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

SANTIAGO GUTIERREZ, as an individual
and on behalf of all others similarly situated,

Plaintiff,

vs.

M.M.C.L., INC. dba CALIFORNIA
LANDCARE, a California corporation; and
DOES 1 through 100,

Defendants.

Case No. 30-2021-01182371-CU-OE-CXC

*[Case assigned for all purposes to the Hon.
Randall J. Sherman, Dept. CX105]*

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

Date: October 28, 2022

Time: 10:00 a.m.

Dept.: CX105

Reservation No.: 73797124

Action Filed: February 2, 2021

Trial Date: None Set

1 PLEASE TAKE NOTICE that, pursuant to Rule 3.769 of the California Rules of Court,
2 on October 28, 2022, at 10:00 a.m., or as soon thereafter as the matter may be heard, in
3 Department CX105 of the Orange County Superior Court, located at 751 W Santa Ana Blvd,
4 Santa Ana, California 92701, Plaintiff Santiago Gutierrez (“Plaintiff”), individually and on behalf
5 of a class of similarly situated individuals, will and hereby does move this Court for:

- 6 1. Preliminary approval of the proposed Stipulation of Settlement (“Settlement
7 Agreement”) in this lawsuit;
- 8 2. Pursuant to Section 382 of the California Code of Civil Procedure, provisional
9 certification of the Settlement Class, defined as follows:

10 All current and former non-exempt employees who worked for
11 Defendant M.M.C.L., Inc. dba California Landcare (“Defendant”) in
12 California at any time between February 2, 2017 and October 31, 2021
13 (the “Class Period”) and who did not sign a “Release Agreement” with
14 Defendant in connection with its *Chindarah v. Pick Up Stix, Inc.*
15 campaign.

- 14 3. Preliminary appointment of Plaintiff Santiago Gutierrez as the Class Representative;
- 15 4. Preliminary appointment of Paul K. Haines, Fletcher W. Schmidt, Matthew K. Moen,
16 and Susan J. Perez of Haines Law Group, APC as Class Counsel;
- 17 5. The scheduling of a hearing to consider whether the Settlement Agreement should be
18 finally approved and to award amounts for the Class Representative Enhancement
19 Payment, settlement administration costs, payment to the Labor and Workforce
20 Development Agency for its share of civil penalties under the Private Attorneys
21 General Act, Labor Code section 2698 *et seq.*, and Class Counsel’s attorneys’ fees and
22 costs;
- 23 6. Appointment of Simpluris, Inc. as the third-party settlement administrator; and
- 24 7. Approval of the proposed Notice of Class Action Settlement and Notice of Individual
25 Settlement Payment (collectively, the “Notice Packet”), and entry of the proposed
26 Order instructing the Notice Packet to be disseminated to the proposed Settlement
27 Class in English and Spanish, as provided in the Settlement Agreement.

28 ///

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, Plaintiff Santiago Gutierrez, and Eric Springer of Simpluris, Inc., and the exhibits attached
4 thereto, the pleadings and other papers filed in this action, and on any further oral or documentary
5 evidence or argument presented at the time of hearing.

6
7 Dated: July 7, 2022

Respectfully Submitted,
HAINES LAW GROUP, APC

8
9 By:


Matthew K. Moen
Attorneys for Plaintiff

TABLE OF CONTENTS

I. INTRODUCTION	1
II. SUMMARY OF THE LITIGATION	3
A. Factual And Procedural Background	3
B. Plaintiff’s Claims And Defendant’s Defenses	4
1. Off-the-Clock Violations	4
2. Meal Period Violations	5
3. Rest Period Violations	6
4. Failure to Reimburse Violations	7
5. Wage Statement, Waiting Time, and PAGA Penalties	8
C. Discovery And Mediation	9
III. THE PROPOSED SETTLEMENT.....	9
A. Essential Terms Of The Settlement	9
1. The Settlement Provides for Reasonable Monetary Payments	10
2. Attorneys’ Fees, Costs, and Plaintiff’s Enhancement Payment.....	10
IV. ARGUMENT.....	12
A. Preliminary Approval Is Warranted.....	12
1. Standard for Preliminary Approval.....	12
a. The Strength of Plaintiff’s Case	13
b. Risk, Expense, Complexity, and Duration of Further Litigation.....	13
c. Risk of Maintaining Class Action Status	13
d. Amount Offered in Settlement Given Realistic Value of Claims.....	14
e. The Experience and Views of Counsel	18
2. The Preliminary Approval Standard is Met	19
a. The Settlement is Within the Range of Possible Approval.....	19
b. The Settlement Resulted from Serious, Informed and Non-Collusive Negotiations	20
c. The Settlement is Devoid of Obvious Deficiencies	20
B. The Court Should Certify The Settlement Class.....	20

1	1. The Proposed Class is Ascertainable and Numerous.....	20
2	2. Common Issues of Law and Fact Predominate.....	21
3	3. The Claims of the Named Plaintiff are Typical.....	21
4	4. Plaintiff and Class Counsel are Adequate to Represent the Class.....	22
5	C. The Court Should Order Distribution Of The Proposed Class Notice.....	22
6	D. The Court Should Set A Final Approval Hearing.....	23
7	V. CONCLUSION.....	23

TABLES OF AUTHORITIES

Federal Cases

<i>Dunleavy v. Nadler</i> 213 F.3d 454 (9th Cir. 2000)	18
<i>Eisen v. Carlisle and Jacquelin</i> 417 U.S. 156 (1974).....	22
<i>Hanlon v. Chrysler Corp.</i> 150 F.3d 1011 (9th Cir. 1998)	12
<i>In re Pacific Enterprises Securities Litigation</i> 47 F.3d 373 (9th Cir. 1995)	18
<i>In re Syncor ERISA Litigation</i> 516 F.3d 1095 (9th Cir. 2008)	12
<i>Linney v. Cellular Alaska Partnership</i> 151 F.3d 1234 (9th Cir. 1998)	18

State Cases

<i>Amaral v. Cintas Corp. No. 2</i> (2008) 163 Cal.App.4th 1157	8, 17
<i>Augustus v. ABM Security Services, Inc.</i> (2016) 2 Cal.5th 257	6
<i>B.W.I. Custom Kitchen v. Owens-Illinois, Inc.</i> (1987) 191 Cal.App.3d 1341	21
<i>Benton v. Telecom Network Specialists, Inc.</i> (2013) 220 Cal.App.4th 701	5
<i>Bradley v. Networkers Int'l, LLC</i> (2012) 211 Cal.App.4th 1129	5, 6
<i>Brinker Restaurant Corp. v. Superior Court</i> (2012) 53 Cal.4th 1004	5, 21
<i>Bufile v. Dollar Financial Group, Inc.</i> (2008) 162 Cal.App.4th 1193	6
<i>Capitol People First v. Department of Developmental Services</i> (2007) 155 Cal.App.4th 676	22
<i>Carrington v. Starbucks Corporation</i> (2018) 30 Cal.App.5th 504	9
<i>Chindarah v. Pick Up Stix, Inc.</i> (2009) 171 Cal.App.4th 796	3, 14

