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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF SANTA CLARA
12

13 ROY WITTBECKER, on behalf of himself,
and all others similarly situated, and the
14 general public,

15 Plaintiff,

16 vs.

17 CUPERTINO ELECTRIC, INC., a Delaware
corporation; and DOES 1 through 50,
18 inclusive,

19 Defendants.
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Case No. 20CV368613 (CLASS)
Case No. 20CV371987 (PAGA)

Assigned for All Purposes to the Honorable
Theodore C. Zayner, Department 19

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT AND CERTIFICATION OF
SETTLEMENT CLASS; MEMORANDUM
OF POINTS AND AUTHORITIES**

*[Filed concurrently with Declaration of Shaun
Setareh in support thereof]*

Date: May 7, 2025
Time: 1:30 p.m.
Place: Department 19

Class Action Complaint Filed: 07/27/2020
PAGA Complaint Filed: 10/23/2020

1 TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on May 7, 2025 at 1:30 p.m., or as soon thereafter as the matter
3 may be heard in Department 19 of the above-entitled Court located at 191 N. First Street, San Jose, CA
4 95113, Plaintiff Roy Wittbecker (“Plaintiff”) will and does hereby move this Court for an Order:

- 5 • Preliminarily approving the proposed Stipulation of Class and Representative Action
6 Settlement as fair, reasonable, and adequate;
- 7 • Preliminarily approving the form, manner, and content of the notice to be mailed to the
8 Class;
- 9 • Setting deadlines for the Settlement Administrator to provide notice to the Class and for
10 Class Members to opt out of or object to the Settlement;
- 11 • Scheduling a hearing date for the Motion for Final Approval of Class Action Settlement;
- 12 • Provisionally certifying the Class;
- 13 • Staying all proceedings in this action, except for such proceedings as may be necessary to
14 implement and complete the Settlement, until Final Approval;
- 15 • Appointing Plaintiff Roy Wittbecker as the Class Representative for settlement purposes
16 only;
- 17 • Appointing Shaun Setareh, Thomas Segal and Farrah Grant of Setareh Law Group as Class
18 Counsel for settlement purposes only;
- 19 • Approving Simpluris, Inc. as the Settlement Administrator;
- 20 • Directing that notice be mailed to the Class; and
- 21 • Scheduling a hearing date for the Motion for Final Approval of Class Action Settlement.

22 This motion is made pursuant to California Rules of Court 3.769. This motion will be based upon
23 this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the
24 Declaration of Shaun Setareh as well as exhibits attached thereto, the arguments of counsel, the documents
25 filed in this action and any other matters as may be properly presented on or before the hearing on this
26 motion.

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DATED: March 16, 2025

SETAREH LAW GROUP

/s/ Farrah Grant
SHAUN SETAREH
THOMAS SEGAL
FARRAH GRANT
Attorneys for Plaintiff
Roy Wittbecker

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff ROY WITTBECKER (“Plaintiff”) seeks preliminary approval of a non-reversionary class
4 and representative action settlement of wage and hour claims and claims for civil penalties under the
5 Private Attorneys General Act of 2004 (“PAGA”) against Defendant CUPERTINO ELECTRIC, INC.
6 (“Defendant”)¹ for a Maximum Settlement Amount (“MSA”) of **\$9,675,000**. The Class, to be certified
7 for purposes of settlement only, is estimated to consist of approximately 10,220 Class Members. No Class
8 Members will have to make a claim to receive payment. Instead, all Class Members will be mailed checks
9 directly. Any residue from uncashed checks will go to a *cy pres* organization subject to court approval.²

10 The Net Class Settlement Amount (“NCSA”) expected to be paid to Class Members – after
11 payment of Class Counsel fees of thirty three and one-third of the MSA (\$3,225,000) and costs of up to
12 \$40,000, settlement administration estimated to be \$36,500, Plaintiff’s enhancement payment of \$12,000,
13 and a PAGA Settlement Amount of \$300,000, which includes payment to the California Labor &
14 Workforce Development Agency (“LWDA”) of \$225,000 (75% of the total PAGA Settlement Amount)
15 and payment to PAGA Group Members of \$75,000 (25% of the PAGA Settlement Amount), is
16 \$6,059,500. Including the 25% portion of the PAGA Payment, or \$75,000, that will be paid to PAGA
17 Group Members, the NCSA being paid to Class Members is **\$6,134,500**. The average estimated share of
18 the NCSA per Class Member is approximately **\$600.24**. Plaintiff has obtained a significant monetary
19 recovery for Class Members.

20 The Settlement occurred as a result of extensive, arm’s-length negotiations by experienced counsel
21 after sufficient formal and informal written discovery and investigation into the facts. The case settled
22 following two mediations and the acceptance of a mediator’s proposal made by David Rotman, an
23 experienced mediator. The Settlement seeks to fully and finally settle and resolve all claims against
24 Defendant on behalf of all individuals employed by Defendant as non-exempt employees in California at

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26
27 ¹ The Parties executed a Stipulation of Class and Representative Action Settlement (“Settlement”),
attached as Exhibit 2 to the Declaration of Shaun Setareh filed concurrently herewith.

28 ² The Parties propose the Labor Dispute Cy Pres Fund at San Francisco State University as the *cy pres*.

any time from July 27, 2016, to the preliminary approval date.³ The Settlement will result in financial benefit to the class members on terms that are fair, reasonable, and adequate. Based upon their evaluation, Plaintiff and his counsel have determined that the Settlement is fair, reasonable, adequate and in the best interest of the Class, and they request that this Court grant preliminary approval of the Settlement.

II. THE MAJOR TERMS OF SETTLEMENT

Key provisions of the proposed settlement include the following:

- Defendant will pay a MSA of **\$9,675,000**.
- Defendant will not oppose Class Counsel’s application for fees up to 33 and 1/3 percent of the MSA (**\$3,225,000**) and costs not to exceed **\$40,000**, to be paid out of the MSA.
- The notice portion of the Settlement will be administered by Simpluris, Inc. (“Simpluris”), whose costs are estimated to be **\$36,500** to administer the Settlement per its terms.
- Out of the MSA, **\$300,000** is allocated to resolve the PAGA claims, with 75%, i.e., **\$225,000**, to be paid by the Settlement Administrator to the LWDA, and 25%, i.e., **\$75,000**, to be paid to PAGA Group Members – i.e., individuals employed by Defendant in California from August 19, 2019 to the date the Court issues an order granting preliminary approval of the settlement. (Settlement ¶ 10.3). In the event that the workweeks at the time of preliminary approval are more than 5% greater than the estimated workweeks, the Class and PAGA Period will be adjusted to an end date where the workweeks did not exceed that amount. (*Id.* ¶ 13.9).
- Defendant will not oppose the application for a **\$12,000** Service Award to Plaintiff.
- After deducting Class Counsel’s attorneys’ fees and costs, service award to Plaintiff, settlement administration costs, and the PAGA Settlement Amount, the remainder – i.e., the NCSA – is calculated to be at least \$6,059,500. Including the 25% portion of the PAGA Payment, or \$75,000, that will be paid to PAGA Group Members, the NCSA being paid to Class Members is **\$6,134,500**. Each Settlement Class Member and each PAGA Member will receive a *pro rata* share from one or both of

³ In the event that the workweeks at the time of preliminary approval are more than 5% greater than the estimated workweeks of 628,822, (or greater than 660,263) the Class and PAGA Period will be adjusted to an end date where the workweeks did not exceed that amount. (Settlement ¶ 13.9).

these amounts based upon the number of weeks worked during the Class Period and/or PAGA Period.

- Settlement Class Members will be mailed a check so long as they do not opt out. PAGA Members will be mailed a check regardless of whether they opt out of the Settlement as a Class Member.
- Any checks issued by the Settlement Administrator to Settlement Class Members shall be negotiable for 120 days after mailing. Those checks remaining uncashed for more than 120 days after issuance will be sent to a mutually agreeable cy pres organization subject to court approval.

(Declaration of Shaun Setareh (“Setareh Decl.”), ¶ 28, Exh. 2 (the “Settlement”).)

