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

EDWARD SALGADO, as an individual and  
on behalf of all others similarly situated,

Plaintiff,

vs.

S.R. BRAY LLC, a California limited  
liability company d/b/a Power Plus!;  
POWER PLUS LLC, a California limited  
liability company; and DOES 1 through 100,

Defendants.

CASE NO. 30-2020-01172134

*[Case assigned for all purposes to the Hon.  
Glenda Sanders, Dept. CX101]*

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

Date: April 8, 2022  
Time: 1:30 p.m.  
Dept.: CX101

Action Filed: May 28, 2020  
Trial Date: None Set

PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court, on April 8, 2022, at 1:30 p.m. in Department CX101 of the above-entitled Court, located at 751 W Santa Ana Blvd, Santa Ana, California 92701, Plaintiff Edward Salgado ("Plaintiff"), individually and on behalf of a class of similarly situated individuals, will and hereby does move this Court for:

1. Preliminary approval of the proposed Settlement of this lawsuit;
2. Pursuant to Section 382 of the California Code of Civil Procedure, provisional certification of the following Settlement Class defined as follows:

All current and former non-exempt employees, excluding all electricians and union members who were temporarily employed by Defendant S.R. Bray LLC d.b.a Power Plus! ("Power Plus"), who worked for Power Plus in California during the time period of April 6, 2016 through July 31, 2021 (the "Class Period").

3. Preliminary appointment of Plaintiff Edward Salgado as Class Representative;
4. Preliminary appointment of Fletcher W. Schmidt, Paul K. Haines, and Alexandra R. McIntosh of Haines Law Group, APC as Class Counsel;
5. The scheduling of a hearing to consider whether the Settlement should be finally approved and to award amounts for the Class Representative Service Award, Settlement Administrator costs, the PAGA payment to the Labor and Workforce Development Agency, as well as attorneys' fees and costs to Class Counsel;
6. Appointment of Simpluris, Inc. as the third-party Settlement Administrator for mailing notices; and
7. Approval of the proposed Class Notice and entry of the proposed Order instructing the Class Notice to be disseminated to the proposed Settlement Class as provided in the Settlement.

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1 This Motion is based on this Notice of Motion, the attached Memorandum of Points and  
2 Authorities, the declarations of Fletcher W. Schmidt, Paul K. Haines, Alexandra R. McIntosh,  
3 Edward Salgado, Kimberly Sutherland of Simpluris, Inc., and the exhibits attached thereto, the  
4 pleadings and other papers filed in this action, and on any further oral or documentary evidence  
5 or argument presented at the time of hearing.

6 Given the multiplicity of issues addressed in this Motion, Plaintiff believes there is good  
7 cause to exceed the 20-page limit set forth in California Rule of Court 3.764(c)(2), and  
8 respectfully requests that the Court consider Plaintiff's Memorandum of Points and Authorities,  
9 which is 24 pages in length.

10  
11  
12 Dated: March 17, 2022

Respectfully Submitted,  
HAINES LAW GROUP, APC

13  
14 By:



Fletcher W. Schmidt  
Attorneys for Plaintiff

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Edward Salgado (“Plaintiff”) filed this putative class action (the “Lawsuit”) on  
4 behalf of all current and former non-exempt employees who worked for Defendant S.R. Bray  
5 LLC d.b.a. Power Plus! (“Power Plus”) in California from April 6, 2016 to July 31, 2021 (the  
6 “Class Period”) (hereinafter Plaintiff and Power Plus will be referred to collectively as the  
7 “Parties”). Plaintiff alleges that Power Plus: (1) failed to pay all minimum wages owed; (2) failed  
8 to pay all overtime wages owed; (3) failed to provide all legally-compliant meal periods; (4) failed  
9 to authorize and permit all legally-required rest periods; (5) failed to issue accurate and itemized  
10 wage statements; (6) failed to pay all final wages to employees upon separation of employment;  
11 (7) engaged in unfair, unlawful business practices; and (8) is liable for civil penalties under the  
12 Private Attorneys General Act (Labor Code § 2698 *et seq.*) (“PAGA”).

13 Through this Motion, Plaintiff respectfully requests that this Court preliminarily approve  
14 this non-reversionary class action settlement (“Settlement”),<sup>1</sup> on behalf of the following Class  
15 Members:

16 All current and former non-exempt employees, excluding all electricians and union  
17 members who were temporarily employed by Defendant S.R. Bray LLC d.b.a Power  
18 Plus! (“Power Plus”), who worked for Power Plus in California during the time  
period of April 6, 2016 through July 31, 2021 (the “Class Period”).

19 Based upon the data received from Power Plus, there are approximately 615 Class  
20 Members who worked approximately 65,000 combined workweeks during the Class Period. The  
21 Settlement calls for Power Plus to pay a Gross Settlement Amount (“GSA”) of \$3,750,000.00.  
22 This represents a significant result for Class Members who will be agreeing to a release of only  
23 those claims that were actually asserted, or which could have been asserted based on the same set  
24 of operative facts alleged in the Lawsuit. After deductions for Plaintiff’s service award, settlement  
25

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26 <sup>1</sup> The Stipulation of Settlement (“Settlement Agreement”) is attached to the Declaration of Fletcher W.  
27 Schmidt as Exhibit A and the proposed Notice Packet (which is comprised of the Notice of Class Action  
28 Settlement (“Class Notice”), Notice of Individual Settlement Payment (“Dispute Form”), and Opt-Out  
Request Form are attached as Exhibits 1A-1C to the Settlement Agreement.

1 administrator costs, the PAGA Penalty, and attorneys' fees and costs to Class Counsel, the  
2 remaining amount (the "Net Settlement Amount") of approximately \$2,336,972.00 will be  
3 distributed to the Class Participants. Additionally, Class Members who were employed during the  
4 PAGA period ("Aggrieved Employees") of June 1, 2019 to July 31, 2021 ("PAGA Period") will  
5 also receive a portion of the \$25,000 PAGA Payment.<sup>2</sup> Significantly, Class Members do not need  
6 to file a claim form in order to receive an Individual Settlement Payment, and all Class Members  
7 who do not opt-out will automatically receive average payments of approximately **\$3,799.95**.<sup>3</sup>

8 Prior to reaching this proposed Settlement, Power Plus provided Plaintiff with  
9 timekeeping and payroll data for the entire putative class, which Plaintiff's counsel and a retained  
10 expert used to construct a comprehensive damages model. Power Plus also produced relevant  
11 policies in effect during the Class Period. After extensive legal research and analysis along with  
12 a comprehensive review of the data performed by Plaintiff and his expert, the Parties participated  
13 in a mediation session with Francis "Tripper" Ortman, Esq., a respected wage and hour class  
14 action mediator, which resulted in a settlement. The long-form Settlement Agreement was drafted  
15 and executed over the following months and is now submitted to this Court for approval.

16 This proposed Settlement is well within the range of possible approval in light of the  
17 significant legal and factual obstacles that Plaintiff faced, the risks and costs of further litigation,  
18 and the substantial monetary benefits to the Settlement Class. For the reasons discussed herein,  
19 Plaintiff respectfully requests that the Court grant preliminary approval of the Settlement.