1	<i>Cochran v. Schwan's Home Service, Inc.</i>	
2	(2014) 228 Cal.App.4th 1137	7
3	<i>Collins v. Rocha</i>	
4	(1972) 7 Cal.3d 232	21
5	<i>Dunk v. Ford Motor Co.</i>	
6	(1996) 48 Cal.App.4th 1794	12
7	<i>Kullar v. Foot Locker Retail, Inc.</i>	
8	(2008) 168 Cal.App.4th 116	12, 20
9	<i>Laffitte v. Robert Half Int'l, Inc.,</i>	
10	1 Cal.5th 480 (2016)	11
11	<i>Maldonado v. Epsilon Plastics, Inc.</i>	
12	(2018) 22 Cal.App.5th 1308	8
13	<i>McGhee v. Bank of America</i>	
14	(1976) 60 Cal.App.3d 442	22
15	<i>Price v. Starbucks Corp.</i>	
16	(2011) 192 Cal.App.4th 1136	8
17	<i>Reed v. United Teachers Los Angeles</i>	
18	(2012) 208 Cal.App.4th 322	12
19	<i>Robinson v. Southern Counties Oil Company</i>	
20	(2020) Cal.App.5th 476	2
21	<i>Safeway, Inc. v. Superior Court</i>	
22	(2015) 238 Cal.App.4th 1138	6
23	<i>Sav-On Drug Stores, Inc. v. Superior Court</i>	
24	(2004) 34 Cal.4th 319	21
25	<i>Sevidal v. Target Corp.</i>	
26	(2010) 189 Cal.App.4th 905	20
27	<i>Thurman v. Bayshore Transit Mgmt., Inc.</i>	
28	(2012) 203 Cal.App.4th 1112	9, 18
	<i>Wershba v. Apple Computer, Inc.</i>	
	(2001) 91 Cal.App.4th 224	11, 12
	<u>State Statutes and Rules</u>	
	8 Cal. Code Regs. § 13520.....	9
	Cal. Code Civ. Proc. § 382	20
	Cal. Rule of Court 3.769	23

1	Labor Code § 203(a)	8
2	Labor Code § 226.....	8
3	Labor Code § 226.7.....	6
4	Labor Code § 510.....	4
5	Labor Code § 512.....	5
6	Labor Code § 516.....	6
7	Labor Code § 1197.....	4
8	Labor Code § 1182.12.....	4
9	Labor Code § 2699(e)(2)	9, 18
10	Labor Code § 2802.....	7
11	<u>Unpublished Cases</u>	
12	<i>Altamirano v. Shaw Industries, Inc</i>	
13	Case No. 13-cv-00939-HSG	
14	2015 WL 4512372 (N.D. Cal. July 24, 2015).....	18
15	<i>Bercea v. AE Retail West</i>	
16	Case No. 34-2012-00123947 (Sacramento County Super. Ct. May 9, 2012)	19
17	<i>Fleming v. Covidien Inc.</i>	
18	Case No. ED CV 10-01487 RGK (OPx),	
19	2011 WL 7563047 (C.D. Cal. Aug. 12, 2011).....	18
20	<i>Green v. Lawrence Service Co.</i>	
21	(C.D. Cal. 2013) 2013 WL 3907506.....	17-18
22	<i>Ressler v. Federated Department Stores, Inc.</i>	
23	Case No. BC335018 (L.A. County Super. Ct. Jan. 2, 2009)	19
24	<i>Schiller v. David's Bridal, Inc.</i>	
25	Case No. 1:10-cv-00616-AWI-SKO	
26	2012 WL 2117001 (E.D. Cal. June 11, 2012)	19
27	<u>Other Sources</u>	
28	4 Newberg on Class Actions (4th Ed. 2013).....	11, 19
	Manual for Complex Litigation § 30.41 (3rd Ed. 1995).....	19
	Wage Order 5	4

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Santiago Gutierrez (“Plaintiff”), individually and on behalf of the proposed
4 Settlement Class, respectfully requests that this Court preliminarily approve the proposed
5 Stipulation of Settlement (“Settlement Agreement” or “Settlement”),¹ entered into by Plaintiff
6 and Defendant M.M.C.L., Inc. dba California Landcare (“California Landcare” or “Defendant”)
7 (Plaintiff and Defendant are referred to collectively herein as the “Parties”). The operative First
8 Amended Complaint alleges Defendant: (i) failed to pay all overtime wages owed; (ii) failed to
9 pay all minimum wages; (iii) failed to provide all lawful meal periods; (iv) failed to authorize and
10 permit all lawful rest periods; (v) failed to reimburse necessary business expenses; (vi) failed to
11 issue accurate and itemized wage statements; (vii) failed to timely pay all final wages upon
12 separation; (viii) failed to comply with California’s Unfair Competition laws and; (ix) is liable
13 for civil penalties under the Private Attorneys General Act, Labor Code § 2698 *et seq.* (“PAGA”).

14 Plaintiff respectfully requests that this Court preliminarily approve this non-reversionary,
15 \$1,250,000.00 class action settlement on behalf of the following Settlement Class:

16 All current and former non-exempt employees who worked for Defendant in
17 California at any time between February 2, 2017 and October 31, 2021 (the “Class
18 Period”) and who did not sign a “Release Agreement” with Defendant in
connection with its *Chindarah v. Pick Up Stix, Inc.* campaign.

19 Based upon the data provided by Defendant, there are approximately 352 potential
20 Settlement Class members. After Court-approved deductions for Plaintiff’s enhancement
21 payment, settlement administrator costs, the PAGA payment to the Labor & Workforce
22 Development Agency (“LWDA”), and attorneys’ fees and costs to Class Counsel, the remaining
23 Net Settlement Amount (“NSA”) is estimated to be no less than \$772,538.33. This results in
24 average Individual Settlement Payments of approximately \$2,194.71, with the lowest possible
25

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 Individual Settlement Payment (collectively, the “Notice Packet”) are attached to the Moen Decl.
as Exhibit B.

1 estimated Individual Settlement Payment of \$20.88 (in the event a Settlement Class member
2 worked only one workweek during the Class Period) and the highest possible estimated Individual
3 Settlement Payment of \$5,157.22 (in the event a Settlement Class member performed worked in
4 every workweek throughout the Class Period). Significantly, Settlement Class members do not
5 need to file a claim form in order to receive an Individual Settlement Payment, and all Settlement
6 Class members who do not opt-out will automatically receive their share of the Settlement. This
7 represents a fair and reasonable result for Settlement Class members, who will be agreeing to a
8 release of only those claims that were actually asserted, or which could have been asserted based
9 on the facts alleged in the operative First Amended Complaint in the lawsuit.

