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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF CONTRA COSTA**

GEORGE TORRES, as an individual and on
behalf of all others similarly situated,

Plaintiff,

vs.

ARCH TELECOM INC., a California
corporation; and DOES 1 through 100,

Defendants

Case No. C20-01679

*[Assigned for all purposes to Hon. Edward
Weil, Dept. 39]*

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

Date: TBD
Time:
Dept.: 39

Complaint Filed: August 26, 2020
Trial Date: None set

PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court, on a date and time to be determined by the Court, in Department 39 of the above-entitled Court, located at 725 Court Street, Martinez, California, 94553, Plaintiffs Ryan J. Molale (“Plaintiff Molale”), George Torres (“Plaintiff Torres”), and Tran Le (“Plaintiff Le”) (collectively, “Plaintiffs”) will, and hereby do, move this Court for:

1. Preliminary approval of the proposed Stipulation of Settlement (“Settlement” or “Settlement Agreement”);
2. Pursuant to Section 382 of the California Code of Civil Procedure, provisional certification, for settlement purposes only, of the proposed Settlement Class, which includes the following subclasses:
 - a. **Non-Release Sub-Class**: All current and former non-exempt employees who worked for Defendant Arch Telecom, Inc. (“Arch”) in California at any time from October 18, 2014 until the date of preliminary approval of the Settlement Agreement (the “Class Period”), and who did not sign an individual settlement and release pursuant to Arch’s *Pick Up Stix* campaign.
 - b. **Release Sub-Class**: All current and former non-exempt employees who worked for Arch in California at any time during the Class Period and who did sign an individual settlement and release pursuant to Arch’s *Pick Up Stix* campaign.
3. Preliminary appointment of Plaintiffs as Class Representatives;
4. Preliminary appointment of Paul K. Haines, Tuvia Korobkin, and Alexandra R. McIntosh of Haines Law Group, APC as Class Counsel;
5. Appointment of Phoenix Settlement Administrators, as the third-party Settlement Administrator for mailing notices;
6. Approval of the proposed Class Notice, and an order that it be disseminated to the proposed Class as provided in the Settlement Agreement; and
7. The scheduling of a hearing to consider whether the Settlement should be finally approved and to award an amount for incentive awards to the Class Representatives, 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, and Alexandra R. McIntosh and exhibits attached thereto; the declaration of Jodey Lawrence of Phoenix Settlement

1 Administrators and exhibits attached thereto; the pleadings and other papers filed in this action;
2 and any further oral or documentary evidence or argument presented at the time of hearing.

3 Given the multiplicity of issues addressed in this Motion, Plaintiffs believe there is good
4 cause to exceed the 20-page limit set forth in California Rule of Court 3.764(c)(2), and
5 respectfully requests that the Court consider Plaintiffs' Memorandum of Points and Authorities
6 in its entirety, which is 25 pages in length.

7
8
9 Dated: April 22, 2021

Respectfully Submitted,
HAINES LAW GROUP, APC

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11 By:



Paul K. Haines
Attorneys for Plaintiffs

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Ryan J. Molale (“Plaintiff Molale”), George Torres (“Plaintiff Torres”), and
4 Tran Le (“Plaintiff Le”) (collectively, “Plaintiffs”) seek preliminary approval of a classwide
5 settlement reached between Plaintiffs and Defendant Arch Telecom Inc. (“Defendant” or “Arch”)
6 (together with Plaintiffs, the “Parties”). In their lawsuits, Plaintiffs collectively allege that Arch:
7 failed to pay non-exempt employees all required overtime due to Arch’s failure to include all non-
8 discretionary incentive pay in the “regular rate” of pay; failed to pay all wages due to its failure
9 to pay employees for time spent attending mandatory meetings; failed to provide all required meal
10 periods; failed to authorize and permit all required rest periods; failed to reimburse non-exempt
11 employees for all necessary work expenditures, including use of their personal cell phones for
12 work related purposes; failed to provide suitable seating for non-exempt employees during the
13 time they spent working; and issued facially deficient wage statements that failed to include all
14 applicable hourly rates of pay and the corresponding number of hours worked at each rate. Based
15 on these allegations, Plaintiffs also bring derivative claims for Arch’s alleged failure to furnish
16 accurate itemized wage statements and alleged failure to timely pay all final wages, as well as a
17 derivative claim for civil penalties under the Private Attorneys General Act (“PAGA”).

18 Plaintiffs now respectfully request that the Court preliminarily approve this common-
19 fund, non-reversionary class action settlement,¹ in which Arch has agreed to pay \$750,000.00 to
20 Settlement Class members *in addition to* \$40,950.00 it previously paid Settlement Class members
21 through individual settlements, for a total settlement payment of \$790,950.00. The Settlement
22 Class includes approximately 1,085 employees, consisting of the following subclasses:

23 **Non-Release Sub-Class:** All current and former non-exempt employees who
24 worked for Defendant Arch Telecom, Inc. (“Arch”) in California at any time from
25 October 18, 2014 until the date of preliminary approval of the Settlement
Agreement (the “Class Period”), and who did not sign an individual settlement and
release pursuant to Arch’s *Pick Up Stix* campaign.

26 **Release Sub-Class:** All current and former non-exempt employees who worked for
27 Arch in California at any time during the Class Period and who did sign an
individual settlement and release pursuant to Arch’s *Pick Up Stix* campaign.

28 ¹ The Stipulation of Settlement (“Settlement”) is attached as Exhibit 1 to the Declaration of Paul K. Haines
filed herewith. The proposed Class Notice and Notice of Settlement Award are attached as Exhibits A
and B, respectively, to the Settlement.

1 As explained below, while this litigation was pending, Arch offered a number of
2 employees individual settlement agreements to extinguish the claims brought on their behalf in
3 this lawsuit. Each employee was offered a payment, between \$100.00 and \$350.00, calculated
4 based on how long the employee had been employed by Arch prior to May 31, 2020, in exchange
5 for a release. Arch represents that approximately 179 employees opted to sign the agreements and
6 receive the offered compensation. Those employees comprise the “Release Sub-Class.” In
7 addition, there are approximately 906 current and former employees who did not sign individual
8 releases; those employees comprise the “Non-Release Sub-Class.” Thus, there are approximately
9 1,085 total Settlement Class members.

10 The Settlement was reached after the Parties engaged in extensive formal written and
11 deposition discovery, and after they had attended mediation with Francis “Tripper” Ortman, Esq.,
12 a prominent wage and hour class action mediator. Over the course of both formal discovery and
13 informal discovery in connection with mediation, Arch provided Plaintiffs’ counsel with
14 extensive classwide data, including contact information, timekeeping data, and payroll records
15 for a significant sample of non-exempt employees; the total number of class members; and other
16 relevant data, as well as Arch’s relevant wage and hour policies, compensation plans, and other
17 documents. Plaintiffs also took a full-day deposition of Arch’s Person Most Knowledge on several
18 topics. Thus, the Parties arrived at the Settlement only after they had engaged in significant
19 discovery and had sufficient information to evaluate the strengths and weaknesses of Plaintiffs’
20 claims, and the potential value of those claims.