III. STATEMENT OF FACTS

A. THE PARTIES

Defendant Cupertino Electric, Inc. is a prominent electrical engineering and construction company in the United States. (Setareh Decl. ¶ 7.) Plaintiff Roy Wittbecker worked for Defendant as an hourly non-exempt employee as a Mobile Mechanic in California from approximately March 6, 2019, to July 8, 2019. (*Id.* ¶ 8.)

B. PLAINTIFF’S CLAIMS AND DEFENDANT’S DEFENSES

Plaintiff alleges that Plaintiff and putative class members’ meal and rest breaks were not scheduled and that they were sometimes not provided in a timely fashion. Additionally, Plaintiff alleges that Defendant did not record when meal breaks were taken or if they were provided. Plaintiff alleges that Defendant automatically deducted time for a meal break from pay whether a meal break was provided or not. (*Id.* ¶ 19.)

Plaintiff alleges that Plaintiff and putative class members were not paid for time spent traveling from their homes to worksites and back even though they were required to transport necessary tools and Personal Protective Equipment “PPE” to and from the jobsite. Sometimes class members traveled several hours from their homes to the jobsite, and they were not compensated for that time by Defendant. (*Id.*)

Additionally, Plaintiff asserts that Defendant did not factor in Plaintiff’s Per Diem pay when calculating his regular rate of pay for overtime and/or double time. (*Id.*)

Plaintiff also alleges that he and putative class members were not paid for all vested paid vacation days. (*Id.*)

Plaintiff further asserts he was not reimbursed for tool business expenses or mileage incurred while traveling to and from work sites. (*Id.*)

1 Finally, Plaintiff alleges that because of these discrepancies, Defendant failed to provide accurate
2 wage statements and failed to timely pay all wages owed to him and other former employees all wages
3 owed upon separation of employment. (*Id.*)

4 Defendant asserts that the vast majority of its employees were employed as a union worker
5 whose employment was governed by a collective bargaining agreement ("CBA"). Defendant states
6 that Plaintiff's employment with Defendant was governed by a CBA that exhaustively covered his
7 hours, wages, and working conditions. Defendant asserts that Plaintiff's claims rest upon the CBA and
8 within the context of the Labor Management Relations Act ("LMRA"), not as state law claims before
9 this Court. Specifically, as discussed further in Defendant's Motion for Summary Judgment, Defendant
10 argues that Plaintiff's employment with Defendant was governed by an expansive CBA and therefore that
11 Plaintiff's claims are expressly exempt from the Labor Code and preempted by the LMRA. Defendant
12 states in their Motion for Summary Judgment:

- 13 • Overtime — Under Labor Code section 514, employees are exempt from
14 California's overtime laws where, as here, the employee is covered by a CBA
that provides the employee's hours of work, wages, and working conditions.
- 15 • Meal Periods — Under Labor Code section 512 and Industrial Wage Order
16 16(10), employees in the construction industry are exempt from California's meal
17 period laws where, as here, the employee is covered by a CBA that provides (a)
the employee's hours of work, wages, and working conditions; (b) an hourly and
18 overtime rate of pay no less than 30% more than the state minimum wage; and
(c) arbitration for disputes.
- 19 • Rest Breaks — Under Industrial Wage Order 16(11), employees in the
20 construction industry are exempt from California's rest break laws if, as here,
the employee is covered by a CBA that provides equivalent protection for rest
breaks as the Wage Order.
- 21 • Pay Periods — Under Labor Code section 204, employees are exempt from
22 California's pay period requirements where, as here, the employee is covered by a
CBA that provides different pay timing requirements than the Labor Code.
- 23 • Overtime, Hourly Wages, Minimum Wage, Meal Periods, Rest Breaks, Business
24 Expenses, Wage Statements, Pay Periods, Vacation Wages and Final Pay —
25 Plaintiffs state law claims for overtime, hourly wages, minimum wage, meal
26 periods, rest breaks, business expenses, wage statements, pay periods, vacation
wages, and final pay are preempted by the LMRA because the claims are based
on rights created by the CBA or otherwise require interpretation of the CBA to
adjudicate those rights.

27 (Setareh Decl. ¶¶ 20, 18; Exhibit 1 Defendant's MSJ page 1.)

28 Defendant further contends that Plaintiff cannot establish the requirements to certify a class.

1 Defendant also contends that Plaintiff's claims are incapable of being manageably tried as a class or PAGA
2 representative action. Defendant asserts that pursuant to the CBA, Plaintiff received a 30-minute meal
3 period between the fourth and fifth hour of work, as well as two 15-minute rest breaks, during each
4 eight-hour day. Moreover, Defendant states that if Plaintiff worked more than two and one-half hours
5 after his regularly scheduled quitting time, he was entitled to a second meal period. If Plaintiff for
6 some reason did not receive a meal period to which he was entitled, Defendant asserts that he received
7 a premium of \$15.00 plus 30 minutes of pay. Defendant states that pursuant to the CBA, Plaintiff
8 received a \$50 per diem to cover mileage and subsistence while traveling. The Industrial Wage Orders
9 provide that employers are not required to reimburse employees for tools or other equipment customarily
10 required by a particular trade or craft if the employee earns at least two times the state minimum wage.
11 (See Indus. Wage Order 16(8)(B).) Defendant argues that Plaintiff's claim for failure to reimburse him
12 for tools under Labor Code section 2802 fails because Plaintiff earned \$45.36 for each regular hour
13 worked (nearly four times the State minimum wage in 2019), and the tools that Plaintiff used in
14 connection with his job were those customarily required in the mechanic trade/craft. Defendant argues
15 that although Plaintiff was expected to furnish his own basic tools, Defendant provided overalls,
16 gloves, and laundry service for jobs requiring exceptionally dirty work. Defendant asserts that for
17 union employees like Plaintiff, accrued vacation (if any) is solely dictated by the terms of the
18 governing CBA. Defendant states that the CBA does not provide union employees accrued vacation,
19 and as such Plaintiff was not entitled to accrue any vacation. (Setareh Decl. ¶ 20.)

20 Defendant denies all of Plaintiff's allegations and contends it has fully complied with all applicable
21 laws and regulations in connection with its employment of Plaintiff and the employees he seeks to
22 represent. Defendant asserts that to prove whether any particular employee was not provided the
23 opportunity to take a meal or rest periods on any given day would require an individualized inquiry that
24 would prevent this issue from being resolved on a class and/or representative basis. Defendant asserts that
25 California law does not require employers to pay for time spent commuting from home to job sites, even
26 if the employees are transporting tools and PPE to jobsites. Similarly, Defendant argues that California
27 law does not require employers to pay for milage costs incurred in commuting to and from worksites as
28 part of employees' ordinary commute. Defendant asserts that they appropriately calculated the regular rate

1 of pay in compliance with California law. (*Id.*). And, in any event, such allegations involve highly
2 individualized circumstances as to prevent class certification and representative action treatment should
3 this case be litigated. Defendant argues that Plaintiff’s claims for accurate wage statements, final pay
4 unfair competition claim, and PAGA are derivative in nature, and therefore preempted and fail since the
5 underlying claims upon which they are premised are preempted and fail. (*See, e.g., Giles v. Canus Corp.*
6 (N.D. Cal. Aug. 16, 2022) 2022 U.S. Dist. LEXIS 146789, at *14-15; *See Aleksick v. 7-Eleven, Inc.*
7 (2012) 205 Cal. App. 4th 1176, 1185). (Setareh Decl. ¶ 20.)

8 Defendant denies all material allegations set forth in the PAGA Notices and the operative
9 Complaints in the Action and has asserted numerous affirmative defenses and other defenses to each
10 and every claim. Defendant had filed a Motion for Summary Judgment or, in the Alternative,
11 Summary Adjudication. Nevertheless, in the interest of avoiding the cost and expense of further
12 litigation, Defendant desires to fully and finally settle all actual or potential claims by the putative
13 class members. (Settlement ¶ 8.)

14 C. PROCEDURAL HISTORY

15 On July 7, 2020, Plaintiff submitted written notice of various alleged California Labor Code
16 violations to the LWDA pursuant to the California Labor Code Private Attorneys General Act of
17 2004 (“PAGA”), California Labor Code section 2699, *et seq.* Plaintiff submitted a second notice to
18 the LWDA clarifying that the scope of Plaintiff’s PAGA claims included all employees who were
19 subject to the violations alleged in Plaintiff’s July 7, 2020 notice to the LWDA. (Settlement ¶ 1).

