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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
**FOR THE COUNTY OF SAN BERNARDINO**

JOHN ERVING, as an individual and on  
behalf of all others similarly situated,

Plaintiff,

vs.

LAZER SPOT, INC., a Georgia corporation;  
and DOES 1 through 100,

Defendants.

Case No.: CIVSB2101370

*[Assigned for all purposes to the Hon.  
David Cohn; Dept. S-26]*

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

Date: November 7, 2022  
Time: 10:00 a.m.  
Dept.: S-26

Action Filed: January 27, 2021  
Trial Date: None Set

PLEASE TAKE NOTICE that, pursuant to Rule 3.769 of the California Rules of Court, on November 7, 2022, at 10:00 a.m., or as soon thereafter as the matter may be heard, in Department S-26 of the San Bernardino County Superior Court, located at 247 W. 3rd Street, San Bernardino, California 92415, Plaintiff John Erving, 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 Joint Stipulation of Class Action Settlement (“Settlement Agreement”) in this lawsuit;
2. Pursuant to Section 382 of the California Code of Civil Procedure, provisional certification of the Settlement Class, defined as follows:

All persons who are employed or have been employed by Defendant in California as hourly-paid or non-exempt employees at any time during the time period from January 27, 2020 to December 20, 2020 (the “Class Period”), who worked at certain sites where they allegedly incurred unreimbursed expenses. The Settlement Class will include any participating Class Member who settled or released any of the claims covered by this Settlement.

3. Preliminary appointment of Plaintiff John Erving as the Class Representative;
4. Preliminary appointment of Paul K. Haines, Fletcher W. Schmidt, Matthew K. Moen, and Susan J. Perez of Haines Law Group, APC as Class Counsel;
5. The scheduling of a hearing to consider whether the Settlement Agreement should be finally approved and to award amounts for the Class Representative Enhancement Award, settlement administration costs, payment to the Labor and Workforce Development Agency for its share of civil penalties under the Private Attorneys General Act, Labor Code section 2698 *et seq.*, and Class Counsel’s attorneys’ fees and costs;
6. Appointment of Simpluris, Inc. as the third-party settlement administrator; and
7. Approval of the proposed Notice of Class Action Settlement and Notice of Individual Settlement Award, and entry of the proposed Order instructing the Notice Packet to be disseminated to the proposed Settlement Class in English and Spanish, as provided in the Settlement Agreement.

1           This motion is based on this notice of motion, the attached memorandum of points and  
2 authorities, the declarations of Paul K. Haines, Fletcher W. Schmidt, Matthew K. Moen, Susan J.  
3 Perez, John Erving, and Eric Springer of Simpluris Inc., and the exhibits attached thereto, the  
4 pleadings and other papers filed in this action, and on any further oral or documentary evidence  
5 or argument presented at the time of hearing.

6  
7 Dated: October 12, 2022

Respectfully Submitted,  
HAINES LAW GROUP, APC

8  
9 By:

  
Matthew K. Moen  
Attorneys for Plaintiff

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff John Erving (“Plaintiff”), individually and on behalf of the proposed Settlement  
4 Class, respectfully requests that this Court preliminarily approve the proposed Joint Stipulation  
5 of Class Action Settlement (“Settlement Agreement” or “Settlement”),<sup>1</sup> entered into by Plaintiff  
6 and Defendant Lazer Spot, Inc. (“Lazer Spot” or “Defendant”) (Plaintiff and Defendant are  
7 referred to collectively herein as the “Parties”). The operative Third Amended Complaint  
8 (“TAC”) alleges Defendant: (i) failed to reimburse necessary business expenses; and (ii) is liable  
9 for civil penalties under the Private Attorneys General Act, Labor Code § 2698 *et seq.* (“PAGA”).

10 Plaintiff respectfully requests that this Court preliminarily approve this non-reversionary,  
11 \$150,000.00 class action settlement on behalf of the following Settlement Class:

12 All persons who are employed or have been employed by Defendant in California  
13 as hourly-paid or non-exempt employees at any time during the time period from  
14 January 27, 2020 to December 20, 2020, who worked at certain sites where they  
15 allegedly incurred unreimbursed expenses. The Settlement Class will include any  
16 participating Class Member who settled or released any of the claims covered by  
17 this Settlement.

18 Based upon the data provided by Defendant, there are approximately 196 potential  
19 Settlement Class members. After Court-approved deductions for Plaintiff’s Class Representative  
20 Enhancement Award, settlement administrator costs, the PAGA payment to the California Labor  
21 & Workforce Development Agency (“LWDA”), and attorneys’ fees and costs to Class Counsel,  
22 the remaining Net Settlement Amount (“NSA”) is estimated to be no less than \$56,750.00. This  
23 results in average Individual Settlement Awards of approximately \$289.54, which is fair and  
24 reasonable in light of the limited scope of the claims being released through this Settlement.<sup>2</sup>

25 <sup>1</sup> The Settlement Agreement is attached as Exhibit A to the Declaration of Matthew K. Moen (“Moen  
26 Decl.”), filed concurrently herewith, and the Notice of Class Action Settlement (“Class Notice”) and  
27 Notice of Individual Settlement Award (collectively, the “Notice Packet”) are attached to the Moen Decl.  
28 as Exhibit B.

<sup>2</sup> Individual Settlement Awards shall be allocated as 100% expense reimbursements (which are not wages)  
and PAGA civil penalties (not subject to withholdings), and issued pursuant to an IRS Form 1099-MISC.  
See Settlement, ¶ 5.D.

