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

DANIEL TRAN, as an individual and on behalf
of all others similarly situated,

Plaintiff,

vs.

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

Defendants.

Case No. 30-2019-01102027-CU-OE-CXC

CLASS ACTION

*[Assigned for all purposes to the Hon.
William D. Claster; Dept. CX-104]*

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

Date: December 11, 2020

Time: 9:00 a.m.

Dept.: CX-104

Reservation No.: 73408859

Complaint Filed: October 2, 2019

Trial Date: None Set

PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court, on December 11, 2020, at 9:00 a.m., or as soon thereafter as the matter may be heard in Department CX-104 of the above-entitled Court, located at 751 W. Santa Ana Blvd, Santa Ana, CA 92701, Plaintiff Daniel Tran (“Plaintiff”), individually and on behalf of a class of similarly-situated individuals, will, and hereby does, move this Court for:

1. Preliminary approval of the proposed Stipulation of Class Action Settlement (“Settlement Agreement”);
2. Pursuant to Section 382 of the California Code of Civil Procedure, provisional certification of the following Settlement Class:
All current and former non-exempt employees employed by Defendant Silliker, Inc. in California from October 2, 2015 until the date of preliminary approval of this Settlement.
3. Preliminary appointment of Plaintiff Daniel Tran as Class Representative;
4. Preliminary appointment of Paul K. Haines and Sean M. Blakely of Haines Law Group, APC as Class Counsel;
5. Appointment of Phoenix Settlement Administrators as the third-party Settlement Administrator;
6. Approval of the proposed Class Notice, Request for Exclusion Form, and Notice of Estimated Settlement Award (collectively, the “Notice Packet”), and an order that the Notice Packet be disseminated to the proposed Settlement Class as provided in the Settlement Agreement;
7. An order granting Plaintiff’s unopposed request to file a First Amended Class and Representative Action Complaint, which adds claims for rest period violations, failure to furnish accurate, itemized wage statements, and civil penalties under the Labor Code Private Attorneys General Act (“PAGA”); and
8. The scheduling of a hearing to consider whether the class settlement should be finally approved and to award a Service Award to the Class Representative, and attorneys’ fees and costs to Class Counsel.

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, and exhibits attached thereto;
3 the declaration of Jodey Lawrence and exhibits attached thereto; the pleadings and other papers
4 filed in this action; and on any further oral or documentary evidence or argument presented at the
5 time of hearing.

6
7 Dated: November 13, 2020

Respectfully Submitted,
HAINES LAW GROUP, APC

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9 By:


Paul K. Haines
Attorneys for Plaintiff

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Daniel Tran (“Plaintiff”) seeks preliminary approval of a class-wide settlement
4 reached with Defendant Silliker, Inc. (“Silliker” or “Defendant”). The settlement resolves a class
5 and representative action now pending before this Court (the “Action”), in which Plaintiff alleges
6 that Silliker: (a) failed to pay all overtime wages as a result of its failure to incorporate all non-
7 discretionary incentive pay into the “regular rate” of pay; (b) failed to provide all legally
8 compliant meal periods; and (c) failed to authorize and permit all legally compliant rest periods.
9 As a result of these violations, Plaintiff alleges that Silliker is liable for derivative waiting time
10 and wage statement penalties, and is further liable for civil penalties under the Private Attorneys
11 General Act, Labor Code § 2698 *et seq.* (“PAGA”).¹

12 Plaintiff respectfully requests that the Court preliminarily approve this non-reversionary,
13 common-fund class action settlement,² in which Silliker has agreed to pay \$945,000.00 on behalf
14 of the following Settlement Class, which consists of an estimated 460 current and former
15 employees:

16 All current and former non-exempt employees employed by Defendant
17 Silliker, Inc. in California from October 2, 2015 until the date of
preliminary approval of this Settlement (the “Class Period”).

18 The Settlement is an excellent result for Settlement Class members, with the average gross
19 individual payment estimated at \$1,198.91. The Settlement was only reached after the parties
20 engaged in mediation with Jeffrey A. Ross, Esq., an experienced wage and hour class action
21 mediator. In connection with mediation, Silliker produced extensive discovery and information,
22 including a sampling of employee timekeeping and payroll records, Silliker’s relevant wage and
23 hour policies, as well as other relevant data points and information. After extensive research and

24 ¹ Plaintiff’s proposed First Amended Class and Representative Action Complaint (“FAC”), which
25 is attached as Exhibit B to the Declaration of Paul K. Haines filed herewith, alleges causes of
26 action for (1) Failure to Pay All Overtime Wages; (2) Meal Period Violations; (3) Rest Period
27 Violations; (4) Waiting Time Penalties; (5) Failure to Provide Accurate, Itemized Wage
Statements; (6) Unfair Competition; and (7) Civil Penalties under the PAGA.

28 ² The Stipulation of Class Action Settlement (“Settlement” or “Settlement Agreement”) is
attached as Exhibit A to the Declaration of Paul K. Haines filed herewith. The proposed Class
Notice, Request for Exclusion Form, and Notice of Estimated Settlement Award are attached as
Exhibits 1, 2, and 3, respectively, to the Settlement.

1 investigation, including a detailed analysis of Silliker's potential exposure made with the
2 assistance of Plaintiff's retained expert who holds a Ph.D. in economics, a full-day mediation was
3 held with Mr. Ross on June 22, 2020. With Mr. Ross's assistance, the parties reached an
4 agreement in principle, which ultimately resulted in the Settlement Agreement.