21 The Settlement provides that the \$750,000.00 Gross Settlement Amount (“GSA”) will be
22 deposited with the Settlement Administrator in eighteen (18) equal monthly installments of
23 \$41,666.67, with the first installment of \$41,666.67 being due November 1, 2020 and the last
24 installment being due April 1, 2022. Settlement Class members will receive their payments
25 (“Settlement Awards”) within 30 days after the Settlement is fully funded.²

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27
28 ² As noted below and in the Haines Declaration, this payment plan was warranted based on Arch’s
financial condition and circumstances surrounding both the COVID-19 pandemic and the
recent acquisition of Sprint by T-Mobile. See Haines Decl., ¶ 20.

Settlement payments will be calculated based on three factors: First, each Non-Release Sub-Class member will receive between \$100.00 and \$350.00, equal to the amount they would have received had they signed the individual settlements previously offered by Arch. Second, all Settlement Class members will receive a *pro rata* payment based on the number of workweeks worked during the Class Period. Third, Class Members who worked for Arch at any time from October 18, 2017 to preliminary approval (the “PAGA Period”) will be eligible for a *pro rata* share of the \$12,500 “PAGA Amount,” based on the number of workweeks worked by each eligible Settlement Class Member during the PAGA Period.

II. SUMMARY OF THE LITIGATION

A. FACTUAL AND PROCEDURAL BACKGROUND

Arch is a national Sprint (now T-Mobile) authorized retailer. *See* Declaration of Paul K. Haines (“Haines Decl.”), ¶ 11. Plaintiffs and Settlement Class members worked as non-exempt employees for Arch in California during the Class Period. *Id.*

On October 18, 2018, pursuant to an arbitration agreement with Arch, Plaintiff Molale initiated this litigation by filing and serving a classwide Demand for Arbitration (“Demand”), alleging that Arch: (i) failed to pay all overtime wages; (ii) failed to provide all meal periods; (iii) failed to authorize and permit rest periods; (iv) failed to pay all wages owed upon separation of employment; and (v) engaged in unlawful business practices pursuant to California Business & Professions Code § 17200 *et seq.*, based on the above alleged violations. Haines Decl., ¶ 12. On February 8, 2019, after Arch did not respond to Plaintiff Molale’s Demand and did not pay its arbitration fees, Plaintiff Molale filed a class action lawsuit against Arch in Contra Costa Superior Court, titled *Ryan J. Molale v. Arch Telecom Inc.*, Case No. C19-00279 (“*Molale*”), alleging the same causes of action alleged in the Demand. *Id.*

On January 3, 2019, after exhausting her administrative remedies with the LWDA, Plaintiff Le filed a representative action lawsuit against Arch in Los Angeles Superior Court, titled *Tran Le v. Arch Telecom Inc.*, Case No. 19STCV00027 (“*Le*”). Haines Decl., ¶ 13. The operative First Amended Complaint in *Le* alleges that Arch is liable for civil penalties pursuant to the Private Attorneys General Act of 2004 (“PAGA”), California Labor Code § 2698, *et seq.*

1 for its: (i) failed to provide all meal periods; (ii) failed to authorize and permit rest periods; (iii)
2 failure to pay all overtime wages; (iv) failure to pay all minimum wages; (v) failure to provide
3 suitable seating; (vi) failure to reimburse all necessary business expenses; (vii) failure to issue
4 accurate and itemized wage statements; (viii) failure to timely pay all wages owed including upon
5 separation of employment; and (ix) unlawful withholding of wages owed. *Id.*

6 On August 26, 2020, Plaintiff Torres filed a class and representative action lawsuit against
7 Arch in Contra Costa Superior Court, titled *George Torres v. Arch Telecom Inc.*, Case No. C20-
8 01679 (“*Torres*”), alleging claims against Arch for: (i) failure to pay all minimum wages owed;
9 (ii) failure to issue accurate itemized wage statements; (iii) failure to reimburse all necessary
10 business expenses; (iv) engaging in unlawful business practices; and (v) civil penalties under
11 PAGA, for the aforementioned violations of the Labor Code. Haines Decl., ¶ 14.

12 **B. PLAINTIFFS’ CLAIMS AND ARCH’S DEFENSES**

13 **1. Unpaid Overtime Claim Based on Failure to Include Incentive Pay in**
14 **“Regular Rate” of Pay**

15 Plaintiffs allege that Arch paid commissions, bonuses, spiffs, and other forms of non-
16 discretionary incentive pay (collectively, “Incentive Pay”), which cannot be excluded from the
17 “regular rate” as a matter of law, and that Arch failed to include these payments in the “regular
18 rate,” resulting in underpaid overtime wages. *See Huntington Memorial Hospital v. Superior*
19 *Court* (2005) 131 Cal. App. 4th 893, 902-903 (payments included in the calculation of the regular
20 rate are generally consistent under state and federal law and include all earnings whether paid on
21 an hourly, piece-rate, or commission basis); *see also* 29 U.S.C. § 207(e) (requiring overtime to
22 be paid at 1.5 times the “regular rate” of pay, which includes “all remuneration for employment
23 paid to, or on behalf of, the employee”); Haines Decl., ¶ 23.

24 Arch counters that bonuses provided to employees were discretionary and therefore
25 excludable from the regular rate. Haines Decl., ¶ 23; *see also* 29 U.S.C. § 207(e)(3) (bonuses over
26 which the employer maintains discretion as to both the fact and amount of payment are excludable
27 from regular rate). Arch further asserts that Plaintiffs and other Sales Representatives earn more
28 than half their wages in commissions, and they therefore fall within the inside sales exemption

under Wage Order 7, subdivision 3(D), and Arch is not required to pay them any overtime, let alone overtime at their “regular rate” of pay. *Id.* Moreover, Arch asserts that differences in the frequency, type, and amount of incentive pay received by different putative class members would preclude class certification of this claim. *Id.*

2. Meal Period Claim

Plaintiffs maintain that Arch failed to provide employees with full, uninterrupted 30-minute meal periods before the end of the fifth hour of work and failed to provide second meal periods when employees worked in excess of 10.0 hours. *See Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1049 (discussing meal period requirements); Haines Decl., ¶ 25. Specifically, Plaintiffs assert that Arch understaffs its stores and does not schedule meal periods, which, in practice, prevents Arch’s non-exempt employees from taking all timely and duty-free, 30-minute meal periods to which they are entitled. *Id.* Instead, Arch required Plaintiffs and putative class members to execute on-duty meal period agreements which obligate employees to remain on duty during all meal periods. *Id.* However, Plaintiffs assert that the nature of the work being performed by Defendants’ non-exempt employees do not necessitate an on-duty meal period, thereby rendering the on-duty meal period agreements invalid. *Id.*; *see also* Wage Order No. 7, § 11(A) (“An “on duty” meal period shall be permitted **only when** the nature of the work prevents an employee from being relieved of all duty...”)(emphasis added). Plaintiffs contend that the nature of Plaintiffs’ and putative class members’ work does not prevent them from being relieved of all duty, and therefore Arch’s on-duty meal period agreements are invalid.