20 On July 27, 2020, Plaintiff initiated this putative class action by filing a Class Action
21 Complaint in Santa Clara County Superior Court, Case No. 20CV368613, on behalf of himself and
22 all current and former non-exempt employees employed by Defendant in California, alleging the
23 following causes of action: (1) failure to pay hourly wages, minimum wages, and overtime; (2) failure
24 to provide meal periods; (3) failure to provide rest breaks; (4) failure to pay vacation wages; (5) failure
25 to reimburse business expenses; (6) failure to provide accurate itemized wage statements; (7) failure
26 to pay all wages timely upon termination; (8) violation of California Business and Professions Code
27 section 17200, *et seq.*; and (9) violation of the Fair Credit Reporting Act (“FCRA”) (“Class Action”).
28 (*Id.* ¶ 2).

1 On September 2, 2020, Defendant removed the case to the United States District Court of
2 the Northern District of California. On February 24, 2021, Plaintiff filed a Motion to Remand. The
3 motion was fully briefed and granted. (Setareh Decl. ¶ 13.)

4 On October 23, 2020, Plaintiff filed a subsequent Complaint in Santa Clara County Superior
5 Court, Case No. 20CV371987, asserting a single a claim for civil penalties pursuant to PAGA based
6 on the alleged violations of the following Labor Code sections: 201, 202, 203, 204, 210, 223, 226, 226.7,
7 227.3, 510, 512, 1174, 1194, 1197, 1198 and 2802 (“PAGA Action”). (Settlement ¶ 3). The two actions
8 have since been consolidated.

9 On April 21, 2023, Defendant brought a Motion for Judgment on the Pleadings as to Plaintiff’s
10 FCRA claim, which was granted on August 8, 2023. (Settlement. ¶ 5).

11 Plaintiff filed a Motion to Compel Regarding Defendant’s Responses to Special Interrogatories,
12 Set One, and Request for Production, Set One, which was granted on September 21, 2023. The parties
13 engaged in the Belaire West notice process and Plaintiff received a sampling of contact information
14 for those putative class members who did not opt out. Plaintiff’s counsel interviewed a number of
15 putative class members and obtained declarations in anticipation of filing a motion for class
16 certification. (Setareh Decl. ¶ 15.)

17 On March 15, 2024, the parties engaged in an Informal Discovery Conference regarding
18 Plaintiff’s deposition and Defendant providing time and pay data for putative class members. (Id. ¶
19 16.)

20 Defendant deposed Plaintiff on March 27, 2024. (Id. ¶ 23.)

21 On April 16, 2024, the Parties stipulated to consolidate the Class Action (Case No.
22 20CV368613) and the PAGA Action (Case No. 20CV371987), with Case No. 20CV368613 being
23 designated as the lead case for all purposes (collectively, “the Action”). (Settlement ¶ 6).

24 On May 17, 2024, Defendant filed a Motion for Summary Judgment or, in the Alternative,
25 Summary Adjudication. (Setareh Decl. ¶ 18.)

26 On February 4, 2025, Plaintiff submitted an amended PAGA letter to the Labor & Workforce
27 Development Agency that (a) attaches the operative Complaint in the Class Action; and (b) asserts all
28 of the alleged Labor Code violations alleged in the Class Action and PAGA Action. Following the

1 sixty-five-day exhaustion period under Labor Code section 2699.3 expiring, Plaintiff and Class
2 Counsel shall file an amended consolidated Complaint that includes all of the allegations and alleged
3 Labor Code violations currently alleged in the Class Action and PAGA Action. (*Id.* ¶ 12.)

4 **D. INVESTIGATION AND DISCOVERY**

5 The Parties conducted formal discovery, including Plaintiff's deposition and the exchange
6 of formal discovery requests, responses, and responsive documents. Based on the documents and
7 information produced, as well as Plaintiff's Counsel's own independent investigation and
8 evaluation, and the Mediator's efforts, Plaintiff's Counsel believes that the settlement with
9 Defendant for the consideration and on the terms set forth in this Settlement Agreement is fair,
10 reasonable, and adequate, and is in the best interest of the putative class members in light of the
11 facts and circumstances, including the risk of significant delay and uncertainty associated with
12 litigation and various defenses asserted by Defendant. (Settlement ¶ 7). For example, Defendant
13 produced Plaintiff's CBA and argued that Plaintiff's employment with Defendant was governed by a
14 CBA that exhaustively covered his hours, wages, and working conditions. Defendant asserts that
15 Plaintiff's employment with Defendant was governed by an expansive CBA and therefore that Plaintiff's
16 claims are expressly exempt from the Labor Code and preempted by the LMRA. (Setareh Decl. ¶ 22.)

17 Leading up to the mediation, the Parties engaged in extensive formal and informal discovery
18 and exchange of information and documents. Defendant propounded a set of document requests, to
19 which Plaintiff responded. Plaintiff propounded written discovery as well, to which Defendant
20 responded and produced thousands of pages of documents and other information, including, but not
21 limited to, Collective Bargaining Agreements, policy documents and records relating to Plaintiff's
22 employment. The parties engaged in multiple Informal Discovery Conferences ("IDCs"). Plaintiff filed
23 a Motion to Compel Regarding Defendant's Responses to Special Interrogatories, Set One, and
24 Request for Production, Set One, which was granted. The parties engaged in the Belaire West notice
25 process and Plaintiff received a sampling of contact information for those putative class members who
26 did not opt out. Plaintiff's counsel interviewed multiple putative class members and obtained
27 declarations in anticipation of filing a motion for class certification. Defendant deposed Plaintiff.
28 (Setareh Decl. ¶ 23).

1 In addition to this exchange of formal discovery, the Parties agreed to attend mediation to attempt
2 to resolve the action entirely and further agreed to engage in informal discovery in advance and in
3 preparation thereof. In preparation for mediation, Plaintiff requested, and Defendant provided
4 substantial informal discovery, including production of additional policy documents, putative class
5 members' time and pay records, employee headcounts and pay period counts, and other information
6 requested by Plaintiff. (*Id.* ¶ 24.)

7 Plaintiff hired an expert to analyze the produced data with respect to potential damages and
8 penalties in preparation for mediation. (Setareh Decl. ¶ 25.) From the data and other documents obtained
9 from Defendant pertaining to the Class and Defendant's policies, Plaintiff's expert was able to analyze the
10 data sampling, and Plaintiff was then able to thoroughly assess the merits of each claim. (*Id.*)

11 **E. MEDIATIONS AND SETTLEMENT**

12 On February 21, 2022, the Parties participated in mediation before Michael Dickstein, a
13 respected mediator for wage and hour class actions. The Parties were unable to reach a settlement
14 at that time. (*Id.* ¶ 26).

15 On May 29, 2024, the Parties participated in a second mediation before David Rotman, Esq.
16 another respected mediator for wage and hour class actions, and through the Mediator's efforts were
17 able to reach a settlement in principle, subject to the Court's approval. The settlement discussions
18 were conducted at arm's-length, and the settlement is the result of an informed and detailed analysis
19 of Defendant's potential liability of total exposure in relation to the costs and risks associated with
20 continued litigation. The case settled following acceptance of a mediator's proposal. (Setareh Decl.,
21 ¶ 27.) Each of the Parties, represented by its respective counsel, recognized the risk of an adverse result
22 in the Action. (*Id.*, ¶ 30.)

