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

FRANCISCO RAMIREZ GONZALEZ, as an
individual and on behalf of all others similarly
situated,

Plaintiff,

vs.

TOMARCO CONTRACTOR SPECIALTIES,
INC., a California corporation; and DOES 1
through 100,

Defendants.

Case No. 19STCV20723

*[Assigned for all purposes to the Hon.
Carolyn B. Kuhl, Dept. SSC-12]*

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

Date: August 31, 2021
Time: 10:30 a.m.
Dept: SSC-12

Complaint Filed: June 14, 2019
Trial Date: None set

PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court, on August 31, 2021, at 10:30 a.m., or as soon thereafter as the matter may be heard in Department 12 of the above-entitled Court, located at 312 N. Spring Street in Los Angeles, CA 90012, Plaintiff Francisco Ramirez Gonzalez ("Plaintiff") will, and hereby does, move this Court for:

1. Preliminary approval of the proposed Stipulation of Settlement ("Settlement");
2. Pursuant to Section 382 of the Code of Civil Procedure, provisional certification, for settlement purposes only, of the proposed Settlement Class, defined as follows:
All current and former non-exempt Production Department employees employed by Defendant Tomarco Contractor Specialties, Inc. ("Tomarco") in the State of California at any time from June 14, 2015 through February 26, 2021 (the "Class Period").
3. Preliminary appointment of Plaintiff as Class Representative;
4. Preliminary appointment of Paul K. Haines and Tuvia Korobkin of Haines Law Group, APC as Class Counsel;
5. Appointment of Phoenix Settlement Administrators as the Settlement Administrator;
6. Approval of the proposed Notice, and an Order that the Notice be disseminated to the proposed Settlement Class as provided in the Settlement; and
7. The scheduling of a hearing to consider whether the Settlement should be finally approved and to award an amount for enhancement payment to the Class Representative, and attorneys' fees and costs to Class Counsel.

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

Dated: August 9, 2021

Respectfully Submitted,
HAINES LAW GROUP, APC

By:


Paul K. Haines
Attorneys for Plaintiff

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Francisco Ramirez Gonzalez (“Plaintiff”) seeks preliminary approval of a class
4 action settlement (“Settlement”) with Defendant Tomarco Contractor Specialties, Inc.
5 (“Tomarco” or “Defendant”). The Settlement resolves a class and representative action pending
6 before this Court (the “Action”), in which Plaintiff alleges that Tomarco: (i) failed to pay all
7 overtime wages, (ii) failed to pay all minimum wages due, (iii) failed to provide rest periods, and
8 (iv) failed to provide meal periods. As a result of these alleged violations, Plaintiff further alleges
9 that Tomarco engaged in unfair business practices and is liable for civil penalties under the Private
10 Attorneys General Act (“PAGA”), Labor Code section 2698, *et seq.*

11 Plaintiff now respectfully requests that this Court preliminarily approve this non-
12 reversionary, common-fund class action Settlement¹, in which Tomarco has agreed to pay the
13 Gross Settlement Amount (“GSA”) of \$550,000.00 to the following Settlement Class, consisting
14 of approximately 164 individuals:

15 All current and former non-exempt Production Department employees employed
16 by Tomarco in the State of California at any time from June 14, 2015 through
February 26, 2021 (the “Class Period”).

17 The Settlement was reached after the parties engaged in mediation with Jeffrey Krivis,
18 Esq., an experienced and well-respected wage and hour class action mediator. The Settlement was
19 only reached after the parties engaged in significant discovery (including formal discovery), and
20 Tomarco’s production of additional data and documents in connection with mediation. After
21 extensive research and investigation, including a detailed analysis of Tomarco’s potential
22 exposure made with the assistance of Plaintiff’s expert economist who holds a Ph.D. in
23 economics, the parties attended a full-day mediation with Mr. Krivis on September 15, 2020. The
24 parties did not reach settlement at mediation, but with Mr. Krivis’ assistance the parties eventually
25 agreed to a mediator’s proposal, and then spent months negotiating the long-form Settlement.

26
27
28 ¹ The Stipulation of Settlement (“Settlement”) is attached as Exhibit 1 to the Declaration of Paul
K. Haines (“Haines Decl.”). The proposed Class Notice and Notice of Estimated Settlement
Award are attached as Exhibit A and B, respectively, to the Settlement.