5 Settlement Class members do not need to submit a claim form to reap financial benefit
6 from the Settlement, as Individual Settlement Awards will be distributed to all Settlement Class
7 members who do not affirmatively opt out. As stated, after deductions for proposed settlement
8 administration costs, attorneys' fees and costs, Plaintiff's Service Award, and PAGA penalties to
9 be paid to the Labor & Workforce Development Agency ("LWDA"), the gross average Individual
10 Settlement Award is projected to be approximately \$1,198.91. For the reasons discussed herein,
11 Plaintiff respectfully requests that the Court preliminarily approve the Settlement.

12 **II. SUMMARY OF THE LITIGATION**

13 **A. FACTUAL AND PROCEDURAL BACKGROUND**

14 Silliker owns and operates testing laboratories serving the food, environmental, cosmetic,
15 and pharmaceutical industries. *See* Declaration of Paul K. Haines ("Haines Decl."), ¶ 10. Plaintiff
16 and Settlement Class members are current and former non-exempt employees who worked for
17 Silliker in California during the Class Period. *Id.*

18 On October 2, 2019, Plaintiff filed this instant action in this Court, alleging claims for
19 failure to pay overtime wages, meal period violations, waiting time penalties, and unfair
20 competition. Haines Decl., ¶ 11. As part of the Settlement, the parties have stipulated to the filing
21 of a First Amended Class and Representative Action Complaint ("FAC"), which adds causes of
22 action for rest period violations, wage statement violations, and PAGA civil penalties. *Id.*

23 **B. PLAINTIFF'S CLAIMS AND SILLIKER'S DEFENSES**

24 **1. Meal Period Claims**

25 Plaintiff alleges that Silliker failed to provide non-exempt employees with timely, 30-
26 minute meal periods that commenced prior to the end of the fifth hour of work. Haines Decl., ¶
27 16. Specifically, Plaintiff alleges that first meal periods were regularly late due to work demands
28 imposed by Silliker, as Plaintiff and other Settlement Class members had to complete assigned

1 tasks and assignments, including sterilizing, recording, weighing, and blending materials for
2 laboratory analysis; performing various analyses on products; and tracking and recording
3 findings, before they could be relieved to take a meal period. *Id.* Plaintiff argues that once certain
4 processes and testing commences, Plaintiff and other Settlement Class members were not able to
5 stop their work to take an off-duty meal period, rather, employees were required to complete a
6 test and record the findings before taking an off-duty meal period. *Id.* Plaintiff further alleges
7 that Silliker failed to provide Settlement Class members with second meal periods on shifts in
8 excess of 10.0 hours. *Id.*, at ¶ 17.

9 Silliker counters that it has always *provided* employees the opportunity to take legally
10 compliant meal periods, and that its written meal period policies throughout the Class Period
11 comply with California law. Haines Decl., ¶ 16. Silliker further argues that under *Brinker* it is
12 only required to “provide” meal periods, not “ensure” meal periods are taken, and that, as stated,
13 it has always done so. *Id.*; see *Brinker Rest. Corp. v. Sup. Ct.*, 53 Cal.4th 1004, 1038 (2012)
14 (rejecting “ensure” standard). Because Silliker has always provided legally compliant meal
15 periods, Silliker contends that any non-compliant meal periods in the timekeeping records were
16 the result of employee choice, rather than any policy or practice of Silliker. Haines Decl., ¶ 16.
17 With respect to second meal periods, Silliker asserts that many employees choose to waive their
18 right to a second meal period, as they are entitled to do under Labor Code § 512(a), so that they
19 do not need to stay at work for an extra unpaid 30 minutes. *Id.*, at ¶ 17. Finally, Silliker maintains
20 Plaintiff’s meal period claim is not suited for class certification, since individual inquiries would
21 be needed to assess which employees, if any, took non-compliant meal periods or missed meal
22 periods, how many meal periods were non-compliant or missed, and the reasons why a particular
23 employee did not take a compliant meal period on a particular shift. *Id.*, at ¶ 16.

24 **2. Unpaid Overtime Due to Regular Rate Miscalculations**

25 Plaintiff alleges that Silliker paid its non-exempt employees multiple forms of non-
26 discretionary incentive pay but failed to include these payments in employees’ “regular rate” of
27 pay when calculating overtime compensation, and underpaid employees’ overtime wages as a
28 result. Haines Decl., ¶ 18. Specifically, Plaintiff contends Silliker paid Settlement Class members

1 payments denoted as “benefit credit” and “hourly impact,” and various bonus payments, but failed
2 to include these payments when calculating the regular rate of pay for overtime purposes. *Id.*

3 Silliker counters that the payments at issue were not tied to employees’ hours worked, and
4 therefore, do not need to be included in the regular rate of pay. Haines Decl., ¶ 18; *see also* 29
5 U.S.C. § 207(e)(2) (payments made to employee which are not compensation for hours of
6 employment need not be included in regular rate of pay). Silliker further argues that the bonuses
7 at issue were discretionary and therefore excludable from the “regular rate.” *Id.*; *see also* 29 C.F.R.
8 § 778.208 (discretionary bonuses excludable from regular rate). Moreover, Silliker argues that
9 differences in the frequency, type, and amount of bonuses and various forms of incentive pay
10 received by Settlement Class members would preclude class certification of this claim. Haines
11 Decl., ¶ 18.

