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

JACOB CARRILLO, on behalf of himself and all
others similarly situated,

Plaintiff,

vs.

BIKEHUB, a California corporation; BICYCLE
TRANSIT SYSTEMS, INC., a Delaware
Corporation; and DOES 1 through 100,

Defendants.

Case No. 20STCV28879

*[Assigned for all purposes to the
Hon. David S. Cunningham; Dept. SSC-11]*

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

Date: March 23, 2022
Time: 10:00 a.m.
Dept.: SSC-11

Complaint Filed: July 29, 2020
Trial Date: None set

1 PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court,
2 on March 23, 2022, at 10:00 a.m. in Department SSC-11 of the above-entitled Court, located at
3 312 North Spring Street, Los Angeles, California 90012, Plaintiff Jacob Carrillo (“Plaintiff”)
4 individually and on behalf of a class of similarly situated individuals, will and hereby does move
5 this Court for:

- 6 1. Preliminary approval of the proposed class settlement of this lawsuit.
- 7 2. Pursuant to section 382 of the California Code of Civil Procedure, provisional
8 certification of the following Settlement Class defined as follows:
9 All current and former non-exempt or hourly-paid employees who are
10 or were employed by Defendants Bikehub and Bicycle Transit
11 Systems, Inc. in the State of California at any time between July 29,
2016 through the date of preliminary approval of the Settlement (the
“Class Period”).
- 12 3. Preliminary appointment of Plaintiff Jacob Carrillo as Class Representative;
- 13 4. Preliminary appointment of Paul K. Haines, Sean M. Blakely, and Neil M. Larsen of
14 Haines Law Group, APC as Class Counsel;
- 15 5. The scheduling of a hearing to consider whether the Settlement should be finally
16 approved and to permit an incentive payment to Plaintiff, Settlement Administrator
17 costs, and attorneys’ fees and costs to Class Counsel;
- 18 6. Appointment of Phoenix Settlement Administrators as the third-party Settlement
19 Administrator for mailing notices; and
- 20 7. Approval of the proposed Class Notice and an order that it be disseminated to the
21 proposed Settlement Class as provided in the Settlement Agreement.

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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 Paul K. Haines, Sean M. Blakely, Neil M. Larsen, Jodey Lawrence
3 of Phoenix Settlement Administrators, and the exhibits attached thereto, the pleadings and other
4 papers filed in this action, and on any further oral or documentary evidence or argument presented
5 at the time of hearing.

6
7 Respectfully submitted,

8 Dated: March 1, 2022

HAINES LAW GROUP, APC

9
10 By:



Paul K. Haines
Sean M. Blakely
Neil M. Larsen
Attorneys for Plaintiff

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Jacob Carrillo (“Plaintiff”) seeks preliminary approval of a class action
4 settlement (“Settlement”) reached with Defendants Bikehub and Bicycle Transit Systems, Inc.
5 (collectively “Defendants”). The Settlement resolves the class and representative action pending
6 before this Court (the “Action”), in which Plaintiff alleges that Defendants failed to pay all
7 minimum and overtime wages by virtue of its unlawful timekeeping policies and/or practices,
8 failed to provide all legally-compliant meal periods or make meal period premium payments in
9 lieu thereof, failed to authorize and permit all legally-compliant rest periods or make rest period
10 premium payments in lieu thereof, and failed to reimburse necessary business expenses. Plaintiff
11 further alleges that as a result of these violations, Defendants failed to issue accurate itemized
12 wage statements, failed to timely pay all final wages, and are liable for civil penalties under the
13 Labor Code Private Attorneys General Act (“PAGA”).

14 Plaintiff now respectfully requests that this Court preliminarily approve this non-
15 reversionary, common-fund class action settlement,¹ in which Defendants have agreed to pay a
16 Gross Settlement Amount of Three Hundred Seventy-Five Thousand Dollars and Zero Cents
17 (\$375,000.00) to the following Settlement Class:

18 All current and former non-exempt or hourly-paid employees who are
19 or were employed by Defendants Bikehub and Bicycle Transit
20 Systems, Inc. in the State of California at any time between July 29,
21 2016 through the date of preliminary approval of the Settlement (the
22 “Class Period”).

23 The Settlement was only reached after extensive informal discovery, and a full-day
24 mediation with Jeffrey A. Ross, Esq., a well-respected wage and hour class action mediator. Prior
25 to the mediation, Defendants produced timekeeping and payroll records for a sampling of the
26 putative class, as well as applicable documents regarding Defendants’ wage and hour policies,

27 ¹ The Stipulation of Class Action and PAGA Settlement (“Settlement”) is attached to the
28 Declaration of Paul K. Haines as Exhibit A. The proposed Class Notice is attached as Exhibit 1
to the Settlement. All defined terms in this Motion have the same definition as that in the
Settlement.

1 and other information. After extensive research and analysis, including Plaintiff's detailed
2 analysis of Defendants' potential exposure, a full-day mediation was held on December 7, 2021.
3 At the conclusion of mediation, Mr. Ross issued a mediator's proposal to resolve all of the claims
4 alleged in Plaintiff's operative complaint, which both sides ultimately accepted.

5 If the Settlement is approved, Defendants will pay a non-reversionary Gross Settlement
6 Amount of \$375,000.00. After deducting settlement administration costs, Plaintiff's requested
7 incentive payment, payment of PAGA penalties to the Labor and Workforce Development
8 Agency ("LWDA"), and requested attorneys' fees and costs, the remaining Net Settlement
9 Amount ("NSA") will be distributed to all Class Members who do not opt out of the Settlement
10 based on the proportionate number of workweeks worked by each Class Member during the Class
11 Period.

12 Significantly, Class Members do not need to file a claim to reap the financial benefits of
13 the Settlement, as all Class Members will automatically receive a payment unless they
14 affirmatively opt-out. There are approximately 105 Class Members, and the average payment to
15 participating Class Members is projected to be approximately \$1,809.52. This is a favorable result
16 for Class Members, who will be agreeing to a release of only those claims that were asserted in
17 this litigation.

18 The proposed Settlement is within the range of possible approval in light of the significant
19 legal and factual obstacles that Plaintiff faced, the risks and costs of further litigation, and the
20 tangible monetary benefits to be received by Plaintiff and the Settlement Class. For the reasons
21 discussed herein, Plaintiff respectfully requests that this Court grant preliminary approval of the
22 Settlement.

23 **II. SUMMARY OF THE LITIGATION**

24 **A. THE PARTIES AND BRIEF PROCEDURAL HISTORY**

25 Defendants administer bike share programs on behalf of the Bay Area Rapid Transit, Los
26 Angeles County Metropolitan Authority, and the city of Sacramento, California. See Declaration
27 of Paul K. Haines ("Haines Decl."), ¶ 9. Plaintiff worked for Defendants as a non-exempt
28 employee from approximately January 2019 until January 2020.