10 Further, given the tenet that aggrieved employees do not have the ability to opt-out of a
11 representative PAGA claim, all PAGA aggrieved employees, regardless of whether they elect to
12 opt out from participating in the class action settlement or not, shall receive a portion of the
13 settlement monies designated as the PAGA Amount payable to the aggrieved employees and shall
14 release their claims for civil penalties under PAGA based on the Labor Code violations that were
15 pled in the operative First Amended Complaint in the action or Plaintiff's February 2, 2021 PAGA
16 Notice letter to the LWDA, or which could have been pled in the operative First Amended
17 Complaint in the action based on the factual allegations therein, that arose during the PAGA
18 Period. *See Robinson v. Southern Counties Oil Company* (2020) 53 Cal.App.5th 476, 482
19 (holding that there is no opt-out mechanism for PAGA claims and "nonparty employees as well
20 as the government are bound by the judgment in an action brought under [PAGA]."); *see also*
21 Moen Decl., Exhibit C (Plaintiff's PAGA Notice Letter and LWDA Confirmation of Receipt).

22 Prior to reaching this proposed Settlement, Defendant provided Plaintiff with timekeeping
23 and payroll data for a random sampling of approximately 20% of the Settlement Class members
24 for the duration of the relevant time period, as well as policy documents and an anonymized class
25 list identifying all Settlement Class members' dates of employment and total bi-weekly pay
26 periods worked. Plaintiff and his counsel then conducted a comprehensive, class-wide analysis of
27 the data to estimate Defendant's maximum potential exposure on all claims at issue. On January
28 5, 2022, after extensive legal research and analysis, along with Plaintiff's comprehensive review

1 of the data, the Parties participated in a mediation session with Todd Smith, Esq., who made a
2 mediator’s proposal for a class-wide resolution of all claims at issue that the Parties ultimately
3 accepted. Over the following months, the Parties negotiated and executed the long-form
4 Settlement Agreement that is now before this Court for preliminary approval.

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

9 **II. SUMMARY OF THE LITIGATION**

10 **A. Factual And Procedural Background**

11 Defendant operates a landscaping company specializing in landscape maintenance. Moen
12 Decl., ¶ 10. Plaintiff was employed by Defendant as a non-exempt employee from approximately
13 August 2019 until approximately March 24, 2020. *Id.*; Declaration of Santiago Gutierrez
14 (“Gutierrez Decl.”), ¶ 2. Plaintiff’s primary job duties included landscaping and maintenance
15 work, such as trimming trees, planting seeds, and uprooting plants and flowers. *Id.* Like all
16 Settlement Class members, Plaintiff was subject to Defendant’s wage and hour policies and
17 practices. Moen Decl., ¶ 10.; Gutierrez Decl. ¶ 3.

18 On February 2, 2021, Plaintiff filed the initial Complaint in this action, alleging Defendant
19 failed to: (i) pay all overtime wages owed; (ii) pay all minimum wages; (iii) provide all lawful
20 meal periods; (iv) authorize and permit all lawful rest periods; (v) reimburse necessary business
21 expenses; (vi) issue accurate and itemized wage statements; (vii) timely pay all final wages upon
22 separation; and (viii) comply with California’s Unfair Competition laws. Moen Decl., ¶ 11. On
23 April 9, 2021, Plaintiff filed the operative First Amended Complaint (“FAC”), adding a cause of
24 action for civil penalties under PAGA, premised on the same underlying Labor Code violations.
25 *Id.*

26 Shortly after Plaintiff filed this action, Defendant engaged in a *Pick Up Stix* campaign to
27 obtain general releases from putative class members. Moen Decl., ¶ 12; *see Chindarah v. Pick Up*
28 *Stix, Inc.* (2009) 171 Cal.App.4th 796, 803 (allowing employer to enter into individual releases
with employees during pendency of putative class action litigating same claims). Therefore, the

scope of the Parties' Settlement is with respect to only those putative class members who did not sign a "Release Agreement" with Defendant in connection with its *Pick Up Stix* campaign. *See* Settlement, ¶ 1.

B. Plaintiff's Claims and Defendant's Defenses

1. Off-the-Clock Violations

Plaintiff asserts that, as a result of Defendant's uniform practices, Defendant failed to maintain accurate records of the hours actually worked by Settlement Class members, resulting in unpaid minimum and overtime wages throughout the Class Period. Moen Decl., ¶ 13. Specifically, Plaintiff alleges that Defendant only paid Plaintiff and other non-exempt employees for an assumed 8-hour shift each workday, even though Plaintiff and other non-exempt employees routinely worked in excess of 8-hours per shift. *Id.* Plaintiff asserts Defendant required that he and other non-exempt employees report for work prior to the scheduled start time of their shift and immediately start loading trucks and preparing for the workday, and also would generally not release Plaintiff and other non-exempt employees from work until 10 to 30 minutes after the scheduled end of their shifts. *Id.* Despite Defendant requiring Plaintiff and other non-exempt employees to perform work outside of their scheduled shift times, Plaintiff and other non-exempt employees were not paid for this pre-shift and post-shift work time. *Id.*; *see* Wage Order 5, §§ 3(A)(1), 4, 7; Labor Code §§ 510(a), 1197 and 1182.12 (establishing the right of employees to be paid minimum wages for all hours "subject to the control of an employer, [including] all the time the employee is suffered or permitted to work, whether or not required to do so.").

In response, Defendant maintains it has properly paid all minimum and overtime wages for all hours worked by the Settlement Class members. Moen Decl., ¶ 14. Defendant argues it did not direct Plaintiff and other non-exempt employees to conduct off-the-clock work and, in fact, there was no work to be done prior to or after scheduled shift times. *Id.* As such, Defendant contends that all work was performed while on the clock and accurately recorded, and Plaintiff's claim would fail on the merits. *Id.* Further, Defendant asserts that this claim is not suitable for class treatment, as it requires individualized inquiries into exactly how much time each employee purportedly worked off-the-clock each day, resulting in an unmanageable series of mini-trials. *Id.*

///

2. Meal Period Violations

Plaintiff further asserts that Defendant failed to provide Settlement Class members with all timely and lawful meal periods to which they were entitled. Moen Decl., ¶ 15. Specifically, Defendant routinely provided Plaintiff and other non-exempt employees with late meal periods which commenced at 12:00 p.m., regardless of what time their shifts started. *Id.* This practice resulted in first meal periods routinely being provided after the completion of the fifth hour of work. *Id.*; see Labor Code § 512(a); see also *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1041 (“We conclude that, absent waiver, section 512 requires a first meal period no later than the end of an employee’s fifth hour of work...”); *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 728-29 (“[The wage order] imposes an affirmative obligation on every employer to authorize and provide legally required meal and rest breaks; if it fails to do so, it has violated the law and is liable.”). Further, Plaintiff contends that Defendant failed to maintain a lawful written meal period policy during the Class Period, an issue which itself is certifiable. Moen Decl., ¶ 15; see, e.g., *Benton, supra*, 220 Cal.App.4th at 726 (class certification proper where employer failed to adopt a policy authorizing meal and rest periods); *Bradley v. Networkers Int’l, LLC* (2012) 211 Cal.App.4th 1129, 1150-51 (certifying meal and rest period classes based on employer’s uniform lack of meal and rest period policy). Additionally, Plaintiff asserts Defendant mandated that Plaintiff and other non-exempt employees remain at the jobsite for the entire meal period under threat of reprimanded and/or termination, in violation of California law. Moen Decl., ¶ 15; see *Brinker, supra*, 53 Cal.4th at 1037 (“Employers must afford employees uninterrupted half-hour periods in which they are relieved of any duty or employer control **and are free to come and go as they please.**”) (Emphasis added).