1 Notably, Settlement Class members are not required to submit a claim to receive a
2 payment (“Settlement Share”) from the Settlement. After deductions for proposed administration
3 costs, attorneys’ fees and costs, Plaintiff’s Class Representative Incentive Award, and the Labor
4 & Workforce Development Agency’s (“LWDA”) share of PAGA civil penalties, the average
5 individual Settlement Share is estimated at approximately \$1,729.67. For the reasons discussed
6 herein, Plaintiff respectfully requests that the Court preliminarily approve the Settlement.

7 **II. SUMMARY OF THE LITIGATION**

8 **A. FACTUAL AND PROCEDURAL BACKGROUND**

9 Based in La Mirada, California Tomarco is in the business of designing and manufacturing
10 products and other solutions for product categories such as plumbing, HVAC, electrical utilities,
11 cabling telecom, drywall, and general construction. Declaration of Paul K. Haines (“Haines
12 Decl.”) ¶ 10. Plaintiff and Settlement Class members are current and former non-exempt
13 Production Department employees employed by Tomarco in the State of California at any time
14 during the Class Period. *Id.*; *see also* Settlement, § 1.

15 On June 14, 2019, Plaintiff filed the instant action, alleging claims for: (1) failure to pay
16 overtime wages, (2) minimum wage violations, (3) rest period violations, (4) meal period
17 violations, and (5) unfair competition. Haines Decl., ¶ 11. As part of the Settlement, on March
18 11, 2021, after exhausting his administrative requirements with the Labor & Workforce
19 Development Agency (“LWDA”), Plaintiff filed his operative First Amended Complaint, adding
20 a cause of action for PAGA civil penalties. *Id.*

21 **B. PLAINTIFF’S CLAIMS AND TOMARCO’S DEFENSES**

22 **1. Rest Period Claim**

23 Plaintiff alleges that Tomarco failed to authorize and permit legally-compliant rest
24 periods, because in practice, Tomarco required Plaintiff and other employees to remain on the
25 company’s premises during rest periods. Haines Decl. ¶ 16. Plaintiff contends this practice
26 violates California law as announced in *Augustus v. ABM Security Svcs., Inc.*, 2 Cal. 5th 257, 272
27 (2016), which held that during rest periods employers must “relieve their employees of all work-
28 related duties and employer control...”

Tomarco argues it maintains a facially compliant written rest period policy, and that it has always authorized and permitted rest periods in compliance with that policy. Haines Decl. ¶ 16. Tomarco further asserts that *Augustus* rejected Plaintiff’s “on premises” theory of liability when it observed that “one would expect that employees will ordinarily have to remain onsite or nearby. This constraint, which is of course common to all rest periods, is not sufficient to establish employer control.” *Augustus*, 2 Cal.5th at 270. Tomarco further maintains it does not, in practice, require employees to remain on premises during rest periods. Haines Decl., ¶ 16. Finally, Tomarco argues Plaintiff’s rest period claim is not amenable to class treatment, as individual inquiries would be required to determine which employees failed to take rest periods and why, and whether each employee was in fact able to leave the premises during each particular shift. *Id.*

2. Meal Period Claim

Plaintiff contends that Tomarco failed to provide legally-compliant meal periods, such that the meal periods were often late, in that they were provided after the completion of the fifth hour of work, and that this is reflected in employee timekeeping records that show many non-compliant meal periods. Haines Decl. ¶ 17. Plaintiff also contends that, as with rest periods, Tomarco required employees to remain on premises during meal periods. *Id.*

Tomarco argues it maintains a legally-compliant meal period policy, that it has always provided meal periods consistent with that policy, and that it is only required to “provide” the opportunity to take meal periods, not “ensure” meal periods are taken. Haines Decl. ¶ 17; *Brinker Restaurant Corp. v. Superior Court*, 54 Cal.4th 1004, 1038 (2012) (rejecting “ensure” standard and holding employers only have to “provide” employees the opportunity to take meal periods). Tomarco further maintains that any meal period violations reflected in timekeeping records were the result of lawful employee waiver or choice, thereby precluding liability. Haines Decl. ¶ 17. Tomarco also asserts that it does not require employees to remain on premises during meal periods, and that its meal period policy expressly states employees are “relieved of all restrictions” during meal periods. *Id.* Tomarco also argues that individualized inquiries will be required to determine why each meal period was taken late or was otherwise non-compliant, and whether there was a valid waiver, thereby making certification of this claim unlikely. *Id.*