12 **3. Rest Period Claims**

13 Plaintiff alleges that Silliker failed to authorize and permit all off-duty rest periods due to
14 work demands imposed by Silliker. Haines Decl., ¶ 19. Plaintiff alleges that in order to comply
15 with Defendants’ stringent work demands, including Silliker’s requirement that employees
16 complete testing and various analyses before rest periods are taken, Plaintiff was prevented from
17 being relieved of all work duties during rest periods. *Id.*

18 Silliker contends its written rest period policies are legally compliant, and that it has always
19 authorized and permitted employees at least 10-minute rest periods for each four (4) hours
20 worked, or major fraction thereof. Haines Decl., ¶ 19. Any failure to take rest periods was a result
21 of employee choice, Silliker argues, rather than any Silliker policy or practice. *Id.* Silliker further
22 argues that Plaintiff’s rest period claim is not amenable to class treatment, since individual
23 inquiries would be required to determine which employees failed to take rest periods, how many
24 rest periods they failed to take, and the reasons why each employee failed to take rest period(s)
25 on a particular shift. *Id.* These manageability concerns are especially present with respect to rest
26 periods, Silliker argues, since rest periods are not recorded. *Id.*

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

28 As a result of the alleged unpaid overtime wages and unpaid meal and rest period

1 premiums, Plaintiff asserts that Silliker failed to comply with its final payment and wage
2 statement obligations, in violation of Cal. Labor Code §§ 203 and 226, respectively, and that
3 Silliker is liable for civil penalties under the PAGA. Haines Decl., ¶¶ 20-22.

4 Silliker asserts it has strong, good-faith defenses to Plaintiff’s underlying claims,
5 precluding the imposition of waiting time penalties. Haines Decl., ¶ 20; *see also* 8 Cal. Code
6 Regs. § 13520 (a “good faith dispute that any wages are due will preclude imposition of waiting
7 time penalties”); *Kao v. Joy Holiday*, 12 Cal.App.5th 947, 963 (2017) (holding “good faith
8 dispute” precluded imposition of waiting time penalties). Silliker further contends Plaintiff’s meal
9 and rest period claims cannot support a claim for waiting time or wage statement penalties, as a
10 Court of Appeal recently held in *Naranjo v. Spectrum Security Servs., Inc.*, 40 Cal.App.5th. 444
11 (2019) (*review granted* Jan. 2, 2020). Silliker further contends any alleged wage statement
12 violations could not be shown to be “knowing and intentional” given its good-faith defenses, and
13 that Plaintiff cannot show he or other employees “suffer[ed] injury,” as required by Lab. Code §
14 226(e). Haines Decl., ¶ 21. Silliker further argues wage statements always accurately reflected
15 hours worked and amounts paid to employees, and thus Silliker could not be found liable for wage
16 statement penalties per *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal.App.5th 1308, 1336-37 (2018)
17 (agreeing with employer’s “commonsense position that the pay stubs were accurate in that they
18 correctly reflected the hours worked and the pay received...The purpose of section 226 is to
19 *document the paid wages* to ensure the employee is fully informed regarding the calculation of
20 those wages.”) (*italics in original; citation omitted*). Haines Decl., ¶ 21.

21 Finally, Silliker contends Plaintiff’s PAGA claim fails because the underlying claims fail.
22 Haines Decl., ¶ 22; *see, e.g., Price v. Starbucks Corp.*, 192 Cal.App.4th 1136, 1147 (2011)
23 (“Because the underlying causes of action fail, the derivative UCL and PAGA claims also fail.”).
24 Silliker further maintains that given its good-faith defenses, the Court would substantially reduce
25 any PAGA civil penalties if it were to find Silliker liable for any of Plaintiff’s claims. Haines
26 Decl., ¶ 22; *see also* Lab. Code § 2699(e)(2) (authorizing reduction in PAGA penalties in court’s
27 discretion); *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 1135 (2012)
28 (affirming reduction of PAGA penalties); *Fleming v. Covidien, Inc.*, No. ED-CV-10-1487-

RGK(OPx), 2011 WL 7563047 at *4 (C.D. Cal. 2011) (reducing PAGA penalties by over 82%); *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018) (affirming PAGA civil penalty of just \$5 per pay period where employer made “good faith attempts” to comply with the law).

C. DISCOVERY AND MEDIATION

In connection with mediation, the parties engaged in extensive informal discovery, including Silliker’s production of a 10% sample of timekeeping data and payroll data for putative class members; its relevant written wage and hour policies and other relevant documents; as well as the total number of class members, average rates of pay, and additional relevant data points. Haines Decl., ¶ 12. Plaintiff hired a labor economist with a Ph.D. in economics to assist in his damages analyses by analyzing and extrapolating the extensive data produced by Silliker. *Id.* This discovery allowed the parties to assess the merits and value of Plaintiff’s claims, as well as Silliker’s potential defenses. *Id.*

The parties attended a full-day mediation on June 22, 2020 with Jeffrey A. Ross, Esq. Haines Decl., ¶ 13. The parties vigorously debated their legal positions, including the likelihood of class certification and the legal bases for their respective claims and defenses. *Id.* At the conclusion of mediation, Mr. Ross issued a mediator’s proposal which was eventually agreed to in the days following mediation. *Id.* Over the following months, the parties negotiated and formalized the Settlement now before the Court. *Id.*