23 **F. REASONABLENESS OF THE SETTLEMENT**

24 Plaintiff's Counsel believe that the Settlement is in the best interest of the class members based on
25 their investigation and discovery, their detailed understanding of the issues raised, and the outcome of
26 extensive settlement negotiations. (Setareh Decl., ¶ 29.) Plaintiff's counsel balanced the Settlement
27 against the probable outcome of class certification, liability, the range of recovery at trial, the risks of losing
28 class certification, losing the Motion for Summary Judgment, losing at trial, or not recovering as much as

provided by the proposed Settlement, as well as the difficulties and complexity of the litigation, the lengthy process of litigating to judgment, and the various possible delays and appeals. (*Id.* ¶ 30.) Although Defendant contends they have no liability in this case, Plaintiff’s Counsel believe that the Settlement represents a fair, reasonable, and adequate settlement given the respective risks associated with the Action. (*Id.*)

IV. DESCRIPTION OF THE SETTLEMENT

A. APPOINTMENT OF SETTLEMENT ADMINISTRATOR

The Parties have stipulated to the appointment of Simpluris to administer the Settlement and to provide notice to the Class Members (the “Settlement Administrator”). Simpluris estimates that settlement administration costs shall be **\$36,500**. The Settlement Administrator’s estimated fee of \$36,500 is reasonable for a settlement with a class of this size. (Setareh Decl., ¶ 34.)

B. DESCRIPTION OF THE SETTLEMENT CLASS

For settlement purposes only, the Parties agree to the certification of a class pursuant to California Code of Civil Procedure § 382 defined as all current and former non-exempt employees who worked for Defendant in California at any time from July 27, 2016 through the date the Court issues an order granting preliminary approval of the Settlement. (Settlement ¶ 10.3). In the event that the workweeks at the time of preliminary approval are more than 5% greater than the estimated workweeks of 628,822, (or greater than 660,263) the Class and PAGA Period will be adjusted to an end date where the workweeks did not exceed that amount. (Settlement ¶ 13.9). Defendant estimates that there are approximately 10,220 Class Members. (Setareh Decl. ¶ 36.)

PAGA Group Members are defined as the subclass of Class Members employed by Defendant in California at any time during the PAGA Period, from August 19, 2019 through the date the Court issues an order granting preliminary approval of the Settlement. (*Id.* ¶¶ 10.20; 10.23).

C. SCOPE OF THE RELEASE

1. Class Released Claims

Release of Class Claims. Upon the Effective Date, Plaintiff and all Participating Class Members will be deemed to have fully, finally and forever released, settled, compromised, relinquished, and discharged with respect to all of the Released Parties any and all Released Class Claims that accrued during the Released Class Claims

1 Period. As defined above, Released Class Claims include all claims under state,
2 federal, or local law, whether statutory, arising out of the claims expressly pleaded in
3 the Action and all other claims that could have been pleaded based on the facts
4 pleaded in the Action including, but not limited to, any alleged failure to pay wages
5 owed, including minimum and overtime wages, and vacation wages; failure to
6 provide compliant meal and rest periods; failure to reimburse business expenses;
7 failure to timely pay all wages due to discharged or quitting employees; failure to
8 provide accurate wage statements; alleged violation of Business and Professions
Code Section 17200 based on the alleged Labor Code violations; alleged violation of
the IWC Wage Orders; any claims for injunctive relief; liquidated damages, penalties,
interest, fees, and costs; and all other claims and allegations made or that could have
been made in the Action based on the facts and allegations alleged in the Action.

(*Id.*, ¶ 14.1.)

2. Released PAGA Claims

10 Release of PAGA Claims. Upon the Effective Date, Plaintiff, the State of California
11 (including the LWDA), and the PAGA Members will be deemed to have fully, finally
12 and forever released, settled, compromised, relinquished, and discharged with respect
13 to all of the Released Parties any and all Released PAGA Claims that accrued during
14 the Released PAGA Claims Period. As defined above, Released PAGA Claims
15 include all claims for civil penalties, attorney's fees, and costs arising out of the
16 Labor Code claims and allegations expressly pleaded in the Action, and all other
17 Labor Code claims that could have been asserted based on the facts and allegations
pleaded in the Action, including but not limited to: any alleged failure to pay wages
owed, including minimum and overtime wages, and vacation wages; failure to
provide compliant meal and rest periods; failure to reimburse business expenses;
failure to timely pay all wages due to discharged or quitting employees; failure to pay
wages timely during employment; and failure to provide accurate wage statements.

(*Id.*, ¶ 14.2.)

3. Settlement Amount And Allocation Of Settlement Monies

20 The Settlement provides for a MSA of \$9,675,000, which includes settlement payments to the
21 Class Members, attorneys' fees, litigation costs, settlement administration expenses, payments to the
22 LWDA, and the service award to Plaintiff. In no event shall Defendant be required to pay more than
23 the Maximum Settlement Amount, except for Defendant's payment of employer's side payroll taxes
24 as provided in the Settlement. (*Id.*, ¶ 10.18.) This is a non-reversionary settlement, and none of the MSA
25 shall revert to Defendant, with the funds of checks uncashed more than 120 days after issue being directed
26 to the cy pres. (¶¶ 16.4-16.5.) The parties propose the Labor Dispute Cy Pres Fund at San Francisco State
27 University as the cy pres. (Setareh Decl. ¶ 37, Exhibit 3.)

28 //

1 **D. CLASS MEMBER SETTLEMENT PAYMENT FORMULA**

2 The Parties have agreed to a settlement formula which allocates settlement amounts to Class
3 Members and PAGA Members on a *pro rata* basis, based on their number of pay periods. (Settlement, ¶
4 13.6 (3-4). Distribution of the Net Class Settlement Amount will be calculated by dividing the Net
5 Class Settlement Amount by the total number of pay periods for all Participating Class Members
6 during the Class Period (resulting in the “Class Pay Period Value”), and then multiplying the Class
7 Pay Period Value by the number of pay periods worked by each Participating Class Member during
8 the Class Period. Distribution of the portion of the PAGA Payment allocable to alleged aggrieved
9 employees will be calculated by dividing \$75,000 by the total number of pay periods for all PAGA
10 Members during the PAGA Period (resulting in the “PAGA Pay Period Value”) and then
11 multiplying the PAGA Pay Period Value by the number of pay periods worked by each PAGA
12 Member during the PAGA Period. (*Id.*)

13 20% of each Individual Settlement Payment will be allocated as disputed wages, 40% will
14 be allocated as interest and the remaining 40% will be allocated as penalties. All distributions from
15 the PAGA Payment to the PAGA Members will be allocated as 100% penalties. (*Id.*, ¶ 16.7.)

16 The Parties agree to allocate **\$300,000** of the MSA for settlement of claims for civil penalties under
17 PAGA, Labor Code § 2699, *et seq.* (*Id.*, ¶ 10.22.) Pursuant to Labor Code section 2699(i), 75% of that
18 amount (**\$225,000**) will be paid to the LWDA. The remaining 25% (**\$75,000**), will be distributed to PAGA
19 Members on a *pro rata* basis according to the number of PAGA Pay Periods. (*Id.* ¶¶ 10.22, 13.6 (3-4)).

20 The Claims Administrator shall distribute the Individual Settlement Payments within 7 business
21 days after receipt of the payment from Defendant. (*Id.*, ¶ 16.3.)

22 **E. NOTICE TO CLASS MEMBERS OF SETTLEMENT**

23 The proposed Notice of Class and Representative PAGA Action Settlement (“Notice”) (attached
24 as Exhibit A to the Settlement) provides Class Members with all required information so that each member
25 may make an informed decision regarding his or her participation in the Settlement. (*Id.*, ¶ 10.7.) All
26 Class Members will receive a Notice Packet. (*Id.* ¶ 17.12.)

27 Within 14 business days following entry of the Preliminary Approval Order, Defendant will
28 provide the Settlement Administrator the following information with respect to each Class Member: (a)

1 full name; (b) Social Security Number; (c) most recent mailing address; and (d) dates of employment. (*Id.*, ¶¶
2 10.5, 15.3.)

3 No later than 21 days after receiving the information from Defendant, the Settlement Administrator
4 shall mail the Notice Packet to all Class Members via first class United States Mail. (*Id.*, ¶ 15.4.) Prior to
5 mailing the Class Notices, the Settlement Administrator will perform a search based on the National
6 Change of Address Database to update and correct for any known or identifiable address changes.
7 (*Id.*)

8 Class Members have 45 days to object or opt out of the settlement or dispute the number of
9 workweeks. (*Id.* ¶ 15.5).

