amount of \$5,000 each. *See* Settlement, § 3(D)(3). “[I]ncentive awards are fairly typical in class action cases...and are intended to compensate class representatives for work done on behalf of the class [and] to make up for financial or reputational risk undertaken in bringing the action.” *In re Cellphone Fee Termination Cases*, 186 Cal.App.4th 1380, 1393-94 (2010). As will be fully briefed at final approval, Plaintiffs’ requested payments are in recognition of the time and effort they expended on behalf of the Settlement Class, including providing factual information and documents to counsel, identifying potential witnesses, attending in-person and telephonic meetings with counsel to discuss the claims and theories at issue in the litigation, responding to written discovery, preparing for and attending their depositions, and otherwise actively participating in the prosecution of this case. Haines Decl., ¶ 24. Plaintiffs respectfully submit that these requested payments are well within the range of permissible approval. *See, e.g., Alvarado v. Nederend*, No. 1:08-cv-01099-OWW-DLB, 2011 WL 1883188 at *10 (E.D. Cal. May 17, 2011) (approving \$7,500 award to each of five named plaintiffs from \$505,058.60 settlement).

The parties have also designated \$50,000 of the GSA as PAGA penalties, of which \$37,500 (75%) will be paid to the LWDA (*see* Settlement, § 3(D)(5)), consistent with the requirements of Labor Code § 2699(i). Plaintiffs submit this allocation to the LWDA is appropriate in light of other settlements allocating penalties to the LWDA. *See, e.g., Chu v. Wells Fargo Inv., LLC*, No. C-05-4526-MHP, 2011 WL 672645 (N.D. Cal. Feb. 16, 2011) (approving PAGA payment of \$7,500 to LWDA from \$6.9 million settlement).

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At final approval, Plaintiffs’ counsel will request attorneys’ fees of one-third of the GSA (estimated at \$133,333.33), and up to \$25,000 in litigation costs. *See* Settlement, § 3(D)(4). The requested fee is fair compensation for undertaking complex, risky, time-consuming, and expensive litigation on a contingent basis. Counsel have incurred substantial attorneys’ fees conducting pre-filing investigation; analyzing Plaintiffs’ claims; conducting legal research; propounding and responding to written discovery, and meeting and conferring and drafting and reviewing supplemental responses and document production; preparing for and attending depositions; analyzing timekeeping and other data to create a comprehensive damages model; interviewing putative class members; preparing for and attending mediation; negotiating and preparing the Settlement; preparing this Motion; and otherwise prosecuting this case. Haines Decl., ¶ 23. Further, Counsel will incur significant future fees in overseeing the Notice process, preparing the Final Approval Motion and supporting documents, and appearing at the Final Approval Hearing. *Id.*

It is appropriate to award attorneys’ fees as a percentage of the “common fund” created by the settlement. *Laffitte v. Robert Half Int’l, Inc.*, 1 Cal.5th 480 (2016) (holding “the percentage of fund method survives in California class action cases”). Counsel’s request for fees of one-third of the GSA (the same percentage approved in *Laffitte*) is well within the range of reasonableness and is typical for common fund settlements. *See Newberg on Class Actions* § 14.6 (4th Ed. 2013) (historically, courts have awarded percentage fees in the range of 20% to 50%). As will be fully briefed at final approval, counsel submit their request for fees is reasonable in light of the substantial risks and significant work undertaken, the results obtained, and the efficiency with which counsel conducted the litigation.