## 20 **II. SUMMARY OF THE LITIGATION**

21 Power Plus is one of the nation's largest providers of innovative temporary power  
22 solutions and backup power systems. Declaration of Fletcher W. Schmidt ("Schmidt Decl."), ¶  
23 8. Plaintiff worked for Power Plus as a non-exempt "Installer" from April 2016 through  
24 approximately May 13, 2020. *Id.* Plaintiff's theories of liability, and Power Plus's defenses to  
25 each are discussed below.

---

26  
27 <sup>2</sup> A copy of Plaintiff's June 1, 2020 PAGA letter is included as Exhibit 4 to the Settlement Agreement  
attached as Exhibit A to the Declaration of Fletcher W. Schmidt.

28 <sup>3</sup> In addition to the \$3,799.95, Aggrieved Employees will also receive a portion of the PAGA Payment.  
The average share of the PAGA Payment is \$51.12.

1           **A.     PLAINTIFF’S CLAIMS AND POWER PLUS’S DEFENSES**

2           1.   Regular Rate Claim

3           Plaintiff alleges that Power Plus failed to pay all overtime wages to Plaintiff and other  
4 Class Members by failing to include the value of all non-discretionary remuneration, including  
5 on-call payments and annual and quarterly bonuses, into the “regular rate” of pay. Schmidt Decl.,  
6 ¶ 9; 29 U.S.C. 207(e) (“regular rate” includes “all remuneration for employment”); *Huntington*  
7 *Mem’l Hosp. v. Superior Court*, 131 Cal.App.4th 893, 902-903 (2005) (payments included in  
8 calculation of regular rate are generally consistent under state and federal law).

9           In response, Power Plus argues that it properly includes on-call pay and bonus payments  
10 in its calculation of the regular rate of pay for the purposes of overtime. Schmidt Decl., ¶ 9. Power  
11 Plus contends that many of the bonuses were discretionary, including end of the year discretionary  
12 holiday bonuses, and thus do not need to be included in the regular rate of pay for overtime  
13 purposes. 29 C.F.R. § 778.200(a)(1) (defining the regular rate of pay to include all remuneration  
14 for employment paid to the employee while excluding “sums paid as gifts; payments in the nature  
15 of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts  
16 of which are not measured by or dependent on hours worked, production, or efficiency.”) Power  
17 Plus contends that the discretionary holiday bonuses were not tied to employees’ hours worked  
18 and therefore do not need to be included in the regular rate. Schmidt Decl., ¶ 9; see also 29 U.S.C.  
19 § 207(e)(2) (payments made to employee which are not compensation for hours of employment  
20 need not be included in regular rate of pay); 29 C.F.R. § 778.208 (discretionary bonuses  
21 excludable from regular rate). Power Plus further contends it is not required to include quarterly  
22 profit-sharing bonuses in employees “regular rate” of pay when calculating overtime  
23 compensation, as its profit-sharing plan qualifies as a “bona fide profit-sharing plan” under 29  
24 U.S.C. § 207(e)(3)(b). Moreover, Power Plus contends Plaintiff would be unable to certify this  
25 claim given the differences and the individualized nature of frequency, type, and amount of  
26 bonuses received by class members. *Id.*

27  
28   ///

1                   2. Claim for Unpaid Wages Due to Auto-Deduct for Meals

2           Plaintiff alleges that prior to October 2019, Power Plus auto-deducted 30 minutes from  
3 employees' time for meal periods, regardless of whether the employee actually took a full 30-  
4 minute meal period. Schmidt Decl., ¶ 10. Plaintiff alleges this resulted in additional unpaid wages,  
5 on those occasions employees took less than 30-minute meal periods but had a full 30 minutes  
6 auto-deducted. *Id.*

7           In response, Power Plus contends that it has always provided employees with 30-minute  
8 meal periods, and employees were not underpaid at all as a result of its auto-deduct practice.  
9 Schmidt Decl., ¶ 10. Power Plus further argues that the auto-deduct practice was instituted for  
10 employee convenience, as it allowed employees to take their meal periods without having to worry  
11 about clocking out and clocking back in. *Id.* Power Plus also argues it did not know, and  
12 reasonably could not have known, employees were working during meal periods, since Power  
13 Plus relieves employees of all duty for 30 minutes. *Id.* Finally, Power Plus contends this claim  
14 would not be amenable to class certification since it would require an employee-by-employee,  
15 shift-by-shift analysis as to whether each employee in fact took a full 30-minute meal period on  
16 each shift. *Id.*

17                   3. Meal Period Claim

18           Plaintiff alleges that Power Plus failed to provide employees with full, uninterrupted 30-  
19 minute meal periods before the end of the fifth hour of work and failed to provide second meal  
20 periods when employees worked in excess of 10.0 hours. *See Brinker Restaurant Corp. v.*  
21 *Superior Court* (2012) 53 Cal.4th 1004, 1049 (holding that the applicable wage orders and the  
22 California Labor Code require employers to provide a first meal period before the end of the fifth  
23 hour of work and a second meal period "after no more than 10 hours of work"); Schmidt Decl., ¶  
24 11. Additionally, as stated above, prior to October 2019 Power Plus did not require employees to  
25 clock out for meal periods and instead relies on an automatic deduction of 30-minutes from hours  
26 worked to account for purported meal periods. Schmidt Decl., ¶ 11. Plaintiff alleges that this  
27 practice is unlawful as it deducts time worked in instances when employees are not provided with  
28 a full, uninterrupted 30-minute meal period. *Id.* In response, Power Plus contends that it has

1 always provided employees with legally-compliant first and second meal periods and that any  
2 meal periods that did not meet that standard were solely the result of employee choice (not Power  
3 Plus’s policy/practice). *Id.* Power Plus further argues that under *Brinker* it is only required to  
4 “provide” the opportunity to take meal periods, not “ensure” meal periods are taken, which Power  
5 Plus contends it has always done. *Brinker, supra*, 53 Cal.4th at 1038 (rejecting “ensure” standard);  
6 Schmidt Decl., ¶ 11. Power Plus maintains that employees voluntarily waived their second meal  
7 period when they worked shifts in excess of 10.0 hours (but less than 12.0 hours). Schmidt Decl.,  
8 ¶ 11. Finally, Power Plus contends that Plaintiff’s meal period claim is not suited for class  
9 certification as individual inquiries would be required to assess which employees received non-  
10 compliant meal periods or missed second meal periods, how many meal periods were non-  
11 compliant or missed, and the reasons why a particular individual recorded a non-compliant meal  
12 period or missed a meal period on a particular shift. *Id.*

#### 13 4. Rest Period Claim

14 Plaintiff alleges that Power Plus failed to authorize and permit third rest periods on shifts  
15 over 10 hours for him and other non-exempt employees. Schmidt Decl., ¶ 12; *see also Brinker*,  
16 53 Cal.4th at 1028-31 (discussing rate at which rest periods must be provided).