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Tomarco contends it utilized an even-handed timekeeping system that, on balance, resulted in employees being paid for all hours worked, that some employees were *overpaid* due to rounding, and that those who were underpaid were only underpaid by a *de minimis* amount. Haines Decl. ¶ 18. Further, Tomarco maintains that when employees clocked in early, they did not perform any work before the start of the shift. *Id.* Tomarco also asserts Plaintiff would not be certify this claim given the individualized inquiries necessary to determine whether each employee was in fact underpaid on each workday in question, and whether an employee was actually working on each day they clocked in before the beginning of their shift. *Id.*

As a result of these alleged wage and hour violations, Plaintiff asserts that Tomarco is liable for civil penalties under the PAGA. Haines Decl., ¶ 19. In response, Tomarco asserts that it has strong, good-faith defenses to Plaintiff’s underlying claims, and that Plaintiff’s PAGA claim would fall with his underlying claims. *Id.* Moreover, even if Plaintiff were to recover on some or all of his underlying claims, Tomarco argues that, given its good faith defenses, this Court would exercise its discretion to substantially reduce any PAGA penalties. *Id.*; *see also* Labor Code § 2699(e)(2) (authorizing trial court to award less than the full PAGA civil penalty if, in court’s discretion, to award to the full penalty would be “unjust, arbitrary and oppressive, or confiscatory”); *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties); *Fleming v. Covidien, Inc.*, No. ED-CV-10-1487-RGK (OPx), 2011 WL 7563047 at *4 (C.D. Cal. 2011) (reducing PAGA penalties by over 82%); *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018) (affirming PAGA penalty of just \$5 per pay period where employer made “good faith attempts” to comply with the law).

1 **C. DISCOVERY AND MEDIATION**

2 The parties engaged in formal discovery, including Plaintiff’s propounding Requests for
3 Production and Special Interrogatories, and Tomarco’s serving of verified responses as well as
4 documents. In connection with mediation, Tomarco provided Plaintiff with significant informal
5 discovery, including a class list with Settlement Class members’ hire dates and termination dates;
6 timekeeping records for a majority of Settlement Class members; Tomarco’s relevant wage and
7 hour policies; and other relevant information. Haines Decl. ¶ 12. Plaintiff’s counsel also hired a
8 labor economist with a Ph.D. in economics to assist with an analysis and extrapolation of the data
9 provided by Tomarco to calculate potential classwide exposure for Plaintiff’s claims. *Id.*

10 On September 15, 2020, the Parties engaged in a full-day mediation with Jeffrey Krivis,
11 an experienced and well-respected wage and hour class action mediator. Haines Decl. ¶ 13.
12 During mediation, the parties vigorously debated their opposing positions, the chances of class
13 certification, and the legal and factual bases of Plaintiff’s claims and Tomarco’s defenses. *Id.*
14 Although the parties did not reach settlement at mediation, they continued their negotiations in
15 the ensuing months with Mr. Krivis’ assistance. *Id.* The Parties eventually agreed to a settlement
16 in principle following a mediator’s proposal, and over the following months they negotiated and
17 formalized the Settlement now before the Court. *Id.*

18 **III. THE PROPOSED SETTLEMENT**

19 **A. Essential Terms of the Settlement**

20 Under the Settlement, Tomarco will pay a non-reversionary GSA of \$550,000. *See*
21 Settlement, § 3. No Settlement Class member will need to file a claim to receive payment; all
22 Settlement Class members will receive a Settlement Share unless they affirmatively opt-out. *Id.*;
23 § 4. The Settlement’s monetary terms are summarized below:

24	• Gross Settlement Amount (“GSA”):	\$550,000.00
25	• Minus Court-approved attorneys’ fees (one-third):	\$183,333.33
26	• Minus Court-approved verified costs (up to):	\$30,000.00
27	• Minus Court-approved Class Incentive Award:	\$7,500.00
28	• Minus PAGA payment to LWDA:	\$37,500.00
	• <u>Minus estimated settlement administration costs:</u>	<u>\$8,000.00</u>
	Net Settlement Amount (“NSA”):	\$283,666.67