IV. ARGUMENT

A. PRELIMINARY APPROVAL IS WARRANTED

California Rule of Court 3.769 conditions class action settlements on court approval, which is generally evaluated under the same standards as Fed. R. Civ. Proc. 23. *See Reed v. United Teachers Los Angeles*, 208 Cal.App.4th 322, 337 (2012) (Rule 3.769 requires court to determine “that the settlement is fair, reasonable and adequate to all concerned”); *Hanlon v. Chrysler Corp.*,

1 150 F.3d 1011, 1026 (9th Cir. 1998) (Rule 23(e) requires court to determine “whether a proposed
2 settlement is fundamentally fair, adequate, and reasonable”). The Court’s role is to ensure the
3 settlement agreement taken as a whole is fair and within the range of reasonableness. *Id.* at 1027.
4 There is a presumption of fairness when a settlement is negotiated at arm’s length by counsel.
5 *See, e.g., Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 130 (2008).

6 **1. Standard for Preliminary Approval**

7 To make a fairness determination, the Court should consider several factors, including:
8 “the strength of Plaintiff’s case, the risk, expense, complexity and likely duration of further
9 litigation, the risk of maintaining class action status through trial, the amount offered in
10 settlement, the extent of discovery completed and the stage of the proceedings, [and] the
11 experience and views of counsel.” *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996).
12 “The list of factors is not exclusive and the Court is free to engage in a balancing and weighing
13 of the factors depending on the circumstances of each case.” *Wershba v. Apple Computer, Inc.*,
14 91 Cal.App.4th 224, 245 (2001). As discussed below, the proposed Settlement is fair, adequate,
15 and reasonable in light of the overall balance of factors in this case.

16 **a. The Strength of Plaintiffs’ Case**

17 Although they maintain their claims are meritorious, Plaintiffs acknowledge there were
18 substantial risks and uncertainty in proceeding with class certification and eventual trial on the
19 merits. As described in section II.B., *supra*, LVN presented multiple defenses to Plaintiffs’ claims,
20 both on the merits and to class certification. While Plaintiffs were prepared to litigate their claims
21 through class certification and ultimately trial, success was far from certain.

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

23 Although the parties engaged in significant discovery before reaching settlement, the
24 parties had not yet completed formal written and deposition discovery, which would have required
25 the expenditure of substantial time and resources by all parties. Haines Decl., ¶ 26. The Settlement
26 also avoids the attorneys’ fees and costs associated with moving for class certification and
27 summary judgment, and ultimately, trial, as well as the risks and the accompanying burden of
28 continued litigation on the Court. *Id.* Thus, this factor supports preliminary approval.

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

2 Plaintiffs had not yet filed their class certification motion, and as such, the extent to which
3 Plaintiffs' proposed classes were certifiable is somewhat speculative. Absent settlement, there
4 was a risk there would not be a certified class at trial, or if there were, that it would consist of a
5 significantly smaller group of employees than the proposed Settlement Class, and the expected
6 recovery would be significantly reduced. Thus, this factor supports preliminary approval.

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

8 The Settlement provides a fair and reasonable monetary recovery for the Settlement Class
9 for disputed claims. Plaintiffs analyzed the records produced by LVN and conducted an analysis
10 of potential damages due to LVN's allegedly unlawful policies and practices. Plaintiffs' analyses
11 of realistic expected recoveries for each theory of liability are set forth below:

12 **Unpaid Wages Due to Rounding: \$51,075**

13 As explained above, Plaintiffs allege that LVN rounded employees' time entries to
14 employees' detriment. Haines Decl., ¶ 16. Based on Plaintiffs' analysis and extrapolation of
15 timekeeping records, Plaintiffs estimate that Settlement Class members were underpaid by
16 approximately 10,000 hours during the Class Period as a result of its rounding practice. *Id.* The
17 average minimum wage in California during the Class Period was approximately \$11.35. *Id.*
18 Thus, Plaintiffs estimate LVN's maximum exposure for this claim as: 10,000 hours * \$11.35 min.
19 wage * 2 (liquidated damages per Lab. Code § 1194.2) = \$227,000. *Id.* But as noted above, LVN
20 maintains its rounding practice is even-handed and results in employees being paid for all hours
21 worked; that just because an employee is clocked in does not mean they are *working*; that
22 employees work as a group and that they do not (and cannot) begin performing work before the
23 start of their shift, and instead engage in personal activities before their scheduled shift start time;
24 that the amount of unpaid time per shift is *de minimis* and thus non-compensable; and that this
25 claim would not be certified, since individualized inquiries would be necessary as to whether
26 employees were in fact underpaid or overpaid for each workday in question (including whether
27 they were actually working when they were clocked in), resulting in an unmanageable series of
28 mini-trials. *Id.* In light of these defenses, Plaintiffs discounted the maximum exposure by 50% to