17 Power Plus asserts it has always maintained lawful rest period policies and has always  
18 authorized and permitted all required rest periods, including third rest periods on shifts over 10  
19 hours. Schmidt Decl., ¶ 12. As with meal periods, Power Plus argues, it need not *ensure* rest  
20 periods are taken but need only “authorize and permit” them, and it has always done so. *Id.* Finally,  
21 Power Plus argues this claim is not amenable to class treatment, as individualized inquiries would  
22 be required to determine whether each employee failed to a third rest periods on each 10+ hour  
23 shift, and why they did so. *Id.* These issues are especially present for rest periods, Power Plus  
24 argues, as rest periods need not be recorded. *Id.*

#### 25 5. Reporting Time Claim

26 Plaintiff alleges that Power Plus failed to pay all reporting time wages owed as a result of  
27 its failure to pay its on-call employees reporting time wages on those occasions when employees  
28 were required to work on-call shifts, but were not called in to work or were furnished with less

1 than half of their usual or scheduled day's work. *See Ward v. Till's Inc.*, 31 Cal. App. 5th 1167  
2 (2019) (finding that employers are liable for reporting time pay when employers are required to  
3 call their employer to determine whether they need to report to work); *see also Dimercurio v.*  
4 *Equilon Enterprises LLC*, No. 19-cv-04029-JSC, 2020 WL 227262 at \* 8 (N.D. Cal. Jan 15, 2020)  
5 (“Defendant attempts to distinguish *Ward* primarily because the employees in that case were  
6 required to actively telephone their employer...That is a distinction without a difference, however,  
7 and the *Ward* court’s reasoning applies with equal – and arguably greater – force on the facts  
8 alleged here.”)

9 In response, Power Plus alleges that it has always paid its employees at least minimum  
10 wage for all hours worked and that its on-call payments greatly exceed California’s minimum  
11 wage. Schmidt Decl., ¶ 13. Power Plus further argues that even when employees are working an  
12 on-call shift, they are not required to report to work even if they get a call. *Id.* Power Plus claims  
13 that on-call shifts are completely voluntary and employees working an on-call shift have the option  
14 of reporting to work when they receive a call or can just pass it on to another employee without  
15 consequence. *Id.* Power Plus argues that because on-call shifts are completely voluntary, the facts  
16 are unlike the facts in *Ward* where employees were required to actively telephone their employer  
17 or *Dimercurio* where employees were required to be by their phones and actively waiting for a  
18 phone call from their employer. *See Ward*, 31 Cal. App. 5th at 1185 (If “the employer directs  
19 employees to present themselves for work by telephoning the store two hours prior to the start of  
20 a shift, then the reporting time requirement is triggered by the telephonic contact”); *see also*  
21 *Dimercurio*, 2020 WL 227262 at \*8 (finding that standby employees were entitled to reporting  
22 time pay when they were required to passively wait for a call from their employer.); *see also id.*  
23 Power Plus further argues that because employees did not have to physically report to work, they  
24 are not entitled to reporting time pay. Schmidt Decl., ¶ 13.

25 6. Facially Deficient Wage Statement Claim

26 With respect to Plaintiff’s claim that the wage statements issued by Power Plus failed to  
27 list the applicable hourly rates for on-call payments and double time, Power Plus argues that the  
28 information can be easily be determined using the information available on the wage statements

1 and simple math (i.e. the amount earned divided by hours worked). Schmidt Decl., ¶ 14. Power  
2 Plus argues that because an employee is not required to refer to other documents to determine their  
3 rate of pay for on call payments and/or double time pay, Power Plus' wage statements comply  
4 with the requirements of Labor Code section 226(a)(9). *See Hernandez v. BCI Coca-Cola Bottling*  
5 *Co.*, (9th Cir. 2014) 554 Fed. Appx. 661, 662 (“Wage Statements comply with § 226(a) when a  
6 plaintiff employee can ascertain the required information by performing simple math, using  
7 figures on the face of the wage statement.”); *Morgan v. United Retail, Inc.* (2010) 186 Cal.App.4th  
8 1136, 1142 (where an employee “could determine the sum of all hours worked without referring  
9 to time records or other documents” by “simply add[ing] together the total regular hours figure  
10 and the total overtime figure” does not constitute a violation of section 226(a)(2).); *see also*  
11 Schmidt Decl., ¶ 14. Moreover, as to Plaintiff’s claim that wage statements did not include rates  
12 of pay or units for on-call pay, Power Plus argues that on-call payments are not paid based on an  
13 employee’s number of hours worked, nor are they piece-rate units because they are not based on  
14 units of employee production, and therefore no hourly rate of pay or piece-rate unit need be  
15 included on wage statements pursuant to Labor Code § 226(a)(3) or (9). *Id.*

16 7. Derivative Claims Under Lab. Code §§ 203, 226, and the PAGA

17 As a result of these alleged substantive violations, Plaintiff contends that Power Plus is  
18 liable for derivate wage statement violations, waiting time liability for its failure to pay  
19 employees all final wages upon their separation of employment, and civil penalties under PAGA,  
20 Labor Code section 2698 *et seq.* Schmidt Decl., ¶ 15.

21 In response, Power Plus argues that the alleged wage statement violations were not  
22 “knowing and intentional,” and that Plaintiff could not show he “suffer[ed] injury,” as required  
23 by Labor Code section 226(e) for imposition of penalties. Power Plus also contends that it  
24 possesses strong, good faith defense to Plaintiff’s underlying claims, thus precluding recovery  
25 of waiting time penalties (which are only available for the “willful” failure to pay wages). *See* 8  
26 Cal. Code Regs. § 13520 (“[A] good faith dispute that any wages are due will preclude  
27 imposition of waiting time penalties under Section 203...A good-faith dispute that any wages  
28 are due occurs when an employer presents a defense, based in law or fact which, if successful,

would preclude any recovery on the part of the employee.”); Schmidt Decl., ¶ 15. Power Plus maintains that not all former employees (if any) experienced an underpayment of wages, thus Plaintiff’s exposure analysis is overstated. *Id.* Power Plus also contends that Plaintiff’s meal and rest period claims cannot support a claim for waiting time penalties. *See Ling v. P.F. Chang’s China Bistro, Inc.* (2016) 245 Cal.App.4th 1242, 1261 (meal and rest period premium pay compensates for the non-provision of meal and rest periods, not for the ‘nonpayment of wages’ as required by Labor Code § 203); Schmidt Decl., ¶ 15. Additionally, since Plaintiff’s PAGA claim is derivative of the underlying wage claims, Power Plus asserts that the PAGA claim will fail with those claims. *See Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136, 1147 (“Because the underlying causes of action fail, the derivative UCL and PAGA claims also fail.”); Schmidt Decl., ¶ 15. Power Plus also maintains that given its good faith defenses, this Court would exercise its discretion to substantially reduce any PAGA penalties if it were to find Power Plus liable for any of Plaintiff’s claims. Schmidt Decl., ¶ 15.

**B. DISCOVERY AND MEDIATION**

In connection with mediation, Power Plus provided Plaintiff with timekeeping and payroll data for the entire putative class. Schmidt Decl., ¶ 19. Power Plus also provided relevant policies and procedures in effect during the Class Period along with other relevant data necessary to perform a class-wide exposure analysis. *Id.* Plaintiff, with the help of his retained expert, conducted an analysis of this data and created a comprehensive damages model to calculate the likely exposure that Power Plus faced on each claim. *Id.*

On July 13, 2021, the Parties participated in a mediation with Francis “Tripper” Ortman, Esq., a highly respected wage and hour class action mediator. Schmidt Decl., ¶ 20. During mediation, the Parties exchanged divergent views on Power Plus’s liability and exposure valuations, their legal positions, and the likelihood of certification of Plaintiff’s claims. *Id.* With the help of Mr. Ortman, the Parties reached a class-wide resolution at the conclusion of the mediation. *Id.*

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1 **III. THE PROPOSED SETTLEMENT**

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

3 If the Court preliminarily approves this settlement, Power Plus will pay a Gross Settlement  
4 Amount (“GSA”) of \$3,750,000.00. Settlement § I.16. This Settlement is non-reversionary and  
5 Class Members will automatically receive their Individual Settlement Payment unless they  
6 affirmatively opt-out of the Settlement. *Id.*, § IV.2.