In response, Defendant contends that the Settlement Class members were never required to remain on Defendant’s jobsites during meal periods, and were free to come and go as they wished during their duty-free meal periods. Moen Decl., ¶ 16. Further, Defendant contends that its scheduled meal periods ensured that all employees whose shifts started at or after 7:00 a.m. were provided with a timely meal period, and any late meal periods were the result of employee choice. *Id.* Defendant, therefore, contends that Plaintiff’s meal period claim is not suited for class

1 certification as individual inquiries would be required to assess the reasons why a particular
2 individual recorded a non-compliant meal period or missed a meal period on a particular shift,
3 and whether a particular individual chose to take an untimely meal period on a particular shift,
4 resulting in a series of mini-trials. *Id.*

5 **3. Rest Period Violations**

6 Plaintiff further alleges that Defendant failed to authorize and permit Settlement Class
7 members to take all lawful rest periods to which they were entitled. Moen Decl., ¶ 17.
8 Specifically, Plaintiff alleges that Defendant failed to authorize and permit *any* separate rest
9 periods and failed to maintain a written rest period policy. *Id.*; see Labor Code § 516; *Bufile v.*
10 *Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1199 (“The onus is on the employer
11 to ***clearly communicate*** the authorization and permission to its employees.”) (emphasis added);
12 *Benton, supra*, 220 Cal.App.4th at 726; *Bradley, supra*, 211 Cal.App.4th at 1150-51. Instead,
13 Plaintiff asserts that Defendant provided only a single, one-hour unpaid meal period to Plaintiff
14 and other non-exempt employees during their work shifts, during which employees were required
15 to remain on Defendant’s work premises. Moen Decl., ¶ 17; *Augustus v. ABM Security Services,*
16 *Inc.* (2016) 2 Cal.5th 257, 260, 265 (requiring employers to “relieve their employees of all duties
17 and relinquish any control over how employees spend their break time.”). Plaintiff alleges that he
18 and other non-exempt employees were not authorized and permitted to take additional rest periods
19 other than the lone unpaid meal period. *Id.* On occasions when lawful rest periods were not
20 authorized and permitted, Defendant failed to pay rest period premiums as required by Labor
21 Code section 226.7; an issue which itself is certifiable. See Labor Code § 226.7; *Safeway, Inc. v.*
22 *Superior Court* (2015) 238 Cal.App.4th 1138, 1159.

23 Defendant asserts it has always authorized and permitted all required rest periods for its
24 non-exempt employees. Moen Decl., ¶ 18. Defendant argues that it maintained lawful rest period
25 practices at all times during the Class Period, including authorizing and permitting two rest
26 periods per workday that exceeded 6.5 hours in length, which were pre-scheduled at 9:30am and
27 1:30pm, and Plaintiff and other non-exempt employees were authorized and permitted to take all
28 lawful rest periods to which they were entitled. *Id.* Therefore, Defendant asserts that if employees

1 did not take all lawful rest periods, this was solely the result of employee choice and not reflective
2 of Defendant's policies and practices. *Id.* Further, Defendants assert that this claim is
3 unmanageable, as it requires individualized inquiries into whether each employee failed to take a
4 lawful rest period and on which days, resulting in an unmanageable series of mini-trials. *Id.* These
5 manageability concerns are especially present for rest periods, Defendant argues, as rest periods
6 are not required by statute to be recorded. *Id.*

7 **4. Failure to Reimburse Violations**

8 Plaintiff further alleges that Defendant failed to reimburse the Settlement Class members
9 for all necessary business expenses incurred, in violation of Labor Code section 2802. Moen
10 Decl., ¶ 19; *see* Labor Code § 2802 ("An employer shall indemnify his or her employee for all
11 necessary expenditures or losses incurred by the employee in direct consequence of the discharge
12 of his or her duties."). Specifically, Plaintiff asserts that Defendant required Plaintiff and other
13 non-exempt employees to purchase and wear hats with the Defendant's logo on it for use during
14 their shifts, as well as requiring Plaintiff and other non-exempt employees to use their personal
15 cell phones to communicate with supervisors during their workday. Moen Decl., ¶ 19. Despite
16 requiring employees to use their personal cell phones, Defendant did not reimburse Plaintiff and
17 other non-exempt employees for a reasonable portion of their monthly cell phone bills. *Id.*; *see*
18 *Cochran v. Schwan's Home Service, Inc.* (2014) 228 Cal.App.4th 1137, 1144 ("If an employee is
19 required to make work-related calls on a personal cell phone, then he or she is incurring an
20 expense for purposes of section 2802.").

21 In response, Defendant argues that it maintains a policy to reimburse all reasonable and
22 necessary business expenditures and that, to the extent that any expenses were not reimbursed, it
23 was the result of Defendant's employees failing to submit expense reimbursement requests. Moen
24 Decl., ¶ 20. Further, Defendant argues that any expenses incurred by the Settlement Class
25 members were minimal given the wide availability of low-cost cellular phone plans. *Id.*
26 Defendant also maintains that this claim faces similar obstacles towards certification as Plaintiff's
27 other claims, particularly that it would require a series of mini-trials to determine which
28 employees incurred expenses, whether those expenses were reasonable and necessary for the

particular job duties of the affected employee, and in which pay periods such expenses were allegedly incurred. *Id.*

5. Wage Statement, Waiting Time, and PAGA Penalties

As a result of Defendant's failure to pay all overtime wages, minimum wages, and meal period and rest period premiums, Plaintiff asserts that Defendant also failed to issue accurate and itemized wage statements and failed to timely pay all final wages at the time of separation. Moen Decl., ¶ 21; *see also* Labor Code §§ 203(a) and 226(a). Further, Plaintiff alleges that, for a portion of the Class Period, Defendant issued wage statements to the putative Settlement Class members that failed to include the address of the legal entity that is the employer, in violation of Labor Code section 226(a)(8). Moen Decl., ¶ 21; *see* Labor Code § 226(a)(8). As a result of these alleged Labor Code violations, Plaintiff also seeks PAGA civil penalties on behalf of all aggrieved employees. Moen Decl., ¶ 21; *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, the derivative wage statement, waiting time, and PAGA claims will also fail. Moen Decl., ¶ 22; *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."). Defendant also maintains that Plaintiff cannot show that the wage statement violations were "knowing and intentional," or that the putative class members "suffer[ed] injury" as a result of the alleged violations, as required by Labor Code § 226(e) for the imposition of wage statement penalties. Moen Decl., ¶ 22; *see* Labor Code § 226(e)(1). Further, Defendant argues that the wage statements always accurately reflected hours worked and amounts actually paid to employees, and thus Defendant could not be found liable for wage statement penalties. Moen Decl., ¶ 22; *see also Maldonado v. Epsilon Plastics, Inc.* (2018) 22 Cal.App.5th 1308, 1336-37 (agreeing with employer's "commonsense position that the pay stubs were accurate in that they correctly reflected the hours worked and the pay received.") (citation omitted). Moreover, Defendant maintains that its good faith defenses to Plaintiff's underlying claims would preclude the recovery of waiting time penalties, which are