1 account for the risk of non-certification, and an additional 55% for risk of losing on the merits, to
2 arrive at an estimated exposure of approximately \$51,075. *Id.*

3 Meal Period Violations: \$169,722

4 Plaintiffs allege that LVN frequently provided late meal periods, as it scheduled meal
5 periods exactly 5 hours into employees’ shifts but employees often clocked in prior to the
6 scheduled start of the shift. Haines Decl., ¶ 17. Plaintiffs also allege LVN failed to provide second
7 meal periods on shifts over 10 hours. *Id.* Based on Plaintiffs’ analysis and extrapolation of
8 timekeeping records, Plaintiffs estimate there were approximately 120,000 shifts during the Class
9 Period containing at least one potential meal period violation. *Id.* In addition, the data produced
10 by LVN reflected an average rate of pay of approximately \$13.47. *Id.* Thus, Plaintiffs estimated
11 LVN’s total maximum exposure on this claim under Labor Code § 226.7 as: 120,000 meal period
12 violations * \$13.47 avg. hourly rate = \$1,616,400. *Id.* But as noted above, LVN argues that it has
13 always provided employees with timely, 30-minute meal periods; that employees who clocked in
14 early did not actually begin *working* until their scheduled shift time, and therefore meal periods
15 were not late; that employees rarely work shifts of over 10 hours, and when they do, employees
16 routinely waive their second meal period; and that this claim would not be amenable to class
17 certification given that individual inquiries would be necessary on a shift-by-shift basis to
18 determine whether each employee took a timely 30-minute meal period on each shift, and in the
19 case of second meals, whether the employee had waived the second meal period on each shift. *Id.*
20 In light of these defenses, Plaintiffs discounted the maximum exposure by 65% for risk of non-
21 certification, and by an additional 70% for risk of losing on the merits, for a realistic estimated
22 exposure of \$169,722. *Id.*

23 Unlawful Deductions: \$1,100

24 Plaintiffs allege that LVN caused unlawful deductions to be taken from certain employees’
25 wages by treating reimbursements as “wages” thereby causing taxes to be deducted from
26 reimbursements. Haines Decl., ¶ 18. Based on Plaintiffs’ analysis and extrapolation of payroll
27 data provided by LVN, Plaintiffs estimate that during the Class Period approximately \$1,100 in
28 deductions were unlawfully taken as taxes on employees’ business expense reimbursements. *Id.*

1 Although, as mentioned above, LVN raised multiple defenses to this claim, given the relatively
2 low value, Plaintiffs did not discount this claim for purposes of their damages analysis. *Id.*