7 Power Plus will fund the GSA within 30 calendar days after the Court signs an order  
8 granting final approval of the Settlement. Settlement § VI.1.

9 The monetary terms of the Settlement are as follows:

|    |                                                           |                       |
|----|-----------------------------------------------------------|-----------------------|
| 10 | • Gross Settlement Amount (“GSA”):                        | \$3,750,000.00        |
| 11 | • Minus Court-approved attorneys’ fees (one-third):       | \$1,250,000.00        |
| 12 | • Minus Court-approved verified costs (up to):            | \$50,000.00           |
| 13 | • Minus Court-approved Service Award:                     | \$5,000.00            |
| 14 | • Minus Amount Set Aside as PAGA penalties:               | \$100,000.00          |
| 15 | • <u>Minus estimated settlement administration costs:</u> | <u>\$8,028.00</u>     |
|    | Net Settlement Amount (“NSA”):                            | \$2,336,972.00        |
|    | • PLUS 25% “PAGA Amount” to Settlement Class:             | \$25,000.00           |
|    | <b>Total Amount Paid to Class Members:</b>                | <b>\$2,361,972.00</b> |

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

17 After deducting amounts for court-approved attorneys’ fees and costs, enhancement  
18 payment, costs of settlement administration, and the PAGA Payment, the Settlement requires  
19 Power Plus to pay a Net Settlement Amount of approximately \$2,336,972.00 to the Class  
20 Members. *See* Settlement § VIII.1. Additionally, Aggrieved Employees will receive a portion of  
21 the \$25,000 allocated as the PAGA Payment for a total of \$2,361,972.00 paid to Class Members.  
22 *See* Settlement § VIII.3.

23 Power Plus’ records indicate that there are approximately 615 total Class Members who  
24 worked a combined 65,000 workweeks during the Class Period. Schmidt Decl., ¶ 21; Settlement  
25 § IV.4. Based on the allocations of the Net Settlement Amount, participating employees will  
26 receive, on average, a payment of approximately \$3,799.95, with the highest individual payment  
27 estimated to be \$9,958 and the lowest payment estimated to be \$35.95. Schmidt Decl., ¶ 21. Class  
28 Members will have 60 calendar days from the mailing of the Class Notice to opt-out or object to

1 the Settlement, thereby providing ample time to review the Class Notice without unduly delaying  
2 the Settlement. *See* Settlement § VII.3. Those Class Members who do not opt-out of the  
3 Settlement will be bound by its terms and will release all claims that were pled in the Action, or  
4 which could have been pled in the Action based on the factual allegations in the Action, that arose  
5 during the Class Period. *Id.*, § X.4.

6 **2. Attorneys' Fees, Costs, and Representative Enhancement Payment**

7 As part of the Settlement, Plaintiff will apply for a service award at the time of seeking  
8 final approval of the Settlement in the total amount of \$5,000.00 for his service to the Class  
9 Members and his general release of all claims (known or unknown) against Power Plus. *See*  
10 Settlement §§ IV.7; X.5-8; Schmidt Decl., ¶ 22. “[I]ncentive awards are fairly typical in class  
11 action cases . . . and are intended to compensate class representatives for work done on behalf of  
12 the class [and] to make up for financial or reputational risk undertaken in bringing the action.” *In*  
13 *re Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th 1380, 1393-94. Plaintiff’s requested  
14 service award is intended to recognize the significant benefits conferred upon the Settlement Class  
15 due to the time and effort that Plaintiff expended on behalf of the Settlement Class, including  
16 providing factual information and documents to his attorneys, identifying potential witnesses, and  
17 participating in in-person and telephonic meetings with his attorneys to discuss the claims and  
18 theories at issue in the litigation, as well as the significant risks Plaintiff undertook by agreeing  
19 to serve as the named plaintiff in this case, as well as the fact that Plaintiff agreed to a general  
20 release of all claims subject to a waiver of California Civil Code section 1542. *See* Settlement §§  
21 X.5-8; Schmidt Decl., ¶ 22.

22 Class Counsel will also apply for an attorneys’ fee award of \$1,250,000.00 (one-third of  
23 the GSA), and up to \$50,000.00 in verified costs. *See* Settlement, § IV.5.; Schmidt Decl., ¶ 23.  
24 Plaintiff submits that the requested fee is fair compensation for undertaking complex, risky,  
25 expensive, and time-consuming litigation on a purely contingent fee basis. Class Counsel incurred  
26 substantial attorneys’ fees conducting pre-filing investigation, analyzing Plaintiff’s claims,  
27 conducting legal research and analysis, reviewing documents and data produced by Power Plus,  
28 building a comprehensive damages model, preparing for and attending mediation, negotiating and

1 preparing the long-form Settlement Agreement, preparing this motion for preliminary approval,  
2 and otherwise litigating the case. Schmidt Decl., ¶ 23. Class Counsel will also expend future  
3 attorney time in attending the hearing on this Motion, overseeing the Notice process, drafting the  
4 Final Approval Motion and supporting documents, and attending the Final Approval hearing,  
5 among other tasks, such as fielding questions from Class Members. *Id.*

6 Both California and federal courts have recognized that an appropriate method for  
7 awarding attorneys' fees in class actions is to award a percentage of the "common fund" created  
8 as a result of the settlement. *See Laffitte v. Robert Half Int'l Inc.* (2016) 1 Cal.5th 480, 506 ("the  
9 percentage of fund method survives in California class action cases..."); *Wershba v. Apple*  
10 *Computer, Inc.* (2001) 91 Cal.App.4th 224, 254 (recognizing both the "percentage of recovery"  
11 and "lodestar/multiplier" methods). Historically, courts have awarded percentage fees in the range  
12 of 20% to 50%, depending on the circumstances of the case. *See 4 Newberg on Class Actions* §  
13 14.6 (4th Ed. 2013) ("No general rule can be articulated on what is a reasonable percentage of a  
14 common fund. Usually 50% of the fund is the upper limit on a reasonable fee award from a  
15 common fund in order to assure that the fees do not consume a disproportionate part of the  
16 recovery obtained for the class, although somewhat larger percentages are not unprecedented.").

17 Class Counsel submits that the request for attorneys' fees is reasonable when viewed as  
18 an overall percentage of the settlement (one-third) in light of the substantial risks, including the  
19 possibility that the Lawsuit could not move forward as a class action, as well as the significant  
20 work undertaken, the extremely positive results obtained for the class, and the efficiency with  
21 which the Parties conducted the litigation. Should the Court grant preliminary approval, Class  
22 Counsel will seek an award of attorneys' fees and verified litigation costs at the time of seeking  
23 final approval of the Settlement.