only available for the “willful” failure to pay wages, and that this Court would exercise its discretion to substantially reduce any PAGA penalties awarded. Moen Decl., ¶ 22; *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 electronic timekeeping and payroll records for approximately 20% of the Settlement Class members spanning the entire Class Period, as well as key policy documents and an anonymized list identifying all putative Settlement Class members and their dates of employment and total bi-weekly pay periods. Moen Decl., ¶ 23. Plaintiff and his counsel then conducted a comprehensive analysis of the produced data to create a detailed, class-wide exposure model for the claims at issue. *Id.* On January 5, 2022, the Parties participated in a mediation session with Todd Smith, Esq., 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. Smith made a mediator’s proposal that the Parties ultimately accepted. *Id.* Over the following months, the Parties finalized the terms of 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 \$1,250,000.00. Moen Decl., ¶ 26; Settlement, ¶ 3. This Settlement is non-reversionary, and Settlement Class members will automatically receive their Individual Settlement Payment unless they affirmatively opt-out. Settlement, ¶¶ 3.C, 4. The monetary terms of the Settlement are as follows:

Maximum Settlement Amount:	\$1,250,000.00
Minus Court-approved attorneys’ fees (1/3):	\$416,666.67
Minus Court-approved attorneys’ costs (up to):	\$20,000.00
Minus Court-approved Enhancement Payment:	\$5,000.00
Minus settlement administrator costs (up to):	\$5,795.00

1 Minus PAGA payment to the LWDA: \$30,000.00
2 Net Settlement Amount: \$772,538.33

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

4 After deducting amounts for Court-approved attorneys' fees and costs, Plaintiff's
5 Enhancement Payment, settlement administration costs, and the LWDA's share of PAGA
6 penalties, the Settlement provides for an estimated NSA of no less than \$772,538.33. *See*
7 Settlement, ¶¶ 3.C, 4.A. Individual Settlement Payments will be calculated based on the
8 proportionate number of eligible workweeks worked by each participating Settlement Class
9 member during the Class Period divided by the total number of eligible workweeks worked by
10 all participating Settlement Class members, as well as membership in various subclasses. *Id.*, ¶
11 4.B.

12 Defendant's records indicate that there are approximately 352 Settlement Class members.
13 Moen Decl., ¶ 26. Based on the estimated NSA, average Individual Settlement Payments are
14 projected to be approximately \$2,194.71, with the lowest possible estimated Individual
15 Settlement Payment of \$20.88 (in the event a Settlement Class member worked only one
16 workweek during the Class Period) and the highest possible estimated Individual Settlement
17 Payment of \$5,157.22 (in the event a Settlement Class member performed worked in every
18 workweek throughout the Class Period). Moen Decl., ¶ 26. Settlement Class members will have
19 60 calendar days from the date of the initial mailing of the Notice Packet to opt-out or object to
20 the Settlement, thereby providing ample time to review the Class Notice without unduly delaying
21 the Settlement. *See* Settlement, ¶¶ 9.D-E. Those Settlement Class members who do not opt-out
22 of the Settlement will be bound by its terms and will release all claims against Defendant as
23 detailed in the Settlement. *Id.*, ¶¶ 2.A, 9.D.

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

25 At the time of seeking final settlement approval, Plaintiff will apply for an enhancement
26 payment in the amount of \$5,000.00 for his service to the Settlement Class and his general release
27 of all claims. Moen Decl., ¶ 27; *see* Settlement ¶¶ 2.B, 3.C.3, 6. Plaintiff's requested enhancement
28 payment is intended to recognize the significant time and effort that he expended on behalf of the
Settlement Class, including gathering relevant documents for use in the lawsuit and providing

1 copies of his wage statements and other factual information to his attorneys, holding various
2 phone calls with his attorneys to discuss the claims in the lawsuit and Defendant's practices,
3 assisting his attorneys in preparing for mediation, reviewing and providing input regarding the
4 Settlement in this case, and otherwise assisting his attorneys in moving the case towards
5 resolution, the significant risks Plaintiff undertook by serving as the named plaintiff, and the fact
6 that he agreed to a general release of all claims subject to a waiver of Civil Code § 1542. Moen
7 Decl., ¶ 27; Gutierrez Decl., ¶¶ 4-5; Settlement, ¶ 2.B.

8 Class Counsel will also apply for an attorneys' fee award of up to one third of the MSA
9 (currently estimated at \$416,666.67), and up to \$20,000 in reimbursement for actual litigation
10 costs. Moen Decl., ¶ 28; *see* Settlement, ¶ 3.C.4. Plaintiff submits that the requested fee is fair
11 compensation for undertaking complex, risky, expensive, and time-consuming litigation on a
12 purely contingent fee basis. Moen Decl., ¶ 28. Class Counsel has incurred substantial attorneys'
13 fees conducting pre-filing investigation, analyzing Plaintiff's claims, conducting legal research
14 and analysis, reviewing class documents and data produced by Defendant, extensively reviewing
15 and evaluating the produced timekeeping and payroll records to build a comprehensive damages
16 model, preparing for and attending mediation, negotiating and drafting the Memorandum of
17 Understanding, long-form Settlement Agreement, and Notice Packet documents, preparing this
18 motion for preliminary approval, and otherwise litigating the case. *Id.* Class Counsel will also
19 expend future attorney time attending the hearing on this Motion, overseeing the Notice process,
20 drafting the Final Approval Motion and supporting documents, attending the Final Approval
21 hearing, and completing other tasks, such as fielding questions from Settlement Class members.
22 *Id.*

23 Both California and federal courts have recognized that an appropriate method for
24 awarding attorneys' fees in class actions is to award a percentage of the "common fund" created
25 as a result of the settlement. *See Laffitte v. Robert Half Int'l, Inc.* (2016) 1 Cal.5th 480, 506;
26 *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254. Historically, courts have
27 awarded percentage fees in the range of 20% to 50%. *See* 4 Newberg on Class Actions § 14.6 (4th
28 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* (9th Cir. 2008) 516 F.3d 1095, 1101. 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 settlement, the extent of discovery completed and the stage of the proceedings, [and] the experience and views of counsel." *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. "[T]he court is free to engage in a balancing and weighing of factors depending on the circumstances of each case." *Wershba, supra*, 91 Cal.App.4th at 245. As discussed below, the proposed Settlement is fair, adequate, and reasonable in light of the overall balance of factors.