In response, Arch argues that, not only is the nature of employees’ work such that on-duty meal period agreements are proper and valid, but also that Plaintiffs have misapplied the “nature of the work” analysis beyond its proper scope. Haines Decl., ¶ 25. Specifically, Defendants contend that the nature of the work analysis must be performed on a day-by-day basis to determine whether the nature of the work prevents a meal period from being taken, and that, in its business, the nature of the work does often prevent employees from taking off-duty meal periods. *Id.* Arch further argues that, in practice, it has always provided employees with off-duty first and second meal periods and that any meal periods that did not meet that standard were solely the result of

1 employee choice (not Arch’s policy/practice), and that under *Brinker* it is only required to
2 “provide” the opportunity to take meal periods, not “ensure” meal periods are taken, which Arch
3 contends it has always done. *Brinker*, 53 Cal.4th at 1038 (rejecting “ensure” standard). Arch
4 further maintains that employees voluntarily waived their second meal period when they worked
5 shifts in excess of 10.0 hours (but less than 12.0 hours), as they are entitled to do under Labor
6 Code § 512. Haines Decl., ¶ 25. Arch also points out that it has paid thousands of meal period
7 premiums during the Class Period, which demonstrates that it takes its meal period obligations
8 seriously and rectifies any non-compliant meal periods of which it becomes aware. Finally, Arch
9 contends that Plaintiffs’ meal period claim is not suited for class certification as individual
10 inquiries would be required to assess which employees received non-compliant meal periods or
11 missed second meal periods, how many meal periods were non-compliant or missed, whether the
12 nature of the work prevented off-duty meal periods on each individual shift, and/or the reasons
13 why a particular individual recorded a non-compliant meal period or missed a meal period on a
14 particular shift. *Id.*

15 **3. Rest Period Claim**

16 Plaintiffs assert that pursuant to Arch’s written policy, Arch failed to authorize and permit
17 a second rest periods on shifts in excess of 6.00 hours and a third rest period on shifts in excess
18 of 10.0 hours. Haines Decl., ¶ 26. In response, Arch contends that, in practice, it has always
19 “authorized and permitted” employees to take second rest periods on shifts of more than six hours
20 and third rest periods on shifts of more than 10.0 hours, despite any alleged deficiency in its
21 policy, and that, as with meal periods, it is not required to “ensure” rest periods are taken. Haines
22 Decl., ¶ 26; *see also Brinker*, 53 Cal.4th at 1034 (rejecting “ensure” standard). Arch further
23 contends that employees would not be eligible for third rest periods on a vast majority of shifts
24 as only a small fraction of shifts worked were more than 10.0 hours. *Id.* Finally, Arch argues
25 the rest period claim is not amenable to class treatment, as individual inquiries would be required
26 to determine how many rest periods each employee failed to take, and the reasons why each
27 employee failed to take a rest period on a particular shift. *Id.* These certification issues are
28 particularly present with respect to rest periods, Arch contends, since they are not recorded. *Id.*

1 **4. Unpaid Wage Claim Based on Failure to Pay for Mandatory Meetings**

2 Plaintiffs assert that Arch failed to pay all earned wages because employees occasionally
3 required to attend meetings on their days off for which they were not compensated. Haines Decl.,
4 ¶ 24. In response, Arch argues that it never required employees to attend meetings on their days
5 off but rather, if a meeting was held on an employee’s day off, the employee’s attendance was
6 only optional. *Id.* Further, Arch argues that to the extent employees did attend trainings on their
7 days-off, employees were always told to clock-in and receive pay for their attendance. *Id.* Lastly,
8 Arch argues that Plaintiffs’ off-the-clock claim is not amenable to class treatment, as individual
9 inquiries would be required to determine whether an employee attended a meeting on their day-
10 off, the reasons why each employee failed to clock-in for the meeting, whether each meeting was
11 required or optional, and how long each meeting was. *Id.*

12 **5. Failure to Reimburse Business Expenses**

13 Plaintiffs allege that Arch required employees to use their personal cellular phones for
14 company business without reimbursement. Haines Decl., ¶ 27; *see also Gattuso v. Harte-Hanks*
15 *Shoppers, Inc.* (2015) 42 Cal.4th 554, 558 (“Labor Code § 2802, subdivision (a), requires an
16 employer to indemnify its employees for expenses they necessarily incur in the discharge of their
17 duties.”); *Cochran v. Schwan's Home Service, Inc.* (2014) 228 Cal.App.4th 1137, 1144 (holding
18 employers must reimburse employee cell phone expenses incurred in connection with
19 employment). Arch argues that it reimburses all necessary business expenditures and contends
20 employees have access to a land line for rare instances when they may need to make work-related
21 calls. Haines Decl., ¶ 27. Arch further argues that in light of the fact that company phones were
22 provided, any phone-related expense would not have been reasonable or necessary. *See Gattuso*,
23 42 Cal.4th at 568 (“In calculating the reimbursement amount due under section 2802, the
24 employer may consider not only the actual expenses that the employee incurred, but also whether
25 each of those expenses was ‘necessary,’ which in turn depends on the reasonableness of the
26 employee's choices”); *Grissom v. Vons Cos., Inc.* (1991) 1 Cal.App.4th 52, 58 (“ascertaining what
27 was a necessary expenditure will require an inquiry into what was reasonable under the
28 circumstances.”); Haines Decl., ¶ 27 Arch further maintains that any alleged failure to reimburse

business expenses were not experienced on a class-wide basis, and that every reimbursement request would have to be reviewed on a case by case basis (as to whether, among other things, the expense was “reasonable”), making this claim unsuitable for certification. *Id.*

6. Claims Under Lab. Code §§ 203, 226, and the PAGA

As a result of these alleged wage and hour violations, Plaintiffs assert that Arch failed to comply with its final payment and wage statement obligations, in violation of Lab. Code §§ 203 and 226, respectively. Haines Decl., ¶¶ 28, 29. Finally, Plaintiffs seeks civil penalties under the PAGA, based on the aforementioned claims, as well as Arch’s alleged failure to provide suitable seating to Plaintiffs and other retail employees. Haines Decl., ¶ 30.

Arch asserts it has strong defenses to the waiting time claim because there exist good-faith disputes as to Plaintiffs’ underlying claims, precluding imposition of penalties. *See* 8 Cal. Code Regs. § 13520 (a “good faith dispute that any wages are due will preclude imposition of waiting time penalties”); *Kao v. Joy Holiday*, 12 Cal.App.5th 947, 963 (2017) (holding “good faith dispute” precluded imposition of waiting time penalties). Arch further contends Plaintiffs’ meal and rest period claims cannot support a claim for waiting time penalties after *Kirby v. Immoos Fire Protection, Inc.*, 53 Cal.4th 1244 (2012), which held such claims are not actions for “nonpayment of wages,” a view adopted in *Ling v. P.F. Chang’s China Bistro, Inc.*, 245 Cal.App.4th 1242, 1261 (2016) (“Following *Kirby*, section 226.7 cannot support a section 203 penalty”). Haines Decl., ¶¶ 28, 29. Arch also argues meal and rest period claims cannot support a claim for wage statement penalties after *Kirby* (*see, e.g., Jones v. Spherion Staffing*, No. LA-CV-11-06462-JAK(JCx), 2012 WL 3264081 at **8-9 (C.D. Cal. Aug. 7, 2012)).³ Arch further argues its alleged wage statement violations could not be shown to be “knowing and intentional,” that Plaintiffs cannot show he “suffer[ed] injury” as required by Labor Code § 226(e), and employees’ wage statements always accurately showed what employees were *paid*. *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal.App.5th 1308, 1336-37 (2018) (“The purpose of section 226 is to ‘document the *paid wages* to ensure the employee is fully informed regarding the calculation of those wages.’”) (citing *Soto v. Motel 6 Operating, L.P.*, 4 Cal.App.5th 385, 392 (2016)).

³ Whether meal and rest period claims may form the basis of claims for waiting time or wage statement penalties is set to be decided by the California Supreme Court in *Naranjo v. Spectrum Security Services, Inc.*, 455 P.3d 704 (review granted Jan. 2, 2020).

