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

MARIA TERESA PEREZ, as an individual
and on behalf of all others similarly situated,

Plaintiff,

vs.

ADVANCED BIONICS, LLC, a Delaware
corporation; and DOES 1 through 100,
inclusive,

Defendants.

Case No.: 20STCV26408

CLASS ACTION

*[Assigned for all purposes to the Hon.
Kenneth R. Freeman, Dept. SSC-14]*

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

Date: May 31, 2022

Time: 8:30 a.m.

Dept.: SSC-14

Action Filed: July 14, 2020

Trial Date: None Set

PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court, on May 31, 2022 at 8:30 a.m., or as soon thereafter as the matter may be heard in Department SSC-14 of the above-entitled Court, located at 312 N Spring St, Los Angeles, CA 90012, Plaintiff Maria Teresa Perez ("Plaintiff") will, and hereby does, move this Court for:

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

All current and former non-exempt employees who worked for Advanced Bionics, LLC ("AB") in California at any time from April 6, 2016 through July 9, 2021 (the "Class Period").

3. Preliminary appointment of Plaintiff as Class Representative;
4. Preliminary appointment of Paul K. Haines, Tuvia Korobkin, Neil M. Larsen, and Alexandra R. McIntosh of Haines Law Group, APC as Class Counsel;
5. Appointment of Phoenix Settlement Administrators as the Settlement Administrator;
6. Approval of the proposed Class Notice and Notice of Estimated Settlement Award (together, the "Notice Packet"), and an order that the Notice Packet be disseminated to the Settlement Class as provided in the Settlement Agreement; and
7. The scheduling of a hearing to consider whether the class settlement should be finally approved and to award an amount for a Class Representative Incentive Award to Plaintiff, and attorneys' fees and costs to Class Counsel.

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

Dated: May 3, 2022

Respectfully Submitted,
HAINES LAW GROUP, APC



Paul K. Haines
Attorneys for Plaintiff

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Maria Teresa Perez (“Plaintiff”) seeks preliminary approval of a class action
4 settlement agreement (“Settlement”) with Defendant Advanced Bionics, LLC (“AB” or
5 “Defendant”). The Settlement resolves a class and representative action pending before this Court
6 (the “Action”), in which Plaintiff alleges that AB (i) failed to pay all earned minimum and
7 overtime wages due to its allegedly unlawful rounding practice, (ii) underpaid overtime wages by
8 failing to include bonuses in employees’ “regular rate of pay”; (iii) failed to provide all meal
9 periods, and (iii) failed to authorize and permit all rest periods. Plaintiff further alleges that as a
10 result of these violations, AB failed to provide accurate itemized wage statements, failed to pay
11 all final wages, and is liable for Private Attorneys General act (“PAGA”) civil penalties.

12 Plaintiff now respectfully requests that this Court preliminarily approve this non-
13 reversionary, common-fund class action Settlement,¹ in which AB has agreed to pay
14 \$2,850,000.00 to the following Settlement Class, estimated to consist of 636 individuals:

15 All current and former non-exempt employees who worked for AB in
16 California at any time from April 6, 2016 through July 9, 2021 (the “Class
Period”).

17 The Settlement was reached after the parties engaged in mediation with Michael E.
18 Dickstein, Esq., an experienced wage and hour class action mediator. In connection with
19 mediation, AB provided Plaintiff with extensive informal discovery, including full timekeeping
20 and payroll records for putative class members for a vast majority of the putative class period;
21 relevant wage and hour policies; and other data and documents. After extensive research and
22 investigation, including a detailed analysis of AB’s potential exposure made with the assistance
23 of Plaintiff’s expert economist who holds a Ph.D. in economics, the parties attended a full-day
24 mediation with Mr. Dickstein on April 9, 2021. At the conclusion of mediation the parties reached
25 a resolution in principle, and over the following several months the parties continued their
26 negotiations to resolve the finer terms of the settlement, ultimately resulting in the Settlement.

27
28 ¹ The Settlement is attached as Exhibit 1 to the Haines Declaration. The Class Notice and Notice
of Estimated Settlement Award are attached as Exhibits A and B, respectively, to the Settlement.

1 Notably, Settlement Class members are not required to submit a claim form to receive a
2 payment (“Settlement Award”) from the Settlement. After deductions for proposed settlement
3 administration costs, attorneys’ fees and costs, Plaintiff’s incentive award, and the LWDA’s share
4 of PAGA civil penalties, the average Settlement Award is estimated to be at least **\$2,693.40**, an
5 excellent result. For the reasons discussed herein, Plaintiff respectfully requests that the Court
6 grant preliminary approval of the Settlement.