1 Significantly, Settlement Class members do not need to file a claim form in order to receive an  
2 Individual Settlement Award, and all Settlement Class members who do not opt-out will  
3 automatically receive their share of the Settlement. This represents a fair and reasonable result  
4 for Settlement Class members, who will be agreeing to a release of only those claims that were  
5 actually asserted, or which could have been asserted based on the facts alleged in the operative  
6 Third Amended Complaint in the lawsuit.

7 Prior to reaching this proposed Settlement, Defendant provided Plaintiff key data points,  
8 including the dates of employment and job titles for all 196 putative class members and their  
9 number of pay periods worked at the relevant worksites spanning the entire relevant time period.  
10 Plaintiff and his counsel then conducted a comprehensive, class-wide analysis of the data to  
11 estimate Defendant's maximum potential exposure on all claims at issue. On March 29, 2022,  
12 after extensive legal research and analysis, along with Plaintiff's comprehensive review of the  
13 data, the Parties participated in a mediation session with Jeffrey Ross, Esq., and ultimately  
14 accepted a mediator's proposal for a class-wide settlement of all claims at issue. Over the  
15 following months, the Parties negotiated and executed the long-form Settlement Agreement that  
16 is now before this Court for preliminary approval.

17 This proposed Settlement is well within the range of possible approval in light of the  
18 significant legal and factual obstacles that Plaintiff faced, the risks and costs of further litigation,  
19 the monetary benefit to the Settlement Class members, and the limited scope of the Settlement  
20 Class members' release of claims. For the reasons discussed herein, Plaintiff respectfully requests  
21 that the Court grant preliminary approval of the Settlement.

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

### 23 **A. Factual And Procedural Background**

24 Defendant operates a trucking business that contracts with third parties to provide yard  
25 management and logistics services to those third parties, consisting of transporting trailers and  
26 cargo to and from production and distribution centers. Moen Decl., ¶ 9. Plaintiff worked for  
27 Defendant from approximately December 2019 to January 2021 as a non-exempt "truck driver."  
28 *Id.*; Declaration of John Erving ("Erving Decl."), ¶ 2. Plaintiff's duties included picking up loaded  
cargo trailers and transporting them to assigned drop-off locations and picking up empty trailers

1 and taking them back to be loaded. *Id.* Like all Settlement Class members, Plaintiff was subject  
2 to Defendant’s wage and hour policies and practices. Moen Decl., ¶ 9; Erving Decl., ¶¶ 3-4.

3 On January 27, 2021, Plaintiff filed the initial Complaint in this action, alleging Defendant  
4 failed to: (i) reimburse necessary business expenses; and (ii) comply with California’s Unfair  
5 Competition laws. Moen Decl., ¶ 10. On April 5, 2021, Plaintiff filed his First Amended Class  
6 and Representative Action Complaint (“FAC”), adding a cause of action for civil penalties under  
7 the PAGA. *Id.* On April 20, 2021, Plaintiff filed his Second Amended Representative Action  
8 Complaint (“SAC”), amending this action to proceed exclusively as a representative action for  
9 recovery of civil penalties under the PAGA, premised upon Defendant’s alleged failure to  
10 reimburse all necessary business expenses incurred. *Id.*

11 As a material term of the Parties’ settlement agreement reached during their March 29,  
12 2022 mediation, the Parties’ stipulated to Plaintiff filing a further amended complaint to add a  
13 class-wide cause of action for Defendant’s alleged failure to reimburse necessary business  
14 expenses, in violation of Labor Code sections 2802 and 2804. Moen Decl., ¶ 11. Accordingly, on  
15 June 3, 2022, Plaintiff filed the operative TAC, alleging Defendant failed to: (i) reimburse  
16 necessary business expenses; and (ii) is liable for civil penalties under the PAGA for Defendant’s  
17 alleged failure to reimburse all necessary business expenses incurred. *Id.*

18 **B. Plaintiff’s Claims and Defendant’s Defenses**

19 **1. Failure to Reimburse Violations**

20 Plaintiff asserts that Defendant failed to reimburse the Settlement Class members for all  
21 necessary business expenses incurred, in violation of Labor Code sections 2802 and 2804. Moen  
22 Decl., ¶ 12; *See* Labor Code § 2802 (“An employer shall indemnify his or her employee for all  
23 necessary expenditures or losses incurred by the employee in direct consequence of the discharge  
24 of his or her duties.”). Specifically, Defendant required Plaintiff and other non-exempt employees  
25 to use their personal cellular phones to communicate with dispatchers for work assignments and  
26 instructions throughout the workday. Moen Decl., ¶ 12. For example, a dispatcher would send a  
27 text message to the employee’s personal cellular phone telling the employee which trailer to pick  
28 up. *Id.* After the employee picked up the trailer, the employee was required to text the dispatcher

1 a picture of the bill of lading, which was taken by the employee using their personal cellular  
2 phone. *Id.* The dispatcher would then instruct the employee, via text, where to take the trailer. *Id.*  
3 Once the employee had transported the trailer to the drop site, the employee would pick up an  
4 empty trailer and text the trailer number to the dispatcher, who in turn would tell the employee  
5 where to take the empty trailer. *Id.* Because the assignments are all local, an employee can  
6 complete approximately 20 different assignments during each shift. *Id.*