1 Finally, Arch asserts Plaintiffs’ derivative PAGA claim fails because Plaintiffs’
2 underlying claims fail. *See Price v. Starbucks Corp.*, 192 Cal.App.4th 1136, 1147 (2011)
3 (“Because the underlying causes of action fail, the derivative UCL and PAGA claims also fail.”).
4 As for Plaintiffs’ suitable seating claim, Arch maintains it has always provided adequate seating
5 for employees, in both work areas and break rooms, and that, in any event, the claim is
6 unmanageable as it would require a store-by-store, employee by employee, and potentially shift-
7 by-shift analysis as to whether each employee received proper seating. Arch further maintains
8 that, even if the Court were to find PAGA liability, the Court would utilize its discretion to
9 substantially reduce any civil penalties in light of Arch’s good-faith defenses. Haines Decl., ¶ 30;
10 *see also* Labor Code § 2699(e)(2) (authorizing reduction in PAGA penalties in trial court’s
11 discretion); *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 1135 (2012)
12 (affirming reduction of PAGA penalties because “the evidence showed...defendants took their
13 obligations...seriously and attempted to comply with the law”); *Fleming v. Covidien, Inc.*, No.
14 ED-CV-10-1487-RGK (OPx), 2011 WL 7563047 at *4 (C.D. Cal. 2011) (reducing PAGA
15 penalties by over 82% in part because the employer was “not aware” of violations); *Carrington*
16 *v. Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018) (affirming PAGA civil penalty of just \$5 per
17 pay period where employer made “good faith attempts” to comply with the law).

18 **C. THE LAWSUIT, ARCH’S PICK UP STIX CAMPAIGN AND RELEASES**
19 **OBTAINED, AND ARBITRATION AGREEMENTS**

20 After Plaintiffs initiated the Actions, Arch conducted a “Pick Up Stix” campaign⁴ in
21 which it offered individual settlement payments to putative class members in exchange for a
22 release of claims. Haines Decl., ¶ 15. Settlement payments were calculated based on how long
23 each employee had been employed by Arch prior to May 31, 2020. *Id.* Arch offered \$350 to
24 employees who had been employed by Arch for over 48 months; \$300 to employees who had
25 been employed by Arch for 24 to 48 months; \$250 to employees who had worked for Arch
26 between for 11 to 24 months; \$200 to employees who had worked for Arch for 6 to 11 months;
27 \$150 to employees who had worked for Arch for 3 to 6 months; and \$100 to employees who
worked for Arch for less than 3 months. *Id.*

28 ⁴ *Chindarah v. Pick Up Stix, Inc.*, 171 Cal.App.4th 796 (2009) held that an employer may enter into pre-
certification settlement agreements with individual putative class members in which the putative class
members receive compensation in exchange for a release of claims for past unpaid wages and penalties.

1 Arch represents that a large portion of current employees decided to sign the individual
2 settlement agreements and accept the offered compensation. Haines Decl., ¶ 16. In total, Arch
3 paid \$40,950.00 to 179 Settlement Class members in exchange for releases. *Id.*

4 Arch also contends that Plaintiffs and other putative class members signed arbitration
5 agreements with Arch. Haines Decl., ¶ 16. Thus, in addition to Arch's *Pick Up Stix* campaign
6 and its other defenses described above, Arch maintains that these arbitration agreements would
7 further limit Plaintiffs' ability to maintain their claims on a classwide basis. *Id.*

8 **D. DISCOVERY, MEDIATION, AND SETTLEMENT**

9 In preparation for mediation, the parties engaged in extensive informal discovery,
10 including Arch's production of its relevant wage and hour policies; timekeeping records, payroll
11 records, contact information, and other records for a significant sampling of the putative class,
12 and other documents and information. Haines Decl., ¶ 17. Plaintiffs' counsel, with the help of
13 their retained expert, conducted an analysis of this data and created a damages model based on
14 that analysis. *Id.* This discovery allowed the parties to assess the merits of Plaintiffs' claims, the
15 potential value of those claims, and Arch's defenses. *Id.*

16 On September 24, 2019, the parties attended a full-day mediation with Francis "Tripper"
17 Ortman, Esq., a well-respected wage and hour class action mediator. Haines Decl., ¶ 18. The
18 parties vigorously debated their opposing legal positions, the likelihood of certification of
19 Plaintiffs' claims, and the legal bases for the claims and defenses. *Id.* The parties did not reach
20 resolution at mediation, but they continued their settlement discussions with Mr. Ortman's
21 assistance. *Id.* In addition, after mediation the parties engaged in significant formal discovery,
22 including Arch's production of an additional sampling of employee timekeeping, payroll, and
23 other records, and hundreds of additional pages of relevant documents. In total, Arch produced
24 more than 6,000 pages of documents in both formal and informal discovery. *Id.*, ¶ 19. Plaintiffs
25 also took the full-day deposition of Arch's Person Most Knowledgeable in July 2020. *Id.* After
26 engaging in this extensive discovery and after further negotiations both directly and through the
27 mediator, the parties eventually reached a classwide settlement and memorialized their
28 agreement in the Settlement now before this Court. *Id.*

1 **III. THE PROPOSED SETTLEMENT**

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

3 If the Court approves this settlement, Arch will pay a non-reversionary Gross Settlement
4 Amount (“GSA”) of \$750,000.00. As described above, this amount is in addition to the
5 \$40,950.00 Arch previously paid to Settlement Class members, essentially resulting in a total
6 payment to the Settlement Class of \$790,950.00. *See* Settlement, § 3. This Settlement is non-
7 reversionary, and Settlement Class members will automatically receive their Settlement Award
8 unless they affirmatively opt-out of the Settlement. *Id.*, § 5.

9 Arch will deposit the GSA into an escrow account in eighteen (18) equal monthly
10 installments of \$41,666.67 each, with the first installment being made on November 1, 2020 and
11 the last installment no later than April 1, 2022. Settlement § 3A. As attested to by the Settlement
12 Administrator, as of the date this motion was filed, Arch has made its payments for November
13 2020 through April 2021. *See* Declaration of Jodey Lawrence (“Lawrence Decl.”), ¶ 17.

14 The monetary terms of the Settlement are as follows:

Gross Settlement Amount (“GSA”):	\$750,000.00
Minus Court-approved attorneys’ fees (1/3 of the \$790,950 total compensation to the Class):	\$263,650.00
Minus Court-approved attorneys’ costs (up to):	\$35,000.00
Minus Court-approved incentive awards (up to \$5,000 each):	\$15,000.00
Minus Settlement Administrator costs (up to):	\$14,000.00
Minus Amount Set Aside as PAGA Penalties:	\$50,000.00
Net Settlement Amount (“NSA”):	\$372,350.00
PLUS 25% of PAGA Penalties Paid to Settlement Class:	\$12,500.00
Total Amount Paid to Settlement Class members:	\$384,850.00

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

22 After deducting amounts for court-approved incentive awards to Plaintiffs, costs of
23 settlement administration, reasonable attorneys’ fees and verified costs, and payment to the
24 LWDA, the Settlement requires Arch to pay at least \$384,850.00 to all Settlement Class members
25 who do not timely opt-out. Haines Decl., ¶ 21; *see also* Settlement, §§ 3.B, 4.A. There are
26 approximately 1,085 Settlement Class members, including 179 employees who previously signed
27 the *Pick Up Stix* release and comprise the Release Sub-Class and 906 employees who did not
28 sign the release and comprise the Non-Release Sub-Class. Haines Decl., ¶ 22; Settlement, § 1.