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

2 After deducting amounts for a Court-approved Incentive Payment, administration costs,
3 attorneys' fees and costs, and PAGA payment to the LWDA, Tomarco will pay at least
4 \$283,666.67 to the Settlement Class. Haines Decl., ¶ 14; Settlement, § 4(A). Tomarco represents
5 there are approximately 164 Settlement Class members. *See* Settlement, § 1. Thus, the average
6 payment is projected to be approximately \$1,729.67. Haines Decl., ¶ 15. Settlement Class
7 members will have 60 days to opt-out or object, providing ample time to review the Notice. *Id.*,
8 § 9(C)-(D). Settlement Class members who do not opt out will release all claims asserted in the
9 operative Complaint that arose during the Class Period. *Id.*, § 2(A).

10 The NSA will be distributed proportionally among participating Settlement Class
11 members based on the number of workweeks worked by each Settlement Class member during
12 the Class Period. *See* Settlement, § 4(B). Tomarco will pay employer-side payroll taxes on the
13 wage portion of each payment in addition to the GSA. *See id.*, § 3(D). Tomarco shall deposit the
14 GSA with the Settlement Administrator within twenty-one (21) days after Final Approval, or, in
15 the event there are any objections to the Settlement, either (i) twenty-one (21) days after the last
16 date on which any appeal might be filed, with no appeal having been filed; or (ii) if an appeal is
17 filed, twenty-one (21) days after the successful resolution of any appeals. *Id.* at § 3(B).

18 **2. Attorneys' Fees, Costs, Enhancement Award, and PAGA Payment**

19 At final approval, Plaintiff's counsel will request attorneys' fees of one-third of the GSA
20 (estimated at \$183,333.33), and up to \$30,000 in costs. *See* Settlement, § 5. Plaintiff submits the
21 requested fee is fair compensation for undertaking complex, risky, expensive, and time-
22 consuming litigation on a contingent basis. Counsel have incurred substantial attorney fees
23 conducting pre-filing investigation; analyzing Plaintiff's claims; conducting legal research;
24 conducting formal discovery; analyzing timekeeping and other data with Plaintiff's expert to
25 create a damages model; preparing for and attending mediation; negotiating and preparing the
26 Settlement; preparing this Motion; and otherwise litigating this case. Haines Decl., ¶ 21. Counsel
27 anticipate incurring additional fees in overseeing the Notice process, preparing the Final Approval
28 Motion, and appearing at the Final Approval Hearing. *Id.*

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

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

22 The Settlement also designates \$50,000 as PAGA penalties, of which \$37,500 (75%) will
23 be paid to the LWDA, with the remaining \$12,500 distributed to the Settlement Class, consistent
24 with the requirements of Labor Code § 2699(i). *See* Settlement, § 3(C)(5). Plaintiff submits this
25 allocation is appropriate in light of other settlements allocating penalties to the LWDA. *See, e.g.,*
26 *Chu v. Wells Fargo Inv., LLC*, No. C-05-4526-MHP, 2011 WL 672645 (N.D. Cal. Feb. 16, 2011)
27 (approving PAGA payment of \$7,500 to LWDA from \$6.9 million settlement).

28 ///

1 **IV. ARGUMENT**

2 **A. PRELIMINARY APPROVAL IS WARRANTED**

3 Cal. Rule of Court 3.769 conditions class action settlements on court approval, which is
4 generally evaluated under the same standards as Fed. R. Civ. Proc. 23. *See Reed v. United*
5 *Teachers Los Angeles*, 208 Cal.App.4th 322, 337 (2012) (Rule 3.769 requires court to determine
6 “that the settlement is fair, reasonable and adequate to all concerned”); *Hanlon v. Chrysler Corp.*,
7 150 F.3d 1011, 1026 (9th Cir. 1998) (Rule 23(e) requires court to determine “whether a proposed
8 settlement is fundamentally fair, adequate, and reasonable”). Settlement is the preferred means of
9 dispute resolution, particularly in complex class action litigation. *See In re Syncor ERISA Litig.*,
10 516 F.3d 1095, 1101 (9th Cir. 2008). The Court’s role is to ensure the agreement taken as a whole
11 is fair and within the range of reasonableness. *Hanlon*, 150 F.3d at 1027. There is a presumption
12 of fairness when a settlement is negotiated at arm’s length by counsel. *See, e.g., Kullar v. Foot*
13 *Locker Retail, Inc.*, 168 Cal.App.4th 116, 130 (2008).