///

1 **a. The Strength of Plaintiff's Case**

2 Class Counsel carefully vetted the claims at issue, reviewed a representative sampling of
3 Settlement Class member data and all relevant policy documents, and created a comprehensive
4 damages model for Defendant's liability. Moen Decl., ¶ 29. Although Plaintiff steadfastly
5 maintains that his claims are meritorious, Plaintiff acknowledges that there were substantial risks
6 and uncertainty in proceeding with class certification and trial. As explained in detail in Section
7 II.B., *supra*, Defendant presented numerous defenses to Plaintiff's claims, both on the merits and
8 with respect to class certification. Although he was prepared to litigate these claims through class
9 certification and ultimately through trial, it was far from certain that Plaintiff would be able to
10 recover a greater amount should this matter proceed through trial. This fact is compounded when
11 considering that Defendant engaged in a *Pick Up Stix* campaign prior to the Parties attending
12 mediation. Thus, this factor supports preliminary approval.

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

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

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

26 At the time of the proposed Settlement, Plaintiff had not filed his motion for class
27 certification. Moen Decl., ¶ 30. Had the Court certified any claims, Plaintiff anticipated that
28 Defendant would seek decertification. *Id.* Notably, Defendant has already engaged in a *Pick Up*

1 *Stix* campaign that significantly reduced the size of the putative class. *Id.*; see *Chindarah*, *supra*,
2 171 Cal.App.4th at 803. Therefore, absent the Settlement, there was a serious risk that Plaintiff
3 would be unable to move forward on a class-wide basis. *Id.* Thus, this factor supports preliminary
4 approval.

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

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

9 **Off-the-Clock Violations: \$109,890**

10 Plaintiff estimates that putative Settlement Class members were required to perform work
11 before and after their scheduled shifts for a total of approximately 1.5 hours per pay period during
12 the Class Period. See Moen Decl., ¶ 31. Plaintiff's data analysis determined that the putative
13 Settlement Class members worked an aggregate total of 18,500 pay periods during the Class
14 Period. *Id.* Accordingly, Plaintiff calculated Defendant's maximum potential exposure for off-
15 the-clock wage violations at approximately \$305,250.00 (1.5 hours * 18,500 pay periods * \$11.00
16 minimum wage). *Id.*

17 Defendant, however, maintains that it has properly recorded and paid Settlement Class
18 members for all time worked during the Class Period, and argues that Plaintiff and other non-
19 exempt employees were never required to conduct off-the-clock work. Moen Decl., ¶ 31. Further,
20 Defendant asserts that this claim is unmanageable, as it requires individualized inquiries into
21 whether or not each individual employee performed off-the-clock work on each day during the
22 Class Period, resulting in an unmanageable series of mini-trials. *Id.* Plaintiff discounted the
23 maximum exposure by 55% for the risk of non-certification, and by an additional 20% for risk of
24 losing on the merits, to arrive at an estimated exposure of \$109,890.00. *Id.*

25 **Meal Period Violations: \$464,581**

26 Plaintiff's data analysis revealed that non-exempt employees received an average hourly
27 rate of approximately \$15.26 and worked an aggregate total of approximately 173,968 shifts over
28 5.0 hours during the Class Period. Moen Decl., ¶ 32. Given Plaintiff's allegations that non-exempt

1 employees were required to remain on the premises during purported meal periods, as well as
2 being required to perform pre-shift work off-the-clock thereby causing Defendant's scheduled
3 12:00 noon meal periods to be untimely, Plaintiff asserts that a meal period violation occurred in
4 each and every applicable shift. *Id.* Accordingly, Plaintiff calculated Defendant's liability on this
5 claim at \$2,654,751 (173,968 meal period violations * \$15.26 average premium). *Id.*

6 In response, Defendant asserts that its non-exempt employees were always clocked in
7 when performing work, and therefore its scheduled meal periods remained timely. Moen Decl., ¶
8 32. Further, Defendant asserts that it never maintained an on-premises meal period policy or
9 practice, and employees were free to come and go as they wished during their duty-free meal
10 periods. *Id.* Defendant also contends that Plaintiff's meal period claim is not suited for class
11 certification as individual inquiries would be required to assess if a particular individual
12 performed off-the-clock pre-shift work and therefore received an untimely meal period on a
13 particular shift, resulting in a series of mini-trials. *Id.* Given these defenses, Plaintiff discounted
14 the maximum exposure by 65% for the risk of non-certification, and by an additional 50% for
15 risk of losing on the merits, to arrive at an estimated exposure of \$464,581. *Id.*

16 **Rest Period Violations: \$365,028**

17 Plaintiff's data analysis revealed that non-exempt employees worked an aggregate total
18 of 173,968 shifts in excess of 3.5 hours during the Class Period. Moen Decl., ¶ 33. By combining
19 purported rest periods into hour long unpaid meal periods, Plaintiff contends that any rest periods
20 purportedly authorized and permitted by Defendant during the Class Period were not legally-
21 compliant. *Id.* Accordingly, Plaintiff calculated Defendant's liability on this claim at \$2,654,751
22 (173,968 rest period violations * \$15.26 average premium). *Id.*

23 But as noted above, Defendant argues it has always authorized and permitted rest periods
24 in accordance with California law, and any failure to take a rest period is a result of individual
25 employee choice, rather than company-wide policies or practices. Moen Decl., ¶ 33. Further,
26 Defendant asserts that this claim is not amenable to class certification given the individual
27 inquiries required to determine whether and why each employee missed a rest period on any given
28

1 shift, particularly given that rest periods need not be recorded. *Id.* Given these defenses, Plaintiff
2 discounted the maximum exposure by 75% for the risk of non-certification, and by an additional
3 45% for risk of losing on the merits, to arrive at an estimated exposure of \$365,028. *Id.*

4 **Failure to Reimburse Violations: \$61,846**

5 Plaintiff further alleges that Defendant failed to reimburse Settlement Class members for
6 all necessary business expenses incurred, including requiring Settlement Class members to
7 purchase hats with Defendant's logo and use of their personal cell phones for communications
8 with supervisors. Moen Decl., ¶ 34. Plaintiff calculates Defendant is responsible for \$15.00 per
9 month for each of the 352 Settlement Class members as a reasonable percentage of their
10 respective monthly phone bills in addition to reimbursements of the \$10 cost to purchase
11 Defendant's hat. *Id.* Therefore, Plaintiff calculates Defendant total exposure for violations of
12 Labor Code section 2802 as follows: \$146,380 ((352 employees * \$10 hats) + (9,524 aggregate
13 months * \$15.00)). *Id.*