1 Non-Release Sub-Class members will receive a payment equal to what they would have
2 received under Arch's *Pick Up Stix* process. Specifically, each Non-Release Sub-Class member
3 will receive an amount from the NSA based on how long he or she was employed by Arch prior
4 to May 31, 2020. *See* Settlement, § 4.B.i. After these amounts are deducted from the NSA, the
5 remainder of the NSA will be divided among all Settlement Class members *pro rata* based on the
6 number of workweeks employed by Arch during the Settlement Period. *Id.*, §4.B.ii. Finally, the
7 \$12,500 Class Member PAGA Amount will be distributed *pro rata* among all Settlement Class
8 members employed by Arch from October 8, 2017 through the end of the Settlement Period,
9 based on the number of pay periods worked during that time period. *Id.*, § 4.B.iii. When taking
10 into account the \$40,950 already paid by Arch, Settlement Class members will have received
11 average payments of \$392.44 as a direct result of this litigation. Haines Decl., ¶ 22.

12 Class Data will be provided to the Settlement Administrator within 15 business days of
13 preliminary approval, and Notices will be mailed to Settlement Class members within 10 business
14 days thereafter. *See* Settlement, §§ 9.A-B. Settlement Class members will have 60 days from
15 mailing to opt-out or object, thereby providing ample time to review the Notice without unduly
16 delaying the settlement. *Id.*, § 9.C.

17 Settlement Class members who do not opt out of the Settlement will be bound by its terms,
18 and will release all claims against Arch that were asserted in, or could have been asserted based
19 on the facts and allegations alleged in, the Actions, that arose during the Class Period. *See*
20 Settlement, § 2.A. Plaintiffs have additionally agreed to a general release of all claims, known or
21 unknown, against Arch, subject to a waiver of Civil Code § 1542. *Id.*, § 2.B.

22 **2. The Settlement Provides Reasonable Incentive and PAGA Payments**

23 As part of the Settlement, Plaintiffs will each apply for a Representative Incentive Award
24 in the amount of \$5,000 for their services to the Settlement Class. Haines Decl., ¶ 33; *see also*
25 Settlement, § 3.C.3 “[I]ncentive awards are fairly typical in class action cases...and are intended
26 to compensate class representatives for work done on behalf of the class [and] to make up for
27 financial or reputational risk undertaken in bringing the action.” *In re Cellphone Fee Termination*
28 *Cases*, 186 Cal.App.4th 1380, 1393-94 (2010). As will be fully briefed at final approval,

1 Plaintiffs’ requested incentive awards are intended to recognize the substantial time and effort
2 Plaintiffs expended on behalf of the Settlement Class, including providing substantial factual
3 information and documents to counsel, identifying potential witnesses, attending in-person and
4 telephonic meetings with counsel to discuss the claims and theories at issue in the litigation, and
5 otherwise participating in the prosecution of their claims. *Id.* Plaintiffs respectfully submit that
6 their requested incentive awards are well within the range of approval and are in line with
7 enhancement payments approved in similar class action settlements. *See, e.g., Alvarado v.*
8 *Nederend*, No. 1:08-cv-01099-OWW-DLB, 2011 WL 90228 (E.D. Cal. Jan. 11, 2011)
9 (approving \$7,500 incentive award to each of five named plaintiffs in \$505,058.60 settlement).

10 In addition, the parties have agreed to designate \$50,000.00 as PAGA penalties, of which
11 \$37,500.00 will be paid to the LWDA, consistent with the PAGA’s requirement that 75% of such
12 penalties be allocated to the LWDA, with the remaining 25% of penalties allocated to aggrieved
13 employees (*see* Lab. Code § 2699(i)). *See* Settlement, ¶ 3.B.4. Plaintiffs submit this allocation
14 to the LWDA is appropriate in light of other settlements allocating penalties to the LWDA. *See,*
15 *e.g., Chu v. Wells Fargo Investments, LLC*, 2011 WL 672645 (N.D. Cal. 2011) (approving \$7,500
16 payment to LWDA out of \$6.9 million settlement); *Lazarin v. Pro Unlimited, Inc.*, 2013 WL
17 3541217 (N.D. Cal. 2013) (approving \$7,500 payment to LWDA from \$1.25 million settlement).

18 **3. The Settlement Provides for Reasonable Attorneys’ Fees and Costs**
19 **Under the Catalyst Theory**

20 Plaintiffs’ counsel will apply for an attorneys’ fee award of \$250,000.00, which amounts
21 to one-third of the GSA, plus \$13,650.00 in “catalyst fees” based on the \$40,950 gross amount
22 already paid by Arch as part of its *Pick Up Stix* campaign, as well as up to \$35,000 in verified
23 costs. Haines Decl., ¶ 32; Settlement, ¶ 3.B.5. Plaintiffs’ counsel’s requested fee of \$13,650 (i.e.,
24 one-third of \$40,950) in “catalyst fees” in this lawsuit is proper under the catalyst theory. *Id.*

25 In *Tipton-Whittingham v. City of Los Angeles*, 34 Cal.4th 604, 608 (2004), the California
26 Supreme Court held, “California law continues to recognize the catalyst theory and does not
27 require ‘a judicially recognized change in the legal relationship between the parties’ as a
28 prerequisite for obtaining attorney fees under [CCP] section 1021.5.” According to the Court,

1 “In order to obtain attorney fees [in such circumstances]..., a plaintiff must establish that (1) the
2 lawsuit was a catalyst motivating the defendants to provide the primary relief sought; (2) that the
3 lawsuit had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and
4 threat of expense...; and (3) that the plaintiffs reasonably attempted to settle the litigation.” *Id.*
5 Plaintiffs satisfy these requirements.

6 Here, after Plaintiffs initiated the Actions, Arch offered individual settlements to its
7 employees, together with a document that explicitly mentioned this litigation, implicitly
8 acknowledging this lawsuit was the catalyst for the payments. Haines Decl., ¶ 15. The document
9 included a release of claims, and offered employees an amount based on how long each employee
10 had been employed by Arch prior to May 31, 2020. *Id.* In total, Arch paid \$40,950 as release
11 consideration after this lawsuit was initiated, over and above the monetary relief paid through the
12 Settlement. *Id.*, at ¶ 16. In sum, the filing of this lawsuit was the catalyst that activated Arch to
13 provide substantial monetary benefit to its employees. It is appropriate to anchor Plaintiffs’
14 counsel’s fee award on the *total* benefit that was achieved on behalf of the Settlement Class.

15 Plaintiffs further submit the requested fee is fair compensation for undertaking complex,
16 risky, expensive, and time-consuming litigation on a contingent basis. Plaintiffs’ counsel have
17 incurred substantial attorneys’ fees conducting pre-filing investigation, analyzing Plaintiffs’
18 claims, propounding numerous sets of discovery, meeting and conferring over Arch’s discovery
19 responses, taking Arch’s PMK deposition, conducting legal research, analyzing employee
20 timekeeping and payroll data and other documents, preparing for and attending mediation,
21 negotiating the Settlement, preparing this Motion, and otherwise prosecuting the Actions. Haines
22 Decl., ¶ 32. Plaintiffs’ counsel also anticipate incurring significant fees in appearing at the hearing
23 on this Motion, supervising the Notice process, fielding calls from Settlement Class members,
24 preparing the Final Approval motion and appearing at the final fairness hearing. *Id.*

25 It is appropriate to award attorneys’ fees as a percentage of the “common fund.” *See*
26 *Laffitte v. Robert Half Int’l, Inc.*, 1 Cal.5th 480 (2016) (holding “the percentage of fund method
27 survives in California class action cases”). Counsel’s request for fees of 1/3 of the total common
28 fund created by this litigation is well within the range of reasonableness, and is typical for

common fund settlements. *Newberg on Class Actions* § 14.6 (4th Ed. 2013) (historically, courts have awarded percentage fees in the range of 20%-50%). Counsel submit their fee request is reasonable when viewed as a percentage of the total funds created by this litigation, and in light of the substantial risks and significant work undertaken by counsel, the positive results obtained for the Settlement Class, and the efficiency with which counsel conducted the litigation.