7 Additionally, Plaintiff and other non-exempt employees were required to download an  
8 ADP application on their personal cellular phones that was used for timekeeping and to receive  
9 paystubs. Moen Decl., ¶ 13. Finally, Plaintiff also alleges that Defendant required Plaintiff and  
10 other non-exempt employees to purchase personal protective equipment (“PPE”) for work  
11 purposes, including sanitizing sprays and wipes, during the COVID-19 pandemic. *Id.* Despite  
12 requiring employees to use their personal cellular phones and purchase PPE for work purposes  
13 during the COVID-19 pandemic, Defendant did not reimburse Plaintiff and other non-exempt  
14 employees for these expenses or a reasonable portion of their monthly cellular phone bills. *Id.*;  
15 *see Cochran v. Schwan’s Home Service, Inc.* (2014) 228 Cal.App.4th 1137, 1144 (“If an employee  
16 is required to make work-related calls on a personal cell phone, then he or she is incurring an  
17 expense for purposes of section 2802.”); Labor Code § 2802.

18 In response, Defendant firmly denies it required Plaintiff and other non-exempt employees  
19 to purchase PPE during the COVID-19 pandemic. Moen Decl., ¶ 14. Defendant maintains that it  
20 provided Plaintiff and other non-exempt employees with all needed hand sanitizers and masks.  
21 *Id.* Defendant further maintains that Plaintiff’s cell phone reimbursement allegations lack merit.  
22 *Id.* Specifically, Defendant asserts that, at all relevant times, it provided scan guns to its non-  
23 exempt employees through which trailers were assigned, bills of lading were scanned, and  
24 employees recorded their time, alleviating the need for employees to use their personal cellular  
25 phones for any work-related purposes. *Id.* Defendant also maintains that Plaintiff’s liability  
26 valuations are substantially overstated, as any potential personal cellular phone usage by Plaintiff  
27 and other non-exempt employees for work purposes could only have occurred, if at all, at  
28 approximately 12 worksites in California, which were the only locations at which employees

needed to leave the worksite to transport trailers, and therefore would be the only locations where information regarding trailer numbers and bills of lading needed to be relayed between the drivers and dispatch employees. *Id.* Defendant contends that these alleged Labor Code violations, therefore, could have only affected, at most, 196 employees, and could not have continued beyond December 20, 2020, when Defendant installed company-provided phones in all truck cabs, ensuring that employees did not need to use their personal cellular devices for work-related purposes. *Id.* Moreover, Defendant also contends that it provided multiple options for Plaintiff and other non-exempt employees to clock in and out each day, including the company-provided scan guns and punch clocks located at various worksites, and that the option to use the ADP application on their cellular phones was for employee convenience only and purely voluntary. *Id.* Finally, Defendant contends this claim is not certifiable since it would require a series of mini-trials to determine which employees used their cellular phone for work purposes, the extent of each employees' cellular phone usage, the value of each employees' cellular phone plan, and whether an employee requested a cellular phone plan reimbursement. *Id.*

## 2. PAGA Penalties

As a result of Defendant's failure to reimburse all necessary business expenses, Plaintiff also seeks PAGA civil penalties on behalf of all aggrieved employees and the State of California. Moen Decl., ¶ 15; *see also Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1213 ("As we have explained, they [civil penalties under PAGA] are mandatory, not discretionary.").

In response, Defendant argues that Plaintiff's underlying claims will fail and, as a result, PAGA claims will also fail. Moen Decl., ¶ 15; *see Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136, 1147 ("Because the underlying causes of action fail, the derivative UCL and PAGA claims also fail."). Additionally, at the time of mediation, Defendant raised the possibility that Plaintiff's PAGA claims could soon be compelled to individual arbitration pending the United States Supreme Court's ruling in *Viking River Cruises Inc. v. Moriana*. Moen Decl., ¶ 15; *see Viking River Cruises Inc. v. Moriana*, 596 U.S. \_\_\_\_ (2022), Case No. 20 1573. Moreover, Defendant also maintains that given its good faith defenses, this Court would exercise its discretion to substantially reduce any PAGA penalties awarded and provided case law at

mediation in support of its position. Moen Decl., ¶ 15; *see also* 8 Cal. Code Regs. § 13520 (“[A] good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203.”); Labor Code § 2699(e)(2); *Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203 Cal.App.4th 1112, 1135; *Carrington v. Starbucks Corporation* (2018) 30 Cal.App.5th 504 (affirming reduction of PAGA penalties to 10% of exposure).

### C. Discovery And Mediation

In connection with mediation, Defendant provided Plaintiff with key class-wide data points and relevant documents, including a spreadsheet listing each employee, their number of respective pay periods worked during the relevant time period, and the locations at which they worked. Moen Decl., ¶ 16. Plaintiff and his counsel then conducted a comprehensive analysis of the key data points to create a detailed, class-wide exposure model for the claims at issue. *Id.* On March 29, 2022, the Parties participated in a mediation session with Jeffrey A. Ross, Esq., a well-respected wage and hour class action mediator, during which the Parties exchanged divergent views on Defendant’s liability and exposure valuations, their legal positions, and the likelihood of certification of Plaintiff’s claims. *Id.* At the conclusion of mediation, Mr. Ross made a mediator’s proposal for a class-wide settlement that the Parties ultimately accepted. *Id.* Over the following weeks, the Parties negotiated and finalized the remaining terms of the Settlement, and executed the proposed Settlement now before the Court for preliminary approval. *Id.*