7 **II. SUMMARY OF THE LITIGATION**

8 **A. FACTUAL AND PROCEDURAL BACKGROUND**

9 AB develops and manufactures advanced cochlear implants, and has operations in over
10 50 countries around the world. See Declaration of Paul K. Haines (“Haines Decl.”), ¶ 10. AB’s
11 manufacturing is performed at its Los Angeles-area plant. *Id.* Plaintiff is a former non-exempt
12 AB employee who worked for AB during the Class Period. *Id.*

13 On July 14, 2020, Plaintiff filed the instant action, alleging claims for failure to pay
14 overtime and minimum wages, meal period violations, rest period violations, wage statement
15 penalties, and a claim for unfair competition. Haines Decl., ¶ 11. On December 10, 2020, Plaintiff
16 filed a First Amended Complaint adding a claim for PAGA civil penalties. *Id.* On May 3, 2022,
17 pursuant to the Settlement and the parties’ stipulation, Plaintiff filed a Second Amended
18 Complaint adding a claim for waiting time penalties. *Id.*

19 **B. PLAINTIFF’S CLAIMS AND AB’S DEFENSES**

20 **1. Unpaid Overtime Based on Miscalculation of “Regular Rate”**

21 Plaintiff alleges that AB failed to pay all overtime wages to Plaintiff and other Settlement
22 Class members by failing to include the value of all non-discretionary remuneration, including
23 several types of bonuses, into the “regular rate” of pay. Haines Decl., ¶ 16; 29 U.S.C. 207(e)
24 (“regular rate” includes “all remuneration for employment”); *Huntington Mem’l Hosp. v.*
25 *Superior Court*, 131 Cal.App.4th 893, 902-903 (2005) (payments included in calculation of
26 regular rate are generally consistent under state and federal law).

27 AB contends that the vast majority of additional payments at issue are discretionary spot
28 bonuses, discretionary end-of-year bonuses, and/or percentage-of-total-earnings bonuses and thus

do not need to be included in the regular rate for overtime purposes. Haines Decl., ¶ 16; 29 C.F.R. § 778.211 (discretionary bonuses need not be included in regular rate); *see also* 29 C.F.R. § 778.200(a)(1) (excluding from regular rate “sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency.”); 29 C.F.R. § 778.210 (bonuses calculated based on a percentage of employee’s total compensation including overtime need not be included in the regular rate calculation, since bonus is already being paid on the overtime wages). AB also contends that differences in the amount, type, and frequency of bonuses paid to different employees would require hundreds of mini-trials and render class certification of this claim inappropriate. Haines Decl., ¶ 16.

2. Unpaid Wages Due to Time-Rounding

Plaintiff alleges that, until October 2018, AB rounded its employees’ time entries in a manner that underpaid AB employees. Haines Decl., ¶ 17. AB contends that it utilized an even-handed timekeeping system that, on balance, resulted in employees being paid for all hours actually worked. *Id.*; *see also See’s Candy Shops, Inc. v. Superior Court*, 210 Cal.App.4th 889, 901 (2012) (holding rounding policies lawful if they are consistently applied and, on average, favor neither overpayment nor underpayment of wages); *Corbin v. Time Warner Entertainment-Advance/NewHouse Partnership*, 821 F.3d 1069 (9th Cir. 2016) (an employer’s “policy is facially neutral” where it “rounds all employee time punches to the nearest quarter-hour without an eye towards whether the employer or the employee is benefitting from the rounding”). AB further argues that even assuming all time on-the-clock were otherwise compensable, employees were either paid for all time on-the-clock or overpaid because of rounding, on more than half of all shifts. *Id.* AB also argues the amount of unpaid time per shift is *de minimis* (less than one minute, on average) and thus non-compensable.² *Id.* While Plaintiff points to *Troester v. Starbucks*, 5 Cal.5th 829 (2018), where the California Supreme Court held California’s labor laws generally do not recognize a *de minimis* defense, AB argues *Troester* should be limited to its facts. (“[W]e decide only whether the *de minimis* rule is applicable to the facts of this case as described by the

² Courts have held daily periods of up to 10 minutes to be *de minimis*. *Lindow v. U.S.*, 738 F.2d 1057, 1062 (9th Cir. 1984) (collecting cases).

Ninth Circuit.” *Troester*, 5 Cal.5th at 829.) AB also contends this claim was not certifiable, since its rounding policy was facially neutral and individualized inquiries would be necessary as to whether each employee was in fact underpaid or overpaid for each workday in question, resulting in an unmanageable series of hundreds of mini-trials. Haines Decl., ¶ 17.

3. Meal Period Claim

Plaintiff alleges that AB failed to provide timely meal periods, such that meal periods sometimes commenced after the completion of the fifth hour of work, due to work demands placed on Plaintiff and other employees. Haines Decl., ¶ 18. Plaintiff also alleges that AB frequently failed to provide second meal periods on shifts over 10 hours. *Id.*

AB argues that it maintained legally-compliant meal period policies throughout the Class Period, for both first and second meal periods, and that under *Brinker* it is only required to “provide” the opportunity to take meal periods, not “ensure” meal periods are taken. Haines Decl., ¶ 18; see *Brinker Rest. Corp. v. Sup. Ct.*, 53 Cal.4th 1004, 1038 (rejecting “ensure” standard). AB further argues that its timekeeping records reflect a very high compliance rate for first meal periods, demonstrating that it takes its meal period obligations seriously and consistently relieves employees of all duty for timely, 30-minute meal periods. *Id.* Any failure by employees to take a timely meal period is the result of employee choice, AB argues, not any AB policy or practice. *Id.* With respect to second meal periods, AB points to second meal period waivers signed by its employees as evidence that it does, in fact, provide second meal periods on shifts over 10 hours, and that any employee’s failure to take a second meal period is a result of waiver, not any policy or practice of AB. *Id.* Lastly, AB argues individualized inquiries would be required to determine whether individual employees received a late meal period or did not receive a second meal period on each individual shift, and why any meal period was otherwise late or missed, thereby precluding certification of this claim. Haines Decl., ¶ 18.