IV. ARGUMENT

A. PRELIMINARY APPROVAL IS WARRANTED

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

1. Standard for Preliminary Approval

To make a fairness determination, a court should consider several factors, including: “the strength of Plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, [and] the experience and views of counsel.” *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996). “The list of factors is not exclusive and the Court is free to engage in a balancing and weighing of the factors depending on the circumstances of each case.” *Wershba v. Apple Computer*, 91 Cal.App.4th 224, 245 (2001).

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1 **a. The Strength of Plaintiffs' Case**

2 Although they steadfastly maintain their claims are meritorious, Plaintiffs acknowledge
3 there were substantial risks and uncertainty in proceeding with class certification and eventual
4 trial on the merits. As described in section II.B., *supra*, Arch presented multiple defenses to
5 Plaintiffs' claims, both on the merits and to class certification. While Plaintiffs were prepared to
6 litigate their claims through class certification and ultimately trial, success was far from certain.

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

8 Although the parties engaged in significant formal and informal discovery before reaching
9 settlement, the parties had not yet completed formal written and deposition discovery, which
10 would have required the expenditure of substantial time and resources by all parties. Haines Decl.,
11 ¶ 34. Moreover, Plaintiffs still had to file for class certification, and faced the prospect of appeals
12 in the wake of a disputed class certification ruling for Plaintiffs and/or an adverse summary
13 judgment ruling. *Id.* Even if the classes sought to be certified by Plaintiffs were in fact certified,
14 the parties would incur considerably more attorneys' fees and costs through a possible
15 decertification motion, trial, and possible appeal. *Id.* This settlement avoids those risks and the
16 accompanying expense. Thus, this factor supports preliminary approval.

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

18 Plaintiffs had not yet filed their motion for class certification. Absent settlement, there
19 was a risk that there would not be a certified class at the time of trial, or if there were, it would
20 consist of a significantly smaller group of employees than the proposed Settlement Class,
21 especially given that Arch had already obtained releases from 179 putative class members, and
22 that Arch asserts that Settlement Class members signed arbitration agreements with Arch which
23 Arch contends would preclude class certification. Thus, this factor supports preliminary approval.

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

25 The Settlement provides fair and reasonable monetary recovery for the Settlement Class
26 on hotly disputed claims. Based on data provided by Arch, Plaintiffs conducted the following
27 exposure analysis of Arch's potential liability:

28 ///

1 Unpaid Overtime Wages Due to Miscalculation of Regular Rate: \$81,120

2 Assuming that all of the categories of incentive pay identified in the payroll records should
3 have been included in the “regular rate” of pay, Plaintiffs’ expert’s analysis of the data produced
4 by Arch revealed that putative class members were underpaid by approximately \$338,000 in
5 unpaid overtime wages during the Class Period. But as explained above, Plaintiffs’ regular rate
6 claim faced significant obstacles both on the merits and on class certification. Arch asserts it is
7 not required to pay Plaintiffs and other non-exempt Sales Representatives overtime at all under
8 Wage Order 7, § 3(D), because Plaintiffs and other Sales Representatives earn more than half
9 their wages in commissions. Haines Decl., ¶ 23. Arch further asserts that not all bonuses in payroll
10 records constitute non-discretionary bonuses, and that any potential underpaid overtime wages
11 actually amount to a fraction of Plaintiffs’ projected exposure. *Id.* Moreover, Arch asserts that
12 differences in the frequency, type, and amount of incentive pay received by different putative
13 class members, as well as the releases signed by 197 putative class members and the arbitration
14 agreements signed by putative class members, would preclude class certification of this claim. *Id.*
15 Based on these defenses, Plaintiffs discounted the calculated exposure by 40% for a risk of non-
16 certification and an additional 60% to account for a risk of being unsuccessful on the merits or
17 failure to recover the full amount sought, to arrive at an estimated exposure of \$81,120. *Id.*

18 Unpaid Minimum Wages for Failure to Pay for Off-Schedule Meetings: \$41,610

19 Plaintiffs allege that Arch would occasionally require employees to attend meetings on
20 their days off and would not pay employees for time spent attending these meetings. Haines
21 Decl., ¶ 24. Based on Plaintiffs’ experience and interviews with putative class members, Plaintiffs
22 estimate that approximately once per month, employees were required to attend these meetings,
23 and that the meetings lasted for approximately 1 hour. *Id.* Based on data provided by Arch, there
24 were approximately 8,406 work months during the Class Period. *Id.* In addition, the average
25 minimum wage during the Class Period was approximately \$11.00 per hour. Thus, Plaintiffs
26 calculated Arch’s potential maximum exposure on this claim as: 8,406 x 1 hr x \$11.00/hr x 2
27 (liquidated damages under Labor Code § 1194.2) = \$184,932. *Id.* As discussed above, however,
28 Arch raised several defenses to this claim, including that it never *required* employees to attend

meetings on their days off; that employees were always told to clock-in and receive pay for their attendance, even on their days off; and that this claim is not amenable to class treatment, as individual inquiries would be required to determine whether an employee attended a meeting on their day-off, the reasons why each employee failed to clock-in for the meeting, whether each meeting was required or optional, and how long each meeting was, as well as issues calculating damages since any off-the-clock work is, by its nature, not recorded. *Id.* Based on these defenses, Plaintiffs discounted this maximum amount by 50% for risk of non-certification and by an additional 55% for risk of losing on the merits or failure to recover the full amount sought, to arrive at an estimated realistic exposure of \$41,610.

Meal Period Premium Wages: \$166,640

Plaintiffs allege that Arch failed to provide off-duty, 30-minute meal periods before the end of the fifth hour of work, and failed to provide second meal periods on shifts over 10.0 hours. Haines Decl., ¶ 25. Based on a review and extrapolation of timekeeping data, and giving Arch credit for meal period premiums already paid, Plaintiffs estimate there were approximately 65,024 shifts over 5.0 hours with one or more potential meal period violations.⁵ In addition, based on data produced by Arch, the average hourly rate of pay for Settlement Class members during the Class Period was approximately \$11.39. *Id.* Thus, Plaintiffs calculated Arch’s potential maximum liability on the meal period claim as: 65,024 *\$11.39= \$740,623. *Id.* But as explained *supra*, Plaintiffs’ theories of liability carried significant risks of both non-certification and reduction on the merits. Arch argues that its on-duty meal period agreements were valid and that regardless, it has always provided compliant meal periods; that many putative class members signed declarations to this effect; and any non-compliant meal periods reflected in time records were the result of employee choice. *Id.* Arch further argues that its payment of thousands of meal period premiums demonstrates that it takes its obligations seriously. *Id.* Arch also contends significant individualized issues could arise based on differences as to whether, how often, and why a particular employee took a particular meal period late or missed a particular meal period

⁵ Plaintiffs may recover up to one meal period premium and one rest period premium per workday. *United Parcel Service, Inc. v. Sup. Ct.*, 196 Cal.App.4th 57, 69 (2011) (construing Labor Code § 226.7 “as permitting up to two premium payments per workday—one for failure to provide one or more meal periods, and another for failure to provide one or more rest periods.”)