On July 29, 2020, Plaintiff filed his Class Action Complaint in Los Angeles County Superior Court alleging causes of action for: (1) failure to reimburse necessary business expenses; (2) meal period violations; (3) wage statement violations; (4) waiting time penalties; and (5) unfair competition in violation of California Business & Professions Code § 17200, *et seq.* Haines Decl., ¶ 10. On October 5, 2020, Plaintiff filed his First Amended Class and Representative Action Complaint (“FAC”) to add a cause of action for civil penalties under the Private Attorneys General Act (“PAGA”). *Id.* On February 16, 2022, the Parties stipulated for leave to file a Second Amended Class and Representative Action Complaint (“SAC”) to add causes of action for: (1) minimum wage violations; (2) overtime violations; and (3) rest period violations. *Id.*

B. PLAINTIFF’S CLAIMS AND DEFENDANTS’ DEFENSES

1. Meal Period Claims

Plaintiff alleges that Defendants failed to provide legally-compliant off-duty first meal periods. Haines Decl., ¶ 15. Specifically, Plaintiff alleges that from July 29, 2016 to January 1, 2018, Class Members were required to take on-duty meal periods and did not record their meal periods. *Id.* Plaintiff contends that Defendants did not maintain on-duty meal period agreements, and that Defendants could not lawfully utilize an on-duty meal period agreement given the nature of the work performed by Class Members. *Id.* Furthermore, beginning in January 2018, Defendants required that Class Members record their meal periods and to take off-duty meal periods when they worked at least 5.0 hours; however, Plaintiff’s analysis of timekeeping records produced by Defendants revealed that meal periods were occasionally “late” and/or “short.” *Id.* Plaintiff further alleges that Defendants failed to provide legally-compliant second meal periods on shifts in excess of 10.0 hours. *Id.*, ¶ 16.

However, Defendants argue that from July 29, 2016 to January 1, 2018, Class Members were always provided with an opportunity to take an off-duty meal period prior to the fifth hour of work, but as an employee benefit, paid Class Members an extra 30 minutes per shift for paid “lunches”. Haines Decl., ¶ 15. Defendants also argue that under *Brinker* they are only required to “provide” the opportunity to take meal periods, not “ensure” meal periods are taken, and that, as described above, it has always done so, and any non-compliant first meal periods in the

timekeeping records were the result of employee choice. *Id.*, ¶ 15; *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004, 1038 (2012) (rejecting “ensure” standard and holding employers only have to “provide” employees the opportunity to take meal periods). Defendants further contend that Plaintiff’s first and second meal period claims are not suited for class certification, since individual inquiries would be needed to assess which employees took non-compliant meal periods or missed meal periods, how many meal periods were non-compliant or missed, and the reasons why a particular employee did not take a compliant meal period on a particular shift. Haines Decl., ¶¶ 15-16. With respect to Plaintiff’s second meal period claim, Defendants contend that Class Members voluntarily waived their second meal periods on shifts in excess of 10.0 hours but less than 12.0 hours, as they are entitled to do pursuant to Labor Code § 512. *Id.*, 16. Finally, Defendants represented that it paid approximately \$34,592 in meal period premium wages during the Class Period, furthering its argument that it paid meal period premiums for any non-compliant meal periods. *Id.*, ¶15.

2. Unpaid Overtime – Failure to Include All Remuneration Into Regular Rate of Pay

Plaintiff also alleges that Defendants underpaid Class Members’ overtime wages due to its failure to include all remuneration in the regular rate of pay for overtime purposes. Haines Decl., ¶ 17. Specifically, Plaintiff alleges that from July 29, 2016 to January 1, 2018, Defendants provided Class Members with gratuitous ‘paid’ off-duty meal periods, but did not include these gratuitous payments into Class Members’ regular rate of pay for overtime purposes, and thereby miscalculated and underpaid Class Members’ overtime wages. *Id.* Defendants contend that they properly included all forms of remuneration when calculating the regular rate of pay, and therefore, paid all overtime wages to Class Members. *Id.*

3. Failure to Reimburse Necessary Business Expenses

Plaintiff also contends that Defendants required Class Members to use their personal cellphones for work-related purposes, including to check their daily work schedules, communicate with dispatchers, and to clock in and out of their work shifts, however, Defendants did not reimburse Class Members for these expenses. Haines Decl., ¶ 18.

Defendants argue that this claim would require individual inquiries into whether Class Members actually used their personal cellular phones for work purposes, how much expense they incurred, whether they submitted a request for reimbursement, and the reasonableness of that expense, thus precluding class certification. Haines Decl., ¶ 18; *see also*, e.g., *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 568 (2007) (“In calculating the reimbursement amount due under section 2802, the employer may consider not only the actual expenses that the employee incurred, but also whether each of those expenses was ‘necessary,’ which in turn depends on the reasonableness of the employee’s choices”). Moreover, Defendants represented that they provided company cell phones and tablets for Class Members to use starting in December 2019, thereby cutting off its potential liability for a significant portion of the Class Period. Haines Decl., ¶ 18. Finally, Defendants represented that it reimbursed non-exempt supervisory employees for cell phone expenses in the amount of \$20,035 during the Class Period. *Id.*

4. Rest Period Claims

Plaintiff alleges that due to work demands imposed by Defendants, Defendants failed to authorize and permit all legally-compliant off-duty rest periods throughout the Class Period. Haines Decl., ¶ 19. However, Defendants argue that they have always maintained and enforced lawful rest period policies and practices during the Class Period. *Id.* Defendants also maintain that any failure to take rest periods was the result of employee choice, and that it is not required to police rest periods. *Id.* Finally, Defendants contend that Plaintiff’s rest period claim is not amenable to class treatment as individualized inquiries would be required to determine which employees failed to take rest periods, and the reasons why each employee failed to take a rest period on a particular shift. *Id.* These considerations are particularly present with respect to rest periods, Defendants argue, as rest periods are not – and need not be – recorded. *Id.*

5. Unpaid Wages – Off-The-Clock Work

Plaintiff also alleges that Defendants’ timekeeping policies and/or practices resulted in an underpayment of wages, in that Class Members were required to perform work off-the-clock work. Haines Decl., ¶ 20.

Defendants contend that they maintained lawful timekeeping policies and/or practices,

1 expressly prohibited off-the-clock work, and compensated employees for all hours actually
2 worked. *Id.* Defendants also assert that this claim is not amenable to class certification as
3 individualized inquiries would be required to determine whether each employee performed off-
4 the-clock work on a particular shift, and whether Defendants were aware that such work was
5 being performed. *Id.*

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

7 As a result of the alleged unpaid wages and unpaid meal and rest period premiums
8 discussed above, Plaintiff asserts that Defendants failed to comply with its final payment and
9 wage statement obligations, in violation of Labor Code §§ 203 and 226, respectively. Haines
10 Decl., ¶¶ 21-22. Finally, Plaintiff seeks civil penalties under the PAGA based on the
11 aforementioned claims. Haines Decl., ¶ 23.