## III. THE PROPOSED SETTLEMENT

### A. Essential Terms Of The Settlement

If the Court preliminarily approves this settlement, Defendant will pay a Maximum Settlement Amount (“MSA”) of \$150,000.00. Moen Decl., ¶ 18; Settlement, ¶ 3. This Settlement is non-reversionary, and Settlement Class members will automatically receive their Individual Settlement Award unless they affirmatively opt-out. Settlement, ¶¶ 3.D, 5. The monetary terms of the Settlement are as follows:

|                                                |                     |
|------------------------------------------------|---------------------|
| <b>Maximum Settlement Amount:</b>              | <b>\$150,000.00</b> |
| Minus Court-approved attorneys’ fees (1/3):    | \$50,000.00         |
| Minus Court-approved attorneys’ costs (up to): | \$17,500.00         |
| Minus Court-approved Enhancement Award:        | \$5,000.00          |
| Minus settlement administrator costs (up to):  | \$5,750.00          |

|                                 |                    |
|---------------------------------|--------------------|
| Minus PAGA payment to the LWDA: | \$15,000.00        |
| <b>Net Settlement Amount:</b>   | <b>\$56,750.00</b> |

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

After deducting amounts for Court-approved attorneys' fees and costs, Plaintiff's Class Representative Enhancement Award, settlement administration costs, and the LWDA's share of PAGA penalties, the Settlement provides for an estimated NSA of no less than \$56,750.00 *See* Settlement, ¶¶ 3.D, 5.A. Individual Settlement Awards will be calculated based on the proportionate number of eligible workweeks worked by each participating Settlement Class member during the Class Period divided by the total number of eligible workweeks worked by all participating Settlement Class members. *Id.*, ¶ 5.B. Further, 25% of the PAGA payment will be paid to all PAGA Aggrieved Employees, regardless of their election to opt-out from participating in the Settlement, based on the proportionate number of workweeks worked by the PAGA Aggrieved Employee during the PAGA Period (January 27, 2020 through December 20, 2020) divided by the total number of workweeks worked by all PAGA Aggrieved Employees during the PAGA Period. *Id.*, ¶ 5.B.i.

Defendant's records indicate that there are approximately 196 Settlement Class members. Moen Decl., ¶ 18; Settlement, ¶ 3.F. Based on the estimated NSA, average Individual Settlement Awards are projected to be approximately \$289.54. Moen Decl., ¶ 18. The lowest possible estimated Individual Settlement Award (in the event a Settlement Class member worked only one workweek during the Class Period) is approximately \$6.83, and the highest possible estimated Individual Settlement Award (in the event a Settlement Class member performed worked in every workweek throughout the Class Period) is approximately \$321.12. *Id.*

Settlement Class members will have 60 calendar days from the date of the initial mailing of the Notice Packet to opt-out or object to the Settlement, thereby providing ample time to review the Class Notice without unduly delaying the Settlement. *See* Settlement, ¶¶ 10.D-E. Those Settlement Class members who do not opt-out of the Settlement will be bound by its terms and will release all claims against Defendant as detailed in the Settlement. *Id.*, ¶¶ 2.A, 10.D. Further, since there is no statutory right for a PAGA Aggrieved Employee to opt-out or otherwise be excluded from the PAGA payment and associated release of claims and rights under PAGA, all

1 PAGA Aggrieved Employees will be deemed to release their respective PAGA Released Claims  
2 against Defendant in connection with the Settlement. *Id.*, ¶ 2.A.

3 **2. Attorneys' Fees, Costs, and Plaintiff's Class Representative**  
4 **Enhancement Award**

5 At the time of seeking final settlement approval, Plaintiff will apply for a Class  
6 Representative Enhancement Award in the amount of \$5,000.00 for his service to the Settlement  
7 Class and his general release of all claims. Moen Decl., ¶ 19. Plaintiff's requested Class  
8 Representative Enhancement Award is intended to recognize the significant time and effort that  
9 he expended on behalf of the Settlement Class, including searching for relevant documents to use  
10 in this lawsuit, providing factual information to his attorneys, having various phone calls with his  
11 attorneys to discuss the claims in this lawsuit, assisting his attorneys in preparing for mediation,  
12 the significant risks Plaintiff undertook by serving as the named plaintiff, and the fact that he  
13 agreed to a general release of all claims subject to a waiver of Civil Code § 1542. *Id.*; Erving  
14 Decl., ¶¶ 5-6; Settlement, ¶ 2.B.

15 Class Counsel will also apply for an attorneys' fee award of up to one third of the MSA  
16 (currently estimated at \$50,000.00), and up to \$17,500 in reimbursement for actual litigation  
17 costs. Moen Decl., ¶ 20; *see* Settlement, ¶ 3.D.4. Plaintiff submits that the requested fee is fair  
18 compensation for undertaking complex, risky, expensive, and time-consuming litigation on a  
19 purely contingent fee basis. Moen Decl., ¶ 20. Class Counsel has incurred substantial attorneys'  
20 fees conducting pre-filing investigation, analyzing Plaintiff's claims, conducting legal research  
21 and analysis, reviewing class documents and data produced by Defendant, extensively reviewing  
22 and evaluating the produced data to build a comprehensive damages model, preparing for and  
23 attending mediation, negotiating and drafting the Memorandum of Understanding, long-form  
24 Settlement Agreement, and Notice Packet documents, preparing this motion for preliminary  
25 approval, and otherwise litigating the case. *Id.* Class Counsel will also expend future attorney  
26 time attending the hearing on this Motion, overseeing the Notice process, drafting the Final  
27 Approval Motion and supporting documents, attending the Final Approval hearing, and  
28 completing other tasks, such as fielding questions from Settlement Class members. *Id.*

Both California and federal courts have recognized that an appropriate method for awarding attorneys' fees in class actions is to award a percentage of the "common fund" created as a result of the settlement. *See Laffitte v. Robert Half Int'l, Inc.* (2016) 1 Cal.5th 480, 506; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254. Historically, courts have awarded percentage fees in the range of 20% to 50%. *See* 4 Newberg on Class Actions § 14.6 (4th Ed. 2013). Class Counsel submits that the request for attorneys' fees is reasonable when viewed as an overall percentage of the Settlement in light of the risks and work undertaken, the positive results obtained for the class, and the efficiency with which the Parties have conducted the litigation. Class Counsel will seek an award of attorneys' fees when seeking final approval.