10 Any Class Member wishing to be excluded from the Settlement Agreement must sign and
11 send a written request for exclusion to the Settlement Administrator. The request for exclusion
12 must: (a) be signed by the Class Member; (b) contain the name, address, telephone number, and the
13 last four digits of the Social Security Number of the Class Member requesting exclusion; (c) clearly
14 state that the Class Member does not wish to be included in the settlement; (d) be returned by fax or
15 mail to the Settlement Administrator at the specified address and/or facsimile number; and, (e) be
16 postmarked or faxed on or before the applicable response deadline. Any Class Member who submits
17 a request for exclusion from the Settlement is prohibited from making any objection to the
18 Settlement Agreement. (*Id.* ¶ 15.7).

19 To object to the Settlement Agreement, a Class Member must postmark a valid Notice of
20 Objection to the Settlement Administrator including: (1) the case name and number; (2) full name,
21 address, and telephone number; (3) the last four digits of Social Security Number; (4) a written statement of all
22 grounds for the objection accompanied by any legal support for such objection; (5) copies of any papers, briefs,
23 or other documents upon which the objection is based; and (6) be signed by the Class Member and the Class
24 Member's attorney in the event that the Class Member is represented by counsel. (*Id.* ¶ 15.9.)

25 Settlement Class Members may dispute the number of pay periods attributed to them for the Class
26 Period by producing evidence to the Settlement Administrator. (*Id.* ¶ 15.6.)

27 **F. NOTICE AND PAGA PAYMENT TO THE LWDA**

28 The Parties agree to allocate **\$300,000** of the MSA for settlement of claims for civil penalties under

1 PAGA, Labor Code § 2699, *et seq.* (*Id.*, ¶ 10.22.) Pursuant to Labor Code section 2699(i), 75% of that
2 amount (\$225,000) will be paid to the LWDA. The remaining 25% (\$75,000), will be distributed to PAGA
3 Members on a *pro rata* basis according to the number of PAGA Pay Periods. (*Id.* ¶¶ 10.22, 13.6 (3-4)).

4 Class Counsel will provide a copy of the Settlement and this Motion for Preliminary Approval to
5 the LWDA in accordance with the requirements specified in Labor Code sections 2698-2699.5. (Setareh
6 Decl., ¶ 35.) After the filing of this motion, Class Counsel will submit a supplemental declaration
7 confirming that this has been done.

8 **V. ARGUMENT**

9 **A. THE COURT SHOULD CONDITIONALLY CERTIFY THE SETTLEMENT**
10 **CLASS BECAUSE IT MEETS ALL THE REQUIREMENTS FOR CLASS**
11 **CERTIFICATION FOR SETTLEMENT PURPOSES ONLY UNDER CODE**
12 **OF CIVIL PROCEDURE SECTION 382**

13 Under Code of Civil Procedure § 382, class certification is warranted so long as there is “a
14 numerous and ascertainable class with a well-defined community of interest among its members” and a
15 “class action proceeding is superior to other means for a fair and efficient adjudication of the litigation.”
16 *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326, 332. “The certification question
17 is ‘essentially a procedural one that does not ask whether an action is legally or factually meritorious.’” *Id.*
18 at 326 (quoting *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439-440). Indeed, the certification
19 question simply asks whether the theory of recovery advanced by the plaintiff is likely to prove amenable
20 to class treatment. *E.g., Jaimez v. Daiohs USA, Inc.* (2010) 181 Cal.App.4th 1286, 1298. In ruling on a
21 certification motion, a trial court’s task is to determine “whether...the issues which may be jointly tried,
22 when compared with those requiring separate adjudication, are so numerous or substantial that the
23 maintenance of a class action would be advantageous to the judicial process and to the litigants.” *Id.*

24 “[I]t is also well established that trial courts should use different standards to determine the
25 propriety of a settlement class, as opposed to a litigation class certification. Specifically, a lesser standard
26 of scrutiny is used for settlement cases.” *Global Minerals & Metals Corp. v. Superior Court* (2003) 113
27 Cal.App.4th 836, 859 (citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1807 n.19 (“*Dunk*”)).
28 As the court noted in *Dunk*, although certification requirements are intended “to protect the interests of the

1 non-representative class members,” that concern is “protected by the trial court’s fairness review of the
2 settlement.” *Id.*

3 Indeed, numerous courts have certified settlement classes. For example, *In re Drexel Burnham*
4 *Lambert Group, Inc.* (2d Cir. 1992) 960 F.2d 285, *cert. dismissed* (1993) 506 U.S. 1088, 122 L. Ed. 497,
5 113 S. Ct 1070, the parties entered into a tentative settlement before a class was certified. After a hearing,
6 the "district court issued an order certifying the class and approving the settlement agreement." *Id.* at 289;
7 *see also, Alaniz v. California Processors, Inc.* (N.D. Cal. 1976) 73 F.R.D. 269, 278 ("the use of the
8 tentative settlement class procedure was appropriate in this case"), *aff’d*, 572 F.2d 657 (9th Cir.), *cert.*
9 *denied*, 439 U.S. 837 (1978). Certification of a settlement class is a regular feature of class action litigation
10 and an approved procedure which ought to be followed in this case. *See Newberg on Class Actions* (3d ed.
11 1991) § 11.27, pp. 11-40 to 11-56; and *Manual for Complex Litigation*, 2d (1993) § 30.45.

12 Plaintiff submits that, as shown below, this Settlement and the Settlement Class easily meet all of
13 the requirements for certification for settlement purposes.

14 **1. Objectively Ascertainable and Sufficiently Numerous Class**

15 A class is ascertainable when it may be readily identified via an objectively stated definition
16 without unreasonable expense or time by reference to official records. *Rose v. City of Hayward* (1981) 126
17 Cal.App.3d 926, 932. No set number of class members is required to maintain a class action. *Hebbard v.*
18 *Colgrove* (1972) 28 Cal.App.3d 1017, 1030. The California Supreme Court has upheld a class of as few
19 as ten members. *Bowles v. Super. Ct. (Nickel, Jr.)* (1955) 44 Cal.2d 574, 577-81. Here, the Settlement
20 Class is made up of approximately 10,220 individuals, all of whom may be readily ascertained by reference
21 to Defendant’s personnel records. Setareh Decl. ¶ 36. Accordingly, the Settlement Class is not only
22 ascertainable but also sufficiently numerous.

23 **2. Predominance of Common Questions**

24 A question of law or fact is common to the members of a class if it may be resolved through
25 common proof. *See Jaimez, supra*, 181 Cal.App.4th at 1305. As for predominance, it “is a comparative
26 concept, and ‘the necessity for class members to individually establish eligibility and damages does not
27 mean individual fact questions predominate.’” *Sav-on, supra*, 34 Cal.4th at 334 (*quoting Reyes v. San*
28 *Diego Cty. Bd. of Supervisors* (1979) 196 Cal.App.3d 1263, 1278). Thus, “[i]ndividual issues do not render

1 class certification inappropriate so long as such issues may effectively be managed.” *Id.* This is especially
2 so where the key difference between class members solely concerns their respective amounts of damages.
3 *See id.* As a general rule, if a defendant’s liability can be determined by facts common to all members, a
4 class will be certified even if the members must individually prove their damages. *See Hicks v. Kaufman*
5 *& Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916.

6 Plaintiff contends that in this case, the Settlement Class meets these requirements. Plaintiff submits
7 that Defendant’s liability arises from the same set of facts and legal questions that apply to and are
8 answered equally as to all Class Members. Plaintiff alleges Class Members were subjected to a common
9 practice in that Defendant: failed to pay for all hours worked, failed to provide compliant meal periods and
10 rest periods, failed to reimburse for business expenses, failed to provide compliant wage statements, and
11 failed to pay all wages due upon separation of employment. (Setareh Decl. ¶ 31).

12 The Court accordingly should certify the Settlement Class for purposes of settlement under Code
13 of Civil Procedure section 382 and Rule of Court 3.769(c).