4. Rest Period Claim

Plaintiff alleges that AB failed to authorize and permit all required rest periods, including third rest periods on shifts over 10 hours. Haines Decl., ¶ 19. AB argues that its written rest period policy authorizes and permits all required rest periods, in that it specifically authorizes and

permits a 10-minute (or 15-minute) rest period for each 4 hours worked or major fraction thereof, as required under the Wage Order. Haines Decl., ¶ 19. The rest period policy further specifies the amount of rest period time authorized for employees who work 3.5-6.0 hours, over 6.0 hours, over 10.0 hours, etc., as specified under *Brinker*. Thus, AB argues, any failure by employees to take a rest period is the result of employee choice rather than an AB policy or practice. *Id.* Finally, AB argues this claim is not amenable to class treatment as individualized inquiries would be required to determine whether individual employees missed a rest period on any particular shift, and if so, why the rest period was missed, resulting in a series of unmanageable mini-trials for each employee. *Id.* This manageability issue is especially present with respect to rest periods, AB argues, since rest periods are not – and need not be – recorded. *Id.*

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

As a result of its alleged failure to pay all wages, Plaintiff asserts that AB failed to comply with its final payment and wage statement obligations, in violation of Cal. Labor Code §§ 203 and 226, respectively. Haines Decl., ¶¶ 20-21. Finally, Plaintiff seeks civil penalties under the PAGA based on the aforementioned claims. *Id.*, ¶ 22.

AB argues that Plaintiff’s derivative claims fail for the same reasons her underlying claims. AB further asserts it has strong, good-faith defenses to Plaintiff’s underlying claims, precluding imposition of waiting time penalties. See 8 Cal. Code Regs. § 13520 (a “good faith dispute that any wages are due will preclude imposition of waiting time penalties”); *Kao v. Joy Holiday*, 12 Cal.App.5th 947, 963 (2017) (holding “good faith dispute” precluded imposition of waiting time penalties). AB further contends any alleged wage statement violations could not be shown to be “knowing and intentional,” particularly given its good-faith defenses; that Plaintiff cannot show she or other employees “suffer[ed] injury” due to alleged wage statement violations, as required by Lab. Code § 226(e); and that the wage statements always accurately reflected amounts *paid* to employees. Haines Decl., ¶ 20; see also *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal.App.5th 1308, 1336-37 (2018) (“The purpose of section 226 is to ‘document the paid wages to ensure the employee is fully informed regarding the calculation of those wages.’”) (citing *Soto v. Motel 6 Operating, L.P.*, 4 Cal.App.5th 385, 392 (2016)).

1 Finally, AB contends Plaintiff's PAGA claim fails because the underlying claims fail. *See*,
2 *e.g.*, *Price v. Starbucks Corp.*, 192 Cal.App.4th 1136, 1147 (2011) ("Because the underlying
3 causes of action fail, the derivative UCL and PAGA claims also fail."). AB further maintains that
4 given its good-faith defenses, the Court would substantially reduce PAGA civil penalties even if
5 it were to find in favor of Plaintiff on her underlying claims. Haines Decl., ¶ 22; *see also* Lab.
6 Code § 2699(e)(2) (authorizing reduction in PAGA penalties in court's discretion); *Thurman v.*
7 *Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA
8 penalties because "the evidence showed...defendants took their obligations...seriously and
9 attempted to comply with the law"); *Fleming v. Covidien, Inc.*, No. ED-CV-10-1487-RGK (OPx),
10 2011 WL 7563047 at *4 (C.D. Cal. 2011) (reducing PAGA penalties by over 82% in part because
11 employer was "not aware" of violations); *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504, 529
12 (2018) (affirming PAGA civil penalty of just \$5 per pay period where employer made "good faith
13 attempts" to comply with the law).

14 C. DISCOVERY AND MEDIATION

15 In preparation for mediation, the parties engaged in extensive informal discovery. AB
16 produced timekeeping and payroll records for all putative class members for a vast majority of
17 the putative class period; relevant wage and hour policies; a class list which each putative class
18 member's hire date, termination date, rate of pay, and other information; and other relevant data
19 and information. Haines Decl., ¶ 12. Plaintiff hired a labor economist with a Ph.D. in economics
20 to analyze and extrapolate the data produced by AB. *Id.* This discovery allowed the parties to
21 assess the merits and value of Plaintiff's claims and AB's defenses, as well as the chances for
22 class certification. *Id.*

23 The parties attended a full-day mediation on April 9, 2021 with Mr. Dickstein. Haines
24 Decl., ¶ 13. The parties vigorously debated their legal positions, the likelihood of certification of
25 Plaintiff's claims, and the legal bases for the claims and defenses. *Id.* At the end of mediation,
26 the parties, with Mr. Dickstein's assistance, agreed to a resolution in principle. *Id.* Over the next
27 several months, the parties negotiated the finer terms of the settlement, ultimately resulting in the
28 Settlement. *Id.*