III. THE PROPOSED SETTLEMENT

A. ESSENTIAL TERMS OF THE SETTLEMENT

If the Court approves this settlement, Silliker will pay a non-reversionary Gross Settlement Amount (“GSA”) of \$945,000.00. *See* Settlement, ¶ 4. No Settlement Class member will be required to file a claim in order to reap financial benefit from the Settlement. *Id.*, at ¶ 5. All Settlement Class members will automatically receive an “Individual Settlement Award” unless they affirmatively opt-out. The monetary terms of the settlement are summarized below:

- Gross Settlement Amount (“GSA”): \$945,000.00
- Minus Court-approved attorneys’ fees (one-third): \$315,000.00
- Minus Court-approved verified costs (up to): \$25,000.00
- Minus Court-approved Service Award: \$5,000.00
- Minus Amount Designated as PAGA penalties: \$50,000.00
- Minus estimated settlement administration costs: \$11,000.00

Net Settlement Amount (“NSA”): \$539,000.00
• PLUS 25% of PAGA penalties to Settlement Class: \$12,500.00
Total Amount Paid to Settlement Class members: \$551,500.00

1. The Settlement Provides for Reasonable Monetary Payments

As shown above, after deducting amounts for a court-approved Service Award to Plaintiff, settlement administration costs, attorneys’ fees and costs, and the PAGA payment to the LWDA, the settlement requires Silliker to pay at least \$551,500.00 to all members of the Settlement Class who do not timely opt-out. *See* Settlement, ¶ 4(C). According to Silliker, there are approximately 460 total Settlement Class members. Haines Decl., ¶ 15. Thus, the average Individual Settlement Award is projected to be approximately \$1,198.91. *Id.* Settlement Class members will have forty-five (45) days from the mailing of the Class Notice to opt-out or object, thereby providing ample time to review the Notice without unduly delaying the settlement. *See* Settlement, ¶¶ 10(C)-(D).

Individual Settlement Awards will be calculated as follows: (i) 75% of the NSA shall be distributed to all participating Settlement Class members based on their proportionate number of workweeks worked during the Class Period; (ii) 20% of the NSA is designated the “Waiting Time Amount” and will be distributed equally to all Settlement Class members who separated their employment with Silliker between October 2, 2016 through the end of the Class Period (the “Waiting Time Period”); (iii) the remaining 5% of the NSA is designated the “Wage Statement Amount” and will be distributed to all Settlement Class members who worked for Silliker from October 2, 2018 to the end of the Class Period, based on the proportionate number of workweeks worked during that period; and (iv) in addition to the NSA, the \$12,500 “PAGA Amount” (i.e., 25% of total PAGA penalties) will be distributed to all Settlement Class members who worked for Silliker from July 17, 2019 to the end of the Class Period, based on the proportionate number of workweeks worked during that period. *See* Settlement, ¶ 5(B).

Settlement Class members who do not opt out of the Settlement will be bound by its terms, and will release all claims that are asserted in the First Amended Class and Representative Action Complaint that arose during the Class Period. *See* Settlement Agreement, ¶ 3(A). Plaintiff has also agreed to a general release of claims, subject to a waiver of California Civil Code § 1542. *Id.*, ¶ 3(B).

1 **2. Attorneys' Fees and Costs, Service Award and PAGA Payment**

2 Plaintiff will apply for a Service Award at final approval in the amount of \$5,000 for his
3 services to the Settlement Class. *See* Settlement, ¶¶ 4(C)(3); 7. “[I]ncentive awards are fairly
4 typical in class action cases...and are intended to compensate class representatives for work done
5 on behalf of the class [and] to make up for financial or reputational risk undertaken in bringing
6 the action.” *In re Cellphone Fee Termination Cases*, 186 Cal.App.4th 1380, 1393-94 (2010). As
7 will be fully briefed at final approval, Plaintiff’s requested Service Award is intended to recognize
8 the time and effort he expended on behalf of the Settlement Class, including providing
9 information and documents to counsel, identifying potential witnesses, attending telephonic
10 meetings with counsel, and otherwise actively participating in the prosecution of this case; and
11 the risks Plaintiff took in bringing a class action against a former employer. Haines Decl., ¶ 24.
12 Plaintiff respectfully submits that this requested payment, which is only 0.5% of the GSA, is well
13 within the range of permissible approval. *See, e.g., Bond v. Ferguson Enter., Inc.*, No. 1:09–1662
14 OWW MJS, 2011 WL 3268879 at **2, 15 (E.D. Cal. Jun. 30, 2011) (approving \$11,250
15 enhancement award to each of two named plaintiffs out of \$2,250,000 settlement); *Ross v. U.S.*
16 *Bank Nat’l Ass’n*, No. 3:07-2951 SI, 2010 WL 3833922 at *3 (N.D. Cal. Sept. 29, 2010)
17 (approving enhancement award of \$20,000 to each of four named plaintiffs from \$1,050,000
18 settlement).

19 The parties have also agreed to designate \$50,000 of the GSA as PAGA civil penalties, of
20 which \$37,500 will be paid to the LWDA, with the remaining \$12,500 distributed to the
21 Settlement Class as described above, consistent with the PAGA’s requirement that 75% of such
22 penalties be allocated to the LWDA with the remaining 25% of penalties allocated to aggrieved
23 employees (Labor Code § 2699(i)). *See* Settlement, ¶ 4(C)(5). Plaintiff submits this allocation to
24 the LWDA is appropriate in light of other settlements allocating penalties to the LWDA. *See,*
25 *e.g., Chu v. Wells Fargo Inv., LLC*, No. C-05-4526-MHP, 2011 WL 673265 (N.D. Cal. Feb. 16,
26 2011) (approving PAGA payment of \$7,500 to LWDA out of \$6.9 million settlement).