14 **3. Typicality of Plaintiff’s Claims**

15 Typicality “requires a showing that the class representative has claims or defenses typical of the
16 class.” *See, e.g., Fireside Bank v. Super. Ct. (Gonzalez)* (2007) 40 Cal.4th 1069, 1090. This focuses on
17 “the nature of the claim or defense of the class representative, and not to the specific facts from which it
18 arose or the relief sought.” *Hanon v. Dataproducts Corp.* (9th Cir. 1992) 976 F.2d 497, 508 (internal
19 citations omitted). “The test of typicality ‘is whether other members have the same or similar injury,
20 whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class
21 members have been injured by the same course of conduct.’” *Id.* (quoting *Schwartz v. Harp* (C.D. Cal.
22 1985) 108 F.R.D. 279, 282; accord *Classen v. Weller* (1983) 145 Cal.App.3d 27, 46 (“it has never been
23 the law in California that the class representative must have *identical* interest with the class members”).

24 Plaintiff submits that under these standards, Plaintiff’s claims are typical of those of the class
25 members. Like Class Members, Plaintiff was an hourly non-exempt employee of Defendant in California.
26 (Setareh Decl., ¶ 8.) Plaintiff alleges he was not paid for all hours worked, was not provided with compliant
27 meal periods and rest breaks, was not reimbursed for business expenses, did not receive accurate wage
28 statements, and was not paid all wages due upon separation of employment. (*Id.* ¶ 31.) *See Classen, supra*,

1 145 Cal. App. 3d at 46 (representative plaintiffs need not have all claims or identical interests with class
2 members; they need only have claims that are “typical of the class”); *see also B.W.I. Custom Kitchen v.*
3 *Owens-Illinois, Inc.* (1987) 191 Cal. App. 3d 1341, 1347 (representative plaintiffs need not suffer all of
4 the exact same damages as every class member). Accordingly, Plaintiff pursues claims typical of the class
5 he seeks to represent.

6 **4. Adequacy of Plaintiff and Class Counsel to Represent the Class**

7 The adequacy requirement is met where the named plaintiffs are represented by counsel qualified
8 to conduct the litigation and the plaintiffs’ interest in the litigation is not antagonistic to the class’s interests.
9 *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450-51. In other words, where the named
10 plaintiffs have adequate counsel, they may represent the entire class absent any disabling conflicts of
11 interest that might hinder the named plaintiffs’ ability to represent the class. *Id.*

12 In this case, Plaintiff submits that he has no conflict of interest with absent Settlement Class
13 Members and has agreed to place the class interests above his own. (Setareh Decl., ¶ 31.) *See Global*
14 *Minerals, supra*, 113 Cal.App.4th at 851 (the inquiry into the adequacy of a class representative is intended
15 to uncover any conflicts between the plaintiff and the class he or she seeks to represent). Setareh Law
16 Group is experienced in wage and hour class action litigation and has no conflicts of interest with absent
17 Class Members. (Setareh Decl., ¶¶ 4-6, 31.) Thus, this Court should appoint Plaintiff Roy Wittbecker as
18 Class Representative for the Settlement Class and appoint his counsel as Class Counsel.

19 **B. STANDARD FOR GRANTING PRELIMINARY SETTLEMENT APPROVAL**

20 Cases brought as class actions may only be settled upon court approval and then only after a
21 determination that the settlement is fair, adequate, and reasonable is made. *In re Microsoft I-V Cases*
22 (2006) 135 Cal.App.4th 706, 723. Courts have broad discretion to make this determination and consider
23 factors, such as the strength of plaintiff’s case, the risk, expense, complexity and likely duration of further
24 litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the
25 extent of discovery completed and the stage of the proceedings, the experience and views of counsel, and
26 the reaction of the class members to the proposed settlement. *Id.*; *Dunk*, 48 Cal.App.4th at 1800-01; *Reed*
27 *v. United Teachers Los Angeles* (2012) 208 Cal.App.4th 322, 336. “[A] presumption of fairness exists
28 where: (1) the settlement is reached through arm’s-length bargaining; (2) investigation and discovery are

1 sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation;
2 and (4) the percentage of objectors is small.” *Dunk, supra*, at 1802; *see also Chaves v. Netflix, Inc.* (2008)
3 162 Cal.App.4th 43, 52.

4 California Rule of Court 3.769 sets forth the procedures for settlement of class actions in
5 California. A two-step process is required. First, the court preliminarily approves the settlement, and the
6 class members are notified as directed by the court. Cal. Rule of Court 3.769(c)-(f). “The notice must
7 contain an explanation of the proposed settlement and the procedures for class members to follow in filing
8 written objections to it and in arranging to appear at the settlement hearing and state any objections to the
9 proposed settlement.” Cal. Rule of Court 3.769(f). Second, the court conducts a final approval hearing to
10 inquire into the fairness of the proposed settlement. Cal. Rule of Court 3.769(g). If the court approves
11 the settlement, a judgment is entered with provision for continued jurisdiction for the enforcement of the
12 judgment. Cal. Rule of Court 3.769(h).

13 In deciding whether to grant preliminary approval, courts are to give “due regard” to “what is
14 otherwise a private consensual agreement between the parties.” *Sutter Health Uninsured Pricing Cases*
15 (2009) 171 Cal.App.4th 495, 505. When approving a settlement, “the court need not ‘reach any ultimate
16 conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the
17 very uncertainty of the outcome in litigation and avoidance of wasteful and expensive litigation that induce
18 consensual settlements.’” *Class Plaintiffs v. City of Seattle* (9th Cir. 1992) 955 F.2d 1268, 1291 (quoting
19 *Officers for Justice v. Civil Serv. Comm’n* (9th Cir. 1982) 688 F.2d 615, 625).⁴ The court’s inquiry must
20 be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of
21 fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a
22 whole, is fair, reasonable and adequate to all concerned. *Id.*

23 //

24 //

25 _____
26 ⁴ The California Supreme Court has suggested that trial courts, in the absence of controlling California
27 authority, utilize class action procedures of the Federal Rules of Civil Procedure. *See LaSala v.*
28 *American Sav. & Loan Ass’n* (1971) 5 Cal.3d 864, 872. Thus, the Court may look to federal authorities
in ruling on this motion.

1 **C. THIS COURT SHOULD GRANT THIS MOTION AND ISSUE AN ORDER**
2 **PRELIMINARILY APPROVING THE SETTLEMENT BECAUSE IT IS**
3 **FAIR, ADEQUATE, AND REASONABLE**

4 **1. Settlement Resulted From Serious, Informed, Non-Collusive Negotiations**

5 The Parties reached this settlement only after they conducted extensive and protracted arm's-length
6 negotiations through two experienced and knowledgeable mediators and accepted a mediator's proposal.
7 (Setareh Decl., ¶¶ 26-27.) The Parties have not engaged in any collusion or improper negotiations.
8 Plaintiff and Defendant do not have any agreements regarding the proposed Settlement that are not
9 reflected in the Settlement. (*Id.* ¶ 30.)

10 **2. Sufficient Fact Investigation and Discovery Has Occurred to Assess the**
11 **Fairness of the Settlement**

12 As discussed above, Plaintiff's counsel engaged in investigation and written discovery that has
13 allowed them to evaluate the merits of the Class Members' claims and Defendant's defenses as well as the
14 range of possible recoverable damages. (*Id.*, ¶¶ 21-25.) Based on Plaintiff's counsel's investigation and
15 discovery, Plaintiff and his counsel are of the opinion that this settlement is fair, reasonable, adequate, and
16 in the Class Members' best interest. (*Id.* ¶ 29.) Plaintiff's counsel's investigation and discovery are more
17 than sufficient to warrant their and Plaintiff's decision to enter into the Settlement.

18 Leading up to the mediation, the Parties engaged in extensive formal and informal discovery
19 and exchange of information and documents. Defendant propounded a set of document requests, to
20 which Plaintiff responded. Plaintiff propounded written discovery as well, to which Defendant
21 responded and produced thousands of pages of documents and other information, including, but not
22 limited to, policy documents and records relating to Plaintiff's employment. The parties engaged in
23 multiple IDCs. Plaintiff filed a Motion to Compel Regarding Defendant's Responses to Special
24 Interrogatories, Set One, and Request for Production, Set One, which was granted. The parties engaged
25 in the Belaire West notice process and Plaintiff received a sampling of contact information for those
26 putative class members who did not opt out. Plaintiff's counsel interviewed multiple putative class
27 members and obtained declarations in anticipation of filing a motion for class certification. (Setareh
28 Decl., ¶ 23; Settlement, ¶ 1.5.)