III. THE PROPOSED SETTLEMENT

A. ESSENTIAL TERMS OF THE SETTLEMENT

Under the Settlement, AB will pay a non-reversionary Gross Settlement Amount (“GSA”) of \$2,850,000.00, with no claims process required for Settlement Class members to receive payment. The monetary terms of the Settlement are summarized below:

• Gross Settlement Amount (“GSA”):	\$2,850,000.00
• Minus Court-approved attorneys’ fees (one-third):	\$950,000.00
• Minus Court-approved verified costs (up to):	\$55,000.00
• Minus Court-approved Incentive Award:	\$7,500.00
• Minus Amount Paid Set Aside as PAGA penalties:	\$150,000.00
• <u>Minus estimated settlement administration costs:</u>	<u>\$12,000.00</u>
Net Settlement Amount (“NSA”):	\$1,675,500.00
• PLUS 25% “PAGA Amount” to Settlement Class:	\$37,500.00
Total Amount Paid to Settlement Class members:	\$1,713,000.00

1. The Settlement Provides for Reasonable Monetary Payments

After deducting amounts for a court-approved incentive award, administration costs, attorneys’ fees and costs, and PAGA payment to the LWDA, AB will pay at least \$1,713,000.00 to Settlement Class members. *See* Settlement, § 3(C). AB represents there are approximately 636 Settlement Class members. *Id.*, §§ 1, 3(E). Thus, the average Settlement Award is estimated to be \$2,693.40. Haines Decl., ¶ 15. Payments will be distributed as follows. First, each participating Settlement Class member will receive a payment from the NSA based on their proportionate number of workweeks worked for AB in California during the Class Period. Next, in addition to the NSA, \$37,500.00 of the GSA is designated the “PAGA Amount,” and will be distributed to all Settlement Class members who worked for AB during the PAGA Period (April 6, 2019 to July 9, 2021), based on the proportionate number of pay periods worked for AB during the PAGA Period. *See* Settlement, § 4(C).

Payments from the NSA will be treated as 50% wages reported on a Form W-2, and as 25% interest and 25% penalties and reported on a Form 1099. *See* Settlement, § 4(E). Payments from the PAGA Amount will be treated as 100% penalties. *Id.* AB will pay the employer’s share of payroll taxes on the amount designated as “wages” separate from, and in addition to, the GSA. *Id.*, §§ 3(D), 4(E). Settlement Class members will have 60 days from the Notice mailing to object

1 or request to opt-out, or submit disputes, thereby providing ample time to review the Notice
2 without unduly delaying the Settlement. *See id.*, § 9(C)-(E).

3 Participating Settlement Class members will be bound by the Settlement, and shall release
4 all wage and hour claims pled in the Action, or that could have been pled based on the facts
5 alleged in the Action, during the Class Period (“California Released Claims”). *See* Settlement, §
6 2(A). All Settlement Class members (regardless whether they opt out) who worked for AB in
7 California during the PAGA Period will release all claims for PAGA civil penalties based on the
8 facts alleged in Plaintiff’s complaint and PAGA notice letter. *See* Settlement, § 2(A). Plaintiff has
9 also agreed to a general release of claims, subject to a waiver of Civil Code § 1542. *Id.*, § 2(B).

10 **2. Attorneys’ Fees and Costs, Incentive Award, and PAGA Payment**

11 At final approval, Plaintiff will separately apply for a Class Representative Incentive
12 Award in the amount of \$7,500. *See* Settlement, § 3(C)(3). “[I]ncentive awards are fairly typical
13 in class action cases...and are intended to compensate class representatives for work done on
14 behalf of the class [and] to make up for financial or reputational risk undertaken in bringing the
15 action.” *In re Cellphone Fee Termination Cases*, 186 Cal.App.4th 1380, 1393-94 (2010). As will
16 be fully briefed at final approval, Plaintiff’s requested payment is in recognition of the time and
17 effort she expended on behalf of the Settlement Class, including providing factual information
18 and documents to counsel, identifying potential witnesses, attending in-person and telephonic
19 meetings with counsel to discuss the claims and theories at issue in the litigation, and otherwise
20 actively participating in the prosecution of this case. Haines Decl., ¶ 25. Plaintiff respectfully
21 submits that this requested payment is well within the range of permissible approval. *See, e.g.,*
22 *Alvarado v. Nederend*, No. 1:08-cv-01099-OWW-DLB, 2011 WL 1883188 at *10 (E.D. Cal. May
23 17, 2011) (approving \$7,500 award to each of five named plaintiffs from \$505,058.60 settlement).

24 The parties have also designated \$150,000 of the GSA as PAGA penalties, of which
25 \$112,500 (75%) will be paid to the LWDA, with the remaining \$37,500.00 (25%) distributed to
26 Settlement Class members (*see* Settlement, § 3(C)(5)), consistent with the PAGA’s requirement
27 that 75% of penalties be allocated to the LWDA with the remaining 25% of penalties allocated to
28 aggrieved employees (Labor Code § 2699(i)). Plaintiff submits this allocation to the LWDA is

appropriate in light of other settlements allocating penalties to the LWDA. *See, e.g., Chu v. Wells Fargo Inv., LLC*, No. C-05-4526-MHP, 2011 WL 672645 (N.D. Cal. Feb. 16, 2011) (approving PAGA payment of \$7,500 to LWDA from \$6.9 million settlement).