14 **1. Standard for Preliminary Approval**

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

23 **a. The Strength of Plaintiff’s Claims**

24 Although he maintains his claims are meritorious, Plaintiff acknowledges there were
25 substantial risks and uncertainty in proceeding with class certification and eventual trial. As
26 described in section II.B., *supra*, Tomarco presented multiple defenses to Plaintiff’s claims, both
27 on the merits and to class certification. Thus, success was far from certain and this factor supports
28 preliminary approval.

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

2 Although the Parties engaged in significant informal discovery (as well as some formal
3 discovery) prior to reaching the proposed Settlement, they had not completed formal written and
4 deposition discovery, which would have required expenditure of substantial time and resources.
5 Haines Decl., ¶ 24. The Settlement avoids the attorneys' fees and costs associated with completing
6 discovery, moving for class certification and summary judgment, and ultimately, trial, as well as
7 the risks and the accompanying burden of continued litigation on the Court. *Id.* Thus, this factor
8 supports preliminary approval.

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

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

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

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

20 Rest Period Violations: \$266,200

21 Plaintiff contends that Tomarco failed to authorize and permit legally-compliant rest
22 periods by requiring employees to remain on premises during rest periods. Haines Decl., ¶ 16.
23 Plaintiff therefore contends that Tomarco is liable for a rest period premium per each 3.5+ hour
24 shift during the Class Period. Based on Plaintiff's expert's analysis and extrapolation of employee
25 timekeeping records, Plaintiff estimates there were approximately 88,000 such shifts during the
26 Class Period. Further, Tomarco represented that employees were paid the minimum wage, which
27 was approximately \$11 per hour during the Class Period. Thus, Plaintiff estimated Tomarco's
28 potential exposure for this claim as: $88,000 * \$11 = \$968,000$. *Id.*

1 As noted *supra*, however, Tomarco argues that it has always and permitted rest periods
2 in accordance with California law and that it has never required employees to remain on premises
3 during rest periods. Haines Decl. ¶ 16. Even if it did, Tomarco argues, Plaintiff’s “on premises”
4 rest period theory was rejected by the California Supreme Court in *Augustus* and therefore
5 Plaintiff’s claim would fail. *Id.* Tomarco further claims that a determination of which individuals
6 missed rest periods and/or were required to remain on premises during each individual shift
7 would require a multitude of individualized inquiries, making the class unmanageable. In light
8 of these defenses and arguments, Plaintiff discounted the maximum exposure by 45% to account
9 for the risk of non-certification, and an additional 50% to account for risk of losing on the merits,
10 to arrive at an estimated exposure of \$266,200. *Id.*

11 **Meal Period Violations: \$315,810**

12 As discussed above, Plaintiff alleges that Tomarco failed to provide legally-compliant
13 meal periods, such that the meal periods often commenced after the completion of the fifth hour
14 of work, and that Tomarco required Plaintiff and other employees to remain on premises for meal
15 periods. Haines Decl. ¶ 17. Based on Plaintiff’s expert’s analysis and extrapolation of employee
16 timekeeping and payroll records, there were approximately 87,000 meal period-eligible shifts
17 during the Class Period. *Id.* Therefore, Plaintiff estimated Tomarco’s maximum exposure for meal
18 period violations as: $87,000 * \$11.00 = 957,000$. *Id.* But as noted above, Tomarco argues it has
19 always maintained legally-compliant meal period policies/practices; that under *Brinker* it is only
20 required to “provide” the opportunity to take meal periods; that any late or otherwise non-
21 compliant meal periods were the result of lawful employee waiver or choice; that it has never
22 required employees to remain on premises for meal periods; and that individualized inquiries will
23 be required to determine whether an employee missed or took a non-compliant meal period on
24 each shift, why they did so, and whether they could leave the premises on each shift, making
25 certification of this claim unlikely. *Id.* In light of these defenses, Plaintiff discounted the
26 maximum amount by 40% for risk of non-certification and an additional 45% for risk of losing
27 on the merits or failing to recover the full amount sought, to arrive at an estimated exposure of
28 \$315,810. *Id.*