1 In addition to this exchange of formal discovery, the Parties agreed to attend mediation to attempt
2 to resolve the action entirely and further agreed to engage in informal discovery in advance and in
3 preparation thereof. In preparation for mediation, Plaintiff requested and Defendant provided
4 substantial informal discovery, including production of additional policy documents, putative class
5 members' time and pay records, employee headcounts and pay period counts, and other information
6 requested by Plaintiff. (Setareh Decl., ¶ 24.)

7 Plaintiff hired an expert to analyze the produced data with respect to potential damages and
8 penalties in preparation for mediation. (*Id.* ¶ 25.) From the data and other documents obtained from
9 Defendant pertaining to the Class and Defendant's policies, Plaintiff's expert was able to analyze the data
10 sampling, and Plaintiff was then able to thoroughly assess the merits of each claim. (*Id.*)

11 **3. Plaintiff's Counsel Are Experienced Class Action and Employment**
12 **Attorneys and the Amount of Attorneys' Fees Sought Are Appropriate**

13 As detailed more completely in the Declaration of Shaun Setareh of the Setareh Law Group,
14 Plaintiff's counsel are particularly experienced in employment law and wage and hour class actions.
15 (Setareh Decl., ¶¶ 4-6.)

16 Plaintiff's counsel believe that the 33 $\frac{1}{3}$ % of the MSA that they will seek in attorneys' fees are
17 appropriate in this matter. (Setareh Decl., ¶ 33.) The Court of Appeal has recognized that one factor
18 supporting a lodestar multiplier is comparison to the fees typically earned in contingency fee litigation
19 where the plaintiff's attorney is awarded fees based on a percentage of the award recovered for the client:
20 "to ensure that the fee awarded is within the range of fees freely negotiated in the legal marketplace in
21 comparable litigation." *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 50. As the Court
22 knows, contingency fees typically range from one-third to forty percent. Indeed, Setareh Law Group has
23 been awarded 33 $\frac{1}{3}$ % common-fund attorneys' fees in numerous class actions. (*Id.*)

24 Factors that courts consider in determining the multiplier include: "The quality of the
25 representation, the novelty and complexity of the issues, the results obtained, and the contingent risk
26 presented." *Lafitte v. Robert Half International, Inc.* (2016) 1 Cal.5th 480, 489. "There is no hard and fast
27 rule limiting [these]...numerous factors, and their evaluation is entrusted to a trial court's sound
28 discretion." *Center for Biological Diversity v. Cty. of San Bernardino* (2010) 185 Cal.App.4th 866, 901.

Counsel believe the proposed settlement is fair, reasonable, and adequate in light of the complexities of the case, the uncertainties of further litigation, and that it represents a fair and reasonable recovery for the Settlement Class. (Setareh Decl., ¶ 30.)

4. The Settlement Is Fair and Reasonable Based on the Strength of Plaintiff's Case and the Risks and Costs of Further Litigation

California courts recognize that “the merits of the underlying class claims are not a basis for upsetting the settlement of a class action.” *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 246 (quoting *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1150). The settlement need not provide one-hundred percent of the damages sought in order to be judged reasonable. *Wershba*, 91 Cal.App.4th at 250. “Thus, even if ‘the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated,’ this is not a bar to a class settlement because ‘the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation.’” *Id.* (quoting *Air Lines Stewards v. American Airlines, Inc.* (7th Cir. 1972) 455 F.2d 101, 109).

The settlement sum of **\$9,675,000** represents about 32.7% of the estimated \$29,527,810 exposure for claims for damages under the Labor Code, assuming these amounts could be proven at trial. If the derivative Labor Code section 203 waiting time penalties and section 226 inaccurate wage statement penalties are included (those are \$123,754,101 and \$21,726,500) the potential exposure is \$175,008,411. (*Id.*) However, as the Ninth Circuit has indicated, only damages not penalties need be considered when assessing the fairness of a settlement because the fairness inquiry looks to whether the class members were compensated for “past injuries”. *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 964 (2009.) Further Labor Code section 203 and 226 penalties require a showing of willfulness, and Defendants would argue that any failure to pay meal or rest premiums or other amounts owed was not willful. For example, in *Naranjo v. Spectrum Security Services, Inc.*, 17 Cal.5th 1056, 1088 (2024) the California Supreme Court held that section 226 penalties like section 203 penalties, should not be awarded even if liability is established at trial, if the employer presents defenses that were “reasonable, if ultimately unconvincing.”

Plaintiff recognizes the challenges he faces in certifying a class action and establishing liability on the underlying wage and hour claims. (*Id.*) Plaintiff estimates that his likelihood of prevailing on all his

1 causes of action (on the derivative Labor Code section 203 and 226 claims, in particular) are extremely
2 low and thus his likelihood of recovering the full amount potentially recoverable is very unlikely. (*Id.*)

3 Here, Defendant zealously argued that Plaintiff's claims were preempted by the LMRA.
4 Plaintiff mostly disagrees with Defendant's analysis, except as to the meal period and overtime/
5 regular rate claims where Defendant appears to have strong preemption arguments which make it
6 unlikely the class would prevail on those claims.

7 Plaintiff would argue that many of his claims cannot be preempted by the LMRA as a CBA
8 cannot waive non-waivable state law rights. *Livadas v. Bradshaw*, 512 U.S. 107, 123 (1994); *Balcorta*
9 *v. Twentieth Century Fox Film, Corp.*, 208 F.3d 1102, 1111 (9th Cir. 2000.) For example, pursuant to
10 Labor Code Section 2804, claims for expense reimbursement are a non-waivable state law right. As the
11 California Supreme Court has explained: "Section 2804 expressly prohibits waiver of the rights
12 afforded under Section 2802." *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 561 (2007.)
13 Therefore, the issue is not what the CBA provides but whether Plaintiff incurred expenses at the
14 direction of his employer, and whether he was fully reimbursed for that. As a federal district court
15 ruled in *Sykes v. F.D. Thomas, Inc.*, (N.D. Cal. 2021) 2021 WL 343960 *2: "Because Sykes alleges
16 that he was made to purchase various items, the expenditures can be considered 'necessary' without
17 looking to the CBA." Moreover, Plaintiff's claims for unpaid non-overtime wages are not preempted
18 by the LMRA. The right to be paid for all hours worked is a non-negotiable state law right. *E.g.*,
19 *Gutierrez v. Brand Energy Services of California, Inc.*, 50 Cal.App.5th 786, 800 (2020). Further, a
20 claim for working off-the-clock during meal periods is distinct from a claim for failure to provide
21 meal periods and is not preempted even if the meal period claim might be. The California Supreme
22 Court recently explained that a CBA cannot bargain away the right to be paid for working during a
23 meal period. *Huerta v. CSI Electrical Contractors*, 15 Cal.5th 908, 932-933 (2024); *See also Garcia*
24 *v. Statewide Traffic Safety & Signs, Inc.*, 2018 WL 6242866 *3-4 (C.D. Cal. 2018) (agreeing with
25 plaintiff's argument that even if the CBA has a meal period provision: "the CBA would not and could
26 not contract around California's law that all workers cannot be forced to work off-the-clock without
27 pay.") (Setareh Decl., ¶ 20.)

28 While Plaintiff disputes the claims in Defendant's Motion for Summary Judgment, there was

1 a serious risk that the Court would grant wholly or in part Defendant's motion for summary judgment,
2 or in the alternative, summary adjudication. If the Court made such a ruling, judgment could have
3 been issued against Plaintiff on his causes of action, leaving him with no award. Even if Plaintiff fully
4 prevailed in opposition to the Motion for Summary Judgment, and managed to have one or more
5 classes certified, serious risks in the case lay ahead. (*Id.* ¶ 30.)

6 For those claims, if any, that are certified for class treatment, Plaintiff must prevail at a trial on the
7 merits. In addition to having to prove that Plaintiff and other workers were not paid for all hours worked,
8 Plaintiff must establish willfulness with respect to their waiting time penalties claim under Labor Code
9 Section 203 as well as a knowing and intentional violation under Labor Code Section 226 for wage
10 statement penalties.