27 In addition, at final approval Plaintiff’s counsel will request attorneys’ fees of one-third
28 of the GSA (i.e., \$315,000), and up to \$25,000 in cost reimbursement. *See* Settlement, ¶¶ 4(C)(4);

1 6. Plaintiff submits the requested fee is fair compensation for undertaking complex, expensive,
2 risky, and time-consuming litigation on a contingent basis. Haines Decl., ¶ 25. Counsel have
3 incurred substantial attorneys' fees in, among other things, conducting pre-filing investigation;
4 conducting legal research; reviewing documents and data produced by Silliker; analyzing
5 employee timekeeping, payroll, and other data with Plaintiff's expert to create a comprehensive
6 damages model; preparing for and attending mediation; negotiating and preparing the Settlement
7 Agreement; preparing this Motion; and otherwise prosecuting this case. *Id.* Further, counsel
8 anticipate incurring significant future attorneys' fees in overseeing the Notice process, fielding
9 phone calls from Settlement Class members, preparing the Motion for Final Approval and
10 supporting documents, and appearing at the Final Approval Hearing. *Id.*

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

19 **IV. ARGUMENT**

20 **A. PRELIMINARY APPROVAL IS WARRANTED**

21 Rule of Court 3.769 conditions the settlement of a class action on court approval, which
22 is generally evaluated under the same standards as Fed. R. Civ. Proc. 23. *See Reed v. United*
23 *Teachers Los Angeles*, 208 Cal.App.4th 322, 337 (2012) (Rule 3.769 requires court to determine
24 "that the settlement is fair, reasonable and adequate"); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
25 1026 (9th Cir. 1998) (Rule 23(e) requires trial court to determine "whether a proposed settlement
26 is fundamentally fair, adequate, and reasonable"). The court's role is to ensure the agreement as
27 a whole is fair and within the range of reasonableness. *Hanlon*, 150 F.3d at 1027. There is a
28 presumption of fairness, as here, where the settlement was negotiated at arm's length by class

counsel, with the assistance of a well-respected 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 224, 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 he maintains his claims are meritorious, Plaintiff acknowledges there were substantial risks and uncertainty in proceeding with class certification and eventual trial on the merits. As described in section II.B., *supra*, Silliker presented multiple defenses to Plaintiff’s claims, both on the merits and to class certification. While Plaintiff was prepared to litigate his 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, they had not yet completed formal written and deposition discovery, which would have required expenditure of substantial time and resources by all parties. Haines Decl., ¶ 26. Plaintiff also still had to file for class certification, and faced the prospect of appeals in the wake of a disputed class certification ruling and/or summary judgment ruling. *Id.* Even if Plaintiff obtained class certification, the parties would incur considerable attorneys’ fees and costs through a possible decertification motion, trial, and potential appeal. *Id.* This settlement avoids those risks and the accompanying expense. *Id.* Thus, this factor supports preliminary approval.

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

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

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

8 This proposed settlement provides a fair and reasonable monetary recovery for the
9 Settlement Class in the face of disputed claims. With the assistance of a retained economist with
10 a Ph.D., Plaintiff conducted an analysis of unpaid overtime wages due to Silliker's regular rate
11 miscalculations, potential meal and rest period premiums owing, and derivative penalties.
12 Plaintiff's analysis of the realistic expected recoveries for each of the theories of liability pled is
13 set forth below:

14 **First Meal Period Violations: \$322,971**

15 Plaintiff alleges that Silliker failed to provide timely, 30-minute meal periods prior to the
16 end of the fifth hour of work. Haines Decl., ¶ 16. Based on Plaintiff's expert's review and
17 extrapolation of the timekeeping data, approximately 101,755 shifts during the Class Period
18 reflected a late, short, and/or missed first meal period. *Id.* In addition, based on data provided by
19 Silliker, Settlement Class members' average hourly rate of pay during the Class Period was
20 \$15.87 per hour. *Id.* Therefore, assuming that each late, short, and/or missed meal period reflected
21 in the timekeeping records would result in a violation, Plaintiff estimated Silliker's maximum
22 exposure on this claim at \$1,614,852 (101,755 non-compliant first meal periods * \$15.87
23 premium). *Id.*

24 However, Plaintiff's theory of liability carried significant risks of both non-certification
25 and losing on the merits. Silliker maintains it has always *provided* its employees the opportunity
26 to take legally compliant meal periods, and that its written meal period policies comply with
27 California law. Haines Decl., ¶ 16. Silliker also asserts that under *Brinker* it is only required to
28 "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.* Finally, Silliker maintains that the first meal period claim is 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. *Id.* Based on these defenses, Plaintiff discounted the maximum amount by 50% for risk of non-certification and an additional 60% for risk of being unsuccessful on the merits or failing to recover the full amount sought, to arrive at an estimated exposure of \$322,971. *Id.*

Second Meal Period Violations: \$43,385

Plaintiff's analysis of the timekeeping data showed that during the Class Period, Settlement Class members worked approximately 22,781 shifts in excess of 10.0 hours without a legally-compliant second meal period. Haines Decl., ¶ 17. Therefore, Plaintiff calculates Silliker's maximum exposure for second meal period violations at approximately \$361,534 (22,781 non-compliant second meal periods * \$15.87 premium). *Id.*