At final approval, Plaintiff's counsel will request attorneys' fees of one-third of the GSA (currently estimated at \$950,000.00), and up to \$55,000 in litigation costs. Settlement, § 3(C)(4). Plaintiff submits the requested fee is fair compensation for undertaking complex, risky, expensive, and time-consuming litigation on a contingent basis. Plaintiff's counsel have incurred substantial attorneys' fees conducting pre-filing investigation; analyzing Plaintiff's claims; conducting legal research; analyzing timekeeping, payroll, and other data with Plaintiff's expert to create a comprehensive damages model; preparing for and attending mediation; negotiating and preparing the Settlement; preparing this Motion; and otherwise prosecuting this case. Haines Decl., ¶ 24. Further, Plaintiff's counsel will incur significant future attorneys' fees in overseeing the Notice process, fielding phone calls from Settlement Class members, preparing the Final Approval Motion and supporting documents, and appearing at the Final Approval Hearing. *Id.*

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

IV. ARGUMENT

A. PRELIMINARY APPROVAL IS WARRANTED

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

1 150 F.3d 1011, 1026 (9th Cir. 1998) (Rule 23(e) requires court to determine “whether a proposed
2 settlement is fundamentally fair, adequate, and reasonable”). Settlement is the preferred means of
3 dispute resolution, particularly in complex class action litigation. *See In re Syncor ERISA Litig.*,
4 516 F.3d 1095, 1101 (9th Cir. 2008). The Court’s role is to ensure the settlement agreement taken
5 as a whole is fair and within the range of reasonableness. *Hanlon*, 150 F.3d at 1027. There is a
6 presumption of fairness when a settlement is negotiated at arm’s length by counsel. *See, e.g.*,
7 *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 130 (2008).

8 **1. Standard for Preliminary Approval**

9 To make a fairness determination, the Court should consider several factors, including:
10 “the strength of Plaintiff’s case, the risk, expense, complexity and likely duration of further
11 litigation, the risk of maintaining class action status through trial, the amount offered in
12 settlement, the extent of discovery completed and the stage of the proceedings, [and] the
13 experience and views of counsel.” *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996).
14 “The list of factors is not exclusive and the Court is free to engage in a balancing and weighing
15 of the factors depending on the circumstances of each case.” *Wershba v. Apple Computer, Inc.*,
16 91 Cal.App.4th 224, 245 (2001). As discussed below, the proposed Settlement is fair, adequate,
17 and reasonable in light of the overall balance of factors in this case.

18 **a. The Strength of Plaintiff’s Case**

19 Although she maintains her claims are meritorious, Plaintiff acknowledges there were
20 substantial risks and uncertainty in proceeding with class certification and eventual trial on the
21 merits. As described in section II.B., *supra*, AB presented multiple defenses to Plaintiff’s claims,
22 both on the merits and to class certification. While Plaintiff was prepared to litigate her claims
23 through class certification and ultimately trial, success was far from certain.

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

25 Although the parties engaged in significant informal discovery, they had not completed
26 formal written and deposition discovery, which would have required expenditure of substantial
27 time and resources. Haines Decl., ¶ 26. Plaintiff also still had to file for class certification. *Id.*
28 Even if Plaintiff obtained certification, the parties would incur considerable attorneys’ fees and

costs through a possible decertification motion, motions for summary judgment, trial, and potential appeals. *Id.* This settlement avoids those risks and the accompanying expense. *Id.* Thus, this factor supports preliminary approval.

c. Risk of Maintaining Class Action Status

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

d. Amount Offered in Settlement Given Realistic Value of Claims

The Settlement provides a fair and reasonable monetary recovery for the Settlement Class for disputed claims. With the assistance of a retained economist with a Ph.D., Plaintiff conducted an analysis of potential damages due to AB's allegedly unlawful policies and practices. Plaintiff's analyses of realistic expected recoveries for each theory of liability are set forth below:

Underpaid Overtime Due to Regular Rate Miscalculation: \$81,200

Plaintiff alleges that AB failed to include bonuses in employees' regular rate of pay and therefore underpaid employees' overtime compensation in pay periods where employees received these types of compensation and also worked overtime. Haines Decl., ¶ 16. Based on Plaintiff's expert's review and extrapolation of the payroll records produced by AB, and assuming that every category of compensation at issue should have been incorporated into the "regular rate," Plaintiff estimated that AB employees were underpaid by approximately \$136,471. *Id.* But as noted above, AB argues that the bonuses in question were discretionary, and/or were calculated based on a percentage of total compensation, and therefore did not need to be included in the regular rate of pay pursuant to the relevant regulations. *Id.* AB also argues that differences among employees in type, frequency, and amount of bonuses would create individualized issues that would make a class unmanageable. *Id.* Based on these defenses, Plaintiff discounted the maximum exposure by 15% for risk of non-certification, and by an additional 30% for risk of losing on the merits or failing to recover the full amount sought, to arrive at a realistic exposure of \$81,200. *Id.*