12 However, Defendants argue that they possess strong, good faith defenses to Plaintiff's
13 underlying claims, thus precluding recovery of waiting time penalties, which are only available
14 for the "willful" failure to pay wages. *Id.*, ¶ 21. Defendants further contend that Plaintiff's meal
15 and rest period claims cannot support a claim for waiting time or wage statement penalties, as a
16 Court of Appeal recently held in *Naranjo v. Spectrum Security Servs., Inc.*, 40 Cal.App.5th. 444,
17 473-75 (2019) (review granted Jan. 2, 2020). Haines Decl., ¶ 21. Moreover, because the waiting
18 time claim is derivative of Plaintiff's underlying wage claims, Plaintiff would need to overcome
19 Defendants' defenses, both as to class certification and as to the merits of his underlying claims.
20 *Id.*, ¶ 21.

21 In addition, Defendants argue that any alleged wage statement violations were not
22 "knowing and intentional," and that Plaintiff cannot show he or other employees "suffer[ed]
23 injury" due to alleged wage statement violations, as required to recover penalties under Section
24 226(e). Haines Decl., ¶ 22. Further, Defendants contend that Class Members' wage statements
25 always accurately reflected hours worked and amounts paid as well as all other required
26 information, precluding liability for wage statement penalties under *Maldonado v. Epsilon*
27 *Plastics, Inc.*, 22 Cal.App.5th 1308, 1336-37 (2018) (agreeing with employer's "commonsense
28 position that the pay stubs were accurate in that they correctly reflected the hours worked and the

1 pay received...The purpose of section 226 is to *document* the *paid wages* to ensure the employee
2 is fully informed regarding the calculation of those wages.”) (italics in original). Haines Decl., ¶
3 22. Defendants further argue the same defenses to class certification as to Plaintiff’s underlying
4 claims apply equally to his derivative waiting time and wage statement claims. Haines Decl., ¶¶
5 21-22.

6 Finally, Defendants assert that the PAGA claim fails because Plaintiff’s underlying claims
7 fail. Haines Decl., ¶ 23; *see also Price v. Starbucks Corp.*, 192 Cal.App.4th 1136, 1147 (2011)
8 (“Because the underlying causes of action fail, the derivative UCL and PAGA claims also fail.”).
9 Additionally, Defendants maintain that, given its good-faith defenses, the Court would
10 substantially reduce any PAGA civil penalties if it were to find Defendants liable for any of
11 Plaintiff’s claims. Haines Decl., ¶ 23; *see also* Lab. Code § 2699(e)(2) (authorizing reduction in
12 PAGA penalties in court’s discretion); *Thurman v. Bayshore Transit Mgmt., Inc.*, 203
13 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties) (*disapproved on other*
14 *grounds in ZB, N.A. v. Sup. Ct.*, 8 Cal.5th 175, FN8 (2019)); *Fleming v. Covidien, Inc.*, No. ED-
15 CV-10-01487-RGK (OPx), 2011 WL 7563047 at *4 (C.D. Cal. Aug. 12, 2011) (reducing PAGA
16 penalties by over 82%); *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018)
17 (affirming PAGA civil penalty of just \$5 per pay period where employer made “good faith
18 attempts” to comply with the law).

19 **C. DISCOVERY AND MEDIATION**

20 Prior to mediation, the Parties engaged in significant informal discovery, including
21 Defendants’ production of an approximate 15% random sampling of timekeeping and payroll data
22 for the putative class, all relevant wage and hour written policies, and other relevant data and
23 information. Haines Decl., ¶ 11. Defendants also produced a “class list” with Class Members’
24 hire and termination dates (if applicable). *Id.* Plaintiff conducted a comprehensive analysis and
25 extrapolation of the timekeeping and payroll data to calculate Defendants’ potential exposure for
26 each of Plaintiff’s claims. *Id.* This discovery allowed the Parties to assess the merits and value of
27 Plaintiff’s claims, the chances of certification of Plaintiff’s claims, and Defendants’ potential
28 defenses. *Id.*

On December 7, 2021, the Parties participated in a full-day mediation with Jeffrey A. Ross, Esq., a well-respected wage and hour class action mediator. Haines Decl., ¶ 12. During mediation, the Parties vigorously debated their opposing legal positions, the likelihood of certification of Plaintiff's claims, and the legal basis for the claims and defenses. *Id.* At the conclusion of mediation, Mr. Ross issued a mediator's proposal for a class-wide settlement, which was ultimately accepted by all Parties and documented in a Memorandum of Understanding ("MOU"). *Id.* During the months that followed, the Parties negotiated and finalized the long-form Settlement Agreement now before this Court. *Id.*

III. THE PROPOSED SETTLEMENT

A. ESSENTIAL TERMS OF THE SETTLEMENT

If the Court preliminarily approves the Settlement, Defendants will pay a Gross Settlement Amount ("GSA") of \$375,000.00. *See* Settlement, ¶¶ 16, 52. Significantly, this Settlement is non-reversionary, and no Class Member will have to submit a claim form to receive an individual Settlement Award. *Id.*, at ¶¶ 43, 61. Each Class Member will automatically receive a Settlement Award unless he or she affirmatively opts out of the Settlement. *Id.*

The monetary terms of the Settlement are summarized below:

• Gross Settlement Amount ("GSA"):	\$375,000.00
• Minus Court-approved attorneys' fees (up to 1/3):	\$125,000.00
• Minus Court-approved verified costs (up to):	\$30,000.00
• Minus Court-approved Incentive Payment:	\$5,000.00
• Minus PAGA Payment to LWDA:	\$15,000.00
• <u>Minus estimated settlement administration costs (up to):</u>	<u>\$10,000.00</u>
Net Settlement Amount ("NSA"):	\$190,000.00

1. The Settlement Provides for Reasonable Monetary Payments

After deducting amounts for the Court-approved attorneys' fees and costs, Class Representative incentive payment to Plaintiff, payment to the LWDA, and Settlement Administrator costs, the Settlement requires Defendants to pay a Net Settlement Amount ("NSA") of at least One Hundred Ninety Thousand Dollars and Zero Cents (\$190,000.00) to all Class Members who do not timely opt out. *See* Settlement, ¶ 52. The NSA shall be distributed to all participating Class Members based on the proportionate number of workweeks each participating Class Member worked during the Class Period. Settlement, ¶ 53(a). Finally, Five Thousand

Dollars and Zero Cents (\$5,000.00) shall be designated as the 25% share of the PAGA Civil Penalties designated for distribution to the PAGA Members and shall be distributed to Class Members (regardless of whether they opt-out) proportionately based on the number of workweeks worked at any time from July 30, 2019 through the end of the Class Period (“PAGA Period”). Settlement, ¶¶ 23, 53(b).

According to Defendants, there are approximately 105 total Class Members. Haines Decl., ¶ 14. Therefore, the average Settlement Award is projected to be approximately \$1,809.52. *Id.* Class Members will have sixty (60) calendar days from the mailing of the Notice Packet to opt-out or object to the Settlement, thereby providing ample time to review the Class Notice without unduly delaying the Settlement. *See* Settlement, ¶¶ 33-34, 61, 64. Those Class Members who do not opt-out of the Settlement will be bound by its terms and will release all claims against Defendants included within the Settlement. *Id.*, at ¶ 31. In addition, all Class Members (whether or not they opt out) who worked for Defendants during the PAGA Period will release all related PAGA claims against Defendants during the PAGA Period (“PAGA Released Claims”). *Id.* at ¶¶ 24, 51. Plaintiff has also agreed to a general release of claims, including a waiver of Cal. Civil Code § 1542. *Id.*, at ¶ 71.