3 Wage Statement Violations: \$73,123

4 Plaintiffs' analysis of data from LVN reflected that there were approximately 10,833
5 unique pay periods worked within the one-year liability window under Labor Code § 226. Haines
6 Decl., ¶ 19. In calculating LVN's exposure, Plaintiffs assumed they could recover the "initial"
7 wage statement penalty of \$50 for each violation, for a total of \$541,650 in potential penalties.
8 *Id.*; see also Lab. Code § 226(e) (providing \$50 penalty for "initial" violations); *Amaral v. Cintas*
9 *Corp. No. 2*, 163 Cal.App.4th 1157, 1207 (2008) (finding "initial" violation rate applies until
10 employer has been notified it violated the Labor Code); *Patel v. Nike Retail Svcs., Inc.*, 58
11 F.Supp.3d 1032, 1042-43 (N.D. Cal. 2014) (citing *Amaral* and applying "initial" \$50 penalty to
12 all pay periods in calculating amount-in-controversy for wage statement claim). However, given
13 LVN's arguments that no violations occurred; that class members suffered no "injury;" that any
14 alleged violations were not "knowing and intentional;" that a meal period claim cannot support
15 wage statement penalties; that Plaintiffs would not be able to show a penalty in every pay period;
16 as well as the risks associated with Plaintiffs' underlying claims as to both certification and the
17 merits, Plaintiffs discounted the maximum exposure by 55% for risk of non-certification, and by
18 an additional 70% for risk of being unsuccessful on the merits or failure to recover the full amount
19 sought, for an estimated realistic exposure of \$73,123. *Id.*

20 Waiting Time Penalties: \$92,747

21 Based on data provided by LVN, there are approximately 255 Settlement Class members
22 who have separated their employment with LVN since April 18, 2016. Haines Decl., ¶ 20. Using
23 an estimated average waiting time penalty of \$3,233 (\$13.47/hr. * 8 hours * 30 days), Plaintiffs
24 estimated LVN's maximum potential waiting time penalty exposure as \$824,415 (255 * \$3,233).
25 *Id.* As noted above, however, LVN asserts it has strong, good-faith defenses to Plaintiffs'
26 underlying claims, and thus, even if Plaintiffs were able to recover on their underlying claims,
27 they would not be able to recover derivative waiting time penalties. *Id.* LVN further contends
28 Plaintiffs' meal period claim cannot support a claim for waiting time penalties, as multiple courts

1 have held. *Id.* Moreover, because the waiting time claim is derivative of Plaintiffs’ underlying
2 wage claims, Plaintiffs would need to overcome LVN’s defenses, both as to class certification
3 and the merits, to their underlying claims. And, LVN argues, not every former employee suffered
4 every single alleged wrong, and therefore if Plaintiffs only certified or prevailed on some but not
5 all of their claims, the size of any potential waiting time claim would be reduced. Based on these
6 defenses, Plaintiffs discounted LVN’s maximum exposure by 55% for risk of non-certification
7 and by an additional 75% for risk of being unsuccessful on the merits or failure to recover the full
8 amount sought, to arrive at an estimated realistic exposure of \$92,747. *Id.*

9 PAGA Civil Penalties: \$94,789

10 Plaintiffs estimated a maximum PAGA exposure of \$1,083,300, based on approximately
11 10,833 pay periods during the PAGA Period at the \$100 “initial” violation rate under Lab. Code
12 § 2699(f). Haines Decl., ¶ 21; *Amaral*, 163 Cal.App.4th at 1209. However, these penalties derive
13 from Plaintiffs’ underlying claims, each of which LVN vigorously disputes. LVN further argues
14 Plaintiffs would not be able to show a violation in every pay period, and thus their damages
15 estimate is inflated. *Id.* The PAGA also grants courts discretion to reduce PAGA civil penalties
16 (Lab. Code § 2699(e)(2)), and LVN argues the Court would reduce penalties significantly given
17 its good-faith defenses. *Id.* Thus, Plaintiffs discounted the maximum figure by 65% for risk of
18 losing on the merits and/or failure to recover a penalty in each pay period, and by an additional
19 75% for risk of the Court reducing penalties, to arrive at an estimated exposure of \$94,789. *Id.*;
20 see also *Thurman*, 203 Cal.App.4th at 1135-36 (affirming reduction of PAGA civil penalties);
21 *Fleming*, 2011 WL 7563047 at *4 (reducing PAGA civil penalties by over 82%); *Carrington*, 30
22 Cal.App.5th at 529 (affirming PAGA civil penalty of just \$5 per pay period).

