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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN LUIS OBISPO**

STEPHEN FIANT, as an individual and on
behalf of all others similarly situated,

Plaintiff,

vs.

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

Defendant.

Case No. 21CV-0016

*[Assigned for all purposes to the Hon. Tana L.
Coates, Dept. 9]*

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

Date: May 4, 2022
Time: 9:00 a.m.
Dept.: 9

Action Filed: January 14, 2021
Trial Date: None Set

PLEASE TAKE NOTICE that, pursuant to Rule 3.769 of the California Rules of Court, on May 4, 2022, at 9:00 a.m., or as soon thereafter as the matter may be heard, in Department 9 of the San Luis Obispo County Superior Court, located at 1050 Monterey Street, San Luis Obispo, California 93408, Plaintiff Stephen Fiant (“Plaintiff”), individually and on behalf of a class of similarly situated individuals, will and hereby does move this Court for:

1. Preliminary approval of the proposed Stipulation of 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 current and former non-exempt employees who worked for Defendant Ernie Ball, Inc. in California and received both an attendance bonus during the COVID-19 pandemic and overtime wages in the same pay period during at least one pay period between January 14, 2017 and October 1, 2021 (the “Class Period”).

3. Preliminary appointment of Plaintiff Stephen Fiant 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 Payment, 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 Phoenix Settlement Administrators as the third-party settlement administrator; and
7. Approval of the proposed Notice of Class Action Settlement and Notice of Settlement Award (collectively, the “Notice Packet”), 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, Stephen Fiant, and Jodey Lawrence of Phoenix Settlement Administrators, and the exhibits
4 attached thereto, the pleadings and other papers filed in this action, and on any further oral or
5 documentary evidence or argument presented at the time of hearing.

6
7 Dated: April 7, 2022

Respectfully Submitted,
HAINES LAW GROUP, APC

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9 By: 
10 Matthew K. Moen
11 Attorneys for Plaintiff
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Stephen Fiant (“Plaintiff”), individually and on behalf of the proposed Settlement
4 Class, respectfully requests that this Court preliminarily approve the proposed Stipulation of
5 Settlement (“Settlement Agreement” or “Settlement”),¹ entered into by Plaintiff and Defendant
6 Ernie Ball, Inc. (“Ernie Ball” or “Defendant”) (Plaintiff and Defendant are referred to collectively
7 herein as the “Parties”). The operative Second Amended Complaint alleges Defendant: (i) failed
8 to pay all overtime wages owed; (ii) failed to issue accurate and itemized wage statements; (iii)
9 failed to timely pay all final wages upon separation; (iv) failed to comply with California’s Unfair
10 Competition laws and; (v) is liable for civil penalties under the Private Attorneys General Act,
11 Labor Code § 2698 *et seq.* (“PAGA”).

12 Plaintiff respectfully requests that this Court preliminarily approve this non-reversionary,
13 \$145,000.00 class action settlement on behalf of the following Settlement Class:

14 All current and former non-exempt employees who worked for Defendant in
15 California and received both an attendance bonus during the COVID-19 pandemic
16 and overtime wages in the same pay period during at least one pay period between
January 14, 2017 and October 1, 2021 (the “Class Period”).

17 Based upon the data provided by Defendant, there are approximately 207 potential
18 Settlement Class members. After Court-approved deductions for Plaintiff’s enhancement
19 payment, settlement administrator costs, the PAGA payment to the Labor & Workforce
20 Development Agency (“LWDA”), and attorneys’ fees and costs to Class Counsel, the remaining
21 Net Settlement Amount (“NSA”) is estimated to be no less than \$64,166.67. This results in
22 average Settlement Awards of approximately \$309.98. This result is fantastic given that
23 Defendant has already repaid all unpaid overtime wages to all 207 putative Settlement Class
24 members as a result of this lawsuit. Significantly, Settlement Class members do not need to file a
25 claim form in order to receive a Settlement Award, and all Settlement Class members who do not

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

1 opt-out will automatically receive their share of the Settlement. This represents a fair and
2 reasonable result for Settlement Class members, who will be agreeing to a release of only those
3 claims that were actually asserted, or which could have been asserted based on the facts alleged
4 in the operative Second Amended Complaint in the lawsuit.