Settlement Award checks will be valid for 180 days after issuance. *See* Settlement, ¶ 66. After 180 days, funds from uncashed checks shall be distributed to the Controller of the State of California to be held pursuant to the Unclaimed Property Law, California Civil Code §1500, *et seq. Id.*

Lastly, Defendants’ share of employer-side payroll taxes will be paid by Defendants separate, and in addition to, the GSA. *See* Settlement, at ¶¶ 16, 43, 46, 68.

2. Attorneys’ Fees and Costs, Incentive Payment, and LWDA Payment

Plaintiff will separately apply for a Class Representative Incentive Payment at the time of seeking final approval of the proposed Settlement in the amount of \$5,000.00, for his services to the Settlement Class. *See* Settlement, ¶ 49. “[I]ncentive awards are fairly typical in class action cases . . . and are intended to compensate class representatives for work done on behalf of the class [and] to make up for financial or reputational risk undertaken in bringing the action.” *In re*

1 *Cellphone Fee Termination Cases*, 186 Cal.App.4th 1380, 1393-94 (2010). As will be fully
2 briefed at the time of final approval, Plaintiff’s requested incentive payment is intended to
3 recognize the time and effort Plaintiff expended on behalf of the Settlement Class, including
4 providing substantial factual information and documents to Class Counsel, attending multiple
5 meetings with Class Counsel to discuss the claims and theories at issue in the litigation, actively
6 participating in the prosecution of his claims, as well as the significant risks Plaintiff undertook
7 by agreeing to serve as the named Plaintiff in this case, and the fact that Plaintiff agreed to a
8 general release of all claims subject to a waiver of Civil Code § 1542. *See* Settlement, ¶ 71.

9 Class Counsel will also apply for an attorneys’ fees award of one-third of the Gross
10 Settlement Amount, which is currently estimated to be \$125,000.00, and up to \$30,000.00 in
11 verified costs reimbursement. *See* Settlement, ¶¶ 48, 52; *see also* Haines Decl., ¶ 25. Plaintiff
12 submits that the requested fee is fair compensation for undertaking complex, risky, expensive,
13 and time-consuming litigation on a purely contingent fee basis. Haines Decl., ¶ 25. Class Counsel
14 has incurred substantial attorneys’ fees conducting pre-filing investigation, analyzing Plaintiff’s
15 claims, conducting legal research, engaging in informal discovery, analyzing Class Members’
16 payroll and timekeeping records, interviewing Class Members regarding their work experiences
17 with Defendants, conducting a detailed statistical analysis and extrapolation of the timekeeping
18 and payroll records Defendants produced in order to develop a comprehensive damages model,
19 preparing for and attending mediation, negotiating and preparing the long-form Settlement
20 Agreement, preparing this Motion, and otherwise litigating the case. *Id.* Class Counsel expects to
21 expend additional attorney time in attending the hearing on this Motion, overseeing the Notice
22 process and fielding questions from Class Members, preparing the final approval papers, and
23 attending the Final Approval hearing. *Id.*

24 California courts recognize an appropriate method for awarding attorneys’ fees in class
25 actions is to award a percentage of the “common fund” created as a result of a settlement. *See*
26 *e.g., Laffitte v. Robert Half Int’l, Inc.*, 1 Cal.5th 480, 506 (2016) (holding “the percentage of fund
27 method survives in California class action cases”). Class Counsel’s request for fees of one-third
28 of the Gross Settlement Amount is well within the range of reasonableness, and indeed is

1 considered the typical rate for common fund settlements. Historically, courts have awarded
2 percentage fees in the range of 20% to 50%, depending on the circumstances of the case. *See* 4
3 Newberg on Class Actions § 14.6 (4th Ed. 2013).

4 Class Counsel submit that their request for attorneys' fees is reasonable when viewed as
5 an overall percentage of the Settlement and in light of the substantial risks and significant work
6 undertaken, the results obtained, and the efficiency with which the litigation has been conducted.
7 Should the Court grant preliminary approval, Class Counsel will seek an award of attorneys' fees
8 and verified costs upon seeking final approval.

9 Additionally, the Parties have agreed to designate \$20,000.00 of the GSA as PAGA Civil
10 Penalties, of which \$15,000.00 (75%) will be paid to the LWDA, with the remaining \$5,000.00
11 (25%) for distribution to the Settlement Class, as the PAGA requires such penalties to be allocated
12 per Labor Code § 2699(i). *See* Settlement, ¶¶ 22, 51. Plaintiff submits this allocation to the LWDA
13 for PAGA civil penalties is appropriate. *See, e.g., Chu v. Wells Fargo Investments, LLC* (N.D.
14 Cal. 2011) Case No. C 05-4526 MHP, 2011 WL 672645 at *1 (approving PAGA payment of
15 \$7,500 to LWDA out of \$6.9 million common-fund settlement); *Lazarin v. Pro Unlimited, Inc.*
16 (N.D. Cal. 2013) Case No. C11-03609 HRL, 2013 WL 3541217 (approving PAGA payment of
17 \$7,500 to LWDA out of \$1.25 million common-fund settlement).

18 **IV. ARGUMENT**

19 **A. PRELIMINARY APPROVAL IS WARRANTED**

20 California Rule of Court 3.769 conditions settlement of a class action on court approval,
21 which is generally evaluated under the federal standards applicable under Rule 23 of the Federal
22 Rules of Civil Procedure. *See Reed v. United Teachers Los Angeles*, 208 Cal.App.4th 322, 337
23 (2012) (Rule 3.769 requires trial court to determine "that the settlement is fair, reasonable and
24 adequate to all concerned"); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)
25 (Rule 23(e) requires the trial court to determine "whether a proposed settlement is fundamentally
26 fair, adequate, and reasonable"). Settlement is the preferred means of dispute resolution,
27 particularly in complex class action litigation. *See In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101
28 (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. *See e.g., Hanlon, supra*, 150 F.3d at 1027. There is an initial presumption of fairness where, as here, the Settlement was negotiated at arm’s-length by class counsel and with the assistance of an experienced wage and hour class action mediator. *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, the Court should consider several factors, including: “the strength of Plaintiff’s 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, Inc.*, 91 Cal.App.4th at 245 (2001). As discussed below, the proposed Settlement is fair, adequate, and reasonable in light of the overall balance of factors in this case.

a. The Strength of Plaintiff’s Case

Although Plaintiff steadfastly maintains that his claims are meritorious, Plaintiff acknowledges that there were substantial risks and uncertainty in proceeding with litigation. As described above in section II.B., *supra*, Defendants presented multiple defenses to Plaintiff’s claims, both on the merits and with respect to class certification. Thus, while Plaintiff was prepared to litigate these claims through class certification, and ultimately trial, success was far from certain.