#### 24 **IV. ARGUMENT**

##### 25 **A. PRELIMINARY APPROVAL IS WARRANTED**

26 California Rule of Court 3.769 conditions the settlement of a class action on court  
27 approval, which is generally evaluated under the federal standards applicable under Rule 23 of  
28 the Federal Rules of Civil Procedure. *See Reed v. United Teachers Los Angeles* (2012) 208

Cal.App.4th 322, 337 (stating that Rule 3.769 requires the trial court to determine “that the settlement is fair, reasonable and adequate to all concerned”); *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026 (stating that Rule 23(e) requires the trial court to determine “whether a proposed 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 Litigation* (9th Cir. 2008) 516 F.3d 1095, 1101. The Court’s role in evaluating a proposed settlement is limited to ensuring that the agreement taken as a whole is fair and is not the product of fraud or collusion between the negotiating parties. *See e.g., Hanlon, supra*, 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 Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130.

**1. Standard for Preliminary Approval**

To make a fairness determination, the 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.* (1996) 48 Cal.App.4th 1794, 1801. “The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case.” *Wershba, supra*, 91 Cal.App.4th at 245. As discussed below, the proposed Settlement is fair, adequate, and reasonable in light of the overall balance of factors in this case.

**i. The Strength of Plaintiff’s Case**

Class Counsel carefully vetted the claims at issue, reviewed timekeeping and payroll records as well as relevant policy documents, and conducted a detailed analysis of that data to create a comprehensive damages model for Power Plus’s liability. *See Schmidt Decl.*, ¶¶ 9-19. Although Plaintiff steadfastly maintains that his claims are meritorious, Plaintiff acknowledges that there were substantial risks and uncertainty in proceeding with class certification and trial. As explained in detail in section II.B., *supra*, Power Plus presented numerous defenses to

1 Plaintiff's claims, both on the merits and with respect to class certification. Although Plaintiff  
2 was prepared to litigate these claims through class certification and, ultimately, through trial,  
3 given the amount offered in settlement, Plaintiff predicted that it was unlikely that further  
4 litigation would result in a substantially more beneficial result for the Class Members. Thus, this  
5 factor supports preliminary approval of the Settlement.

6 **ii. Risk, Expense, Complexity, and Duration of Further Litigation**

7 Although the Parties engaged in substantial informal discovery and information exchange  
8 prior to mediation, the Parties had agreed to refrain from engaging in formal written and  
9 deposition discovery until after exhausting their settlement efforts at mediation. *See* Schmidt  
10 Decl., ¶¶ 17-18. Therefore, absent settlement, the Parties would need to expend substantial time  
11 and resources to complete formal written and deposition discovery and prepare the case for class  
12 certification and trial. *Id.* There was also a risk that Power Plus would engage in a *Pick-up-Stix*  
13 campaign to significantly reduce the size of the putative class for a fraction of what Class  
14 Members are receiving through this Settlement. *Id.*; *see Chindarah v. Pick Up Stix, Inc.* (2009)  
15 171 Cal.App.4th 796. Thus, this factor supports preliminary approval.

16 **iii. Risk of Maintaining Class Action Status**

17 At the time of the Parties' proposed Settlement, Plaintiff had not yet filed a motion for  
18 class certification. Given Power Plus's numerous arguments that individualized issues would  
19 predominate Plaintiff's claims (thereby precluding class certification), there was a risk that there  
20 would not be a certified class at the time of trial. Thus, this factor supports preliminary approval  
21 of the Settlement.

22 **iv. Amount Offered in Settlement Given Realistic Value of Claims**

23 This proposed Settlement provides a fair and reasonable monetary recovery for the  
24 Settlement Class in the face of disputed claims. After analyzing the data provided by Power Plus  
25 prior to mediation, Plaintiff prepared a class-wide exposure analysis and forecasted the Settlement  
26 Class' expected recovery for each claim as follows:

27 Regular Rate Violations: \$72,186

28 Plaintiff alleges that Power Plus failed to pay all overtime wages to Plaintiff and other

1 Class Members by failing to include the value of all non-discretionary remuneration, including  
2 on-call payments and bonuses, into the “regular rate” of pay. Schmidt Decl., ¶ 9; 29 U.S.C. 207(e)  
3 (“regular rate” includes “all remuneration for employment”); *Huntington Mem’l Hosp. v.*  
4 *Superior Court*, 131 Cal.App.4th 893, 902-903 (2005) (payments included in calculation of  
5 regular rate are generally consistent under state and federal law). Based on Plaintiff’s expert’s  
6 analysis and extrapolation of data provided by Power Plus, Plaintiff calculates a total  
7 underpayment of approximately \$267,356 in overtime wages for failure to include on-call pay  
8 and a number of bonuses in its calculation of the “regular rate of pay” for the purposes of overtime.  
9 *Id.* However, as detailed above, Power Plus asserts a number of defenses to Plaintiff’s regular rate  
10 claim, including that a number of bonuses are discretionary. Schmidt Decl., ¶ 9. Power Plus  
11 further argues that the largest bonuses are profit sharing bonuses that are not required to be  
12 included in employees “regular rate” of pay when calculating overtime compensation under 29  
13 U.S.C. § 207(e)(3)(b). Schmidt Decl., ¶ 9. Furthermore, Power Plus maintains that annual holiday  
14 bonuses and other incentive payments were discretionary and/or were not tied to employees’  
15 hours worked and therefore do not need to be included in the regular rate. *Id.*; *see also* 29 U.S.C.  
16 § 207(e)(2) (payments made to employee which are not compensation for hours of employment  
17 need not be included in regular rate of pay); 29 C.F.R. § 778.208 (discretionary bonuses  
18 excludable from regular rate). Given these potential defenses, Plaintiff discounted Power Plus  
19 maximum exposure by 40% for the risk of non-certification and 55% for the risk of being  
20 unsuccessful on the merits or obtaining reduced damages, to arrive at an estimated exposure of  
21 \$72,186. *Id.*, ¶ 9.

22 **Unpaid Wages Due to Meal Period Auto-Deduct: \$23,112**

23 Plaintiff alleges that until about October 19, 2019, Power Plus auto-deducted 30 minutes  
24 from employee time entries for meal periods, even if employees did not take a full 30 minutes for  
25 their meal period. Schmidt Decl. ¶ 10. Beginning on approximately October 20, 2019, Power  
26 Plus began to require its employees to clock out and in for their meal periods; thus, Plaintiff’s  
27 expert was able to examine those time records where employees clocked out for meal periods and  
28 extrapolated those violation rates to the auto-deducted shifts. *Id.* Based on Plaintiff’s expert’s

analysis of those time records, Plaintiff estimated approximately 11% of recorded meal periods were less than 30 minutes, and that those meal periods were short by an average of approximately 5 minutes. *Id.* Plaintiff's expert's analysis of the data further revealed approximately 220,665 total meal period-eligible shifts prior to October 20, 2019. *Id.* Thus, Plaintiff estimated Power Plus' total maximum exposure on this claim as follows:  $220,653 * 11\% * 5/60 * 11.66 \text{ min. wage} * 2$  (liquidated damages) = \$47,168. *Id.* But as noted above, Power Plus argues that it has always provided employees with full, 30-minute meal periods, and therefore no one was ever underpaid as a result of its former auto-deduct practice; that its auto-deduct practice was implemented for employees' conveniences; that it never had reason to believe that employees were working during meal periods, since they were relieved of all duty; and that this claim would not be amenable to class certification given that individual inquiries would be necessary to determine whether each employee took a full 30-minute meal period on each shift, and if not, how many minutes short the meal period was, and whether Power Plus reasonably should have known the employee came back early from lunch. *Id.* In light of these defenses, Plaintiff discounted the maximum exposure by 30% for risk of non-certification, and by an additional 30% for risk of losing on the merits, for a realistic estimated exposure of \$23,112.