5 Prior to reaching this proposed Settlement, Defendant provided Plaintiff with timekeeping
6 and payroll data for approximately 25% of the Settlement Class members for the duration of the
7 relevant time period, as well as an anonymized class list identifying all Settlement Class members
8 and their dates of employment and base hourly rates of pay. Plaintiff and his counsel then
9 conducted a comprehensive, class-wide analysis of the data to estimate Defendant's maximum
10 potential exposure on all claims at issue. On September 2, 2021, after extensive legal research
11 and analysis, along with Plaintiff's comprehensive review of the data, the Parties participated in
12 a mediation session with Henry J. Bongiovi, Esq., and were able to reach a class-wide settlement
13 at the conclusion of mediation. Over the following months, the Parties negotiated and executed
14 the long-form Settlement Agreement that is now before this Court for preliminary approval.

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

19 **II. SUMMARY OF THE LITIGATION**

20 **A. Factual And Procedural Background**

21 Defendant manufactures guitar accessories and electric guitar, acoustic guitar, and bass
22 strings for commercial sale. Moen Decl., ¶ 9. Plaintiff worked for Defendant as a non-exempt
23 employee from approximately September 16, 2016 until approximately July 27, 2020, at
24 Defendant's San Luis Obispo, California location. *Id.*; Declaration of Stephen Fiant ("Fiant
25 Decl."), ¶ 2. Plaintiff's duties included metalworking, machine operation, and the assembly and
26 fabrication of various tools. *Id.* Like all Settlement Class members, Plaintiff was subject to
27 Defendant's wage and hour policies and practices. Moen Decl., ¶ 9; Fiant Decl., ¶ 3.

28 On January 14, 2021, Plaintiff filed the initial Complaint in this action, alleging Defendant
failed to: (i) pay all overtime wages owed; (ii) authorize and permit all lawful rest periods; (iii)

1 issue accurate and itemized wage statements; (vi) timely pay all final wages upon separation; and
2 (vii) comply with California’s Unfair Competition laws. Moen Decl., ¶ 10. On March 22, 2021,
3 Plaintiff filed his First Amended Complaint (“FAC”), adding a cause of action for civil penalties
4 under PAGA, premised on the underlying Labor Code violations. Moen Decl., ¶ 10.

5 On December 9, 2021, the Court issued an Order granting Plaintiff’s request for dismissal
6 of his second cause of action for rest period violations and granting Plaintiff leave to file the
7 operative Second Amended Complaint (“SAC”) in this action, further removing all allegations of
8 an allegedly defective alternative workweek schedule or unlawful rest break policy, as well as
9 claims for any alleged unpaid wages, overtime, premium or other payments or penalties arising
10 from those two theories of liability. Moen Decl., ¶ 10. Accordingly, on December 9, 2021,
11 Plaintiff filed the operative SAC, alleging Defendant: (i) failed to pay all overtime wages owed;
12 (ii) failed to issue accurate and itemized wage statements; (iii) failed to timely pay all final wages
13 upon separation; (iv) failed to comply with California’s Unfair Competition laws; and (v) is liable
14 for civil penalties under PAGA. *Id.*

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

16 **1. Overtime Wage Violations**

17 Plaintiff asserts that, as a result of Defendant’s uniform practices, Defendant failed to
18 accurately pay Settlement Class members all overtime wages owed throughout the Class Period.
19 Moen Decl., ¶ 11. Specifically, Plaintiff alleges that Defendant paid Plaintiff and Settlement Class
20 members non-discretionary attendance bonuses between April and June of 2020 as an incentive
21 for employees to work during the initial months of the COVID-19 pandemic. *Id.* However,
22 Plaintiff asserts that Defendant failed to include the value of these COVID-19 attendance bonuses
23 when calculating employees’ respective regular rates of pay, thereby causing Plaintiff and other
24 non-exempt employees to be underpaid for all required overtime wages. *Id.*; *see Huntington*
25 *Memorial Hosp. v. Sup. Ct.* (2005) 131 Cal.App.4th 893, 902-03 (“[I]n determining what
26 payments are to be included in or excluded from the calculation of the regular rate of pay,
27 California will adhere to the standards adopted by the U.S. Department of Labor.”); *see also* 29
28 U.S.C. §§ 207(a)(1) and (e); 29 C.F.R. §778.211(c) (“Bonuses which are announced to employees
to induce them to work more steadily or more rapidly ... are regarded as part of the regular rate

1 of pay. Most attendance bonuses, individual or group production bonuses, bonuses for quality and
2 accuracy of work ... must be included in the regular rate of pay.”).