However, Silliker's argued that it has maintained compliant written meal period policies throughout the Class Period, provided all second meal periods to Settlement Class members, and Settlement Class members voluntarily waived their second meal period on shifts in excess of 10.0 hours but less than 12.0 hours per Labor Code § 512. Haines Decl., ¶ 17. If the Court accepted Silliker's waiver argument for shifts less than 12.0 hours in duration, then there were only approximately 1,474 shifts at issue, as this is the estimated number of shifts worked over 12.0 hours. *Id.* This would significantly reduce Silliker's maximum exposure as only shifts in excess of 12.0 hours would be at issue, thereby reducing Silliker's potential liability to \$23,392 (1,474 shifts * \$15.87 premium). *Id.* In light of these risks, Plaintiff discounted the maximum amount that the class could potentially recover for second meal periods by 60% for a risk of non-certification, and an additional 70% for a risk of losing on the merits, or having exposure reduced due to Silliker's waiver arguments to arrive at \$43,385. *Id.*

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1 Rest Period Premium Wages: \$185,996

2 Plaintiff alleges that Silliker failed to authorize and permit legally compliant off-duty rest
3 periods. Haines Decl., ¶ 19. Based on Plaintiff's expert's analysis and extrapolation of the
4 timekeeping records provided by Silliker, there were approximately 195,333 rest period eligible
5 shifts worked during the Class Period. *Id.* Plaintiff estimates there was a 50% violation rate with
6 respect to rest periods, and therefore, Plaintiff calculated a maximum estimated exposure of
7 approximately \$1,549,959 (97,666 non-compliant rest periods * \$15.87 premium) for Plaintiff's
8 rest period claim. *Id.* As noted, however, Silliker presented multiple defenses to Plaintiff's rest
9 period claim. Silliker contends its written rest period policy is legally compliant, and that it has
10 always authorized and permitted employees at least 10-minute rest periods for each 4 hours
11 worked, or major fraction thereof. *Id.* Any failure to take rest periods was as a result of employee
12 choice, Silliker contends, rather than any Silliker policy or practice. *Id.* Silliker further argues that
13 Plaintiff's rest period claim is not amenable to class treatment, since individual inquiries would
14 be required to determine which employees failed to take rest periods, how many rest periods they
15 failed to take, and the reasons why each employee failed to take rest period(s) on a particular shift.
16 *Id.* These manageability concerns are especially present with respect to rest period claims, Silliker
17 argues, given that rest periods are not recorded. *Id.* Plaintiff therefore discounted this maximum
18 amount by 60% for risk of non-certification and an additional 70% for a risk of being unsuccessful
19 on the merits or of failing to recover the full amount sought, to arrive at an estimated realistic
20 exposure of \$185,996. *Id.*

21 Underpaid Overtime: \$37,615

22 Plaintiff alleges that Silliker paid Plaintiff and Settlement Class members non-
23 discretionary incentive pay, but failed to include those payments in the "regular rate," thereby
24 underpaying employees' overtime wages. Haines Decl., ¶ 18. Based on Plaintiff's expert's
25 analysis and extrapolation of payroll data provided by Silliker, Plaintiff calculated that putative
26 class members were underpaid by approximately \$62,691 in overtime wages during the Class
27 Period as a result of Silliker's alleged failure to properly calculate the "regular rate" of pay. *Id.*

28 However, Silliker counters that the incentive payments at issue are not tied to employees'

1 hours worked and therefore do not need to be included in the regular rate, and/or are discretionary
2 bonuses which need not be included in the regular rate. Haines Decl., ¶ 18. Silliker further argues
3 that differences in the frequency, type, and amount of incentive pay received by different
4 employees would preclude class certification of this claim. *Id.* Based on these defenses, Plaintiff
5 discounted the estimated maximum by 20% for risk of non-certification, and by an additional
6 25% to account for risk of losing on the merits or failure to recover the full amount sought, to
7 arrive at an estimated exposure of \$37,615. *Id.*

8 **Waiting Time Penalties: \$293,674**

9 Based on data provided by Silliker, there are approximately 257 Settlement Class
10 members who have separated their employment with Silliker since October 2, 2016. Haines Decl.,
11 ¶ 20. Plaintiff estimates an average waiting time penalty of \$3,809 ($\$15.87 \times 8 \text{ hours} \times 30 \text{ days}$),
12 and therefore, calculated Silliker's maximum waiting time penalty exposure at approximately
13 \$978,913 (257 former employees * \$3,809 avg. waiting time penalty). *Id.* As noted above,
14 however, Silliker asserts it has strong, good-faith defenses to Plaintiff's underlying claims, most
15 notably their assertion that because they possessed good-faith defenses to the underlying claims,
16 any failure to pay wages was not "willful" as a matter of law. *Id.* Silliker further contends
17 Plaintiff's meal and rest period claims cannot support a claim for waiting time penalties, as
18 multiple courts have held. *Id.* Based on these defenses, Plaintiff discounted Silliker's maximum
19 exposure by 40% for risk of non-certification and by an additional 50% for risk of being
20 unsuccessful on the merits, to arrive at an estimated total of \$293,674. *Id.*