1 Unpaid Wages Due to Time-Rounding: \$2,046

2 Based on Plaintiff's expert's review of employee timekeeping records, Plaintiff contends
3 Tomarco's rounding practice resulted in approximately 93 net hours of unpaid wages. Haines
4 Decl. ¶ 18. Thus, based on the average minimum wage of approximately \$11.00 during the Class
5 Period, Plaintiff estimates Tomarco's maximum exposure for this claim at approximately \$2,046
6 (93 hrs. * \$11 * 2 (liq. damages per Labor Code § 1194.2). *Id.* As noted above, Tomarco raised
7 several defenses to this claim, including its argument that it utilized an even-handed timekeeping
8 system that, on balance, resulted in employees being paid for all hours actually worked; that some
9 employees were *overpaid* as a result of rounding; that employees did not perform any work before
10 the scheduled start of their shifts; and that Plaintiff would be unable to certify this claim given the
11 individualized inquiries as to whether employees were in fact underpaid, or overpaid for each
12 workday in question. *Id.* Although these defenses warranted discounting the value of this claim,
13 because of the relative low value of the claim overall, Plaintiff did not discount this claim for
14 purposes of his damages analysis, resulting in an estimated exposure of \$2,046.

15 PAGA Civil Penalties: \$75,600

16 Plaintiff estimated a maximum PAGA exposure of \$210,000, based on approximately
17 2,100 pay periods worked by Settlement Class members during the PAGA Period (January 2020
18 through February 2021) at the \$100 "initial" violation rate under Lab. Code § 2699(f). Haines
19 Decl., ¶ 19; *see also Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1207 (2008) (finding
20 "initial" PAGA violation rate applies until employer has been notified it violated the Labor Code).
21 However, these penalties derive from Plaintiff's underlying claims, each of which are vigorously
22 disputed. *Green v. Lawrence Service Co.*, No. LA-CV-12-6155-JAK (VBKx), 2013 WL 3907506
23 at *5, fn. 5 (C.D. Cal. July 23, 2013) (PAGA claim's success is determined by merits of
24 underlying claims). The PAGA also grants trial courts discretion to reduce PAGA civil penalties
25 (Lab. Code § 2699(e)(2)), and Tomarco argues the Court would reduce penalties significantly
26 given its good-faith defenses. Haines Decl., ¶ 19. Thus, Plaintiff discounted the maximum figure
27 by 40% for risk of losing on the merits, and by an additional 40% for risk of the Court reducing
28 penalties, to arrive at an estimated exposure of \$75,600. *Id.*

1 Thus, after taking into account Tomarco's various affirmative defenses, difficulties of
2 proof, and other risks as described above, Plaintiff predicted that the potential likely realistic
3 recovery for the Settlement Class at trial would be approximately \$659,656. Haines Decl. ¶ 20.
4 The proposed settlement of \$550,000 therefore roughly approximates 83.4% of the full value of
5 Plaintiff's reasonably forecasted recovery. *Id.* Thus, preliminary approval is appropriate, as the
6 Settlement will provide significant monetary relief to the Settlement class.

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

8 "Parties represented by competent counsel are better positioned than courts to produce a
9 settlement that fairly reflects each party's expected outcome in litigation." *In re Pac. Enter.*
10 *Securities Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Plaintiff is represented by competent counsel
11 with extensive experience litigating wage and hour class actions from both the plaintiff and
12 defense side, and who have been appointed class counsel in numerous cases alleging similar
13 claims. *See* Haines Decl., ¶¶ 2-8; Declaration of Tuvia Korobkin, ¶¶ 2-6. The Settlement was also
14 reached with the assistance of a highly respected wage and hour class action mediator. Thus, this
15 factor strongly supports preliminary approval.

16 **2. The Preliminary Approval Standard Is Met**

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

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

22 As explained above, the proposed Settlement reflects about 83.4% of the estimated
23 recovery the Settlement Class could realistically expect to recover in light of significant litigation
24 risks, and will provide tangible and significant monetary recovery for the wage and hour claims
25 in dispute. Plaintiff submits the Settlement is within the range of possible approval.