#### **IV. ARGUMENT**

##### **A. Preliminary Approval Is Warranted**

California Rule of Court 3.769 conditions the settlement of a class action on court approval, which is generally evaluated under the federal standards applicable under Rule 23 of the Federal Rules of Civil Procedure. *See Reed v. United Teachers Los Angeles* (2012) 208 Cal.App.4th 322, 337 (stating that Rule 3.769 requires the trial court to determine "that the settlement is fair, reasonable and adequate to all concerned"); *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026 (stating that Rule 23(e) requires the trial court to determine "whether a proposed settlement is fundamentally fair, adequate, and reasonable"). Settlement is the preferred means of dispute resolution, particularly in complex class action litigation. *In re Syncor ERISA Litigation*, 516 F.3d 1095, 1101 (9th Cir. 2008). The Court's role in evaluating a proposed settlement is limited to ensuring that the agreement taken as a whole is fair and is not the product of fraud or collusion between the negotiating parties. *See e.g., Hanlon, supra*, 150 F.3d at 1027. There is an initial presumption of fairness when the settlement agreement was negotiated at arm's length by class counsel. *See Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130.

##### **1. Standard for Preliminary Approval**

The Court should consider the following factors when making a fairness determination: "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in

1 settlement, the extent of discovery completed and the stage of the proceedings, [and] the  
2 experience and views of counsel.” *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.  
3 “[T]he court is free to engage in a balancing and weighing of factors depending on the  
4 circumstances of each case.” *Wershba, supra*, 91 Cal.App.4th at 245. As discussed below, the  
5 proposed Settlement is fair, adequate, and reasonable in light of the overall balance of factors.

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

7 Class Counsel carefully vetted the claims at issue, reviewed relevant data produced by  
8 Defendant, and created a comprehensive damages model for Defendant’s liability. Moen Decl., ¶  
9 21. Although Plaintiff steadfastly maintains that his claims are meritorious, Plaintiff  
10 acknowledges that there were substantial risks and uncertainty in proceeding with class  
11 certification and trial. As explained in detail in Section II.B., *supra*, Defendant presented  
12 numerous defenses to Plaintiff’s claims, both on the merits and with respect to class certification.  
13 Although he was prepared to litigate these claims through class certification and ultimately  
14 through trial, it was far from certain that Plaintiff would be able to recover a greater amount  
15 should this matter proceed through trial. Thus, this factor supports preliminary approval.

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

17 Although the Parties engaged in substantial informal discovery and information exchange  
18 prior to mediation, the Parties had agreed to refrain from engaging in formal written and  
19 deposition discovery until after exhausting their settlement efforts at mediation. Moen Decl., ¶  
20 21. Absent settlement, the Parties will be required to expend substantial time and resources  
21 conducting extensive formal written and deposition discovery. *Id.* Moreover, Plaintiff has not yet  
22 filed for class certification, and thus, absent settlement, the Parties would face the prospect of  
23 appeals in the wake of a disputed class certification ruling and/or an adverse summary judgment  
24 ruling. *Id.* Even if Plaintiff succeeded in certifying one or more classes, the Parties would incur  
25 considerably more attorneys’ fees and costs through a possible decertification motion, trial, and  
26 possible appeal. *Id.* This Settlement avoids these considerable costs, risks, and the accompanying  
27 burden of continued litigation on the Court. Thus, this factor supports preliminary approval.

28 ///

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

2            At the time of the proposed Settlement, Plaintiff had not filed his motion for class  
3 certification. Moen Decl., ¶ 22. Had the Court certified any claims, Plaintiff anticipated that  
4 Defendant would seek decertification. *Id.* There was also a risk that Defendant would engage in  
5 a *Pick-up-Stix* campaign to significantly reduce the size of the putative class for a fraction of what  
6 Settlement Class members are receiving through this Settlement. *Id.*; see *Chindarah v. Pick Up*  
7 *Stix, Inc.* (2009) 171 Cal.App.4th 796. Therefore, absent the Settlement, there was a serious risk  
8 that Plaintiff would be unable to move forward on a class-wide basis, or that a significantly  
9 smaller class would exist than that which is currently before this Court for approval. *Id.* Thus, this  
10 factor supports preliminary approval.