21 **Wage Statement Penalties: \$110,016**

22 Plaintiff's analysis reflected that there were approximately 9,168 pay periods worked by
23 Settlement Class members within the liability period applicable to Plaintiff's wage statement
24 claim. Haines Decl., ¶ 21. In calculating Silliker's exposure, Plaintiff gave Silliker the benefit of
25 assuming Plaintiff could only obtain the "initial" wage statement violation rate of \$50 per pay
26 period, for a total of \$458,400 ($9,168 \text{ pay periods} \times \$50 \text{ "initial" penalty}$) in potential penalties.
27 *Id.*; see also Lab. Code 226(e) (\$50 penalty for "initial" violations); *Amaral v. Cintas Corp. No.*
28 *2*, 163 Cal.App.4th 1157, 1209 (2008) (finding "initial" violation rate applies for civil penalties

1 until employer has been notified it is violating the Labor Code); *Patel v. Nike Retail Svcs., Inc.*,
2 58 F.Supp.3d 1032, 1042-43 (N.D. Cal. 2014) (citing *Amaral* and applying “initial” \$50 penalty
3 to all pay periods in calculating amount-in-controversy for wage statement claim). But given
4 Silliker’s arguments that no violations occurred, that employees suffered no “injury,” that any
5 alleged violations were not “knowing and intentional,” and that meal and rest period claims
6 cannot support wage statement penalties, as well as risks associated with Plaintiff’s underlying
7 claims discussed above, Plaintiff discounted the maximum exposure by 40% for risk of non-
8 certification, and by an additional 60% for risk of being unsuccessful on the merits, for an
9 estimated realistic exposure of \$110,016. Haines Decl., ¶ 21.

10 **PAGA Penalties: \$64,463**

11 Plaintiff’s analysis reflected there were approximately 5,730 pay periods worked in the
12 PAGA Period (i.e., July 17, 2019 through the present). Therefore, Plaintiff estimated a maximum
13 PAGA exposure of \$573,000 (5,730 pay periods * \$100 “initial” violation rate). Haines Decl., ¶
14 22; *Amaral*, 163 Cal.App.4th at 1209. However, these penalties derive from Plaintiff’s underlying
15 claims, each of which Silliker vigorously disputes. *Green v. Lawrence Service Co.*, No. LA-CV-
16 12-6155-JAK (VBKx), 2013 WL 3907506 at fn. 5 (C.D. Cal. July 23, 2013) (PAGA claim’s
17 success is determined by merits of underlying claims). The PAGA also specifically grants courts
18 discretion to reduce penalties (Lab. Code § 2699(e)(2)), and Silliker argues the Court would
19 reduce penalties significantly given its good-faith defenses. Haines Decl., ¶ 22. Thus, Plaintiff
20 discounted the maximum figure by 55% for risk of losing on the merits and by an additional 75%
21 for risk of the Court reducing penalties, to arrive at estimated exposure of \$64,463. *Id.*; *see also*
22 *Thurman, supra*, 203 Cal.App.4th at 1135-36 (affirming PAGA penalty reduction); *Fleming,*
23 *supra*, 2011 WL 7563047 at *4 (reducing PAGA penalties by over 82%); *Carrington, supra*, 30
24 Cal.App.5th at 529 (affirming PAGA penalty of just \$5 per pay period).

25 Using these estimated figures, Plaintiff estimated a realistic total recovery for the
26 Settlement Class of approximately \$1,058,120. Haines Decl., ¶ 23. The proposed settlement of
27 \$945,000.00 therefore represents about 89.3% of Plaintiff’s reasonably forecasted recovery. *Id.*
28 This recovery is significant, and preliminary approval is 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). Plaintiff is represented by competent counsel with extensive experience litigating wage and hour class actions from both the plaintiff and defense side, and who have been appointed class counsel in numerous wage and hour class actions. *See* Haines Decl., ¶¶ 3-8; *see also* Declaration of Sean M. Blakely (“Blakely Decl.”), ¶¶ 2-6. Counsel conducted an in-depth review of Silliker’s policies, timekeeping and payroll records, and other relevant data, and drew on their extensive experience to assess Plaintiff’s claims and Silliker’s defenses. The settlement was also reached with the assistance of Jeffrey A. Ross, a well-respected wage and hour class action mediator. *Id.*, ¶ 13. This factor 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 explained above, the proposed Settlement reflects approximately 89.3% of the realistic estimated recovery on Plaintiff’s claims, and will provide tangible, monetary compensation for hotly disputed wage claims on a classwide basis. Plaintiff submits the Settlement is within the range of possible approval, such that notice should be provided to the Settlement Class so that they can consider the settlement. The Court will again have the opportunity to assess the reasonableness of the Settlement after the Settlement Class has had the opportunity to opt-out or object.

b. The Settlement Resulted from Serious, Informed Negotiations

This proposed Settlement is the result of an exchange of substantial information, arm’s-

length negotiations, a full-day mediation with an experienced mediator, and additional months of negotiating the Settlement. Thus, the Settlement is entitled to a presumption of fairness. *Kullar*, 168 Cal.App.4th at 130. Plaintiff carefully vetted the claims at issue, reviewed extensive data and information, and conducted a detailed analysis of the data with the help of their retained expert. Haines Decl., ¶¶ 16-23. Thus, this factor supports preliminary approval.

c. The Settlement Is Devoid of Obvious Deficiencies

Preliminary approval of the proposed 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 Service Award, and PAGA civil penalties are all reasonable and appropriate based on the particular facts of this case. Because the Settlement is devoid of obvious deficiencies, this factor supports preliminary approval.

B. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS

The proposed Settlement Class satisfies the criteria for certification of a settlement class under California law because: (1) the individuals in the Settlement Class are ascertainable and sufficiently 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 his 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) (alterations in original). The Settlement Class is defined as non-exempt employees who worked for Silliker in California during the Class Period. Thus, Settlement Class members can be readily identified from Silliker's employment records. As stated, Silliker represents there are approximately 460 Settlement Class members, rendering it impracticable to bring all of them before the Court. Thus, the Settlement Class satisfies the numerosity requirement.

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

1 questions, “common or individual,” are likely to arise in the action. *Sav-On Drug Store, Inc. v.*
2 *Sup. Ct.*, 34 Cal.4th 319, 327 (2004). Plaintiff’s claims are predicated primarily on Silliker’s
3 allegedly unlawful meal and rest period policies and practices, and alleged regular rate
4 miscalculations. These claims are commonly held proper for class certification. *See, e.g., Benton*
5 *v. Telecom Network Specialists, Inc.*, 220 Cal.App.4th 701, 726 (2013) (reversing denial of
6 certification of meal and rest period claims); *Faulkinbury v. Boyd & Assoc., Inc.*, 216 Cal.App.4th
7 220, 240 (2013) (certifying regular rate miscalculation claim because “[t]he legality of Boyd’s
8 policy of excluding the bonus from calculating overtime wages can be determined on a class-wide
9 basis”).

10 **3. The Named Plaintiff’s Claims Are Typical**

11 The typicality requirement is satisfied where class representatives have claims that are
12 typical of those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191
13 Cal.App.3d 1341, 1347 (1987). Here, Plaintiff’s claims are typical of those held by Settlement
14 Class members. Plaintiff was employed by Silliker as a non-exempt employee in California during
15 the proposed Class Period and was subject to Silliker’s wage and hour policies at issue in this
16 lawsuit. Plaintiff alleges he was injured by the same challenged policies that injured the
17 Settlement Class as a whole, including an underpayment of overtime wages and failure to provide
18 meal and rest periods. Thus, typicality is satisfied.

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

20 The adequacy of representation requirement examines conflicts of interest between named
21 parties and the class(es) they seek to represent. *Capital People First v. State Dept. of*
22 *Developmental Svcs.*, 155 Cal.App.4th 676, 697 (2007). Plaintiff and his counsel will adequately
23 represent the Settlement Class, as there are no known conflicts between Plaintiff and the
24 Settlement Class he seeks to represent. *See McGhee v. Bank of America*, 60 Cal.App.3d 442, 450
25 (1976) (finding adequacy satisfied where there was no indication that plaintiff’s counsel was not
26 qualified and the named plaintiff had no interests antagonistic to those of the proposed class).
27 Class Counsel also have extensive experience in wage and hour class action litigation. *See Haines*
28 *Decl.*, ¶¶ 3-8; *Blakely Decl.*, ¶¶ 2-6.

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

3 This Court should order distribution to the Settlement Class of the proposed Class Notice
4 by U.S. Mail, postage prepaid, using last known mailing address information provided by Silliker.
5 See Settlement, ¶ 10. This manner of giving notice is the “best notice practicable” under the
6 circumstances as it provides “individual notice to all members who can be identified through
7 reasonable effort.” See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Plaintiff
8 proposes that the settlement be administered by Phoenix Settlement Administrators (“Phoenix”),
9 an experienced class action settlement administrator. See Declaration of Jodey Lawrence
10 (“Lawrence Decl.”) and attached exhibits. Settlement Class members’ addresses will be
11 ascertainable through Silliker’s employment records. To the extent the employees’ addresses have
12 changed, Phoenix will run all addresses through the U.S. Postal Service National Change of
13 Address database and/or perform “skip traces” to obtain current address information. See
14 Settlement, ¶¶ 10(B), (F).

15 The content of the proposed Notice satisfies Cal. Rule of Court 3.766(d) because it advises
16 Settlement Class members of the nature of the claims, the basic contentions and denials of the
17 parties and the key terms of the Settlement, the uniform 45-day deadline to opt-out or object to
18 the Settlement and the procedures by which to do so, explains the recovery formula and expected
19 recovery amount for each Settlement Class member, and advises that they will be bound by the
20 terms of the Settlement if they do not request exclusion. See Haines Decl., Exhs. 1, 2, 3, to Exh.
21 A. The proposed Class Notice will also notify Settlement Class members of the final approval
22 hearing date and time, provides contact information for Class Counsel, and advises Settlement
23 Class members that they may enter an appearance through counsel if they wish. This Notice
24 satisfies Cal. Rule of Court 3.766(e) as the most reliable and cost-effective method of reaching
25 Settlement Class members.

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

27 Finally, the Court should set a hearing for final approval of the settlement on a date
28 appropriately scheduled to follow the deadline by which Settlement Class members must file

1 objections to the settlement or opt-out. *See* Cal. Rule of Court 3.769.

2 **V. CONCLUSION**

3 For the foregoing reasons, Plaintiff respectfully requests that the Court preliminarily
4 approve the proposed settlement, provisionally certify the Settlement Class, and enter the
5 Proposed Order submitted concurrently herewith.

6
7 Dated: November 13, 2020

Respectfully submitted,
HAINES LAW GROUP, APC

8
9 By:



Paul K. Haines
Attorneys for Plaintiff