23 Using these estimated figures, Plaintiffs predicted the realistic total recovery for the
24 Settlement Class would be approximately \$482,556. Haines Decl., ¶ 22. Thus, the proposed
25 settlement of \$400,000 represents approximately 83% of Plaintiffs’ reasonably forecasted
26 classwide recovery. *Id.* Preliminary approval is therefore appropriate as the Settlement will
27 provide significant monetary relief to the Settlement Class.

28 ///

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

2 “Parties represented by competent counsel are better positioned than courts to produce a
3 settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pac. Enter.*
4 *Securities Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Here, counsel have extensive experience
5 litigating wage and hour class actions from both the plaintiff and defense side, and have been
6 appointed class counsel in numerous cases alleging similar claims. *See* Haines Decl., ¶¶ 3-8;
7 Declaration of Tuvia Korobkin, ¶¶ 2-6; Declaration of Neil M. Larsen, ¶¶ 2-4. Counsel conducted
8 an in-depth review of LVN’s policies, timekeeping and payroll records, and other relevant data,
9 and drew on their extensive experience to assess Plaintiffs’ claims. The Settlement was also
10 reached with the assistance of Mr. Krivis, an experienced wage and hour class action mediator.
11 Haines Decl., ¶ 13. This strongly supports preliminary approval. *Kullar*, 168 Cal.App.4th at 130.

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

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

17 **a. The Settlement Is Within the Range of Possible Approval**

18 As noted, the Settlement reflects about 83% of the realistic estimated recovery on
19 Plaintiffs’ claims, and will provide tangible, monetary compensation for hotly disputed wage
20 claims. Accordingly, Plaintiffs submit the Settlement is within the range of possible approval.

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

22 The Settlement resulted from an exchange of substantial information, arm’s-length
23 negotiations, and a full-day mediation with an experienced mediator. Thus, the Settlement is
24 entitled to a presumption of fairness. *Kullar*, 168 Cal.App.4th at 130. Plaintiffs carefully vetted
25 the claims at issue, and conducted a detailed analysis of the relevant data and information. Haines
26 Decl., ¶¶ 16-21. Thus, this factor supports preliminary approval.

27 ///

28 ///

1 **c. The Settlement Is Devoid of Obvious Deficiencies**

2 Preliminary approval of the Settlement is warranted because there are no obvious
3 deficiencies. The Settlement provides tangible monetary relief to the Settlement Class, and the
4 amounts proposed for attorneys' fees, costs, Plaintiffs' service awards, and PAGA penalties are
5 all reasonable and appropriate based on the facts of this case. Because the Settlement is devoid
6 of obvious deficiencies, this factor supports preliminary approval.

7 **B. THE COURT SHOULD CERTIFY THE PROPOSED CLASS**

8 The proposed Settlement Class satisfies the criteria for certification of a settlement class
9 under California law because: 1) the Settlement Class is ascertainable and numerous; 2) common
10 questions predominate; 3) Plaintiffs' claims are typical of the Settlement Class; and 4) Plaintiffs
11 and counsel will fairly and adequately represent the Settlement Class. Cal. Code Civ. Proc. § 382.

12 **1. The Proposed Class Is Ascertainable and Numerous**

13 A class is "ascertainable" where members "may be readily identified without unreason-
14 able expense or time by reference to official [or business] records." *Sevidal v. Target Corp.*, 189
15 Cal.App.4th 905, 919 (2010). The Settlement Class includes non-exempt employees who worked
16 for LVN in California during the Class Period. Thus, they can be readily identified from LVN's
17 records. LVN represents there are approximately 422 Settlement Class members, rendering it
18 impracticable to bring them all before the Court. *See* Settlement, § 3(F). Numerosity is thus
19 satisfied.