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

12            This proposed Settlement provides a fair and reasonable recovery for the Settlement Class  
13 in the face of disputed claims. After analyzing Defendant's produced data, Class Counsel  
14 conducted a class-wide exposure analysis, forecasting the total expected recovery as follows:

15                    **Failure to Reimburse Violations: \$13,948**

16            Plaintiff extensively researched and analyzed the market rates for cellular phones and  
17 cellular calling and data plans during the relevant time period, including reviewing JD Power and  
18 Consumer Reports analyses of cellular phone plan rates from all major service providers during  
19 the liability period to determine the true reasonable monthly cell phone expenses incurred by the  
20 putative class members. Moen Decl., ¶ 23. As a result, Plaintiff determined that a reasonable  
21 portion of the employees' monthly cell phone bill during the relevant time period was  
22 approximately \$40. *Id.*; see also *Cochran, supra*, 228 Cal.App.4th at 1144 ("Thus, to be in  
23 compliance with section 2802, the employer must pay some reasonable percentage of the  
24 employee's cell phone bill."). Plaintiff then calculated the weekly value of the unreimbursed  
25 expenses by dividing the monthly cost by 30 days and multiplying by 7, resulting in a weekly  
26 expense value of \$9.33. Moen Decl., ¶ 23. Therefore, Plaintiff determined that Defendant failed  
27 to reimburse the putative Settlement Class members for an aggregate total of approximately  
28 \$38,747 (4,153 workweeks x \$9.33 weekly expenses incurred). *Id.*

1 Defendant maintains Plaintiff's reimbursement allegations fail on their merits, as  
2 Defendant asserts that, at all relevant times, it provided scan guns to its non-exempt employees  
3 through which trailers were assigned, bills of lading were scanned, and employees recorded their  
4 time, alleviating the need for employees to use their personal cellular phones for any work-related  
5 purposes. Moen Decl., ¶ 24. As such, Defendant contends this claim is not certifiable since it  
6 would require a series of mini-trials to determine the extent of each employee's cellular phone  
7 use and value of reimbursement, whether or not the employee utilized Defendant's reimbursement  
8 policies and, if not, why, and a day-by-day analysis of which days each of the Settlement Class  
9 members worked at a location where off-site transportation was required. *Id.* Finally, Defendant  
10 asserts that class certification will be impossible to achieve through contested litigation due to the  
11 existence of an arbitration agreement potentially applicable to all putative class members that  
12 includes a waiver of representative and/or collective action litigation. *Id.* Therefore, Plaintiff  
13 discounted the maximum potential exposure by 60% for the risk of non-certification and 10% for  
14 the risk of being unsuccessful on the merits, to arrive at an estimated exposure of \$13,948. *Id.*

15 **PAGA Penalties: \$141,202**

16 Plaintiff alleges that PAGA civil penalties would be recoverable for each pay period in  
17 which he could prove an underlying Labor Code violation. Moen Decl., ¶ 25. According to  
18 Plaintiff's data analysis, the Settlement Class members worked a combined total of 4,153 pay  
19 periods during the PAGA liability period in which Defendant failed to reimburse all employees  
20 for their necessary business expenses. *Id.* Plaintiff therefore calculates Defendant's maximum  
21 PAGA exposure at \$415,300.00 (4,153 pay periods x \$100 per violation). *Id.*; *see also Amaral,*  
22 *supra*, 163 Cal.App.4th at 1207 (finding "initial" violation rate applies until employer is notified  
23 that it is violating a Labor Code provision). However, these penalties are exclusively derivative  
24 of the underlying violations that Defendant vigorously disputes, both as to certification and the  
25 merits. Moen Decl., ¶ 25; *see also Green v. Lawrence Service Co.*, 2013 WL 3907506, \*5, fn. 5  
26 (C.D. Cal. 2013) (explaining that a PAGA claim's success was determined by the merits of its  
27 underlying claims). Plaintiff also recognizes that the Court has discretion to substantially reduce  
28 any award of PAGA penalties. Moen Decl., ¶ 25; *see also* Labor Code § 2699(e)(2); *Thurman,*

1 *supra*, 203 Cal.App.4th at 1135; *Fleming v. Covidien Inc.*, Case No. ED CV 10-01487 RGK  
2 (OPx), 2011 WL 7563047, \*4 (C.D. Cal. Aug. 12, 2011) (reducing PAGA penalties from \$2.8  
3 million to \$500,000). Additionally, at the time of mediation, Defendant raised the possibility that  
4 Plaintiff's PAGA claims could soon be compelled to individual arbitration pending the United  
5 States Supreme Court's ruling in *Viking River Cruises Inc. v. Moriana*. Moen Decl., ¶ 15; *see*  
6 *Viking River Cruises Inc. v. Moriana*, 596 U.S. \_\_\_\_ (2022), Case No. 20 1573. Therefore,  
7 Plaintiff discounted the maximum figure by 15% to account for the risk that he would not prevail  
8 on the underlying claims, and by an additional 60% for the likely possibility that this Court would  
9 reduce the PAGA penalties to arrive at an estimated exposure on this claim of \$141,202. Moen  
10 Decl., ¶ 25.

11 Using these estimated figures, Plaintiff estimated that the potential reasonable recovery  
12 for the Settlement Class would be approximately \$155,150. Moen Decl., ¶ 26. Thus, the proposed  
13 recovery to the Settlement Class of \$150,000 represents approximately 96.6% of Plaintiff's  
14 reasonably forecasted class-wide recovery, which is a fantastic result and well within the range  
15 approved by courts as being fair, reasonable and adequate, while also avoiding further expense  
16 and risk of proceeding towards class certification and trial. *Id.*; *see, e.g., Altamirano v. Shaw*  
17 *Industries, Inc.*, 2015 WL 4512372, \*9 (N.D. Cal. 2015) ("Although 15% represents a modest  
18 fraction of the hypothetical maximum recovery estimated by Plaintiff, that figure is sufficient for  
19 the Court to grant preliminary approval..."); *Dunleavy v. Nadler*, 213 F.3d 454, 459 (9th Cir.  
20 2000) (approving settlement of "roughly one-sixth of the potential recovery"); *Linney v. Cellular*  
21 *Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998) ("The fact that a proposed settlement  
22 may only amount to a fraction of the potential recovery does not, in and of itself, mean that the  
23 proposed settlement is grossly inadequate and should be disapproved.") (internal quotations  
24 omitted). Preliminary approval is appropriate since the Settlement will provide tangible monetary  
25 relief to the Settlement Class members without the uncertainty, delay, and additional expense of  
26 further litigation.