3 In response, Defendant maintains it has properly paid all overtime wages for all hours
4 worked by the Settlement Class members. Moen Decl., ¶ 12. Defendant argues it compensated all
5 affected current and former employees for all unpaid overtime wages resulting from its alleged
6 regular rate miscalculation after Plaintiff filed the action. *Id.* As such, Defendant contends that
7 Plaintiff’s claim would fail on the merits. *Id.* Further, Defendant asserts that this claim is
8 unmanageable, as it requires individualized inquiries into exactly how much money each
9 employee was purportedly owed as a result of Defendant’s alleged regular rate violation, how
10 much money each employee received as a true up payment from Defendant, and finally, whether
11 or not any overtime wage underpayment remained, resulting in an unmanageable series of mini-
12 trials. *Id.*

13 **2. Wage Statement, Waiting Time, and PAGA Penalties**

14 As a result of Defendant’s failure to pay all overtime wages, Plaintiff asserts that
15 Defendant also failed to issue accurate and itemized wage statements and failed to timely pay all
16 final wages at the time of separation. Moen Decl., ¶ 13; *see also* Labor Code §§ 203(a) and 226(a).
17 As a result of these alleged Labor Code violations, Plaintiff also seeks PAGA civil penalties on
18 behalf of all aggrieved employees. Moen Decl., ¶ 13; *see also Amaral v. Cintas Corp. No. 2*
19 *(2008) 163 Cal.App.4th 1157, 1213* (“As we have explained, they [civil penalties under PAGA]
20 are mandatory, not discretionary.”).

21 In response, Defendant argues that Plaintiff’s underlying claims will fail and, as a result,
22 the wholly derivative wage statement, waiting time, and PAGA claims will also fail. Moen Decl.,
23 ¶ 14; *see Price v. Starbucks Corp. (2011) 192 Cal.App.4th 1136, 1147* (“Because the underlying
24 causes of action fail, the derivative UCL and PAGA claims also fail.”). Defendant also maintains
25 that Plaintiff cannot show that the wage statement violations were “knowing and intentional,” or
26 that the putative class members “suffer[ed] injury” as a result of the alleged violations, as required
27 by Labor Code § 226(e) for the imposition of wage statement penalties. Moen Decl., ¶ 14; *see*
28 Labor Code § 226(e)(1). Further, Defendant argues that the wage statements always accurately

1 reflected hours worked and amounts actually paid to employees, and thus Defendant could not be
2 found liable for wage statement penalties. Moen Decl., ¶ 14; *see also Maldonado v. Epsilon*
3 *Plastics, Inc.* (2018) 22 Cal.App.5th 1308, 1336-37 (agreeing with employer’s “commonsense
4 position that the pay stubs were accurate in that they correctly reflected the hours worked and the
5 pay received.”) (citation omitted). Moreover, Defendant maintains that their good faith defenses
6 to Plaintiff’s underlying claims would preclude the recovery of waiting time penalties, which are
7 only available for the “willful” failure to pay wages, and that this Court would exercise its
8 discretion to substantially reduce any PAGA penalties awarded. Moen Decl., ¶ 14; *see also* 8 Cal.
9 Code Regs. § 13520 (“[A] good faith dispute that any wages are due will preclude imposition of
10 waiting time penalties under Section 203.”); Labor Code § 2699(e)(2); *Thurman v. Bayshore*
11 *Transit Mgmt., Inc.* (2012) 203 Cal.App.4th 1112, 1135; *Carrington v. Starbucks Corporation*
12 (2018) 30 Cal.App.5th 504 (affirming reduction of PAGA penalties to 10% of exposure).