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

Although the Parties engaged in significant informal discovery in advance of mediation, the Parties still had substantial discovery to complete in formal litigation had the matter not settled. Haines Decl., ¶ 26. This would have required expenditure of substantial time and resources by both Parties that would have very likely spanned several years. *Id.* Even if Plaintiff were to certify the classes, the Parties would incur considerably more attorney’s fees and costs through a possible decertification motion, trial, and possible appeal. *Id.* This Settlement avoids

those risks and the accompanying expense. *Id.*

c. Risk of Maintaining Class Action Status

Plaintiff had not yet filed his motion for class certification, and as such, the extent to which Plaintiff's proposed classes were certifiable is somewhat speculative. Absent settlement, there was a risk that there would not be a certified class at the time of trial, or if there were, it would consist of a significantly smaller group of employees than the proposed Settlement Class (either due to a narrowing of the class definition in a Court order on a contested motion for class certification, or through settlement agreements entered into by Defendants with individual class Members by way of *Pick-Up-Stix* type settlement agreements²) and the expected recovery could be significantly reduced, given the settlement amounts that are typically offered through the *Pick-Up-Stix* process. Thus, this factor, too, supports preliminary approval of the Settlement.

d. Amount Offered in Settlement Given Realistic Value of Claims

The Settlement provides a positive recovery for the Settlement Class in the face of disputed claims. Plaintiff conducted a detailed analysis of the underpaid wages due to Defendants' alleged regular rate miscalculations, meal and rest period premiums owing, unpaid wages, unreimbursed business expenses, wage statement penalties, waiting time penalties, and civil penalties under the PAGA. The results of the damages analysis are discussed below:

First Meal Period Violations: \$114,234

Plaintiff alleges that Defendants failed to provide legally-compliant off-duty first meal periods. Haines Decl., ¶ 15. Plaintiff's review and analysis of timekeeping records produced by Defendants revealed that 11% of meal period eligible shifts had a non-compliant first meal period, and that there were approximately 11,772 shifts in excess of 6.0 hours with a non-compliant meal period. *Id.* Giving credit to the \$34,592 in meal period premiums Defendants represented they

² In *Chindarah v. Pick Up Stix, Inc.*, 171 Cal.App.4th 796 (2009), the Court of Appeal held an employer may enter into pre-certification settlement agreements with individual putative class members in which the putative class members release claims for past unpaid wages and penalties in exchange for consideration. The Court further held that such settlements could preclude those individual employees from recovery in class action litigation against the employer for the same wage claims.

1 paid to Class Members, Plaintiff calculated Defendants' maximum exposure for this claim at
2 approximately \$203,084 (11,772 non-compliant meal periods * \$20.19 average premium) -
3 \$34,592. *Id.*

4 However, as noted above, Defendants argue that from July 29, 2016 to January 1, 2018,
5 Class Members were always provided with an opportunity to take an off-duty meal period prior
6 to the fifth hour of work, but as an employee benefit, paid Class Members an extra 30 minutes
7 per shift for paid "lunches". Haines Decl., ¶ 15. Defendants also argue that under *Brinker* they
8 are only required to "provide" the opportunity to take meal periods, not "ensure" meal periods
9 are taken, and that, as described above, it has always done so, and any non-compliant first meal
10 periods in the timekeeping records were the result of employee choice. *Id.* Defendants further
11 contend that the first meal period claim is not suited for class certification, since individual
12 inquiries would be needed to assess which employees took non-compliant meal periods or missed
13 meal periods, how many meal periods were non-compliant or missed, and the reasons why a
14 particular employee did not take a compliant meal period on a particular shift. *Id.* In light of
15 Defendants' defenses and arguments, Plaintiff discounted Defendants' maximum exposure by
16 25% for the risk of non-certification, and an additional 25% to account for Defendants' defenses
17 on the merits, to arrive at an estimated total of approximately \$114,234. *Id.*

18 Second Meal Period Violations: \$9,937

19 Plaintiff further alleges that Defendants failed to provide legally-compliant second meal
20 periods on shifts in excess of 10.0 hours. Haines Decl., ¶ 16. Based on Plaintiff's review and
21 analysis of Defendants' timekeeping records, Plaintiff calculated Defendants' maximum
22 exposure for this claim at approximately \$17,666 (875 second meal period violations * \$20.19
23 average premium). *Id.*

24 However, Defendants argue that under *Brinker* it is only required to "provide" the
25 opportunity to take second meal periods, and that any missed second meal periods were the result
26 of lawful employee waiver or choice. Haines Decl., ¶ 16. Defendants also contend that Class
27 Members voluntarily waived their second meal periods on shifts in excess of 10.0 hours but less
28 than 12.0 hours, as they are entitled to do pursuant to Labor Code § 512. *Id.* Defendants also

1 contend that class certification would not be proper as individualized inquiries will be required to
2 determine why each second meal period was missed, and whether there was a valid waiver. *Id.* In
3 light of these arguments and defenses, Plaintiff discounted the maximum amount that the class
4 could potentially recover for second meal periods by 25% for a risk of non-certification, and an
5 additional 25% for a risk of losing on the merits to arrive at an estimated exposure amount of
6 approximately \$9,937. *Id.*

7 Unpaid Overtime – Failure to Include All Remuneration Into Regular Rate of Pay: **\$4,919**

8 Plaintiff alleges that Defendants underpaid Class Members’ overtime wages due to its
9 failure to include all remuneration in the regular rate of pay for overtime purposes. Haines Decl.,
10 ¶ 17. Specifically, Plaintiff alleges that from July 29, 2016 to January 1, 2018, Defendants
11 provided Class Members with gratuitous ‘paid’ off-duty meal periods, but did not include these
12 gratuitous payments into Class Members’ regular rate of pay for overtime purposes, and thereby
13 miscalculated and underpaid Class Members’ overtime wages. *Id.* Based upon Plaintiff’s analysis
14 and extrapolation of timekeeping and payroll data provided by Defendants, Plaintiff calculated
15 Defendants’ maximum exposure for this claim at approximately \$6,430. *Id.*

16 Defendants contend that they properly included all forms of remuneration when
17 calculating the regular rate of pay, and therefore, paid all overtime wages to Class Members.
18 Haines Decl., ¶ 17. In light of these defenses, Plaintiff discounted the maximum amount that the
19 class could potentially recover by 10% for a risk of non-certification, and an additional 15% for
20 a risk of losing on the merits, to arrive at an estimated exposure amount of approximately \$4,919.
21 *Id.*

22 Failure to Reimburse Necessary Business Expenses: **\$8,948**

23 Plaintiff contends that Defendants required Class Members to use their personal
24 cellphones for work-related purposes, but did not reimburse Class Members for these expenses.
25 Haines Decl., ¶ 18. Plaintiff’s Counsel estimated that Class Members’ expended \$25 per month
26 during the Class Period in reasonable work-related cell-phone usage. *Id.* Defendants represented
27 that it reimbursed non-exempt supervisory employees for cell phone expenses in the amount of
28 \$20,035 during the Class Period. *Id.* Giving credit to the reimbursements Defendants represented

they made, Plaintiff calculated Defendants’ maximum exposure for this claim at approximately \$35,790 ((\$25.00 per month * 2,233 aggregate months in Class Period) - \$20,035). *Id.*