26 **b. The Settlement Resulted from Serious, Informed Negotiations**

27 The Settlement resulted from an exchange of substantial information, arm's-length
28 negotiations, a full-day mediation and months of additional negotiations. Thus, the Settlement is

entitled to a presumption of fairness. *Kullar*, 168 Cal.App.4th at 130. Plaintiff carefully vetted the claims at issue, and worked with an expert to conduct a detailed data analysis to arrive at estimated damages. Haines Decl., ¶¶ 16-20. This factor supports preliminary approval.

c. The Settlement is Devoid of Obvious Deficiencies

The Settlement contains no obvious deficiencies. The Settlement will provide tangible, significant monetary relief to the Settlement Class. The amounts proposed for attorney fees, costs, and enhancement award are reasonable. Thus, this factor supports preliminary approval.

B. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS

The Settlement Class satisfies the criteria for certification under C.C.P. § 382 because: 1) it is ascertainable and numerous; 2) common questions of law and fact predominate; 3) Plaintiff's claims are typical; and 4) Plaintiff and his counsel will adequately represent the Settlement Class.

1. The Proposed Class Is Ascertainable and Numerous

A class is "ascertainable" where members "may be readily identified without unreasonable expense or time by reference to...[business] records." *Sevidal v. Target Corp.*, 189 Cal.App.4th 905, 919 (2010). The Settlement Class includes current and former non-exempt Production Department employees who worked for Tomarco in California during the Class Period. Thus, they can be identified from Tomarco's records. As noted, there are approximately 164 Settlement Class members, making it impracticable to bring them all before the Court.

2. Common Issues of Law and Fact Predominate

The focus on certification is not on the merits, but rather on what types of questions, "common or individual," are likely to arise in the action. *Sav-On Drug Store, Inc. v. Sup. Ct.*, 34 Cal.4th 319, 327 (2004). Plaintiff's claims are predicated on Tomarco's alleged unlawful rounding practice and alleged failure to provide meal and rest periods. These claims are commonly certified. *See, e.g., Tapia v. Zale Delaware Inc.*, No. 13-CV-1565-BAS, WL 1385181 at **3-4 (S.D. Cal. Apr. 6, 2016) (certifying rounding claim); *Benton v. Telecom Network Specialists, Inc.*, 220 Cal.App.4th 701, 726 (2013) (certifying meal and rest period claims).

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1 **3. The Named Plaintiff's Claims are Typical**

2 Typicality is satisfied where a class representative's claims are typical of those of the
3 class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal.App.3d 1341, 1347 (1987). Here,
4 Plaintiff worked for Tomarco as a non-exempt employee in California during the proposed Class
5 Period and was subject to the wage and hour policies and practices at issue in this lawsuit. See
6 Declaration of Francisco Ramirez Gonzalez, ¶¶ 2-4. Thus, typicality is satisfied.

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

8 The adequacy requirement examines conflicts of interest between named parties and the
9 class(es) they seek to represent. *Capital People First v. State Dept. of Developmental Svcs.*, 155
10 Cal.App.4th 676, 697 (2007). Plaintiff and his counsel will adequately represent the Settlement
11 Class, as there are no known conflicts between Plaintiff and the Settlement Class, and as noted
12 above, Plaintiff's Counsel has significant relevant experience. Haines Decl., ¶¶ 2-8, 23.

13 **C. THE COURT SHOULD ORDER DISTRIBUTION OF CLASS NOTICE**

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

23 The Notice's content satisfies Cal. Rule of Court 3.766(d) because it advises Settlement
24 Class members of the nature of the claims, the basic contentions and denials of the parties and the
25 key terms of the Settlement, the 60-day deadline to opt-out or object to the settlement and the
26 procedures by which to do so, explains the recovery formula and expected recovery amount for
27 each Settlement Class member, and advises that they will be bound by the terms of the settlement
28 if they do not request exclusion. See Haines Decl., Exh. A to Exh. 1. The Notice also notifies

1 Settlement Class members of the final approval hearing and provides Class Counsel's contact
2 information. *Id.*

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

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

7 **V. CONCLUSION**

8 For the foregoing reasons, Plaintiff respectfully requests that the Court preliminarily
9 approve the proposed Settlement, provisionally certify the Settlement Class, and enter the
10 Proposed Order submitted concurrently herewith.

11 Dated: August 9, 2021

HAINES LAW GROUP, APC

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13 By:



14 Paul K. Haines
15 Attorneys for Plaintiff
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