1 on a particular shift. *Id.* Arch further points to its releases obtained and arbitration agreements
2 signed by putative class members as further hurdles to Plaintiffs’ ability to certify this claim and
3 prevail on the merits. Based on these risks, Plaintiffs discounted the maximum amount by 50%
4 for risk of non-certification and an additional 55% for risk of being unsuccessful on the merits or
5 failing to recover the full amount sought, to arrive at an estimated exposure of \$166,640. *Id.*

6 **Rest Period Premiums Wages: \$248,638**

7 Plaintiffs assert that Arch failed to authorize and permit second rest periods on shifts over
8 6.0 hours and third rest periods on shifts over 10.0 hours. Haines Decl., ¶ 26. Based on data
9 produced by Arch, Plaintiffs estimated there were approximately 138,600 shifts of over 6.0 hours
10 worked by employees during the Settlement Period. Thus, assuming a 100% violation rate,
11 Plaintiffs calculated Arch’s potential maximum liability for Plaintiffs’ rest period claim as:
12 $138,600 * \$11.39 = \$1,578,654$. But as explained above, Arch asserts several defenses to this
13 claim, including that its rest period policies are legally compliant, that it has always “authorized
14 and permitted” employees to take rest periods in accordance with California law and that many
15 putative class members signed declarations to this effect, and that, as with meal periods, it is not
16 required to “ensure” rest periods are taken. *Id.* Arch further asserts that the rest period claim is
17 not amenable to class treatment, as individual inquiries would be needed to determine how many
18 rest periods each employee failed to take, and the reason(s) why an employee failed to take a rest
19 period on a particular shift, and thus Plaintiffs have no common issue to bind the class. *Id.* These
20 individualized issues are particularly present with respect to rest periods, Arch contends, since
21 they are not recorded. *Id.* As with Plaintiffs’ other claims, Arch further points to its nearly 200
22 releases obtained and the arbitration agreements signed by putative class members, as additional
23 reasons why Plaintiffs would not be able to certify this claim or prevail on the merits. Plaintiffs
24 thus discounted the maximum amount by 65% for risk of non-certification and an additional 55%
25 for risk of being unsuccessful on the merits, to arrive at an estimated exposure of \$248,638. *Id.*

26 **Failure to Reimburse for Business Expenses: \$30,262**

27 Plaintiffs contend that Arch failed to reimburse its employees for use of their personal cell
28 phones for work purposes, including communicating with managers. Haines Decl., ¶ 27. In

1 calculating exposure for this claim, Plaintiffs assumed an average monthly cell phone bill of
2 approximately \$50, and that employees' work-related use was approximately 30% of their
3 monthly cell phone usage, or \$15 per month. *Id.* Moreover, based on records produced by Arch,
4 Plaintiffs estimated that Settlement Class members worked approximately 8,406 work months
5 during the Class Period. Thus, Plaintiffs calculated Arch's maximum potential exposure on this
6 claim as approximately \$126,090 (\$15.00/mo. * 8,406 months). *Id.* As noted above, Arch counters
7 that there was no reason for employees to use their personal cell phones for work purposes, and
8 there were alternative means for employees to communicate with managers that did not require
9 use of personal cell phones. *Id.* Arch further argues that individual inquiries would be needed to
10 establish not only whether the employee incurred an expense but also whether the expense was
11 "reasonable." *Id.* These individual inquiries, which Arch asserts go to both liability and damages,
12 would preclude class certification. *Id.* Based on these defenses, Plaintiffs discounted the
13 maximum value of this claim by 40% for risk of non-certification, and an additional 60% for risk
14 of losing on the merits or failure to recover the full amount, to arrive at a realistic exposure of
15 \$30,262 on this claim. *Id.*

16 **Waiting Time Penalties: \$283,207**

17 Plaintiffs alleges that all Settlement Class members whose employment ended on or after
18 October 18, 2015 are entitled to a derivative "waiting time" penalty under Labor Code § 203.
19 That penalty is calculated as the employee's daily wages for each day the final wages are not paid,
20 up to a max of 30 days. Based on data provided by Arch, there are approximately 829 employees
21 who separated their employment since October 8, 2015, and an estimated average maximum
22 waiting time penalty per employee of \$2,733 (\$11.39 (avg. hourly rate) * 8 * 30), for total
23 maximum exposure of \$2,265,657. Haines Decl., ¶ 28. However, as noted, there was significant
24 risk of non-recovery on this claim given Arch's good-faith defenses to Plaintiffs' underlying
25 claims, as well as Arch's contention that waiting time penalties are not available for meal or rest
26 period claims after *Kirby*. Thus, Plaintiffs discounted this maximum by 50% for risk of non-
27 certification and by an additional 75% for risk of being unsuccessful on the merits, to arrive at an
28 estimated exposure of \$283,207. *Id.*

1 Wage Statement Penalties: \$78,353

2 Based on data provided by Arch, Plaintiffs estimate there have been about 10,447 pay
3 periods worked by Settlement Class members since October 18, 2017 (one year prior to filing of
4 *Molale*). Haines Decl., ¶ 29. Plaintiffs assumed they could obtain the “initial” wage statement
5 penalty of \$50 per violation, for a maximum of \$522,350 in wage statement penalties. *Id.*; *see*
6 *also* Lab. Code § 226(e) (providing \$50 penalty for “initial” violations); *Amaral v. Cintas Corp.*
7 *No. 2*, 163 Cal.App.4th 1157, 1207 (2008) (finding “initial” violation rate applies until employer
8 has been notified that it violated the Labor Code). However, given Arch’s affirmative defenses
9 to Plaintiffs’ underlying claims, its argument that wage statement penalties cannot be predicated
10 on meal and rest period premiums, and its argument that Plaintiff Molale did not allege a wage
11 statement claim and therefore, any wage statement claim can only relate back to one year prior to
12 *Torres* (i.e., August 26, 2019), Plaintiffs discounted this maximum exposure by 50% for risk of
13 non-certification, and by an additional 70% for risk of being unsuccessful on the merits or failure
14 to recover the full amount, to arrive at an estimated \$78,353. *Id.*

15 PAGA Penalties: \$130,588

16 Plaintiffs estimated a total PAGA exposure of \$1,044,700 (calculated from 10,447
17 “initial” violations at \$100 each). Haines Decl., ¶ 30; *Amaral*, 163 Cal.App.4th at 1209. However,
18 these penalties derived largely from the underlying violations discussed herein, each of which
19 Arch vigorously disputes, and to the extent these alleged penalties were based on a suitable
20 seating claim, Arch presented separate affirmative defenses as described above. Moreover, the
21 PAGA grants courts discretion to reduce penalties (Lab. Code § 2699(e)(2)), and Arch argues
22 the Court would significantly reduce penalties in light of its several good-faith defenses. Based
23 on these risks, Plaintiffs discounted that maximal figure by 50% for a risk of losing on the merits
24 and by an additional 75% for the risk of this Court reducing penalties, to arrive at an estimated
25 total of \$130,588. Haines Decl., ¶ 30; *see also Thurman, supra*, 203 Cal.App.4th at 1135
26 (affirming reduction of PAGA penalties); *Fleming, supra*, 2011 WL 7563047 at *4 (reducing
27 PAGA penalties by over 82%); *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018)
28 (affirming PAGA civil penalty of just \$5 per pay period).