13 **C. Discovery And Mediation**

14 In connection with mediation, Defendant provided Plaintiff with electronic timekeeping
15 and payroll records for approximately 25% of the Settlement Class members spanning the entire
16 Class Period, as well as an anonymized list identifying all Settlement Class members and their
17 dates of employment, and other key data points. Moen Decl., ¶ 15. Plaintiff and his counsel then
18 conducted a comprehensive analysis of the produced data to create a detailed, class-wide exposure
19 model for the claims at issue. *Id.* On September 2, 2021, the Parties participated in a mediation
20 session with Henry J. Bongiovi, Esq., during which the Parties exchanged divergent views on
21 Defendant’s liability and exposure valuations, their legal positions, and the likelihood of
22 certification of Plaintiff’s claims. *Id.* With the help of Mr. Bongiovi, the Parties ultimately
23 reached the proposed Settlement now before the Court for preliminary approval. *Id.*

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1 **III. THE PROPOSED SETTLEMENT**

2 **A. Essential Terms Of The Settlement**

3 If the Court preliminarily approves this settlement, Defendant will pay a Maximum
4 Settlement Amount (“MSA”) of \$145,000.00. Moen Decl., ¶ 17; Settlement, ¶ 3. This Settlement
5 is non-reversionary, and Settlement Class members will automatically receive their Settlement
6 Award unless they affirmatively opt-out. Settlement, ¶¶ 3.C, 4. The monetary terms of the
7 Settlement are as follows:

Maximum Settlement Amount:	\$145,000.00
Minus Court-approved attorneys’ fees (1/3):	\$48,333.33
Minus Court-approved attorneys’ costs (up to):	\$12,500.00
Minus Court-approved Enhancement Payment:	\$5,000.00
Minus settlement administrator costs (up to):	\$7,500.00
Minus PAGA payment to the LWDA:	\$7,500.00
Net Settlement Amount:	\$64,166.67

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

12 After deducting amounts for Court-approved attorneys’ fees and costs, Plaintiff’s
13 Enhancement Payment, settlement administration costs, and the LWDA’s share of PAGA
14 penalties, the Settlement provides for an estimated NSA of no less than \$64,166.67. *See*
15 Settlement, ¶¶ 3.C, 4.A. Settlement Awards will be calculated based on the proportionate number
16 of eligible workweeks worked by each participating Settlement Class member during the Class
17 Period divided by the total number of eligible workweeks worked by all participating Settlement
18 Class members, as well as membership in various subclasses. *Id.*, ¶ 4.B.

19 Defendant’ records indicate that there are approximately 207 Settlement Class members.
20 Moen Decl., ¶ 17; Settlement, ¶ 3.E. Based on the estimated NSA, average Settlement Awards
21 are projected to be approximately \$309.98. Moen Decl., ¶ 17. Settlement Class members will
22 have 60 calendar days from the date of the initial mailing of the Notice Packet to opt-out or object
23 to the Settlement, thereby providing ample time to review the Class Notice without unduly
24 delaying the Settlement. *See* Settlement, ¶¶ 9.D-E. Those Settlement Class members who do not
25 opt-out of the Settlement will be bound by its terms and will release all claims against Defendant
26 as detailed in the Settlement. *Id.*, ¶¶ 2.A, 9.D.

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1 **2. Attorneys' Fees, Costs, and Plaintiff's Enhancement Payment**

2 At the time of seeking final settlement approval, Plaintiff will apply for an enhancement
3 payment in the amount of \$5,000.00 for his service to the Settlement Class and his general release
4 of all claims. Moen Decl., ¶ 18. Plaintiff's requested enhancement payment is intended to
5 recognize the significant time and effort that he expended on behalf of the Settlement Class,
6 including searching through voluminous employment records and providing all potentially
7 relevant documents to his attorneys, discussing the facts, legal theories at issue in the lawsuit, and
8 Defendant's policies/practices with his attorneys, discussing the case and proposed settlement
9 with his attorneys on multiple occasions, assisting his attorneys in preparing for mediation, the
10 significant risks Plaintiff undertook by serving as the named plaintiff, and the fact that he agreed
11 to a general release of all claims subject to a waiver of Civil Code § 1542. *Id.*; Fiant Decl., ¶¶ 4-
12 5; Settlement, ¶ 2.B.