1 Unpaid Wages Due to Rounding: \$27,096

2 Plaintiff alleges AB failed to pay employees for all hours worked because of its unlawful
3 rounding practice. Haines Decl., ¶ 17. Based on data provided by AB and Plaintiff's expert's
4 analysis of AB's timekeeping and payroll records, Plaintiff estimates that as a result of AB's prior
5 rounding practice, Settlement Class members were underpaid by approximately 1,153 hours
6 during the Class Period. *Id.* The average minimum wage in California during the rounding period
7 was approximately \$11.75. *Id.* Thus, Plaintiff estimates AB's maximum exposure for this claim
8 at \$27,096 (1,153 hours * \$11.75 min. wage * 2 [liquidated damages per Lab. Code § 1194.2]).
9 *Id.* As noted *supra*, however, AB maintains its rounding practice was both facially neutral and
10 resulted in employees being paid for all hours worked, and and that any alleged unpaid time was
11 *de minimis*. *Id.* AB also contends this claim would not be certified, since its rounding policy is
12 facially neutral and individualized inquiries would thus be necessary as to whether employees
13 were in fact underpaid or overpaid for each workday in question, resulting in an unmanageable
14 series of hundreds of mini-trials. *Id.* Although these defenses warranted discounting the maximum
15 exposure, in light of the relatively small amount of underpayment, Plaintiff did not discount this
16 claim for purposes of her damages analysis. *Id.*

17 Meal Period Violations: \$927,499

18 Plaintiff's expert's analysis of AB's timekeeping data revealed that there were
19 approximately 77,183 potential first and second meal period violations on shifts worked by
20 Settlement Class members during the Class Period. Haines Decl., ¶ 18. Plaintiff's expert further
21 calculated that the average rate of pay for putative class members during the Class Period was
22 approximately \$18.85. *Id.* Thus, Plaintiff estimated AB's maximum exposure for meal period
23 violations at \$1,454,900. *Id.* As noted above, however, AB argues it has always maintained
24 legally-compliant meal period policies and provided compliant meal periods to Settlement Class
25 members; that it was only required to *provide* meal periods, not ensure they were taken; the
26 timekeeping records reflect a high compliance rate for first meal periods; that employees executed
27 second meal period waivers, and any meal period violations reflected in the timekeeping records
28 were the result of employee choice, rather than any policy or practice of AB. *Id.* AB also contends

1 that this claim would not be certified due to the individualized inquiries that would be required to
2 determine whether individual employees received a late meal period or missed a meal period on
3 each individual shift, and why any meal period was late or missed. *Id.* Given these defenses,
4 Plaintiff discounted AB's maximum exposure by 15% to account for the risk of non-certification,
5 and an additional 25% for risk of losing on the merits or failure to recover the full amount sought,
6 to arrive at an estimated total of \$927,499. *Id.*

7 **Rest Period Violations: \$343,408**

8 Plaintiff alleges AB failed to authorize and permit legally-compliant rest periods,
9 including by failing to authorize and permit third rest periods on shifts over 10 hours. Haines
10 Decl., ¶ 19. Plaintiff's expert's analysis of AB's timekeeping data revealed approximately 32,532
11 shifts over 10 hours worked by Settlement Class members during the Class Period. *Id.* Plaintiff
12 thus estimated AB's exposure at \$613,228 (32,532 * \$18.85 rest period premium). *Id.*

13 As noted above, however, AB contends it has always maintained legally-compliant rest
14 period policies and authorized and permitted all rest periods to Settlement Class members. Haines
15 Decl., ¶ 19. Further, AB argues this claim is not amenable to class treatment as individualized
16 inquiries would be required to determine whether employees missed a rest period on each relevant
17 shift, and why each rest period was missed on thousands of eligible shifts spanning several years
18 and several different supervisors. *Id.* In light of these defenses, Plaintiff discounted AB's
19 maximum exposure by 20% to account for the risk of non-certification, and an additional 30%
20 for risk of losing on the merits, to arrive at an estimated exposure of approximately \$343,408. *Id.*

21 **Wage Statement Penalties: \$487,648**

22 Based on information provided by AB, there were approximately 17,416 pay periods
23 worked by Settlement Class members within the one-year liability window under Labor Code §
24 226. Haines Decl., ¶ 20. In calculating AB's exposure, Plaintiff assumed she could recover the
25 "initial" wage statement penalty of \$50 for each violation, for a total of \$870,800 (17,416 pay
26 periods * \$50) in potential penalties. *Id.*; see also Lab. Code § 226(e) (providing \$50 penalty for
27 "initial" violations); *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1207 (2008) (finding
28 "initial" violation rate applies until employer has been notified it violated Labor Code); *Patel v.*

1 *Nike Retail Svcs., Inc.*, 58 F.Supp.3d 1032, 1042-43 (N.D. Cal. 2014) (citing *Amaral* and applying
2 “initial” \$50 penalty to all pay periods in calculating amount-in-controversy for wage statement
3 claim). However, given AB’s arguments that no violations occurred, that class members suffered
4 no “injury,” and that any alleged violations were not “knowing and intentional,” as well as risks
5 associated with Plaintiff’s underlying claims discussed above, Plaintiff discounted the maximum
6 exposure by 20% for risk of non-certification, and by an additional 30% for risk of being
7 unsuccessful on the merits, for an estimated realistic exposure of \$487,648. Haines Decl., ¶ 20.