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28 ///

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

2           “Parties represented by competent counsel are better positioned than courts to produce a  
3 settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pacific*  
4 *Enterprises Securities Litigation*, 47 F.3d 373, 378 (9th Cir. 1995). Here, Plaintiff is represented  
5 by competent and experienced counsel who possesses extensive experience litigating wage and  
6 hour class actions from both the plaintiff and defense side, and who have been appointed as class  
7 counsel in numerous cases alleging similar claims. *See* Moen Decl., ¶¶ 2-7; Declaration of Paul  
8 K. Haines (“Haines Decl.”), ¶¶ 2-8; Declaration of Fletcher W. Schmidt (“Schmidt Decl.”), ¶¶ 2-  
9 7; and Declaration of Susan J. Perez (“Perez Decl.”), ¶¶ 2-4. Class Counsel conducted an  
10 extensive review and analysis of Defendant’s produced key data points and drew on their  
11 extensive experience in similar cases to assess the strengths and weaknesses of Plaintiff’s case.  
12 *See* Moen Decl., ¶¶ 16, 21-25. It was only after the completion of this work that the Parties  
13 attended mediation and ultimately reached a class-wide settlement of all claims at issue. *Id.* Thus,  
14 this factor strongly supports preliminary approval of the Settlement.

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

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

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

22           The proposed Settlement reflects a fair and reasonable recovery for the Settlement Class  
23 members in light of the significant risks of litigation. The proposed Settlement will provide  
24 compensation for contested claims, while only releasing the claims actually at issue in this  
25 litigation. Further, the average Individual Settlement Award of \$289.54 is fair and reasonable in  
26 light of the limited scope of the claims being released by the Settlement Class members, and  
27 exceeds the average awards achieved in other wage and hour class action settlements that have  
28

1 been approved.<sup>3</sup> Thus, the proposed Settlement is within the range of possible approval such that  
2 notice should be provided to the Settlement Class members to consider the Settlement. The Court  
3 will have the opportunity to again assess the reasonableness of the Settlement after the Settlement  
4 Class members have had the opportunity to opt-out or object.

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

7 This proposed Settlement is entitled to an initial presumption of fairness as it is the result  
8 of the exchange of pertinent information, including the employees' key data points which were  
9 analyzed by Plaintiff and his counsel; arm's-length negotiations by counsel; mediation before an  
10 experienced wage and hour class action mediator; and additional negotiations until the terms of  
11 the long-form Settlement were agreed upon and finalized. Moen Decl., ¶ 16; *see also Kullar,*  
12 *supra*, 168 Cal.App.4th at 130. Thus, this factor supports preliminary approval.

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

14 The Settlement will provide tangible monetary relief to the Settlement Class members.  
15 Moreover, the amounts proposed for Plaintiff's Class Representative Enhancement Award,  
16 settlement administration costs, attorneys' fees and costs to Class Counsel, and the LWDA's  
17 portion of PAGA civil penalties are all reasonable and appropriate. Because the Settlement is  
18 devoid of obvious deficiencies, this final factor supports preliminary approval.

19 **B. The Court Should Certify The Settlement Class**

20 The proposed Settlement Class satisfies the criteria for certification of a settlement class  
21 under California law because: (1) the individuals in the Settlement Class are so numerous that  
22 joinder would be impractical; (2) common questions of law and fact predominate over individual  
23 questions such that class certification is the most efficient and desirable way to maintain this

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24  
25 <sup>3</sup> *See e.g., Bercea v. AE Retail West*, Case No. 34-2012-00123947 (Sacramento County Super. Ct. May 9,  
26 2012) (average net recovery of approximately \$105); *Ressler v. Federated Department Stores, Inc.*, Case  
27 No. BC335018 (L.A. County Super. Ct. Jan. 2, 2009) (average net recovery of approximately \$90); and  
28 *Schiller v. David's Bridal, Inc.*, Case No. 1:10-cv-00616-AWI-SKO, 2012 WL 2117001, at \*17 (E.D. Cal.  
June 11, 2012) ("Class Members will receive an average of approximately 198.70 . . . [T]his is a substantial  
recovery where Defendants asserted compelling defenses to liability; Plaintiff also notes several similar  
actions where the gross recoveries per class member were less than \$90 . . . [T]he Court finds that the  
results achieved are good").

litigation; (3) Plaintiff's claims are typical of the claims of the absent Settlement Class members; and (4) Plaintiff and Plaintiff's counsel will fairly and adequately represent the interests of the absent Settlement Class members. *See* Cal. Code Civ. Proc. § 382.