14 In response, Defendant argues that it maintained a lawful reimbursement policy
15 throughout the Class Period, and that Plaintiff's damages calculations were substantially
16 overstated given the wide availability of low-cost cellular phone plans. Moen Decl., ¶ 34.
17 Defendant also maintains that this claim would require a series of mini-trials to determine which
18 expenses were allegedly incurred in any given pay period and to determine why each employee
19 failed to comply with Defendant's reimbursement policies. *Id.* Plaintiff therefore discounted the
20 maximum exposure by 35% for the risk of non-certification, and by an additional 35% for risk of
21 losing on the merits, to arrive at an estimated exposure of \$61,846. *Id.*

22 **Wage Statement Penalties: \$264,747**

23 According to the key data points provided by Defendant, approximately 229 Settlement
24 Class members are eligible for wage statement penalties, and a total of 7,520 wage statements
25 were issued during the relevant one-year statute of limitations period applicable to this claim.
26 Moen Decl., ¶ 35. Plaintiff calculated Defendant's maximum possible wage statement exposure
27 as approximately \$740,550 ((229 initial violations * \$50 per pay period) + (7,291 subsequent pay
28 periods * \$100 per pay period)). *Id.* However, Defendant raises numerous defenses, including

1 that the alleged violations, if any, were not “knowing and intentional,” and that Plaintiff could not
2 show that the Settlement Class members “suffer[ed] injury” as a result of any alleged violations.
3 *Id.* Therefore, Plaintiff discounted the maximum exposure by 35% for the risk of non-certification
4 of the underlying claims and 45% for a risk of being unsuccessful on the merits, including failing
5 to prove the violations were “knowing and intentional,” that the Class Members “suffer[ed]
6 injury,” for an estimated recovery on this claim of \$264,747. *Id.*

7 Waiting Time Penalties: \$229,129

8 Based on data provided by Defendant, approximately 175 Settlement Class members
9 separated their employment during the Class Period. Moen Decl., ¶ 36. Assuming Plaintiff can
10 prove that each of these employees was owed wages that were not paid at the time of their
11 separation, Plaintiff calculated a maximum exposure of \$640,920.00 ((average waiting time
12 penalty of \$3,662.40 (\$15.26 average hourly rate x 8 hours x 30)). *Id.* Defendant maintains that
13 waiting time penalties are not appropriate because Plaintiff’s claims fail on the merits, and given
14 its good-faith defenses, Plaintiff cannot show that any failure by Defendant to pay all final wages
15 was willful under 8 Cal. Code Regs. § 13520. *Id.* Thus, Plaintiff discounted this claim by 35% for
16 the risk of non-certification and by an additional 45% for risk of being unsuccessful on the merits
17 or failing to establish willfulness, for an estimated recovery of \$229,129. *Id.*

18 PAGA Penalties: \$112,800

19 Plaintiff alleges that PAGA civil penalties would be recoverable for each pay period in
20 which he could prove an underlying Labor Code violation. Moen Decl., ¶ 37. According to
21 Plaintiff’s data analysis, the Settlement Class members worked a combined total of 7,520 pay
22 periods during the PAGA liability period in which at least one of Plaintiff’s alleged Labor Code
23 violations occurred. *Id.* Plaintiff therefore calculates Defendant’s maximum PAGA exposure at
24 \$752,000 (7,520 pay periods x \$100 per violation). *Id.*; *see also Amaral, supra*, 163 Cal.App.4th
25 at 1207 (finding “initial” violation rate applies until employer is notified that it is violating a
26 Labor Code provision). However, these penalties are almost exclusively derivative of the
27 underlying violations that Defendant vigorously disputes, both as to certification and the merits.
28 Moen Decl., ¶ 37; *see also Green v. Lawrence Service Co.*, 2013 WL 3907506, *5, fn. 5 (C.D.

Cal. 2013) (explaining that a PAGA claim’s success was determined by the merits of its underlying claims). Plaintiff also recognizes that the Court has discretion to substantially reduce any award of PAGA penalties. Moen Decl., ¶ 37; *see also* Labor Code § 2699(e)(2); *Thurman, supra*, 203 Cal.App.4th at 1135; *Fleming v. Covidien Inc.*, Case No. ED CV 10-01487 RGK (OPx), 2011 WL 7563047, *4 (C.D. Cal. Aug. 12, 2011) (reducing PAGA penalties from \$2.8 million to \$500,000). Therefore, Plaintiff discounted the maximum figure by 85% for risk of the Court reducing penalties, to arrive at an estimated exposure of \$112,800.00. Moen Decl., ¶ 37.

Using these estimated figures, Plaintiff estimated that the potential reasonable recovery for the Settlement Class would be approximately \$1,608,021. Moen Decl., ¶ 38. Thus, the proposed recovery to the Settlement Class of \$1,250,000.00 represents approximately 77.74% of Plaintiff’s reasonably forecasted class-wide recovery, which is well within the range approved by courts as being fair, reasonable and adequate, while also avoiding further expense and risk of proceeding towards class certification and trial. *Id.*; *see, e.g., Altamirano v. Shaw Industries, Inc.*, 2015 WL 4512372, *9 (N.D. Cal. 2015) (“Although 15% represents a modest fraction of the hypothetical maximum recovery estimated by Plaintiff, that figure is sufficient for the Court to grant preliminary approval...”); *Dunleavy v. Nadler* (9th Cir. 2000) 213 F.3d 454, 459 (approving settlement of “roughly one-sixth of the potential recovery”); *Linney v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242 (“The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.”) (internal quotations omitted). Preliminary approval is appropriate since the Settlement will provide tangible monetary relief to the Settlement Class members without the uncertainty, delay, and additional expense of further litigation.

e. The Experience and Views of Counsel

“Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pacific Enterprises Securities Litigation* (9th Cir. 1995) 47 F.3d 373, 378. Here, Plaintiff is represented by competent and experienced counsel who possesses extensive experience litigating wage and

hour class actions from both the plaintiff and defense side, and who have been appointed as class counsel in numerous cases alleging similar claims. *See* Moen Decl., ¶¶ 2-7; Declaration of Paul K. Haines (“Haines Decl.”), ¶¶ 2-8; Declaration of Fletcher W. Schmidt (“Schmidt Decl.”), ¶¶ 2-6; and Declaration of Susan J. Perez (“Perez Decl.”), ¶¶ 2-5. Class Counsel conducted an extensive review and analysis of Defendant’s produced timekeeping and payroll records and drew on their extensive experience in similar cases to assess the strengths and weaknesses of Plaintiff’s case. *See* Moen Decl., ¶ 23. It was only after the completion of this work that the Parties attended mediation and ultimately accepted a mediator’s proposal for a class-wide settlement of all claims at issue. *Id.* Thus, this factor strongly supports preliminary approval of the Settlement.