**Meal Period Violations: \$1,443,659**

As stated above, Plaintiff alleges that prior to October 19, 2019, 2019, Power Plus routinely provided late and/or short meal periods to its non-exempt employees. Schmidt Decl., ¶ 11. Plaintiff further alleges that Power Plus failed to provide second meal periods on shifts over 10.0 hours. *Id.* Based on Plaintiff's expert's review and extrapolation of employee timekeeping data, Plaintiff estimated approximately 138,825 shifts reflected at least one potential meal period violation (late, short, or missed meal period(s)) and did not have a corresponding meal period premium payment. *Id.* Further, the data produced by Power Plus reflected an average hourly rate of approximately \$19.71 for Class Members during the Class Period. *Id.* Plaintiff therefore estimated a maximum total exposure for this claim as:  $160,978 * \$19.71 = \$3,172,876$ . *Id.* But as discussed *supra*, Power Plus presented several defenses to this claim, including that it has always "provided" lawful meal periods and communicated to employees their right to take lawful meal periods; that under *Brinker*

1 it need not “ensure” meal periods are taken; that any missed, short, or late meal periods reflected  
2 in the time records are the result of employee choice rather than any Power Plus policy or practice;  
3 that employees voluntarily choose to waive their second meal periods; and that this claim is not  
4 amenable to class certification, given the individual inquiries needed to assess whether each  
5 employee did not take a compliant meal period on each shift, why they didn’t, and (for second  
6 meal periods) whether the second meal period was waived. *Id.* Based on these defenses, Plaintiff  
7 discounted the maximal amount by 35% for risk of non-certification, and by an additional 40%  
8 for risk of losing on the merits or failure to recover the full amount sought, to arrive at a realistic  
9 exposure of \$1,443,659. *Id.*

10 **Rest Period Violations: \$722,197**

11 As discussed above, Plaintiff alleges that Power Plus failed to authorize and permit third  
12 rest periods on shifts over 10 hours. Schmidt Decl., ¶ 12. Based on Plaintiff’s expert’s review and  
13 extrapolation of the timekeeping data, there were approximately shifts of over 10 hours during  
14 the Class Period. *Id.* Thus, Plaintiff calculated Power Plus’ maximum exposure for the third rest  
15 period claim as: 104,689 shifts \* \$19.71 premium = \$2,063,420. *Id.* But as noted above, Power  
16 Plus argues it has always authorized and permitted rest periods in accordance with California law,  
17 including third rest periods on shifts over 10 hours; that its written rest period policy reflects its  
18 lawful policy; that any failure to take a third rest period is a result of employee choice; and that  
19 this claim is not amenable to class certification given the individual inquiries required to determine  
20 whether and why each employee missed a third rest period on each of 104,689 shifts, particularly  
21 given that rest periods need not be recorded. *Id.* Plaintiff therefore discounted the potential  
22 maximum by 50% for risk of non-certification, and an additional 30% for risk of losing on merits  
23 or failing to recover the full amount sought, to arrive at a realistic exposure of \$722,197. *Id.*

24 **Reporting Time Claim: \$264,932**

25 Plaintiff alleges that Power Plus failed to pay all reporting time wages to its on-call  
26 employees. Specifically, Plaintiff alleges that Power Plus failed to pay its employees reporting  
27 time pay on those occasions when employees were required to work on-call shifts, but were not  
28 called in to work or were furnished with less than half of their usual or scheduled day’s work. *See*

Schmidt Decl., ¶ 13. Based on Plaintiff’s review of Power Plus’ timekeeping data and the estimation that employees were not called into work for approximately 50% of shifts, Plaintiff calculated Power Plus’ potential liability for reporting time pay to be \$815,174. *Id.* However, Power Plus alleges that it has always paid its employees at least minimum wage for all hours worked and that its on-call payments greatly exceed California’s minimum wage. *Id.* Power Plus further argues that even when employees are working an on-call shift, they are not required to report to work even if they get a call. *Id.* Power Plus claims that on-call shifts are completely voluntary and employees working an on-call shift have the option of reporting to work when they receive a call or can just pass it on to another employee without consequence. *Id.* Power Plus argues that because on-call shifts are completely voluntary, the facts are unlike the facts in *Ward* where employees were required to actively telephone their employer or *Dimercurio* where employees were required to be by their phones and actively waiting for a phone call from their employer. *See Ward*, 31 Cal. App. 5th at 1185 (If “the employer directs employees to present themselves for work by telephoning the store two hours prior to the start of a shift, then the reporting time requirement is triggered by the telephonic contact”); *see also Dimercurio*, 2020 WL 227262 at \*8 (finding that standby employees were entitled to reporting time pay when they were required to passively wait for a call from their employer.); *see also id.* Plaintiff therefore discounted the potential maximum by 35% for risk of non-certification, and an additional 50% for risk of losing on merits or failing to recover the full amount sought, to arrive at a realistic exposure of \$264,932.

**Wage Statement Penalties: \$480,714**

Plaintiff’s expert’s analysis reflected that there were approximately 18,489 bi-weekly pay periods within the one-year liability window under Labor Code § 226. Schmidt Decl., ¶ 14. In calculating Power Plus’ exposure, Plaintiff assumed he could recover the “initial” wage statement penalty of \$50 for each violation, for a total of \$924,450 in potential penalties. *Id.*; *see also* Lab. Code § 226(e) (providing \$50 penalty for “initial” violations); *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1207 (2008) (finding “initial” violation rate applies until employer has been notified it violated the Labor Code); *Patel v. Nike Retail Svcs., Inc.*, 58 F.Supp.3d 1032, 1042-43

(N.D. Cal. 2014) (citing *Amaral* and applying “initial” \$50 penalty to all pay periods in calculating amount-in-controversy for wage statement claim). However, given Power Plus’ arguments that no violations occurred, that class members suffered no “injury,” that any alleged violations were not “knowing and intentional,” that a meal or rest period claim cannot support wage statement penalties, and that Plaintiff would not be able to show a penalty in every pay period, as well as the risks associated with Plaintiff’s underlying claims, Plaintiff discounted the maximum exposure by 20% for risk of non-certification, and by an additional 35% for risk of being unsuccessful on the merits or failure to recover the full amount sought, for an estimated realistic exposure of \$480,714. *Id.*