13 Class Counsel will also apply for an attorneys' fee award of up to one third of the MSA
14 (currently estimated at \$48,333.33), and up to \$12,500 in reimbursement for actual litigation
15 costs. Moen Decl., ¶ 19; *see* Settlement, ¶ 3.C.4. Plaintiff submits that the requested fee is fair
16 compensation for undertaking complex, risky, expensive, and time-consuming litigation on a
17 purely contingent fee basis. Moen Decl., ¶ 19. Class Counsel has incurred substantial attorneys'
18 fees conducting pre-filing investigation, analyzing Plaintiff's claims, conducting legal research
19 and analysis, reviewing class documents and data produced by Defendant, extensively reviewing
20 and evaluating the produced timekeeping and payroll records to build a comprehensive damages
21 model, preparing for and attending mediation, negotiating and drafting the Memorandum of
22 Understanding, long-form Settlement Agreement, and Notice Packet documents, preparing this
23 motion for preliminary approval, and otherwise litigating the case. *Id.* Class Counsel will also
24 expend future attorney time attending the hearing on this Motion, overseeing the Notice process,
25 drafting the Final Approval Motion and supporting documents, attending the Final Approval
26 hearing, and completing other tasks, such as fielding questions from Settlement Class members.
27 *Id.*

28 Both California and federal courts have recognized that an appropriate method for

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

9 **IV. ARGUMENT**

10 **A. Preliminary Approval Is Warranted**

11 California Rule of Court 3.769 conditions the settlement of a class action on court
12 approval, which is generally evaluated under the federal standards applicable under Rule 23 of
13 the Federal Rules of Civil Procedure. *See Reed v. United Teachers Los Angeles* (2012) 208
14 Cal.App.4th 322, 337 (stating that Rule 3.769 requires the trial court to determine "that the
15 settlement is fair, reasonable and adequate to all concerned"); *Hanlon v. Chrysler Corp.* (9th Cir.
16 1998) 150 F.3d 1011, 1026 (stating that Rule 23(e) requires the trial court to determine "whether
17 a proposed settlement is fundamentally fair, adequate, and reasonable"). Settlement is the
18 preferred means of dispute resolution, particularly in complex class action litigation. *In re Syncor*
19 *ERISA Litigation* (9th Cir. 2008) 516 F.3d 1095, 1101. The Court's role in evaluating a proposed
20 settlement is limited to ensuring that the agreement taken as a whole is fair and is not the product
21 of fraud or collusion between the negotiating parties. *See e.g., Hanlon, supra*, 150 F.3d at 1027.
22 There is an initial presumption of fairness when the settlement agreement was negotiated at arm's
23 length by class counsel. *See Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130.

24 **1. Standard for Preliminary Approval**

25 The Court should consider the following factors when making a fairness determination:
26 "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further
27 litigation, the risk of maintaining class action status through trial, the amount offered in
28 settlement, the extent of discovery completed and the stage of the proceedings, [and] the

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

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

6 Class Counsel carefully vetted the claims at issue, reviewed a representative sampling of
7 Settlement Class member data and all relevant policy documents, and created a comprehensive
8 damages model for Defendant’s liability. Moen Decl., ¶ 20. Although Plaintiff steadfastly
9 maintains that his claims are meritorious, Plaintiff acknowledges that there were substantial risks
10 and uncertainty in proceeding with class certification and trial. As explained in detail in Section
11 II.B., *supra*, Defendant presented numerous defenses to Plaintiff’s claims, both on the merits and
12 with respect to class certification. Although he was prepared to litigate these claims through class
13 certification and ultimately through trial, it was far from certain that Plaintiff would be able to
14 recover a greater amount should this matter proceed through trial. Thus, this factor supports
15 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 20. 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.