8 **Waiting Time Penalties: \$792,605**

9 Based on Plaintiff’s expert’s analysis of the data provided by AB, there were
10 approximately 292 employees who separated their employment with AB since April 6, 2017.
11 Haines Decl., ¶ 21. Plaintiff further estimated an average waiting time penalty of \$4,524 (\$18.85
12 * 8 hours * 30 days), and thus calculated AB’s maximum waiting time penalty exposure as
13 approximately \$1,321,008 (292 * \$4,524). *Id.* As noted above, however, AB asserts it has strong,
14 good-faith defenses to Plaintiff’s underlying claims, and that any failure to pay wages was
15 therefore not “willful” as a matter of law. *Id.* AB further contends Plaintiff’s meal and rest period
16 claims cannot support a claim for waiting time penalties, as multiple courts have held (and which
17 issue is going to be decided by the California Supreme Court in *Naranjo v. Spectrum Security*
18 *Services*, Case No. S258966 (review granted Jan. 2, 2020). *Id.* Moreover, because the waiting
19 time claim is derivative of Plaintiff’s underlying wage claims, Plaintiff would need to overcome
20 AB’s defenses, both as to class certification and as to the merits, to her underlying claims. Based
21 on these defenses, Plaintiff discounted AB’s maximum exposure by 20% for risk of non-
22 certification and by an additional 25% for risk of being unsuccessful on the merits, to arrive at an
23 estimated total of \$792,605. *Id.*

24 **PAGA Civil Penalties: \$383,152**

25 Plaintiff estimated a maximum PAGA exposure of \$1,741,600, based on 17,416 pay
26 periods at the \$100 “initial” violation rate under Lab. Code § 2699(f). Haines Decl., ¶ 22; *Amaral*,
27 163 Cal.App.4th at 1209. However, these penalties derive from Plaintiff’s underlying claims, each
28 of which AB vigorously disputes. *Green v. Lawrence Service Co.*, No. LA-CV-12-6155-JAK

(VBKx), 2013 WL 3907506 at *5, fn. 5 (C.D. Cal. July 23, 2013) (PAGA claim’s success is determined by merits of underlying claims). In addition, AB argued that even if Plaintiff were to prevail on some of her underlying claims, she could not show a violation in each pay period. For example, the rounding practice stopped in October 2018, before the beginning of the PAGA Period, and thus there could be no PAGA liability for that claim; and AB contends Plaintiff would not be able to show a late meal period for *every* employee in *every* pay period in the PAGA Period. AB further argues that the PAGA grants trial courts discretion to reduce PAGA civil penalties (Lab. Code § 2699(e)(2)), and that the Court would reduce penalties significantly given AB’s good-faith defenses. *Id.* Thus, Plaintiff discounted the maximum figure by 45% for risk of losing on the merits and/or not recovering a PAGA penalty for each pay period, and by an additional 60% for risk of the Court reducing penalties, to arrive at an estimated exposure of \$383,152. *Id.*; *see also, e.g., Fleming*, 2011 WL 7563047 at *4 (reducing PAGA penalties by more than 82%); *Carrington*, 30 Cal.App.5th at 529 (affirming PAGA civil penalty of just \$5 per pay period).

Using these estimated figures, Plaintiff predicted the realistic total recovery for the Settlement Class would be approximately \$3,042,608. Haines Decl., ¶ 23. The proposed settlement of \$2,850,000 thus represents over 93% of Plaintiff’s reasonably forecasted recovery. *Id.* Preliminary approval is therefore appropriate as the Settlement will provide significant monetary relief to the Settlement Class.

e. The Experience and Views of Counsel

“Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pac. Enter. Securities Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Here, counsel have extensive experience litigating wage and hour class actions from both the plaintiff and defense side, and have been appointed class counsel in numerous cases alleging similar claims. *See* Haines Decl., ¶¶ 3-8; Declaration of Tuvia Korobkin (“Korobkin Decl.”), ¶¶ 2-6; Declaration of Neil M. Larsen, ¶¶ 2-5; Declaration of Alexandra R. McIntosh, ¶¶ 2-4. Counsel conducted an in-depth review of AB’s policies, timekeeping and payroll records, and other relevant data, and drew on their extensive experience to assess Plaintiff’s claims. Haines Decl., ¶¶ 12-13, 16-22. The Settlement was also

reached with the assistance of Mr. Dickstein, a respected wage and hour class action mediator. *Id.*, ¶ 13. This strongly supports preliminary approval. *Kullar*, 168 Cal.App.4th at 130.