**Waiting Time Penalties: \$574,460**

Based on data provided by Power Plus, there are approximately 368 Class Members who have separated their employment with Power Plus since April 6, 2017. *See* Schmidt Decl., ¶ 16. Using an estimated average waiting time penalty of \$4,730 (\$19.17 \* 8 hours \* 30 days), Plaintiff estimated Power Plus’s maximum potential waiting time penalty exposure as \$1,740,787 (368 \* \$4,730) *Id.* As noted above, however, Power Plus asserts it has strong, good-faith defenses to Plaintiff’s underlying claims, and thus, even if Plaintiff were able to recover on his underlying claims, he would not be able to recover derivative waiting time penalties. *Id.* Power Plus further contends Plaintiff’s meal and rest period claims cannot support a claim for waiting time penalties, as multiple courts have held. *Id.* Moreover, because the waiting time claim is derivative of Plaintiff’s underlying wage claims, Plaintiff would need to overcome Power Plus’ defenses, both as to class certification and the merits, to his underlying claims. And, Power Plus argues, not every former employee suffered every single alleged wrong, and therefore if Plaintiff only certified or prevailed on some but not all of his claims, the size of any potential waiting time claim would be reduced. Based on these defenses, Plaintiff discounted Power Plus’s maximum exposure by 40% for risk of non-certification and by an additional 45% for risk of being unsuccessful on the merits or failure to recover the full amount sought, to arrive at an estimated realistic exposure of \$574,460. *Id.*

///

1           PAGA Civil Penalties: \$711,827

2           Plaintiff estimated a maximum PAGA exposure of \$1,848,900, based on 18,489 pay  
3 periods during the PAGA Period at the \$100 “initial” violation rate under Lab. Code § 2699(f).  
4 Schmidt Decl., ¶ 17; *Amaral*, 163 Cal.App.4th at 1209. However, these penalties derive from  
5 Plaintiff’s underlying claims, each of which Power Plus vigorously disputes. Power Plus further  
6 argues Plaintiff would not be able to show a violation in *every* pay period, and thus his damages  
7 estimate is inflated. *Id.* The PAGA also grants courts discretion to reduce PAGA civil penalties  
8 (Lab. Code § 2699(e)(2)), and Power Plus argues the Court would reduce penalties significantly  
9 given its good-faith defenses, as well as its financial condition. *Id.* Thus, Plaintiff discounted the  
10 maximum figure by 45% for risk of losing on the merits, and by an additional 30% for risk of the  
11 Court reducing penalties, to arrive at an estimated exposure of \$711,827. *Id.*; *see also Thurman*,  
12 203 Cal.App.4th at 1135-36 (affirming reduction of PAGA penalties); *Fleming*, 2011 WL 7563047  
13 at \*4 (reducing PAGA penalties by over 82%); *Carrington*, 30 Cal.App.5th at 529 (affirming  
14 PAGA penalty of just \$5 per pay period).

15           Using these estimated figures for each of the claims described above, Plaintiff predicts  
16 that a possible recovery for the Settlement Class would be approximately \$4,293,087. Schmidt  
17 Decl., ¶ 18. The proposed recovery to the Settlement Class of \$3,750,000 represents  
18 approximately 87.3% of Plaintiff’s projected potential recovery, while avoiding the further  
19 expense and serious risk of proceeding towards class certification and trial. *Id.* Taking into  
20 account the risk of non-certification, the risk of a failure to prevail on the merits, and the Court’s  
21 power to reduce the civil penalties, the proposed Settlement falls well within the realm of being  
22 fair, reasonable, and adequate. *See e.g., Altamirano v. Shaw Industries, Inc.* (N.D. Cal. 2015)  
23 2015 WL 4512372, at \*9 (preliminarily approving wage and hour class action settlement, stating,  
24 “[a]lthough 15% represents a modest fraction of the hypothetical maximum recovery estimated  
25 by Plaintiff, that figure is sufficient for the Court to grant preliminary approval given the merits  
26 of Plaintiff’s claims.”). Preliminary approval is appropriate since the Settlement will provide  
27 significant monetary relief to Class Members without the uncertainty, delay, and additional  
28 expense of further litigation.

1                                    **v.    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 Pacific*  
4 *Enterprises Securities Litigation* (9th Cir. 1995) 47 F.3d 373, 378. Here, Plaintiff is represented  
5 by competent and experienced counsel who possess extensive experience litigating wage and hour  
6 class actions from both the plaintiff and defense side and have been appointed as class counsel in  
7 numerous cases alleging similar claims. *See* Schmidt Decl., ¶¶ 2-6; Declaration of Paul K. Haines  
8 (“Haines Decl.”), ¶¶ 2-8. Class Counsel, with the help of their expert, conducted an extensive  
9 review of Power Plus’s records produced for mediation as well as relevant policies in effect during  
10 the Class Period and drew on their extensive experience in similar cases to assess the strengths  
11 and weaknesses of Plaintiff’s case. Schmidt Decl., ¶ 19. The Settlement was also reached with  
12 the input and assistance of Francis “Tripper” Ortman, Esq., an experienced and highly respected  
13 neutral wage and hour class action mediator. *Id.*, ¶ 20. This factor strongly supports preliminary  
14 approval of the Settlement. *See Kullar, supra*, 168 Cal.App.4th at 130.

15                                    **2.    The Preliminary Approval Standard is Met**

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

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

22            The proposed Settlement reflects an excellent recovery for the Class Members in light of  
23 the significant risks of litigation. The proposed Settlement will provide substantial compensation  
24 for contested claims and derivative penalties, and the overall average payment of \$3,209.48  
25 greatly exceeds the average payment achieved in other wage and hour class action settlements.<sup>4</sup>  
26

27 <sup>4</sup> *See e.g., Bercea v. AE Retail West*, Case No. 34-2012-00123947 (Sacramento County Super. Ct. May 9,  
28 2012) (average net recovery of approximately \$105); *Ressler v. Federated Department Stores, Inc.*, Case  
No. BC335018 (L.A. County Super. Ct. Jan. 2, 2009) (average net recovery of approximately \$90); and

Thus, Plaintiff submits that the proposed Settlement is within the range of possible approval, such that notice should be provided to the Class Members so they can consider the Settlement. The Court will have the opportunity to again assess the reasonableness of the Settlement after the Class Members have had the opportunity to opt-out or object.

**b. The Settlement Resulted from Serious, Informed, and Non-Collusive Negotiations**

This proposed Settlement is entitled to an initial presumption of fairness (*see Kullar, supra*, 168 Cal.App.4th at 130) as it is the result of the exchange of substantial information, including timekeeping and payroll data which was analyzed by Plaintiff's counsel and an expert with a Ph.D. in economics, arm's length negotiations by counsel; mediation before an experienced wage and hour class action mediator; and additional months of finalizing the terms of the long-form Settlement Agreement. *See Schmidt Decl.*, ¶¶ 19-20, 23. Thus, the proposed settlement is entitled to an initial presumption of fairness. *See Kullar, supra*, 168 Cal.App.4th at 130.

**c. The Settlement is Devoid of Obvious Deficiencies**

The Settlement will provide substantial tangible monetary relief to Class Members. Moreover, the amounts proposed for Plaintiff's enhancement payment, settlement administration costs, attorneys' fees and costs to Class Counsel, and the PAGA payment to the LWDA are all reasonable and appropriate. Because the Settlement is devoid of obvious deficiencies, this final factor supports preliminary approval.