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c. Risk of Maintaining Class Action Status

At the time of the proposed Settlement, Plaintiff had not filed his motion for class certification. Moen Decl., ¶ 21. Had the Court certified any claims, Plaintiff anticipated that Defendant would seek decertification. *Id.* There was also a risk that Defendant would engage in a *Pick-up-Stix* campaign to significantly reduce the size of the putative class for a fraction of what Settlement Class members are receiving through this Settlement. *Id.*; see *Chindarah v. Pick Up Stix, Inc.* (2009) 171 Cal.App.4th 796. Therefore, absent the Settlement, there was a serious risk that Plaintiff would be unable to move forward on a class-wide basis, or that a significantly smaller class would exist than that which is currently before this Court for approval. *Id.* Thus, this factor supports preliminary approval.

d. Amount Offered in Settlement Given Realistic Value of Claims

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

Regular Rate Miscalculations: nominal value

Plaintiff alleges that Defendant failed to pay all overtime wages owed due to its failure to properly include the value of non-discretionary attendance bonus payments when calculating the regular rate of pay for overtime purposes. See Moen Decl., ¶ 22. Plaintiff's data analysis determined that Defendant underpaid the putative Settlement Class members by a total of approximately \$1,519.60 during the Class Period as a result of Defendants' failure to accurately calculate the employees' respective regular rates of pay. *Id.* However, Defendant contends that after Plaintiff filed this action, Defendant reviewed its regular rate calculations and issued a total of \$7,423.93 in overtime true up payments to the putative Settlement Class members. *Id.* As such, Defendant maintains that it would have no liability for any alleged unpaid overtime wages. *Id.* Plaintiff therefore attributed nominal value to this claim. *Id.*

Wage Statement Penalties: \$32,782.75

According to the key data points provided by Defendant, approximately 207 Settlement Class members are eligible for wage statement penalties, and a total of 824 wage statements were issued during the relevant one-year statute of limitations applicable to this claim. Moen Decl., ¶

23. Plaintiff calculated Defendant's maximum possible wage statement exposure as approximately \$72,050 ((207 initial violations * \$50 per pay period) + (617 subsequent pay periods * \$100 per pay period)). *Id.* However, Defendant raises numerous defenses, including that the alleged violations, if any, were not "knowing and intentional," and that Plaintiff could not show that the Settlement Class members "suffer[ed] injury" as a result of any alleged violations. *Id.* Therefore, Plaintiff discounted the maximum exposure by 30% for the risk of non-certification of the underlying claims and 35% for a risk of being unsuccessful on the merits, including failing to prove the violations were "knowing and intentional," that the Class Members "suffer[ed] injury," or that any derivative wage statement penalties were recoverable, for an estimated recovery on this claim of \$32,782.75. Moen Decl., ¶ 23.

Waiting Time Penalties: \$47,113.92

Based on data provided by Defendant, approximately 19 Settlement Class members separated their employment during the Class Period. Moen Decl., ¶ 24. Assuming Plaintiff can prove that each of these employees was owed wages that were not paid at the time of their separation, Plaintiff calculated a maximum exposure of \$74,784 ((average waiting time penalty of \$3,936 (\$16.40 average hourly rate x 8 hours x 30)). *Id.* Defendant maintains that waiting time penalties are not appropriate because Plaintiff's claims fail on the merits, and given its good-faith defenses, Plaintiff cannot show that any failure by Defendant to pay all final wages was willful under 8 Cal. Code Regs. § 13520. *Id.* Thus, Plaintiff discounted this claim by 30% for the risk of non-certification and by an additional 10% for risk of being unsuccessful on the merits or failing to establish willfulness, for an estimated recovery of \$47,113.92. *Id.*

PAGA Penalties: \$86,520

Plaintiff alleges that PAGA civil penalties would be recoverable for each pay period in which he could prove an underlying Labor Code violation. Moen Decl., ¶ 25. According to Plaintiff's data analysis, the Settlement Class members worked a combined total of 824 pay periods during the PAGA liability period in which Defendant failed to pay employees all of their earned overtime wages. *Id.* Plaintiff therefore calculates Defendant's maximum PAGA exposure at \$206,000 (824 pay periods x \$250 per violation). *Id.*; see also *Amaral, supra*, 163 Cal.App.4th