1 Using these figures, Plaintiffs predicted the total realistic recovery for the Settlement Class
2 on their claims would be approximately \$1,060,418. Haines Decl., ¶ 31. The proposed settlement
3 of \$750,000 therefore represents roughly 71% of Plaintiffs’ reasonably forecasted recovery. *Id.*
4 Particularly in light of Arch’s financial condition, which was severely impacted by the COVID-
5 19 pandemic as well as Sprint’s recent merger with T-Mobile, the amount recovered by Plaintiffs
6 is substantial. Haines Decl., ¶ 20. Preliminary approval is therefore appropriate.

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

8 “Parties represented by competent counsel are better positioned than courts to produce a
9 settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pac. Enter. Sec.*
10 *Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Plaintiffs are represented by competent, experienced
11 counsel with extensive experience litigating wage and hour class actions and who have been
12 appointed class counsel in numerous similar cases. *See* Haines Decl., ¶¶ 2-8; Declaration of Tuvia
13 Korobkin, ¶¶ 2-5; Declaration of Alexandra R. McIntosh, ¶¶ 2-4. The settlement was also reached
14 with the assistance of Mr. Ortman, a respected wage and hour class action mediator. Haines Decl.,
15 ¶ 18. This factor strongly supports preliminary approval. *Kullar*, 168 Cal.App.4th at 130.

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

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

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

22 The Settlement reflects roughly 71% of the estimated recovery the Settlement Class could
23 reasonably expect in light of significant litigation risks, and it will provide tangible, monetary
24 compensation for hotly disputed claims. Plaintiffs submit the settlement is within the range of
25 possible approval, such that notice should be provided to the Settlement Class. The Court will
26 again have the opportunity to assess the reasonableness of the settlement after Settlement Class
members have had the opportunity to opt-out and/or object.

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

28 This proposed settlement is the result of an exchange of extensive discovery, a full-day

1 mediation, and months of arm's-length negotiations. Thus, the settlement is entitled to an initial
2 presumption of fairness. *Kullar*, 168 Cal.App.4th at 130. Plaintiffs carefully vetted the claims at
3 issue, and conducted detailed analyses of the data to arrive at classwide damages figures.

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

5 Preliminary approval is also warranted because there are no obvious deficiencies. This
6 settlement will provide tangible monetary relief to Settlement Class members. The amounts
7 proposed for attorneys' fees and costs, Plaintiffs' incentive awards, and the PAGA set-aside are
8 all reasonable and appropriate based on the particular facts of this case.

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

10 The proposed Class satisfies the criteria for certification of a settlement class under
11 California law because: 1) the individuals in the class are so numerous that joinder would be
12 impractical; 2) common questions of law and fact predominate over individual questions such
13 that class certification is the most efficient and desirable way to maintain this litigation; 3)
14 Plaintiffs' claims are typical of the class's claims; and 4) Plaintiffs and their counsel will fairly
15 and adequately represent the interests of the absent class members. Code Civ. Proc. § 382.

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

17 A class is "ascertainable" where members "may be readily identified without unreason-
18 able expense or time by reference to official [or business] records." *See Sevidal v. Target Corp.*,
19 189 Cal.App.4th 905, 919 (2010). The Settlement Class is defined as non-exempt employees
20 employed by Arch in California during the Class Period. Thus, Settlement Class members can
21 be identified from Arch's personnel and employment records. Arch represents there are
22 approximately 1,085 Settlement Class members, rendering it impracticable to bring all class
23 members before the Court. *See Settlement*, § 3.E1. Numerosity is therefore satisfied.

24 **2. Common Issues of Law and Fact Predominate for Settlement Purposes**

25 The focus on certification is not on the merits, but on what types of questions, "common
26 or individual," are likely to arise in the action. *See Sav-On Drug Store, Inc. v. Sup. Ct.*, 34 Cal.4th
27 319, 327 (2004). Plaintiffs' claims are predicated primarily on Arch's alleged regular rate, meal
28 period, and rest period policies and practices. Such claims are often held proper for class

certification. *See, e.g., Benton v. Telecom Network Specialists, Inc.*, 220 Cal.App.4th 701 (2013) (certifying meal & rest period claims); *Leyva v. Medline Industries, Inc.*, 716 F. 3d 510, 514 (9th Cir. 2013) (directing district court to certify regular rate claim).

3. The Claims of the Named Plaintiffs Are Typical

The typicality requirement is satisfied where class representatives have claims that are typical of those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal.App.3d 1341, 1347 (1987). Here, Plaintiffs were employed by Arch during the Class Period, were subject to Arch's relevant wage and hour policies, and were injured in the same manner as the members of the Settlement Class. Haines Decl., ¶ 11. Thus, typicality is satisfied.

4. Plaintiffs and Counsel Will Fairly and Adequately Represent the Class

The adequacy requirement examines conflicts of interest between named parties and the class(es) they seek to represent. *See Capital People First v. State Dept. of Develop. Svcs.*, 155 Cal.App.4th 676, 697 (2007). There are no known conflicts between Plaintiffs and the Settlement Class, and Plaintiffs' claims are in line with those of the Settlement Class. Finally, as discussed above, Plaintiffs' counsel have extensive experience in wage and hour class action litigation.

C. THE COURT SHOULD ORDER DISTRIBUTION OF THE CLASS NOTICE

This Court should order distribution of the proposed notice by U.S. Mail, postage prepaid, using last known mailing address information provided by Arch. *See Settlement*, § 9.B. This is the "best notice practicable" under the circumstances because it provides "individual notice to all members who can be identified through reasonable effort." *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Plaintiffs propose the settlement be administered by Phoenix Settlement Administrators, an experienced class action settlement administrator. *See Declaration of Jodey Lawrence*. To the extent employee addresses have changed, Phoenix will run them through the U.S.P.S. National Change of Address database to obtain current addresses. *Settlement*, § 9.B.

The proposed class notice satisfies California Rule of Court 3.766(d) because it advises Settlement Class members of the nature of the basic contentions and denials of the parties and the key terms of the settlement, the uniform 60-day deadline to opt-out or object, the recovery formula and expected recovery amount for each Settlement Class member, and advises that they will be

1 bound by the terms of the settlement if they do not request exclusion. *See* Haines Decl., Exh. A
2 to Exh. 1. The Notice will also notify Settlement Class members of the final fairness hearing, and
3 provide contact information for Class Counsel. *Id.* This notice satisfies C.R.C. 3.766(e) as the
4 most reliable and cost-effective method of reaching Settlement Class Members.

5 **D. THE COURT SHOULD SET A FINAL FAIRNESS HEARING**

6 Finally, the Court should set a hearing for final approval of the settlement on a date
7 appropriately scheduled to follow the deadline by which Settlement Class members must file
8 objections to the settlement or opt-out. *See* California Rule of Court 3.769.

9 **V. CONCLUSION**

10 Plaintiffs respectfully request that the Court preliminarily approve the Settlement,
11 provisionally certify the Settlement Class, and enter the Proposed Order submitted herewith.

12
13 Dated: April 22, 2021

Respectfully submitted,
HAINES LAW GROUP, APC

14 By: 

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