However, Defendants argue that this claim would require individual inquiries into whether Class Members actually used their personal cellular phones for work purposes, how much expense they incurred, whether they submitted a request for reimbursement, and the reasonableness of that expense, thus precluding class certification. Haines Decl., ¶ 18; *see also*, e.g., *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 568 (2007) (“In calculating the reimbursement amount due under section 2802, the employer may consider not only the actual expenses that the employee incurred, but also whether each of those expenses was ‘necessary,’ which in turn depends on the reasonableness of the employee’s choices”). Moreover, Defendants represented that they provided company cell phones and tablets for Class Members to use at work starting on December 2019, thereby cutting off any potential liability for this claim. Haines Decl., ¶ 18. In light of Defendants’ arguments and defenses, Plaintiff discounted the maximum amount that the class could potentially recover by 50% for a risk of non-certification, and an additional 50% for risk of losing on the merits or failure to recover the full amount, to arrive at a projected exposure of \$8,948. *Id.*

Rest Period Violations: \$88,715

Plaintiff alleges that Defendants failed to authorize and permit all legally-compliant rest periods throughout the Class Period. Haines Decl., ¶ 19. Based on Plaintiff’s analysis and extrapolation of the timekeeping records provided by Defendants, there were approximately 43,940 rest period eligible shifts worked during the Class Period. *Id.* Based on interviews with Class Members, Plaintiff estimates there was a 50% violation rate with respect to rest periods, and therefore, Plaintiff calculated a maximum estimated exposure of approximately \$443,574 (21,970 non-compliant rest periods * \$20.19 average premium) for Plaintiff’s rest period claim. *Id.*

Defendants argue that they have always maintained and enforced lawful rest period policies and practices during the Class Period. Haines Decl., ¶ 19. Defendants also maintain that any failure to take rest periods was the result of employee choice, and that it is not required to

1 police rest periods. *Id.* Finally, Defendants contend that Plaintiff's rest period claim is not
2 amenable to class treatment as individualized inquiries would be required to determine which
3 employees failed to take rest periods, and the reasons why each employee failed to take a rest
4 period on a particular shift. *Id.* These considerations are particularly present with respect to rest
5 periods, Defendants argues, as rest periods are not – and need not be – recorded. *Id.* In light of
6 these defenses, Plaintiff assessed a 60% risk of non-certification, and discounted an additional
7 50% for risk of being unsuccessful on the merits or failure to recover the full amount sought, to
8 arrive at a projected exposure of \$88,715. *Id.*

9 Unpaid Wages – Off-The-Clock Work: \$18,481

10 Plaintiff also alleges that Defendants' timekeeping policies and/or practices resulted in an
11 underpayment of wages, in that Class Members, at times, were required to perform work off-the-
12 clock work. Haines Decl., ¶ 20. Based on interviews with Class Members and an analysis of
13 Defendants' timekeeping and payroll data, Plaintiff estimates that Class Members were underpaid
14 by approximately 10 minutes per shift, which results in approximately 7,323 unpaid hours during
15 the Class Period. *Id.* Accordingly, Plaintiff calculated Defendants' maximum exposure for this
16 claim at \$147,851 (7,323 unpaid hours * \$20.19 average rate of pay). *Id.*

17 However, Defendants contend that they maintained lawful timekeeping policies and/or
18 practices, expressly prohibited off-the-clock work, and compensated employees for all hours
19 actually worked. *Id.* Defendants also assert that this claim is not amenable to class certification
20 as individualized inquiries would be required to determine whether each employee performed off-
21 the-clock work on a particular shift, and whether Defendants were aware that such work was
22 being performed. *Id.* In light of Defendants' arguments and defenses, Plaintiff attributed a 75%
23 chance that this claim would not be certified, and an additional 50% chance that he would not
24 succeed on the merits, for a projected exposure of \$18,481. *Id.*

25 Waiting Time Penalties: \$82,867

26 Based on data provided by Defendants, there are approximately 57 Class Members who
27 have separated their employment with Defendants since July 29, 2017. Haines Decl., ¶ 21.
28 Therefore, and based on an estimated average waiting time penalty of \$4,846 (\$20.19/hr. * 8

hours per day * 30 days), Plaintiff estimated Defendants' maximum waiting time penalty exposure at approximately \$276,222 (57 former employees * \$4,846 penalty). *Id.* However, Defendants argue that they possess strong, good faith defenses to Plaintiff's underlying claims, thus precluding recovery of waiting time penalties, which are only available for the "willful" failure to pay wages. *Id.* Defendants further contend that Plaintiff's meal and rest period claims cannot support waiting time or wage statement. *Id.* Moreover, because the waiting time claim is derivative of Plaintiff's underlying wage claims, Plaintiff would need to overcome Defendants' defenses, both as to class certification and as to the merits of his underlying claims. *Id.* Based on these defenses, Plaintiff discounted Defendants' maximum exposure by 40% for risk of non-certification, and an additional 50% for risk of being unsuccessful on the merits or failure to recover the full amount sought, to arrive at an estimated total of approximately \$82,867. *Id.*

Wage Statement Penalties: \$34,113

Plaintiff further alleges that Defendants furnished inaccurate wage statements in violation of Labor Code § 226. Haines Decl., ¶ 22. Plaintiff's analysis reflected that there were approximately 2,729 pay periods worked by Class Members within the liability period applicable to Plaintiff's wage statement claim. *Id.* In calculating Defendants' exposure, Plaintiff gave Defendants the benefit of assuming Plaintiff could only obtain the "initial" wage statement violation rate of \$50 per pay period, for a total of approximately \$136,450 (2,729 pay periods * \$50 "initial" penalty) in potential penalties. *Id.* However, Defendants argue that any alleged wage statement violations were not "knowing and intentional," that Plaintiff cannot show he or other employees "suffer[ed] injury" to recover penalties under Section 226(e), that wage statement penalties are not recoverable for meal and rest period violations, that wage statements always included the actual amounts paid to employees, and that this claim is not amenable for class certification for the same reasons as Plaintiff's underlying claims. *Id.* Defendants further argues the same defenses to class certification as to Plaintiff's underlying claims apply equally to his derivative wage statement claim. *Id.* Thus, Plaintiff discounted the maximal exposure by 50% for risk of non-certification, and by an additional 50% for risk of being unsuccessful on the merits, to arrive at an estimated realistic total of approximately \$34,113. *Id.*

1 **PAGA Penalties: \$38,206**

2 Plaintiff's analysis reflected there were approximately 2,729 pay periods worked in the
3 PAGA Period (i.e., July 29, 2019 through the end of the Class Period). Haines Decl., ¶ 23.
4 Therefore, Plaintiff estimated a maximum total PAGA exposure of approximately \$272,900
5 (2,729 pay periods * \$100 "initial" penalty). *Id.*; see also *Amaral v. Cintas Corp. No. 2*, 163
6 Cal.App.4th 1157, 1207 (2008) (finding "initial" violation rate applies until employer is notified
7 that it is violating a Labor Code provision).