1 at 1207 (finding “initial” violation rate applies until employer is notified that it is violating a
2 Labor Code provision). However, these penalties are almost exclusively derivative of the
3 underlying violations that Defendant vigorously disputes, both as to certification and the merits.
4 Moen Decl., ¶ 25; *see also Green v. Lawrence Service Co.*, 2013 WL 3907506, *5, fn. 5 (C.D.
5 Cal. 2013) (explaining that a PAGA claim’s success was determined by the merits of its
6 underlying claims). Plaintiff also recognizes that the Court has discretion to substantially reduce
7 any award of PAGA penalties. Moen Decl., ¶ 25; *see also* Labor Code § 2699(e)(2); *Thurman*,
8 *supra*, 203 Cal.App.4th at 1135; *Fleming v. Covidien Inc.*, Case No. ED CV 10-01487 RGK
9 (OPx), 2011 WL 7563047, *4 (C.D. Cal. Aug. 12, 2011) (reducing PAGA penalties from \$2.8
10 million to \$500,000). Therefore, Plaintiff discounted the maximum figure by 30% to account for
11 the risk that he would not prevail on the underlying claims, and by an additional 40% for the
12 likely possibility that this Court would reduce the PAGA penalties, especially given that
13 Defendant had already issued overtime true up payments to the Settlement Class members, to
14 arrive at an estimated exposure on this claim of \$86,520. Moen Decl., ¶ 25.

15 Using these estimated figures, Plaintiff estimated that the potential reasonable recovery
16 for the Settlement Class would be approximately \$166,416.67. Moen Decl., ¶ 26. Thus, the
17 proposed recovery to the Settlement Class of \$145,000 represents approximately 87.13% of
18 Plaintiff’s reasonably forecasted class-wide recovery, which is well within the range approved by
19 courts as being fair, reasonable and adequate, while also avoiding further expense and risk of
20 proceeding towards class certification and trial. *Id.*; *see, e.g., Altamirano v. Shaw Industries, Inc.*,
21 2015 WL 4512372, *9 (N.D. Cal. 2015) (“Although 15% represents a modest fraction of the
22 hypothetical maximum recovery estimated by Plaintiff, that figure is sufficient for the Court to
23 grant preliminary approval...”); *Dunleavy v. Nadler* (9th Cir. 2000) 213 F.3d 454, 459 (approving
24 settlement of “roughly one-sixth of the potential recovery”); *Linney v. Cellular Alaska*
25 *Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242 (“The fact that a proposed settlement may only
26 amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed
27 settlement is grossly inadequate and should be disapproved.”) (internal quotations omitted).
28 Preliminary approval is appropriate since the Settlement will provide tangible monetary relief to

1 the Settlement Class members without the uncertainty, delay, and additional expense of further
2 litigation.

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

4 “Parties represented by competent counsel are better positioned than courts to produce a
5 settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pacific*
6 *Enterprises Securities Litigation* (9th Cir. 1995) 47 F.3d 373, 378. Here, Plaintiff is represented
7 by competent and experienced counsel who possesses extensive experience litigating wage and
8 hour class actions from both the plaintiff and defense side, and who have been appointed as class
9 counsel in numerous cases alleging similar claims. *See* Moen Decl., ¶¶ 2-7; Declaration of Paul
10 K. Haines (“Haines Decl.”), ¶¶ 2-8; Declaration of Fletcher W. Schmidt (“Schmidt Decl.”), ¶¶ 2-
11 7; and Declaration of Susan J. Perez (“Perez Decl.”), ¶¶ 2-4. Class Counsel conducted an
12 extensive review and analysis of Defendant’s produced timekeeping and payroll records and drew
13 on their extensive experience in similar cases to assess the strengths and weaknesses of Plaintiff’s
14 case. *See* Moen Decl., ¶¶ 15, 20-26. It was only after the completion of this work that the Parties
15 attended mediation and ultimately reached a class-wide settlement of all claims at issue. *Id.* Thus,
16 this factor strongly supports preliminary approval of the Settlement.

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

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

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

24 The proposed Settlement reflects a fair and reasonable recovery for the Settlement Class
25 members in light of the significant risks of litigation. The proposed Settlement will provide
26 compensation for contested claims, while only releasing the claims actually at issue in this
27 litigation. Further, the average payment of \$309.98 exceeds the average payments achieved in
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1 other wage and hour class action settlements that have been approved.² Thus, the proposed
2 Settlement is within the range of possible approval such that notice should be provided to the
3 Settlement Class members to consider the Settlement. The Court will have the opportunity to
4 again assess the reasonableness of the Settlement after the Settlement Class members have had
5 the opportunity to opt-out or object.