20 **2. Common Issues of Law and Fact Predominate**

21 The focus on certification is on what types of questions, "common or individual," are
22 likely to arise in the action. *Sav-On Drug Store, Inc. v. Sup. Ct.*, 34 Cal.4th 319, 327 (2004).
23 Plaintiffs' claims are predicated primarily on allegedly unlawful rounding practices and allegedly
24 unlawful meal period practices. Such claims are commonly held proper for class certification.
25 *See, e.g., Tapia v. Zale Delaware Inc.*, No. 13-CV-1565-BAS, WL 1385181 at **3-4 (S.D. Cal.
26 Apr. 6, 2016) (certifying rounding claim); *Benton v. Telecom Network Specialists, Inc.* 220
27 Cal.App.4th 701, 726 (2013) (certifying meal and rest period claims).

28 ///

1 **3. The Named Plaintiffs' Claims Are Typical**

2 The typicality requirement is satisfied where class representatives have claims that are
3 typical of those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191
4 Cal.App.3d 1341, 1347 (1987). Here, Plaintiffs' claims are typical of those held by Settlement
5 Class members. Plaintiffs were employed by LVN as non-exempt employees in California during
6 the Class Period, and they were injured by the same challenged policies that allegedly injured the
7 Settlement Class. See Declaration of Francisco Agapito, ¶¶ 2-5; Declaration of Ambrocio Lezama,
8 ¶¶ 2-4. Typicality is thus satisfied.

9 **4. Plaintiffs and Class Counsel Will Adequately Represent the Class**

10 The adequacy requirement examines conflicts of interest between named parties and the
11 class(es) they seek to represent. *Capital People First v. State Dept. of Developmental Svcs.*, 155
12 Cal.App.4th 676, 697 (2007). Plaintiffs and their counsel will adequately represent the Settlement
13 Class, as there are no known conflicts between Plaintiffs or their counsel and the Settlement Class.
14 See *McGhee v. Bank of Am.*, 60 Cal.App.3d 442, 450 (1976) (finding adequacy satisfied where
15 there was no indication that plaintiff's counsel was not qualified and the named plaintiff had no
16 interests antagonistic to those of the proposed class). Plaintiffs' counsel also have extensive
17 experience in wage and hour class action litigation, as noted above.

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

19 The Court should order distribution of the proposed Notice by U.S. Mail, using last known
20 mailing addresses provided by LVN. See Settlement, § 9. This is the "best notice practicable"
21 under the circumstances as it provides "individual notice to all members who can be identified
22 through reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Plaintiffs
23 propose the Settlement be administered by Phoenix, an experienced class action settlement
24 administrator. See Jodey Lawrence Declaration and exhibits. Phoenix will run all addresses
25 through the U.S. Postal Service National Change of Address database and/or perform "skip
26 traces" to obtain current addresses. See Settlement, § 9(B) & (F).

27 The Notice satisfies Cal. Rule of Court 3.766(d) because it advises the Settlement Class
28 of the nature of the claims; the parties' basic contentions; the key terms of the Settlement; the 60-

1 day deadline to opt out, object, or submit a dispute and procedures by which to do so; the recovery
2 formula and expected recovery amount for each Settlement Class member; and the release of
3 claims. *See* Haines Decl., Exh. A to Exh. 1. The Notice also includes the final approval hearing
4 date and time, and provides contact information for Class Counsel and the administrator if
5 Settlement Class members have any questions. *Id.* This satisfies Cal. Rule of Court 3.766(e) as
6 the most reliable and cost-effective method of reaching Settlement Class members.

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

8 Finally, the Court should set a hearing for final approval of the settlement on a date
9 appropriately scheduled to follow Settlement Class members' response deadline. *See* Cal. Rule
10 of Court 3.769.

11 **V. CONCLUSION**

12 For the foregoing reasons, Plaintiffs respectfully request that the Court preliminarily
13 approve the proposed Settlement, provisionally certify the Settlement Class, and enter the
14 Proposed Order submitted concurrently herewith.

15
16 Dated: December 27, 2021

Respectfully submitted,
HAINES LAW GROUP, APC

17
18 By:



Paul K. Haines
Attorneys for Plaintiffs