2. The Preliminary Approval Standard is Met

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

a. The Settlement is Within the Range of Possible Approval

The proposed Settlement reflects a fair and reasonable recovery for the Settlement Class members in light of the significant risks of litigation. The proposed Settlement will provide compensation for contested claims, while only releasing the claims actually at issue in this litigation. Further, the average payment of \$2,194.71 greatly exceeds the average payments achieved in other wage and hour class action settlements that have been approved.² Thus, the proposed Settlement is within the range of possible approval such that notice should be provided to the Settlement Class members to consider the Settlement. The Court will have the opportunity

² *See e.g., Bercea v. AE Retail West*, Case No. 34-2012-00123947 (Sacramento County Super. Ct. May 9, 2012) (average net recovery of approximately \$105); *Ressler v. Federated Department Stores, Inc.*, Case No. BC335018 (L.A. County Super. Ct. Jan. 2, 2009) (average net recovery of approximately \$90); and *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 to again assess the reasonableness of the Settlement after the Settlement Class members have had
2 the opportunity to opt-out or object.

3 **b. The Settlement Resulted from Serious, Informed and Non-Collusive**
4 **Negotiations**

5 This proposed Settlement is entitled to an initial presumption of fairness as it is the result
6 of the exchange of pertinent information, including all relevant policies, employee timekeeping
7 and payroll records, and key data points which were analyzed by Plaintiff and his counsel; arm's-
8 length negotiations by counsel; mediation before an experienced wage and hour class action
9 mediator; and additional negotiations until the terms of the long-form Settlement were agreed
10 upon and finalized. Moen Decl., ¶ 23; *see also Kullar, supra*, 168 Cal.App.4th at 130. Thus, this
11 factor supports preliminary approval.

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

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

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

19 The proposed Settlement Class satisfies the criteria for certification of a settlement class
20 under California law because: (1) the individuals in the Settlement Class are so numerous that
21 joinder would be impractical; (2) common questions of law and fact predominate over individual
22 questions such that class certification is the most efficient and desirable way to maintain this
23 litigation; (3) Plaintiff's claims are typical of the claims of the absent Settlement Class members;
24 and (4) Plaintiff and Plaintiff's counsel will fairly and adequately represent the interests of the
25 absent Settlement Class members. *See* Cal. Code Civ. Proc. § 382.

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

27 A class is "ascertainable" where the members "may be readily identified without
28 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

1 Class is defined as all current and former non-exempt employees who worked for Defendant in
2 California at any time between February 2, 2017 and October 31, 2021 and who did not sign a
3 “Release Agreement” with Defendant in connection with its *Chindarah v. Pick Up Stix, Inc.*
4 campaign. *See* Settlement, ¶ 1. Settlement Class members can be easily identified using
5 Defendant’s employment and payroll records. Moen Decl., ¶ 26. Defendant represents that the
6 Settlement Class consists of approximately 352 individuals, rendering it impracticable to bring
7 all Settlement Class members before the Court. *Id.* Thus, the proposed Settlement Class satisfies
8 numerosity. *See Collins v. Rocha* (1972) 7 Cal.3d 232, 234.

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

10 The focus in a certification dispute is not on the merits of the case, but rather on what
11 types of questions, “common or individual,” are likely to arise in the action. *See Sav-On Drug*
12 *Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327. Here, Plaintiff’s claims are predicated
13 on Defendant’s alleged failures to pay all off-the-clock wages owed, pay all meal and rest period
14 premiums, reimburse all necessary business expenses, furnish accurate and itemized wage
15 statements, and pay all final wages owed upon separation of employment. These types of claims
16 are commonly held to be proper for class certification. *See, e.g., Brinker, supra*, 53 Cal.4th at
17 1032-34 (“The theory of liability—that Brinker has a uniform policy, and that that
18 policy...allegedly violates the law—is by its nature a common question eminently suited for class
19 treatment.”).

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

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

///

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

2 The adequacy of representation requirement examines conflicts of interest between named
3 parties and the class(es) they seek to represent. *See Capitol People First v. Department of*
4 *Developmental Services* (2007) 155 Cal.App.4th 676, 697. Here, Plaintiff and Class Counsel will
5 adequately represent the Settlement Class as there are no conflicts between the named Plaintiff
6 and the Settlement Class he seeks to represent, and Plaintiff possesses claims that are in line with
7 those of the Settlement Class members. *See McGhee v. Bank of America* (1976) 60 Cal.App.3d
8 442, 450 (finding adequacy satisfied where there was no indication that the plaintiff's counsel
9 were not qualified and the named plaintiff had no interests antagonistic to those of the proposed
10 class). Class Counsel also has extensive experience in wage and hour class action litigation. *See*
11 *Schmidt Decl.*, ¶¶ 2-6; *Haines Decl.*, ¶¶ 2-8; *Moen Decl.*, ¶ 2-7; *Perez Decl.*, ¶¶ 2-5.

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

13 This Court should order distribution of the proposed Class Notice in both English and
14 Spanish to the Settlement Class members by first class mail, postage prepaid, using the last known
15 mailing address information provided by Defendant. This manner of giving notice is the “best
16 notice practicable” under the circumstances because it provides “individual notice to all members
17 who can be identified through reasonable effort.” *See Eisen v. Carlisle and Jacquelin* (1974) 417
18 U.S. 156, 173. The Parties propose that the settlement be administered by Simpluris, Inc.
19 (“Simpluris”), an experienced class action settlement administrator. *See Declaration of Eric*
20 *Springer*. Settlement Class members’ addresses will be ascertainable through Defendant’s
21 personnel records, and Defendant will provide all Settlement Class members’ names, last known
22 addresses, phone numbers, social security numbers, and workweek data to Simpluris within ten
23 (10) business days after of the Court signs an order preliminarily approving the Settlement. *See*
24 *Settlement*, ¶ 9.A. Simpluris will run the Settlement Class members’ addresses through the
25 National Change of Address database and/or conduct skip traces to obtain current address
26 information. *Id.*, ¶¶ 9.B-C.

27 The content of the proposed Notice Packet satisfies California Rule of Court 3.766(d)
28 because it advises the Settlement Class members of the nature of the claims, basic contentions

1 and denials of the Parties, the key terms of the Settlement, the uniform 60-day deadline to opt-out
2 or object to the Settlement and the procedures by which to do so, explains the recovery formula
3 and expected recovery amount for each Settlement Class member, and advises them that they will
4 be bound by the terms of the Settlement if they do not request exclusion. *See* Moen Decl., Exhibit
5 B. The proposed Class Notice will also notify the Settlement Class of the Final Approval Hearing
6 date, provide Class Counsel's contact information, and advise Settlement Class members that they
7 may enter an appearance through counsel if they so wish. *Id.* This manner of giving notice satisfies
8 California Rule of Court 3.766(e) as the most reliable and cost-effective method of reaching
9 Settlement Class members. Additionally, because the proposed Settlement includes settlement of
10 Plaintiff's representative PAGA claim, notice of the Settlement has been submitted to the LWDA.
11 *See id.* at ¶ 39, Exhibit D (LWDA Settlement Submission and Confirmation); Proof of Service.

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

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

16 **V. CONCLUSION**

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

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21 Dated: July 7, 2022

Respectfully submitted,
HAINES LAW GROUP, APC

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23 By: 
24 Matthew K. Moen
25 Attorneys for Plaintiff
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