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

8 This proposed Settlement is entitled to an initial presumption of fairness as it is the result
9 of the exchange of pertinent information, including all relevant policies, employee timekeeping
10 and payroll records, and key data points which were analyzed by Plaintiff and his counsel; arm's-
11 length negotiations by counsel; mediation before an experienced wage and hour class action
12 mediator; and additional negotiations until the terms of the long-form Settlement were agreed
13 upon and finalized. Moen Decl., ¶ 15; *see also Kullar, supra*, 168 Cal.App.4th at 130. Thus, this
14 factor supports preliminary approval.

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

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

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

22 The proposed Settlement Class satisfies the criteria for certification of a settlement class
23 under California law because: (1) the individuals in the Settlement Class are so numerous that
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25 ² *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").

1 joinder would be impractical; (2) common questions of law and fact predominate over individual
2 questions such that class certification is the most efficient and desirable way to maintain this
3 litigation; (3) Plaintiff's claims are typical of the claims of the absent Settlement Class members;
4 and (4) Plaintiff and Plaintiff's counsel will fairly and adequately represent the interests of the
5 absent Settlement Class members. *See* Cal. Code Civ. Proc. § 382.

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

7 A class is "ascertainable" where the members "may be readily identified without
8 unreasonable expense or time by reference to official [or business] records." *See Sevidal v. Target*
9 *Corp.* (2010) 189 Cal.App.4th 905, 919 (alterations in original). Here, the proposed Settlement
10 Class is defined as all current and former non-exempt employees who performed work for
11 Defendant in California and received both an attendance bonus during the COVID-19 pandemic
12 and overtime wages in the same pay period during at least one pay period between January 14,
13 2017 and October 1, 2021. *See* Settlement, ¶ 1. Settlement Class members can be easily identified
14 using Defendant's employment and payroll records. Moen Decl., ¶ 17. Defendant represents that
15 the Settlement Class consists of approximately 207 individuals, rendering it impracticable to bring
16 all Settlement Class members before the Court. *Id.*; *see* Settlement, ¶ 3.E. Thus, the proposed
17 Settlement Class satisfies numerosity. *See Collins v. Rocha* (1972) 7 Cal.3d 232, 234.

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

19 The focus in a certification dispute is not on the merits of the case, but rather on what
20 types of questions, "common or individual," are likely to arise in the action. *See Sav-On Drug*
21 *Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327. Here, Plaintiff's claims are predicated
22 on Defendant's alleged failures to pay all overtime wages owed, furnish accurate and itemized
23 wage statements, and pay all final wages owed upon separation of employment. These types of
24 claims are commonly held to be proper for class certification. *See, e.g., Brinker v. Superior Court*
25 (2012) 53 Cal.4th 1004, 1032-34 ("The theory of liability—that Brinker has a uniform policy,
26 and that that policy...allegedly violates the law—is by its nature a common question eminently
27 suited for class treatment.").

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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. Fiant Decl., ¶¶ 2-3. 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 *Schmidt Decl.*, ¶¶ 2-6; *Haines Decl.*, ¶¶ 2-8; *Moen Decl.*, ¶ 2-7; *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* (1974) 417
27 U.S. 156, 173. The Parties propose that the settlement be administered by Phoenix Settlement
28 Administrators (“Phoenix”), an experienced class action settlement administrator. *See Declaration*
of Jodey Lawrence. Settlement Class members’ addresses will be ascertainable through

1 Defendant's personnel records, and Defendant will provide all Settlement Class members' names,
2 last known addresses, phone numbers, social security numbers, dates of employment, and
3 workweek data to Phoenix within fifteen (15) calendar days after entry of an order preliminarily
4 approving the Settlement. *See* Settlement, ¶ 9.A. Phoenix will run the Settlement Class members'
5 addresses through the National Change of Address database and/or conduct skip traces to obtain
6 current address information. *Id.*, ¶¶ 9.B-C.

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

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

21 Finally, this Court should set a hearing for final approval of the Settlement on a date
22 appropriately scheduled to follow the deadline by which Settlement Class members must file
23 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.

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6 Dated: April 7, 2022

Respectfully submitted,
HAINES LAW GROUP, APC

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8 By: 
9 Matthew K. Moen
10 Attorneys for Plaintiff
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