8 However, these penalties derive from the underlying wage and hour violations discussed
9 above, which Defendants vigorously disputes. Haines Decl., ¶ 23; see e.g., *Green v. Lawrence*
10 *Service Co.*, 2013 WL 3907506, *5, n.5 (C.D. Cal. 2013) (explaining that a PAGA claim's success
11 was determined by the merits of its underlying claims). Defendants also assert that, given its good
12 faith defenses, this Court would exercise its discretion to substantially reduce any PAGA penalties
13 if it were to find Defendants liable for any of Plaintiff's claims. Haines Decl., ¶ 23; see also
14 *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 1135 (2012) (affirming
15 reduction of PAGA penalties); *Fleming v. Covidien Inc.*, Case No. ED CV10-01487 RGK (OPx)
16 2011 WL 7563047, at *4 (C.D. Cal. 2011) (reducing PAGA penalties from \$2.8 million to
17 \$500,000). Therefore, based on these risks, Plaintiff discounted the maximum figure by 60% for
18 risk of losing on the merits, and an additional 65% to account for the possibility of this Court
19 reducing penalties, to arrive at an estimated exposure of approximately \$38,206. Haines Decl., ¶
20 23.

21 Using these estimated figures for each of the claims described above, Plaintiff calculates
22 a maximum potential recovery to be approximately \$400,420. Haines Decl., ¶ 24. The proposed
23 settlement of \$375,000 therefore represents approximately 93.7% of the reasonably forecasted
24 recovery for the Settlement Class. *Id.* Preliminary approval is appropriate since the Settlement
25 will provide significant monetary relief to the Settlement Class, which is consistent with what
26 Plaintiff's counsel believes could have been recovered had the case proceeded through trial. *Id.*

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

28 "Parties represented by competent counsel are better positioned than courts to produce a

1 settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pacific*
2 *Enterprises Securities Litigation*, 47 F.3d 373, 378 (9th Cir. 1995) . Here, Plaintiff is represented
3 by competent, experienced counsel who possess extensive experience prosecuting and defending
4 wage-and-hour class actions, and who have been appointed as class counsel in numerous cases
5 alleging similar claims. *See* Haines Decl., ¶¶ 2-7; Declaration of Sean M. Blakely (“Blakely
6 Decl.”), ¶¶ 2-6; Declaration of Neil M. Larsen (“Larsen Decl.”), ¶¶ 2-5. Class Counsel conducted
7 an in-depth review of Defendants’ timekeeping and payroll records, and drew on their extensive
8 experience in similar cases to assess the strengths and weaknesses of Plaintiff’s case. *See* Haines
9 Decl., ¶¶ 11-12. The Settlement was also reached with the assistance of a well-respected wage-
10 and-hour class action mediator. *Id.* This factor strongly supports preliminary approval of the
11 Settlement. *See Kullar, supra*, 168 Cal.App.4th at 130.

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

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

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

19 The proposed settlement reflects approximately 93.7% of the estimated recovery the
20 Settlement Class could reasonably expect in light of the significant litigation risks, and will
21 provide tangible, substantial monetary compensation for hotly disputed claims. Indeed, the
22 percentage of the liability exposure recovered in this case far exceeds percentages routinely
23 approved by courts. *See, e.g., Glass v. UBS Finan. Servs.*, Case No. C-06-4068 MMC, 2007 WL
24 221862, *4 (N.D. Cal. 2007) (approving settlement representing 25% to 35% of potential
25 damages); *Dunleavy v. Nadler* (9th Cir. 2000) 213 F.3d 454, 459 (approving settlement
26 representing about one-sixth of potential recovery); *Nat’l Rural Telecomm. Coop. v. DirecTV,*
27 *Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 527 (“it is well-settled law that a proposed settlement may
28 be acceptable even though it amounts to only a fraction of the potential recovery that might be

1 available to the Settlement Class members at trial”).

2 Further, the average Settlement Award of approximately \$1,809.52 exceeds the average
3 payments achieved in other wage and hour class action settlements.³ Thus, Plaintiff submits that
4 the proposed settlement is within the range of possible approval, such that notice should be
5 provided to the Class Members so that they can consider the Settlement. The Court will have the
6 opportunity to again assess the reasonableness of the Settlement after the Settlement Class
7 Members have had the opportunity to opt-out or object.

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

9 The Settlement resulted from an exchange of substantial information, arm’s-length
10 negotiations by counsel, and a full-day mediation before an experienced wage and hour mediator.
11 Thus, the Settlement is entitled to an initial presumption of fairness. *See Kullar, supra*, 168
12 Cal.App.4th at 130. As discussed above, Plaintiff carefully vetted the claims at issue, reviewed
13 extensive timekeeping and payroll data, and conducted a detailed statistical analysis of the data
14 to arrive at the estimated class-wide damages figures. *See Haines Decl.*, ¶¶ 15-23. The Parties
15 attended a full-day mediation, and worked collaboratively in the following months to finalize the
16 Settlement. *Id.*, at ¶¶ 11-12. Thus, this factor supports preliminary approval.

17
18 ³ *See e.g., Bercea v. AE Retail West*, Case No. 34-2012-00123947 (Sacramento County Super. Ct.
19 May 9, 2012) (average net recovery of approximately \$105); *Ressler v. Federated Department*
20 *Stores, Inc.*, Case No. BC335018 (Los Angeles County Super. Ct. Jan. 2, 2009) (average net
21 recovery of approximately \$90); *Palencia v. 99 Cents Only Stores*, Case No. 34-2010-00079619
22 (Sacramento County Super. Ct.) (average net recovery of approximately \$80); *Doty v. Costco*
23 *Wholesale Corp.*, Case No. CV05-3241 FMC-JWJx (C.D. Cal. May 14, 2007) (average recovery
24 of approximately \$65); *Lim v. Victoria’s Secret Stores, Inc.*, Case No. 04CC00213 (Orange
25 County Super. Ct. Jan. 20, 2006) (average net recovery of approximately \$35); *Gomez v. Amadeus*
26 *Salon, Inc.*, Case No. BC392297 (Los Angeles County Super. Ct. July 23, 2010) (average net
27 recovery of approximately \$20); *Sorenson v. PetSmart, Inc.*, Case No. 2:06-CV-02674-JAM-
28 DAD (E.D. Cal. Dec. 17, 2008) (wage and hour class action settlement approved where average
recovery was approximately \$60); *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”); and *Williams v. Centerplate, Inc.*, Case Nos. 11-CV-2159-H-KSC, 12-CV-0008-H-KSC,
2013 WL 4525428 (S.D. Cal. Aug. 26, 2013) (average recovery of approximately \$108).