11 With respect to the claims asserted on behalf of the Settlement Class in this case, there are
12 significant risks that support the reduced compromise amount. These risks include, but are not limited to,
13 the following:

14 (i) The risk that the Court would find that Plaintiff and putative class member's claims rest
15 upon the CBA and within the context of the Labor Management Relations Act ("LMRA"), not as state
16 law claims before this Court. This includes the risk that the Court would find that Plaintiff and putative
17 class members' employment with Defendant is expressly exempt from the Labor Code and preempted
18 by the LMRA. If the Court made such a ruling, Plaintiff could potentially not recover anything at trial.
19 Plaintiff does not include damages for meal period premiums or overtime as those damages are valued
20 at \$0 because of CBA preemption. Under Labor Code section 514, employees are exempt from
21 California's overtime laws where, as here, the employee is covered by a CBA that provides the
22 employees' hours of work, wages, and working conditions. Under Labor Code section 512 and
23 Industrial Wage Order 16(10), employees in the construction industry are exempt from California's meal
24 period laws where, as here, the employee is covered by a CBA that provides (a) the employee's hours of
25 work, wages, and working conditions; (b) an hourly and overtime rate of pay no less than 30% more than
26 the state minimum wage; and (c) arbitration for disputes.

27 (ii) The risk that Plaintiff would be unable to establish liability for allegedly unpaid straight
28 time and overtime wages. *See Duran v. U.S. Bank Nat'l Ass'n* (2014) 59 Cal.4th 1, 39 & fn. 33 ("*Duran*"),

1 citing *Dilts v. Penske Logistics, LLC* (S.D. Cal. 2014) 2014 WL 205039 (dismissing certified off-the-
2 clock claims based on proof at trial).

3 (iii) The risk that Plaintiff would not be able to prove liability for alleged failure to provide
4 compliant meal periods and rest breaks; or that to establish liability for the failure to provide compliant
5 meal periods and rest breaks would require an individualized inquiry that would prevent these issues from
6 being resolved on a class and/or collective basis. For example, Plaintiff alleged that that some meal and
7 rest breaks were not timely provided due to work constraints. Defendant asserts that it provides meal
8 periods to employees and authorizes and permits them to take rest periods, and pays meal and rest period
9 premiums, in accordance with applicable law. Defendant asserts that to prove whether any particular
10 employee was not provided the opportunity to take a meal or rest periods on any given day would require
11 an individualized inquiry that would prevent this issue from being resolved on a class and/or representative
12 basis.

13 (iv) The risk that Defendant's challenged employment policies might not ultimately support
14 class certification or a class-wide liability finding, *see, Duran*, 59 Cal.4th at 14 & fn. 28 (citing Court of
15 Appeal decisions favorable on class certification issue without expressing opinion as to ultimate viability
16 of proposition). Defendant has contended, for example, that it did not have a purported policy of not
17 paying required compensation, but rather a policy of paying compensation and of requiring employees to
18 report any unpaid compensable time, and that any failures to report by employees cannot be legally charged
19 to Defendant and, in any event, involve such highly individualized circumstances as to prevent class
20 certification and representative action treatment should this case be litigated. *See, e.g., Morillion v. Royal*
21 *Packing Co.* (2000) 22 Cal.4th 575, 585 (employer not required to pay employees for time spent
22 performing work of which the employer had no knowledge).

23 (v) For the same reasons, liability, damages recovery, and certification risks are heightened
24 given: (1) the risk that uncertainties pertaining to the ultimate legality of Defendant's policies and practices
25 could preclude class-wide awards of statutory penalties under Labor Code section 226(e); (2) the risk that
26 individual differences between settlement Class Members could be construed as pertaining to liability, and
27 not solely to damages, *see, Duran*, 59 Cal.4th at 19; and (3) the risk that class or collective treatment could
28 be deemed improper as to one or more claims except for settlement purposes.

1 (vi) The risk that any civil penalties award under PAGA could be reduced by the Court in its
2 discretion, which would materially impact the recovery by the Class. *See* Labor Code section 2699(e)(1).

3 (vii) The risk that lengthy appellate litigation could ensue as to both liability and certification
4 issues, with associated litigation risk and costs, further enhances the value of a confirmed settlement as
5 opposed to unpredictable litigation.

6 (viii) Although the PAGA penalties calculated by Plaintiff's expert amounts to an extravagant
7 \$8,662,540, that amount is not likely to bear fruit in this case. Most significantly, the ultimate decision as
8 to the amount of penalties is always up to the discretion of the Court.

9 (ix) The risk that the Court would find that Defendant's reimbursement policies were compliant.

10 In these respects, Defendant strongly denies any liability and the propriety of class certification for
11 any reason other than settlement. (*Id.* ¶ 30.) Continued litigation of this lawsuit presented Plaintiff and
12 Defendant with substantial legal risks that were (and continue to be) very difficult to assess. (*Id.*)

13 In light of the uncertainties of protracted litigation, the Settlement amount reflects a fair and
14 reasonable recovery for the Class Members. (*Id.*) The Settlement amount is, of course, a compromise
15 figure. (*Id.*) By necessity, it took into account risks related to liability, damages, class action certification,
16 and all the defenses asserted by Defendant as to all such matters. (*Id.*) Moreover, each Settlement Class
17 Member will be given the opportunity to opt out of the Settlement, allowing those who feel they have
18 claims that are greater than the benefits they can receive under this Settlement to pursue their own claims.

19 **D. THE COURT SHOULD GRANT THIS MOTION AND ISSUE AN ORDER**
20 **DIRECTING THAT NOTICE BE SENT**

21 "The notice given to the class must fairly apprise the class members of the terms of the proposed
22 compromise and of the options open to dissenting class members." *Trotsky v. L.A. Fed. Sav. & Loan Ass'n*
23 (1975) 48 Cal.App.3d 134, 151-52. "The notice must be structured to enable class members to decide
24 whether to intervene or object, 'opt out,' or accept the settlement." *Id.* at 152. Class notice must strike a
25 balance between thoroughness and the need to avoid unduly complicating the content of the notice and
26 confusing class members. *Wershba*, 91 Cal.App.4th at 252. Furthermore, an appropriate notice is one
27 which has a reasonable chance of reaching the class members. *Cartt v. Superior Court* (1975) 50
28 Cal.App.3d 960, 974.

1 The Notice Packet explains in plain and easily understood language what the case is about; the
2 class definition and claims; the settlement amount and approximate individual amount each Class Member
3 will receive; the requested amounts to be paid to class counsel and as a service award to the class
4 representative; the rights of class members to opt out or object to the Settlement's terms and the process
5 by which they can do so; the binding effect of the Settlement on those who do not request exclusion,
6 including a description of the claims being released; and the particulars of the final fairness hearing.
7 (Settlement, ¶ 10.7, Ex. A.)

8 The Parties' proposed plan for directing notice to the Class is also the best notice that is practicable
9 under the circumstances. Using last-known addresses, the Settlement Administrator will send the Notice
10 Packet by First Class U.S. Mail to all Class Members. (*Id.*, ¶ 15.4.)

11 **E. THE COURT SHOULD SET A HEARING FOR FINAL APPROVAL**

12 Finally, the Court should set a formal hearing to conduct an inquiry into the fairness of the proposed
13 settlement. Cal. Rule Ct. 3.769(e), (g). At the hearing, proponents of the Settlement may explain and
14 describe the terms and conditions and offer argument of settlement approval. Members of the Settlement
15 Class, or their counsel, may also appear and offer evidence and testimony in opposition to the Stipulation
16 of Settlement. The Parties request that the hearing on final approval of the settlement be set as soon as
17 may be convenient for the Court.

18 **VI. CONCLUSION**

19 For the foregoing reasons, the Parties respectfully submit that the Settlement's terms are fair,
20 adequate, and reasonable and that it is in the best interest of the Class Members. Under the applicable
21 class action criteria and guidelines, this Class should be conditionally certified, the Settlement should be
22 preliminarily approved, the Class should be notified regarding the Settlement, and the Court should
23 schedule a final approval hearing.

24 DATED: March 16, 2025

SETAREH LAW GROUP

25 /s/ Farrah Grant

26 SHAUN SETAREH
27 THOMAS SEGAL
28 FARRAH GRANT
Attorneys for Plaintiff
ROY WITTBECKER