2. The Preliminary Approval Standard Is Met

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

a. The Settlement Is Within the Range of Possible Approval

As noted, the Settlement reflects over 93% of the realistic estimated recovery on Plaintiff's claims, and will provide tangible, monetary compensation for hotly disputed wage claims. Accordingly, Plaintiff submits the Settlement is within the range of possible approval.

b. The Settlement Resulted from Serious, Informed Negotiations

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

c. The Settlement Is Devoid of Obvious Deficiencies

Preliminary approval of the Settlement is warranted because there are no obvious deficiencies. The Settlement provides tangible monetary relief to the Settlement Class, and the amounts proposed for attorneys' fees, costs, Plaintiff's incentive award, and PAGA penalties are all reasonable and appropriate based on the facts of this case. Because the Settlement is devoid of obvious deficiencies, this supports preliminary approval.

B. THE COURT SHOULD CERTIFY THE PROPOSED 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 ascertainable and numerous; 2) common questions of law and fact predominate; 3) Plaintiff's claims are typical of

the claims of the Settlement Class; and 4) Plaintiff and her counsel will fairly and adequately represent the interests of the Settlement Class. Cal. Code Civ. Proc. § 382.

1. The Proposed Class Is Ascertainable and Numerous

A class is “ascertainable” where members “may be readily identified without unreasonable expense or time by reference to official [or business] records.” *Sevidal v. Target Corp.*, 189 Cal.App.4th 905, 919 (2010). The Settlement Class includes non-exempt employees who worked for AB in California during the Class Period. Thus, they can be readily identified from AB’s records. AB represents there are approximately 636 Settlement Class members, rendering it impracticable to bring them all before the Court. *See* Settlement, § 1. Thus, numerosity is satisfied.

2. Common Issues of Law and Fact Predominate

The focus on certification is not on the merits of the case, but rather on what types of questions, “common or individual,” are likely to arise in the action. *Sav-On Drug Store, Inc. v. Sup. Ct.*, 34 Cal.4th 319, 327 (2004). Plaintiff’s claims are predicated primarily on AB’s allegedly unlawful rounding practice, alleged failure to properly calculate the regular rate, and allegedly unlawful meal and rest period policies/practices. Such claims are commonly held proper for class certification. *See, e.g., Leyva v. Medline Industries, Inc.*, 716 F. 3d 510, 514 (9th Cir. 2013) (directing district court to certify regular rate claim); *Tapia v. Zale Delaware Inc.*, No. 13-CV-1565-BAS, WL 1385181 at **3-4 (S.D. Cal. Apr. 6, 2016) (certifying rounding claim); *Benton v. Telecom Network Specialists, Inc.* 220 Cal.App.4th 701, 726 (2013) (certifying meal and rest period claims).

3. The Named Plaintiff’s Claims Are Typical

The typicality requirement is satisfied where class representatives have claims that are typical of those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal.App.3d 1341, 1347 (1987). Here, Plaintiff’s claims are typical of those held by Settlement Class members. Plaintiff was employed by AB as a non-exempt employee in California during the Class Period, and she was injured by the same challenged policies that allegedly injured the Settlement Class as a whole. Plaintiff asserts she was deprived of all minimum and overtime wages due to AB’s rounding practice, that AB failed to pay her all overtime wages due to its

1 failure to include bonuses in her regular rate of pay, that AB failed to provide her with legally-
2 compliant meal periods and failed to authorize and permit all rest periods, and that she received
3 inaccurate wage statements and was not paid all final wages at termination as a result. See
4 Declaration of Maria Teresa Perez, ¶¶ 2-4. Thus, typicality is satisfied.

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

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

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

15 The Court should order distribution of the proposed Notice by U.S. Mail, in English and
16 Spanish, using last known mailing addresses provided by AB. See Settlement, § 9. This is the
17 “best notice practicable” under the circumstances as it provides “individual notice to all members
18 who can be identified through reasonable effort.” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156,
19 173 (1974). Plaintiff proposes the Settlement be administered by Phoenix Settlement
20 Administrators, an experienced class action settlement administrator. See Jodey Lawrence
21 Declaration and exhibits. Settlement Class members’ addresses will be ascertainable through
22 AB’s records. Phoenix will also run all addresses through the U.S. Postal Service National Change
23 of Address database and/or perform “skip traces” to obtain current addresses. See Settlement, §
24 9(B) & (F).

25 The content of the proposed Notice satisfies Cal. Rule of Court 3.766(d) because it advises
26 Settlement Class members of the nature of the claims; the basic contentions and denials of the
27 parties and the key terms of the Settlement; the 60-day deadline to opt out, object, or submit a
28 dispute and the procedures by which to do so; explains the recovery formula and expected

1 recovery amount for each Settlement Class member; and explains the releases of claims included
2 in the Settlement. *See* Haines Decl., Exh. A to Exh. 1. The proposed Notice also includes the final
3 approval hearing date and time, and provides contact information for Class Counsel and the
4 administrator in the event Settlement Class members have any questions about the Settlement. *Id.*
5 This Notice satisfies Cal. Rule of Court 3.766(e) as the most reliable and cost-effective method
6 of reaching Settlement Class members.

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

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

11 **V. CONCLUSION**

12 For the foregoing reasons, 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 Dated: May 3, 2022

Respectfully submitted,
HAINES LAW GROUP, APC

17
18 By:



Paul K. Haines
Attorneys for Plaintiff