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

2 Preliminary approval of the Settlement is also warranted because there are no obvious
3 deficiencies. The Settlement will provide substantial monetary relief to Class Members. The
4 amounts proposed for Class Counsel’s attorneys’ fees and costs, settlement administration,
5 LWDA payment, and Plaintiff’s Class Representative incentive payment are all reasonable and
6 appropriate based on the facts of this case. Because the Settlement is devoid of obvious
7 deficiencies, this factor supports preliminary approval.

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

9 The Settlement Class satisfies the criteria for certification of a settlement class under
10 California law because: (1) the Settlement Class is so numerous that joinder would be impractical;
11 (2) common questions of law and fact predominate over individual questions such that class
12 certification is the most efficient and desirable way to maintain this litigation; (3) Plaintiff’s
13 claims are typical of the claims of absent Class Members; and (4) Plaintiff and his counsel will
14 fairly and adequately represent Class Members’ interest. *See* Cal. Civ. Proc. § 382.

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

16 A class is “ascertainable” where the members “may be readily identified without
17 unreasonable expense or time by reference to official [or business] records.” *See Sevidal v. Target*
18 *Corp.*, 189 Cal.App.4th 905, 916 (2010) (alterations in original). Here, the proposed class is
19 defined as all current and former non-exempt or hourly-paid employees who are or were
20 employed by Defendants in the State of California at any time during the Class Period. Settlement,
21 ¶ 6. Therefore, Class Members can be identified from Defendants’ personnel and employment
22 records. Defendants represent that the Settlement Class consists of approximately 105 current and
23 former non-exempt employees. *See* Haines Decl., ¶ 14. It would therefore be impracticable to
24 bring all Class Members before the Court, or for each Class Member to bring an individual
25 lawsuit. The proposed Settlement Class therefore satisfies numerosity. *See, e.g., Bowles v. Sup.*
26 *Ct.*, 44 Cal.2d 574 (1955) (holding a class representing 10 beneficiaries of a trust sufficiently
27 numerous).

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

2 The focus in a certification dispute is not the merits, but rather on what types of questions,
3 “common or individual,” are likely to arise in the action. *See Sav-On Drug Store, Inc. v. Superior*
4 *Court (Rocher)*, 34 Cal.4th 319, 327 (2004). Plaintiff’s claims are predicated on, among other
5 issues, Defendants’ timekeeping policies and/or practices, business expense reimbursement
6 policies and/or practices, as well as its meal and rest period policies and/or practices. These types
7 of claims are commonly held to be proper for class certification. *See e.g., Williams v. Superior*
8 *Court*, 221 Cal.App.4th 1353, 1371 (2013) (certifying class based on uncompensated work time);
9 *Benton v. Telecom Network Specialists, Inc.*, 220 Cal.App.4th 701, 726 (2013) (certifying meal
10 and rest period claims).

11 **3. The Claims of the Named Plaintiff Are Typical**

12 The typicality requirement is satisfied where class representatives have claims that are
13 typical of those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191
14 Cal.App.3d 1341, 1347 (1987) (finding typicality satisfied where named Plaintiff purchased the
15 same goods as the putative class in a consumer class action). Here, Plaintiff’s claims are typical
16 of those held by the Class Members. First, Defendants employed Plaintiff as a non-exempt
17 employee during the Class Period, and Plaintiff was subject to Defendants’ wage and hour policies
18 at issue in this case. Second, Plaintiff was injured by the same challenged policies/practices that
19 allegedly injured the Settlement Class as a whole. For example, Plaintiff contends that Defendants
20 failed to pay him wages for all hours worked, failed provide him with legally-compliant meal and
21 rest periods, and failed to reimburse him for necessary business expenses. Because Plaintiff has
22 suffered the same injuries as the other members of the Settlement Class, the typicality requirement
23 is satisfied.

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

26 The adequacy requirement examines conflicts of interest between named Parties and the
27 class(es) they seek to represent. *See Capital People First v. State Dept. of Developmental*
28 *Services*, 155 Cal.App.4th 676, 697 (2007). Plaintiff and his counsel will adequately represent the
Settlement Class, as there are no conflicts between Plaintiff and the proposed Settlement Class,

1 and Plaintiff possesses claims that are in line with those of the Settlement Class. *See McGhee v.*
2 *Bank of America*, 60 Cal.App.3d 442, 450-51 (1976) (adequacy satisfied where there was no
3 indication that Class Counsel were not qualified and the named plaintiff had no interests
4 antagonistic to those of the proposed class). Class Counsel also have extensive experience in wage
5 and hour class action litigation. *See Haines Decl.*, ¶¶ 2-7; *Blakely Decl.*, ¶¶ 2-6; *Larsen Decl.*, ¶¶
6 2-5.

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

8 This Court should order distribution to the Settlement Class of the proposed Class Notice
9 in English and Spanish by U.S. Mail, using last known mailing address information provided by
10 Defendants. *See Settlement*, ¶¶ 56-57. This manner of giving notice is the “best notice
11 practicable” under the circumstances because it provides “individual notice to all members who
12 can be identified through reasonable effort.” *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173
13 (1974). Here, Plaintiff proposes that the Settlement be administered by Phoenix Settlement
14 Administrators (“Phoenix”), an experienced class action settlement administrator. *See generally*
15 *Lawrence Decl.* and attached exhibits. Class Members’ addresses will be ascertainable through
16 Defendants’ records, which Defendants will provide to Phoenix within twenty-one (21) calendar
17 days after entry of an order preliminarily approving this Settlement. *See Settlement*, ¶ 56. Within
18 fourteen (14) calendar days of receipt of the Class Members’ addresses, Phoenix will run the
19 addresses through the National Change of Address (“NCOA”) database (which provides updated
20 addresses for any individual who has moved in the previous four years and has notified the U.S.
21 Postal Service of a forwarding address) and mail the Class Notice to all Class members. *See*
22 *Settlement*, ¶¶ 57-58. To the extent that any notices are returned, Phoenix will perform a “skip
23 trace” to track any Class Member’s current mailing address. *Id.*

24 The content of the proposed Class Notice satisfies California Rule of Court 3.766(d)
25 because it advises Class Members of the nature of the claims, basic contentions and denials of the
26 Parties and the key terms of the Settlement, the 60-day deadline to opt-out or object to the
27 Settlement and the procedures by which to do so, explains the recovery formula and expected
28 recovery amount for each Class Member, and advises them that they will be bound by the terms

1 of the Settlement if they do not opt-out. *See* Haines Decl., Exh. 1 to Exh. A. The proposed Class
2 Notice will also notify Class Members of the final approval hearing date and provides the
3 Settlement Class contact information for Class Counsel, and advises Class Members that they
4 may enter an appearance through counsel if they wish to. *Id.* This manner of giving notice satisfies
5 California Rule of Court 3.766(e) as the most reliable and cost-effective method of reaching
6 Settlement Class Members.

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

8 Finally, this Court should set a hearing for Final Approval of the Settlement on a date
9 appropriately scheduled to follow the deadline by which Class Members must file objections to
10 the Settlement or opt-out. *See* California Rule of Court 3.769.

11 **V. CONCLUSION**

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

15
16 Respectfully submitted,

17 Dated: March 1, 2022

HAINES LAW GROUP, APC

18
19 By:



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