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

A class is "ascertainable" where the members "may be readily identified without unreasonable expense or time by reference to official [or business] records." *See Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 919 (alterations in original). Here, the proposed Settlement Class is defined as all persons who are employed or have been employed by Defendant in California as hourly-paid or non-exempt employees at any time during the time period from January 27, 2020 to December 20, 2020, who worked at certain sites where they allegedly incurred unreimbursed expenses. *See* Settlement, ¶ 1. The Settlement Class will include any participating Class Member who settled or released any of the claims covered by this Settlement, and Settlement Class members can be easily identified using Defendant's employment and payroll records. Moen Decl., ¶ 18. Defendant represents that the Settlement Class consists of approximately 196 individuals, rendering it impracticable to bring all Settlement Class members before the Court. *Id.*; *see* Settlement, ¶ 3.F. Thus, the proposed Settlement Class satisfies numerosity. *See Collins v. Rocha* (1972) 7 Cal.3d 232, 234.

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

The focus in a certification dispute is not on the merits of the case, but rather on what types of questions, "common or individual," are likely to arise in the action. *See Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327. Here, Plaintiff's claims are predicated on Defendant's alleged failure to reimburse all necessary business expenses. These types of claims are commonly held to be proper for class certification. *See, e.g., Brinker v. Superior Court* (2012) 53 Cal.4th 1004, 1032-34 ("The theory of liability—that Brinker has a uniform policy, and that that policy...allegedly violates the law—is by its nature a common question eminently suited for class treatment."); *see also Cochran, supra*, 228 Cal.App.4th 1137.

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1                   **3. The Claims of the Named Plaintiff are Typical**

2           The typicality requirement is satisfied where class representatives have claims that are  
3 typical of those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191  
4 Cal.App.3d 1341, 1347. Here, like other Settlement Class members, Plaintiff was employed by  
5 Defendant as a non-exempt employee in California and was subject to Defendant’s allegedly  
6 unlawful wage and hour policies/practices during the Class Period. Erving Decl., ¶¶ 2-4. Plaintiff  
7 was therefore impacted by the same challenged policies that allegedly injured the Settlement Class  
8 as a whole and was subject to the same defenses forwarded by Defendant as to the Settlement  
9 Class, and is therefore typical.

10                   **4. Plaintiff and Class Counsel are Adequate to Represent the Class**

11           The adequacy of representation requirement examines conflicts of interest between named  
12 parties and the class(es) they seek to represent. *See Capitol People First v. Department of*  
13 *Developmental Services* (2007) 155 Cal.App.4th 676, 697. Here, Plaintiff and Class Counsel will  
14 adequately represent the Settlement Class as there are no conflicts between the named Plaintiff  
15 and the Settlement Class he seeks to represent, and Plaintiff possesses claims that are in line with  
16 those of the Settlement Class members. *See McGhee v. Bank of America* (1976) 60 Cal.App.3d  
17 442, 450 (finding adequacy satisfied where there was no indication that the plaintiff’s counsel  
18 were not qualified and the named plaintiff had no interests antagonistic to those of the proposed  
19 class). Class Counsel also has extensive experience in wage and hour class action litigation. *See*  
20 *Moen Decl.*, ¶ 2-7; *Haines Decl.*, ¶¶ 2-8; *Schmidt Decl.*, ¶¶ 2-6; *Perez Decl.*, ¶¶ 2-4.

21                   **C. The Court Should Order Distribution Of The Proposed Class Notice**

22           This Court should order distribution of the proposed Class Notice in both English and  
23 Spanish to the Settlement Class members by first class mail, postage prepaid, using the last known  
24 mailing address information provided by Defendant. This manner of giving notice is the “best  
25 notice practicable” under the circumstances because it provides “individual notice to all members  
26 who can be identified through reasonable effort.” *See Eisen v. Carlisle and Jacquelin*, 417 U.S.  
27 156, 173 (1974). The Parties propose that the settlement be administered by Simpluris, Inc.  
28 (“Simpluris”), an experienced class action settlement administrator. *See Declaration of Eric*

Springer. Settlement Class members' addresses will be ascertainable through Defendant's personnel records, and Defendant will provide all Settlement Class members' names, last known addresses, last known phone numbers, social security numbers, and pay periods/workweek data to Simpluris within twenty-one (21) calendar days after of the Court signs an order preliminarily approving the Settlement. *See* Settlement, ¶ 10.A. Simpluris will run the Settlement Class members' addresses through the National Change of Address database and/or conduct skip traces to obtain current address information. *Id.*, ¶¶ 10.B-C.

The content of the proposed Notice Packet satisfies California Rule of Court 3.766(d) because it advises the Settlement Class members of the nature of the claims, basic contentions and denials of the Parties, the key terms of the Settlement, the uniform 60-day deadline to opt-out or object to the Settlement and the procedures by which to do so, explains the recovery formula and expected recovery amount for each Settlement Class member, and advises them that they will be bound by the terms of the Settlement if they do not request exclusion. *See* Moen Decl., Exhibit B. The proposed Class Notice will also notify the Settlement Class of the Final Approval Hearing date, provide Class Counsel's contact information, and advise Settlement Class members that they may enter an appearance through counsel if they so wish. *Id.* This manner of giving notice satisfies California Rule of Court 3.766(e) as the most reliable and cost-effective method of reaching Settlement Class members. Additionally, because the proposed Settlement includes settlement of Plaintiff's representative PAGA claim, notice of the Settlement has been submitted to the LWDA. *See id.* at ¶ 27, Exhibit C; Proof of Service.

**D. The Court Should Set A Final Approval Hearing**

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

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1 **V. CONCLUSION**

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

5  
6 Dated: October 12, 2022

Respectfully submitted,  
HAINES LAW GROUP, APC

7  
8 By:

  
Matthew K. Moen  
Attorneys for Plaintiff