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

The proposed Settlement Class satisfies the criteria for certification of a settlement class under California law because: (1) the individuals in the Settlement Class are so numerous that joinder would be impractical; (2) common questions of law and fact predominate over individual

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*Schiller v. David's Bridal, Inc.*, Case No. 1:10-cv-00616-AWI-SKO, 2012 WL 2117001, at \*17 (E.D. Cal. June 11, 2012) ("Class Members will receive an average of approximately 198.70 . . . [T]his is a substantial recovery where Defendants asserted compelling defenses to liability; Plaintiff also notes several similar actions where the gross recoveries per class member were less than \$90 . . . [T]he Court finds that the results achieved are good").

1 questions such that class certification is the most efficient and desirable way to maintain this  
2 litigation; (3) Plaintiff’s claims are typical of the claims of the absent Class Members; and (4)  
3 Plaintiff and his counsel will fairly and adequately represent the interests of the absent Class  
4 Members. *See* Cal. Code Civ. Proc. § 382.

5 **1. The Proposed Class is Ascertainable and Numerous**

6 A class is “ascertainable” where the members “may be readily identified without  
7 unreasonable expense or time by reference to official [or business] records.” *See Sevidal v. Target*  
8 *Corp.* (2010) 189 Cal.App.4th 905, 919 (alterations in original). Here, the proposed Settlement  
9 Class is defined as all current and former non-exempt employees who worked for Power Plus in  
10 California from April 6, 2016 to July 31, 2021.<sup>5</sup> According to Power Plus’s records, the  
11 Settlement Class consists of approximately 615 individuals, rendering it impracticable to gather  
12 all the Class Members and bring them before the Court. Schmidt Decl., ¶ 20. Thus, the proposed  
13 Settlement Class satisfies the numerosity requirement.

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

15 The focus in a certification dispute is not on the merits of the case, but rather on what  
16 types of questions, “common or individual,” are likely to arise in the action. *See Sav-On Drug*  
17 *Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327. Here, Plaintiff’s claims are predicated  
18 on uniform company policies, principally revolving around Power Plus’s failure to provide all  
19 meal periods and failure to authorize and permit all rest periods. These types of claims are  
20 commonly held to be proper for class certification. *See, e.g., Brinker, supra*, 53 Cal.4th at 1032-  
21 34 (“The theory of liability—that Brinker has a uniform policy, and that that policy...allegedly  
22 violates the law—is by its nature a common question eminently suited for class treatment.”);  
23 *Faulkinbury v. Boyd & Assoc., Inc.* (2013) 216 Cal.App.4th 220, 240 (certifying meal and rest  
24 period claims); *Bradley v. Networkers Int’l, LLC* (2012) 211 Cal.App.4th 1129, 1150 (certifying  
25 meal and rest period claims); *Bluford, supra*, 216 Cal.App.4th at 871 (reversing denial for  
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27 <sup>5</sup> Excluded from the Settlement Class are certain electricians and union laborers who were only  
28 temporarily employed by Power Plus for brief periods of time, and who worked under entirely dissimilar  
conditions and policies as the other non-exempt employees and are therefore not similarly situated for  
purposes of this lawsuit. Schmidt Decl., ¶ 21.

certification of rest period claim).

**3. The Claims of the Named Plaintiff 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.* (1987) 191 Cal.App.3d 1341, 1347. Here, Plaintiff's claims are typical of those held by the members of the proposed Settlement Class. Like other Class Members, Plaintiff was employed by Power Plus in California during the Class Period. *See* Schmidt Decl., ¶ 8; Declaration of Edward Salgado ("Salgado Decl."), ¶¶ 2-6. Plaintiff was not paid all minimum and overtime wages, provided all meal periods and rest periods, furnished with legally compliant wage statements, and/or paid all final wages owed at separation from employment. *Id.* Plaintiff was therefore impacted by the same challenged policies that allegedly injured the Settlement Class as a whole and were subject to the same defenses forwarded by Power Plus as to the Settlement Class and is therefore typical.

**4. Plaintiff and Class Counsel Will Fairly and Adequately Represent the Class**

The adequacy of representation requirement examines conflicts of interest between named parties and the class(es) they seek to represent. *See Capitol People First v. Department of Developmental Services* (2007)155 Cal.App.4th 676, 697. Here, Plaintiff and Class Counsel will adequately represent the Settlement Class, as there are no conflicts between Plaintiff and the Settlement Class he seeks to represent, and Plaintiff possesses claims that are in line with those of the Class. *See McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450 (finding adequacy satisfied where there was no indication that the plaintiff's counsel were not qualified and the named plaintiff had no interests antagonistic to those of the proposed class). Class Counsel also has extensive experience in wage and hour class action litigation. *See* Schmidt Decl., ¶¶ 2-6; Haines Decl., ¶¶ 2-8; Declaration of Alexandra R. McIntosh ("McIntosh Decl."), ¶¶ 2-4.

**C. THE COURT SHOULD ORDER DISTRIBUTION OF THE PROPOSED CLASS NOTICE**

This Court should order distribution of the proposed Class Notice to the Settlement Class by first class mail, postage prepaid, using the last known mailing address information provided

1 by Power Plus. This manner of giving notice is the “best notice practicable” under the  
2 circumstances because it provides “individual notice to all members who can be identified through  
3 reasonable effort.” *See Eisen v. Carlisle and Jacquelin* (1974) 417 U.S. 156, 173. Here, Plaintiff  
4 proposes that the settlement be administered by Simpluris, Inc., an experienced class action  
5 settlement administrator. *See* Declaration of Kimberly Sutherland and attached exhibits. Class  
6 Members’ addresses will be ascertainable through Power Plus’ personnel and payroll records,  
7 which Power Plus will provide to Simpluris within 15 calendar days after preliminary approval  
8 of the Settlement. *See* Settlement § VII.2. To the extent that any notices are returned, Simpluris  
9 will conduct a skip trace to obtain current address information. *Id.* The content of the proposed  
10 Class Notice satisfies California Rule of Court 3.766(d) because it advises putative Class  
11 Members of the nature of the claims, basic contentions and denials of the parties, the key terms  
12 of the Settlement, the uniform 60-day deadline to opt-out or object to the Settlement and the  
13 procedure by which to do so, explains the recovery formula and expected recovery amount for  
14 each Class Member and advises them that they will be bound by the terms of the Settlement if  
15 they do not request exclusion. *See* Settlement, Exhibits 1A-1C (“Notice Packet”). The proposed  
16 Class Notice, which will be mailed in both Spanish and English, will also notify Class Members  
17 of the final approval hearing date and provide the Settlement Class contact information for Class  
18 Counsel and advise Class Members that they may enter an appearance through counsel if they  
19 wish to. *Id.*, Exhibit 1A. This manner of giving notice satisfies California Rule of Court 3.766(e)  
20 as the most reliable and cost-effective method of reaching Class Members.

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

22 Finally, this Court should set a hearing for final approval of the Settlement on a date  
23 appropriately scheduled to follow the deadline by which Class Members must file objections to  
24 the Settlement or opt-out. *See* California Rule of Court 3.769.

25 **V. CONCLUSION**

26 For the foregoing reasons, Plaintiff respectfully requests that the Court preliminarily  
27 approve the proposed Settlement, provisionally certify the Settlement Class, and enter the  
28 proposed order submitted concurrently herewith.

1  
2 Dated: March 17, 2022

Respectfully submitted,  
HAINES LAW GROUP, APC

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4 By:



5 Fletcher W. Schmidt  
6 Attorneys for Plaintiff  
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